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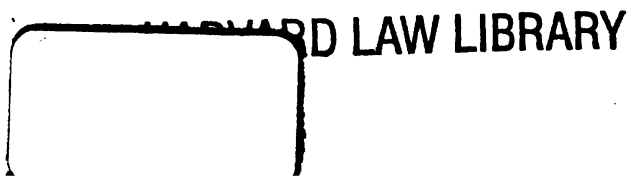
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THE SOUTHWESTERN REPORTER

WITH KEY-NUMBER ANNOTATIONS

VOLUME 134
PERMANENT EDITION

CONTAINING ALL THE CURRENT DECISIONS OF THE
SUPREME AND APPELLATE COURTS OF

ARKANSAS, KENTUCKY, MISSOURI, TENNESSEE
AND TEXAS

WITH TABLE OF SOUTHWESTERN CASES IN WHICH
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CASES REPORTED

	Page		Page
A. B. Spencer Lumber Co., Buchanan v. (Tex. Civ. App.).....	292	Bickers v. Lacy (Tex. Civ. App.).....	763
Aday, Brotherhood of Locomotive Firemen & Enginemen v. (Ark.).....	928	Billings Mercantile Co., Blades v. (Mo. App.).....	579
Alexander v. Board of Directors of Crawford County Levee Dist. (Ark.).....	618	Bird v. State (Tex. Cr. App.).....	687
Alexander v. State (Ark.).....	953	Birkhead, Patrick v. (Ky.).....	483
Allen, Craven Lumber Co. v. (Tex. Civ. App.).....	238	Black, D. S. Cage & Co. v. (Ark.).....	942
Allison & Yates, Linneman & Moore v. (Ky.).....	134	Blades v. Billings Mercantile Co. (Mo. App.).....	579
Alport, Nelson v. (Mo. App.).....	71	Blakely, New Hampshire Fire Ins. Co. v. (Ark.).....	926
American Engineering & Construction Co. v. Crawford (Ky.).....	448	Block, Bailey v. (Tex.).....	323
American Lead Pencil Co. v. Nashville, C. & St. L. Ry. (Tenn.).....	613	Bloodworth, Lindsey v. (Ark.).....	959
Anderson v. Commonwealth (Ky.).....	477	Board of Council of City of Danville v. Fox (Ky.).....	883
Anderson v. St. Louis Southwestern R. Co. of Texas (Tex.).....	1175	Board of Councilmen of City of Frankfort, East Tennessee Tel. Co. v. (Ky.).....	475
Anderson County v. Collins (Ky.).....	463	Board of Directors of Crawford County Levee Dist., Alexander v. (Ark.).....	618
Anderson Foundry & Machine Works, Walton Brick Co. v. (Ky.).....	136	Board of Education of City of St. Louis v. United States Fidelity & Guaranty Co. (Mo. App.).....	18
Anglea's Adm'r v. East Tennessee Tel. Co. (Ky.).....	1119	Board of Education of Mercer County v. Rankin (Ky.).....	157
Anglea's Adm'r, Franklin Electric & Ice Co. v. (Ky.).....	1119	Board of Trustees of Town of Rockport, Green River Chemical Co. v. (Ky.).....	1164
Arkansas Cypress Shingle Co. v. Meto Val. R. Co. (Ark.).....	1195	Bottom v. Tinsley (Tex. Civ. App.).....	833
Asbury, Clark v. (Tex. Civ. App.).....	286	Bouldin, Jennings v. (Ark.).....	948
Asel, First Nat. Bank v. (Mo. App.).....	110	Boulware v. Victor Automobile Mfg. Co. (Mo. App.).....	7
Asel, First Nat. Bank v. (Mo. App.).....	111	Bowen v. Walton (Ky.).....	885
Asmus v. United Rys. Co. of St. Louis (Mo. App.).....	92	Bowling Green Gaslight Co. v. Dean's Ex'r (Ky.).....	1115
Atchison, T. & S. F. R. Co. v. Classin (Tex. Civ. App.).....	358	Bowman, Doodv v. (Ky.).....	148
Atwood v. Fagan (Tex. Civ. App.).....	765	Boyce v. Gingrich (Mo. App.).....	79
Augustus v. Chicago, R. I. & P. R. Co. (Mo. App.).....	22	Boyd, Cheek v. (Tex. Civ. App.).....	252
Bach, Lang v. (Ky.).....	188	Boydston, Ward v. (Tex. Civ. App.).....	786
Bacon v. State (Tex. Cr. App.).....	690	Boyer, State v. (Mo.).....	542
Bailey v. Block (Tex.).....	323	Bradbury v. Wightman (Mo.).....	511
Baker, Humphreys County Board of Education v. (Tenn.).....	863	Bradfield, Independence Sash, Door & Lumber Co. v. (Mo. App.).....	118
Baker v. State (Tex. Cr. App.).....	686	Bradley, Craig v. (Mo. App.).....	1081
Baldwin v. Haskell Nat. Bank (Tex.).....	1178	Brandenberg, State v. (Mo.).....	529
Ballard County Bank, Randolph v. (Ky.).....	165	Brent, O'Leary v. (Ark.).....	617
Baltimore & O. S. W. R. Co. v. Clift (Ky.).....	917	Bright, Reed v. (Mo.).....	653
Banks v. Chicago, B. & Q. R. Co. (Mo. App.).....	1071	Brightwell v. Kansas City (Mo. App.).....	87
Barker, City of Haskell v. (Tex. Civ. App.).....	833	Brinkman v. Gottenstroeter (Mo. App.).....	584
Barnes, Farmers' Cotton Oil Co. v. (Tex. Civ. App.).....	869	Britt v. Sovereign Camp of Woodmen of the World (Mo. App.).....	1073
Barr Dry Goods Co., Wade v. (Mo. App.).....	1084	Broadus & Leavell, Loomis v. (Tex. Civ. App.).....	743
Barron, Neblett v. (Tex.).....	208	Brockman, Ex parte (Mo.).....	977
Barton v. Barton's Adm'r (Ky.).....	902	Brogdon, Millsaps v. (Ark.).....	632
Barton's Adm'r, Barton v. (Ky.).....	902	Brotherhood of Locomotive Firemen & Enginemen v. Aday (Ark.).....	928
Bayle v. Norris (Tex. Civ. App.).....	767	Brown v. Carpenter (Ky.).....	1150
Bays' Adm'r, Louisville & N. R. Co. v. (Ky.).....	450	Brown v. Emerson (Mo. App.).....	1108
Beasley & Beasley, Louisville & N. R. Co. v. (Tenn.).....	306	Brown, Gantt v. (Mo.).....	571
Beckhold Printing & Book Mfg. Co., Jackson v. (Ark.).....	629	Brown, St. Louis, I. M. & S. R. Co. v. (Ark.).....	1194
Beebe v. Olentine (Ark.).....	936	Brown v. T. J. Moss Tie Co. (Mo. App.).....	1103
Belcher, Childers v. (Ky.).....	1129	Bryant, Keahey v. (Tex. Civ. App.).....	409
Belcher, Mullins v. (Ky.).....	1151	Bryant, Louisville R. Co. v. (Ky.).....	182
Belfiglio, State v. (Mo.).....	508	Buchanan v. A. B. Spencer Lumber Co. (Tex. Civ. App.).....	292
Bell, St. Louis, I. M. & S. R. Co. v. (Ark.).....	1199	Bucklew v. Pyron (Mo. App.).....	1064
Rest, Ricketson v. (Tex. Civ. App.).....	353	Buckley v. Hogan (Ky.).....	1139
Bevins v. Collinsworth (Ky.).....	441	Burford v. Lewis (Ark.).....	1199
		Bullitt v. Louisville R. Co. (Ky.).....	1153
		Bullock, Holtman v. (Ky.).....	480
		Burchfield, Cornett v. (Ky.).....	466
		Burk v. State (Tex. Cr. App.).....	705
		Burlingame, French v. (Mo. App.).....	1100
		Burns, Greene v. (Ky.).....	1134

	Page		Page
Busse, State ex rel. Prosecuting Attorney of Saline County v. (Mo. App.).....	680	City of Sedalia, Hall v. (Mo.).....	650
Butcher, Christy v. (Mo. App.).....	1058	Clark v. Asbury (Tex. Civ. App.).....	286
Butler v. State (Tex. Cr. App.).....	230	Classin, Atchison, T. & S. F. R. Co. v. (Tex. Civ. App.).....	358
Caddell, Lone Star Lignite Min. Co. v. (Tex. Civ. App.).....	841	Clay, Durham's Adm'r v. (Ky.).....	153
Cage & Co. v. Black (Ark.).....	942	Clegg v. Mayer (Tex. Civ. App.).....	386
Caldwell v. Nichol (Ark.).....	622	Clements v. State (Tex. Cr. App.).....	728
Camden, Commonwealth v. (Ky.).....	914	Clift, Baltimore & O. S. W. R. Co. v. (Ky.).....	917
Cameron, Consumers' Lignite Co. v. (Tex. Civ. App.).....	283	Clinkenbeard, State v. (Mo.).....	537
Campbell v. Kerrick (Ky.).....	186	Coe, Stark v. (Tex. Civ. App.).....	373
Cannon, State v. (Mo.).....	513	Coffee v. Chicago, R. I. & G. R. Co. (Tex.)	1174
Cape Girardeau Bell Tel. Co. v. Hamill's Estate (Mo. App.).....	1103	Coghlan, Mecca Fire Ins. Co. v. (Tex. Civ. App.).....	266
Caperton's Ex'r v. Todd (Ky.).....	1103	Collett & Bro., Pleasant J. Potter College v. (Ky.).....	173
Capps v. Citizens' Nat. Bank of Longview (Tex. Civ. App.).....	808	Collins, Anderson County v. (Ky.).....	463
Cariker & Wintz v. W. J. Vawters & Son (Tex. Civ. App.).....	780	Collinsworth, Bevins v. (Ky.).....	441
Carpenter, Brown v. (Ky.).....	1150	Columbia Trust Co., Hankins v. (Ky.).....	498
Carroll, Peters v. (Mo. App.).....	49	Commonwealth, Anderson v. (Ky.).....	477
Carter, City of Louisville v. (Ky.).....	468	Commonwealth v. Camden (Ky.).....	914
Carter, Dallas Oil & Refining Co. v. (Tex. Civ. App.).....	418	Commonwealth, Ewald Iron Co. v. (Ky.)..	481
Caruthers v. Hadley (Tex. Civ. App.).....	757	Commonwealth, Gambill v. (Ky.).....	160
Case Threshing Mach. Co. v. Mattingly (Ky.).....	1131	Commonwealth, Gatliff v. (Ky.).....	133
Casperson v. Michaels (Ky.).....	200	Commonwealth, Higgins v. (Ky.).....	1135
Castle v. Terry (Mo. App.).....	78	Commonwealth, Louisville Banking Co. v. (Ky.).....	1142
Central Coffee & Spice Co. v. Welborn (Mo. App.).....	2	Commonwealth, Lucas v. (Ky.).....	456
Cernock, Michalek v. (Tex. Civ. App.).....	270	Commonwealth, Potter v. (Ky.).....	462
Chambers v. Kupper-Benson Hotel Co. (Mo. App.).....	45	Commonwealth, Thurman v. (Ky.).....	174
Chamlee v. Planters' Hotel Co. (Mo. App.)	123	Conley v. Fairchild (Ky.).....	142
Cheek v. Boyd (Tex. Civ. App.).....	252	Connecticut Mut. Life Ins. Co. of Hart- ford, Conn., Fable v. (Mo. App.).....	60
Chesapeake & O. R. Co. v. Selsor (Ky.)....	143	Conroy v. Sharnan (Tex. Civ. App.).....	244
Chesapeake & O. R. Co. v. Stein (Ky.)....	1169	Consumers' Lignite Co. v. Cameron (Tex. Civ. App.).....	283
Chicago, B. & Q. R. Co., Banks v. (Mo. App.).....	1071	Continental Assur. Co. of America, Miller v. (Mo.).....	1003
Chicago, R. I. & G. R. Co., Coffee v. (Tex.).....	1174	Continental Ins. Co. of New York, Thomas v. (Ky.).....	199
Chicago, R. I. & P. R. Co., Augustus v. (Mo. App.).....	22	Cook v. Metropolitan Life Ins. Co. (Mo. App.).....	13
Chicago, R. I. & P. R. Co. v. Grubbs (Ark.)	636	Cooper, Louisville & N. R. Co. v. (Ky.)....	920
Chicago, R. I. & P. R. Co., McKinstry v. (Mo. App.).....	1061	Cooper, Norvell v. (Mo. App.).....	1095
Chicago, R. I. & P. R. Co., Pennell v. (Mo. App.).....	114	Cooper v. Walker (Ky.).....	171
Childers v. Belcher (Ky.).....	1120	Cornett v. Burchfield (Ky.).....	466
Chowning Electric Co., First Nat. Bank v. (Ky.).....	1156	Cornwell v. State (Tex. Cr. App.).....	221
Christensen v. New York Life Ins. Co. (Mo. App.).....	100	Courier-Journal Co. v. Phillips (Ky.).....	446
Christy v. Butcher (Mo. App.).....	1058	Courtney, Freeman v. (Tex. Civ. App.).....	260
Cincinnati, N. O. & T. P. R. Co. v. Rue (Ky.).....	1144	Courtney Shoe Co. v. E. W. Curd & Son (Ky.).....	146
Cincinnati, N. O. & T. P. R. Co., Trussell v. (Ky.).....	1141	Cousins, Lott v. (Tex. Civ. App.).....	270
Cincinnati Tobacco Warehouse Co., Glass v. (Ky.).....	897	Couturie v. Crespi (Tex. Civ. App.).....	257
Citizens' Nat. Bank of Longview, Capps v. (Tex. Civ. App.).....	808	Couturie v. Roensch (Tex. Civ. App.).....	413
Citizens' State Bank of Toyah v. O'Neal (Tex. Civ. App.).....	1183	Cox v. Illinois Cent. R. Co. (Ky.).....	911
City of Bowling Green v. Rogers (Ky.)....	921	Craig v. Bradley (Mo. App.).....	1081
City of Cape Girardeau, McNeill v. (Mo. App.).....	582	Crain v. Miles (Mo. App.).....	52
City of Caruthersville v. Palsgrove (Mo. App.).....	1032	Craven Lumber Co. v. Allen (Tex. Civ. App.).....	238
City of Columbia, Powell v. (Mo. App.)....	76	Crawford, American Engineering & Con- struction Co. v. (Ky.).....	448
City of Dallas, Southwestern Telegraph & Telephone Co. v. (Tex.).....	321	Crawford v. Ozark Ins. Co. (Ark.).....	951
City of Ft. Worth v. Lopp (Tex. Civ. App.)	824	Crawford, Wiedemann v. (Ky.).....	495
City of Greenville, Tutt v. (Ky.).....	890	Creamer v. Louisville R. Co. (Ky.).....	193
City of Haskell v. Barker (Tex. Civ. App.)	833	Crespi, Couturie v. (Tex. Civ. App.).....	257
City of Haskell, Ferrell v. (Tex. Civ. App.).....	784	Cross, Robinson v. (Ark.).....	954
City of Louisville v. Carter (Ky.).....	468	Cumberland Telephone & Telegraph Co. v. Logsdon (Ky.).....	1159
City of Louisville, Render v. (Ky.).....	458	Cunningham v. State (Tex. Cr. App.).....	728
City of Louisville v. Uebelhor (Ky.).....	152	Cunningham v. Toye (Ark.).....	962
City of Newport v. Schoolfield (Ky.).....	503	Curd & Son, Courtney Shoe Co. v. (Ky.)..	146
City of St. Louis v. Ruecking (Mo.).....	657	Current, National Bank of the Republic v. (Ky.).....	470
		C. & A. J. Matthews v. Phoenix Ins. Co. of Hartford (Mo. App.).....	587
		Dallas Oil & Refining Co. v. Carter (Tex. Civ. App.).....	418
		Darnell v. State (Tenn.).....	307
		Davis v. George (Tex.).....	326
		Davis v. Gross (Mo. App.).....	83
		Day v. State (Tex. Cr. App.).....	215
		Dazey v. Elvin (Mo. App.).....	85
		Dean's Ex'r, Bowling Green Gaslight Co. v. (Ky.).....	1115

	Page		Page
De Gloppe v. Nashville Ry. & Light Co. (Tenn.)	609	Fox, Board of Council of City of Danville v. (Ky.)	883
De Van Rose v. Tholborn (Mo. App.)	1093	Franklin v. State (Tex. Cr. App.)	702
Dillender v. Lester (Mo. App.)	1041	Franklin Electric & Ice Co. v. Angles's Adm'r (Ky.)	1119
Dodd, Woodmen of the World v. (Tex. Civ. App.)	234	Franks v. Smith (Ky.)	484
Doherty v. Doherty (Mo. App.)	1112	Frase v. Lee (Mo. App.)	10
Doody v. Bowman (Ky.)	148	Freeman v. Courtney (Tex. Civ. App.)	290
Dooley v. Ryan's Estate (Mo. App.)	30	French v. Burlingame (Mo. App.)	1100
Dority, Slaven v. (Ky.)	1166	Fritter v. Pendleton (Tex. Civ. App.)	1186
Douthitt, Long v. (Ky.)	433	Fussell v. Mallory (Ark.)	631
Downman, State v. (Tex. Civ. App.)	787	Galveston Electric Co., Gehring v. (Tex. Civ. App.)	288
Doyle v. Scott (Tex. Civ. App.)	828	Galveston, H. & S. A. R. Co. v. Jones (Tex.)	328
Doyle v. Scott (Tex. Civ. App.)	829	Galveston, H. & S. A. R. Co. v. Quilhot (Tex. Civ. App.)	261
D. S. Cage & Co. v. Black (Ark.)	942	Galveston Tribune v. Guisti (Tex. Civ. App.)	239
D. Sullivan & Co., Skinner v. (Tex. Civ. App.)	426	Gambill v. Commonwealth (Ky.)	160
Duke v. State (Tex. Cr. App.)	705	Gantt v. Brown (Mo.)	571
Durham's Adm'r v. Clay (Ky.)	153	Garrett v. State (Tex. Cr. App.)	696
Dykeman, State ex rel. Smith v. (Mo. App.)	120	Garrett, Texas Co. v. (Tex. Civ. App.)	812
East Tennessee Tel. Co., Angles's Adm'r v. (Ky.)	1119	Gass v. Evans (Mo.)	571
East Tennessee Tel. Co. v. Board of Councilmen of City of Frankfort (Ky.)	475	Gatliff v. Commonwealth (Ky.)	133
Eastern Kentucky Telephone & Telegraph Co. v. Hardwick (Ky.)	140	Gay Oil Co. v. Muskogee Oil Refining Co. (Ark.)	639
Edling-Adcock Real Estate Co. v. Thompson (Mo. App.)	681	Gehring v. Galveston Electric Co. (Tex. Civ. App.)	288
Edwards, St. Louis Southwestern R. Co. of Texas v. (Tex. Civ. App.)	264	George, Davis v. (Tex.)	326
Edwards, St. Victor v. (Mo. App.)	1105	George A. Collett & Bro., Pleasant J. Potter College v. (Ky.)	173
Ellis, Houston & T. C. R. Co. v. (Tex. Civ. App.)	246	Gilliam v. Guffy (Ky.)	1162
Elvin, Dazey v. (Mo. App.)	85	Gilmore & Co., W. B. Samuels & Co. v. (Ky.)	169
Emerson, Brown v. (Mo. App.)	1108	Gingrich, Boyce v. (Mo. App.)	79
Empire Timber & Lumber Co., Ramsey & Montgomery v. (Tex. Civ. App.)	294	Ginnocchio v. Illinois Cent. R. Co. (Mo. App.)	129
Engel v. Powell (Mo. App.)	74	Ginnocchio-Jones Fruit Co. v. Missouri, K. & T. R. Co. (Mo. App.)	1028
Epperson, Ex parte (Tex. Cr. App.)	685	Glass v. Cincinnati Tobacco Warehouse Co. (Ky.)	897
Estes v. Estes (Ky.)	494	Glasscock, State v. (Mo.)	549
Estis v. Harnden (Mo. App.)	43	Globe Realty Co. v. Lentz (Ky.)	882
Evans, Gass v. (Mo.)	571	Goggan & Bros. v. Synnott (Tex. Civ. App.)	1184
Evans, Patterson v. (Mo. App.)	1030	Goodman v. Griffith (Mo. App.)	1051
Evans v. Stratton (Ky.)	1154	Goolsbee, Wm. M. Rice Institute v. (Tex. Civ. App.)	397
Ewald Iron Co. v. Commonwealth (Ky.)	481	Gordon v. Metropolitan St. R. Co. (Mo. App.)	26
Ewald's Ex'r, Shaver's Adm'r v. (Ky.)	906	Gottenstroeter, Brinkman v. (Mo. App.)	584
E. W. Curd & Son, Courtney Shoe Co. v. (Ky.)	146	Gould v. St. John (Mo. App.)	578
Excelsior Powder Mfg. Co., Laughlin v. (Mo. App.)	116	Gould v. State (Tex. Cr. App.)	695
Fagan, Atwood v. (Tex. Civ. App.)	765	Gray, Vance v. (Ky.)	181
Fahle v. Connecticut Mut. Life Ins. Co. of Hartford, Conn. (Mo. App.)	60	Green v. Maddox (Ark.)	931
Fairchild, Conley v. (Ky.)	142	Green River Chemical Co. v. Board of Trustees of Town of Rockport (Ky.)	1164
Farmer v. International & G. N. R. Co. (Tex. Civ. App.)	356	Greene v. Burns (Ky.)	1134
Farmers' Cotton Oil Co. v. Barnes (Tex. Civ. App.)	369	Gribble-Carter Grain Co., Keel & Son v. (Tex. Civ. App.)	801
Farmers' & Mechanics' Nat. Bank, Texas Seating Co. v. (Tex. Civ. App.)	807	Grier Land & Mining Co., State ex rel. Lawrence County v. (Mo. App.)	1087
Ferrell v. Haskell (Tex. Civ. App.)	784	Griffith, Goodman v. (Mo. App.)	1051
F. Haag & Bro. v. Reichert (Ky.)	191	Grimes, Northern Texas Traction Co. v. (Tex. Civ. App.)	803
Fields, Middleton v. (Ky.)	180	Groseclose, Missouri, K. & T. R. Co. of Texas v. (Tex. Civ. App.)	736
Findley, Thornton v. (Ark.)	627	Gross, Davis v. (Mo. App.)	83
First Nat. Bank v. Asel (Mo. App.)	110	Grubbs, Chicago, R. I. & P. R. Co. v. (Ark.)	636
First Nat. Bank v. Asel (Mo. App.)	111	Guffy, Gilliam v. (Ky.)	1162
First Nat. Bank v. Chowning Electric Co. (Ky.)	1156	Guisti, Galveston Tribune v. (Tex. Civ. App.)	239
First Nat. Bank v. First Nat. Bank (Tex. Civ. App.)	831	Gulf, C. & S. F. R. Co., Lemons v. (Tex. Civ. App.)	742
First Nat. Bank, Maysville Tel. Co. v. (Ky.)	886	Gullett, Texas & P. R. Co. v. (Tex. Civ. App.)	262
First Nat. Bank, Nashville Trust Co. v. (Tenn.)	311	Gullick, Thompson Cotton Co. v. (Ark.)	1199
First Nat. Bank, Prosser v. (Tex. Civ. App.)	781	Haag & Bro. v. Reichert (Ky.)	191
First Nat. Bank v. Shewalter (Mo. App.)	42	Haberlin, Houston & T. O. R. Co. v. (Tex. Civ. App.)	411
Fish, Mitchell v. (Ark.)	940	Hadley, Caruthers v. (Tex. Civ. App.)	737
Florence v. State (Tex. Cr. App.)	689	Hale's Heirs v. Ritchie (Ky.)	474
Floyd v. Newton (Ark.)	934	Hall v. Pratt (Ky.)	900
Ford County, Sandifer v. (Tex. Civ. App.)	823		
Forder v. Handlan (Mo. App.)	1110		
Foreman v. State (Tex. Cr. App.)	229		
Ft. Worth & D. C. R. Co., Suter v. (Tex. Civ. App.)	785		

	Page		Page
Hall v. Sedalia (Mo.).....	650	International & G. N. R. Co., Farmer v. (Tex. Civ. App.).....	356
Hamill's Estate, Cape Girardeau Bell Tel. Co. v. (Mo. App.).....	1103	Irby, Louisville & N. R. Co. v. (Ky.).....	139
Hammar v. St. Louis Motor Carriage Co. (Mo. App.).....	1060	Jackson v. Bechtold Printing & Book Mfg. Co. (Ark.).....	629
Handlan, Forder v. (Mo. App.).....	1110	Jacksonville Ice & Electric Co. v. Moses (Tex. Civ. App.).....	379
Hankins v. Columbia Trust Co. (Ky.).....	498	Jacoway, Thompson v. (Ark.).....	955
Hardin v. St. Louis Southwestern R. Co. of Texas (Tex. Civ. App.).....	408	James v. Holdam (Ky.).....	435
Harding v. Missouri Pac. R. Co. (Mo.).....	641	James v. State (Tex. Cr. App.).....	699
Hardwick, Eastern Kentucky Telephone & Telegraph Co. v. (Ky.).....	140	Jennings v. Bouldin (Ark.).....	948
Hardy, Louisville & N. R. Co. v. (Ky.).....	899	Jerome v. United Rys. Co. of St. Louis (Mo. App.).....	107
Harnden, Estis v. (Mo. App.).....	43	J. I. Case Threshing Mach. Co. v. Mattingly (Ky.).....	1131
Harris, Munden v. (Mo. App.).....	1076	Johnson v. State (Tex. Cr. App.).....	225
Harris v. Rather (Tex. Civ. App.).....	754	Johnson v. Wilson (Ky.).....	1141
Harris, State v. (Mo.).....	535	Johnston, State v. (Mo. App.).....	38
Hart v. State (Tex. Cr. App.).....	1178	Jones, Galveston, H. & S. A. R. Co. v. (Tex.).....	828
Hart's Adm'r v. Louisville R. Co. (Ky.).....	140	Jones, Martin v. (Mo. App.).....	1097
Hartfield v. State (Tex. Cr. App.).....	1180	Jones Lumber Co. v. Howard (Ky.).....	133
Harwell v. State (Tex. Cr. App.).....	701	Jordan v. Massey (Tex. Civ. App.).....	804
Haskell Nat. Bank, Baldwin v. (Tex.).....	1178	Joseph W. Moon Buggy Co., Thompson v. (Mo. App.).....	1088
Hatcher v. National Annuity Ass'n (Mo. App.).....	1	Kansas City, Brightwell v. (Mo. App.).....	87
Hawver v. Springfield Traction Co. (Mo. App.).....	70	Kansas City, Ryan v. (Mo.).....	566, 985
Hayden v. State (Tex. Cr. App.).....	703	Kansas City, State ex inf. Major v. (Mo.).....	1007
Hayes v. Martin (Ark.).....	626	Karchmer v. State (Tex. Cr. App.).....	700
Haynes, Missouri, K. & T. R. Co. of Texas v. (Tex. Civ. App.).....	271	Kaufman Bros. v. Redwine (Ark.).....	1193
Haywood v. State (Tex. Cr. App.).....	218	Keahey v. Bryant (Tex. Civ. App.).....	409
H. D. Williams Cooperage Co., Headrick v. (Ark.).....	957	Keel & Son v. Gribble-Carter Grain Co. (Tex. Civ. App.).....	801
Headrick v. H. D. Williams Cooperage Co. (Ark.).....	957	Keller, Smallhouse v. (Ky.).....	493
Heath v. Tucker (Mo. App.).....	572	Kennish, Timmonds v. (Mo.).....	571
Hessey, Smith v. (Tex. Civ. App.).....	256	Kentucky Heating Co., Louisville Gas Co. v. (Ky.).....	205
Higgins v. Commonwealth (Ky.).....	1135	Kerrick, Campbell v. (Ky.).....	186
Hill v. Mottley (Ky.).....	469	Kidd v. McCracken (Tex. Civ. App.).....	839
Hill, Pulaski County v. (Ark.).....	973	Kimble v. McDermott (Mo. App.).....	72
Hill County v. Sauls (Tex. Civ. App.).....	287	Kimble v. McDermott (Mo. App.).....	1029
Hite v. Hite (Ky.).....	138	King v. State (Tex. Cr. App.).....	687
Hoag, State v. (Mo.).....	509	Kinyoun v. Metropolitan St. R. Co. (Mo. App.).....	15
Hobart-Lee Tie Co., Sligo Furnace Co. v. (Mo. App.).....	585	Kirkland, Sutherland v. (Tex. Civ. App.).....	851
Hogan, Buckley v. (Ky.).....	1139	Kreis, Wilks v. (Tex. Civ. App.).....	838
Hogg, York v. (Ky.).....	1125	Kupper-Benson Hotel Co., Chambers v. (Mo. App.).....	45
Holdam, James v. (Ky.).....	435	Lacy, Bickers v. (Tex. Civ. App.).....	763
Holland, Roberts v. (Tex. Civ. App.).....	810	Lancaster v. School Dist. No. 17 (Ark.).....	314
Holland v. State (Tex. Cr. App.).....	693	Landry, Western Union Tel. Co. v. (Tex. Civ. App.).....	848
Hollis v. Weissinger (Ky.).....	176	Lang v. Bach (Ky.).....	188
Holtman v. Bullock (Ky.).....	480	Lantry-Sharpe Contracting Co. v. McCracken (Tex. Civ. App.).....	363
Hooge v. Hooge (Ky.).....	476	Laughlin v. Excelsior Powder Mfg. Co. (Mo. App.).....	116
Horrell, Shelton v. (Mo.).....	988	Lee, Frase v. (Mo. App.).....	10
Houghton, Metropolitan St. R. Co. v. (Tex. Civ. App.).....	422	Leeker v. Prudential Ins. Co. of America (Mo. App.).....	676
Houston E. & W. T. R. Co. v. Inman, Akers & Inman (Tex. Civ. App.).....	275	Le May-Wegmann Brokerage Co., Osmer v. (Mo. App.).....	65
Houston, E. & W. T. R. Co., Mack v. (Tex. Civ. App.).....	846	Lemoine v. Sullivan (Ark.).....	946
Houston & T. C. R. Co. v. Ellis (Tex. Civ. App.).....	246	Lemons v. Gulf, C. & S. F. R. Co. (Tex. Civ. App.).....	742
Houston & T. C. R. Co. v. Haberlin (Tex. Civ. App.).....	411	Lentz, Globe Realty Co. v. (Ky.).....	882
Howard, Jones Lumber Co. v. (Ky.).....	133	Leopold v. Newport Coal Co. (Ky.).....	1165
Howard v. Waterman Lumber & Supply Co. (Tex. Civ. App.).....	387	Lester, Dillender v. (Mo. App.).....	1041
Hughes v. Roberts (Ky.).....	168	Levy, Paine v. (Ky.).....	1180
Humphrey, Williams v. (Ark.).....	939	Lewis, Buford v. (Ark.).....	1199
Humphreys County Board of Education v. Baker (Tenn.).....	863	Lindsey v. Bloodworth (Ark.).....	969
Hurt, Illinois Cent. R. Co. v. (Ky.).....	144	Linneman & Moore v. Allison & Yates (Ky.).....	134
Illinois Cent. R. Co., Cox v. (Ky.).....	911	Logsdon, Cumberland Telephone & Telegraph Co. v. (Ky.).....	1159
Illinois Cent. R. Co., Ginnochio v. (Mo. App.).....	129	Lone Star Lignite Min. Co. v. Caddell (Tex. Civ. App.).....	841
Illinois Cent. R. Co. v. Hurt (Ky.).....	144	Long v. Douthitt (Ky.).....	453
Illinois Cent. R. Co. v. Mayes (Ky.).....	436	Loomis v. Broadbudd & Leavell (Tex. Civ. App.).....	743
Illinois Cent. R. Co. v. Moss' Adm'r (Ky.).....	1122	Looper, Ex parte (Tex. Cr. App.).....	845
Independence Sash, Door & Lumber Co. v. Bradfield (Mo. App.).....	118	Lopp, City of Ft. Worth v. (Tex. Civ. App.).....	824
Inman, Akers & Inman, Houston E. & W. T. R. Co. v. (Tex. Civ. App.).....	275		
International Fire Assur. Co. of America, Miller v. (Mo.).....	1007		

	Page		Page
Lord & Bushnell Co. v. Texas & N. O. R. Co. (Mo. App.).....	111	Metropolitan St. R. Co., Kinyoun v. (Mo. App.).....	15
Lott v. Cousins (Tex. Civ. App.).....	270	Metropolitan St. R. Co., Tewksbury v. (Mo. App.).....	682
Louis Maull Cheese & Fish Co., Ungerer & Co. v. (Mo. App.).....	56	Metropolitan St. R. Co., Zeiler v. (Mo. App.).....	1067
Louisville Banking Co. v. Commonwealth (Ky.).....	1142	Metropolitan St. R. Co., Zimmerman v. (Mo. App.).....	40
Louisville Gas Co. v. Kentucky Heating Co. (Ky.).....	205	Michaels, Casperson v. (Ky.).....	200
Louisville, H. & St. L. R. Co. v. Stillwell (Ky.).....	202	Michalek v. Cernock (Tex. Civ. App.).....	270
Louisville R. Co. v. Bryant (Ky.).....	182	Middleton v. Fields (Ky.).....	180
Louisville R. Co., Bullitt v. (Ky.).....	1153	Miles, Crain v. (Mo. App.).....	52
Louisville R. Co., Creamer v. (Ky.).....	193	Miller v. Continental Assur. Co. of America (Mo.).....	1003
Louisville R. Co., Hart's Adm'r v. (Ky.).....	140	Miller v. International Fire Assur. Co. of America (Mo.).....	1007
Louisville & N. R. Co. v. Bays' Adm'r (Ky.).....	450	Miller v. State (Ark.).....	1199
Louisville & N. R. Co. v. Beasley & Beasley (Tenn.).....	306	Miller v. United Rys. Co. of St. Louis (Mo. App.).....	1045
Louisville & N. R. Co. v. Cooper (Ky.).....	920	Millsaps v. Brogdon (Ark.).....	632
Louisville & N. R. Co. v. Hardy (Ky.).....	899	Mine La Motte Lead & Smelting Co., Tucker v. (Mo. App.).....	1101
Louisville & N. R. Co. v. Irby (Ky.).....	139	Missouri, K. & T. R. Co., Ginnochio-Jones Fruit Co. v. (Mo. App.).....	1028
Louisville & N. R. Co. v. McMillen (Ky.).....	185	Missouri, K. & T. R. Co. v. Morris (Mo. App.).....	1027
Louisville & N. R. Co. v. Ray, two cases (Tenn.).....	858	Missouri, K. & T. R. Co., Moss v. (Mo. App.).....	1070
Louisville & N. R. Co. v. Roe (Ky.).....	437	Missouri, K. & T. R. Co. of Texas v. Grose-close (Tex. Civ. App.).....	736
Louisville & N. R. Co. v. Sewell (Ky.).....	162	Missouri, K. & T. R. Co. of Texas v. Haynes (Tex. Civ. App.).....	271
Louisville & N. R. Co. v. Smith (Tenn.).....	866	Missouri, K. & T. R. Co. of Texas v. Schroeter (Tex. Civ. App.).....	826
Louisville & N. R. Co. v. Sweet (Ky.).....	204	Missouri, K. & T. R. Co. of Texas v. Tolbert (Tex. Civ. App.).....	280
Lucas v. Commonwealth (Ky.).....	456	Missouri Pac. R. Co., Harding v. (Mo.).....	641
Lumpkin v. Story (Tex. Civ. App.).....	298	Mitchell v. Fish (Ark.).....	940
McCauley, St. Louis Southwestern R. Co. of Texas v. (Tex. Civ. App.).....	798	Mitchell, Maysville Tel. Co. v. (Ky.).....	886
McClintock, Pulaski Gas Light Co. v. (Ark.).....	1189	Mitchell v. State (Tenn.).....	306
McCracken, Kidd v. (Tex. Civ. App.).....	839	Modern Brotherhood of America v. Phelps (Ky.).....	892
McCracken, Lantry-Sharpe Contracting Co. v. (Tex. Civ. App.).....	363	Montgomery, Saunders v. (Tex. Civ. App.).....	775
McDermott, Kimble v. (Mo. App.).....	72	Montgomery County v. Taylor (Ky.).....	894
McDermott, Kimble v. (Mo. App.).....	1029	Moon Buggy Co., Thompson v. (Mo. App.).....	1088
McDonough, State v. (Mo.).....	545	Morris, Missouri, K. & T. R. Co. v. (Mo. App.).....	1027
McFarland, School Dist. No. 61 v. (Mo. App.).....	673	Morris v. Sailer (Mo. App.).....	98
McFarlane, Ex parte (Tex. Cr. App.).....	685	Morse v. Tackaberry (Tex. Civ. App.).....	273
McGhee, Wilkerson v. (Mo. App.).....	595	Moses, Jacksonville Ice & Electric Co. v. (Tex. Civ. App.).....	379
Mack v. Houston, E. & W. T. R. Co. (Tex. Civ. App.).....	846	Moss v. Missouri, K. & T. R. Co. (Mo. App.).....	1070
McKinstry v. Chicago, R. I. & P. R. Co. (Mo. App.).....	1061	Moss' Adm'r, Illinois Cent. R. Co. v. (Ky.).....	1122
McMillen, Louisville & N. R. Co. v. (Ky.).....	185	Moss Tie Co., Brown v. (Mo. App.).....	1108
McNeill v. Cape Girardeau (Mo. App.).....	582	Mottley, Hill v. (Ky.).....	469
Maddox, Green v. (Ark.).....	931	Mouser v. Nunn (Ky.).....	1148
Maggard, Sackett v. (Ky.).....	888	Mudd, State v. (Mo.).....	562
Mallory, Fussell v. (Ark.).....	631	Mullins v. Belcher (Ky.).....	1151
Marshall & E. T. R. Co. v. Petty (Tex. Civ. App.).....	406	Munden v. Harris (Mo. App.).....	1076
Martin, Hayes v. (Ark.).....	626	Murphy, St. Louis, I. M. & S. R. Co. v. (Ark.).....	1199
Martin v. Jones (Mo. App.).....	1097	Musick v. United Rys. Co. of St. Louis (Mo. App.).....	31
Marne v. State (Tex. Cr. App.).....	727	Muskogee Oil Refining Co., Gay Oil Co. v. (Ark.).....	639
Massey, Jordan v. (Tex. Civ. App.).....	804	Myers v. Texas & P. R. Co. (Tex. Civ. App.).....	814
Matthews, Maysville Tel. Co. v. (Ky.).....	886	Nash v. State (Tex. Cr. App.).....	709
Matthews v. Phoenix Ins. Co. of Hartford (Mo. App.).....	587	Nashville, C. & St. L. Ry., American Lead Pencil Co. v. (Tenn.).....	613
Matttingly, J. I. Case Threshing Mach. Co. v. (Ky.).....	1131	Nashville Ry. & Light Co., De Glopper v. (Tenn.).....	609
Maull Cheese & Fish Co., Ungerer & Co. v. (Mo. App.).....	56	Nashville Trust Co. v. First Nat. Bank (Tenn.).....	311
Mayer, Clegg v. (Tex. Civ. App.).....	386	National Annuity Ass'n, Hatcher v. (Mo. App.).....	1
Mayes, Illinois Cent. R. Co. v. (Ky.).....	436	National Bank of the Republic v. Current (Ky.).....	479
Maysville Tel. Co. v. First Nat. Bank (Ky.).....	886	Neblett v. Barron (Tex.).....	208
Maysville Tel. Co. v. Matthews (Ky.).....	886	Nelson v. Alport (Mo. App.).....	71
Maysville Tel. Co. v. Mitchell (Ky.).....	886	Nelson, Sanborn v. (Tex. Civ. App.).....	855
Mecca Fire Ins. Co. v. Coghlan (Tex. Civ. App.).....	266	Nelson v. State (Tex. Cr. App.).....	218
Menefee, Union Nat. Bank v. (Tex. Civ. App.).....	822		
Meto Val. R. Co., Arkansas Cypress Shingle Co. v. (Ark.).....	1195		
Metropolitan Life Ins. Co., Cook v. (Mo. App.).....	13		
Metropolitan Life Ins. Co., Paschedag v. (Mo. App.).....	102		
Metropolitan St. R. Co., Gordon v. (Mo. App.).....	26		
Metropolitan St. R. Co. v. Houghton (Tex. Civ. App.).....	422		

	Page		Page
New Hampshire Fire Ins. Co. v. Blakely (Ark.)	926	Quilhot, Galveston, H. & S. A. R. Co. v. (Tex. Civ. App.)	261
Newman v. State (Tex. Cr. App.)	688	Racine Sattley Co., State v. (Tex. Civ. App.)	400
Newport Coal Co., Leopold v. (Ky.)	1165	Ragsdale v. State (Tex. Cr. App.)	234
Newton, Floyd v. (Ark.)	934	Ramsey v. Weedman (Ark.)	1197
New York Life Ins. Co., Christensen v. (Mo. App.)	100	Ramsey & Montgomery v. Empire Timber & Lumber Co. (Tex. Civ. App.)	294
Nichol, Caldwell v. (Ark.)	622	Randolph v. Ballard County Bank (Ky.)	165
Nixon, State ex rel. St. Louis Dressed Beef & Provision Co. v. (Mo.)	538	Rankin, Board of Education of Mercer County v. (Ky.)	157
Nolte, State ex rel. Raines v. (Mo.)	542	Rankin v. Rankin (Tex. Civ. App.)	392
Norris, Bayle v. (Tex. Civ. App.)	787	Rather, Harris v. (Tex. Civ. App.)	754
Northern Texas Traction Co. v. Grimes (Tex. Civ. App.)	803	Rawlings, State v. (Mo.)	530
Norvell v. Cooper (Mo. App.)	1095	Ray, Louisville & N. R. Co. v., two cases (Tenn.)	858
Null, Walther v. (Mo.)	993	Reccius v. Weber (Ky.)	145
Nunn, Mouser v. (Ky.)	1148	Redwine, Kaufman Bros v. (Ark.)	1193
O'Connor v. Weissinger (Ky.)	1126	Reed v. Bright (Mo.)	653
O'Connor v. Weissinger (Ky.)	1127	Reichert, F. Haag & Bro. v. (Ky.)	191
O'Leary v. Brent (Ark.)	617	Reisenleiter v. United Rys. Co. of St. Louis (Mo. App.)	11
Olentine, Beebe v. (Ark.)	936	Reisner, Simms v. (Tex. Civ. App.)	278
Olivus v. State (Tex. Cr. App.)	694	Remmers v. Shubert (Mo. App.)	1042
O'Neal, Citizens' State Bank of Toyah v. (Tex. Civ. App.)	1183	Render v. Louisville (Ky.)	458
Osborne v. Texas Traction Co. (Tex. Civ. App.)	816	Retail Hardware Mut. Fire Ins. Co. of Minnesota, Shook v. (Mo. App.)	589
Osmer v. Le May-Wegmann Brokerage Co. (Mo. App.)	65	Rice Institute v. Goolsbee (Tex. Civ. App.)	397
Otrich v. St. Louis, I. M. & S. R. Co. (Mo. App.)	665	Ricketson v. Best (Tex. Civ. App.)	353
Ouita Coal Co., Russellville Anthracite Coal Min. Co. v. (Ark.)	624	Ridge v. State (Tex. Cr. App.)	732
Overcash, Ex parte (Tex. Cr. App.)	700	Ritchie, Hale's Heirs v. (Ky.)	474
Ozark Coal Co. v. Pennsylvania Anthracite R. Co. (Ark.)	634	Roberts v. Holland (Tex. Civ. App.)	810
Ozark Ins. Co., Crawford v. (Ark.)	951	Roberts, Hughes v. (Ky.)	168
Pacific Exp. Co., Rosenberger v. (Mo. App.)	1033	Roberts v. Wabash R. Co. (Mo. App.)	89
Paine v. Levy (Ky.)	1160	Robinson v. Cross (Ark.)	954
Palsgrove, City of Caruthersville v. (Mo. App.)	1032	Robinson v. Robinson (Ky.)	1130
Parker, Watkins v. (Ark.)	1187	Robinson v. Wynne (Ark.)	319
Paschedag v. Metropolitan Life Ins. Co. (Mo. App.)	102	Roe, Louisville & N. R. Co. v. (Ky.)	437
Patrick v. Birkhead (Ky.)	483	Roensch, Couturie v. (Tex. Civ. App.)	413
Patterson v. Evans (Mo. App.)	1030	Rogers, City of Bowling Green v. (Ky.)	921
Paul v. United Rys. Co. of St. Louis (Mo. App.)	3	Rogers, Wilson v. (Ark.)	318
Paxton, United States Fidelity & Guaranty Co. v. (Ky.)	481	Roosevelt Lead & Zinc Co., Weeks-Betts Hardware Co. v. (Mo. App.)	35
Pearce v. Pearce (Tex.)	210	Roper, Ex parte (Tex. Cr. App.)	334
Pelphrey v. Williams (Ky.)	884	Rosenberger v. Pacific Exp. Co. (Mo. App.)	1083
Pendleton, Fritter v. (Tex. Civ. App.)	1186	Rouse, Second Nat. Bank v. (Ky.)	1121
Pennell v. Chicago, R. I. & P. R. Co. (Mo. App.)	114	Rudert, Sedalia Nat. Bank v. (Mo. App.)	1056
Pennsylvania Anthracite R. Co., Ozark Coal Co. v. (Ark.)	634	Rue, Cincinnati, N. O. & T. P. R. Co. v. (Ky.)	1144
Perry v. Veal (Ky.)	458	Ruecking, City of St. Louis v. (Mo.)	657
Peters v. Carroll (Mo. App.)	49	Russellville Anthracite Coal Min. Co. v. Ouita Coal Co. (Ark.)	624
Petry v. Petry (Ky.)	922	Ryan v. Kansas City (Mo.)	566, 985
Petty, Marshall & E. T. R. Co. v. (Tex. Civ. App.)	406	Ryan's Estate, Dooley v. (Mo. App.)	30
Phelps, Modern Brotherhood of America v. (Ky.)	892	Sackett v. Maggard (Ky.)	888
Phillips, Courier-Journal Co. v. (Ky.)	446	Saller, Morris v. (Mo. App.)	98
Phoenix Ins. Co. of Hartford, C. & A. J. Matthews v. (Mo. App.)	587	St. John, Gould v. (Mo. App.)	578
Pinson, Stafford v. (Ky.)	909	St. Louis, I. M. & S. R. Co. v. Bell (Ark.)	1199
Planters' Hotel Co., Chamlee v. (Mo. App.)	123	St. Louis, I. M. & S. R. Co. v. Brown (Ark.)	1194
Pleasant J. Potter College v. George A. Collett & Bro. (Ky.)	173	St. Louis, I. M. & S. R. Co. v. Murphy (Ark.)	1199
Potter v. Commonwealth (Ky.)	462	St. Louis, I. M. & S. R. Co., Otrich v. (Mo. App.)	665
Powdrill v. Powdrill (Tex. Civ. App.)	272	St. Louis, I. M. & S. R. Co. v. Stacks (Ark.)	315
Powell v. Columbia (Mo. App.)	76	St. Louis, I. M. & S. R. Co. v. Watson (Ark.)	949
Powell, Engel v. (Mo. App.)	74	St. Louis Motor Carriage Co., Hammar v. (Mo. App.)	1060
Powell, State v. (Tex. Civ. App.)	746	St. Louis, S. F. & T. R. Co. v. Taylor (Tex. Civ. App.)	819
Pratt, Hall v. (Ky.)	900	St. Louis Southwestern R. Co. v. State (Ark.)	970
Prosser v. First Nat. Bank (Tex. Civ. App.)	781	St. Louis Southwestern R. Co. of Texas, Anderson v. (Tex.)	1175
Prudential Ins. Co. of America, Leeker v. (Mo. App.)	676	St. Louis Southwestern R. Co. of Texas v. Edwards (Tex. Civ. App.)	264
Pulaski County v. Hill (Ark.)	973	St. Louis Southwestern R. Co. of Texas, Hardin v. (Tex. Civ. App.)	408
Pulaski Gas Light Co. v. McClintock (Ark.)	1189, 1190	St. Louis Southwestern R. Co. of Texas v. McCauley (Tex. Civ. App.)	798
Pyron, Bucklew v. (Mo. App.)	1064	St. Louis & S. F. R. Co., South Side Realty Co. v. (Mo. App.)	1034
		St. Victor v. Edwards (Mo. App.)	1105

	Page		Page
Samuels & Co. v. T. M. Gilmore & Co. (Ky.)	169	State, Duke v. (Tex. Cr. App.)	705
Saunborn v. Nelson (Tex. Civ. App.)	855	State, Florence v. (Tex. Cr. App.)	689
Sandifer v. Foard County (Tex. Civ. App.)	823	State, Foreman v. (Tex. Cr. App.)	229
Sauls, Hill County v. (Tex. Civ. App.)	267	State, Franklin v. (Tex. Cr. App.)	702
Saunders v. Montgomery (Tex. Civ. App.)	775	State, Garrett v. (Tex. Cr. App.)	696
Schaper, State ex rel. Zimmerman v. (Mo. App.)	671	State v. Glasscock (Mo.)	549
School Dist. No. 17, Lancaster v. (Ark.)	314	State, Gould v. (Tex. Cr. App.)	695
School Dist. No. 61 v. McFarland (Mo. App.)	673	State v. Harris (Mo.)	535
Schoolfield, City of Newport v. (Ky.)	503	State, Hart v. (Tex. Cr. App.)	1178
Schroeter, Missouri, K. & T. R. Co. of Texas v. (Tex. Civ. App.)	826	State, Hartfield v. (Tex. Cr. App.)	1180
Scott, Doyle v. (Tex. Civ. App.)	828	State, Harwell v. (Tex. Cr. App.)	701
Scott, Doyle v. (Tex. Civ. App.)	829	State, Hayden v. (Tex. Cr. App.)	703
Second Nat. Bank v. Rouse (Ky.)	1121	State, Haywood v. (Tex. Cr. App.)	218
Sedalia Nat. Bank v. Rudert (Mo. App.)	1056	State v. Hoag (Mo.)	509
Sellers v. State (Tex. Cr. App.)	348	State, Holland v. (Tex. Cr. App.)	693
Selsor, Chesapeake & O. R. Co. v. (Ky.)	148	State, James v. (Tex. Cr. App.)	699
Sewell, Louisville & N. R. Co. v. (Ky.)	162	State, Johnson v. (Tex. Cr. App.)	225
Sharman, Conroy v. (Tex. Civ. App.)	244	State v. Johnston (Mo. App.)	38
Sharp v. State (Tex. Cr. App.)	333	State, Karchmer v. (Tex. Cr. App.)	700
Shaver's Adm'r v. Ewald's Ex'r (Ky.)	906	State, King v. (Tex. Cr. App.)	687
Shelton v. Horrell (Mo.)	988	State v. McDonough (Mo.)	545
Shelton, Taylor v. (Tex. Civ. App.)	302	State, Marue v. (Tex. Cr. App.)	727
Shewalter, First Nat. Bank v. (Mo. App.)	42	State, Miller v. (Ark.)	1199
Shook v. Retail Hardware Mut. Fire Ins. Co. of Minnesota (Mo. App.)	589	State, Mitchell v. (Tenn.)	306
Shubert, Remmers v. (Mo. App.)	1042	State v. Mudd (Mo.)	562
Simms v. Reisner (Tex. Civ. App.)	278	State, Nash v. (Tex. Cr. App.)	709
Simpson v. Smith (Ky.)	1166	State, Nelson v. (Tex. Cr. App.)	218
Skinner v. D. Sullivan & Co. (Tex. Civ. App.)	426	State, Newman v. (Tex. Cr. App.)	688
Slaven v. Dority (Ky.)	1166	State, Olivus v. (Tex. Cr. App.)	694
Sligo Furnace Co. v. Hobart-Lee Tie Co. (Mo. App.)	585	State v. Powell (Tex. Civ. App.)	746
Smallhouse v. Keller (Ky.)	493	State v. Racine Sattley Co. (Tex. Civ. App.)	406
Smith, Franks v. (Ky.)	484	State, Ragsdale v. (Tex. Cr. App.)	234
Smith v. Hessey (Tex. Civ. App.)	256	State v. Rawlings (Mo.)	530
Smith, Louisville & N. R. Co. v. (Tenn.)	866	State, Ridge v. (Tex. Cr. App.)	782
Smith, Simpson v. (Ky.)	1166	State, St. Louis Southwestern R. Co. v. (Ark.)	970
Smith v. Taylor (Ark.)	634	State, Sellers v. (Tex. Cr. App.)	348
Smith v. Wright (Mo. App.)	683	State, Sharp v. (Tex. Cr. App.)	333
Snider, State v. (Mo. App.)	588	State v. Snider (Mo. App.)	588
South Side Realty Co. v. St. Louis & S. F. R. Co. (Mo. App.)	1034	State v. Sutton (Mo.)	603
Southern Independent Tel. Co., Standard Underground Cable Co. v. (Tex. Civ. App.)	429	State v. Sutton (Mo.)	604
Southern Pac. Co. v. Weatherford Cotton Mills (Tex. Civ. App.)	778	State, Switzer v. (Tex. Cr. App.)	705
Southwestern Telegraph & Telephone Co. v. Dallas (Tex.)	321	State v. Thomas (Mo.)	571
Sovereign Camp of Woodmen of the World, Britt v. (Mo. App.)	1073	State, Thompson v. (Tex. Cr. App.)	350
Spencer Lumber Co., Buchanan v. (Tex. Civ. App.)	292	State v. Thornton (Mo.)	519
Springfield Traction Co., Hawver v. (Mo. App.)	70	State, Todd v. (Tex. Civ. App.)	761
Springfield Traction Co., Witty v. (Mo. App.)	82	State v. Trainer (Mo.)	528
Stacks, St. Louis, I. M. & S. R. Co. v. (Ark.)	315	State v. Walker (Mo.)	516
Stafford v. Pinson (Ky.)	909	State v. Warren (Mo.)	522
Standard Underground Cable Co. v. Southern Independent Tel. Co. (Tex. Civ. App.)	429	State, Wells v. (Tex. Cr. App.)	702
Stark v. Coe (Tex. Civ. App.)	373	State v. Whitsett (Mo.)	535
State, Alexander v. (Ark.)	953	State, Wilson v. (Ark.)	623
State, Bacon v. (Tex. Cr. App.)	690	State, Wilson v. (Tex. Cr. App.)	704
State, Baker v. (Tex. Cr. App.)	686	State, Young v. (Tex. Cr. App.)	736
State v. Belfiglio (Mo.)	508	State ex inf. Major v. Kansas City (Mo.)	1007
State, Bird v. (Tex. Cr. App.)	687	State ex rel. Lawrence County v. Grier Land & Mining Co. (Mo. App.)	1087
State v. Boyer (Mo.)	542	State ex rel. Prosecuting Attorney of Saline County v. Busse (Mo. App.)	680
State v. Brandenburg (Mo.)	529	State ex rel. Raines v. Nolte (Mo.)	542
State, Burk v. (Tex. Cr. App.)	705	State ex rel. St. Louis Dressed Beef & Provision Co. v. Nixon (Mo.)	538
State, Butler v. (Tex. Cr. App.)	230	State ex rel. Smith v. Dykeman (Mo. App.)	120
State v. Cannon (Mo.)	513	State ex rel. Zimmerman v. Schaper (Mo. App.)	671
State, Clements v. (Tex. Cr. App.)	728	Stein, Chesapeake & O. R. Co. v. (Ky.)	1169
State v. Clinkenbeard (Mo.)	537	Sterns, Weikel v. (Ky.)	908
State, Cornwell v. (Tex. Cr. App.)	221	Stillwell, Louisville, H. & St. L. R. Co. v. (Ky.)	202
State, Cunningham v. (Tex. Cr. App.)	728	Story, Lumpkin v. (Tex. Civ. App.)	298
State, Darnell v. (Tenn.)	307	Stratton, Evans v. (Ky.)	1154
State, Day v. (Tex. Cr. App.)	215	Sullivan, Lemoine v. (Ark.)	946
State v. Downman (Tex. Civ. App.)	787	Sullivan & Co., Skinner v. (Tex. Civ. App.)	426
		Sumpter, Tombler v. (Ark.)	967
		Suter v. Ft. Worth & D. C. R. Co. (Tex. Civ. App.)	785
		Sutherland v. Kirkland (Tex. Civ. App.)	851
		Sutherland v. Sutherland's Ex'rs (Ky.)	1152
		Sutherland's Ex'rs, Sutherland v. (Ky.)	1152
		Sutton, State v. (Mo.)	663
		Sutton, State v. (Mo.)	664
		Sutton Bros., Upchurch v. (Ky.)	477

	Page		Page
Sweet, Louisville & N. R. Co. v. (Ky.)	204	United Rys. Co. of St. Louis, Miller v. (Mo. App.)	1045
Switzer v. State (Tex. Cr. App.)	705	United Rys. Co. of St. Louis, Musick v. (Mo. App.)	31
Synnott, Thos. Goggan & Bros. v. (Tex. Civ. App.)	1184	United Rys. Co. of St. Louis, Paul v. (Mo. App.)	3
Tackaberry, Morse v. (Tex. Civ. App.)	273	United Rys. Co. of St. Louis, Reisenleiter v. (Mo. App.)	11
Tate v. Wabash R. Co. (Mo. App.)	14	United States Fidelity & Guaranty Co., Board of Education of City of St. Louis v. (Mo. App.)	18
Taub v. Woodruff (Tex. Civ. App.)	750	United States Fidelity & Guaranty Co. v. Paxton (Ky.)	481
Taylor, Montgomery County v. (Ky.)	894	Upchurch v. Sutton Bros. (Ky.)	477
Taylor, St. Louis, S. F. & T. R. Co. v. (Tex. Civ. App.)	819	Vance v. Gray (Ky.)	181
Taylor v. Shelton (Tex. Civ. App.)	302	Vawters & Son, Cariker & Wints v. (Tex. Civ. App.)	780
Taylor, Smith v. (Ark.)	634	Veal, Perry v. (Ky.)	453
Taylor, Union Trust & Savings Co. of Maysville v. (Ky.)	196	Victor Automobile Mfg. Co., Boulware v. (Mo. App.)	7
Terry, Castle v. (Mo. App.)	78	Wabash R. Co., Roberts v. (Mo. App.)	89
Tewksbury v. Metropolitan St. R. Co. (Mo. App.)	682	Wabash R. Co., Tate v. (Mo. App.)	14
Texas Co. v. Garrett (Tex. Civ. App.)	812	Wade v. William Barr Dry Goods Co. (Mo. App.)	1084
Texas Seating Co. v. Farmers' & Mechanics' Nat. Bank (Tex. Civ. App.)	807	Walter, Cooper v. (Ky.)	171
Texas Traction Co., Osborne v. (Tex. Civ. App.)	816	Walker, State v. (Mo.)	516
Texas & N. O. R. Co., Lord & Bushnell Co. v. (Mo. App.)	111	Walther v. Null (Mo.)	993
Texas & P. R. Co. v. Gullett (Tex. Civ. App.)	262	Walton, Bowen v. (Ky.)	885
Texas & P. R. Co., Myers v. (Tex. Civ. App.)	814	Walton Brick Co. v. Anderson Foundry & Machine Works (Ky.)	136
Tholborn, De Van Rose v. (Mo. App.)	1093	Ward v. Boydston (Tex. Civ. App.)	786
Thomas v. Continental Ins. Co. of New York (Ky.)	199	Warren, State v. (Mo.)	522
Thomas, State v. (Mo.)	571	Waterman Lumber & Supply Co., Howard v. (Tex. Civ. App.)	387
Thos. Goggan & Bros. v. Synnott (Tex. Civ. App.)	1184	Watkins v. Parker (Ark.)	1187
Thomason v. Thomason (Ky.)	161	Watson, St. Louis, I. M. & S. R. Co. v. (Ark.)	949
Thompson, Edling-Adcock Real Estate Co. v. (Mo. App.)	681	W. B. Samuels & Co. v. T. M. Gilmore & Co. (Ky.)	169
Thompson v. Jacoway (Ark.)	935	Weatherford Cotton Mills, Southern Pac. Co. v. (Tex. Civ. App.)	778
Thompson v. Joseph W. Moon Buggy Co. (Mo. App.)	1088	Weber, Reccius v. (Ky.)	145
Thompson v. State (Tex. Cr. App.)	350	Weedman, Ramsey v. (Ark.)	1197
Thompson Cotton Co. v. Gullick (Ark.)	1199	Weeks-Betts Hardware Co. v. Roosevelt Lead & Zinc Co. (Mo. App.)	85
Thornton v. Findley (Ark.)	627	Weikel v. Sterns (Ky.)	908
Thornton, State v. (Mo.)	519	Weissinger, Hollis v. (Ky.)	176
Thurman v. Commonwealth (Ky.)	174	Weissinger, O'Connor v. (Ky.)	1126
Timmonds v. Kennish (Mo.)	571	Weissinger, O'Connor v. (Ky.)	1127
Timmons, Tomlinson v. (Mo. App.)	582	Welborn, Central Coffee & Spice Co. v. (Mo. App.)	2
Tinsley, Bottom v. (Tex. Civ. App.)	833	Wells v. State (Tex. Cr. App.)	702
T. J. Moss Tie Co., Brown v. (Mo. App.)	1103	Wells, Wolfskill v. (Mo. App.)	51
T. M. Gilmore & Co., W. B. Samuels & Co. v. (Ky.)	169	Western Union Tel. Co. v. Landry (Tex. Civ. App.)	848
Todd, Caperton's Ex'x v. (Ky.)	1163	Western Union Tel. Co. v. Tucker (Ark.)	1199
Todd v. State (Tex. Civ. App.)	761	Whayne, Willis v. (Ky.)	150
Tolbert, Missouri, K. & T. R. Co. of Texas v. (Tex. Civ. App.)	280	White v. Townsend (Ky.)	876
Tombler v. Sumpter (Ark.)	967	Whitsett, State v. (Mo.)	555
Tomlinson v. Timmons (Mo. App.)	582	Wiedemann v. Crawford (Ky.)	495
Townsend, White v. (Ky.)	876	Wiegand v. Woerner (Mo. App.)	596
Toye, Cunningham v. (Ark.)	962	Wightman, Bradbury v. (Mo.)	511
Trainer, State v. (Mo.)	528	Wilkerson v. McGhee (Mo. App.)	595
Travelers' Ins. Co. of Hartford, Conn., Travelers' Ins. Mach. Co. v. (Ky.)	877	Wilks v. Kreis (Tex. Civ. App.)	838
Travelers' Ins. Mach. Co. v. Travelers' Ins. Co. of Hartford, Conn. (Ky.)	877	William Barr Dry Goods Co., Wade v. (Mo. App.)	1084
Trussle v. Cincinnati, N. O. & T. P. R. Co. (Ky.)	1141	Wm. M. Rice Institute v. Goolsbee (Tex. Civ. App.)	397
Tucker, Heath v. (Mo. App.)	572	Williams v. Humphrey (Ark.)	939
Tucker v. Mine La Motte Lead & Smelting Co. (Mo. App.)	1101	Williams, Pelphrey v. (Ky.)	884
Tucker, Western Union Tel. Co. v. (Ark.)	1199	Williams Cooperage Co., Headrick v. (Ark.)	957
Tutt v. Greenville (Ky.)	890	Willis v. Whayne (Ky.)	150
Tyler, Ex parte (Tex. Cr. App.)	1182	Wilson, Johnson v. (Ky.)	1141
Uebelhor, City of Louisville v. (Ky.)	152	Wilson v. Rogers (Ark.)	318
Ungerer & Co. v. Louis Maull Cheese & Fish Co. (Mo. App.)	56	Wilson v. State (Ark.)	623
Union Nat. Bank v. Menefee (Tex. Civ. App.)	822	Wilson v. State (Tex. Cr. App.)	704
Union Trust & Savings Co. of Maysville v. Taylor (Ky.)	196	Wilson v. Wilson (Ark.)	963
United Rys. Co. of St. Louis, Asmus v. (Mo. App.)	92	Witty v. Springfield Traction Co. (Mo. App.)	82
United Rys. Co. of St. Louis, Jerome v. (Mo. App.)	107	W. J. Vawters & Son, Cariker & Wints v. (Tex. Civ. App.)	780
		Woerner, Wiegand v. (Mo. App.)	596

	Page		Page
Wolfe v. Wolfe (Mo. App.).....	83	York v. Hogg (Ky.).....	1125
Wolfskill v. Wells (Mo. App.).....	51	Young v. State (Tex. Cr. App.).....	78c
Woodmen of the World v. Dodd (Tex. Civ. App.)	254	Zeller v. Metropolitan St. R. Co. (Mo. App.)	1087
Woodruff, Taub v. (Tex. Civ. App.)	750	Zimmerman v. Metropolitan St. R. Co. (Mo. App.).....	40
Wright, Smith v. (Mo. App.)	683		
Wynne, Robinson v. (Ark.)	319		

REHEARINGS DENIED

[Cases in which rehearings have been denied, without the rendition of a written opinion, since the publication of the original opinions in previous volumes of this Reporter.]

Abel v. Wueston (Ky.) 133 S. W. 774.	Gregory v. Meister (Ky.) 132 S. W. 399.
Baker v. Crescent Coal Co. (Ky.) 133 S. W. 1146.	James v. Cammack (Ky.) 129 S. W. 582.
Brink v. Moeschl Edwards Corrugating Co. (Ky.) 133 S. W. 1147.	James v. Walker (Ky.) 132 S. W. 149.
Citizens' Life Ins. Co. v. Boyle (Ky.) 129 S. W. 303.	Louisville & N. R. Co. v. Goodwin (Ky.) '131 S. W. 1012.
City of Covington v. Schlosser (Ky.) 133 S. W. 987.	Louisville & N. R. Co. v. Percy (Ky.) 131 S. W. 1036.
Clark v. Logan County (Ky.) 128 S. W. 1079.	McKibben v. Diltz (Ky.) 128 S. W. 1082.
Cole v. Nunnelley (Ky.) 130 S. W. 972.	Manheim Ins. Co. v. Tyner (Ky.) 133 S. W. 1000.
Collins v. Commonwealth (Ky.) 133 S. W. 233.	Penman v. Commonwealth (Ky.) 133 S. W. 540.
Commonwealth v. Kentucky Traction Co. of Louisville (Ky.) 131 S. W. 18.	Pittsburg, C., C. & St. L. R. Co. v. Grom (Ky.) 133 S. W. 977.
Commonwealth v. Malone (Ky.) 132 S. W. 1033.	Postal Tel. Cable Co. v. Louisville Cotton Seed Oil Co. (Ky.) 131 S. W. 277.
Cumberland Telephone & Telegraph Co. v. Yeiser (Ky.) 131 S. W. 1049.	Ralls v. Sharp (Ky.) 131 S. W. 998.
Deaton v. Burton (Ky.) 133 S. W. 958.	Riley v. Louisville, H. & St. L. R. Co. (Ky.) 133 S. W. 971.
Edwards v. Porter (Ky.) 132 S. W. 582.	Sloan v. Commonwealth (Ky.) 130 S. W. 816.
Federal Union Surety Co. v. Commonwealth (Ky.) 129 S. W. 335.	Smith v. Newman (Ky.) 130 S. W. 953.
Goff v. Lowe (Ky.) 133 S. W. 995.	Standard Const. Co. v. Jeunesse (Ky.) 131 S. W. 1028.

See End of Index for Tables of Southwestern Cases in State Reports

134 S.W.

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HATCHER v. NATIONAL ANNUITY ASS'N.

(Kansas City Court of Appeals. Missouri.
Jan., 1911. Rehearing Denied Feb.
13, 1911.)

INSURANCE (§ 699*)—FRATERNAL INSURANCE—REINSURANCE—CONTRACTS—LIABILITY.

A contract by a fraternal insurance order, whereby it assumes the obligation of a benefit certificate issued by another order and agrees to pay, on the death of the member, the sum set out "on the face of the original" certificate, binds the order to pay the amount called for in the original certificate, unaffected by any rider increasing the benefits of the certificate attached pursuant to a by-law of the original maker of the certificate.

[Ed. Note.—For other cases, see Insurance, Dec. Dig. § 699.*]

Appeal from Circuit Court, Livingston County; Arch. B. Davis, Judge.

Action by Lucy A. Hatcher against the National Annuity Association. From a judgment for plaintiff, defendant appeals. Reversed and remanded.

David C. Finley and F. S. Hudson, for appellant. Scott J. Miller, for respondent.

BROADDUS, P. J. This is a suit to recover on a fraternal benefit certificate. In 1905 there was organized under the laws of Missouri a fraternal benefit society, called the Loyal Knights, with headquarters at Chillicothe. But, as the organization did not prosper, in 1907 a certain number of its members transferred their allegiance and membership to the National Annuity Association, among which was Guy F. Hatcher, the holder of the certificate in suit. The certificate as originally issued by the Loyal Knights provided for a payment at death of 10 times the monthly mortuary assessments he shall have paid into the order previous to his death, not exceeding the sum of \$2,000. On August, 1, 1905, the Loyal Knights issued what are called "riders" to its members, increasing the possible benefits, and such a rider was issued to Hatcher, increasing the benefits on his certificate from 10 to 23 times the total sum he should pay into the mortuary fund of the society. When Hatcher and others transferred their membership and al-

legiance to the appellant association, it issued the following document denominated: "Certificate of Assumption. This is to certify that in consideration of the assumption by the National Annuity Association of Kansas City, Missouri, of the benefit certificate issued by the Loyal Knights, of Chillicothe, Missouri, above described, the undersigned member transfers his membership to the National Annuity Association, assumes its obligations and agrees for himself and beneficiaries, to abide by the laws of said association now in force, or that may hereafter be adopted. It is agreed and understood, however, that the amount to be paid at death, by the National Annuity Association, will be the same as that set out on the face of the original benefit certificate issued by the Loyal Knights, to which a copy of this agreement is attached, less only amounts previously paid for disability or other benefits." There was much evidence introduced as to whether the by-law of the Loyal Knights providing for the "rider" increased the benefits on certificates from 10 to 23 times the total sum paid by the member into the mortuary fund of the society. The case was tried before the court without the aid of a jury.

As we consider the case, it was immaterial whether said by-law was legally adopted or not. The contract between the deceased member and the appellant governs the defendant's liability. It is a plain, simple contract which contains the unambiguous stipulation that "the amount to be paid at death, by the National Annuity Association will be the same as set out on the face of the original benefit certificate issued by the Loyal Knights." The original benefit certificate on its face provides for a payment at death of 10 times the monthly mortuary assessments paid by the member. Under the written contract of assumption, 10 times the monthly mortuary assessments paid by the member constitutes the full measure of plaintiff's recovery.

We have examined respondent's motion to dismiss the appeal, but do not think the causes assigned are sufficient to justify the court in sustaining, and it is therefore overruled. The case is therefore reversed and

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes
134 S.W.—1

remanded, with directions to the court to render judgment in accordance with this opinion. All concur.

CENTRAL COFFEE & SPICE CO. v. WELBORN.

(Kansas City Court of Appeals, Missouri, Jan., 1911. Rehearing Denied Feb. 13, 1911.)

1. ATTACHMENT (§ 368*)—WRONGFUL ATTACHMENT—PROPERTY OF THIRD PERSON—ACTION.

An action for willfully and wrongfully causing attachment against a third person, to be levied on plaintiff's goods, is in trespass, and not for wrongful attachment, making existence of grounds for attachment immaterial.

[Ed. Note.—For other cases, see Attachment, Cent. Dig. § 1344; Dec. Dig. § 368.*]

2. ATTACHMENT (§ 376*)—WRONGFUL ATTACHMENT—DAMAGES.

An action for willfully and wrongfully causing attachment against a third person, to be levied on plaintiff's goods, being in trespass, and not for wrongful attachment, it was error to allow the jury to consider damages sustained in defending the attachment suit, which was justifiable, and to which plaintiff was not a party.

[Ed. Note.—For other cases, see Attachment, Cent. Dig. § 1386; Dec. Dig. § 376.*]

3. ATTACHMENT (§ 377*)—WRONGFUL ATTACHMENT—PUNITIVE DAMAGES.

Punitive damages are recoverable for causing seizure of one's goods, knowing them to be his, under attachment against a third person.

[Ed. Note.—For other cases, see Attachment, Cent. Dig. § 1389; Dec. Dig. § 377.*]

Appeal from Circuit Court, Jackson County; John G. Park, Judge.

Action by Central Coffee & Spice Company against F. I. Welborn. Judgment for plaintiff, and defendant appeals. Affirmed, on condition of remittitur.

W. F. Riggs, for appellant. W. F. Zumbrunn, for respondent.

BROADDUS, P. J. This is a suit for an alleged trespass. On February 9, 1909, J. W. Periman and the defendant, Welborn, commenced a suit in a justice court and sued out a writ of attachment against the property of Nancy and A. L. Welsh, nonresidents of the state of Missouri. A. L. Welsh, the president of the plaintiff corporation, was in the possession of a store of goods in Kansas City, Mo. When the constable came to the store, he asked Welsh who owned the goods. He told him that he, Welsh, owned them. The constable then informed him that he had a writ of attachment, and of his intention to levy on them. Welsh then informed the constable that the goods belonged to the plaintiff herein, the Central Coffee & Spice Company. The constable levied the attachment on the goods, but informed Welsh that, if they were the property of said company, he would release them,

if he would make an affidavit to that effect. This was agreed to, and an attorney was sent for, and in about two hours afterwards the affidavit was prepared and executed, and the constable released the goods. At the same time the constable made a statutory levy on 20 shares of stock, standing in the name of A. L. and Nancy Welsh.

There was evidence tending to show that when the constable came to levy on the goods, he was accompanied by the defendant. Welsh was asked whether defendant made any remark regarding the attachment suit, and what he intended to do after the constable came back and released to him the key to the store. "A. Why, he said if he could not get it one way, he would get it another," referring, we presume, to his debt. Witness further testified that defendant was "very angry, and mad all the time he was there." He was allowed to state over the defendant's objection that he paid \$35, as a fee to his lawyer to get the property released. He was allowed to state over defendant's objections whether he lost any of the time of his employes during the existence of the levy. His answer was that he had three employes, and that he lost their services for the afternoon of that day; that he paid one of them at the rate of \$10.50, and the other two \$15, a week. The constable was called to testify as to the levy, to which defendant objected. His testimony is about as stated by Welsh. He also testified over the objections of defendant that defendant directed him to levy on the goods. The defendant showed that the attachment was sustained, and judgment rendered on the demand, as against the said certificate of stock in the plaintiff corporation.

The court instructed the jury, in substance, if they found that defendant knew that the goods were the property of plaintiff and directed the constable to seize them under the writ of attachment, their verdict should be for plaintiff, and they should assess its recovery in such sum as would compensate it for all damages and loss, as described in the evidence; and that, in assessing such damages by way of compensation, they were at liberty to take into consideration the value and amount of money and time expended in defending said attachment suit, if any, not to exceed \$50; and, further, that if the jury believed from the evidence that defendant, knowing the goods levied upon belonged to plaintiff, did maliciously and wrongfully direct and secure a levy upon the goods of plaintiff, that, in addition to the actual damages sustained by the plaintiff, they might assess punitive damages in such sum as they might think proper, not exceeding \$500, as a warning to others. The jury returned a verdict for \$50 compensatory damages, and for \$250 punitive damages.

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

The appellant insists that the petition does not state a cause of action, for the reason, from what we gather from his argument, that it does not allege that the prosecution was without probable cause. It seems that appellant entertains the idea that this is an action for the wrongful suing out and prosecution of the attachment. But it is not such. The facts alleged in the petition make the case one for trespass *vi et armis*. And he further insists that, as the attachment was sustained, the plaintiff was not entitled to recover. But the gist of the cause of action as set forth is that the defendant willfully, maliciously, and wrongfully caused the constable, under the writ of attachment issued, to seize plaintiff's goods, well knowing that they belonged to the plaintiff. This was a statement of a cause of action in trespass, and not for wrongful and malicious prosecution of the attachment.

The court seemed to have fallen into the error that the action was for wrongful prosecution of the attachment, in telling the jury to take into consideration any damages plaintiff may have sustained, and money expended in defending the damage suit. As the defendant sustained the attachment and recovered judgment against the said shares of stock, it was a successful and justifiable proceeding, and plaintiff suffered no injury thereby. And, moreover, he was not a party to the litigation in any way, as he neither pleaded, nor was he impleaded, in the cause. The action stated was not for the wrongful suing out and prosecution of the attachment, but was specifically one for causing the writ therein to be wrongfully levied on goods of plaintiff, who was not a party to the proceedings. If the defendant caused the constable to seize plaintiff's goods, knowing that they were its property, the act was wrongful, intentional, and malicious, and without excuse or justification; all of which was a matter for the jury.

The instruction to the jury that they might allow punitive damages was proper under the allegations and evidence. The rule in such cases is stated in *Buckley v. Knapp*, 48 Mo. 132, to be that: "In all actions for tort whether for assault and battery, or for trespass or libel or slander, where there are circumstances of oppression, malice, or negligence, exemplary damages are allowed not only to compensate the sufferer, but to punish the offender." *Baxter v. Magill*, 127 Mo. App. 392, 105 S. W. 679.

Many errors are assigned by appellant which we consider immaterial.

For error noted, the cause will stand reversed and remanded, unless the respondent within 10 days enters a remittitur of \$50, allowed as compensatory damages by the jury. If such remittitur be made, the cause will stand affirmed. All concur.

PAUL v. UNITED RYS. CO. OF ST. LOUIS.

(Springfield Court of Appeals. Missouri. Jan. 3, 1911. Rehearing Denied Feb. 6, 1911.)

1. STREET RAILROADS (§ 112*)—INJURY TO PEDESTRIAN—LAST CLEAR CHANCE—EVIDENCE.

Where the evidence in an action for personal injuries to plaintiff by being struck by a street car does not show how far away the car was when the plaintiff started to cross the tracks, nor the distances in which a car running at a high speed could be stopped, the last chance doctrine is without bearing, since for that the plaintiff must prove that, after peril arises, the defendant by ordinary care could have averted injury to plaintiff, and failed to do so.

[Ed. Note.—For other cases, see *Street Railroads*, Cent. Dig. §§ 227, 228; Dec. Dig. § 112.*]

2. STREET RAILROADS (§ 98*)—CONTRIBUTORY NEGLIGENCE—PERSONS CROSSING TRACKS.

Where a person alighted from a north-bound car and looked north, while still behind the car, to see whether any south-bound car was approaching, being able to see for 40 feet, and then crossed over to the south-bound track, about 5 feet, and did not look again until he was upon the south-bound track and an approaching car was so near that a collision was unavoidable, he was guilty of contributory negligence.

[Ed. Note.—For other cases, see *Street Railroads*, Cent. Dig. §§ 207, 208; Dec. Dig. § 98.*]

3. STREET RAILROADS (§ 98*)—INJURIES TO PERSON CROSSING TRACKS—CONTRIBUTORY NEGLIGENCE.

When a person about to cross a track could look and discover the true facts as to whether a car was approaching, he has no right after looking, while at a distance from the track, to go ahead on the presumption that a car will not approach at a high rate of speed.

[Ed. Note.—For other cases, see *Street Railroads*, Cent. Dig. §§ 207, 208; Dec. Dig. § 98.*]

4. STREET RAILROADS (§ 112*)—ACTIONS FOR INJURIES—PRESUMPTIONS—RELIANCE ON SPEED ORDINANCE.

Where the plaintiff in an action for personal injuries did not show that he was familiar with the provisions of a speed ordinance or that he relied on it, it will not be presumed, in excuse of contributory negligence, that the plaintiff relied on its observance.

[Ed. Note.—For other cases, see *Street Railroads*, Cent. Dig. §§ 227, 228; Dec. Dig. § 112.*]

Appeal from St. Louis Circuit Court; James E. Withrow, Judge.

Action by George M. Paul against the United Railways Company of St. Louis. Judgment for defendant, and plaintiff appeals. Affirmed.

This is an action in which appellant sued for damages for personal injuries caused by a collision with a street car of the respondent in the city of St. Louis. After hearing the evidence for the plaintiff, the court sustained a demurrer to the same, and directed the jury to return a verdict for the defendant, from which action the plaintiff appealed to the St. Louis Court of Appeals, and the cause has been transferred to this court.

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

The appellant prepared and filed his abstract and brief in this court, and did not by motion or otherwise question the jurisdiction of this court to hear and determine this cause.

The plaintiff's petition charges that the defendant is a corporation conducting a street railway on public thoroughfares in the city of St. Louis, Mo., and carrying passengers for hire by means of electric cars; that while plaintiff on January 29, 1909, was crossing De Hodiamont avenue at or near the south side of the intersection of North Minerva avenue with De Hodiamont avenue, defendant's servants in charge of its south-bound car of the Hamilton avenue line carelessly and negligently, and without using any care to watch for persons on defendant's track at said crossing of Minerva and De Hodiamont avenues, or moving toward it and in danger of being injured by said car, and without using any care to control the movements of said car, or stop same to avoid injury to the plaintiff, and whilst running said car at a high and reckless rate of speed, caused and suffered said car to strike plaintiff violently, and hurl him down in front of and beneath said car, and drag and crush plaintiff, whereby plaintiff was severely bruised and wounded and injured. The petition then alleges the violation of the vigilant watch ordinance (section 1864, Rev. Code St. Louis 1907), which requires that motormen and conductors of street cars must keep a vigilant watch for persons on foot, either on the track or moving toward it, and upon the first appearance of danger to such persons to stop the car within the shortest time and space possible, and that such violation directly caused plaintiff's injury. The petition for a third and further assignment of negligence charges the violation of an ordinance of the city of St. Louis (section 1870, Rev. Code St. Louis 1907) which provides that whenever any car is about to pass another car going in the opposite direction, at a point where it is permissible to passengers to alight from or to board a car, said car shall proceed at a rate of speed not to exceed three miles an hour, and that the violation of said ordinance directly caused the car in question to strike and injure plaintiff. The answer was a general denial, and a plea that plaintiff was guilty of contributory negligence in stepping on the track immediately in front of an approaching car, and so close thereto that the same could not have been stopped in time to have averted the collision. Plaintiff's reply was a general denial.

Evidence introduced by the plaintiff tended to prove the following facts: De Hodiamont avenue, on which are the double tracks of the defendant's Hamilton line, runs north and south in the city of St. Louis, and Minerva avenue runs east and west, but there is an offset in Minerva avenue where it in-

tersects De Hodiamont avenue. The part of Minerva avenue which leads into De Hodiamont avenue from the west, sometimes called North Minerva, is about 50 feet north of that part of Minerva avenue which extends to the east, sometimes called South Minerva, from De Hodiamont. Plaintiff was returning to his home from his work, and at about 6:15 p. m. of the day of his injury—January 29, 1909—he alighted from one of defendant's north-bound Hamilton avenue cars at De Hodiamont and North Minerva avenues, a regular stopping place for passengers, with the intention of going west to his home, and passed behind the car from which he alighted. When he came to the west rail of the north-bound track, he looked north along the south-bound track, and could see at least 40 feet to the north up the south-bound track, and he saw no car on said south-bound track. He listened, but heard no sound of warning of a car's approach. He then proceeded on his way across the tracks toward the west side of De Hodiamont avenue. When he came to the middle of the south-bound track, a south-bound car came upon him, and ran against him, knocking him down under the fender, and dragging him 50 feet before the car could be stopped, and severely injuring him. One witness, Peter Yeakel, testified that the car which collided with plaintiff was running about 20 miles an hour at the time it struck plaintiff. There is a little curve in the tracks at that point. Plaintiff looked straight ahead as he proceeded westward across the tracks after looking north up the track from the place above mentioned where he could see that there was no south-bound car within 40 feet of him. He did not hear the south-bound car which struck him nor any sound of gong, or warning of any kind, of its approach. Yeakel, who was a passenger on the car which struck plaintiff, testified that no gong or bell was sounded. Though it was dark, plaintiff does not contend that he could not have seen the car more than 40 or 50 feet if no obstruction had been in the way. He thought there was no need of looking to a greater distance for a car. His ordinary gait was four miles an hour, and he had several times compared the speed of moving street cars with the speed he was making afoot. Plaintiff testified that, after he looked the first time and continued to go on, he was thinking of getting home; that he was thinking about a street car, and whether he had time to cross after he looked; and that he thought of this because he was in the habit of crossing a double track. He did not hear the car coming, and he was listening. It was then light enough to see an object 50 or 100 yards away if it was large enough. In the opinion of one witness, as we have stated, the speed of the car was 20 miles an hour, but there was no evidence tending to prove within what distance a car running at that rate of

speed could have been stopped, nor was there any evidence tending to show how far the car was from the plaintiff when he entered the danger zone, and there is therefore no room for the application of the last chance doctrine. The speed ordinance counted on in the petition was introduced in evidence, but there was no evidence tending to show that plaintiff was aware of the provisions of said ordinance and relied upon the same.

Hall & Dame, for appellant. T. E. Francis and R. E. Blodgett (Boyle & Priest, of counsel), for respondent.

NIXON, P. J. (after stating the facts as above). 1. As to the last chance doctrine, it may be said that there is not a scintilla of evidence proving, or tending to prove, how far the car was from the point of the collision when the plaintiff emerged from behind the north-bound car and entered the danger zone, nor is there any evidence as to the distance in which a car running at the rate of speed this car is said to have been running (20 miles an hour) could have been stopped, and there was therefore no showing that the car could have been stopped in time to have averted the collision, after plaintiff placed himself in a position of peril. The humanitarian or last chance doctrine is realistic in its operation, and seizes hold of conditions that actually exist at the time of the injury, and does not apply to conditions that could, or should, exist; and, in order to recover under it, it devolves upon the plaintiff to prove that after a situation of peril arose the defendant by the exercise of ordinary care could have averted the injury to the plaintiff and failed to do so. As we said in the case of *Wilkerson v. St. L. & S. F. R. Co.*, 140 Mo. App., loc. cit. 316, 124 S. W. 543: "As there are no tangible facts or circumstances to show where the deceased went on the track or so near it as to imperil his safety, there is no proof that the engineer could have stopped his train in time to have averted the accident, and, there being a failure to prove negligence, no liability, would attach to the defendant company." To the same effect is *Zurfluh v. People's Ry. Co.*, 46 Mo. App., loc. cit. 642, where the St. Louis Court of Appeals said: "Now the difficulty which we encounter is that the plaintiff's evidence fails to show how far away the car was when he started the second time to cross the track, and within what distance the car could have been stopped. It seems to us that it was absolutely necessary for the plaintiff to introduce some evidence tending to prove these facts. Otherwise, it would be impossible for the jury to decide intelligently whether the defendant's servants were lacking in diligence or not, or whether they used proper efforts to stop the car or not." Further ci-

tation of authorities to sustain a proposition so self-evident would be superfluous.

2. Plaintiff testified that he was standing behind the north-bound car near the west rail of the north-bound track, and that he looked north from behind the car to see whether there was a car approaching on the south-bound track; that he could then see about 40 feet only, the north-bound car preventing him from seeing farther than this along the track. After taking this look, he crossed the intervening space between the tracks—about five feet—going west, without looking, and he did not look again for an approaching car until he was upon the south-bound track, at which time the car which struck him was so close that a collision was unavoidable. He testified that at this time it was light enough to have seen an object 50 or 100 yards away if it was large enough, and his counsel in their brief state: "Although it was dark, plaintiff does not contend that he could not have seen a car more than 40 or 50 feet if no obstruction had been in the way."

The law in regard to pedestrians entering upon the tracks of a railroad company under the circumstances shown by the plaintiff's own testimony in this case is that, while ordinary care does not usually require a traveler to look and listen constantly at all points of his approach to the railroad crossing, it does require that he should look just before going upon the track or so near thereto as to enable him to cross before a train within the range of his view going at the usual rate of speed would reach the crossing. 33 Cyc. 1013. Under the conceded facts which we have detailed, coming from the mouth of the plaintiff, we have a case exactly parallel to that of *Gladina v. St. L. & M. R. R. Co.*, 185 Mo. 330, 84 S. W. 928, in which our Supreme Court said: "It may be conceded that the defendant was negligent in running its car at a high rate of speed and without sounding the gong past a standing car from the rear of which the motorman ought to have known that people were liable to pass. * * * Plaintiff was familiar with the location, and also with the movements of the cars. * * * From where he stood the body of the east-bound car shut off his view to the east, but one who was as familiar with the movements of cars as he said he was, in fact, any man of common experience in plaintiff's place, should have known that in a moment the east-bound car would have gone and the obstruction to his vision would have been removed. * * * His act in stepping on or near the north track without looking for the west-bound car was negligence and it contributed to cause the accident." In the case of *Hornstein v. United Rys. Co.*, 195 Mo., loc. cit. 455, 92 S. W. 884, 4 L. R. A. (N. S.) 729, 113 Am. St. Rep. 693, the Supreme Court again expounded the law applicable to the state of

facts disclosed in this record, as follows: "As was well said by Bland, P. J.: 'Common prudence would have dictated when the south-bound car began to move away that the plaintiff stop for a moment that he might have an unobstructed view of the east track, and see whether or not it was safe to proceed across the street. His failure to exercise this precaution was negligence, and there is no escape from the conclusion that this act of negligence contributed to and was the proximate cause of the injury. Where this is the case, the law is well settled that no recovery can be had.'" In the case of *Hafner v. St. Louis T. Co.*, 197 Mo., loc. cit. 201, 94 S. W. 291, the law is declared as follows: "It is negligence for a motorman to run his car at a high rate of speed to a crossing where pedestrians are liable to be when his view of the crossing is so obstructed by a passing wagon that he cannot see whether or not the crossing is clear, but it is also negligence for a full-grown man to approach a railroad track behind a wagon which so obstructs his view that he cannot see whether or not a car that he knows is liable to be coming is actually coming and enter upon the track without looking or pausing until the obstruction to his view has passed, and when the negligence of the two thus combined to cause the accident, the street railroad company is not liable." In *Ross v. Metropolitan St. Ry. Co.*, 125 Mo. App., loc. cit. 618, 102 S. W. 1086, the Kansas City Court of Appeals said: "The law is that, when a car is in the way of a view of the track in the direction from which the car is liable to come, a person must, in common prudence, wait until the obstructing car has passed on so that he may then look to some purpose." These cases are so clearly identical in their facts with those in the case at bar that we think they may be properly denominated—in the parlance of respondent's attorneys—"spotted mule cases."

3. But plaintiff's counsel contend that he was not guilty of contributory negligence as a matter of law, as "he took care to see he would be safe from a car running at a lawful rate of speed, and he had a right to assume that cars would not be running at a reckless and unlawful rate of speed." A person has no right to assume the existence of a certain state of facts, when, by exercising ordinary care, he could discover the true state of facts; and a person who looks, while some distance from the track, to see whether or not a car is approaching and sees none, has no right to go blindly forward without again looking, in reliance upon the presumption that a car will not approach at a high rate of speed. As said in *Gumm v. K. C. B. Ry. Co.*, 141 Mo. App., loc. cit. 314, 125 S. W. 796: "Plaintiff argues that she was justified in presuming that the train was not running to exceed six miles an hour. No presumption gave her the right to fail to

make reasonable use of her senses for her own safety, and she had but to look from her place of safety to know that the train was too close and was coming too fast for the attempt to be made to cross until it had passed. Evidently she suffered her attention to be absorbed in something else, probably by the passing freight train, and forgot to look to the east. Her negligence, as a matter of law, is indisputable, and it deprives plaintiff of any cause of action based on negligence of defendant which merely conduced to place his wife in peril." Further, as said in *Cole v. Metropolitan St. Ry. Co.*, 121 Mo. App., loc. cit. 610, 97 S. W. 555: "He (plaintiff) had the right to indulge in the presumptions that the motorman would not run the car at a negligently high rate of speed; that he would sound the bell as the car neared the crossing, and would reduce its speed to avoid a collision, but this did not absolve him from the performance of his duty to observe the advancing car. A person approaching a railroad crossing whether in the country or in the city is not permitted to rely entirely upon presumptions, but must make reasonable use of his senses to guard his own safety, and the failure to do this is negligence. The duty thus to protect one's own safety continues until the crossing has been traversed. A person in the exercise of reasonable care who is unhindered and whose view is unobstructed cannot take a last look at some distance from the crossing whether it be 20 feet or 2,000 feet away, and then shut his eyes and go blindly forward relying implicitly on the presumption that the servants of the railroad company will not be negligent in the running of its trains or cars."

4. In no event could it be presumed in this case in excuse of plaintiff's contributory negligence that he relied on an observance of the speed ordinance, since he did not testify he was familiar with the provisions of such ordinance, and relied upon the same. The rule is that courts will not assume an injured person relied upon the observance of speed regulations where he testifies, but does not state, that he was aware of the speed regulations and relied on them. This question has also received the consideration of our Supreme Court in the case of *Mockowik v. K. C., St. J. & C. B. R. Co.*, 196 Mo., loc. cit. 571, 94 S. W. 256, Judge Lamm delivering the opinion, wherein it was said: "But will the law indulge presumptions where all parties to the actual occurrence are alive and go upon the stand and the facts are fully disclosed? If plaintiff knew of the ordinances and relied on the fact that defendant was obeying their provisions and acted on that reliance, could he not have said so? Under such conditions, reliance would seem to be a fact susceptible of proof as are other facts, and should be proved by the best evidence of which the case would admit. He of all men knew what the facts were, and, hav-

ing declined to speak, may he invoke the aid of friendly presumptions? 'Presumptions,' as happily stated by a scholarly counselor, ore tenus, in another case, 'may be looked on as the bats of the law, flitting in the twilight but disappearing in the sunshine of actual facts.' That presumptions have no place in the presence of actual facts disclosed to the jury, or where plaintiff should have known the facts had he exercised ordinary care, is held in many cases, of which samples are *Reno v. Railroad*, 180 Mo., loc. cit. 483, 79 S. W. 464; *Nixon v. Railroad*, 141 Mo., loc. cit. 430, 42 S. W. 942; *Bragg v. Railroad*, 192 Mo. 331, 91 S. W. 527. To give place to presumptions, on the facts of this case, is but to play with shadows and reject substance."

From what has been said it follows as night follows day that the judgment of the trial court sustaining the demurrer to the evidence was the only one authorized by law, and it is hereby affirmed. All concur.

BOULWARE v. VICTOR AUTOMOBILE MFG. CO.

(Springfield Court of Appeals. Missouri. Jan. 3, 1911. Rehearing Denied Feb. 6, 1911.)

1. APPEAL AND ERROR (§ 977*)—REVIEW—DISCRETION OF COURT—RULING ON MOTION FOR NEW TRIAL.

The trial court must be allowed a wide discretion in ruling on motions for new trial, and when a motion is sustained upon some ground, the effect of which lies peculiarly within its knowledge, its action in sustaining the motion will not be disturbed provided it is a ground that, if true, might well influence his action.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3860-3865; Dec. Dig. § 977.*]

2. EVIDENCE (§ 442*)—PAROL EVIDENCE—SUPPLEMENTING WRITTEN CONTRACTS.

A written order for goods is not a formal contract which will merge all previous oral agreements or warranties between the parties and preclude oral testimony, tending to establish a warranty not included in the order signed by one party and accepted by the other.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 1874-1899; Dec. Dig. § 442.*]

3. EVIDENCE (§ 442*)—PAROL EVIDENCE—VARYING WRITTEN CONTRACT.

If a written contract shows upon its face that it includes the entire agreement, parol testimony is inadmissible to prove an obligation not therein expressed.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 1882; Dec. Dig. § 442.*]

4. SALES (§ 267*)—CONTRACT—WARRANTY.

An express warranty and an implied warranty may exist together in a contract of sale when not inconsistent, and an express warranty to exclude an implied warranty must be such as to show that it contains all the obligations assumed by the warrantor.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 760, 761; Dec. Dig. § 267.*]

5. SALES (§ 267*)—CONTRACT—WARRANTY.

A signed order from a buyer for an automobile to be manufactured for him contained

a printed statement that the seller's automobiles were thoroughly tested before leaving the factory and that it warranted them to be perfect when shipped, but, should any imperfection appear within a year, it would repair or replace parts. *Held*, that the provision was not a contract, but a mere representation not imposing any liability other than would rest upon the seller in the absence of the provision, and was not exclusive of an implied warranty that the machine was reasonably fitted for the purpose for which it was bought, which purpose was stated to the seller before the purchase.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 760, 761; Dec. Dig. § 267.*]

Appeal from St. Louis Circuit Court; Chas. Clafin Allen, Judge.

Action by Robert M. Boulware against the Victor Automobile Manufacturing Company. There was a verdict for defendant, after which a motion for a new trial was granted, and defendant appeals. Transferred from St. Louis Court of Appeals. Affirmed.

Albert B. Chandler, for appellant. Chilton Atkinson and John M. Wood, for respondent.

COX, J. This is an action to recover the purchase price paid by plaintiff to defendant for an automobile. Trial was had before a jury, and verdict returned in defendant's favor. The court then sustained a motion for a new trial filed by plaintiff, and from that action of the court defendant has appealed.

Plaintiff, in his motion for new trial, alleged 12 reasons why a new trial should be given, and the court in its order sustaining the motion recited that it would sustain it upon the first, third, fourth, fifth, eighth, ninth, tenth, eleventh, and twelfth grounds. Part of these grounds alleged that the jury had been influenced and prejudiced against the plaintiff by reason of the conduct of witness, J. F. Harrington, president of defendant company, by laughing, making gestures and grimaces while on the stand testifying as a witness, which belittled plaintiff in such a way that the jury were thereby prejudiced against him. The trial court must be allowed a very wide discretion in the matter of sustaining motions for new trial, and, when a motion for new trial is sustained upon some ground, the force and effect of which lies peculiarly within the knowledge of the trial court, his action in sustaining the motion will not be disturbed, provided it is a ground that, if found to be true, might well influence the action of the trial judge. In this case, whether or not the conduct of the president of defendant company while on the stand was of such a character as to captivate the jury and to lead them to discredit plaintiff's testimony was a matter peculiarly within the knowledge of the trial judge, and we assume that he was honest in holding that the plaintiff's case had been in-

jured in such a way as to indicate that he had not had a fair trial, and his action in sustaining the motion for a new trial upon this ground must be affirmed.

Since the case is to be retried, it becomes important that the other questions urged in this court should receive attention. The controversy in this case upon its merits rests upon whether or not defendant made certain warranties at the time plaintiff ordered the automobile. The plaintiff in his petition alleges that on or about the 8th of April, 1909, defendant offered to build and construct for and deliver to plaintiff at the city of Canton, Mo., for the sum of \$725 an automobile to be warranted by defendant to be of first-class material and workmanship, the engine and other machinery and other appliances to properly perform their functions, and the automobile to run readily without difficulty and satisfactorily to plaintiff over the roads (heretofore described by plaintiff to defendant) upon which plaintiff desired to run the car that he might purchase; that he relied upon this warranty and paid \$250 of the purchase price at the time he gave the order for the machine, and paid the balance when it was delivered to him, and that the machine, after thorough trial, had wholly failed to comply with the warranty as made by the defendant; that he had offered to return it, and had notified defendant that he had rescinded the contract. The evidence showed:

That plaintiff lived upon a farm some miles distant from Canton, Mo. That he went to St. Louis for the purpose of purchasing an automobile to use upon the roads between his home and the city of Canton. That he intended to purchase from another company, but they did not have the machine that he wanted, and that he then incidentally fell into the place of business of defendant, and after some considerable time spent in negotiations, during which time Mr. Harrington, the president of defendant company, explained to plaintiff the merits of the automobile manufactured by defendant, and took plaintiff in one of his machines for a ride out to Forest Park and back. That during this conversation plaintiff explained to Mr. Harrington that he wanted an automobile that would run upon the roads between his home and the city of Canton. That the road was crossed by some branches, and that there was sand in the road at these places, and that he wanted a machine that would run over these sandy places in the road without difficulty, and that Mr. Harrington assured him that the machine he was proposing to manufacture for him would run over those roads readily and to the satisfaction of plaintiff. That plaintiff relied upon this representation, and was induced by it to purchase the machine. That he did purchase it. That they agreed upon the price, and that there at the office of defendant in the city of St. Louis they presented to him and he

signed an order for the machine. This order was as follows:

Orders are accepted subject to delay from strikes, labor troubles, or other unavoidable causes.

	Entered
Order.	100 Com.
	Ch. 250

Victor Automobile Mfg. Co., St. Louis, Mo.
Dear Sirs: Enclosed find draft for two hundred fifty dollars, being first payment on one Victor Automobile.

Model E. 20-24 Horse Power.
Equipped with water cooled engine. Track 5' 20."

The balance, \$475.00 I will pay you on arrival of car.

Remarks—Wine color, with black and gold strip.

Name in full—R. M. Boulware.

Street, ——— Town, Canton.

County, Clark. State, Mo.

Railroad,

Guarantee—Our automobiles are thoroughly tested before leaving the factory and we warrant them to be in perfect running order when shipped, but should any imperfection appear in material or workmanship within a period of one year from date of shipment, we will repair or replace parts free of charge, at our factory, such parts to be returned, charges prepaid. This does not apply to batteries or spark plugs. We will not be responsible for any repairs or alterations made outside our factory.

[In pencil] Bank of Lewis Co., Canton, Mo.

That plaintiff went home, and some time afterward the automobile was sent to him, and he remitted the balance of the purchase price, took the automobile, and, with the assistance of two men who had had experience in running automobiles, undertook to run the machine, and that it was an absolute failure. That he then notified defendant that he rescinded the contract and demanded back the purchase price and they refused to pay it.

The contention of appellant in this court is that the order for the machine signed by plaintiff constituted the entire contract between plaintiff and defendant, and that the guaranty which appears at the bottom of the order is the only guaranty to which defendant can be held in this transaction, and that the petition in this case, being bottomed upon a warranty not described therein, and the evidence in the case showing that plaintiff did not attempt to comply with the guaranty which appears on the order which he signed, that the judgment of the circuit court should be reversed, and the cause remanded with directions to enter judgment for defendant.

Ordinarily a written order for goods is not such a formal contract between the parties as will merge all previous oral agreements or warranties between them, and thus preclude the admission of oral testimony tending to establish a warranty that is not included in the order signed by one party and accepted by the other. *Leavitt v. Fiberloid & Co.*, 196 Mass. 440, 82 N. E. 682, 15 L. R. A. (N.

S.) 855; *Routledge v. Worthington*, 119 N. Y. 592, 23 N. E. 1111; *Chapin et al. v. Dobson*, 78 N. Y. 74, 34 Am. Rep. 512. Therefore, if nothing appeared upon this order except that part which appears above the signature of plaintiff, there would be no question that plaintiff could be permitted to show a warranty on the part of defendant not named or expressed in the order; but the contention of defendant is that the printed guaranty which appears on the order below the signature of plaintiff expresses the entire obligation assumed by the defendant, and that it does not cover the warranty sued upon. If this position is correct, then plaintiff cannot recover in this action, for the law is that where the written contract shows upon its face that it includes the entire agreement of the parties, and expresses all the obligations assumed by either, then to permit a party to recover upon an obligation not therein expressed, and to prove this obligation by parol testimony, would be to vary by parol the terms of the written contract made by the parties, which cannot be done. *Iron Co. v. Holbeck*, 109 Mo. App. 179, 82 S. W. 1128. While this is true, it is also true that an express warranty and an implied warranty may exist together when not inconsistent. *Miller & Co. v. Hunter*, 82 Mo. App. 632.

An express warranty, to exclude an implied warranty, must be of such a character as to make it apparent that the express warranty contains all the obligations assumed by the warrantor. *Fairbanks, Morse & Co. v. Baskett*, 98 Mo. App. 53, 69, 71 S. W. 1113; *International Pavement Co. v. Smith Machine Co.*, 17 Mo. App. 264. If we concede defendant's position, and hold that the guaranty printed upon the order signed by plaintiff is a part of the contract, yet it will be noted that it only purports to express an obligation upon the part of defendant, and does not show upon its face that it is exclusive. It says: "Our automobiles are thoroughly tested before leaving the factory, and we warrant them to be in perfect running order when shipped." This is a general statement, and sounds more like an advertisement put forth for the purpose of inducing customers to purchase their product than like a warranty of a particular machine sold under the order signed by the purchaser in this case, and there is nothing in it which excludes the idea that the defendant might not give a warranty other than that therein expressed. This supposed warranty was not written in the body of the order, was not signed by the defendant, but, as before suggested, appears to be put forth more in the form of a general statement, and to our mind does not assume the dignity of a contract, but is merely a representation on the part of defendant that all machines put out by them are thoroughly tested and known to be in good running order before leaving their factory. We think defendant bound by this representation

just as he would be by any other representation made to a prospective purchaser, but when we look to the circumstances surrounding the contract made between these parties, and consider that the machine ordered was to be manufactured after the order was given, the statement in this guarantee adds nothing to the obligation of the defendant. Any one manufacturing and selling a machine is held in law to warrant that the machine is reasonably fit for the ordinary purposes for which such a machine is put upon the market and sold, so that if this purported guaranty on the part of defendant had been entirely omitted, and plaintiff had ordered the machine without any warranty at all, the defendant would have been bound, when sending him the machine, to send one that was in "perfect running order when shipped." It is further contended by appellant that the remaining part of this supposed warranty which provides "but, should any imperfection appear in material or workmanship within a period of one year from date of shipment, we will repair or replace parts free of charge, at our factory, such parts to be returned, charges prepaid. This does not apply to batteries or spark plugs. We will not be responsible for any repairs or alterations made outside our factory," bound the plaintiff in case the machine was not satisfactory, or was in any way defective, to return it to the factory of the defendant, and give them an opportunity to repair it. Had plaintiff agreed to do this, there is no question that he would have been bound by his agreement, and would have been required to perform, or offer to perform, upon his part, before he could complain of the failure of defendant to send him a perfect machine, but it will be noticed that the language does not require the plaintiff, in case the machine is defective, to return it, but the statement above quoted is simply an offer on the part of defendant to make repairs free of charge should any defects appear within one year. This does not prevent the plaintiff from standing upon his contract, and, if the machine is defective, to avail himself of whatever redress the law gives him notwithstanding the kind offer of the defendant to repair free of charge.

Plaintiff's petition is grounded upon what he denominates a warranty that the automobile would run upon the sandy roads between his home and the city of Canton, and that the machine should run to the satisfaction of plaintiff. It is familiar law that when a party manufactures and sells to another party a machine to be used for a particular purpose, and the manufacturer is informed of the purpose for which the purchaser wants it, there is an implied warranty that the machine will be reasonably fitted for the purposes for which it was purchased. *Iron Co. v. Holbeck*, 109 Mo. App. 179, 82 S. W. 1128; *Aultman, Miller & Co. v. Hunter*, 82 Mo. App. 632; *St. Louis Brewing Ass'n v.*

McEnroe, 80 Mo. App. 429; Skinner v. Glass Co., 103 Mo. App. 650, 77 S. W. 1011; Comings v. Leedy, 114 Mo. 454, 21 S. W. 804. And it has also been held that when a party sues for the purchase price of a machine sold for a particular purpose the defendant may show, under a plea of failure of consideration, that the machine was purchased for a particular purpose, and that it was valueless for that purpose, and, further, that this defense may be asserted in addition to an express warranty in the same transaction provided the two are not inconsistent. Keystone Implement Co. v. Leonard, 40 Mo. App. 477.

Our conclusion is that the order signed by the plaintiff in this case is not of such a character as to preclude testimony of an oral warranty made by the agent of defendant at the time the machine was ordered, and hence proof that the plaintiff bought the machine for the purpose of using it upon roads of a certain character and that defendant warranted the machine to be suitable for that purpose was competent under the pleadings in this case.

The judgment of the trial court in sustaining a motion for a new trial will be affirmed. All concur.

FRASE et al. v. LEE et al.

(Springfield Court of Appeals. Missouri. Jan. 3, 1911. Rehearing Denied Feb. 6, 1911.)

1. EVIDENCE (§ 419*) — PAROL EVIDENCE — DEEDS—ASSUMPTION OF DEBT.

Where a deed did not state whether or not the grantee assumed the payment of a mortgage executed by a prior grantee, parol evidence was admissible to show that the grantee agreed when he purchased to pay the debt as a part of the price.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 1912-1922; Dec. Dig. § 419.*]

2. MORTGAGES (§ 280*) — ASSUMPTION BY GRANTEE—CONSIDERATION.

If the purchaser of mortgaged property did not agree when he purchased to pay as a part of the price a mortgage executed by a prior grantee, his subsequent agreement to pay the debt would not bind him unless supported by a new consideration, and his voluntary payment of the interest thereon would not bind him to pay the principal of the debt.

[Ed. Note.—For other cases, see Mortgages, Cent. Dig. §§ 740-750, 757-760; Dec. Dig. § 280.*]

3. LIMITATION OF ACTIONS (§ 155*)—RUNNING OF LIMITATIONS—PAYMENT BY VOLUNTEER.

Since a purchaser of land incumbered by mortgage was not bound to pay it, or interest thereon, unless he agreed when he purchased to do so as a part of the consideration, his payment of interest under a subsequent agreement with the holder of the note to do so without any new consideration would not stop the running of limitations; such payment being voluntary.

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. §§ 623-630; Dec. Dig. § 155.*]

Appeal from Circuit Court, Jefferson County.

Action by Charles Frase and others against Thomas J. Lee and others. From a judgment dismissing the bill, plaintiffs appeal. Transferred from the St. Louis Court of Appeals. Affirmed.

Marion C. Early and Clyde Williams, for appellants. Byrns & Bean, for respondent Block. D. D. Holmes, for respondent Lee.

COX, J. Action to foreclose deed of trust. The defense was a plea of the statute of limitations. The deed of trust was given by C. Brassel to Robert Backer, trustee for Charles Frase, dated July 23, 1891, to secure a promissory note of that date for \$250, due one year from date. This deed of trust was given to secure the balance of the purchase price of the land covered by it. On July 8, 1893, Brassel conveyed the land to August Block by general warranty deed. Block quitclaimed it back to Brassel December 22, 1903. Brassel conveyed it to George M. Harrington February 5, 1904, by general warranty deed. Harrington conveyed to Thomas J. Lee March 13, 1905, by general warranty deed. The deed of trust in question was duly recorded, but none of the deeds made when the land was transferred made any reference to this deed of trust. Brassel paid nothing on the note secured by the deed of trust after he first sold the land. The interest upon the note was paid by Block for several years; the date of his last payment being July 21, 1898. This was the last payment made on the note. This suit to foreclose the deed of trust was begun March 30, 1908, and the question at issue in this case is whether or not the payment of interest by Block upon July 21, 1898, tolled the statute of limitations so that the suit was brought within 10 years after the last payment upon the debt secured by the deed of trust. The case was heard by the trial judge, and plaintiff's bill was dismissed. The case turns upon two questions. One is a question of fact which is whether or not Block assumed and agreed to pay the debt secured by the deed of trust when he purchased the lands. There was no statement in his deed in relation to it. This, however, did not preclude the fact being shown by parol testimony, provided he did agree at the time he purchased the land to pay the debt secured by the deed of trust as a part of the purchase price of the land. Nelson v. Brown, 140 Mo. 580, 41 S. W. 960, 62 Am. St. Rep. 755.

The question whether or not Block agreed to pay the debt secured by the deed of trust as a part of the purchase price of the land was one of fact; and, the court having found in defendant's favor, we shall not disturb that finding.

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

It is contended now by plaintiff that the payment of interest by Block, and his having written a letter to plaintiff in which he mentioned something about paying the debt was recognition by him of the deed of trust, and that he is, for that reason, now held for its payment, and therefore, if he paid interest upon the note, the running of the statute of limitations was suspended, and that his suit is in time. With this contention we do not agree. If Block did not agree at the time he purchased the land to pay the debt secured by the deed of trust, a subsequent agreement made by him with the holder of the note to be binding would have to be based upon a new consideration, so that even though he may have promised to pay the debt, and did, as a matter of fact, pay interest upon it, this would not constitute a contract upon his part to pay the principal of the note. *Hall v. Morgan*, 79 Mo. 52; *Hicks v. Hamilton*, 144 Mo. 495, 46 S. W. 432, 66 Am. St. Rep. 431; *B. & L. Ass'n v. Scudder-Gale Grocery Co.*, 82 Mo. App. 245; *Keifer v. Shacklett*, 85 Mo. App. 449. There was no evidence in this case that Block assumed and agreed to pay the debt secured by this deed of trust other than that of the character above enumerated, and this was not sufficient to establish such an agreement upon his part. As Block was not bound to pay the debt, payments made by him were in contemplation of law made by a mere volunteer, and did not stop the running of the statute of limitations. Neither can it make any difference that Block paid interest on the debt to prevent a foreclosure of the deed of trust upon the land. A payment to stop the running of the statute of limitations must be made by some one legally bound to pay the debt. A payment made by one for his own convenience merely is not sufficient.

The judgment will be affirmed. All concur.

REISENLEITER v. UNITED RYS. CO. OF ST. LOUIS.

(St. Louis Court of Appeals. Missouri. Jan. 24, 1911. Rehearing Denied Feb. 7, 1911.)

1. CARRIERS (§ 318*)—INJURIES TO PASSENGERS—EVIDENCE.

In an action for injuries to a passenger while attempting to board a street car, slight evidence in support of the allegations as to defendant's ownership or operation of the car at the time of the injury is sufficient where it is not combatted, and, except for the general denial, there is no intimation that defendant resists the claim on the ground that it was not the operator of the car.

[Ed. Note.—For other cases, see *Carriers*, Cent. Dig. §§ 1249, 1307, 1308; Dec. Dig. § 318.*]

2. CARRIERS (§ 318*)—INJURIES TO PASSENGERS—OWNERSHIP OF ROAD—BURDEN OF PROOF.

Where, in an action for injuries to a passenger while attempting to board a street car,

the evidence showed that plaintiff was injured by the jerking forward of a car on a designated avenue in a city, but there was no evidence as to whose car it was or by whom it was operated, and, so far as the evidence disclosed, any company other than defendant might have owned or operated the car, plaintiff could not recover.

[Ed. Note.—For other cases, see *Carriers*, Cent. Dig. §§ 1283, 1284; Dec. Dig. § 316.*]

3. PLEADING (§ 127*)—ANSWER—ADMISSIONS.

A plea of contributory negligence interposed by a street railway company in an action for injuries to a passenger while attempting to board a car, which alleges that whatever injuries, if any, plaintiff sustained, were caused by his own negligence in attempting to board the car while in motion, merely admits that plaintiff attempted to board a car, which he alleges was operated by the company, but does not admit that the company owned or operated the car.

[Ed. Note.—For other cases, see *Pleading*, Cent. Dig. §§ 264-268; Dec. Dig. § 127.*]

4. APPEAL AND ERROR (§ 714*)—RECORD—MATTERS NOT APPEARING BY RECORD.

The court on appeal from a judgment for plaintiff in a suit for injuries sustained while attempting to board a street car cannot refer to other cases which have been heard in the court with reference to defendant for information as to whether it operated the car at the time of the injury, following *Little Rock Trust Co. v. Southern Missouri & A. R. Co.*, 195 Mo. 669, 98 S. W. 944.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 2958-2963; Dec. Dig. § 714.*]

5. EVIDENCE (§ 22*)—JUDICIAL NOTICE—OWNERSHIP OF STREET RAILROAD.

Courts cannot take judicial notice that on a designated date a street car railway company was the owner of a line on a street in the city of St. Louis, or was operating a car on that line.

[Ed. Note.—For other cases, see *Evidence*, Cent. Dig. §§ 26-28; Dec. Dig. § 22.*]

Appeal from St. Louis Circuit Court; Eugene McQuillin, Judge.

Action by William Reisenleiter against the United Railways Company of St. Louis. From a judgment for plaintiff, defendant appeals. Reversed and remanded.

This suit was instituted by plaintiff in the circuit court of the city of St. Louis to recover of defendant the sum of \$10,000 damages for personal injuries sustained by him through the alleged negligence of defendant. In substance, the second amended petition, upon which the case was tried, alleged that on May 16, 1907, the defendant was a corporation operating an electric street railroad for the carriage of passengers for hire over and along Easton avenue in the said city; that on said day, at the northwest corner of Easton avenue and Whittier street, a customary place for receiving passengers, one of the cars operated by the defendant on said line had slowed down to almost a standstill to receive plaintiff as a passenger pursuant to his signal to stop, but that while he was entering upon said car holding the handrailing thereof, and in the act of stepping there-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

on, defendant's servants and agents in charge of said car, instead of bringing said car to a standstill as it was their duty to do until plaintiff had a reasonable time to get aboard, negligently caused the power to be suddenly and without warning applied to said car with great force, by reason whereof said car was suddenly jerked forward with great and more than usual violence, etc., before plaintiff had a reasonable opportunity to get upon same; that thereby plaintiff was severely and permanently injured, etc., all to his damage, etc. The answer first contains a general denial of each and every allegation in the second amended petition contained, and then the following: "For another and further answer and defense this defendant says that whatever injuries, if any, the plaintiff sustained, were caused by his own carelessness and negligence in attempting to board the street car while it was in motion." There was a trial had before the court and jury, and at the close of plaintiff's evidence defendant asked, and the court refused, an instruction in the nature of a demurrer to the evidence, to which action of the court the defendant duly excepted and saved its exception. The defendant introduced no testimony, and asked no other instructions. The trial resulted in a verdict and judgment for the plaintiff in the sum of \$2,000, and, after an unsuccessful motion for a new trial and in arrest of judgment, the defendant has duly prosecuted its appeal to this court.

Boyle & Priest, T. M. Pierce, and V. H. Roberts, for appellant. John B. Denvir, Jr., and McCoy & Denvir, for respondent.

CAULFIELD, J. (after stating the facts as above). The only assignment of error which we need notice on this appeal is that the court erred in refusing to give at the close of the case the instruction in the nature of a demurrer to the evidence as requested by the defendant. It is urged that this instruction should have been given because there was no evidence that the defendant was the owner or operator of the car from which it is alleged the plaintiff was jerked, and that, therefore, the plaintiff's proof was fatally insufficient. Counsel for defendant cites *Frisby v. St. Louis Transit Co.*, 214 Mo. 567, 113 S. W. 1059. There is no doubt that that case fully sustains the legal proposition for which defendant contends. That was a case where the suit was instituted by plaintiff to recover of the St. Louis Transit Company damages for negligence, and the Supreme Court held that plaintiff's case was fatally defective, and that the demurrer to the evidence was properly sustained because there was no evidence contained in the record which tended to show that the defendant owned or operated the car which caused the injury complained of. In effect, the rule laid down there was that the evidence must support the allegations as to the ownership or opera-

tion of the car at the time of the injury, or else plaintiff must fail. That is unquestionably the rule of law in this state, and we are bound to follow it in this case. It is, however, also the rule that slight evidence tending to support the inference that defendant owns or operates the road will be sufficient where it is not combated, and, except for the general denial, there is no intimation that the defendant resists the claim on the ground that it was not the operator. *Geiser v. St. L., I. M. & S. Ry. Co.*, 61 Mo. App. 459; *O'Keefe v. United Railways Co.*, 124 Mo. App. 613, 619, 620, 101 S. W. 1144.

We have most carefully examined the testimony, with a view to ascertaining whether there is the least evidence tending to support such inference, and have been unable to find it. The record is barren in that respect. There is not the slightest intimation by any witness that the defendant owned any street car, or that it or its agents or servants operated, or had anything to do with any street car. It appears merely that plaintiff was injured by the jerking forward of a car on Easton avenue. Whose car it is or by whom it was operated is blank. So far as the evidence discloses, any company other than the defendant might have owned or operated the street car which injured the plaintiff. Under these circumstances, we are bound to follow the ruling of our Supreme Court in *Frisby v. Railway*, *supra*, and reverse and remand the cause. Plaintiff urges, however, that defendant's plea of contributory negligence admits the allegations of the petition as to its operation of the car and its negligence notwithstanding its general denial. This idea we deem negated by the Supreme Court in *Peterson v. Met. Street Ry. Co.*, 211 Mo. 498, 520, 111 S. W. 37. Neither are we able to agree with plaintiff that the language of defendant's plea is so peculiar that it may be taken to admit that defendant operated the car which injured plaintiff. It is true that it speaks of plaintiff "attempting to board the street car while it was in motion," and it undoubtedly may be taken to refer to the car which the petition alleges was operated by the defendant. In other words, the answer may be taken to read as if it spoke of plaintiff "attempting to board the car which plaintiff alleges was operated by the defendant." It could not be fairly construed to mean more than that. But such meaning is a far step from an admission that the car was owned and operated by the defendant. Plaintiff might be relieved by that language from proving that he attempted to board a car, but the burden would still be on him to show his injury, and the facts necessary to place the responsibility therefor upon defendant.

Plaintiff suggests that we refer to other cases which have been heard in this court with reference to the United Railways Company for information as to whether it opera-

ated the car in question at the time of plaintiff's injury. The same kind of a suggestion was made to the Supreme Court in the case of *Little Rock Trust Co. v. S. M. & A. Ry. Co.*, 195 Mo. 669, 691, 93 S. W. 944, and that court answered the suggestion by saying, "It is apparent that this court cannot look to any facts that appeared to the court in that case in order to help out a judgment in this case, for the very simple reason that the plaintiff in this case is different from the plaintiff in that case." We are compelled to make the same answer to this plaintiff. Neither do we feel justified in holding that courts can take judicial notice without proof that on September 11, 1907, the defendant was the owner of the Easton avenue line, or was operating the car which caused plaintiff's injury.

The judgment will be reversed and the cause remanded.

REYNOLDS, P. J., and NORTONI, J., concur.

COOK v. METROPOLITAN LIFE INS. CO.
(St. Louis Court of Appeals. Missouri. June 28, 1910. Rehearing Denied Oct. 1, 1910.)

INSURANCE (§ 358*)—NONPAYMENT OF PREMIUM—EXTENSION—ACT OF AGENT.

Where an insurance agent on his call to collect the premium, finding the insured sick, refused to take the premium, telling insured and his wife to keep the money, and that he would pay it for them, that it was his money and his affair, and the policy expressly provided that no one save certain officers of the company other than agents could extend the time of payment, the action of the agent was not a refusal of the company to accept a tendered premium, or an extension of time of payment, and, on death of insured without payment of the premium, the company was not liable on the policy.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 913, 1034; Dec. Dig. § 358.*]

Appeal from St. Louis Circuit Court; Eugene McQuillen, Judge.

Action by Amanda E. Cook against the Metropolitan Life Insurance Company. From a judgment for plaintiff, defendant appeals. Reversed.

One Charles F. Cook held a policy in the defendant company, insuring the payment to plaintiff, if alive at the time of the death of Charles F. Cook, of the sum of \$1,000; plaintiff then being the wife and now the widow of said Charles F. Cook. The policy contained the usual stipulation that, if payment of any installment of premium be not made when due, the policy shall be void, and that the contract between the parties is completely set out in the policy, and the application therefor, and that none of its terms can be varied or modified or any forfeiture waived or premiums in arrears be received except by agreement in writing signed by either the president, vice president, sec-

retary, or actuary, "whose authority for this purpose will not be delegated. No other person has or will be given authority." The policy was written on the solicitation of an agent of the company at St. Louis, a Mr. Scott, and Mr. Scott was the party who had collected the premiums on it from time to time as they fell due. All the premiums had been paid on it by the insured, Scott having called at the house of the insured and collected the money from him or his wife and left with them the receipt for that installment, the receipt being signed by the secretary of the company at its home office in New York. A premium falling due December 29, 1901, Mr. Scott called at the house of the insured to collect it. The insured was sick, and his wife, the plaintiff, met Mr. Scott, and asked if he had called to collect the insurance. He said, "Yes," and, quoting from the testimony of plaintiff, respondent here, "I went in the other room and got the money and gave it to my husband to give him, and in the meantime Mr. Scott asked my husband if he had been sick, and I told my husband to give him the money and he offered it to Mr. Scott, and he said, 'No; you had better keep it, and I will pay it for you, and, when you get back to work, you can give it to me. You need not worry, I will pay it, and everything will be all right.'" She reiterated that after Mr. Scott asked her husband if he had been sick and when she told her husband to give Mr. Scott the money, and he offered it to Mr. Scott, Mr. Scott said: "No; you had better keep it, and I will pay it for you, and when you get back to work, you can give it to me. You need not worry, I will pay it, and everything will be all right." Her husband asked Scott if they should pay it to the company then, and Scott said, "No; as it was his money, and not the company's." Mr. Scott had with him at this time when he called the receipt for the money. Witness (plaintiff) said she had never seen Mr. Scott after that but once, that he had never called for the money, and that the next and only time she saw him afterwards he (Scott) had run past the house and she said to him, "Did you pay the dues," and he said "Yes," and for plaintiff not to worry; that it was all right. This occurred a month or so after December and was the last time she had talked to him; had never asked him anything more about it, and had never seen him afterwards except when she went to the office of the insurance company with her attorney. The insured died in May, 1902, and no premiums had matured between December and that date. The December, 1901, premium was never paid. The company refusing payment, this suit was brought for the full amount of the policy; the above facts being in evidence for plaintiff at the trial before the court and a jury. At the

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

close of the testimony of plaintiff defendant interposed a demurrer to the evidence, which was overruled and exceptions saved. Whereupon defendant introduced Mr. Scott, the agent referred to, who testified to the effect that the conversation testified to by plaintiff had never taken place. The jury returned a verdict for plaintiff for the full amount of the policy. Defendant in due time filed its motion for a new trial, which was overruled, and exceptions saved and has brought the case here on appeal.

Nathan Frank, Richard A. Jones, and Max W. Oliver, for appellant. Geo. L. Corlis, H. Ooffenbacher, and F. H. Bacon, for respondent.

. REYNOLDS, P. J. (after stating the facts as above). It is argued by the learned counsel for the respondent that an agent of an insurance company, having power to collect the premiums, is regarded as the alter ego of the company, and his acts in relation to the premium which he had authority to collect will be binding upon the company, and that much more will the company be bound when the agent is tendered the premium and refuses to accept it, as is claimed in the case at bar. That is really the point in the case, and many authorities are cited in support of it. The trouble with this proposition is that it does not meet the facts in this case. The agent, Scott, who called to collect this premium with the receipt in his hand, and to whom the money was tendered, declined to receive it on the ground that the insured needed it, and that he, Scott, would see to the payment of it, and, when he was asked by the plaintiff or her husband if they should call at the company's office and pay it, he said, "No; that he would pay it for them, that it was his money and his affair." This is practically, although not exactly, what he said. This effected two things: First, it was distinct knowledge to the insured and his wife that Scott in saying this was acting in his own behalf, and not for his company; and, in the second place, that he made or offered himself as the agent of the insured and of his wife to make the payment for them and in their behalf, and they accepted his agency. Assuming, as we must, that the testimony of the wife, plaintiff here, is entitled to the fullest credit, that testimony shows conclusively that she knew that Scott in so acting was not acting for the company, but acting for her and for her husband. She and her husband made him their agent in the transaction. He was, as far as they were concerned, in a dual capacity. He came to collect, and in that act represented his company. The policy itself carried specific notice to them that his powers were limited, that he had no power to extend time of payment.

Nor did he undertake to do so. He undertook to pay for the insured. When Scott refused to accept the payment of the premium, he did it as an individual and in his character as an individual and friend of the insured, and he undertook as that friend and agent to pay the money out of his own funds to his company. We are compelled to hold that under such a state of facts the company cannot be charged with his failure to discharge his duty to the insured, and that plaintiff must suffer the consequences of trusting to an agent that had been accepted as their own agent by the insured and plaintiff for his failure to carry out what respondent testifies he agreed to do.

The judgment must be, and is, reversed. All concur.

TATE v. WABASH RY. CO.

(Kansas City Court of Appeals. Missouri. Jan. 30, 1911. Rehearing Denied Feb. 13, 1911.)

1. RAILROADS (§ 446*)—INJURY TO STOCK AT CROSSINGS—ACTIONS—SUFFICIENCY OF EVIDENCE.

In an action against a railroad company for killing cattle at a highway crossing, plaintiff's evidence held sufficient to take the case to the jury.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 1627-1641; Dec. Dig. § 446.*]

2. RAILROADS (§ 447*)—ACTION FOR KILLING STOCK—INSTRUCTIONS—GIVING OF SIGNALS.

In an action against a railroad company for killing stock at a highway crossing, a charge that if the company's servants neglected to sound the whistle, or to ring the bell, plaintiff could recover, was erroneous, as requiring both the sounding of the whistle and ringing of the bell, while, under the statute, the giving of either signal is sufficient.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. § 1649; Dec. Dig. § 447.*]

3. APPEAL AND ERROR (§ 1064*)—HARMLESS ERROR—INSTRUCTIONS.

The instruction was harmless where the undisputed evidence showed that neither signal was given.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4219; Dec. Dig. § 1064.*]

Appeal from Circuit Court, Boone County; N. D. Thurmond, Judge.

Action by Ben Tate against the Wabash Railway Company. Judgment for plaintiff, and defendant appeals. Affirmed.

E. W. Hinton, for appellant. Webster Gordon and N. T. Gentry, for respondent.

ELLISON, J. Defendant's train struck and killed two of plaintiff's cows at a place where its road crosses a public highway, and he brought this action for damages. The judgment in the trial court was in his favor.

The following are the facts, substantially as stated by defendant: The plaintiff lived on a farm on the east side of and adjoining the railroad, about a mile from the village of Hallsville. At this place the railroad

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

runs in a general northeast and southwest direction. There is a county road about a quarter of a mile to the west of, and nearly parallel with, it. Another public road, referred to in the evidence as a lane, runs from the first county road in a general easterly direction across the railroad to the plaintiff's farm. According to the witnesses, the cross-road runs east, then makes a "jog" south for about 75 steps, and then east about 45 or 50 steps to the crossing. In going east toward the crossing the view of the railroad to the north was somewhat obstructed by corn at the time of the accident, but from the jog south there was a clear view for at least a half mile northeast of the crossing. On the afternoon of the accident the plaintiff's son, a boy of 17, was bringing the cows home toward the crossing from a neighbor's pasture. After he turned south, and while he was in the "jog," he noticed a train up at the whistling post, coming south toward the crossing. He then got over the wire fence and attempted to get ahead of the cows, but did not succeed. The cows went onto the crossing immediately in front of the train, and were instantly struck and killed. The train was late and running at a high rate of speed, variously estimated at from 40 to 50 miles an hour. The engine was running backwards. A number of witnesses for the plaintiff testified that the bell was not rung, and that the whistle was first sounded after the train had passed the whistling post and reached a willow tree some 130 yards from the crossing. At this point the brakes were applied, and the speed somewhat slackened, but not enough to do any good. The defendant did not introduce any proof.

We are satisfied with the trial court's view of the demurrer to plaintiff's evidence. The case was properly submitted to the jury. The case, as made by the evidence, cannot fairly be likened to that of an individual crossing a track. Of course, there are instances where one's acts in driving cattle could be illustrated by the duty one owes when himself crossing; but this is not one of them.

We think the only question in the case was that of negligence on the part of the defendant in regard to signals, and in this regard we are not impressed with the argument in defendant's behalf. If the signals had been given as required by statute, it might have attracted the attention of the cows and have prevented them, in one way or another, from going upon the track, or it may have caused them to get over without being struck.

The only question presented looking towards a reversal of the judgment is in regard to an instruction which seems to have required the defendant to have sounded both

the whistle and the bell. If either signal is given, it is all the statute requires. *Turner v. Railway Co.*, 78 Mo. 578; *Van Note v. Railway Co.*, 70 Mo. 641; *Terry v. Railway Co.*, 89 Mo. 586, 1 S. W. 746. The case cited by plaintiff—*Atterberry v. Railway Co.*, 110 Mo. App. 608, 85 S. W. 114—does not sustain the instruction. Sometimes a slight change in wording makes a great difference in meaning, and care should be taken when intending to inform a jury that only one of two duties is required not to tell them that both must be performed. In this case plaintiff's first instruction clearly enough informed the jury that it was defendant's duty to sound the whistle, or to ring the bell. Then, in the second instruction, by changing the form of the statement, the jury were directed to find for plaintiff if they believe from the evidence that defendant failed to do either of these duties. This was the language, omitting parts not applicable: "If the jury believe from the evidence that * * * the servants of defendant in charge of the locomotive and cars neglected to sound the steam whistle of said locomotive at a point, * * * or that said servants neglected to ring the bell of said locomotive at a point, * * * then the jury should find for the plaintiff. * * *" Thus the jury were told that, if they believed the defendant neglected either of those duties, it was liable.

But the question remains: Was there any harm done defendant in view of the undisputed evidence that neither of the duties was performed as required by the statute? We have already said that defendant did not introduce any evidence, while that for plaintiff established, by abundant affirmative testimony, that the whistle was not sounded and the bell was not rung.

In such condition of case we think the technical error ought not to disturb the judgment; and it will accordingly be affirmed. All concur.

KINYOUN v. METROPOLITAN ST. RY. CO.

(Kansas City Court of Appeals. Missouri. Jan. 30, 1911. Rehearing Denied Feb. 13, 1911.)

1. CARRIERS (§ 320*)—INJURY TO PASSENGER—QUESTION FOR JURY.

In an action by a passenger against a street car company for negligently starting a street car as she was alighting, evidence held sufficient to go to the jury as to defendant's negligence, though the place was not the usual place for letting off passengers, but was only used for a safety stop.

[Ed. Note.—For other cases, see *Carriers*, Cent. Dig. § 1322; Dec. Dig. § 320.*]

2. CARRIERS (§ 308*)—ALIGHTING PASSENGER—DUTY OF CARRIER.

When a street car is stopped at a regular stopping place for the ingress and egress of passengers, the carrier should hold the car sta-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

tionary while the passenger is making a reasonable effort to alight.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 1228-1229; Dec. Dig. § 303.*]

3. CARRIERS (§ 303*)—ALIGHTING PASSENGER—DUTY OF CARRIER.

Where a street car is stopped at a place not intended for use as a passenger station, and for another purpose than the admission and discharge of passengers, the carrier should not start the car while a passenger is alighting, with the knowledge and consent of the conductor.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. § 1238; Dec. Dig. § 303.*]

4. CARRIERS (§ 321*)—INJURIES TO PASSENGER—INSTRUCTIONS.

In an action by a passenger against a street car company for negligently starting a street car, where the allegations in the petition were that it came to a stop before she attempted to alight, and where there was evidence that the car was moving, it was not error to modify plaintiff's instruction that the jury were authorized to find for her if they believed her fall was caused by the sudden starting of the car while she was alighting, and the car either stopped at that point or was moving slowly, by striking out the words "or moving slowly," the expression being too indefinite, and admitting of a speed great enough to have been a factor in her fall.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. § 1332; Dec. Dig. § 321.*]

5. CARRIERS (§ 315*)—INJURY TO ALIGHTING PASSENGER—PLEADING—VARIANCE.

While a plaintiff can recover only on the cause pleaded, yet in an action for injury to an alighting passenger there is no variance between a petition charging that plaintiff was thrown down by the sudden start of the car from a standstill, and evidence that the car was still moving though so slightly as to be imperceptible and wholly negligible as a factor in the fall.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 1281, 1282; Dec. Dig. § 315.*]

Appeal from Circuit Court, Jackson County; Henry L. McCune, Judge.

Action by Minnie C. Kinyoun against the Metropolitan Street Railway Company. From an order granting plaintiff a new trial after verdict for defendant, defendant appeals. Affirmed.

John H. Lucas, for appellant. House & Manard, for respondent.

JOHNSON, J. In alighting from a street car on which she was riding, plaintiff fell and was injured. She alleges her injuries were caused by the negligence of defendant in suddenly starting the car—which had been brought to a complete stop—"before the plaintiff had alighted therefrom, and before the plaintiff had a reasonable time to alight therefrom, and when the servants and agents of the defendant in charge of said car knew, or, by the exercise of ordinary care, might have known, that plaintiff was attempting to alight therefrom, and was in a position of danger."

Plaintiff became a passenger on a north-bound Prospect avenue car at Thirty-First street, and intended to alight at Twenty-

Fourth street, but on account of the darkness and the rapid speed of the car did not know when she reached her destination and was carried beyond it. She testified that she inquired of the conductor, "Have we passed Twenty-Fourth?" and that he replied, "Why, I should say so. We are at Eighteenth street now." She exclaimed, "Oh, my goodness me!" and went out to the rear platform. The conductor, who was on that platform, rang the bell and came into the car, passing plaintiff on her way out. The car stopped, and plaintiff started to step down to the pavement. She seized the handhold at the rear of the vestibule with her right hand, and was stepping down when the car suddenly started forward and threw her to the pavement. She supposed the car was stopped at the regular stopping place on the south side of Eighteenth street, and that the conductor had caused it to be stopped to permit her to alight. The car had not reached the regular stopping place, but had made a "safety stop" at a point some distance south of the regular place for receiving and discharging passengers. The rules of the company required north-bound cars to stop at a designated point near the middle of the block on account of the hill in that block, and a cross-street car line on Eighteenth street. Plaintiff states she did not know of the practice of making "safety stops" on that hill, but, as stated, supposed the car was at Eighteenth street. It is a fair inference from her evidence that, though the car was stopped in the middle of the block, the conductor knew she was alighting, and, in effect, invited her to alight at that place. The evidence of defendant contradicts that of plaintiff in essential features. It tends to show that instead of inviting plaintiff to alight during the safety stop, the conductor, when he learned she had been carried by her destination, said to her, "Wait a minute, and I will fix it so you can go back on the next car." Witnesses for defendant say the car only slackened speed at the safety post, and did not come to a full stop, and that plaintiff's fall was caused, not by a sudden start of the car, but by her awkward attempt to alight from the moving car. The evidence is not in entire accord respecting the slowest speed of the car. The jury might have believed that such speed was over three miles per hour or that it was so slow that for practical purposes it amounted to a full stop. The jury returned a verdict for defendant, but on the hearing of a motion for a new trial, the court set aside the verdict and granted a new trial on the ground of error "in refusing to give plaintiff's instruction No. 1 and in modifying instruction No. 4, also for giving defendant's instruction No. 4." Defendant appealed, and argues there was no error against plaintiff in the instructions, and that the

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep r Indexes

court should have sustained defendant's demurrer to the evidence. Counsel for plaintiff filed no brief.

There is no merit in the contention that the court should have taken the case from the jury. The cause of action pleaded is the negligence of the carrier in suddenly starting the car while a passenger is in the very act of alighting. Plaintiff's evidence sustains such cause. When a street car is stopped at a regular stopping place for the ingress and egress of passengers, it is the duty of the carrier to hold the car stationary while a passenger is making a reasonable effort to alight. And where the car is stopped at a place not intended for use as a passenger station and for another purpose than the admission and discharge of passengers, the carrier should not start the car while a passenger is alighting, in a case such as that depicted by the evidence of plaintiff where the passenger was leaving the car with the knowledge and consent of the conductor. The demurrer to the evidence was properly overruled.

In the instructions asked by plaintiff the jury were authorized to find for her if they should believe that her fall was caused by the sudden start of the car while she was alighting, and that she was alighting "while said car was at said point, either stopped, or moving slowly." The court struck out the italicized words, and thereby precluded a recovery by plaintiff unless the jury should find the car was stationary when she attempted to alight. In instruction No. 4, given at the request of defendant, the jury were told "that the only negligence that is submitted to you for your consideration in this case is that after the car was brought to a full stop * * * and while plaintiff was in the act of alighting therefrom, defendant's servants, operating the car, negligently caused * * * it to give a sudden and violent jerk thereby throwing plaintiff," etc. And in another instruction, given at the request of defendant, the jury were told "if you believe and find from the evidence that the plaintiff's injuries, if she sustained any injuries, were caused by her leaving or attempting to leave the car while the same was in motion, either before it stopped, or after it had stopped and started again, then the plaintiff cannot recover, and your verdict must be for the defendant."

The instructions asked by plaintiff are not in harmony with the rule applied by this court in *Bond v. Railroad*, 110 Mo. App., loc. cit. 138, 84 S. W. 124, and the court did not err in refusing to give them. The gravamen of the action pleaded in the petition was negligence in suddenly starting a car that had been brought to a standstill before plaintiff started to alight. No rule is better settled than that which restricts a plaintiff to a recovery only on the cause pleaded. "He must recover upon the cause of action as alleged which is that the car was not in

motion when he attempted to alight, but was suddenly started with a jerk that threw him off and caused his injury." *Bond v. Railroad*, supra. As we shall hold, there would be in such case no material variance between allegata and probata, if the proof showed that the car had not been brought to a dead stop, but had its speed reduced to an imperceptible or perfectly harmless forward motion, but the instructions of plaintiff, had they been given, would have authorized the jury to find for her even on the hypothesis that the forward motion of the car while she was attempting to alight was fast enough to make it a factor in causing her fall. The term "moving slowly," when applied to the speed of an electric street car, might refer to any rate of speed less than 8 or 10 miles per hour. Plaintiff's petition precluded her recovery on any other hypothesis than that of an injury caused solely by the sudden start of the car, and her instructions were erroneous for the reason that they enlarged the scope of her cause of action to include negligence in starting the car in a case where the forward motion of the car during the effort to alight could have been a co-ordinate factor in producing the injury.

But in the modification of plaintiff's instructions, as well as in the giving of the instructions asked by defendant, the court erroneously went to the opposite extreme in holding plaintiff to recovery, if at all, only on the finding that the car had come to a dead stop, and was in that condition when its sudden start threw her to the pavement. There is evidence in the record from which the inference would be reasonable that the car was moving so slowly its motion could not have had any effect on the alighting passenger. Still the instructions given by the court compelled a verdict for defendant even in such case. We considered an identical situation in *Green v. Railway*, 122 Mo. App., loc. cit. 653, 99 S. W. 30, where we said: "Without qualification or exception, the instruction directs a verdict for defendant, should the jury find that plaintiff 'voluntarily attempted to step off the car while it was in motion.' This means that if the car had any motion at all, however slight, when plaintiff began her step to the ground, still she could not recover notwithstanding a sudden acceleration of speed might have been the immediate cause of her fall. It would be extremely harsh and technical should we say that the existence of an almost imperceptible motion when plaintiff's last step began would disprove the act of negligence charged. To have such effect, the motion of the car should be at a rate of speed that in some degree, though slight, would enhance the danger of the act. If less than this, the car for the purpose of alighting from it should be regarded as stationary. *Forrester v. Railroad*, 116 Mo. App. 37 [91 S. W. 401]."

Reaffirming the rule just stated and ap-

plying it to the case in hand, we must hold that, in the instructions given, the court erroneously curtailed the scope of the cause of action pleaded and supported in the evidence. The error was prejudicial, and the learned trial judge did right in granting a new trial.

The judgment is affirmed. All concur.

BOARD OF EDUCATION OF CITY OF ST. LOUIS v. UNITED STATES FIDELITY & GUARANTY CO.

(St. Louis Court of Appeals. Missouri. Jan. 24, 1911. Rehearing Denied Feb. 7, 1911.)

1. PRINCIPAL AND SURETY (§ 59*)—CONTRACT OF SURETYSHIP—CONSTRUCTION.

A contract of suretyship must be given a reasonable interpretation according to the intention of the parties as disclosed by the contract read in the light of the surrounding circumstances, and the purposes for which it was made.

[Ed. Note.—For other cases, see Principal and Surety, Cent. Dig. §§ 103, 103½; Dec. Dig. § 59.*]

2. SCHOOLS AND SCHOOL DISTRICTS (§ 81*)—CONTRACTOR'S BONDS—LIABILITY OF SURETIES.

The obligation of the surety in a bond executed to the board of education of a city by a contractor to install heating and ventilating equipment in a school building is measured by the contract for the work and the bond, read together, and Rev. St. 1899, §§ 6761, 6762 (Ann. St. 1906, p. 3328), requiring contractors for public work to give a bond conditioned for the payment for materials and labor, and which gives a materialman or laborer the right to sue on the bond.

[Ed. Note.—For other cases, see Schools and School Districts, Cent. Dig. §§ 195, 196; Dec. Dig. § 81.*]

3. SCHOOLS AND SCHOOL DISTRICTS (§ 81*)—CONTRACTOR'S BONDS—LIABILITY OF SURETIES.

Under Rev. St. 1899, §§ 6761, 6762 (Ann. St. 1906, p. 3328), requiring contractors for public work to give bond to secure payment for materials and labor, whether by subcontract or otherwise, and giving materialmen and laborers the right to sue on the bond, a bond which stipulates for the payment to the persons furnishing materials used in the work, and which authorizes an assignment of the bond to subcontractors, materialmen, and laborers, who at the instance of the contractor have furnished work or material for the work, binds the surety to answer for the default of the contractor, or the school authorities on the default of the contractor, but does not bind the surety to answer for the default of a third person unless he derives his right to do the work by contract with the contractor.

[Ed. Note.—For other cases, see Schools and School Districts, Cent. Dig. §§ 195, 196; Dec. Dig. § 81.*]

4. MUNICIPAL CORPORATIONS (§ 347*)—CONTRACTOR'S BONDS—LIABILITY OF SURETIES.

Rev. St. 1899, § 6761 (Ann. St. 1906, p. 3328), requiring contractors for public work to execute bonds conditioned for the payment for materials and labor, whether by "subcontract or otherwise," and section 6762 (Ann. St. 1906, p. 3328), authorizing materialmen and laborers of any contractor to sue on the bond, are in pari

materia, and must be read together, and, when so read, the only persons authorized to sue on the bond are those furnishing material or labor for any contractor or subcontractor.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 876, 877; Dec. Dig. § 347.*]

5. PRINCIPAL AND SURETY (§ 185*)—RIGHT OF SURETY—INDEMNITY.

A surety has a right to be indemnified by his principal for whatever sum he has paid out in discharge of the principal's obligation.

[Ed. Note.—For other cases, see Principal and Surety, Cent. Dig. §§ 524-538; Dec. Dig. § 185.*]

6. DISMISSAL AND NONSUIT (§ 7*)—VOLUNTARY NONSUIT—CONDITION OF CAUSE.

Under Rev. St. 1909, § 1980, allowing plaintiff to take a nonsuit at any time before the case is finally submitted to the court or jury and not afterward, a plaintiff is not entitled to nonsuit his case where the case and the instructions for a verdict against him are taken under advisement without any reservation.

[Ed. Note.—For other cases, see Dismissal and Nonsuit, Cent. Dig. §§ 15-19, 22; Dec. Dig. § 7.*]

Appeal from St. Louis Circuit Court; Hugo Muench, Judge.

Action by the Board of Education of the City of St. Louis, at the relation of the Philip Carey Company, against the United States Fidelity & Guaranty Company. There was a judgment for defendant, and the relator appeals. Affirmed.

S. C. Rogers, for appellant. John M. Wood and Edw. C. Kehr, for respondent.

NORTONI, J. This is a suit on a building bond executed under the statute relating to public buildings. The finding and judgment were for defendant, United States Fidelity & Guaranty Company, surety on the bond, and plaintiff prosecutes the appeal.

It appears the board of education of the city of St. Louis contracted with E. Kohlbry & A. De Laney, a copartnership doing business under the firm name of the National Engineering & Construction Company, to install the heating and ventilating equipment of the Baden public school building in the city of St. Louis, and defendant, United States Fidelity & Guaranty Company, became surety on their bond in the penal sum of \$5,375. The bond was executed under and in accordance with the statute in such cases made and provided (see sections 6761, 6762, Rev. St. 1899 [Ann. St. 1906, p. 3328]), and is conditioned for the faithful performance by Kohlbry & De Laney, trading under the firm name of the National Engineering & Construction Company, in executing the contract in full accord with its provisions, and for the use and benefit of all persons furnishing material or labor thereunder. It seems Kohlbry & De Laney did not perform their undertaking, but a corporation, the Advance Engineering & Construction Company, subsequently formed, did so, and of

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

this corporation it is said Kohlbrly, one of the copartners who entered into the contract in the first instance, was president. But there is not a word in proof tending to show the Advance Engineering & Construction Company, a corporation, had any contractual relation whatever with the copartnership of Kohlbrly & De Laney, or with the board of education. Relator, the Philip Carey Company, furnished and installed the covering for the steam pipes, which is parcel of the heating apparatus of the Baden school building, under a contract with the Advance Engineering & Construction Company, for which it was to receive the sum of \$1,200, but there is nothing in the evidence tending to show that it had any contractual relation whatever with the copartnership of Kohlbrly & De Laney, principal obligors in the bond, or with the board of education. The Advance Engineering & Construction Company, which is insolvent, omitted to pay for the material and labor employed in the pipe covering, and this suit is at the instance of the Philip Carey Company, relator, who installed the same for the amount of its debt, \$1,200. It proceeds on the bond executed by defendant surety company under the statutes for the faithful performance of the contract of Kohlbrly & De Laney and to the use of those who furnished labor or material thereunder. After hearing the proof, the court gave judgment for defendant surety company on the theory that plaintiff's claim is not enforceable against, or, in other words, within, the obligation of the bond as it was contracted by the Advance Engineering & Construction Company, which was neither mentioned in the bond nor shown to be in privity with Kohlbrly & De Laney, the principal obligors. In other words, the court by its judgment declared that, though relator furnished the material and installed the covering of the pipes to the extent of \$1,200, it may not recover against defendant surety on the bond, for the reason it does not appear the material was furnished or the labor performed under a contract with, or at the instance or request of, the original contractors, Kohlbrly & De Laney, whose conduct was assured by defendant or with the board of education, which it appears was authorized to complete any portion of the work not installed by the contractors.

It is argued here that notwithstanding the fact that there was no contract on the part of the Advance Engineering & Construction Company, which installed the heating and ventilating apparatus, and the principal obligor in the bond, Kohlbrly & De Laney, whose contract was assured thereby, and notwithstanding there was no contract between the Advance Engineering & Construction Company or relator, the Philip Carey Company, with the board of education to perform the task contracted for and omitted by Kohlbrly & De Laney, the court erred in its judg-

ment, for the reason it conclusively appears the material furnished and labor performed by relator entered into the construction of the school building. The bond in suit is a statutory obligation executed by the authority of and in accordance with sections 6761, 6762, Rev. St. 1890 (Ann. St. 1906, p. 3328), and there can be no doubt of the proposition that by its execution these statutes became part and parcel of the obligation assumed by the surety. *State ex rel. v. Manhattan Rubber Mfg. Co.*, 149 Mo. 181, 212, 50 S. W. 321. But, after conceding the proposition suggested, we have been unable to discover anything in the sections of the statute when read together which extends the obligation of the bond beyond its terms to include the debt of a person for materials and labor furnished to one who is not an obligor in the bond such as the contractor or in some relation of privity with him such as a subcontractor under him, unless it be in the case of a materialman or laborer furnishing material or labor to either the contractor or subcontractor. That the Advance Engineering & Construction Company to whom relator furnished the material and labor is neither the contractor, the performance of whose obligation is vouchsafed in the bond, nor a subcontractor under the original contractors, Kohlbrly & De Laney, is conceded, and the case concedes, too, there is no contractual relation whatever between the board of education and the Advance Engineering & Construction Company, with whom relator contracted his debt, for no such relation between the board of education and the Advance Engineering & Construction Company was either shown or sought to be shown in the proof. This being true, it is obvious that, though relator furnished the material and labor for covering the pipes at the instance of the Advance Engineering & Construction Company, it is not to be regarded as either a materialman or laborer in the eye of the law, for the reason the essential privity of contract between its debtor and the owner of the building or original contractor is absent. Though a surety is regarded as a favorite of the law and the obligation of suretyship in its application to concrete facts is therefore considered strictissimi juris, the suretyship contract itself is nevertheless interpreted and construed in accord with the identical rules which obtain with respect to other undertakings. In other words, the terms employed in the obligation are to be given a reasonable interpretation according to the intent of the parties as disclosed by the instrument read in the light of surrounding circumstances and the purposes for which it was made. 27 Am. & Eng. Ency. Law (2d Ed.) 450; Brandt on Suretyship (3d Ed.) § 107; *Beers v. Wolf*, 116 Mo. 179, 22 S. W. 620; *Martin v. Whites*, 128 Mo. App. 117, 125, 106 S. W. 608. The contract between the board of education and Kohlbrly & De Laney, of course, is to be

read together with the bond executed by defendant surety for its faithful performance. These two instruments with the statutes under which the bond was executed contain the entire obligation of suretyship now in judgment. Upon scrutinizing the written contract and the express terms of the bond, within its four corners, it is entirely clear that defendant surety company obligated itself to answer only for the obligation of the copartnership of Kohlbry & De Laney, the contractors, unless it be in case they omitted to perform and the work was completed by the board of education or some one at its instance, which, of course, continued their obligation to the same effect. There is no suggestion in the case that the board of education itself, or through another at its instance, performed any part of the contract awarded by it in the first instance to Kohlbry & De Laney, and this feature of the matter will not be further adverted to. Indeed, such is not pressed forward by counsel as a matter worthy of consideration on the proof made. How or under what inducement the Advance Engineering & Construction Company came to perform the work, which was contracted for by Kohlbry & De Laney, and engaged relator to aid it in so doing, we are not advised, and the argument advanced concedes that the proof does not show such inducement. But the argument is that because the bond stipulates for the payment "to the parties furnishing the same for all material used in the work" and the first section of the statute to be presently set out and adverted to, after the word "subcontractor," employs the words "or otherwise," the claim of relator is within the obligation of the surety. The words of the bond itself thus quoted are taken from the middle of a sentence which, when read all together, in the light of other provisions, portrays an obvious intention on the part of defendant to assure the payment for such materials and labor furnished under the contract of Kohlbry & De Laney. A subsequent provision of the bond authorizes its assignment by the board of education to subcontractors, materialmen, and laborers who at the instance of the principal obligors (Kohlbry & De Laney) have furnished work or material toward the completion of the contract, and, in case of such assignment the bond shall inure to the benefit of all such parties alike in proportion to their respective demands remaining unpaid. This, too, manifests a clear intention of the parties to the effect that the surety shall respond and answer only for material and labor furnished at the instance of Kohlbry & De Laney, or under their contract. Indeed, when the bond and the statutes are read together, it is obvious that the surety assumed no obligation to answer for the defaults of persons not mentioned therein such as the Advance Engineering & Construction Company, unless such persons

derived their right to improve the Baden public school building either through Kohlbry & De Laney, the original contractors for this particular work, or from the board of education itself, upon their default, of which latter predicate of liability there is no suggestion here. Of course, the idea of calling upon the surety to compensate debts contracted and unpaid by one such as the Advance Engineering & Construction Company, which is neither mentioned in the bond nor in privity with the principal obligor, Kohlbry & De Laney, the contractor, is obnoxious in the highest degree to the legal mind, for such is not nominated in the bond unless it be perforce of the statutes under which it was executed. But, if the statutes so provide, then the obligation is to be enforced notwithstanding the omission to nominate the particular obligation in the written instrument, for of such statutes the parties are deemed to have had notice and to have contracted accordingly. *State ex rel. v. Manhattan Rubber Mfg. Co.*, 149 Mo. 181, 212, 50 S. W. 321. The contract of Kohlbry & De Laney with the board of education and the bond in suit were executed in 1897, and therefore are to be considered together with sections 6761, 6762, Rev. St. 1899 (Ann. St. 1906, p. 3328). We direct particular attention to these statutes for the reason they were amended in 1909, as will appear by Rev. St. 1909, §§ 1247, 1248, and, as so amended, expressly incorporate a condition in like bonds thereafter executed, which, we believe, fairly construed would require the surety company to answer for the claim now in judgment. But the amended statutes are not in judgment, and a question arising thereon is therefore not decided. It is referred to for the purpose of precision only and to point out the fact that the statutes involved were different at the time the bond in suit was executed from those which prevail now. The sections of the statute with which we are concerned are as follows: "All counties, cities, towns and school districts making contracts for public work of any kind to be done for such county, city, town or school district, shall require every contractor to execute a bond with good and sufficient securities, and such bond among other conditions shall be conditioned for the payment for all material used in such work, and all labor performed on such work, whether by subcontract or otherwise." Section 6761, Rev. St. 1899. "Every person furnishing material or performing labor for any contractor with any county, city, town or school district, where bond shall be executed as provided in section 6761, shall have the right to sue on such bond, in the name of such county, city, town or school district, for his use and benefit; and in such suit it shall be sufficient to file a copy of such bond, certified by the clerk or secretary of such county, city, town or school district, which copy shall, unless execution thereof be

denied under oath, be sufficient evidence of execution and delivery of the original: Provided, however, that sections 6761 and 6762 shall not be taken to in any way make such county, city, town or school district liable to such sub-contractor, material-man or laborer to any greater extent than it is liable under the law as it now stands." Section 6762, Rev. St. 1899. It will be noticed that the first of the above sections (i. e., 6761) requires the bond in this case to be conditioned for the payment of all material used in the work, and all labor performed on such work, whether by subcontractor or otherwise.

It is argued that the words "or otherwise" include the claim of relator within the condition of the bond, though it did not furnish material to a subcontractor or to one in contractual privity with the owner or contractor. If this section of the statute alone were before us for consideration, the argument would inhere with more force than it does in view of the two sections to be read together. On considering the subsequent section, we believe, however, the words "or otherwise," employed by the Legislature at the conclusion of section 6761, refer to those persons which might be denominated to be materialmen or laborers under the mechanic's lien law, for it has been determined that the purpose of these statutes as they existed prior to the recent amendment was to afford a remedy on the bond in those cases where the building, because of its public character, is not subject to mechanic's liens. *Hydraulic Press Brick Co. v. School Dist.*, 79 Mo. App. 665. No one can doubt that under the mechanic's lien law one who furnishes labor or material to either the contractor or subcontractor has his remedy against the subject-matter of the improvement. And therefore the words "or otherwise" are not meaningless when the context of the two sections is considered together, for they require the surety to vouchsafe the payment for material and labor whether furnished by a subcontractor himself or by an outside party who furnishes such labor or material to him. When the two sections of the statute are read together, it is entirely clear that the party suing on the bond must deduce his right to so proceed from the contractor whose obligation is assured identically as in mechanic's lien cases. In other words, for one who has furnished material or labor in the improvement to recover on the bond it is essential to prove that he furnished the material or labor either to the contractor or subcontractor, to the end of showing a contractual privity connecting the subject-matter of his suit with the obligation of the surety's undertaking, which stands in lieu of the building in mechanic's lien cases. The two sections, as before said, are to be read together, for they are in pari materia, and the first must be interpreted in connection with the words of the second in

order to accurately deduce the intention of the Legislature manifested in both. The second section authorizes a suit on the bond required to be given in accord with the condition prescribed in the first. By its express words the only persons authorized to sue on the bond for material furnished or labor performed are those which furnish material or labor "for any contractor" with, in this case, the board of education, which, of course, would include the right of one who had furnished material or labor to a subcontractor, for such would be furnishing for the contractor, as it aided the completion of his undertaking. In other words, one who furnishes material or labor to a contractor or a subcontractor under him is nominated in the bond, for such is the sense of the statutes when read together, and, of course, this does not include one who appears to be a mere volunteer, and neither furnished material to the contractor, nor one in contractual privity with him.

To hold this defendant to answer as surety for the unpaid debt contracted by the Advance Engineering & Construction Company would utterly disregard the precept of natural justice which obtains as a fundamental principle in the undertaking of suretyship. There inheres in every contract of suretyship the just, equitable principle which affords to the surety a right to be indemnified by his principal for whatever sum he has paid out in discharge of the principal's obligation. *Reissaus v. Whites*, 128 Mo. App. 135, 106 S. W. 603. It is obvious that, if this defendant were required to compensate the relator for the indebtedness of the Advance Engineering & Construction Company, it would be without recourse for indemnity against its principal, Kohlbry & De Laney, because that copartnership is in no manner privy to the relator's claim, and, in the absence of such privity, there is naught upon which the equitable principle affording indemnity may operate. We approve the conclusion of the trial court to the effect relator is not entitled to recover on the bond in the absence of proof that it furnished material and labor to some one in privity of contract with the original contractors, Kohlbry & De Laney, the principal obligor in the bond.

It is argued the court erred in declining to permit plaintiff to nonsuit his case, to the end of instituting the action anew and supplying the deficiency in proof. The argument must be examined in view of the precise disclosures of the record, for no one can doubt the right of a party to take a nonsuit prior to the final submission of the cause. It appears from the bill of exceptions after plaintiff had introduced all of his proof defendant requested an instruction to the effect that under the evidence in the case plaintiff was not entitled to recover. Defendant introduced no proof, and the bill of exceptions recites, "The court thereupon took said cause under advisement." After having had the

cause under advisement for several weeks, the court made its finding and entered a judgment to the effect that plaintiff was not entitled to recover for the reason he had failed to make out a prima facie case. The judgment entered recites, among other things, that the parties waived a jury and submitted the cause to the court upon the evidence and proof adduced, and the court, having heard and duly considered the same, and being fully advised in the premises, doth find in favor of the defendant on the issues joined. Relator's counsel was not present at the time the judgment was entered, and he was not notified of the fact the court would dispose of the case on that day. A couple of days thereafter relator appeared, and moved the court to set aside its finding and judgment, and permit it to nonsuit the action. So it appears the request was not made until after judgment. On these facts the matter is to be determined by reference to our statute on the subject and the construction placed thereon by the courts. The statute is as follows: "The plaintiff shall be allowed to dismiss his suit or take a nonsuit at any time before the same is finally submitted to the jury, or to the court sitting as a jury, or to the court, and not afterward." Section 1980, Rev. St. 1909. The uniform construction of this statute in practice has been to allow the party to ascertain the opinion of the court upon the law of the case by its action on instructions, and then withdraw the suit before final submission upon the merits if the opinion of the court on the propositions of law is unfavorable to plaintiff. Therefore, when nothing more than a question of law is presented as by an instruction requesting the court to direct a verdict, and this question of law only is taken under advisement, a nonsuit should be allowed on plaintiff's request after the court announces its ruling on the law question raised. Such is the rule of decision announced in several cases by both the Supreme Court and this court. *Lawyers' Co-Op. Pub. Co. v. Gordon*, 173 Mo. 139, 73 S. W. 155; *Lawrence v. Shreve*, 26 Mo. 492; *McLean v. Stuve*, 15 Mo. App. 317, 320. In this view it has been ruled in a case where the evidence was closed and the court acted on the instructions that the plaintiff was entitled to take a nonsuit at any time previous to the retirement of the jury to consider of their verdict. *Templeton v. Wolf*, 19 Mo. 101. See, also, *McLean v. Stuve*, 15 Mo. App. 317, 320. But, when it appears the cause and the instruction for a verdict are taken under advisement, a nonsuit may not be allowed thereafter. The rule is that, though an instruction in the nature of a demurrer to the evidence is requested if the parties submit the cause to the consideration of the court on the proof and instruction together without reservations as to the right of a nonsuit, or to introduce further proof if the court be of opinion that the de-

murrer is well taken, the right to a nonsuit is thereafter precluded. *Lawyers' Co-Op. Pub. Co. v. Gordon*, 173 Mo. 139, 73 S. W. 155; *McLean v. Stuve*, 15 Mo. App. 317, 321. It is said in the authorities cited that, unless the right to a nonsuit or to introduce further proof by one of the parties is expressly reserved at the time of submitting the cause and demurrer together, which, of course, in the circumstances suggested operate to suspend a final submission of the controversy, a nonsuit may not thereafter be taken. It is immaterial, too, if it appears the cause was submitted that plaintiff was not notified of the day the court intended to dispose of the same by giving judgment thereon, for, having submitted the cause along with defendant's demurrer, plaintiff is thereafter precluded by the express terms of the statute. *McLean v. Stuve*, 15 Mo. App. 317, 321. As before stated, the submission in this case was without any reservations whatever, for it appears the cause was submitted together with the instruction, and the court properly denied plaintiff's request for a nonsuit after the judgment was given. The judgment should be affirmed. It is so ordered.

REYNOLDS, P. J., and CAULFIELD, J.,
concur.

AUGUSTUS et al. v. CHICAGO, R. I. & P.
RY. CO. et al.

(Kansas City Court of Appeals. Missouri.
Jan. 30, 1911. Rehearing De-
nied Feb. 13, 1911.)

1. APPEAL AND ERROR (§ 927*)—DEMURRER TO EVIDENCE—REVIEW.

The court on appeal in considering a demurrer of defendant to plaintiff's evidence must accept as proved the facts in evidence hostile to defendant's contention.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3748; Dec. Dig. § 927.*]

2. CARRIERS (§ 280*)—PASSENGERS—CARE REQUIRED.

A street railway company owes to its passengers the duty of exercising the highest degree of care to protect them from injury during transportation.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. § 1089; Dec. Dig. § 280.*]

3. CARRIERS (§ 300*)—PASSENGERS—CARE REQUIRED.

A motorman operating a car across a railroad crossing must hold his car in a place of safety until the crossing is clear, and until it is beyond the action of a train resulting either from its recoil or the reversing of its engine, and for him to run his car in immediately behind a slowly receding string of cars that may stop and return is negligence, notwithstanding any signal from the flagman.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 1211, 1212; Dec. Dig. § 300.*]

4. CARRIERS (§ 320*)—PASSENGERS—NEGLIGENCE—QUESTION FOR JURY.

Whether a motorman operating a car across a railroad crossing was guilty of negli-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

gence in so operating his car as to cause a collision between it and a train *held*, under the evidence, for the jury.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. § 1323; Dec. Dig. § 320.*]

5. CARRIERS (§ 284*)—NEGLIGENCE—LIABILITY.

A flagman stationed at a railroad crossing used by a street railway company is the agent of the latter, and it is liable for his negligence in signaling a motorman to cross.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 1133, 1134; Dec. Dig. § 284.*]

6. CARRIERS (§ 315*)—INJURIES TO PASSENGERS—PETITION—EVIDENCE.

Where the petition in an action for injuries to a street car passenger in a collision between the car and a train at a railroad crossing alleges that the street railway company so negligently constructed, maintained, and operated its car line and the car as to cause the accident, plaintiff may recover on any conceivable negligence of the street railway company that could have caused the collision, and he need not adduce proof of specific negligence.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 1281, 1282; Dec. Dig. § 315.*]

7. CARRIERS (§ 316*)—INJURIES TO PASSENGERS—NEGLIGENCE—BURDEN OF PROOF.

Where a street car passenger proves that he was a passenger, and that he was injured in a collision between the car and a train at a railroad crossing, the street railway company has the burden of showing that the collision was not caused by its negligence, but was due to unavoidable accident or to the negligence of another.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 1283-1294; Dec. Dig. § 316.*]

8. DISMISSAL AND NONSUIT (§ 42*)—DISMISSAL AS TO CODEFENDANT—EFFECT AS TO PLEADINGS.

The allegations of the petition against a street railway company and a railroad company for injuries to a street car passenger in a collision between a car and a train are, so far as they charge negligence against the street railway company, unaffected by the act of plaintiff in dismissing the action as against the railroad company.

[Ed. Note.—For other cases, see Dismissal and Nonsuit, Cent. Dig. §§ 75-83; Dec. Dig. § 42.*]

9. CARRIERS (§ 300*)—INJURIES TO PASSENGERS—CARE REQUIRED.

A motorman operating a car on a railroad crossing must know of the presence of trains there, and he cannot attempt to cross so long as a train is in striking distance, and the failure of a brakeman on the train to warn the motorman of the approach of the train does not affect the charge of negligence of the motorman.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 1211, 1212; Dec. Dig. § 300.*]

10. APPEAL AND ERROR (§ 880*)—QUESTIONS REVIEWABLE—PARTIES ENTITLED TO COMPLAIN.

Where, in an action against a street railway company and a railroad company for injuries to a street car passenger in a collision between the car and a train, the jury found a verdict against both companies, the street railway company could not on appeal complain of errors in instructions to the jury favorable to the railroad company.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3584-3590; Dec. Dig. § 880.*]

11. RAILROADS (§ 288*) — OPERATION OF TRAINS—CARE REQUIRED.

A railway company operating trains across a street on which a street car company is operating street cars must exercise ordinary care to guard against a collision, at the crossing between its trains and street cars, and in the exercise of such care it must consider the fact that it is running its trains over a busy street in rightful use and not to approach the crossing without giving warning, and not to do anything in the running of trains which will unnecessarily enhance the inherent dangers.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 928-932; Dec. Dig. § 288.*]

12. NEGLIGENCE (§ 92*)—IMPUTED NEGLIGENCE—CARRIER AND PASSENGER.

The fact that a motorman in charge of a street car crossing a railroad track failed to exercise the proper degree of care for the protection of the passengers did not excuse negligence of operators of a train resulting in a collision between the car and the train causing injury to a passenger on the street car.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. §§ 142-146; Dec. Dig. § 92.*]

13. RAILROADS (§ 297*) — OPERATION OF TRAINS—NEGLIGENCE—EVIDENCE.

In an action for injuries to a street car passenger in a collision between the car and a train at a crossing, evidence *held* to justify a finding of actionable negligence on the part of the railway company for failing to give warning of the approach of the train.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. § 947; Dec. Dig. § 297.*]

14. RAILROADS (§ 288*) — OPERATION OF TRAINS—NEGLIGENCE.

The rear brakeman of a train approaching a crossing on which street cars are operated must keep a lookout and give warning of the presence of a peril of which he has every reason to believe people on the street cars are in ignorance.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 928-932; Dec. Dig. § 288.*]

Appeal from Circuit Court, Jackson County; James H. Slover, Judge.

Action by Belle J. Augustus and another against the Chicago, Rock Island & Pacific Railway Company and another. From a judgment for plaintiffs, defendants appeal. Affirmed.

M. A. Lowe and Seebree, Conrad & Wendorff, for appellant Chicago, R. I. & P. Ry. Co. John H. Lucas, for appellant Metropolitan St. Ry. Co. Boyle & Howell, A. F. Smith, and Guthrie, Gamble & Street, for respondents.

JOHNSON, J. While plaintiff Belle J. Augustus was a passenger on an electric street car operated by defendant Metropolitan Street Railway Company on the Argentine line of its street railway system in Kansas City, a collision occurred between the car and a freight train at a railroad crossing, and plaintiff was injured. She sued the Street Railway Company, the Chicago, Rock Island & Pacific Railway Company, the owner of the train, and the St. Louis & San Francisco Railroad Company, the owner of the track on which the train was run-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

ning, to recover the damages, but during the trial she dismissed the last-mentioned company, and proceeded against the remaining defendants. The jury returned a verdict in her favor against both defendants and the cause is before us on their appeals from a judgment rendered on the verdict which was for four thousand five hundred dollars. There is no suggestion in the evidence of any negligence on the part of the plaintiff who was seated in the car at the time of the collision. As is usual in such cases each defendant seeks to exculpate itself by casting blame for the collision on its codefendant, and, as we shall show, each has achieved the usual result of adducing proof of the actionable culpability of its companion in the suit without excusing itself.

The collision occurred in the daytime on Nineteenth street near the state line. This street runs east and west, is occupied by two street car tracks, and is crossed at and near the state line by a number of railroad tracks. The east one of these tracks, called in evidence "the Frisco connection," curves from a switch in the Frisco yards south of Nineteenth street in a northeasterly course across the street and to a connection with tracks of the Rock Island Company running in an east and west course north of and parallel to Nineteenth street. A freight train consisting of 28 cars and an engine pulled up from the west on one of the Rock Island tracks for the purpose of backing in on the connection to the Frisco yards. It backed slowly, and the rear brakeman, acting as a pilot, walked ahead around the curve. When he reached the street he discovered another train working on the track ahead, and, to avoid a collision, gave a stop signal to his own engineer which was communicated by the middle and forward brakeman and obeyed by the engineer who could not see the end of the train. When the train stopped, the end car was on the street railway crossing and obstructed both tracks. Immediately after the stop the train moved towards the northeast, and cleared the north street car track by 15 or 20 feet. Then the train stopped, and ran back slowly until its end again reached the north street car track, and collided with a west-bound street car on which plaintiff was a passenger, and which was attempting to pass over the crossing. There was a flagman at this crossing who was hired by the Frisco Company, but who was maintained at the equal charge of the Street Railway Company and three railroad companies, among them the Rock Island. The motorman of the street car knew of the presence of the train, stopped at the crossing, and waited until the train, moving northeastwardly, cleared the crossing, and then proceeded over without looking again in the direction of the train. The train's pilot knew of the presence of the street car and observed it starting to cross as soon as the train left the crossing. The flagman

knew of the presence of both train and street car and was on duty at his post. There is substantial evidence in the record accusing each and all of these men of negligence.

We shall content ourselves with giving only the following summary of the facts we find sustained by substantial evidence: First. The flagman signaled the motorman to stop and remain where he was when his car was in a place of safety, and the motorman disobeyed that signal in proceeding to cross. Second. The flagman signaled the motorman to proceed, and the motorman was following that signal when he ran his car into a place of danger. Third. The return of the train to the crossing was caused by a signal from its pilot to back up. Fourth. He gave no such signal, the engine did not move and the backward motion of the train was due to recoil following the taking up of slack when the engine stopped. Fifth. The motorman gave a warning signal on his gong of his purpose to cross, and the signal was heard by both the flagman and the train pilot. Sixth. The motorman started when the crossing was in range of the train's recoil. Seventh. He did not start until the crossing was beyond the scope of such action, and the train could not return to it without the action of the engine.

The petition contains the following general charge of negligence: "The defendants negligently caused or permitted a collision to occur between the said car of the Metropolitan Street Railway Company and a train of cars of the defendant Chicago, Rock Island & Pacific Railway Company which was running over the tracks and railroad of the St. Louis & San Francisco Railroad Company under a license, lease, permit or running arrangement." Then plaintiff alleges "the negligence of the defendant Metropolitan Street Railway Company, concurring to produce said collision, was that it so negligently constructed, maintained, and operated its car line or street railroad and the car on which said plaintiff Belle J. Augustus was a passenger, that it negligently caused or permitted said collision. The negligence of the defendant Chicago, Rock Island & Pacific Railway Company, concurring to produce said collision, consisted in its negligently causing or permitting its said train or cars to come on and upon said crossing when it knew, or by the exercise of ordinary care should have known that such collision would be a natural and probable result thereof; and in negligently failing to warn said Metropolitan Street Railway Company of the approach of said train or cars and of the danger of a collision therefrom."

First, we shall determine the questions argued by the Street Railway Company, and then consider those argued by the Rock Island Company. Counsel for the Street Railway Company urge here the demurrer to the evidence overruled by the court. In the consideration of this demurrer, we must ac-

cept as proved the facts in evidence hostile to the contention of the defendant. From a merely evidentiary viewpoint it is difficult to conceive of a reasonable ground for excusing this defendant from liability for the injuries inflicted on plaintiff, its passenger, to whom it owed the duty of exercising the highest degree of care to protect her from injury during her transportation. It was the duty of the motorman to hold his car in a place of safety until the crossing was clear; i. e., until it was beyond action of the train resulting either from its recoil or the reversing of its engine. To run his car in immediately behind a slowly receding string of cars that could and might stop and return was not ordinary, much less extraordinary, care. No signal from the flagman would warrant a prudent man in taking such chances and subjecting the lives of those intrusted to his care to such grave risks. If such signal, in fact, was given, it told the motorman nothing more about the train and its future action than his own senses had told him, and he had no right to rely on the flagman's judgment in the face of the known facts that would disparage such judgment in the mind of a careful and prudent person in his situation. His duty commanded him to use his own senses and great caution for the protection of his passengers in a situation so fraught with dangerous possibilities, and he could not cast that duty on the flagman and remain within the limits of proper care. More censurable still was his conduct if, as there is evidence tending to show, he started across in opposition to the flagman's warning. He had no right to take any chances, and even if he thought the way was clear should have heeded a warning from one whose duty it was to give such warning and whose opportunity to detect the presence of danger was equal or superior to his own. The jury were entitled to conclude that the motorman was negligent whether the signal he received was to proceed or remain stationary.

And, further, the flagman, so far as plaintiff was concerned, was the agent of this defendant, and this defendant is answerable for his negligence. The jury were justified in believing from the evidence that he signaled the motorman to advance. If he did, the negligence of such act is too plain for serious discussion. It was his particular duty to know that the way was clear before giving such signal, and the event demonstrated most convincingly his remissness in the performance of that duty. But counsel insist most earnestly that the petition charges this defendant with specific acts of negligence which are not supported by evidence. The answer we give to this argument disposes also of the principal objection urged against the instructions given at the request of plaintiff. The only specification of negligence is that the street railway company "so negligently con-

structed, maintained and operated its car line and the car on which said plaintiff was a passenger," etc. There is no claim in the evidence of any defect in the construction or equipment of the road and the negligence disclosed relates entirely to the operation of the car. The allegation is general and not specific. It does not point to any special act of negligence in the operation of the car, or, for that matter, in the construction of the road or in the maintenance of equipment. Under such averment the plaintiff might recover on any conceivable negligence of the company that could have caused the collision, and in this respect it differs essentially from the averment considered in *Hamilton v. Railway Company*, 114 Mo. App. 504, 89 S. W. 893, where specific acts of negligence were alleged. Since only general negligence is charged, plaintiff was not required to adduce proof of specific negligence. She made out a prima facie case by proving she was a passenger and was injured by a collision of the vehicle in which she was riding. The burden then shifted to the carrier of showing that the collision was not caused by its negligence, but was due to unavoidable accident or to the negligence of others. *Goodloe v. Railway*, 120 Mo. App. 194, 96 S. W. 482; *Wills v. Railroad*, 183 Mo. App. 625, 113 S. W. 713; *Crews v. Railway*, 19 Mo. App. 302; *Kean v. Schoening*, 108 Mo. App. 77, 77 S. W. 835; *Magoffin v. Railway*, 102 Mo. 540, 15 S. W. 76, 22 Am. St. Rep. 798; *Magrane v. Railway*, 183 Mo. 119, 81 S. W. 1158; *Fullerton v. Fordyce*, 144 Mo. 519, 44 S. W. 1053.

The effort in the argument of counsel of the Street Railway Company to make the specific averments of negligence on the part of its original codefendants, the Rock Island and Frisco Companies, perform the office of converting the averment of negligence on the part of the Street Railway Company from a general to a specific charge is unavailing. The dismissal of the last-named defendant from the suit had the effect of eliminating from the petition the cause asserted against that defendant, and we shall not consider the allegations relating to that abandoned cause as possessing any modifying effect on the remainder of the pleading.

As to the pleaded negligence of the Rock Island Company the charge that the brakeman failed to warn the operators of the street car of the approach of the train cannot be construed as a specification of negligence on the part of the motorman, since, with or without such warning, it was his duty to his passengers to know of the presence of the train and not to attempt to cross as long as it was in striking distance.

The demurrer of the Street Railway Company was properly overruled. We have already sufficiently answered the criticism of plaintiff's instructions urged by this defendant. A number of objections are leveled at

the instructions given at the request of its codefendant, but those objections, even if valid, relate to errors of which plaintiff and the Street Railway Company might have complained had the verdict exonerated the Rock Island Company. For instance, plaintiff, as we shall show, well might complain of an instruction authorizing the release of the railroad company on the ground that the collision resulted from the recoil of the train and not from a signal to back the train, but since the jury rejected that theory of the collision and held the Rock Island, in what way could the Street Railway Company have been prejudiced by a rejected hypothesis that was too favorable to its codefendant?

We find the rulings on all the instructions are free from harmful error, and pass to the questions relating to the liability of the Rock Island Company. That defendant owed plaintiff the duty of exercising ordinary care to guard against a collision at the crossing between its train and the car on which she was a passenger. In the exercise of such care it devolved on the Rock Island Company to take into consideration the fact that it was running its train over a busy street in rightful use by pedestrians and vehicles, and not to approach the crossing without giving warning and not to do anything in the running of the train which unnecessarily would enhance the natural and inherent dangers and risks attending the switching of freight trains over a grade crossing. There was no apparent necessity for the stopping of the train at a place where the taking up of slack would clear the crossing and the reaction would cause the end car to return to the crossing, and we say that theory of the collision urged as a defensive fact by counsel of the Rock Island does not tend to free their client from the imputation of negligence. The trainmen should have realized that persons using the street might be misled by the movement of the train away from the crossing into the supposition that it was being pulled away by the engine and would not return immediately. The fact that the movement was caused by the taking up of slack was peculiarly within the knowledge of the trainmen, and, in the exercise of reasonable care, they should not have stopped at a place where the train would "kick" back and strike the unwary traveler who might be in its path. We held the motorman to knowledge of the dangers of the situation on the ground that in the exercise of the high degree of care a carrier owes its passengers, he should have thought of all the dangerous possibilities attending the act of running his car in behind a slowly receding train, but his failure to measure up to the standard of care imposed on him by law did not excuse the negligent invasion by this defendant of the rights of ordinary travelers

on the street (including the plaintiff), whose duty to themselves was only that of exercising ordinary care.

We find ample evidence to support the specific charges against this defendant. The averment that it negligently failed to warn the Street Railway Company of the approach of the train is sustained by evidence to the effect that the rear brakeman, who knew the cars would recoil to the crossing, gave no warning of that fact, but left the safety of the passengers who were in no position to protect themselves solely to the care of the motorman and flagman. Being in immediate control of the threatening instrumentality the active duty was on him to be on the lookout, and to give warning of the presence of a peril of which he had every reason to believe people on the street would be ignorant.

The learned trial judge committed no error in refusing the request of this defendant for a peremptory instruction. Answering the numerous objections urged against the rulings on the instructions, we find this defendant fared better in the instructions than the evidence warranted, and has no cause of complaint.

We do not agree with counsel for the Street Railway Company that the verdict is excessive. The judgment is a clear expression and accomplishment of substantial justice, and, as the cause was tried without material error, it follows that the judgment should be affirmed.

It is so ordered. All concur.

GORDON v. METROPOLITAN ST. RY. CO.

(Kansas City Court of Appeals. Missouri. Jan. 30, 1911. Rehearing Denied Feb. 13, 1911.)

1. APPEAL AND ERROR (§ 215*)—OBJECTIONS BELOW—INSTRUCTIONS.

Where plaintiff asked no instructions, and did not object to the giving of a charge for defendant that there was no evidence sustaining a charge of negligence under the humanitarian doctrine and that plaintiff could not recover on that ground, plaintiff could not object to such charge on appeal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1309-1314; Dec. Dig. § 215; * Trial, Cent. Dig. §§ 683-685, 696.]

2. APPEAL AND ERROR (§ 171*)—THEORY OF CASE.

Plaintiff in the appellate court is held to the theory on which he tried the case below.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1053-1069, 1161-1165; Dec. Dig. § 171.*]

3. TRIAL (§ 418*)—DEMURRER TO EVIDENCE—WAIVER OF ERROR.

Where defendant by adverse rulings on its demurrer to the evidence, challenging plaintiff's right to recover on any hypothesis and presenting the question of contributory negligence as one of law, was driven to the submission in its instructions of contributory negligence as an issue of fact, it may, having preserved exceptions,

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

take advantage of error in the ruling on the demurrer.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 981; Dec. Dig. § 418.*]

4. STREET RAILROADS (§ 81*)—OPERATION—NEGLIGENCE—EXCESSIVE SPEED.

It is negligence to run a street car over a busy street at the speed of an express train.

[Ed. Note.—For other cases, see Street Railroads, Cent. Dig. §§ 172-177; Dec. Dig. § 81.*]

5. STREET RAILROADS (§ 98*)—INJURY TO PERSON ON TRACK—CONTRIBUTORY NEGLIGENCE.

The duty of one crossing a street over street car tracks to pay close attention for approaching cars is a continuing duty, from which he is not excused by the presumption he is entitled to indulge that an approaching car will not be run faster than allowed by ordinance, and at that speed is too far away to menace him, and, where a car was from 900 to 1,000 feet away when a person about to cross the street first saw it and was coming at an angle giving him a view of its illuminated windows, so that the fact that it was running rapidly must have been known to him, and he looked a second time when he was in a place of safety where an ordinarily careful man in his situation would have perceived that the car was not to exceed 75 feet away, and that it had traveled 15 times further than he had walked in coming from the sidewalk, that it was not checking speed, and that a collision would be unavoidable if he attempted to cross in front of it and he proceeded on his way and was struck by it, he was negligent as matter of law, precluding a recovery for his death.

[Ed. Note.—For other cases, see Street Railroads, Cent. Dig. §§ 204-208; Dec. Dig. § 98.*]

6. APPEAL AND ERROR (§ 1178*)—DISPOSITION OF CASE—REMAND.

Where in a death action the issue of negligence under the humanitarian rule was abandoned by plaintiff, and a judgment in plaintiff's favor is reversed because the evidence on the only issue submitted, which was contributory negligence, precluded recovery, the cause will be remanded where the evidence would have justified submission of the issue of negligence under the humanitarian rule had it not been abandoned.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4604-4620; Dec. Dig. § 1178.*]

7. STREET RAILROADS (§ 93*)—OPERATION—CARE AT APPROACHING CROSSING.

Where a street car is approaching a crossing at ordinary speed, a motorman may assume that a pedestrian coming towards the crossing will stop in a place of safety, and is not bound to act on the contrary supposition until something in the appearance of the pedestrian indicates that he is going into danger, but a motorman approaching a crossing at a highly excessive speed for the purpose of running by the regular stopping place where people are waiting for the car cannot indulge in any presumption, but must exercise extraordinary care.

[Ed. Note.—For other cases, see Street Railroads, Cent. Dig. §§ 195-200; Dec. Dig. § 93.*]

Appeal from Circuit Court, Jackson County; W. O. Thomas, Judge.

Action by James W. Gordon, by next friend, against the Metropolitan Street Railway Company. Judgment for plaintiff, and defendant appeals. Reversed and remanded.

John H. Lucas, for appellant. Boyle & Howell, for respondent.

JOHNSON, J. Plaintiff, the minor son of James Gordon, deceased, sued to recover damages for the death of his father, which he alleges was caused by the negligence of defendant. At the time of his death, Gordon was a widower, and plaintiff was his only minor child. The cause is here on the appeal of defendant from a judgment of \$2,000 recovered by plaintiff in the trial court.

Gordon was killed near the intersection of Twenty-Fourth street and Grand avenue in Kansas City shortly after 8 o'clock in the evening of September 22, 1908, as he was crossing Grand avenue, a busy public thoroughfare. A north-bound electric car on defendant's "Westport line" struck him, and inflicted injuries from which he died. Grand avenue runs north and south, the numbered streets east and west. Twenty-Fifth street is 761 feet south of Twenty-Fourth street, and between them, at a point 418 feet south of Twenty-Fourth street, the course of Grand avenue deflects to the southwest, and continues on a tangent in a southwesterly direction. The street car tracks, two in number, make a curve at this point to conform with the course of the street. Gordon and plaintiff lived in the basement of a building on the west side of Grand avenue, a short distance north of Twenty-Fourth street. His daughter, her husband, and her mother-in-law had been paying him a visit, and had left his home accompanied by him for the purpose of boarding a north-bound street car. The party proceeded to cross Grand avenue to the northeast corner of that street and Twenty-Fourth street, which was a regular stopping place for cars running north. The women walked some distance ahead, crossed the car tracks, stopped at the usual stopping place for passengers, and signaled the approaching car to stop. Witnesses for plaintiff say the car which ran on the east track came on at from 35 to 40 miles per hour and ran by Twenty-Fourth street without slackening speed and without ringing the bell. Gordon and his son-in-law walked a few paces behind the women. They left the curb on the west side of the street at a point about 100 feet north of Twenty-Fourth street, and proceeded in a diagonal course towards the stopping place for passengers described. Their direction was southeast, and they traveled 60 feet in going from the curb to the track on which the car was running. The son-in-law testified that they walked slowly, perhaps at the rate of 2 or 2½ miles per hour, and that just as they started to cross the street they looked south, and saw the car more than a block away—from 700 to 1,000 feet from the place of the collision, and that it was "just coming around the curve." As they stepped from the sidewalk, one of the women called back to them, "Here comes the car now." The car had an electric headlight and electric lights inside. The wit-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

ness states they did not and could not observe the speed of the car, but that when they reached the west track—they were just stepping on that track—they looked again and saw the car. He would not state how far away it was then, but said "it was quite a little ways up the track yet." They kept on as before, the witness half a step in front of Gordon. As the witness reached the middle of the east track, he realized the car was rushing on them. He hallooed, and jumped back far enough for the car to clear him as it rushed by. Gordon, heeding the cry, also jumped back, but not far enough. The end of the bumper or the projecting handrail struck him, and hurled him to the pavement.

An ordinance of the city pleaded and introduced in evidence prohibited street cars from running at greater speed than 20 miles per hour, and the petition charges that defendant's negligence in running the car at excessive speed and in violation of the ordinance was the proximate cause of his father's death. The petition further alleges that Gordon "was in a position of peril and danger of which the defendant well knew, or by the exercise of ordinary care might have known in time to have stopped said car and avoided striking said deceased." The answer is a general traverse and a plea of contributory negligence.

The motorman of the car testified: "On the evening of the 22d day of September, 1908, I was in the employ of the Metropolitan Street Railway Company as a motorman, and was running and operating a Westport car. When I got to Hunter avenue and Main street, I got off the car and went in a drug store to telephone to the car barn, and, when I got there, there was a young lady using the phone, and I was delayed about five minutes. By this time there were some other cars close behind me. I went from Hunter avenue into Main street, and started north on Main street. I made the stop at Thirty-First street. After that I made no stop until I passed Twenty-Fourth street. It was just about or a little after 8 o'clock at night. The car was full of people who seemed to be like theater people, going to the theater. The reason I made no stop was because no one wanted to get off, and the other cars were following so close behind. My car was running pretty fast and was coming downgrade. I did not intend to stop my car to take up any passengers because I was behind time, and the other cars were following close behind me. After leaving Twenty-Seventh street, I was ringing my alarm bell with my foot to warn people of the approach of the car, and show people the car was not going to stop. I was running this way and looking directly in front of me as I came around the curve at or near Twenty-Fifth street. As I came around the curve north of Twenty-Fifth street. At this point on Grand avenue the track is straight, and

runs due north from that point. The street was well lighted. Just as I turned the curve north of Twenty-Fifth street, I saw the man who was struck with some other gentleman with him. I also saw at the same time some people standing on the corner on the north side of Twenty-Fourth street and on the east side of Grand avenue. They crossed over the north-bound track just as I turned the curve. At that time the two men were some feet west of the track. These people on the east side of the street saw that my car was not going to stop, and some one held up his hand or something as if to get me to stop, but I did not intend to make the stop, and kept my foot on the alarm bell to notify them of that fact, and rang it more violently and oftener than before. When I first saw these two men, I was ringing this bell. They looked up towards my car as if to stop, and I thought from their movements they were going to stop. I kept ringing my bell and made no effort to stop the car until I was in about a car length of these men, when I reversed my power, and turned on the air and applied the sand. It was too late, however. The young man jumped back, and was not struck. The old man was hit by the handhold on the front end of the car, and knocked down. The handhold of the car was badly bent by the blow. My car ran fully nearly to Twenty-Third street before I could stop it. After I saw this man was not going to stop, I did everything I could to stop the car. I was sounding this bell all the time I was coming down from Twenty-Fifth street, and was in plain view of these two men. I saw them plainly and they saw me. They looked that way, and I thought they heard the gong I was ringing. When these people on the corner held up their hands for me to stop, I rang the gong more violently than before. The fender did not hit the old man at all, but it was the handhold on the side of the car. After I stopped my car, I backed up to where the man was struck, just as some men were carrying him over to the sidewalk. When I first saw these men, they were not going straight across the track, but they were going diagonally at a point north of Twenty-Fourth street, and were kinder facing me. There was nothing in their actions or movements to indicate to me that they did not see my car, and I did not know that they were not going to stop until I was within a car length of them. After I saw they were not going to stop, I did everything in my power to stop. The men were in plain view of me all the time, and I saw and was looking at them all the time after turning in the curve north of Twenty-Fifth street."

At the close of plaintiff's evidence and at the close of all the evidence, the defendant asked the court to direct a verdict in its favor, but these requests were refused, and the cause was submitted to the jury on the sole issues of whether the peril of the deceased

was caused by the negligent manner in which the car was operated, or was caused wholly or in part by negligence of the deceased. The issue of negligence under the "last chance" doctrine was withdrawn from the jury in an instruction given at the request of defendant, and, as later we shall show, was abandoned by plaintiff. The record discloses a novel situation respecting the submission of the cause to the jury. Plaintiff asked no instructions, and did not object to those given at the request of the defendant, which were numerous enough and which included the following: "The court instructs the jury there is no evidence in this case that the defendant's motorman running and operating the car which struck deceased could have stopped or checked the speed of his car after deceased placed himself in a position of peril in time to have avoided the collision and injury to deceased, and hence the plaintiff cannot recover on that ground." Since plaintiff asked no instructions and did not object to the giving of the instruction quoted, in effect, he approved it and agreed with defendant that it correctly declared the law, and that the evidence most favorable to plaintiff would not sustain the charge of negligence under the humanitarian doctrine. Plaintiff is bound to the position he thus selected of his own volition in the trial court, and will not be heard to renounce that position, and shift to another in this court. No rule is better settled than that which holds a plaintiff in the appellate court to the theory on which he tried the cause. On the other hand, defendant is not bound by the submission in its instructions of contributory negligence as an issue of fact. Defendant was driven to take this position by the adverse rulings of the court on its demurrers to the evidence which challenged plaintiff's right to recover on any hypothesis, and presented the question of contributory negligence as one of law. Driven from one line of defense in the trial court, a defendant may fall back to another, but, if he preserves his exceptions (as defendant did in the present case), he may return in the appellate court to his first position. Therefore defendant, despite its instructions, may return here to its demurrer to the evidence, and again challenge the right of plaintiff to recover on any theory of the case. In this view of the situation of the parties, the judgment cannot stand on the charge of negligence under the humanitarian rule, but must rest on the only remaining allegation of negligence; i. e., that the excessive speed at which the car was negligently operated was the sole cause of the injury, and the deceased was not guilty in law of contributory negligence.

The negligence of defendant in running the car over a busy street at the speed of an express train is too apparent and indisputable for argument, and we shall waste no words on that subject. But we think that negligence to the extent that it operated to en-

trap and imperil the unwary pedestrian was assisted by his own contributory negligence, of the existence of which the record affords no room for reasonable difference of opinion. The duty of the deceased to pay close attention to his way over the tracks was a continuing duty, and he was not excused from the performance of that duty by the presumption he was entitled to indulge that the car would not be run faster than 20 miles per hour, and at that speed was too far away to menace him. The law did not require him to look at the car constantly, but it did require him to give it ordinary attention, and, if such attention would have disclosed the reckless speed and manner in which it was being operated, he had no right to presume anything at variance with the plain facts within his observation. The statement of the son-in-law that they could not know until the instant before the collision that the car was running at excessive speed and was in striking distance must be rejected for the reason that it is conclusively disproved by the undisputed and indisputable facts of the situation. The car must have been from 800 to 1,000 feet away when deceased was at the place where the witness says they first looked. It was not coming head on, but was running at an angle that gave them a view of its broadside of illuminated windows. The fact that it was running fast was apparent, and must have been known to them if they looked. If these were all the facts, one still might think there was some room for doubt concerning the negligence of the deceased. But all doubt is removed by the further fact that the second look of the deceased was taken when he was in a place of safety on the west track, and that look, if taken, would have told an ordinarily careful man in his situation that the car was then not to exceed 75 feet away; that it had traveled a distance 15 times greater than that he had traveled in coming from the sidewalk; that it was not checking speed, and that a collision would be unavoidable if he attempted to cross in front of it. One of two conclusions is irresistible. Either the two men did not look at all, or, looking, gave no heed to what they saw. In either case, the conduct of the deceased was negligence in law that precludes a recovery on the issues sent to the jury and compels a reversal of the judgment.

However, we shall remand the cause for the following reason: Though the issue of negligence under the humanitarian rule was abandoned by plaintiff at the last and is not now in the case, the evidence we think would have justified the court in submitting that issue had it not been abandoned, and it is but just to plaintiff to give him an opportunity to have his case tried on its only tenable ground. Doubtless the court in ruling on the demurrer to the evidence indicated the view of the law of the case expressed in the instructions afterward given, and, though

plaintiff was not driven to the acceptance of that view, it would be an unnecessarily harsh rule that would deprive him of a fair opportunity to be heard on the real merits of his case. The jury well might have believed from the evidence that an ordinarily careful and humane man in the position of the motorman would have realized the peril of the deceased in time to have avoided the injury by checking speed or sounding an alarm with the gong. Where a car is approaching a crossing at ordinary speed, a motorman may be justified in assuming that a pedestrian coming towards the crossing will stop in a place of safety, and, in such case, would be under no duty to act on the contrary supposition until something in the appearance of the pedestrian indicated that he was going into danger. But where, as here, the motorman is approaching a crossing at highly excessive speed with the purpose of running by a regular stopping place, where people are waiting for his car, he has no right to indulge in any presumptions. Such conduct is extraordinary, and calls for the exercise of extraordinary care to prevent it from becoming an agency of danger to others. Seeing a straggling group of persons slowly crossing the street, he should have apprehended that they might be surprised and imperiled by his recklessness. He had no right to arrogate to himself a paramount right to the street and compel others to take care of themselves or be injured. Under the peculiar circumstances of this case, the presence of people on the street approaching the track was a danger signal which ordinary prudence would have dictated to the motorman to heed. The evidence of plaintiff would warrant the indulgence of such conclusion by the triers of fact, and, if the same evidence be adduced at a subsequent trial, the issue of "last chance" negligence should be sent to the jury.

The judgment is reversed and the cause remanded. All concur.

DOOLEY v. RYAN'S ESTATE et al.

(Kansas City Court of Appeals. Missouri. Jan. 16, 1911. Rehearing Denied Feb. 13, 1911.)

1. EXECUTORS AND ADMINISTRATORS (§ 283*) —CLAIMS—JUDGMENT—PAYMENT.

Where, on motion to pay a demand against a decedent's estate, previously allowed and assigned to a designated class, the administrator only tendered the issue of payment, the validity of the judgment allowing and classifying the demand was not in issue, either in the probate court or in the circuit court on appeal.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. § 1131; Dec. Dig. § 283.*]

2. EXECUTORS AND ADMINISTRATORS (§ 283*) —CLAIMS—JUDGMENT—PAYMENT.

The validity of a judgment of the probate court allowing a claim and assigning it to a

class cannot be questioned in the circuit court on appeal from a denial of an order to pay the demand pursuant to the judgment, since the jurisdiction of the circuit court is derivative.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. § 1131; Dec. Dig. § 283.*]

3. APPEAL AND ERROR (§ 1074*)—HARMLESS ERROR—JUDGMENT.

Where the circuit court, on appeal from the probate court, denying an order on the administrator to pay a demand against the estate previously allowed and assigned to a designated class, found on the only issue raised by the administrator, pleading payment, in favor of claimant, a judgment for the claimant and sending the matter back to the probate court would not be disturbed, because it erroneously recited that the demand was assigned by the probate court to the fifth class, instead of to the sixth class; for the question of whether the demand had received its proportional share of the funds in the hands of the administrator might arise in the probate court on the making of the order of distribution.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4252; Dec. Dig. § 1074.*]

Appeal from Circuit Court, Bates County; C. A. Denton, Judge.

Proceedings by Silas W. Dooley for an order requiring Nellie Welch and another, administratrices of J. J. Ryan, deceased, to pay a demand against the estate previously allowed by the court. From a judgment of the circuit court for claimant, rendered on appeal from a judgment of the probate court for the estate, the administratrices appeal. Affirmed.

Thos. J. Smith, for appellants. Silas W. Dooley, pro se.

JOHNSON, J. This proceeding was commenced in the probate court of Bates county by a motion filed April 7, 1909, for an order on the administratrices of J. J. Ryan, deceased, to pay a demand against the estate of \$100 and interest previously allowed by the court and assigned to the sixth class. Notice of the motion was not served on the administratrices, but service was acknowledged by their attorney, who appeared and objected to the allowance of the order prayed, for the reason "that said demand has already been paid in full." The issue thus raised was tried before a jury, and a verdict was returned for the estate, on the express ground that the demand had been paid in full. The claimant appealed to the circuit court, where a trial of the cause without the aid of a jury resulted in the following judgment: "Now at this day come the parties, and the court, having previously heard evidence herein and fully considered the same, doth find that on the 12th day of April, 1909, during the regular February term, 1909, of the probate court of this county, claimant herein, S. W. Dooley, did file in said court for allowance and classification, and judgment rendered by this court on the 12th day of August, 1907, in his favor for the sum of \$500 against the estate of J. J. Ryan, deceased; also did file

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

a motion for an order on the administratrices for distribution of the assets of said estate, and the payment of said claim; that said court entered judgment, classifying said claim and making it a fifth-class claim against said estate; that said court rendered judgment against the claimant on his motion for an order of distribution and payment of his said claim, from which said claimant has appealed to this court. The court doth further find that said Dooley has been paid \$400 on said sum of \$500, and that there is a balance due on said judgment of \$100. The court doth further find that at the time said motion was filed in the probate court there was \$1,025 in the hands of the administratrices, and that there has come into their hands additional assets belonging to said estate, subject to distribution on this and other claims probated against said estate. Wherefore the court doth render judgment in favor of said S. W. Dooley, and against the estate of J. J. Ryan, deceased, for said balance of \$100 and interest to date of \$14.75, aggregating \$114.75, together with his costs in this behalf expended. It is further ordered that the probate court direct the administratrices to pay said Dooley, out of the assets of said estate subject thereto, so much of his claim as it may be entitled to under the law." The administratrices appealed from this judgment, and assail it here on a number of grounds.

The points argued by counsel for the estate against the validity of the judgment of the probate court allowing and classifying the demand will not be considered on this appeal, for the reason that such issues are not within the scope of the present proceeding, which presupposes that a valid judgment was rendered, and seeks an order of distribution to aid in the collection of the remainder of that judgment alleged to be due. The only issue tendered by the administratrices was that of payment. The validity of the judgment was not questioned, nor could it have been questioned in the circuit court, since the jurisdiction of that tribunal was derivative, and the administratrices failed to prosecute an appeal from the judgment of the probate court allowing and classifying the demand. The circuit court tried the only issues before it—i. e., that of payment—and, finding that issue for the claimant, properly rendered judgment against the estate for the amount still due the claimant. Though the judgment erroneously recites that the demand was assigned by the probate court to the fifth class, it does not purport to change the classification, and the error should be disregarded as a mere inadvertence. The judgment does not purport to order the administratrices to pay the demand, but sends it back to the probate court as an adjudicated claim entitled to participate in the distribution of the funds of the estate prop-

erly applicable to the payment of demands of its class. The question of whether or not this demand already has received its proportional share of such funds may properly arise in the probate court on the making of an order of distribution.

The judgment of the circuit court properly disposed of the case, and accordingly is affirmed. All concur.

MUSICK v. UNITED RYS. CO. OF ST. LOUIS.

(St. Louis Court of Appeals. Missouri. Jan. 24, 1911. Rehearing Denied Feb. 7, 1911.)

1. CARRIERS (§ 303*)—CARRIAGE OF PASSENGERS—DUTY IN SETTING DOWN PASSENGERS—SUDDEN START.

Where a street car on the signal of a passenger slows down at a customary stopping place, and the passenger prepares to alight, it is negligence for those in charge of the car to suddenly start it just before making the stop.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 1228-1229; Dec. Dig. § 303.*]

2. CARRIERS (§ 315*)—CARRIAGE OF PASSENGERS—PLEADING—VARIANCE.

Where a petition alleged that the plaintiff, a young girl, was a passenger on one of defendant's street cars, and, upon her signal to stop, the car was brought to a slow speed, and she went from her seat to the rear platform holding on to the rail, and that, while standing in apparent safety expecting to alight, those in charge negligently started the car with a violent jerk, throwing her to the ground, proof that the start was made in a sudden and violent manner did not prove a different cause of action from the premature starting alleged, but merely showed the manner of the breach of duty.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 1281, 1282; Dec. Dig. § 315.*]

3. EVIDENCE (§ 471*)—OPINION EVIDENCE—CONCLUSIONS.

Where one testified that the sudden start of a car "jerked me from the car into the gutter," it was not a conclusion, but a statement of a motion and its effect.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 2149-2151; Dec. Dig. § 471.*]

4. APPEAL AND ERROR (§ 1047*)—REVIEW—HARMLESS ERROR—ADMISSION OF EVIDENCE.

In an action for personal injuries, where the plaintiff testified that one claiming to be the defendant's physician had said it was a bad sprain, and the court refused to strike out the statement as hearsay and an unauthorized admission, the ruling was harmless, where other undisputed evidence clearly showed that such injuries were suffered.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4149; Dec. Dig. § 1047.*]

Appeal from St. Louis Circuit Court; J. Hugo Grimm, Judge.

Action by Helva Musick, an infant, by George Musick, next friend, against the United Railways Company of St. Louis. From a judgment for plaintiff, defendant appeals. Affirmed.

Boyle & Priest and Glendy B. Arnold, for appellant. S. C. Rogers and Rogers & Sacks, for respondent.

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

CAULFIELD, J. Suit for damages for personal injuries alleged to have resulted from the negligence of defendant. Plaintiff is an infant and appears by next friend duly appointed. The evidence tended to show that on September 16, 1907, plaintiff was a passenger for hire on defendant's south-bound Jefferson Avenue car, and was injured at her destination, the south side of Park avenue, which was a regular stopping place, by the car slowing down almost to a stop, and then, just as she was standing on the platform ready to alight, starting with a violent jerk and throwing her to the ground. There was verdict and judgment for the plaintiff for \$450, from which, after unsuccessfully moving for a new trial and in arrest of judgment, the defendant has duly appealed to this court. The facts alleged and proved will more clearly appear in the discussion of the points made by defendant.

1. Defendant assigns as error the action of the trial court in refusing to direct a verdict for defendant. Its counsel contends, in effect: That, the only negligence charged in the petition being the mere starting of the car, the proof must have shown that plaintiff was in such a position of danger that starting the car at all, even gently and with great care, must have caused her injury. That the proof shows that she was not in a position of danger, and that her injury was due, not to the mere starting of the car, but to the manner of its starting, its starting with a jerk, which, he says, was another and distinct cause of action.

We cannot agree with defendant's conclusions. The petition in effect alleged, and the proof showed: That the relation of carrier and passenger existed between the parties. That upon plaintiff's signal the defendant's employes in charge of the car brought it to a slow speed, as if about to stop at plaintiff's destination, which the car was approaching and which was a regular stopping place. That, induced by their slowing up and apparent intention to stop in order to let her off, the plaintiff arose from her seat and went to the rear platform and stood near the edge of the steps, facing west, holding to an upright hand bar with her right hand. There is no pretense that plaintiff was negligent in so doing. While she was in this position, the car got to the regular stopping place, her destination. It had almost stopped. A lady and child, standing there ready to get on, stepped aside to allow plaintiff to get off, and she was just about to alight. It was then the duty of defendant to allow plaintiff reasonable time and opportunity to alight in safety. But the petition alleges, and the proof shows, that at this moment of apparent safety, when plaintiff had every reason to expect the car to quietly subside into a quiet stop so that she could safely complete the

descent which she had already prepared to make, "the agents and servants of defendant in charge of said car carelessly, negligently, and in disregard of their duties caused said car to be started forward with a sudden, unusual, and violent jerk as plaintiff was standing on the back platform of said car as aforesaid, and plaintiff was by the force of the sudden and violent jerking and starting of said car violently and with great force thrown to the ground and into the gutter from the back platform of said car."

We have no hesitation in holding that defendant's act in starting the car at all, when it did, under the existing circumstances, was a breach of its duty to allow plaintiff reasonable time and opportunity to alight. And, as it proximately produced plaintiff's injuries, such breach of duty was negligence in law. Proof that the start was made in a sudden, unusual, and violent manner did not, as defendant asserts, prove a cause of action different than the premature starting pleaded. It but showed the method and manner by which the breach of duty occurred and tended to show it to be the proximate cause of plaintiff's injuries. This assignment of error is ruled against the defendant.

2. The plaintiff testified that the car "jerked me from the car into the gutter," and, again, that "it was such a violent jerk that it threw me from the platform into the gutter"; and it is claimed that the court erred in refusing to exclude such statements as conclusions. In effect the witness did nothing more than describe a motion and state what effect it had on her. The statements were not conclusions. They were descriptions of facts—facts which from the infirmity of human language could not be more properly described. The refusal of the court to exclude them was not error.

3. The principal injury plaintiff suffered was a sprained ankle, and she testified that a man who claimed to be the defendant's physician had, while examining and dressing her injuries, "said it was a very bad sprain." It is claimed that the court erred in refusing to strike out the statement made by the doctor as hearsay and an unauthorized admission. Whatever error there was in this action of the court was harmless. The testimony of plaintiff, her mother, and attending physician furnished sufficient competent evidence that the ankle was very badly sprained, and the contrary was not attempted to be shown. We cannot discover that, had the alleged statement been excluded, the result would have been different. Under these circumstances, the failure to exclude the statement attributed to the doctor will not furnish ground for reversal.

The judgment is affirmed.

REYNOLDS, P. J., and NORTON, J., concur.

WOLFE v. WOLFE.

(Kansas City Court of Appeals. Missouri.
Jan., 1911.)

1. WORDS AND PHRASES—"LEGAL REPRESENTATIVES."

The phrase "legal representatives" ordinarily means executors or administrators where not qualified by context, but it may be shown to mean next of kin.

[Ed. Note.—For other definitions, see Words and Phrases, vol. 5, pp. 4070-4079; vol. 8, p. 7704.]

2. PENSIONS (§ 2*)—RAILWAY MAIL CLERK KILLED ON DUTY—CONSTRUCTION OF STATUTE—"LEGAL REPRESENTATIVES."

An act of Congress (Act April 28, 1904, c. 1759, 33 Stat. 436) provided a pension of \$1,000 which should be exempt from payment of debts of decedent, to be paid to the legal representatives of any railway clerk killed while on duty. *Held*, that the words, "legal representatives," were used in their ordinary sense; the intent being that the money should be paid to the administrator to be distributed according to the laws of the state of decedent's domicile, saving the payment of debts.

[Ed. Note.—For other cases, see Pensions, Cent. Dig. § 213; Dec. Dig. § 2.*]

3. EXECUTORS AND ADMINISTRATORS (§ 181*)—RIGHTS OF SURVIVING WIFE.

Decedent's widow should not be deprived of her statutory exemption pension provided by act of Congress to be paid where a railway clerk is killed on duty, because technically a widow has no exemptions except in the personal estate owned by decedent existing at his death, and should be allowed out of such fund \$400, given her under Rev. St. 1899, § 107 (Ann. St. 1906, p. 373), providing that a widow may choose from the deceased husband's personalty, not to exceed the value of \$400, in addition to the allowance of \$500, under section 105 (page 372), permitting a widow to select \$500 worth of articles from decedent's personalty, and should be recompensed from such fund for the reasonable funeral expenses incurred, not to exceed the sum actually paid by her; such expenses not being debts of decedent.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. §§ 681-685; Dec. Dig. § 181.*]

Appeal from Circuit Court, Jackson County; Jas. E. Goodrich, Judge.

Action by Nellie E. Wolfe, administratrix of Cornelius Wolfe, against Mary Wolfe. From the judgment, plaintiff appeals. Reversed and remanded, with directions.

Boyle, Guthrie, Howell & Smith, for appellant. Reinhardt & Schlbsby, for respondent.

BROADDUS, C. J. This was a proceeding instituted in the probate court. An appeal was taken from the decision of that court to the circuit court, where it was tried anew, and from the judgment rendered Nellie Wolfe, administratrix, appealed.

The facts are that the appellant, Nellie Wolfe, was the widow of Cornelius Wolfe, a postal clerk, who was killed while on duty on May 24, 1905. He died childless, and left his mother, Mary Wolfe, and Thomas

Wolfe, an only brother. In October, 1905, the United States government paid to Nellie as administratrix the sum of \$1,000 out of a certain fund appropriated by Congress in 1904 to enable the Postmaster General to pay \$1,000, to be exempt from the payment of the debts of the deceased, to the legal representatives of any railway postal clerk who shall be killed while on duty. Thomas Wolfe on his own behalf and for his mother filed a motion in the probate court to require Nellie Wolfe, the administratrix, to inventory this sum of \$1,000 as a part of the estate of the deceased in her hands as such administratrix, which motion was sustained by the court. The administratrix filed her additional inventory, showing the receipt by her of said sum of \$1,000. On the same day she filed her first annual settlement accompanied by her petition for an allowance to herself as the widow of the deceased. Thomas and his mother filed objections to the settlement, which the court disallowed. The court also held that the credits asked for by the administratrix in her settlement were proper credits, but that the only fund in her hands, the said \$1,000, was not subject to the payment of debts, and the court further ordered that the administratrix pay to herself as the widow of deceased the sum of \$500 out of said fund, and that she pay the remaining \$500 in her hands to Mary Wolfe. Before the finding Thomas Wolfe assigned his interest in the fund to his mother. The finding and judgment of the circuit court were the same in every respect as that of the probate court.

The appellant contends that as the widow of the deceased she is not only entitled to the sum of \$500 allowed by the judgment of the court, but that, in addition thereto, she is entitled to the sum of \$400, as provided by sections 106, 107, Rev. St. 1899 (Ann. St. 1906, p. 373), and for money paid out for funeral expenses. Respondent contends, on the contrary, that she is not entitled to any of the fund. The act of Congress making the provision in question for a pension to be paid to the personal representatives of postal clerks killed while on duty as such reads as follows: "For acting clerks, in place of clerks injured while on duty, and to enable the Postmaster General to pay the sum of \$1,000.00, which shall be exempt from the payment of debts of the deceased, to the legal representatives of any railway clerk, who shall be killed while on duty, or who being injured while on duty, shall die within one year thereafter as the result of such injury, \$110,000.00." Act April 28, 1904, c. 1759, 33 Stat. 436. The case depends upon the proper construction to be placed upon the term "legal representatives." Respondent contends that it was used in the act of Congress as meaning heirs at law, while the

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

appellant insists that it means administrators or executors. It is admitted to be a well-settled rule of construction that the words, "legal representatives," ordinarily mean executors or administrators, where not in any way qualified by the context, but they may be shown to mean next of kin. The quotation is from *Pittel v. Insurance Co.*, 86 Fed. 255, 30 C. C. A. 21. In other instances "heirs at law" are used instead of the words "next of kin."

It is argued that as administrators represent only two classes of persons, viz., creditors and distributees, and inasmuch as Congress declared that creditors should have no share in the fund, it is not likely that it intended that the administrator should receive this pension for the purpose of performing the perfunctory duty of handing it over to the distributees, and that Congress intended it to go to the heirs. It is asserted by respondent, and admitted by appellant, that the fund in controversy is to be treated as a pension or gratuity, and not founded on contract, but merely as payment in consideration of some past service to the country. Or as said in *Manning v. Spry*, 121 Iowa, 191-194, 96 N. W. 873, 874: "A mere bounty or gratuity given by the government in consideration or recognition of meritorious past services rendered by the pensioner, or by some kinsman or ancestor." Many cases are cited in the brief and argument of respondent giving instances where it is held that the words "personal representatives" are used in the sense of next of kin or heirs at law, but, as each case is predicated upon a construction of the peculiar language of the context, they serve no useful purpose as a guide in the construction of some other given case, and they are only to be considered as exemplifying the rule that a different meaning is sometimes given to the term other than that which ordinarily follows its use. It is reasoned that, because of the provision in the act that the pension is to be exempt from the payment of the debts of the deceased, it shows that the heirs at law were meant, because, if it was not to go to the payment of such debts, Congress could not have intended that it should go to the administrator or executor for the mere purpose of handing it over to the heirs. If this contention be true, the respondent would have no case, because, if the appellant was not in the legal custody of the fund, therefore the probate court had no jurisdiction of the matter, and the proceedings were coram non iudice. But we do not believe that the act is subject to such construction. It might with just as much reason be said that the exemption was inserted for the express purpose of preventing the administrator from paying debts, as he is charged with that duty under all ordinary administration proceedings. However, we are of the opinion that the said provision is in no way explanatory of the intention of Congress, and that it does

not in the least tend to elucidate the question, for it is settled law that a pension fund is not subject to the payment of the debts of the deceased. It was so decided by the Supreme Court of the United States as early as 1839 in *Emerson v. Hall*, 13 Pet. 409, 10 L. Ed. 223.

In our opinion there is nothing in the context of the act to indicate that the words "personal representatives" were used in any other sense than that which they ordinarily import. But, if we concede that the pension was to be paid to the decedent's administrator, the more difficult question arises as to who were the beneficiaries. Appellant contends that it was intended for the benefit of his immediate family, his wife and children. But this cannot be true, because the act provided for pension in all cases where the postal clerk was killed while in the performance of his duty, without reference to whether he had a wife or children. We may assume that in many instances such was the case. It neither went to the administrator as assets nor descended to the heirs at law. In *Emerson v. Hall*, supra, the court, in speaking of pension in general terms, used the following language: "A claim having no foundation in law, but depending entirely on the generosity of the government, constitutes no basis for the action of any legal principle. It cannot be assigned. It does not go to the administrator as assets. It does not descend to the heir. And if the government, from motives of public policy, or any other consideration, shall think proper under such circumstances, to make a grant of money to the heirs of the claimant, they receive it as a gift or pure donation. A donation it is true, in reference to some meritorious act of their ancestor, but which did not constitute a matter of right against the government." The pension considered was provided for the especial benefit of certain persons mentioned in the act.

A cursory history of the laws granting pensions shows that they have been of two kinds, viz., such as have been granted to individuals, and to individuals of a certain class. Necessarily such must be the fact. For instance, Congress provided for pensions to be paid to soldiers of the war with Mexico and their widows. Pensions were granted to the Union soldiers who served in the war between the states. Some belong to one class and some to other and different classes, and, in case of death, to the widow and children, and in some instances to an individual soldier who did not belong to any particular class. In all instances the law provided that the pension should be paid to the individual if an adult, or, if an infant, to his guardian. Nothing so far as to whom payment should be made was left to construction. The law was definite. There were no such specifications in the act in question. If Congress had in view the immediate family of the deceased, it would only have provided for a pen-

sion where there would be a wife and children or one or the other. If it was intended solely for the heirs at law, it would operate in this state in eliminating the widow if she had borne no children by the marriage. We do not for a moment entertain such a construction. We do not believe Congress intended such an injustice, or that the act should be so construed. Congress has been, as we have shown, most considerate of the widows and children of persons who have fallen while in the discharge of duty to the country in the way of granting pensions for their benefit. Congress having made the appropriation for a pension in all cases where the postal clerk should be killed while in the performance of his duty could not anticipate whether he had a living wife or children or either of them, or in failure of both, a mother, father, brothers, or sisters, or what other near relatives, but did anticipate that there would be childless widows, and left the disposition of that question to the law of the domicile of the deceased by placing it in the hands of his administrator. It is to be presumed that Congress acted intelligently and with the intention that the money would be utilized for the benefit of those most nearly connected by the ties of affinity and consanguinity to the deceased. And it is to be presumed that that body had notice of the administration law of the different states of the Union. But, conceding that this conclusion be true, it is still insisted that under the administration law of this state, the domicile of the deceased, the widow would be entitled to no part of the pension. Under sections 105, 106, 107, Rev. St. 1899, the widow is entitled to certain allowances out of the personal estate of her deceased husband. It is urged that the allowance cannot be made to appellant, as it was not the property of the deceased at his death, and therefore is not a part of his estate. As the judgments of the probate and circuit courts both made appellant an allowance of \$500 which is not appealed from, we will confine our attention to appellant's contention that the court erred in not making her an allowance of \$400 under section 107, and not allowing the claim for funeral expenses paid out by her.

As a matter of fact, ordinarily the widow has no exemptions except in the personal estate owned by her deceased husband existing at the time of his death. It could not be otherwise. The deceased had no interest in the fund appropriated by Congress. This must be conceded, but it does not necessarily follow that the widow's rights did not attach when it was paid into her hands as a part of his estate. If we are right in what has been said, that it is the intention of the act to put the money into the hands of the administrator to be distributed according to the laws of the state, saving the payment

of debts, it should be treated as such, notwithstanding, technically speaking, it did not belong to the estate at the time of the death of deceased. As has been said, it was intended first for the benefit of the wife and children, and that intention should not be defeated by the technical objection stated. And further we hold funeral expenses are not debts of the deceased. They are not incurred or contracted during his life, but arise out of necessity and are made the first charge upon the decedent's estate. The distinction is quite clear, and has been so held in a case where by the terms of a life policy the proceeds were exempt from decedent's death. The court in the opinion says: "The consideration which supports this view and demonstrates the correctness of the chancellor's decree in allowing the administrator to pay the funeral expenses out of the \$500 insurance money is obvious." *Dobbs v. Chandler*, 84 Miss. 372, 36 South. 388. The court did not conceive it to be a debatable question. From what has been said, it follows that the judgment and the finding of the circuit court is reversed and remanded, with directions to certify to the probate court to allow appellant in addition to the \$500 already allowed the sum of \$400, and also to allow her the further sum of or a reasonable sum for funeral expenses not to exceed the sum of \$314, the actual amount she paid.

As there will be nothing left of the fund after satisfying these claims, it is not necessary to pass upon the other items in the appellant's claim. All concur.

WEEKS-BETTS HARDWARE CO. v. ROOSEVELT LEAD & ZINC CO.

(Springfield Court of Appeals. Missouri. Feb. 6, 1911.)

1. FIXTURES (§ 7*)—ANNEXATION TO REALTY —"TRADE FIXTURES."

A dummy elevator and sludge table which could be removed from a mining plant without injury to the real estate were trade fixtures.

[Ed. Note.—For other cases, see *Fixtures*, Cent. Dig. §§ 7-13; Dec. Dig. § 7.*

For other definitions, see *Words and Phrases*, vol. 8, p. 7042.]

2. FIXTURES (§ 15*)—LANDLORD AND TENANT —MINING PLANT.

A holder of a mining lease at the expiration of his term has the right to remove a mining plant and machinery erected by him to mine, clean, and prepare ore for market, and the plant and machinery are personal property.

[Ed. Note.—For other cases, see *Fixtures*, Cent. Dig. §§ 23-29; Dec. Dig. § 15.*]

3. CONTRACTS (§ 169*)—CONSTRUCTION—GENERAL RULES.

Contracts must be construed with reference to the surrounding circumstances and the condition of the parties.

[Ed. Note.—For other cases, see *Contracts*, Cent. Dig. § 752; Dec. Dig. § 169.*]

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

4. FIXTURES (§ 27*)—LANDLORD AND TENANT—COVENANT IN LEASE.

Covenants restricting a tenant's ordinary right to remove trade fixtures are always strictly construed.

[Ed. Note.—For other cases, see Fixtures, Cent. Dig. §§ 5, 22, 25, 44, 45; Dec. Dig. § 27.*]

5. FIXTURES (§ 27*)—LANDLORD AND TENANT—MINING MACHINERY.

A provision in a lease of a mining plant and machinery that the lessee agrees to keep the plant in good repair, and to make all improvements, repairs, and replacements necessary to keep it in good running order and repair, and that such improvements, repairs, and replacements shall become property of the lessor, does not apply to a dummy elevator and sludge table added to the plant by the lessee, which were not necessary to keep the plant in good repair, and which could be removed without injury to the realty.

[Ed. Note.—For other cases, see Fixtures, Cent. Dig. §§ 5, 22, 25, 44, 45; Dec. Dig. § 27.*]

6. FIXTURES (§ 33*)—LANDLORD AND TENANT—MINING PLANT—REMOVAL AT EXPIRATION OF TERM.

Where the chattel mortgagee of a dummy elevator and sludge table in a mining plant which had been installed by the lessee made demand therefor on the lessor at the expiration of the lease, and the lessor refused, claiming to be the owner thereof under a contract with the lessee, the lessor could not urge that the mortgagee forfeited its right to the property by not removing it within a reasonable time.

[Ed. Note.—For other cases, see Fixtures, Cent. Dig. §§ 64, 65; Dec. Dig. § 33.*]

Appeal from Circuit Court, Jasper County; Henry L. Bright, Judge.

Action by the Weeks-Betts Hardware Company against the Roosevelt Lead & Zinc Company. From a judgment for plaintiff, defendant Roosevelt Lead & Zinc Company appeals. Affirmed.

W. R. Robertson, for appellant. Horace Merritt, for respondent.

GRAY, J. This action was instituted in the circuit court of Jasper county October 30, 1909, by the plaintiff to recover the value of certain mining machinery. At the time the suit was instituted, the appellant herein, the Roosevelt Lead & Zinc Company, a corporation, was not made a party defendant. An amended petition was filed in which the following allegation relating to the appellant is found: "Plaintiff states that the Roosevelt Lead & Zinc Company is now in possession of said property, and holding same, and is claiming to hold some interest in said property and objecting to the plaintiff taking possession of same, and this amended petition is filed for the purpose of bringing said Roosevelt Lead & Zinc Company into court as a defendant that it may set up its claim if any it has." The appellant appeared in obedience to summons, and filed its answer consisting of a general denial. The cause was tried without a jury, resulting in a judgment in favor of plaintiff, and the appellant appealed.

The plaintiff's petition alleged that it was the owner and entitled to the possession of one sludge table, about 3,600 feet of 2-inch gas pipe, one dummy tailing elevator, including belts, cups, and appliances, located on the McKinley lease on the Connor land near Prosperity, Mo.; that the plaintiff was entitled to the possession of said property by virtue of a chattel mortgage executed to it by the defendant John W. McClellan & Co., on the 20th day of November, 1908, and duly recorded in the office of the recorder of deeds of Jasper county, Mo., and which mortgage was executed for the purpose of securing the payment to plaintiff of two promissory notes amounting to \$509.19, that the notes were past due and unpaid, and plaintiff had demanded possession of the property from the defendants, and possession had been refused, and further praying for damages for the unlawful detention and conversion of the property.

The testimony tended to prove that the appellant was the owner of a mining plant and mining lease on a tract of land in Jasper county, known as the Connor land; that the defendant McClellan & Co. had a contract or lease with the appellant for one year, with an option to purchase the mill or lease within the one year; that previous to the time of the execution of that contract other parties had been in possession of the mill, and operating it under similar contracts. There was no sludge table or dummy elevator at the plant when the contract between the appellant and McClellan was entered into. At one time a sludge table had been used in connection with the plant, but the same had been moved away, and nothing but the foundation remained. The relation that the sludge table bore to the mining plant was shown by the testimony of the plaintiff's witness, Mr. Weeks, as follows: "Q. Mr. Weeks, tell the court whether or not the removal and taking away of a sludge table from the mill when it was there in a position this was in would interfere with the operation of the main mill? A. No, sir; it is not a part. Those additions are of very recent date. The mill run for many years without any sludge apparatus. Q. Now, in taking it away, would there still be a complete concentrating plant? A. Certainly. Q. The attachment to the mill was merely the connecting of the power to run such table? A. Yes. Q. That is all the attachment there was to the mill? A. Yes. Throw the belt off and cut out that part. Q. And the cable to this dummy elevator was merely a different way of communicating power, one by belt and one by cable? A. Connected by a cable to a different place. Q. It was not tied to the cable or a cable belt? A. Yes; a transmission cable. Q. The dummy elevator might be taken away without interfering with the operation of the mill? A. It run many years

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

without one. Q. How is this sludge table fastened so far as to ground or foundation? A. It has a separate foundation of its own. Q. These sludge tables, just tell the court what is necessary in the moving—taking them up and moving? A. Very easy to move. Of course, they are not a very large concern, put them on the wagons, just simply a table, about the same pattern. While they are a great many different makes, they are practically the same." And on cross-examination: "Q. Mr. Weeks, the sludge table is set on a cement foundation, is it not? A. I think it is in that case. Q. The cement foundation is set in the ground? A. Yes, sir. Q. And the sludge table is the table that is used to further clean the ore that is milled in the concentrating plant? A. No; not further clean the ore of this mill. It is to extract the sludge. Q. Let me get at it this way. As a result of operating on the mill proper, as originally constructed, there is simply the jig tanks, crushers, and so on, and leaves what is called sludge? A. Yes. Q. And in that sludge there is more or less ore? A. Yes. Q. This sludge table is used to extract that? A. Yes, sir." Thus it will be seen that the sludge table and dummy elevator were simply additions to the mill, and added to it by McClellan & Co. after that company had contracted with the appellant. It is further shown that in taking away the dummy elevator and sludge table no injury would be done to the real estate and they were simply "trade fixtures." *Powell v. Plank*, 141 Mo. App. 406, 125 S. W. 836.

There is no dispute about the facts, and the rights of the parties must be determined by the construction of the paragraph in the contract between McClellan & Co. and the appellant, and reading as follows: "The second party further agrees to keep the mining plant hereby leased in good repair and to make all improvements, repairs, and replacements necessary to keep the same in good running order and repair, and to pay for such at their own expense, but such improvements, repairs, and replacements, when made, shall become a part of the mill and the property of the first party, and shall be delivered to the first party at the expiration of this lease whether by lapse of time or forfeiture." It is the contention of the appellant that, under this clause of the contract, it became the owner of all improvements and additions made upon the mill and property by McClellan & Co. while in possession of the property under the contract. It is the contention of the respondent that the clause of the contract does not include the machinery in controversy. This contract must be construed with reference to the fact that plaintiff's evidence tends to prove that the appellant was not the owner of the land, but only had a mining lease thereon, and, if its mining plant and ma-

chinery were erected for the purpose of mining, cleaning, and preparing ore for market, then it had the right to remove the same at the end of its term, and the same were personal property. *Investment Co. v. Cunningham*, 113 Mo. App. 519, 87 S. W. 605.

We are then confronted with the proposition that the property in question was personal property, and the parties were dealing with it as such. The common-law rule relating to fixtures and improvements put upon property by a tenant has been relaxed, and what would be a fixture as between vendor and vendee or mortgagor and mortgagee would not be between landlord and tenant. The property in controversy when it was purchased was undoubtedly the property of McClellan & Co., and, if it ever became the property of the appellant, it was because it was transferred to the appellant by McClellan & Co. by the terms of the contract just quoted. Contracts must be construed with reference to the surrounding circumstances and the conditions of the parties. The law is liberal towards tenants who make improvements for their own particular and temporary use, which can be removed without working substantial injury to the rented premises. *Bircher v. Parker*, 40 Mo. 118; *State v. Newkirk*, 49 Mo. 84. It will be noticed the contract placed upon McClellan & Co. the obligation to keep the mining plant in good repair and to make all improvements, repairs, and replacements necessary to keep the same in good running order and repair. And such improvements, when made, become a part of the mill and the property of the first party. The contract does not provide that all improvements placed upon the property shall become the property of the appellant, but only such improvements and repairs as were necessary to keep the plant in good repair. It seems to us that the primary purpose of this clause was to require McClellan & Co. to keep the property in repair, and to make improvements necessary therefor. And it does not provide that all improvements placed upon the plant shall become the property of the appellant, but only such improvements as become necessary to keep the property in running order and repair. If it was the intention that the appellant should have all the improvements placed upon the property, why did not the contract so state, instead of limiting the right of appellant to such improvements as were necessary to keep the mill in repair. The testimony shows that the sludge table and dummy elevator were no part of the mill when the contract was entered into. The mill was complete and in running order without them, and McClellan was not required to purchase them and install them in order to comply with his contract.

Covenants restricting the tenant's ordinary

right to remove trade fixtures are always strictly construed. *Fox v. Lynch*, 71 N. J. Eq. 537, 64 Atl. 439; *Montello Brick Co. v. Trexler*, 167 Fed. 482, 93 C. C. A. 118; *Wright v. La May*, 155 Mich. 119, 118 N. W. 964; *Hay v. Bruner*, 61 Pa. 87; *Bernheimer v. Adams*, 175 N. Y. 472, 67 N. E. 1080. In *Montello Brick Co. v. Trexler*, supra, the landlord had leased premises upon which were three complete brick plants at the time the lease was entered into. The lease contained the following clause: "At the expiration of the term hereby created, the lessee shall return and surrender to the lessor the demised premises in good order and condition, and with all improvements, additions, and extensions without any compensation to be paid for said improvements, additions, and extensions." The lessee erected upon the leased premises an additional plant, and afterwards was adjudged a bankrupt. The lessor claimed the new plant under the terms of the lease, but the court held that the clause in the lease restricting the right of the tenant to remove his "trade fixtures" must be strictly construed, and it did not apply to the new plant erected by the lessee upon the premises. In *Hay v. Bruner*, supra, the lessees covenanted: "And at the expiration of the said term shall and will quietly and peaceably yield up and surrender the possession of the said premises demised, together with all and every the improvements and additions which they, the said lessees, shall construct and make thereon unto the lessor, in good order and condition, reasonable wear and tear excepted. Lessees shall forthwith take possession, and shall with all convenient dispatch make alterations, additions, and improvements of a permanent character to consist of items agreeably to a specification and plan to be approved by the lessor, and to introduce machinery necessary to the purpose of their business, hosiery manufacturing, permanent additions and improvements to remain on the property at the expiration of this lease and to belong to the owners of the fee to said premises." It was held that, although the lessor by this lease intended that the machinery installed should belong to him at the expiration of this lease, yet he did not expressly provide, and therefore there was no doubt under the lease that lessee had a right to remove the fixtures, consisting of engine, boiler, shafting, hosiery machinery, etc., as trade fixtures.

In *Fox v. Lynch*, supra, the defendant leased the premises for saloon purposes, and agreed with the lessor to keep the same in repair, and at the end of the term to surrender the premises in as good condition as the same were when received, ordinary wear and tear excepted. During the term of the lease, the lessee removed all the old fixtures and installed others in their stead. In

a contest between him and the landlord the court held that he had a right to remove all the new fixtures substituted for the old ones on the premises at the time he entered into his lease.

When we construe this contract as the law says we shall, strictly in favor of the rights of the tenant, then we must hold that the sludge table and dummy elevator were not improvements and repairs placed on the property by the tenant in order to keep the same in proper repair and running order, and that only such improvements and repairs became the property of the appellant as were necessary for that purpose.

The appellant also claims that the property was not removed from the premises at the expiration of the rights of McClellan & Co., and therefore the right to take the same was forfeited. The appellant claimed to be the owner of the fixtures under the contract, and based its right, when respondent asked for the property, upon such grounds. By so doing, it is in no position to now urge that respondent forfeited its right to the property by not removing the same within a reasonable time. *Bernheimer v. Adams*, 175 N. Y. 472, 67 N. E. 1080.

It necessarily follows that the judgment is for the right party, and should be affirmed. All concur.

STATE v. JOHNSTON.

(Kansas City Court of Appeals. Missouri. Jan. 30, 1911.)

1. CRIMINAL LAW (§ 1020*)—APPEAL—APPELLATE DIVISION.

The punishment under Rev. St. 1899, § 1927 (Ann. St. 1906, p. 1312), for obtaining by false pretenses the sum for so obtaining which defendant was prosecuted and convicted, being that for petit larceny, appeal is properly taken to the Court of Appeals.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2578-2580; Dec. Dig. § 1020.*]

2. FALSE PRETENSES (§ 31*)—INFORMATION—"INDUCED."

The information for obtaining money by false pretenses, alleging merely that the prosecuting witness "was induced" to pay defendant a certain sum, and not that defendant was actually paid said sum, is insufficient.

[Ed. Note.—For other cases, see False Pretenses, Cent. Dig. §§ 33-41; Dec. Dig. § 31.*]

For other definitions, see Words and Phrases, vol. 4, p. 3568.]

Appeal from Criminal Court, Jackson County; Ralph S. Latshaw, Judge.

A. W. Johnston was convicted of obtaining money by false pretenses, and appeals. Reversed.

John C. Stearns for appellant. Virgil Conkling and W. S. Gabriel, for the State.

JOHNSON, J. On information of the prosecuting attorney of Jackson county, defend-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

ant was tried and convicted in a justice court on the charge of obtaining \$5 from the prosecuting witness by means of false and fraudulent statements and pretenses. A trial in the criminal court, where the cause was taken by appeal, resulted in the conviction of defendant, and he appealed to this court.

Defendant, a book agent, sold the prosecuting witness some books at the price of \$120, collected \$5 from her, and secured her written obligation for the payment of the remainder of the purchase price. Following the allegations relating to the false and fraudulent representations and pretenses constituting the offense, the information charges that the prosecuting witness, "believing the said statements to be true, and relying thereon, and being deceived thereby, was induced to pay to the said A. W. Johnston the sum of \$5 and to sign an order for said books and agree to pay the further sum of \$115," etc. The specific offense alleged is "that the said A. W. Johnston well knew the said false and fraudulent statements and pretenses so made as aforesaid by him were false and fraudulent and untrue and were made by him at the time with the intent and for the purpose of defrauding the said Anna S. Welch of the said sum of \$5 against the peace and dignity of the state." The date of the offense was May 26, 1909, and the statute relating to obtaining money, goods, etc., by false pretenses then in force was section 1927, Rev. St. 1899 (Ann. St. 1906, p. 1312), which provided that a person convicted of a violation of its provisions "shall be punished in the same manner and to the same extent as for feloniously stealing the money, property or thing so obtained." Speaking of this section, the Supreme Court say in *State v. Pickett*, 174 Mo., loc. cit. 667, 74 S. W. 845: "Obviously under this section the guilty party was liable to be punished by imprisonment in the penitentiary if the amount of money or property obtained by the false pretense was such as would have sustained a conviction for grand larceny had he stolen it, and, if less, then he is punishable as for petit larceny."

The specific charge on which defendant was prosecuted and convicted is the same, so far as the punishment is concerned, as a charge of stealing \$5—petit larceny—and the appeal was properly taken to this court.

Defendant challenges the information on the ground that it fails to allege specifically one of the essential ingredients of the offense of obtaining money by false pretenses, i. e., that defendant actually was paid \$5 by the prosecuting witness. The information alleges the prosecuting witness "was induced" to pay that sum to defendant. The rule is fundamental that an indictment or information, to be good, must allege all the essential elements of the offense charged, and that nothing may be left to intentment or inference. Speaking for myself, I would say, if this were a question of first impression in this state, the statement that a person

was induced to pay another a certain sum of money would be the legal equivalent of an assertion that he did pay the money. But the Supreme Court has decided to the contrary, and, following, as we must, the decisions of that tribunal, we must hold the indictment bad.

In *State v. Saunders*, 63 Mo., loc. cit. 484, speaking through Norton, J., the court say: "Waiving the point raised as to whether the written account against Marshall for \$300, which was assigned by defendant to Sullivan, was or was not such a false token and writing as is or was contemplated by Wag. St. 47, on which the proceeding was founded, we think the indictment is defective because it is nowhere averred in it that defendant either sold, assigned, or delivered the account to Sullivan, or that Sullivan bought it and parted with his money for it, relying on the false and fraudulent representations of defendant. The only averment on the subject is that defendant said 'he could and would assign it to Sullivan for \$200.' There is no averment that defendant did sell or assign it, or that Sullivan, relying on the representations made by defendant in reference thereto, purchased it and parted with his money for it."

In *State v. Phelan*, 159 Mo. 122, 60 S. W. 71, the indictment charged that the prosecuting witnesses "were induced to then and there sell and deliver to said defendant said pair of horses," etc. The court say: "The pleader does not go further and aver that he did in fact sell his said horses to defendant. Do the words 'induced to sell' amount to a positive, distinct averment that said Cains then and there did sell and deliver said horses to defendant?" The question was answered in the following language: "The rule in criminal pleading is that in an indictment nothing material shall be taken by intentment or implication. The phrase 'induced to sell' signifies that the defendant 'moved,' 'urged,' 'instigated' the Cains to sell to him; but it falls short of averring that they 'did sell' to him."

In *State v. Kelly*, 170 Mo. 151, 70 S. W. 477, the averment that the witness "was induced to sell and deliver" was held insufficient to charge a sale and delivery. And in *State v. Hubbard*, 170 Mo. 346, 70 S. W. 883, the averment, "was induced by the false pretenses to loan the said Walter Hubbard" a sum of money, was condemned on the ground that it contained no distinct allegation that in fact the money was loaned.

Of like import are other decisions we have examined. The case of *State v. Wilson*, 223 Mo. 156, 122 S. W. 701, relied on by the state, does not suggest a view of the law divergent from that expressed in the decisions quoted. The averment in that case was that the prosecuting witness "did then and there cash said draft and in pursuance thereof paid to the said D. E. Wilson the sum of

\$25," etc.—a sufficient charge under the prevailing rule.

It is suggested the rule is exceedingly technical. That may be true; but, as long as it is recognized by the highest court in the state as a rule of pleading, it is the duty of the courts to enforce it. Perhaps it was suggested in the first instance by the proverb: "There's many a slip twixt the cup and the lip." It is not difficult to suppose instances where one might be induced to do a thing and still not do it after all. In the present instance prosecutrix might have been induced to pay the book agent \$5 and then discovered that she did not have that much money, or her husband might have come home opportunely and stayed her hand as she was paying it, or the book agent might have repented at the last moment and refused the money. The last, however, would be a most violent presumption. Whatever reason might be assigned for the rule, we shall apply it, and, accordingly, hold the information bad.

The judgment is reversed. All concur.

ZIMMERMAN v. METROPOLITAN ST. RY. CO.

(Kansas City Court of Appeals. Missouri. Jan. 30, 1911.)

1. MUNICIPAL CORPORATIONS (§ 671*)—STREETS—ABUTTING OWNERS—RIGHT OF INGRESS AND EGRESS.

The owner of property abutting on a street is entitled to have his right of ingress and egress to and from his property over the street not materially obstructed.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 1447; Dec. Dig. § 671.*]

2. MUNICIPAL CORPORATIONS (§ 671*)—STREETS—OBSTRUCTION TO INGRESS AND EGRESS—INJUNCTION.

There being an obstruction of the street materially obstructing the right of ingress and egress of the owner of abutting property, thus constituting a private nuisance, he is entitled to injunctive relief.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 1448; Dec. Dig. § 671.*]

3. MUNICIPAL CORPORATIONS (§ 671*)—STREETS—INGRESS AND EGRESS OF ABUTTING OWNERS—PERMITTING OBSTRUCTION.

A city cannot authorize a street railroad to so use a street with its tracks and cars as to materially obstruct the right of ingress and egress of an abutting owner, thus constituting a private nuisance.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 1449; Dec. Dig. § 671.*]

Appeal from Circuit Court, Jackson County; H. L. McCune, Judge.

Action by A. D. Zimmerman against the Metropolitan Street Railway Company. Judgment for plaintiff. Defendant appeals. Affirmed.

See, also, 227 Mo. 346, 126 S. W. 1030.

John H. Lucas and Ben F. White, for appellant. James G. Smith, for respondent.

ELLISON, J. In the month of October, 1903, defendant was operating a street car line east and west on Fifteenth street in Kansas City at a point where that street intersects Kensington avenue. On the east side of Kensington avenue and south side of Fifteenth street was a car barn of defendant, used for the purpose storing cars, and for such other purposes as are incident to a switchyard of a street railway company. On the west side of Kensington avenue, and immediately south of Fifteenth street, plaintiff had the ownership and possession of a tract of land abutting upon Kensington avenue at said point 132 feet, and situate upon this abutting property are two two-story buildings, to which buildings ingress and egress is had by way of Kensington avenue.

The petition alleges that the defendant had no legal right whatever to construct any street car tracks or any other obstructions in Kensington avenue along and in front of the plaintiff's property; that in the month aforesaid the defendant began the construction of a switch track from the Fifteenth street tracks at a point slightly west of the west line of Kensington avenue, and built such track in a southeasterly direction across Kensington avenue at a point a little south of the south line of Fifteenth street, which track, as so constructed, entered into the barn of defendant. After the switch track had been laid down, defendant began the construction of a spur track in Kensington avenue, branching off in a southerly direction from the south side of the switch track, and then plaintiff filed his petition in the circuit court asking to enjoin defendant from further constructing "car tracks in said Kensington avenue, and from the obstruction and destruction of said Kensington avenue as a public highway; that defendant be ordered to remove all tracks and other obstructions placed in said Kensington avenue, and to restore said Kensington avenue to the condition in which it was previous to the acts herein complained of."

Plaintiff further alleged that: "Said tracks completely gridiron the entire surface of Kensington avenue in front of the plaintiff's property; that said tracks are designated for and will be used when completed for the purpose of shunting cars backward and forward and onto the premises of defendant east of Kensington avenue, and also for the purpose of standing cars or storing them, * * * whereby said defendant will wholly destroy said avenue as a public thoroughfare, and will confine the same to its own exclusive use, without lawful authority or any authority whatever, and wrongfully, to the great and irreparable damage of plain-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

tiff, which said obstruction so placed and maintained by said defendant in said avenue will constitute a public nuisance, and a private nuisance to this plaintiff. * * * Plaintiff says such injuries here complained of will be continuous, irreparable, and unascertainable, and cannot be compensated in damages; that in addition to the damages and injuries sustained by the entire public by reason of the nuisance aforesaid, this plaintiff will sustain local and specific damages and injuries to his said property, and in the use thereof, which said damages and injuries are local, peculiar, and specific to him, and separate and different from that of the public generally, or other persons who may suffer injuries thereby; that plaintiff is without adequate remedy at law or any remedy whatever for the injuries and wrongs aforesaid, except in equity, for the abatement of said nuisance and the restoration of said street to the use of the public, and especially for the free and open use of this plaintiff in connection with his said lot." After filing the petition defendant ceased to further dig in Kensington avenue or further construct tracks there until December 4, 1903, on which date there was approved by the mayor of Kansas City an ordinance styled "An ordinance granting permit to the Metropolitan Street Railway Company to lay and maintain a spur track on Kensington avenue south of Fifteenth street," which permit recites that the company owned 190 feet fronting on the east side, and that the track is permitted to be constructed along in front of said 190 feet on Kensington avenue, with turnouts to the car barn of said Metropolitan Street Railway Company.

Between the date of granting of said permit, and the trial of the cause, the spur tracks in Kensington avenue were actually constructed by defendant as plaintiff alleged in his petition would be done. Defendant was shown by the evidence to be using the street as a depot yard for the purpose of shunting cars, and cleaning them and storing them, as plaintiff in his petition alleged would be done. On the showing of these facts, the trial court issued an injunction in words as follows: "It is ordered, adjudged and decreed that defendant be permanently enjoined from storing or washing cars on any part of Kensington avenue, between Fifteenth and Sixteenth streets, in Kansas City, Missouri, and that they be permanently enjoined from standing cars on said parts of said Kensington avenue. Also, it is ordered, adjudged and decreed that the defendants be and they are ordered within twenty days from the date of this decree, to remove all tracks, cross-ties, and other like obstructions, which it has heretofore constructed in said Kensington avenue between said Fifteenth and Sixteenth streets, and to restore said street to its original state of repair. However, defendants may operate said loop track entering the northwest

corner of car barn at or near intersection of Kensington avenue and Fifteenth street, as now constructed; and may also maintain the single spur track as now constructed, running south from said intersection of said Fifteenth street and Kensington avenue, not to exceed one hundred and ninety feet (190); and may maintain in connection with said spur track not to exceed one switch track running from said spur track into said car barn at east side of Kensington avenue. It is further ordered, adjudged, and decreed by the court that plaintiff have and recover from defendant the costs of this cause and have therefor execution."

Plaintiff did not appeal, and is not therefore permitted to inquire into the right of defendant to use of the loop track, switching off from the south side of Fifteenth and entering defendant's car barn on the east side of Kensington avenue, nor to inquire into the right of defendant to maintain the spur track, dropping off from the south side of the switch track along the center of Kensington avenue for 190 feet south of Fifteenth street, nor to inquire into the right of defendant to construct and maintain in connection with the spur track one switch track running from the spur track into said car barn at the east side of Kensington avenue. These privileges the circuit court refused to take from the defendant, and plaintiff did not save any exceptions. Hence, we only are to inquire whether the circuit court erred in ordering defendant to cease the storing or washing of cars on Kensington avenue in front of plaintiff's property; and did the court err in permanently enjoining defendant from standing cars on said parts of Kensington avenue; and did said court err in ordering defendant, within 20 days from date of decree to remove all tracks, cross-ties, and other like obstructions in front of plaintiff's property save and except the loop track, the spur track, and the switch track from spur track to barn.

The evidence does not show that plaintiff acquiesced in these acts of defendant. The evidence showed that for all practical purposes the defendant took possession of that part of Kensington avenue whereon plaintiff's property abuts. By the construction of tracks leading from its main tracks on Fifteenth street, over Kensington avenue into its car barn, it well nigh destroyed the safe ingress and egress to plaintiff's property by himself or by those connected with him socially and in a business way. It is not meant to say that defendant so obstructed the way that plaintiff could not possibly get to and from his property, or that others could not do so. They could have gotten to the property by necessary effort, if defendant had inclosed it with a wall, or had surrounded it with a stream of water. But a property owner is entitled to a safer and more convenient use of an abutting street than that. He is entitled to have it not

materially obstructed. "An abutting property owner has the same right to use of the street that the public has; in addition thereto, he has rights which are special to himself, and the right of ingress and egress, and this right is a property right, which he may protect." *Schopp v. City of St. Louis*, 117 Mo. 131, 22 S. W. 898, 20 L. R. A. 783; *Lackland v. Railway*, 31 Mo. 180; *Lockwood v. Wabash Ry.*, 122 Mo. 83, 26 S. W. 698, 24 L. R. A. 516, 43 Am. St. Rep. 547; *De Geofroy v. Merchants' Bridge & Ter. Ry. Co.*, 179 Mo. 698, 79 S. W. 386, 64 L. R. A. 959, 101 Am. St. Rep. 524; *Realty Co. v. Deere & Co.*, 208 Mo. 66, 106 S. W. 498, 14 L. R. A. (N. S.) 822. "An obstruction in a street or highway may be both a public and a private nuisance, and, in such cases, the private citizen who is especially injured may have injunctive relief." *Schopp v. St. Louis*, supra; *Cummings v. St. Louis*, 90 Mo. 259, 2 S. W. 130.

We have considered the matter of the permit granted by the city to construct the tracks in controversy. A municipal permit to put structures in or on the streets, cannot be allowed to destroy the use of abutting property by its owner. A municipality cannot legally authorize the creation or maintenance of a nuisance. It cannot authorize the construction and operation of a railway which will necessarily destroy it as a public way and deprive abutting owners of access to their property; and the use may be restrained by injunction: *Lockwood v. Railway*, supra; *Dubach v. Railroad*, 89 Mo. 433, 1 S. W. 86; *Belcher v. Elevator Co.*, 82 Mo. 121; *Schopp v. St. Louis*, supra; *Sherlock v. K. C. Belt Ry. Co.*, 142 Mo. 172, 43 S. W. 629, 64 Am. St. Rep. 551.

A street railway company cannot be legally authorized to establish structures in the streets for the convenience of the road, which materially affect an abutting property owner's use of his property. If such company must have such structures, it must procure ground not owned by the public for the use of the inhabitants generally: *Lackland v. North Mo. Ry. Co.*, 31 Mo. 180, 186. We think no estoppel against plaintiff was shown.

The judgment was for the right party, and is affirmed. All concur.

FIRST NAT. BANK OF INDEPENDENCE v. SHEWALTER.

(Kansas City Court of Appeals. Missouri. Jan. 30, 1911. Rehearing Denied Feb. 13, 1911.)

1. MUNICIPAL CORPORATIONS (§ 567*)—SPECIAL TAX BILLS—ACTION—PETITION.

That the special tax bill issued by a city of the third class, on which action is brought and which is set out in the petition, does not recite performance of some preliminary steps in the proceeding, does not affect the sufficiency

of the petition; the fact of insufficient steps having been taken being matter of defense.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. §§ 1276-1281; Dec. Dig. § 567.*]

2. MUNICIPAL CORPORATIONS (§ 284*)—PUBLIC IMPROVEMENTS—DELEGATION OF POWERS—SPECIAL TAX BILLS—SIGNING.

The signing of special tax bills issued by a city is a purely ministerial duty, which need not be performed by the chief executive, but, in the absence of statutory command, the council may, by ordinance, designate who shall sign them, and so may delegate authority therefor to the city clerk.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. § 756; Dec. Dig. § 284.*]

3. BANKS AND BANKING (§ 280*)—NATIONAL BANKS—ACTION—PETITION.

The allegation of the petition, in an action by a national bank, on a special tax bill, that plaintiff purchased it for a valuable consideration, does not necessarily mean that the purchase was for investment or speculation, which such a bank is not authorized to make, but is comprehensive enough to include the acquisition of title through the taking of additional security for an existing debt created in the lawful course of business, which is permissible; and, in the absence of anything to the contrary, properly implies that the purchase was one it had authority to make.

[Ed. Note.—For other cases, see *Banks and Banking*, Cent. Dig. §§ 1072-1074; Dec. Dig. § 280.*]

4. BANKS AND BANKING (§ 261*)—NATIONAL BANKS—ULTRA VIRES ACTS—ATTACK.

Even if it appeared that the act of plaintiff national bank in acquiring title to the special tax bill sued on was ultra vires, such fact would be no defense, the purchase being only voidable, and its validity being assailable only in a direct proceeding by the government.

[Ed. Note.—For other cases, see *Banks and Banking*, Cent. Dig. §§ 991-1000; Dec. Dig. § 261.*]

Appeal from Circuit Court, Jackson County; Walter A. Powell, Judge.

Action by the First National Bank of Independence against Georgia S. Shewalter. Judgment for plaintiff. Defendant appeals. Affirmed.

J. D. Shewalter, for appellant. Paxton & Rose, for respondent.

JOHNSON, J. This is a suit to enforce the lien of a special tax bill issued by Independence, a city of the third class, on account of the grading and paving of one of its public streets. The court sustained the validity of the tax bill, and defendant appealed from the judgment rendered for plaintiff. No bill of exceptions is in the record, and the issue here is the sufficiency of the petition to state a cause of action. The petition alleges that plaintiff is the owner and holder of the tax bill; that the tax bill, the contents and date of which is set out, was issued by the city of Independence, a city of the third class; that plaintiff, for a valuable consideration, purchased the tax bill from the contractor to whom it was issued;

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep't Indexes

that the contractor duly assigned the bill in writing to plaintiff and that defendant owned the property described. It appears the tax bill was signed only by the city clerk, and the petition alleges that it was so executed "by authority of the ordinance of said city."

We find the petition contains all requisite averments. *City of Carthage v. Badgley*, 73 Mo. App. 123; *Joplin ex rel. v. Hollingshead*, 123 Mo. App. 602, 100 S. W. 506. In these cases the rule is stated that a petition to enforce a special tax bill which pleads the tax bill in *hæc verba*, in a case where the statute gives *prima facie* effect to such tax bills, will be deemed sufficient if it alleges, "first, the making of the tax bill; second, the contents of such tax bill with dates thereof; third, the assignment; fourth, the filing of the same; and, fifth, that the defendant owned the lot described and against which the lien was sought to be enforced." These are the constitutive facts, and as we said in the opinion from which we have quoted (*Carthage v. Badgley*, *supra*): "If the owner of the lot thus named desires to show either the imperfect execution of the work, or that the doing thereof was not properly authorized, or any other fact which goes to the legality or extent of the charge, he cannot do so by pleading the general issue, as was done in this case, but he must specially plead the facts constituting such defense in his answer, so as to notify the plaintiff of the grounds upon which he relies to defeat the enforcement of the tax bill."

The objection of defendant that the tax bill does not recite performance of some preliminary steps in the proceeding does not go to the sufficiency of the petition, but relates to matters of defense which in *Cushing v. Powell*, 130 Mo. App. 578, 109 S. W. 1054, we held might be tendered under the general issue.

There is no merit in the further objection that the city council could not delegate authority to the city clerk to sign special tax bills. The signing of such documents is a purely ministerial act (*State v. Reber*, 226 Mo. 229, 126 S. W. 397), and no good reason is suggested for holding that the chief executive of the municipality must perform that act or that his name be signed. In the absence of statutory command the council, by ordinance, may designate how and by whom such instrument shall be signed.

Only one other point argued by defendant is of enough merit to call for notice here. It is insisted that since plaintiff is a national bank it had no authority to purchase special tax bills. The averment that plaintiff purchased the tax bill for a valuable consideration does not mean necessarily that the purchase was made as an investment or for speculation, but is comprehensive enough to in-

clude any acquisition of title by purchase, including, for example, the taking of additional security for an existing debt to the bank created *bona fides* in the course of lawful business. So far as we are advised the authority of a national bank to protect itself against possible loss by taking additional collateral security for an existing loan has not been seriously questioned by any court of last resort. It was held in *Bank v. Bank*, 92 U. S. 122, 23 L. Ed. 679, that while by implication a national bank is prohibited from dealing in stock, it may take stock, in payment or compromise of a doubtful debt, in order to avoid loss and with a view to convert the stock into money. And for the same purpose it may take a mortgage on real estate (*Bank v. Matthews*, 98 U. S. 624, 25 L. Ed. 188) or accept a deed conveying the fee-simple title to real estate. Nothing to the contrary appearing, the allegation that such bank acquired by purchase the title to stock, bonds, or other kinds of paper property implies that the purchase was one it had authority to make. Moreover, even if it had appeared that the act in question was *ultra vires*, the purchase would not be held void, but only voidable. As to defendant, it was valid in any event, and its validity could not be assailed except in a direct proceeding prosecuted for that purpose by the government. *Hall v. Bank*, 145 Mo. 418, 46 S. W. 1000.

The judgment is affirmed. All concur.

ESTIS v. HARNDEN et al.

(Springfield Court of Appeals. Missouri. Feb. 6, 1911.)

1. SALES (§ 81*)—CONTRACT—TIME OF PERFORMANCE—CONDITION PRECEDENT.

Stipulations as to the time of performance of a contract of sale, if they appear from the language used and the circumstances of the contract and the intent of the parties to be of the essence of the contract, will be construed as conditions precedent.

[Ed. Note.—For other cases, see *Sales*, Cent. Dig. §§ 217-223; Dec. Dig. § 81.*]

2. SALES (§ 201*)—TRANSFER OF TITLE—DELIVERY AND ACCEPTANCE—SELLER'S POSSESSION.

Where a seller stated his price for a cow which the buyer accepted, paying a small part of the purchase price, and agreeing to come for her at a specified time, the buyer's assumption of possession at the specified time is not a condition precedent to passage of title, but there is a completed contract of sale by which the buyer becomes the owner of the cow with a right of possession in the defendants until the balance of the purchase money is paid.

[Ed. Note.—For other cases, see *Sales*, Cent. Dig. §§ 529-541; Dec. Dig. § 201.*]

3. SALES (§ 403*)—REMEDIES OF BUYER—RECOVERY OF GOODS.

Where an action of replevin is brought by one claiming under a contract of sale, and who deposits the balance of the purchase price in court, he is entitled on proof of a completed

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

contract of sale to a judgment awarding possession.

[Ed. Note.—For other cases, see *Sales*, Cent. Dig. §§ 1144, 1145; Dec. Dig. § 403.*]

Appeal from Circuit Court, Jasper County; David E. Blair, Judge.

Action by C. B. Estis against E. J. Harnden and another. Judgment for defendants, and plaintiff appeals. Reversed and remanded, with direction to enter judgment in favor of plaintiff.

Geo. Booth and A. M. Baird, for appellant. W. R. Shuck and A. G. Young, for respondents.

GRAY, J. This is an action of replevin for a cow, commenced before a justice of the peace in Jasper county. The defendants were successful in the justice court, and the plaintiff appealed to the circuit court of said county. On the trial in the circuit court without a jury, the defendants were again successful, and the plaintiff appealed to this court.

There is but little dispute about the facts. The defendants were originally the owners of the cow, and had sent word to the plaintiff that the animal was for sale. The plaintiff, with one Mr. Farris, went to the defendants' premises for the purpose of looking at the cow, with the view of plaintiff purchasing her for Mr. Farris. The defendants are husband and wife. After looking at the cow, the plaintiff asked the husband if less than \$45 would buy her, to which the defendant replied: "No, if I wasn't going off, \$60 wouldn't buy this cow." And the plaintiff replied that he would take the cow, and paid to the husband the sum of \$2.50 on the purchase price. At this time the plaintiff further said: "I will be after the cow Monday," and the said defendant replied: "All right. Probably she won't be here, but she will be over in Carterville, you can get her any time you come after her." The plaintiff did not go after the cow Monday, and in the meantime defendants had moved to Carterville. On Monday evening the plaintiff went to Carterville and saw the defendant, Mrs. Harnden, and told her he was busy and would like to wait until morning to get the cow, and she replied that it would be all right; to come and get the cow in the morning. The plaintiff did not go after the cow in the morning, and it was about one o'clock in the afternoon when he went to the defendants' home after her. The mother of Mrs. Harnden came to the door and told the plaintiff they had decided not to move away, and to keep the cow. About that time Mrs. Harnden, the defendant, came to the door, and notified plaintiff he could not have the cow unless he would pay \$50 for her. The plaintiff waited until the husband came home in the evening, and was notified by

him also that they had decided to keep the cow, to which the plaintiff replied: "I have got the money to pay for her, and would like to have her." The husband replied: "That's all right; I ain't going to let you have the cow to-day."

The above facts are not controverted. The defendants have filed no briefs in this court, but we gather from the bill of exceptions that they defended on the ground that plaintiff did not come after the cow at the time he agreed to do, to wit, Tuesday morning, and that the transaction on Friday evening when plaintiff and Mr. Farris looked at the cow did not amount to a contract of sale. If the transaction amounted to a sale, then there was nothing in the language used to show that the time when plaintiff should call for the cow was the essence of the contract. The evidence shows that the cow was giving milk and the defendants were having the benefit thereof. When the plaintiff stated that he would come after her Monday, the husband replied: "That will be all right. I am going to move to Carterville, and the cow will be over there and come over there and get her."

In determining whether stipulations as to the time of performance of a contract of sale are conditions precedent, the court seeks to discover the intention of the parties, and if time appears, from the language used and the circumstances, to be of the essence of the contract, stipulations in regard to it will be held conditions precedent. *Redlands Orange Growers' Association v. Gorman*, 76 Mo. App. 184; *Lumber Co. v. Forrester et al.*, 124 Mo. App. 304, 101 S. W. 164. We do not believe that time was the essence of the contract so that the failure of the plaintiff to call for the cow at any special hour in the day authorized defendants to repudiate the sale.

It is quite clear to us that the transaction amounted to a sale. The defendants asked \$45 for the animal. The plaintiff said he would take her, and paid \$2.50 of the purchase price and said he would come after the cow on the following Monday. All the terms of the contract had been fully agreed upon, and the plaintiff then and there became the owner of the cow with the right in defendants to retain the possession of her until the balance of the purchase price was offered or paid. *Sigerson v. Kahmann*, 39 Mo. 206; *Stumpf v. Mueller*, 17 Mo. App. 283; *Glass v. Blazer Bros.*, 91 Mo. App. 564; *Kuhler v. Tobin*, 61 Mo. App. 576; *Wren v. Kuhler*, 68 Mo. App. 680; *Wheelless v. Grocery Co.*, 140 Mo. App., loc. cit. 585, 120 S. W. 708. When the plaintiff called Tuesday, he notified the defendants he had come to pay for the cow and to get her. They flatly refused to let him have the animal unless he would pay an increased price for her. Upon this refusal, he instituted this suit, and deposited the balance of the

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

purchase money with the court, where it remains. Under these circumstances we are of the opinion that he was entitled to recover, and the court erred in rendering a judgment in favor of the defendant.

The premises considered, the judgment of the circuit court will be reversed and the cause remanded, with directions to enter judgment in favor of plaintiff. All concur.

CHAMBERS v. KUPPER-BENSON HOTEL CO.

(Kansas City Court of Appeals. Missouri. Jan. 30, 1911.)

1. APPEAL AND ERROR (§ 927*)—DEMURRER TO EVIDENCE—REVIEW.

The appellate court, on disposing of the question arising on defendant's demurrer to the evidence, must give controlling effect to the evidence of plaintiff.

[Ed. Note.—For other cases, see Appeal and Error. Cent. Dig. §§ 2912, 2917, 3743; Dec. Dig. § 927.*]

2. CARRIERS (§ 247*)—PASSENGERS—EXISTENCE OF RELATION.

Where a hotel elevator for the accommodation of guests stops at a floor and the door is opened for the reception of passengers, the relation of carrier and passenger begins the moment the latter starts to enter the car and brings himself within the range of its possible activities.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 984-990; Dec. Dig. § 247.*]

3. CARRIERS (§ 280*)—PASSENGERS—OBLIGATION OF CARRIERS.

A carrier of passengers by elevator must use the utmost care and skill in the choice and maintenance of the machinery and appliances and the selection of operatives.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. § 1092; Dec. Dig. § 280.*]

4. CARRIERS (§ 247*)—PASSENGERS—EXISTENCE OF RELATION.

A guest at a hotel approached the passenger elevator with the intention, recognized by the operator, of becoming a passenger. The operator, who had started up, stopped and returned to the floor for the sole purpose of receiving the guest and his companions. The elevator door was not entirely closed when the descent began and the operator opened it and stopped the car at the proper place to admit passengers. *Held*, that the relation of carrier and passenger began when the car was returned and stopped at the floor and when the elevator door was opened by the operator and the guest started to enter in front of the door.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 984-990; Dec. Dig. § 247.*]

5. CARRIERS (§ 318*)—PASSENGERS—INJURIES—NEGLIGENCE.

Where, in an action for the death of an elevator passenger caused by the fall of the elevator, the evidence showed that the car was in perfect condition and under complete control of the operator, who stood with his hand on the lever, and that the elevator could not descend unless the lever was moved, there was evidence justifying the conclusion that the operator voluntarily, or through inattention to duty, moved the lever, thereby causing the elevator

to fall, and plaintiff to recover need not produce a witness who saw the operator move the lever.

[Ed. Note.—For other cases, see Carriers, Dec. Dig. § 318.*]

6. APPEAL AND ERROR (§ 1066*)—HARMLESS ERROR—ERRONEOUS INSTRUCTIONS.

Where, in an action for the death of a passenger on an elevator, the evidence of plaintiff did not present a case under the humanitarian rule, but did present the issue whether the injury was caused solely by the negligence of the operator or wholly or in part by the negligence of decedent, and the defendant's evidence clearly showed that the operator realized the peril to decedent, but in his anger refused to make a simple turn of the hand that would have saved decedent's life, the refusal to withdraw from the jury negligence under the humanitarian doctrine was not prejudicial error to defendant.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4220; Dec. Dig. § 1066.*]

7. JUDGMENT (§ 248*)—ISSUES AND PROOF.

A plaintiff must recover, if at all, on the issues tendered by his pleadings and evidence and submitted in his instructions.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 434, 439, 440; Dec. Dig. § 248.*]

8. DEATH (§§ 65, 66, 68*)—ACTION FOR NEGLIGENT DEATH—EVIDENCE—ADMISSIBILITY.

In an action by a widow for the negligent death of her husband, his age, expectancy, health, habits, business capacity, etc., may be proved to show the pecuniary loss sustained.

[Ed. Note.—For other cases, see Death, Cent. Dig. §§ 84, 85, 86, 87; Dec. Dig. §§ 65, 66, 68.*]

9. DEATH (§ 71*)—ACTION FOR NEGLIGENT DEATH—EVIDENCE—ADMISSIBILITY.

In an action by a widow for the negligent death of her husband, her age, expectancy, and health may be shown as bearing on the pecuniary loss sustained.

[Ed. Note.—For other cases, see Death, Cent. Dig. § 90; Dec. Dig. § 71.*]

Appeal from Circuit Court, Jackson County.

Action by Regina V. Chambers against the Kupper-Benson Hotel Company. From a judgment for plaintiff, defendant appeals. Affirmed.

Warner, Dean, McLeod & Timmonds, for appellant. Ellis, Cook & Barnett and Beardsley, Gregory & Kirshner, for respondent.

JOHNSON, J. Plaintiff, the widow of M. A. Chambers, deceased, prosecutes this action to recover damages for the death of her husband, which she alleges was caused by the negligence of defendant. The jury before which the cause was tried gave her a verdict for \$6,000, and the case is here on the appeal of defendant from a judgment for plaintiff on that verdict.

Defendant is a corporation engaged in operating the Hotel Kupper, a large hotel in Kansas City. Mr. Chambers was a lawyer and with plaintiff, his wife, as a partner, conducted a law, loan and abstract office in Hoxie, Kan. His practice and business were lucrative and brought him an income of from \$5,000 to \$7,000 per annum. In October, 1908, Mr. and Mrs. Chambers, accom-

panied by their daughter, who was 17 years old, visited Kansas City and were guests of the Hotel Kupper. In the evening of October 24th, they went out to dinner and returned to the hotel about 8 o'clock. The weather being inclement, Mr. Chambers wore an overcoat and carried an umbrella. They entered the lobby at the north entrance and proceeded across to the south side of the room to the door of the passenger elevator. The room was well filled with people. Mr. Chambers was a heavy man, deliberate in his movements, and their progress was not rapid. As they approached the elevator, Mr. Chambers led the way, his daughter followed immediately, and his wife was two or three steps behind. The elevator, carrying two passengers, had just started up from the lobby, when the operator, becoming aware that other guests wished to become passengers, stopped the car at a point two or three feet above the lobby floor and started back for the express purpose of taking on the Chambers family. The car itself had no door, but there were sliding metal doors at the entrance to the elevator shaft, and it was the duty of the elevator boy to keep these doors closed except when the car was at rest at the lobby for the purpose of receiving and discharging passengers. The boy was in the act of closing the doors as the car started to ascend, but had not completely closed them, when he stopped and returned. There is evidence introduced by plaintiff to the effect that the boy opened the doors, brought the car to a complete stop at the lobby floor, and that Mr. Chambers started to enter, and succeeded in placing his forward foot on the car floor with his other foot still on the lobby floor, when the car dropped suddenly and without warning and descended with great rapidity, until the obstruction to its descent offered by the body of the unfortunate man, which was caught between the top of the car entrance and the lobby floor, produced slack in the cables, which automatically set in operation an appliance that shut off the power and applied the brakes. Mr. Chambers received injuries from which he died that evening. The elevator was run by electricity, and an expert examination made immediately after the injury disclosed no defect in the machinery or any of the appliances. Operation of the elevator was resumed immediately, and it appeared to be in perfect order.

Both parties tried the case on the theory that the one great issue was whether the injury was caused by the negligence of the elevator boy or was caused in whole or in part by negligence of the deceased. The petition alleges: "That by reason of the negligence, carelessness, and unskillfulness of the defendant company, its officers, agents, servants, and employes in charge of said elevator, and of the mechanism thereof and as a result of such negligence, carelessness,

and unskillfulness, while the body of said M. A. Chambers was partly in and partly outside said elevator car, and while he was so as aforesaid in the act of entering into the same, the said car suddenly descended and fell, and in so doing the steel crossbar across the front and near the top of said descending car caught said M. A. Chambers across the shoulders and crushed his body and legs downward upon the main floor of the building and into a very narrow space, with such force that the bones of his limbs and body were broken and crushed and injuries inflicted causing his death a few hours later. That defendant was further negligent, careless, and reckless in the premises, in that after said M. A. Chambers was in a perilous position and before the injuries herein complained of had been inflicted, and after defendant, through its agent and servant in charge of said car knew, or through the exercise of such care as was incumbent upon the operator, might have known of said peril in time to avert the same, it neglected and failed to avert it and failed to raise said elevator car, but allowed the same to continue to crush the body of said M. A. Chambers." The answer is a general denial and a plea of contributory negligence.

On behalf of defendant the evidence tends to show that Mr. Chambers approached the elevator in great haste and called sharply, "Going up," when he observed the car starting to ascend; that the elevator boy, hearing the call, stopped and started to descend; that he stood in the car facing the entrance with his right hand on the lever that controlled the car and his left on the sliding door; that as the car descended Mr. Chambers impatiently seized the door and started to open it wider; that the operator struggled to keep the intruder out; that Mr. Chambers violently jerked the door open and proceeded to step into the car while it was still descending; and that the car continued to descend until arrested by the imprisoned body.

The elevator boy testified, in part, as follows: "Q. Where was your left hand at that time? A. It was on the door, elevator door. Q. Where was your right hand? A. On the elevator lever. Q. What were you doing with your left hand? A. Trying to keep the door shut and keep Mr. Chambers out until I could get, could bring the elevator to a stop. Q. What was Mr. Chambers doing? A. He had his left hand on the door pushing the elevator gate back and—I won't let the elevator open for anybody to get into it until I—I have to have the car level with the floor. * * * Q. What did he do next after that, if anything? A. He put his left hand on the gate, which lacked a few inches of being closed, showing the gate—kind of an iron gate—and I had my left hand on the elevator gate, trying to keep it closed until I could stop the elevator at the proper place. Q. What happened after that? What did

Mr. Chambers next do after that? A. He pushed the door back far enough to get about halfway into the car and had one foot on the elevator floor and one on the lobby floor, and I tried to keep him out until I could get it stopped, and he kept going in, and I kept trying to get the elevator gate closed, and the car kept descending and the car descended in some way. Now, I paid more attention to keeping him out than I did to stopping the car, as I knew the passengers on the car were safe and knew he was safe as long as I kept him out. * * * Q. What happened after that? A. Well, the car kept descending, you know, and he was continually trying to get in it. If he had stepped back or stepped into the car all at once there wouldn't have been any accident. I was trying to keep him out, you know, more than anything else, you know, and the car came on there and caught him on the left shoulder, and he had one foot on the floor of the elevator. Q. Which foot? A. The right foot, and the car came on down this way and hit him and caught him and held him there so that the weight of his body held up the elevator and rope became slack, and the elevator was dead at that time, and I could do nothing at all with the car from where I was." On cross-examination he was asked why he did not stop the car on the level of the office floor, and answered: "Simply because I thought it would be better to keep Mr. Chambers out of there. If I went down in the basement, it wouldn't hurt nothing, and Mr. Chambers was liable to get on the car when it was running and liable to be some danger."

At the request of plaintiff, the court instructed the jury as follows: "(1) If you find from the evidence that on the evening of October 24, 1908, defendant company was in the possession of Hotel Kupper, in Kansas City, Mo., and managing the same as a hotel; that defendant then maintained a passenger elevator in said hotel for the carriage of its guests and others from one floor to another; that on said day M. A. Chambers was a guest of said hotel, and sought passage for himself upon said elevator to be carried therein from the first or main floor of said hotel to an upper floor therein, for the purpose of reaching rooms used by him as a guest thereof; that thereupon for the purpose of receiving said M. A. Chambers in the car of said elevator to carry him therein, the operator then in charge thereof brought said elevator car to a position with the car floor substantially on a level with the main floor of said hotel and there brought the same to a position of rest; that said M. A. Chambers was then immediately in front thereof and approaching the same to enter; that thereupon the operator of said car opened the sliding door leading into said elevator car, or permitted the same then to stand open to a width sufficiently large to permit said Chambers to enter; that thereupon said

M. A. Chambers stepped forward, putting one foot into said car in the act of entering same—then, if you find the foregoing from the evidence in this case, you must find that said M. A. Chambers was a passenger upon said car, entitled under the law to receive from defendant and the operator in charge of said car the highest degree of care reasonably practicable for the personal safety of said Chambers.

"(2) If, upon the evidence in the case and under the instructions of the court as elsewhere given in this case, you find that said M. A. Chambers was, on the evening of October 24, 1908, a passenger upon the elevator car in question, and if you further find from the evidence that at said time plaintiff was the wife of said M. A. Chambers, that said Chambers was at said time in the exercise of ordinary care, that, by reason of the negligence of defendant through its employé in charge of said elevator car, the said car suddenly descended while said Chambers was in the act of entering said car and thereby caught and crushed him so that he died as a result thereof, then your verdict must be in favor of the plaintiff.

"(3) If you find for the plaintiff, you will in your verdict fix the amount of her damages, not exceeding \$10,000, at such sum as you may deem fair and just under the evidence in the case with reference to the necessary pecuniary injury resulting to her from the death of her husband.

"(4) You are instructed that the words 'negligence' and 'negligent' as used in these instructions mean failure to exercise ordinary care; and 'ordinary care' means such care as an ordinarily prudent person would usually exercise under the same or similar circumstances."

In disposing of the questions arising from the demurrer to the evidence which defendant argues should have been given, we give controlling effect to the evidence of plaintiff, and find that such evidence tends to establish the following facts: First. Mr. Chambers approached the elevator with the evident intention, recognized by the operator, of becoming a passenger on the car, and the operator stopped and returned for the sole purpose of receiving him and his companions as passengers. Second. The elevator door was not entirely closed when the descent began and the operator opened it and stopped the car at the proper place to admit the passengers. Third. The injury was caused by the sudden drop of the car while Mr. Chambers was in the act of entering. Fourth. There were only two possible causes for the sudden movement of the car, i. e., some defect in the machinery or appliances or a movement of the lever held by the operator.

The defect of the position assumed by defendant in its argument of the demurrer to the evidence is that in vital respects it rests entirely on the evidence of defendant and rejects as unsupported by substantial evi-

dence basic facts of plaintiff's case which we find supported by strong evidence. The keynote of the argument is that Mr. Chambers attempted to force his way into a rapidly descending car, against the will and the utmost efforts of the operator, and with this premise defendant contends that no relation of carrier and passenger was created between defendant and Chambers, and that the operator acted within the scope of his duty and right in attempting to repel an unwarranted and dangerous intrusion. We are cited to the case of *Schepers v. Railway Co.*, 126 Mo. 665, 29 S. W. 712, where the Supreme Court held that "one does not become a passenger on a street railway by a mere attempt to get on a car while it is in motion. There must, in such case, be some act on the part of the carrier indicating its acceptance of such person as a passenger to make him one." But in that case the rule is recognized that: "Where a person intends to take passage on a street car and has hailed it for that purpose, and it has been stopped to enable him to enter, he is to be regarded as a passenger while he is in the act of carefully and prudently attempting to step upon the platform." And speaking through Broaddus, P. J., we held in *Scott v. Railway*, 138 Mo. App. 196, 120 S. W. 131, that: "When a signal is given by one wishing to board a street car, or when his attitude is such as to indicate such wish, and either is seen and recognized by the motorman, and in apparent response he turns off the power and sets the brakes, in view of the passenger indicating to him that the car is going to be stopped that he may get aboard, and he without negligence attempts to do so, the contract of the carrier and passenger is complete."

This rule applies to passenger elevators maintained in hotels for the accommodation of guests and their visitors. Where an elevator is stopped at a floor, and the door is opened for the reception of passengers, the relation of carrier and passenger begins the moment the latter starts to enter the car and brings himself within range of its possible activities. "There is no distinction in law between the duties and liabilities of a carrier by elevator and one by railroad. Each is bound to the use of the utmost care and skill in the choice and maintenance of machinery and appliances, and the selection of operatives, and the liability of both for the slightest negligence of an operative, irrespective of the care with which he may have been selected, resulting in damages to a passenger, is, in its last analysis, identical." *Lee v. Knapp & Co.*, 155 Mo., loc. cit. 642, 56 S. W. 467.

On the hypothesis of facts presented by the evidence of plaintiff, the relation of carrier and passenger began when the car was returned and stopped at the lobby floor, the elevator door was opened by the operator, and Mr. Chambers started to enter from his place of safety in front of the door. Defendant

then owed him the duty of exercising the highest degree of care to hold the car at rest until he had passed safely in, and any breach of that duty resulting in injury would constitute actionable negligence.

But defendant contends there is no evidence to support the specific charge in the petition that the drop of the car was caused by the negligence of the operator, and that, since specific negligence is alleged, plaintiff cannot find aid in the doctrine of *res ipsa loquitur*. The answer to this argument is that the evidence of plaintiff does not compel indulgence in any presumption in order to find that negligence of the operator was the proximate cause of the injury, but the existence of such negligence appears as an inevitable conclusion from facts and circumstances in proof. Plaintiff was not required to produce a witness who saw the operator move the lever, but she might prove the fact by circumstantial evidence. Here was a car in perfect condition under complete control of the operator who stood with his hand on the lever. It could not descend unless the lever was moved, and any reasonable mind would conclude from such facts that the operator either voluntarily or through inattention to duty moved the lever. Such conclusion rests primarily on evidentiary facts and circumstances and does not depend on the process of building inference on inference, nor does it need the aid of presumption. As the evidence of plaintiff exculpates her husband from the imputation of negligence and shows that his death was caused by the negligent handling of the car, it follows that the learned trial judge did right in overruling the demurrer to the evidence.

Defendant insists that the allegations in the petition of negligence under the "humanitarian" doctrine are unsupported by evidence, and, therefore, that the court erred in refusing instructions offered by defendant, withdrawing such negligence from the consideration of the jury. The evidence of plaintiff does not present a case under the humanitarian rule, and, in effect, plaintiff abandoned the claim of such negligence in the instructions given at her request. A clean-cut issue is presented by the evidence and clearly submitted in the instructions of the question of whether the injury was caused solely by the negligence of defendant or wholly or in part by negligence of Mr. Chambers. In accepting the evidence of plaintiff, the jury necessarily had to exclude the issue of humanitarian negligence tendered by the petition. Had the jury disbelieved the version of the injury given in the plaintiff's evidence and accepted as true the evidence of defendant, they would have found in that evidence reasonable ground for the belief that, although Mr. Chambers was negligently endeavoring to enter a moving car, the injury could have been averted by the operator after he perceived the danger by the

simple expedient of stopping the car. The operator admits he did not try to stop, and we cannot avoid indulging the thought that his own testimony shows his efforts could have been more sensibly employed in throwing the lever to stop the car than in struggling so vigorously to prevent what he considered a wrongful intrusion. His excuse that he could not have stopped, but on turning back was compelled to run the car almost to the basement, does not merit serious consideration. The elevator was equipped with the usual devices for stopping, had two "speeds"—one slow and the other fast—and was in perfect condition. The jury would have been entitled to believe the car could have been stopped and the injury averted if the operator had tried to stop. In this view of the evidence, we may concede for argument that, since plaintiff abandoned the "last chance" issue in her instructions, the court should have instructed the jury that there was no such issue before them, and still we would be constrained to regard the error as harmless. How could the defendant be prejudiced by what, at best, would be a mere theoretical error, when its own evidence shows so clearly that the operator fully realized the peril, but in his anger refused to make the simple turn of the hand that would have saved a human life? We are not overlooking the rule that a plaintiff must recover, if at all, on the issues tendered by his pleadings and evidence and submitted in his instructions; but we think this an instance for the application of the statutory rule prohibiting the reversal of judgments except for prejudicial error.

A number of objections are urged against rulings of the trial court on the admission of evidence; but none of them are tenable. Evidence of the age, expectancy, health, habits, business capacity, etc., of plaintiff's husband was admissible in an action where the pecuniary loss she suffered in consequence of the death of her husband was an important issue. The issue involves also the question of her own age, expectancy, and state of health. The rule in such cases is correctly stated by the Supreme Court of Kansas in *Railway v. Moffatt*, 60 Kan., loc. cit. 119, 55 Pac. 839 (72 Am. St. Rep. 343): "Mathematical accuracy in measuring the pecuniary loss suffered is not practicable, and in general it may be said that the basis for the allowance of damages may be found in the character, habits, capacity, business, and condition of the deceased, as well as the age, sex, circumstances, and condition in life of the next of kin. The court is of the opinion that with the elements thus furnished the jury may make a fair estimate of the damages that are recoverable."

Tested by this rule, the damages allowed by the jury are not excessive.

A careful examination of the record discloses no substantial error in the trial.

The judgment is manifestly righteous and should be affirmed. It is so ordered. All concur.

PETERS v. CARROLL.

(Springfield Court of Appeals. Missouri. Feb. 6, 1911.)

1. PLEADING (§ 395*)—VARIANCE.

Where plaintiff sues to recover part of a loan for which he had applied, which was withheld by defendant, on the theory that defendant was the agent of the lender, he cannot recover on the theory that defendant was his own agent.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 1333-1335; Dec. Dig. § 395.*]

2. PRINCIPAL AND AGENT (§ 70*)—RELATION—ACTING FOR BOTH PARTIES.

A person may act as agent for both parties to a transaction where both know of his relation to each and see fit, mutually, to trust him.

[Ed. Note.—For other cases, see Principal and Agent, Cent. Dig. § 146; Dec. Dig. § 70.*]

3. BROKERS (§ 97*)—LIABILITIES AS TO THIRD PERSONS—ACTION.

Where plaintiff applied to a loan broker for a loan, and the broker's principal sent the amount applied for to the broker to be delivered to plaintiff when his title to the land, on which trust deeds were offered as security, was perfected, and the broker assumed the responsibility and violated the instruction of his principal to the extent of advancing to plaintiff enough money to satisfy an outstanding mortgage, it being agreed that he should hold the balance until the defects in the title were removed, and the broker proceeded to remove the defects, and after part of them had been removed, made another payment to the plaintiff, plaintiff cannot, while other defects are not removed, recover the balance of the loan from the broker.

[Ed. Note.—For other cases, see Brokers, Cent. Dig. § 139; Dec. Dig. § 97.*]

4. BROKERS (§ 97*)—LIABILITIES AS TO THIRD PERSON—ACTION.

Where a loan broker under agreement with plaintiff, retained a part of a loan applied for till defects in the title to land offered as security by plaintiff should be removed, the fact that the party making the loan demanded and plaintiff paid interest on the full amount of the loan, does not entitle plaintiff to recover the balance retained by the broker.

[Ed. Note.—For other cases, see Brokers, Cent. Dig. § 139; Dec. Dig. § 97.*]

Appeal from Circuit Court, Texas County; L. B. Woodside, Judge.

Action by John A. Peters against William F. Carroll. From a judgment for plaintiff, defendant appeals. Reversed.

William F. Carroll, pro se. Thomason & Clark and W. L. Hiett, for respondent.

GRAY, J. This case was tried in the circuit court of Texas county, resulting in a judgment in favor of the plaintiff, from which the defendant appealed.

The plaintiff alleges in his petition, filed December 27, 1909, that the defendant in

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes 134 S.W.—4

1908, was engaged in the real estate, loan, and brokerage business in Van Buren, Mo., as the agent for Wells & Adams, loan brokers of Quincy, Ill.; that plaintiff applied to defendant for a loan of \$2,000 on certain real estate in Carter county, Mo., owned by the plaintiff; that on January 4, 1909, the defendant accepted the loan, and plaintiff delivered to the defendant two deeds of trust upon said property to secure said loan of \$2,000, and that he placed said deeds upon the records of Carter county, and forwarded the same and the note secured thereby, to Wells & Adams; that the defendant out of the said \$2,000 paid for plaintiff a prior loan on said land amounting to \$1620, and on October 15, 1909, defendant paid to plaintiff the sum of \$150, leaving a balance of \$230 of the \$2,000 loan still unpaid, and the defendant refused to pay the same. The answer was a general denial. And, further, defendant admitted that as a broker he negotiated the loan of \$2,000 for plaintiff with said Wells & Adams; that in order to secure said loan, the plaintiff made an application in writing, wherein it was stated that he was the owner in fee simple of the land, and that to secure said loan he would execute trust deeds on said property which would be a first lien thereon, and that he would furnish an abstract of titles which would show a perfect title in him from the government down to the date of recording said trust deeds; that the title was defective, and that Wells & Adams rightfully rejected said title, but forwarded the money to defendant with the understanding that the same was to be paid to plaintiff when the objectionable features of the title had been removed.

The application for the loan was introduced in evidence, and fully supported the allegations of the defendant's answer relating thereto. The plaintiff testified that when he made the application for the loan, one Bedell held a first mortgage upon his property, to secure a loan amounting to one thousand six hundred and some odd dollars; that he was anxious to get the money to pay off that incumbrance, as the holder thereof was the owner of lands adjoining his, and was anxious to foreclose the mortgage and buy plaintiff's property thereunder; that the defendant told him when the \$2,000 had been received from Wells & Adams, that he was not authorized to pay it to plaintiff until the title was complete.

Plaintiff also testified he understood there was a three-eighths claim out on his land, and that the defendant was trying to get that interest, so as to perfect the title; that defendant told him he would protect him from the Bedell mortgage and assumed the responsibility of using enough of the loan money from Wells & Adams to take up the Bedell mortgage, and thereupon he made an agreement with the defendant that the defendant should hold the balance of the money

until the title was fixed and Wells & Adams satisfied. Plaintiff further testified that he understood that if, for any reason, the defendant was unable to get deeds for the outstanding interests, that an action was to be commenced to quiet title to the premises. Plaintiff further testified, however, that he understood that if deeds could not be procured, something would be done at the May term of court to perfect the title.

The undisputed evidence shows there were numerous defects in the title, and that plaintiff's attention was called to all of them, and that he agreed that the defendant might hold the balance of the purchase money until the title was perfected according to the contract by which the money was secured from Wells & Adams. Also, that defendant proceeded to straighten out the title, and did secure deeds for some of the outstanding interests from heirs who lived in California. In September or October, 1909, the defendant paid to the plaintiff out of the money on hand, and retained the sum of \$150, which, together with the amounts previously paid and expenses agreed upon, left due and owing to plaintiff out of the \$2,000 loan, \$140.51, to recover which this suit was instituted. When the defendant paid to the plaintiff the \$150, he notified him that it was going to take further time to perfect the title, and that he would go ahead and do so as attorney for plaintiff, and charge \$25 therefor, or plaintiff could select his own attorney to bring the suit and perfect the title. Within a short time after the receipt of this letter, the plaintiff instituted this suit. The above facts are all shown from the plaintiff's own testimony, and in our judgment the plaintiff was not entitled to recover the money sued for, and the court should so have instructed the jury. Instead of so doing, the court instructed the jury to find for the plaintiff.

It is the contention of plaintiff that the defendant was the plaintiff's agent, and could not withhold the money from his principal, and that under no circumstances could he act as the agent of both parties. The plaintiff brought his suit on the theory that the defendant was the agent of Wells & Adams, and must be held to the cause of action stated in his petition. Waiving this point, however, there was nothing in the transaction that prevented defendant from acting as the agent of both parties. If the parties have knowledge of the agent's relation to each, and see fit, mutually, to trust him, there can be no legal objection to his acting for both parties. *Atterbury & Nichols v. Hopkins et al.*, 122 Mo. App. 172, 99 S. W. 11.

No advantage has been taken of the plaintiff. His property was incumbered by a mortgage and the holder of it was threatening foreclosure proceedings. He applied, according to his petition, to the defendant as the agent of Wells & Adams for a loan to

protect his property from sale. The application for the loan was sent to Wells & Adams, and the sum of \$2,000 was sent to the defendant to be delivered to the plaintiff when his title was perfected. The defendant assumed the responsibility, and violated the instructions of Wells & Adams to the extent of advancing to the plaintiff enough money to satisfy the outstanding mortgage, and to protect plaintiff's land from a foreclosure. It was then agreed between the parties that the defendant should hold the balance of the money until the admitted defects in the title had been removed. The defendant proceeded to remove such defects, and after a part of them had been removed, made another payment to the plaintiff out of the money withheld, in the sum of \$150, and retained the balance under the contract with plaintiff. While the defects were unremoved, the plaintiff brought this suit for the balance of the money.

Wells & Adams demanded and plaintiff paid interest in full on the \$2,000 loan, and plaintiff claims that on account thereof Wells & Adams and the defendant are estopped from holding from plaintiff the balance of the loan. We fail to see any force in this contention. The money had been advanced by Wells & Adams, and was being retained by the defendant under a contract with plaintiff, until plaintiff could give the title he had contracted to give as security for the loan. Whether Wells & Adams were entitled to recover the interest in full on the loan is not necessary for us to decide in this connection. We only hold that the fact that they did so, did not authorize the plaintiff to institute this suit to recover the money which he had agreed defendant could retain until he had perfected his title.

We are of the opinion plaintiff is not entitled to recover in this action, and therefore the judgment of the trial court will be reversed. All concur.

WOLFSKILL v. WELLS.

(Kansas City Court of Appeals. Missouri. Jan. 30, 1911.)

1. TRUSTS (§ 43*)—EXPRESS TRUSTS—EVIDENCE TO ESTABLISH—PAROL EVIDENCE—INTENTION OF PARTIES TO ABSOLUTE CONVEYANCE.

A grantor conveyed land to his son with a verbal understanding that he should pay a mortgage thereon and account for one-half of it free from debt to the grantee's brother, who was then incapable of holding property, and after the death of the grantee the administrator of the brother sued to recover the value of one-half of the land as fixed by the deed. Rev. St. 1909, § 2868, requires that declarations of trust in lands shall be manifested by some writing signed by the party who declares it. *Held*, that under the statute the trust in favor of plaintiff's intestate could not be established by parol.

[Ed. Note.—For other cases, see Trusts, Cent. Dig. §§ 62-65; Dec. Dig. § 43.*]

2. TRUSTS (§ 20*)—CONSTRUCTION—RESULTING TRUSTS—NATURE OF RESULTING TRUST.

Where a grantor by absolute deed expressed to be for a valuable consideration, and as to which no fraud or deception or want of consent was shown, declares a trust in the land conveyed for the benefit of a son, the trust declared is an express, and not a resulting, trust.

[Ed. Note.—For other cases, see Trusts, Cent. Dig. §§ 25-28; Dec. Dig. § 20.*]

3. TRUSTS (§ 88*)—RESULTING OR IMPLIED TRUST—EVIDENCE—PAROL EVIDENCE.

An implied or resulting trust may be shown by parol.

[Ed. Note.—For other cases, see Trusts, Cent. Dig. §§ 130-133; Dec. Dig. § 88.*]

4. FRAUDS, STATUTE OF (§ 130*)—EFFECT—CONTRACT IN PART WITHIN THE STATUTE.

Where a grantor made an absolute deed to one of his sons on a verbal understanding that the grantee's brother should be entitled to have one-half interest in the lands conveyed to him, or at his option to be paid a fixed price per acre for his interest, the verbal contract is inseparable, and, as the part relating to the conveyance of the land is invalid under the statute of frauds, the entire contract, standing one part within the statute and one part without, is invalid.

[Ed. Note.—For other cases, see Frauds, Statute of, Cent. Dig. §§ 280-282; Dec. Dig. § 130.*]

Appeal from Circuit Court, Livingston County; J. W. Alexander, Judge.

Action by Elijah H. Wolfskill against Thomas H. Wells. Judgment for plaintiff, and, from an order granting a new trial, plaintiff appeals. Affirmed.

Scott J. Miller and Frank Sheetz & Son, for appellant. B. B. Gill & Son, John H. Taylor, and Lewis A. Chapman, for respondent.

ELLISON, J. This action originated in the probate court by plaintiff filing an account for "one-half interest" in certain described lands, "being 140 acres at \$35 per acre," amounting to \$4,900. There was credited on this account the sum of \$450, leaving a balance due plaintiff's estate of \$4,450. The claim was rejected by the probate court. On appeal to the circuit court, the finding was for plaintiff; but defendant's motion for a new trial was afterwards sustained, and from that order plaintiff appealed.

George W. Wolfskill, Sr., died in December, 1904. He was the father of Elijah H., John J., and George W. Wolfskill, Jr. He owned a large tract of land, a part of which (about 290 acres) he conveyed, for a valuable consideration, to John J. by an unconditional warranty deed, dated 11th of October, 1899, with the verbal understanding between the father and the two sons, John J. and George W., that John J. should pay certain mortgage indebtedness thereon and account to George W. for one-half interest in the land clear of debt. It being understood that, when George wanted his interest, but if he should not want the land, John J. should

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

account to George W. for one-half of it at \$35 per acre. It was explained by plaintiff, who was the chief witness in the case, that the reason the name of George W., Jr., did not appear in the deed to John J., or that a separate deed was not made to him, was that he "was not able to hold property, and my father placed it in trust for him," as he was then in process of being adjudged a bankrupt by the federal court, and it was thus "deeded in order to protect him from his creditors." George W., Jr., and John J. both died, and plaintiff was appointed administrator of the former's estate, and defendant was appointed administrator of the latter.

There were many reasons assigned in the motion for new trial. There is no doubt that it was properly granted. The evidence discloses an express trust, and this proceeding is an attempt to establish and, in effect, enforce an express trust without it being manifested "by some writing signed by the party" who creates it. This would be in the face of our statute (section 2888, Rev. St. 1909), as well as decisions of our Supreme Court. *Crawley v. Crafton*, 193 Mo. 421, 91 S. W. 1027; *Hillman v. Allen*, 145 Mo. 638, 47 S. W. 509; *Mulock v. Mulock*, 156 Mo. 431, 57 S. W. 122.

While an implied or resulting trust may be shown by parol evidence, there is nothing in the evidence to make out a trust of that character. There was no fraud or deception shown. The deed was absolute, expressed to be for a valuable consideration. The transaction, as portrayed in testimony, was had with the consent of all concerned. Nor do we think the relationship of the parties, nor the intention of the father as verbally expressed, in any way alters the character of the trust. *Higbee v. Higbee*, 123 Mo. 287, 27 S. W. 619; *Acker v. Priest*, 92 Iowa, 610, 61 N. W. 235; *Noe v. Roll*, 134 Ind. 115, 33 N. E. 905; *Stonehill v. Swartz*, 129 Ind. 310, 28 N. E. 620; *Gould v. Lynde*, 114 Mass. 366.

If we were to allow plaintiff to succeed in his effort to prosecute this action as a mere account for the value of a half interest in land conveyed to defendant's intestate, at a stated price per acre, if we should allow him to disconnect the case from its trust character, he would still be without legal standing. The verbal contract was one in the alternative to convey to George W., Jr., one-half interest in the land, or, at his option, to pay him \$35 per acre for such interest. As made, it was an inseparable contract. It is not disputed that that part of it to convey the land was invalid under the statute of frauds. So the case would stand with one part of the contract within and one part without the statute. In such instance the entire contract is invalid. *Andrews v. Broughton*, 78 Mo. App. 179; *Beck-*

mann v. Mephram, 97 Mo. App. 161, 70 S. W. 1094.

It is not necessary to notice other points discussed.

The judgment is affirmed. All concur.

CRAIN et al. v. MILES.

(Springfield Court of Appeals. Missouri. Feb. 6, 1911.)

1. WORK AND LABOR (§ 22*)—PLEADING—COMMISSIONS OF BROKER.

In an action by brokers for commissions for a sale of real estate, a complaint, alleging that plaintiffs at the request of defendant found a purchaser of the land, and "that a reasonable value of such services is \$235," for which they demand judgment, presented a cause of action on a quantum meruit.

[Ed. Note.—For other cases, see *Work and Labor*, Cent. Dig. § 41; Dec. Dig. § 22.*]

2. WORK AND LABOR (§ 4*)—RENDITION AND ACCEPTANCE OF SERVICES.

When one performs valuable services for another, who accepts the same, and the circumstances do not show that the services were to be gratuitous, or where there was a request to perform the services, the law implies a contract to pay their reasonable value.

[Ed. Note.—For other cases, see *Work and Labor*, Cent. Dig. §§ 3-7; Dec. Dig. § 4.*]

3. BROKERS (§ 53*)—COMMISSIONS—PROCURING CAUSE.

To entitle a real estate broker to his commission, he must be the efficient cause in finding a purchaser, and it is not sufficient that the act of the broker was one of the chain of causes bringing about the sale.

[Ed. Note.—For other cases, see *Brokers*, Cent. Dig. § 74; Dec. Dig. § 53.*]

4. BROKERS (§ 56*)—COMMISSIONS—PROCURING CAUSE.

Where an agent fails to get his offer within the terms of his authorization, and the purchaser afterwards buys the same piece of property on the same or less terms than those on which the first agent had authority to sell, the chain of causation would be broken.

[Ed. Note.—For other cases, see *Brokers*, Cent. Dig. § 86; Dec. Dig. § 56.*]

5. BROKERS (§ 55*)—COMMISSIONS—PROCURING CAUSE.

The owner of real estate may authorize more than one agent to sell, and, in the absence of a distinct contract to the contrary, where the sale is made the commission belongs to the agent whose efforts were the procuring cause of the sale, no matter which one may close the deal.

[Ed. Note.—For other cases, see *Brokers*, Cent. Dig. § 82; Dec. Dig. § 55.*]

6. BROKERS (§ 55*)—COMMISSIONS—PROCURING CAUSE.

Where an agent sets on foot a sale of property which wholly fails, and after such failure another agent steps in and makes the sale to the parties negotiated with by the first agent, if the first agent has shown his inability to make the sale, even if there is a possibility that the work of the first agent made some impression or had something to do with the sale, the first agent is not entitled to compensation.

[Ed. Note.—For other cases, see *Brokers*, Cent. Dig. § 82; Dec. Dig. § 55.*]

7. APPEAL AND ERROR (§ 999*)—REVIEW—QUESTIONS OF FACT.

Findings of fact by the jury are conclusive upon the appellate court.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3912; Dec. Dig. § 999.*]

8. APPEAL AND ERROR (§ 1057*)—HARMLESS ERROR—EXCLUSION OF EVIDENCE—CUMULATIVE EVIDENCE.

The exclusion of competent evidence is not ground for reversal, where the fact sought to be proved thereby is otherwise clearly established.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4194; Dec. Dig. § 1057.*]

Appeal from Circuit Court, Jasper County; David E. Blair, Judge.

Action by R. H. Crain and another against S. W. Miles. From a judgment for plaintiffs, defendant appeals. Affirmed.

R. A. Mooneyham and Lee Shepherd, for appellant. H. L. Shannon, for respondents.

NIXON, P. J. This was an action commenced before a justice of the peace in the city of Carthage. Trial was had before the justice and an appeal taken to the circuit court. The respondents are real estate brokers, and the action is to recover their commission for the sale of the appellant's real estate. Plaintiffs obtained judgment, from which the defendant appealed.

The evidence tended to show that defendant owned 160 acres of land in Jasper county, Mo.; that he listed this farm for sale with a number of real estate agents in the city of Carthage—among others, the plaintiffs—and notified plaintiffs that he had listed this farm with other agents and that the man who first made the sale would receive the commission. After the farm had been listed with them, the plaintiffs undertook to make the sale, and, in order to effect a sale, opened negotiations with one E. S. Williams. Plaintiffs proposed to Williams that he should go and examine the farm, which he did, and, some week or so before the trade was made Williams had examined the farm and showed a disposition to make the trade. The plaintiffs, on account of their business relations with Williams, having previously sold him a farm, thought they had peculiar advantages in handling him as a customer. They had Williams' farm at the time listed for sale which they had advertised, and they had also advertised the farm of the defendant. After some negotiations with Williams, the plaintiffs, in order to induce him to make the trade for the defendant's land, prevailed on him to cut out his farm and put in city property instead. Williams did not want any more land, but desired the money. Plaintiffs told Williams they would try and induce defendant to make the change and take the city property instead of trading for the farm. R. H. Crain, one of the plaintiffs, made the proposition to defendant to make this change in his offer. Williams then of-

fered to put in the city property for \$1,000 with the farm in pursuance to the suggestion of the plaintiffs, and thereupon, after further consultation, made the proposition to put in the city property at \$1,200 and the farm at the same price at which it had previously been offered. The plaintiffs made several ineffectual attempts to consummate the trade, and several times went to see the defendant for the purpose of inducing him to accept the offer. From the time the property was listed, the defendant made frequent visits to the office of the plaintiffs and had frequent conversations about making the trade with Williams. The trade was finally made on the terms the plaintiffs had proposed; the defendant taking Williams' city property at \$1,200.

The agreement as to compensation at the time defendant first went to plaintiffs' office and listed the land was to the effect that plaintiffs were to sell the land at \$60 an acre, net to defendant, and he stated to plaintiffs that they must get their compensation above the \$60 an acre. After that plaintiffs priced the land to customers at \$62.50 an acre. After the negotiations had been pending some time, the defendant seemed to become more interested in making the trade with Williams, and he then agreed with plaintiffs, in case they made the trade for Williams' land, to take \$60 an acre and pay the plaintiffs' commission out of that, and after this plaintiffs continued their efforts to make the sale. Plaintiffs represented to Williams that the farm was a good investment at \$60 an acre; that he could keep it and put his town property in the trade with the defendant at \$1,200; and that, if he would make that proposition, defendant would make the trade. And Williams finally acceded to this proposition. The evidence tended to show that the services of the plaintiffs were worth \$250. Several of the agents with whom defendant had listed his farm claimed to have called Williams' attention to the farm and to have used their persuasive influence to bring about the trade—among others, an agent by the name of Hall. The evidence of the defendant tended to show that Hall made an effort with Williams to dispose of his land and that he visited Williams several times for that purpose. There was evidence for the defendant tending to show that the sale was induced by real estate agents other than the plaintiffs and that the deal was closed with the assistance of Hall.

The statement of the plaintiffs' cause of action filed with the justice of the peace is as follows (caption omitted): "Plaintiffs say that they are partners doing a real estate commission business under the firm name of Crain & Marrs, and that at the special instance and request of S. W. Miles they found a purchaser for 160 acres of land belonging

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

to said S. W. Miles, and assisted him, the said S. W. Miles, in selling said land, and that the reasonable value of such services is \$265, and that they have demanded said amount of said S. W. Miles, and that he has wholly failed and refused to pay the same. Wherefore plaintiffs ask judgment against the defendant for said sum of \$265 and costs."

The appellant contends that the petition is wholly insufficient and does not state a cause of action; that while it alleges that plaintiffs were partners doing a real estate business, and that at the instance and request of the defendant they found a buyer and assisted the defendant in making the sale, it does not allege any agreement that defendant was to pay them any specific sum for their services, or that any contract or agreement was made between them for a commission, or that they were to receive any compensation for their services. This objection loses sight of the fact that contracts may be of two kinds, express or implied, and that when one person performs valuable services for another who accepts the same, and the circumstances surrounding the transaction do not show the services were to be gratuitous, or where one person performs services for another at the latter's request, the law implies a contract to pay their reasonable value. The facts in this case disclose that the defendant listed the land with the plaintiffs as real estate agents and stated to them that he had also listed it with other agents, and that the first man who made the sale would receive the commission, and this leaves no question as to the intention of the parties; and, when a sale was made pursuant to such understanding, the law implied a contract, and the defendant became bound to pay the plaintiffs the reasonable value of their services. No authorities need be cited to sustain a legal principle so elementary. Besides, this was a statement of a cause of action before a justice of the peace, and its imperfections are not to be viewed with a too critical eye.

It is further contended that there is a fatal variance between the allegations of the petition and the proof, such as to authorize a reversal of the judgment in this case; that plaintiffs cannot plead one cause of action and recover on another not pleaded. The foundation for this claim is that the agreement between the parties was that the land was to be sold at \$60 an acre, net to defendant, and that plaintiffs' commission, in case of sale, was to be the excess of \$60 an acre. Plaintiff Crain in his testimony stated: "Miles said, 'I want you to get busy now.' He priced it, however, at \$60 an acre net to him. He says, 'Now it is in the hands of several real estate men, and you want to get busy.'" If this was all the evidence on the question of plaintiffs' compensation, the defendant's contention would have some merit. But defendant leaves out of view the

additional testimony shown by the record to have been produced by plaintiffs at the trial. Plaintiff Crain, in addition to the above, testified that, after the negotiations with Williams had progressed for some time, defendant got a little more anxious to make the trade with Williams, "and agreed to take \$60 an acre for his land and pay the commission out of the \$60." It will therefore be seen that this contention is wholly without foundation when all the evidence is considered. The evidence of the plaintiffs further showed that \$250 was a reasonable compensation for their services, so that the claim of the defendant that plaintiffs sued on one cause of action and recovered on another overlooks controlling facts adduced at the trial of the case.

The court gave the following instruction for the plaintiffs: "The court instructs the jury that if you believe and find from the preponderance of the evidence that the plaintiffs, or either of them, suggested to E. S. Williams that the defendant Miles would take from him, the said Williams, a certain piece of property in the city of Carthage at a valuation of \$1,200 as a part consideration for a farm belonging to the defendant if the said Williams would take said farm subject to a mortgage for \$2,000 and pay him, the defendant, the difference in cash, and that afterwards the defendant sold said farm to the said Williams for \$6,000 in cash subject to a mortgage for \$2,000, and for the further consideration of the said property in the city of Carthage, and you further believe and find from a preponderance of the evidence that said suggestion made by plaintiffs, or one of them, if it was made, was the procuring cause of said sale and finally brought about the agreement as made between the defendant and the said Williams for the sale of said farm to said Williams, then your verdict should be for the plaintiffs, in a sum not exceeding \$250, which you find from the evidence the services of plaintiffs were reasonably worth."

The court gave the following instructions for the defendant:

"The court instructs the jury that the burden of proof is on the plaintiffs to establish: (1) The employment of the plaintiffs by the defendant for the purpose and on the terms mentioned in plaintiffs' petition. (2) That the plaintiffs were the efficient and procuring cause of the sale, by the defendant Miles, of the farm mentioned in evidence to Mr. Williams, and, unless you believe and find from the evidence that the plaintiffs have so proved these facts, you will find the issues in favor of the defendant.

"The court instructs the jury that unless the plaintiffs sold defendant's real estate on the terms given them by defendant, or procured a purchaser therefor, ready, willing, and able to purchase defendant's property on such terms, plaintiffs cannot recover unless they shall further find that, after hav-

ing been fully informed of the variations made by plaintiffs in selling said real estate from the instructions given them, defendant approved of these variations and ratified the contract of sale as made by plaintiffs.

"The court instructs the jury that, although you may believe and find from the evidence that the defendant did on or about the _____ day of _____, 1909, contract and agree with plaintiffs as alleged in plaintiffs' petition, and that no time was fixed as to when the agency should terminate, yet you are instructed that such employment is in law only for a reasonable time, and what is a reasonable time depends on the intention of the parties as gathered from all the facts and circumstances in the case, and if within a reasonable time, as herein defined, plaintiffs failed to consummate the sale, and failed to induce E. S. Williams to buy, the defendant had a right to employ other agents to make the sale for him, or to make the sale himself, without notice to the plaintiffs, even to a person to whom plaintiffs introduced him, and if, under these circumstances, defendant, through another agent or himself, sold in good faith to Williams, the plaintiffs cannot recover."

For further assignment of error the appellant claims that the evidence wholly fails to show that the plaintiffs were the procuring cause of the sale, and that there was no evidence which authorized the court to submit that question to the jury. The law is well established in this state that, to entitle a real estate broker to his commission, he must be the efficient cause in finding a purchaser; that it is not sufficient that the act of the broker was one of a chain of causes bringing about the sale, but, in order for the broker to recover for his services, his act or acts must have been the procuring or inducing cause, and the burden is upon him to show, not only that he opened negotiations with the purchaser, but that the sale was actually effected through his means, and not by the intervention of new parties or upon different terms. And where an agent fails to get his offer within the terms of his authorization, and the purchaser afterwards buys the same piece of property on the same or less terms than those on which the first agent had authority to sell, the chain of causation would be broken, since the efforts of the first agent would have produced no result, and his labors would not be the proximate, legal, or procuring cause, and therefore he would not be entitled to any compensation.

Objection is made to the instruction given for the plaintiff wherein the court charged that "if the jury believe and find from the preponderance of the evidence that the plaintiffs, or either of them, suggested to E. S. Williams that the defendant, Miles, would take from him, the said Williams, a certain piece of property," etc. This, of itself, would not have been sufficient. However, the in-

struction does not stop there, but proceeds to state "that if said suggestion made by the plaintiffs, if it was made, was the procuring cause of the sale and finally brought about the agreement as made between the defendant and the said Williams for the sale of said farm to said Williams," etc. This clause, considered in connection with the preceding part of the instruction, contained a correct exposition of the law of the case. The owner of real estate may authorize more than one agent to sell, and, in the absence of a distinct contract to the contrary, where a sale is made, the commission belongs to the agent whose efforts are the procuring cause of the sale, no matter which one may close the deal. *Gerhardt Real Estate Co. v. Marjorie Real Estate Co.*, 144 Mo. App. 620, 129 S. W. 419. The instructions given by the learned court contained a full declaration of the law and were applicable to the facts and are not vulnerable to appellant's criticism.

It is further contended that the evidence in this case showed there was no specific time within which the plaintiffs should sell the defendant's land, and that under such circumstances the owner of the land, after a reasonable time, and in good faith, could revoke the agency. The law is undoubtedly well settled that where an agent sets on foot a sale of property which wholly fails, and, after such failure, another agent steps in and makes the sale to the parties negotiated with by the first agent, if the first agent has shown his inability to make the sale, and even though there is a possibility that the work of the first agent made some impression or had something to do with the sale, yet, under such a state of facts, in legal contemplation, the first agent would not effect the sale and consequently would not be entitled to any compensation. *La Force v. Washington University*, 108 Mo. App. 517, 81 S. W. 209. The court in this case gave an instruction for the defendant which fully embodied and fairly presented this phase of the law and properly submitted the question to the jury. The jury have found for the plaintiffs, and their finding as to matters of fact is conclusive upon us.

Appellant also contends that the court refused to permit him to prove by a son of the defendant that, some two years before the trade to Williams, he called Williams' attention to the farm and made an effort to sell it to him. Appellant, in this connection, states: "The evidence in this case shows that numerous agents and others directed Williams' attention to the farm, and the fact that it was for sale by the defendant Miles." Under this condition of the evidence, the testimony of defendant's son, excluded by the court, was cumulative, and its exclusion under such circumstances would not constitute reversible error.

The law in this case has been properly declared and the issues of fact submitted to

the jury. They have decided adversely to the appellant, and their decision is inviolable so far as the appellate court is concerned. The law has provided appellate courts with glasses to detect evidence, but no balances with which to weigh it, but has relegated the duty of weighing the facts exclusively to the jury.

Finding no errors materially affecting the merits of the case, the judgment is affirmed.

COX, J., concurs. GRAY, J., not sitting.

**UNGERER & CO. v. LOUIS MAULL
CHEESE & FISH CO.**

(St. Louis Court of Appeals. Missouri. Jan. 24, 1911. Rehearing denied Feb. 7, 1911.)

1. SALES (§ 166*)—CONTRACTS—CONSTRUCTION—PERFORMANCE.

A contract for the sale and purchase of "gum tragacanth powdered," which is a distinct description of a particular article according to a known mercantile classification, is a contract for goods of the particular kind, and the designation is a condition going to the essence of the contract, and delivery of a substitute is a breach of contract.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 391-402; Dec. Dig. § 166.*]

2. SALES (§ 166*)—SALE BY SAMPLE—OBLIGATION OF SELLER.

A sale by sample does not relieve the seller from the obligation assumed by him in selling by description, and, where the sample is an imitation not discoverable by mere inspection, the goods delivered may not be an imitation of what the contract calls for.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 391-402; Dec. Dig. § 166.*]

3. SALES (§ 119*)—CONTRACTS—RESCISSION.

A buyer of goods for delivery in installments, who received a part of the installments, may revoke the order for future installments because the goods delivered failed to comply with the contract, though the goods subsequently tendered are equal in quality to the contract.

[Ed. Note.—For other cases, see Sales, Cent. Dig. § 293; Dec. Dig. § 119.*]

4. CONTRACTS (§ 265*)—RESCISSION.

A rescission of a contract involves restoring the status quo of the parties.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. § 1187; Dec. Dig. § 265.*]

5. SALES (§ 176*)—CONTRACTS—RESCISSION—GROUNDS.

A buyer, having more than one reason for rejecting goods, does not, by assigning one reason, conclusively admit that there is no other, and he may justify his refusal to accept goods on another ground.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 436-444; Dec. Dig. § 176.*]

6. SALES (§ 166*)—CONTRACTS—BREACH.

Where a buyer of goods for delivery in installments sought to justify a refusal to accept goods tendered because the goods previously delivered did not comply with the terms of the contract, the testimony of an expert chemist that the goods previously received were a substitute for the goods contracted for but of such close resemblance that a casual examination would not detect the defect, was admissible

to prove a fact to defeat the seller's right to recover damages for refusal to receive the goods.

[Ed. Note.—For other cases, see Sales, Dec. Dig. § 166.*]

7. SALES (§ 405*)—CONTRACTS—DAMAGES.

Where, in an action for a buyer's refusal to accept goods under a contract calling for delivery in installments, the buyer sought to recover damages for the seller's act in delivering a substitute, the testimony of an expert chemist that the goods delivered were a substitute for the goods called for of such close resemblance that a casual inspection would not detect the defect was admissible, though the buyer had sold the goods received at a profit.

[Ed. Note.—For other cases, see Sales, Dec. Dig. § 405.*]

8. SALES (§ 382*)—CONTRACTS—BREACH—DAMAGES.

Where, in an action against a buyer for damages for refusal to accept part of goods sold, the seller sought to recover the difference between the contract price and the amount obtained at a public sale of the goods, the testimony of an expert chemist that goods delivered by the seller and received by the buyer under the contract were a substitute for the goods called for was admissible to determine whether the resale was a proper criterion of the market value of the goods not accepted; the seller claiming that the goods delivered by him and the goods sold because of the buyer's refusal to accept were of the same quality.

[Ed. Note.—For other cases, see Sales, Dec. Dig. § 382.*]

Appeal from St. Louis Circuit Court; George H. Williams, Judge.

Action by Ungerer & Co. against the Louis Maull Cheese & Fish Company. From a judgment for plaintiff, defendant appeals. Reversed and remanded.

Plaintiff sued defendant in the circuit court of the city of St. Louis to recover damages for defendant's failure to take and pay for 32 barrels of gum tragacanth as per contract.

It is admitted that the plaintiff and defendant entered into two contracts, the first on March 27, 1908, and the second on April 8, 1908, by each of which plaintiff agreed to sell to defendant, and defendant agreed to buy from plaintiff, 25 barrels of gum tragacanth powdered, or a total of 50 barrels under both contracts, at 26 cents per pound, f. o. b. New York; the goods to be ordered and taken by defendant, as wanted by it, by December 31, 1908, under the first contract, and by April 1, 1909, under the second. The plaintiff alleged in its petition, which contained two counts, that up to September, 1908, defendant took and paid for in the aggregate 18 barrels under the first contract (a barrel containing about 300 pounds), but had taken none under the second, and thereafter declined to order or take any more, and on December 31, 1908, repudiated both contracts and notified plaintiff that it would not order or take any more gum tragacanth. The petition further alleged that, upon the faith of the contracts, plaintiff had purchased sufficient gum tragacanth to meet them, and had retained the

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes.

same up to and including December 31, 1908, and up to the time of filing this suit; that the market price of gum tragacanth in the city of New York on December 31, 1908, and from thence hitherto, has fallen to 12¼ cents per pound, and that plaintiff, after due notice to defendant and proper advertisement, had resold the 32 barrels in the city of New York at public sale realizing only 12¼ cents per pound. By the first count plaintiff seeks to recover \$427.50 as the difference between the contract price and the amount received upon such resale for 7 barrels, and by the second count seeks to recover \$1,127.50 as the difference between the contract price and the amount received upon the resale of 25 barrels.

For its answers and defenses to the two counts of the petition the defendant specifically denies all allegations except those relating to the making of the contracts, and states that it canceled and rejected the contracts and refused to accept further shipments on October 21st, instead of December 31st; that the 18 barrels shipped did not contain gum tragacanth powdered, as called for in the contract, but contained some powdered article, claimed by the plaintiff to be tragacanth powdered, but in reality a cheap, inferior substitute; that the cancellation and rejection and refusal were due to the failure of plaintiff to carry out its warranties and obligations to deliver gum tragacanth powdered, as called for in the contracts.

By counterclaim defendant seeks to recover of plaintiff \$742.50 as the difference between the contract price of 18 barrels of real gum tragacanth, and the market price of the 18 barrels of alleged substitute, at the times and place of the shipments of the 18 barrels; it being alleged that they were shipped in installments between March 27th and September —, 1908.

In its replies to the first and second counts of the petition and in its answer to defendant's counterclaim, plaintiff, in addition to general denials of the allegations of new matter, denies the substitution charged and asserts the genuineness of the article shipped, and then asserts that the 18 barrels of gum tragacanth were shipped under and in pursuance of the terms of the contracts; that defendant by receiving and accepting the barrels as containing gum tragacanth in accordance with and in pursuance of the contracts, without raising any question or objecting on the ground that the contents were not gum tragacanth as called for in the contracts, or were a cheap or inferior article or substitute of any kind for gum tragacanth, has estopped itself to deny or question that the article was gum tragacanth.

The evidence tended to prove that the plaintiff, a corporation dealing in gum tragacanth with its place of business in the city of New York, had a selling agent in St.

Louis named D. B. Morris. Prior to March 27, 1908, it sent Morris a sample of the grade of gum it had in stock. Morris, it seems, had a personal arrangement with one Howland, dealer in ice cream materials, to furnish at 32 cents per pound all the gum tragacanth powdered the latter would need in his business during the season of 1908; the article being used as a filler in ice cream, much the same as gelatine. The defendant was a corporation doing business in the city of St. Louis. Morris visited defendant's president, and, by showing him the arrangement whereby Howland was to take his season's need of gum tragacanth, amounting, so Morris said, to 30 or 40 barrels of 300 pounds each, at 32 cents per pound, and by promising to sell the gum for defendant, probably to Howland, induced the defendant to enter into the contracts sued upon. The contracts were in writing and were each for "25 Bbls. Powd. Gum Tragacanth." The first one, but not the second, stipulated that the article was to be "Identical with sample sent to Morris." The evidence on the part of the plaintiff tended to prove that plaintiff dealt only in "Indian gum," which its witness designated as a grade of "gum tragacanth." Between the time of making the contracts and some time in September, 1908, the plaintiff shipped to the defendant 18 barrels of "gum tragacanth powdered," as its witness called it. These were paid for by the defendant at the contract price of 26 cents per pound. Defendant had an arrangement with Morris whereby he was to dispose of the gum, apparently to Howland, for 32 cents per pound, and was to divide the difference, or 6 cents per pound, between defendant, Morris, and one Larremore, whose connection with the matter does not appear. Defendant's officers personally took no part in disposing of the 18 barrels. It paid for them and held them in its warehouse while Morris disposed of them to Howland. Thirteen of the barrels were entirely acceptable to Howland, and he took and used and paid for their contents without any objection. Three barrels he refused to take, on account of defect in quality; but defendant was put to no trouble on this account, as Morris took the three barrels and disposed of them elsewhere on plaintiff's account, and plaintiff delivered instead three other barrels which were entirely acceptable to Howland and which he took and used and paid for. One barrel Howland objected to Morris about on account of defect in quality, but took and used and paid for it upon Morris' personal assurance that either the plaintiff would give Howland a 10 per cent. rebate on the barrel, or he (Morris) would do so personally. These difficulties defendant apparently knew nothing about; the matter being attended to by Morris alone. There is no pretense in this case that defendant or any one connected with it knew anything

about gum tragacanth powdered or had ever handled or dealt in it before. This was a mere outside speculation on its part.

In September, 1908, Morris and defendant separated as to their selling arrangement. This seems to have left the defendant in the predicament of having still to take 32 barrels of gum tragacanth powdered as to which it knew absolutely nothing and had no customers for. It was then that defendant's president "began to investigate," as he puts it, and he discovered the objections already mentioned, which Howland, the defendant's only customer, had made to the 4 barrels. In October and again in December of the year 1908, in response to proffers of shipment, defendant wrote to the plaintiff repudiating the contract and refusing to take any more goods under it, laying its repudiation and refusal upon the ground that the goods furnished were of poor quality. He had no information at that time that the goods furnished were not genuine gum tragacanth.

The evidence tended to prove the resale of the 32 barrels in the city of New York, after notice and advertisement, all substantially as alleged in the petition; it appearing that the price received was \$1,118.43, or 12¼ cents per pound for the 32 barrels sold in one lot. Plaintiff's evidence also tended to prove that the 32 barrels had been purchased by it to meet its contracts with defendant, and that the contents of each of the 32 barrels were exactly like the contents of each of the 18 barrels shipped.

Defendant was permitted without objection to show: That there is a substitute in common use for powdered gum tragacanth. It consists of gum which is called in India, where it originates, Karaya or Karel gum; it is also known in the gum trade as "Indian gum" and "Indian gum tragacanth." It is frequently used as a substitute for real gum tragacanth. That since the defendant entered into its contracts with the plaintiff the highest market price which said substitute had attained was 20 cents per pound.

Defendant produced as a witness Dr. Charles E. Caspari, an expert chemist, who, after this suit was filed, had tested a sample taken from the barrel which defendant still retained out of the 18 barrels delivered under the contract. He was asked by counsel for defendant if the barrel contained "gum tragacanth powdered." Objection being made by plaintiff, the counsel for defendant stated that he offered to prove by the witness that the article shipped was not gum tragacanth, but a substitute bearing such a close resemblance to it that the usual and casual examination of the goods by sight and feeling would not detect the defect. The court sustained the objection, and defendant duly excepted.

The court instructed the jury that the defendant was not entitled to recover on its counterclaim. There was verdict and judg-

ment in favor of the plaintiff and against the defendant as to the first count of the plaintiff's petition for \$288.75 and as to the second count for \$515.63, and also for plaintiff and against defendant on the defendant's counterclaim. After an unsuccessful motion for a new trial, the defendant has duly prosecuted its appeal to this court.

Clarence T. Case, for appellant. Luther Ely Smith, for respondent.

CAULFIELD, J. (after stating the facts as above). Defendant asserts that the court erred in refusing to allow defendant's expert witness, who made a chemical analysis of one barrel, to testify as to the contents of it. Reviewal of the court's action involves an inquiry into the defendant's right to show upon the trial, under the circumstances of this case: First, that the 18 barrels delivered contained an article different in kind from that called for by the contract; and, second, that the 32 barrels sold in New York did not contain the same article described in the contracts. For undoubtedly the proof offered had a tendency to prove not only that the 18 barrels shipped contained a mere imitation of "gum tragacanth powdered," but that the 32 barrels sold in New York likewise did, for plaintiff's evidence disclosed that the contents of all the 50 barrels were exactly the same. The admissibility of the evidence as proof of the contents of the 18 barrels should in turn be considered: First, as to whether such proof is proper in order to wholly defeat plaintiff's right of recovery; and, second, whether it was proper in support of defendant's counterclaim. Whether it was admissible for the purpose of wholly defeating plaintiff's right of recovery depends, we think, upon the answers to be given to the following questions: Was a warranty as to kind to be implied from the use in the contracts of the descriptive words "gum tragacanth powdered"? Could defendant, after accepting part of the goods without knowing of their insufficiency under the contract, reject future shipments? Did the objection that the goods delivered were not of the contract description come too late? Did the fact that defendant rejected upon the ground of defect in quality prevent it relying upon the after-discovered difference in kind? We have no difficulty in answering the first question in the affirmative. The testimony in this case shows that "gum tragacanth powdered" is distinctly descriptive of a particular article, according to a known mercantile classification. The contract was not as to specific goods, but as to any goods, of a particular kind; and in such case the designation used is a condition going to the essence of the contract. "In such cases the description of the goods is shown by the terms of the order, and the accuracy of the description is necessarily a condition, as it is for goods of that kind only that the buyer contracts." Benjamin on Sales (5th Ed.) p.

608. To breach such a condition "is as if A. should sell a horse to B. and deliver a cow instead." *Catchings v. Hacke*, 15 Mo. App. 51. See, also, *Whitaker v. McCormick*, 6 Mo. App. 114; *Gaus v. Magee*, 42 Mo. App. 307. It was a distinct breach of this implied warranty or condition if plaintiff delivered, instead of the "gum tragacanth powdered," as contemplated by the contract, an article which "was not gum tragacanth powdered, but a substitute which bears such a close resemblance to gum tragacanth powdered that the usual and casual examination of the goods by sight and feeling would not detect the defect," as defendant distinctly offered to prove by the evidence excluded. We have carefully considered in this connection the suggestion made by plaintiff's counsel in his brief that the evidence in the case conclusively shows that the parties received the identical article they contracted for, whether it was properly called gum tragacanth or not; but we cannot agree with it. There may have been evidence to that effect; but, to say the least, it may be equally inferred from the evidence that a clever substitute was palmed off upon defendant for real gum tragacanth. But plaintiff insists that the sale was by sample, and that, if the goods furnished or tendered corresponded with the sample, it was sufficient. This contention could pertain only to the seven barrels remaining undelivered under the first contract. The second contract did not contemplate a sale by sample. But we do not understand that a sale by sample relieves a seller from the obligation assumed by him in selling by description. If the sample is an imitation not discoverable by mere inspection, it does not follow that the bulk which follows may also be an imitation of what the contract calls for.

And the second question can also be answered in the affirmative. In *Morrison v. Lelser*, 73 Mo. App. 95, 98, the court held that a vendee, who agrees to purchase goods of a certain quality to be delivered in installments (as in the case here), will be allowed to revoke the order for future shipments because the prior shipments did not meet the requirements of the contract of sale. The language used by the court in the opinion is peculiarly applicable to the case at bar. "It seems to us that the agreement to sell, as in the case at bar, is one executory contract; that before plaintiffs can be allowed to recover they must show a substantial compliance with the terms of said contract; and if, during the delivery of the goods, the vendor makes substantial breach of any of its conditions as to the quality of goods, then the vendee may rescind the contract as to such future deliveries and decline to take any more goods even though such latter installment may, on inspection, be found equal in quality to the terms of the contract." There is no pretense that the defendant knew at the time of its acceptance of the goods that they failed to comply with the contract, so

that the element of its having waived its right to refuse to go on with the contract by knowingly and voluntarily accepting inferior goods is not in the case. The trial court in sustaining the objection to the question stated that it did so on the authority of *Manley v. Crescent Novelty Mfg. Co.*, 103 Mo. App. 135, 77 S. W. 489. That case declared that, in determining to refuse property and rescind the sale by tendering it back to the vendor, the purchaser is required to act within a reasonable period, and that, where the period is so long that its unreasonableness is apparent, the court may declare it unreasonable as a matter of law. The facts in this case are essentially different. That case was one where the vendee had attempted to rescind the contract as to the goods already delivered and paid for and to recover back the purchase price paid therefor. In this case the vendee is resisting an attempt to make it pay for goods which it has not received and which plaintiff can compel it to pay for only by showing compliance on plaintiff's part with the contract.

The present case can hardly be said to involve the doctrine of rescission at all. It is rather a case where the purchaser claims to be excused from further performance because of the prior breach on the part of the seller. Rescission involves restoring the status quo of the parties, and that is impossible in the present case, as it was in *Morrison v. Lelser*, supra, and in *Grafeman Dairy Co. v. St. Louis Dairy Co.*, 96 Mo. App. 495, 70 S. W. 390, where the right to refuse later installments was upheld in cases like the present. This brings us to the co-related question of whether defendant's basing its refusal to continue with the contract upon an untenable ground estopped it to set up a proper ground when sued for its alleged breach of contract. It has been held in *New York* and *Michigan* that, where a buyer objects to a tender on specified grounds, all others are waived, and the seller, in order to recover, need only prove compliance with the contract in the particulars to which the objections related. *Littlejohn v. Shaw*, 159 N. Y. 188, 53 N. E. 810; *Ginn v. Clark Co.*, 143 Mich. 84, 106 N. W. 867, 107 N. W. 904. But those decisions seem contrary to principle. We see no reason why a buyer, having more than one reason for rejecting goods, conclusively admits, by assigning one, that there is no other. Such action on his part might be evidence that there is only the one objection he specifies; but that is all that can be said. The rule laid down in those cases is not the rule in this state as to other contracts, and we do not see why it should be applied to contracts of sale. In *Hayden v. Grillo*, 26 Mo. App. 239, it was held that the fact that the defendant refused to comply with his agreement to pay commissions to a real estate agent upon another ground did not do away with the necessity, on the part of the plaintiffs, of showing a performance of their

undertaking on their part, in order to recover the price of their services. Then, too, in the cases mentioned, the rule was laid upon the ground of waiver, which necessarily presumes knowledge of the defect to which the waiver relates, while in the case at bar there was no knowledge on the part of defendant of the defect now being discussed at the time when the other ground was assigned.

We conclude that the evidence excluded should have been admitted in evidence, as tending to prove a fact going to wholly defeat plaintiff's right to recover.

In our judgment the evidence was also admissible under defendant's counterclaim. It is immaterial that defendant sold the 18 barrels at an increased price, as plaintiff suggests. *Brown v. Emerson*, 66 Mo. App. 63.

The evidence excluded was also admissible for the purpose of determining whether the alleged resale in New York was a proper criterion of the market value of the 32 barrels. We find no difficulty in holding that, in order that such a sale should have the effect desired, it should be a sale of the thing described in the contract, and not some inferior substitute.

For the error noted the judgment of the court in favor of the plaintiff upon its alleged causes of action and upon the counterclaim is reversed, and the cause remanded.

REYNOLDS, P. J., and NORTON, J., concur.

FAHLE v. CONNECTICUT MUT. LIFE INS. CO. OF HARTFORD, CONN.

(St. Louis Court of Appeals. Missouri. Dec. 30, 1910. Rehearing Denied Feb. 7, 1911.)

1. INSURANCE (§ 830*)—LIFE INSURANCE—NONFORFEITURE STATUTES.

Rev. St. 1899, § 7897 (Ann. St. 1906, p. 3752), provides that life insurance policies shall be nonforfeitable under circumstances specified, notwithstanding a default in payment of premiums. Section 7898 (page 3753) provides when a paid-up policy may be demanded, notwithstanding a default in the payment of premiums. Section 7899 (page 3754) provides that if the death of insured occur within the term of temporary insurance covered by the value of the policy, as determined in section 7897, and if no condition other than the payment of premiums shall have been violated by insured, the company shall be bound to pay the amount of the policy the same as if there had been no default in the payment of premiums. *Held*, that section 7900 (page 3755), specifying four cases in which the three preceding sections shall not be applicable, implies that such sections shall control all cases not so specified whatever the form of policy.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 892, 893; Dec. Dig. § 350.*]

2. INSURANCE (§ 850*)—LIFE INSURANCE—PAYMENT OF PREMIUM—DEFAULT—PAID-UP POLICY—STATUTES—APPLICATION.

Rev. St. 1899, § 7898 (Ann. St. 1906, p. 3753), declares that after payment of three or more full annual premiums, and not later than

60 days from the beginning of the extended insurance provided for in section 7897 (p. 3752), the holder of a policy may demand, and the company shall issue, its paid-up policy, which, in the case of a limited payment life policy or of a continued endowment policy, payable at a certain time or at death, shall be for an amount bearing such proportion to the amount of the original policy as the number of complete annual premiums actually paid shall bear to the number of premiums stipulated for. *Held*, that where insured made default in the payment of premiums on an endowment policy payable August 21, 1947, or at death, after having paid more than three full annual premiums, but prior to his death two months and five days after default had made no demand for a paid-up policy, section 7898 had no application to the rights of his beneficiary under the policy.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 892, 893; Dec. Dig. § 350.*]

3. INSURANCE (§ 350*)—PREMIUMS—DEFAULT—NONFORFEITURE STATUTE—APPLICATION—"NET VALUE."

The term "net value" as used in Rev. St. 1899, §§ 7897, 7898, 7899, 7900 (Ann. St. 1906, pp. 3752-3755), relating to insured's rights in life policies after default in payment of premium, is to be determined by construing such sections together. The term does not mean the provision for the amount of paid-up insurance that insured would be entitled to if demanded, but is an arbitrary apportionment arrived at in the method prescribed by section 7897, which "net value" is the same referred to in section 7900, so that where insured, after having paid more than three annual premiums on an endowment policy, payable on a specified date or at death, made default in the payment of premiums, and at the date of default three-fourths of the net value, computed as directed by section 7897, amounted to \$47.86, while the net value of the paid-up insurance provided in the policy was only \$42.79, and the sum of \$47.86 would purchase extended insurance under section 7897 for a term extending beyond the date of insured's death, the amount of paid-up insurance so stipulated in the policy was not sufficient under section 7900 to make section 7897 inapplicable, and hence insured's beneficiary was entitled to recover the full amount of the policy.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 892, 893; Dec. Dig. § 350.*]

For other definitions, see Words and Phrases, vol. 5, pp. 4782, 4783.]

Norton, J., dissenting.

Appeal from St. Louis Circuit Court; George C. Hitchcock, Judge.

Action by Helen K. Fahle against the Connecticut Mutual Life Insurance Company of Hartford, Connecticut. Judgment for plaintiff, and defendant appeals. Affirmed.

This is a suit by the beneficiary on a life insurance policy for the full amount thereof, \$1,000. The trial was to the court upon an agreed statement of facts from which we deduce the following: The policy is a continued payment endowment policy payable at a certain time, August 21, 1947, or at death. It provided for an annual premium of \$23.29 payable on August 21st in every year during the continuance of the policy. The policy being issued July 1, 1902, the insured, Henry J. Fahle, paid \$1.18, which carried the insurance to August 21, 1902, the date for the

payment of the first annual premium. By agreement it was arranged that the annual premium might be paid by quarterly installments of \$6 each, payable on the 21st day of August, November, February, and May during the continuance of the policy. The insured made payment of all the quarterly installments of premiums due under the policy up to and including that due February 21, 1908, but made default as to the one due May 21, 1908, at age 38, and continued in default until his death, two months and five days later. Proof of death was duly made. The policy contained a provision entitling the holder, in case of default in the payment of premiums, to have paid-up endowment insurance for the same term as was the original insurance; the amount of such paid-up insurance to be determined by a table printed on the policy. According to said provision and the table mentioned, the paid-up insurance to which the holder was entitled after paying five complete annual premiums and three quarterly installments of the sixth annual premium was \$118. The net value of such paid-up insurance, computed at the time of default according to the Actuaries' or Combined Experience Table of Mortality, with 4 per cent. interest per annum, would have been \$42.79. Three-fourths of the net value of the policy in suit, computed at the time of default, upon the Actuaries' or Combined Experience Table of Mortality, with 4 per cent. interest per annum, was \$47.86. If this amount of \$47.86 be taken as a single net premium for the purchase of paid-up insurance or extended term insurance, in accordance with the provisions of sections 7897-7898 of the Revised Statutes of Missouri of 1899 (Ann. St. 1906, pp. 3752, 3753), the net value of such paid-up or extended term insurance at the date of purchase would in any case be equivalent to the said amount, to wit, \$47.86. This sum, \$47.86, if applied as a net single premium for temporary insurance for the full amount written in the policy, to wit, \$1,000, at age of insured at the time of default of premium, upon the basis of the Actuaries' or Combined Experience Table of Mortality with 4 per cent. interest per annum, would have been sufficient to provide such insurance for a period extending beyond the date of death of the insured. At the time of the failure to pay premium due on said policy, to wit, May 21, 1908, no conditions of said policy had been violated other than the payment of premium. The court made a finding and rendered judgment in favor of the plaintiff for the full amount of the policy, \$1,000, and interest at 6 per cent. per annum to the day judgment was rendered. After an unsuccessful motion for a new trial and in arrest of judgment, the defendant has duly prosecuted its appeal to this court.

A. & J. F. Lee, for appellant. Jos. Block, for respondent.

CAULFIELD, J. (after stating the facts as above). Both parties agree that the policy in suit is a Missouri contract, and as the only question presented is to be decided by a construction of, and reference to, sections 7897 to 7900 inclusive, of the Revised Statutes of Missouri of 1899 (Ann. St. 1906, pp. 3752-3755), we will set forth their substance at the outset of this opinion, omitting parts not important to the controversy.

"Sec. 7897. Policies nonforfeitable, when.—No policies of insurance on life hereafter issued by any life insurance company authorized to do business in this state, * * * shall, after payment upon it of three annual payments, be forfeited or become void, by reason of nonpayment of premiums thereof, but it shall be subject to the following rules of commutation, to wit: The net value of the policy, when the premium becomes due, and is not paid, shall be computed upon the actuaries' or combined experience table of mortality, with four per cent. interest per annum, and * * * three-fourths of such net value shall be taken as a net single premium for temporary insurance for the full amount written in the policy; and the term for which said temporary insurance shall be in force shall be determined by the age of the person whose life is insured at the time of default of premium, and the assumption of mortality and interest aforesaid; but, if the policy shall be an endowment payable at a certain time, or at death, if it should occur previously, then, if what remains as aforesaid shall exceed the net single premium of temporary insurance for the remainder of the endowment term for the full amount of the policy such excess shall be considered as a net single premium for a pure endowment of so much as said premium will purchase, determined by the age of the insured at date of default in the payment of premiums on the original policy, and the table of mortality and interest aforesaid, which amount shall be paid at end of original term of endowment, if the insured shall then be alive.

"Sec. 7898. Paid-up policy may be demanded, when.—At any time after the payment of three or more full annual premiums, and not later than sixty days from the beginning of the extended insurance provided in the preceding section, the legal holder of a policy may demand of the company, and the company shall issue, its paid-up policy, which, in case of an ordinary life policy, shall be for such an amount as three-fourths of the net value of the regular policy at the age and date of lapse, computed according to actuaries' or combined experience table of mortality, with interest at the rate of four per cent. per annum, * * * will purchase, applied as a net single premium upon the said table of mortality and interest rate aforesaid; and in case of a limited payment life policy, or of a continued payment endowment policy, payable at a certain time,

or at death, it shall be for an amount bearing such proportion to the amount of the original policy as the number of complete annual premiums actually paid shall bear to the number of such annual premiums stipulated to be paid." (Italics our own.)

"Sec. 7899. Rule of payment on commuted policy.—If the death of the insured occur within the term of temporary insurance covered by the value of the policy as determined in section 7897, and if no condition of the insurance other than the payment of premiums shall have been violated by the insured, the company shall be bound to pay the amount of the policy, the same as if there had been no default in the payment of premium, anything in the policy to the contrary notwithstanding.

"Sec. 7900. Foregoing provisions inapplicable, when.—The three preceding sections shall not be applicable in the following cases, to wit: If the policy shall contain a provision for an unconditional surrender value, at least equal to the net single premium, for the temporary insurance provided for hereinbefore, or for the unconditional commutation of the policy for non-forfeitable paid-up insurance, or if the legal holder of the policy shall within sixty days after default of premium, surrender the policy and accept from the company another form of policy, or if the policy shall be surrendered to the company for a consideration adequate in the judgment of the legal holder thereof, then, and in any of the foregoing cases, this article shall not be applicable: Provided, that in no instance shall a policy be forfeited for nonpayment of premiums after the payment of three annual payments thereon; but in all instances where three annual premiums shall have been paid on a policy of insurance, the holder of such policy shall be entitled to paid-up or extended insurance, the net value of which shall be equal to that provided for in this article."

Defendant states that the only question before us is: "Did the policy in suit meet the conditions of the proviso to section 7900 as to the amount of paid-up insurance given?" That is to say, did the policy entitle its holder to paid-up insurance "the net value of which shall be equal to that provided for in this article"? If it did, then the provision for paid-up insurance was binding upon the insured, the insured could not recover more than \$118, and the finding and judgment of the trial court were erroneous. If it did not, then the judgment of the trial court should be affirmed. Defendant contends that the proviso is satisfied if the paid-up insurance provided for in the policy equals or exceeds in amount that paid-up endowment insurance which the insured might have demanded upon the policy, it being an endowment policy, by virtue of the above italicized portion of section 7898. On this theory the amount of the paid-up insurance

need have been only \$111.11, while in fact it was \$118.

Plaintiff contends that the proviso is not satisfied unless the amount of paid-up insurance provided for is at least equal to the greatest amount of paid-up insurance that could be bought with the net value of the original policy computed at the time of default as provided in section 7897. On this theory the amount of paid-up insurance was insufficient, for it is agreed that it would have taken only \$42.47 of net value to purchase \$118 of paid-up insurance, while three-fourths of the net value of the original policy available to purchase paid-up insurance at the time of default was actually \$47.86.

One of the purposes of these statutes is to prevent the insurance companies inserting in their policies conditions of forfeiture or restriction, except so far as the statute permits. And section 7900, by specifying four cases in which the three preceding sections "shall not be applicable," necessarily implies that those sections shall control all cases not so specified, whatever be the form of the policy. *Equitable Life Assurance Society v. Clements*, 140 U. S. 226, 11 Sup. Ct. 822, 35 L. Ed. 497.

That a provision for paid-up insurance contained in a policy must come strictly within the cases specified in section 7900 is evidenced by the action of our Supreme Court in holding that a provision was not "unconditional" if it provided that the paid-up policy should issue "on demand made within six months," although such provision was more liberal than section 7898, which provided for paid-up insurance on demand made within 60 days. *Cravens v. Insurance Co.*, 148 Mo. 583, 50 S. W. 519, 53 L. R. A. 305, 71 Am. St. Rep. 628. The court there held that section 7898 was not applicable in any event because the holder of the policy had not demanded the paid-up insurance. Such is the case here. No pretense is made that any demand was made for paid-up insurance. Either the provision in the policy is sufficient under section 7900, and its proviso, to render section 7897 inapplicable, or else the plaintiff is entitled to recover the full amount of the policy; it being conceded that, if section 7897 is applicable, the net value of the policy at the time of default was more than sufficient to carry the insurance for its full amount beyond the time when the insured died. Undoubtedly section 7897 is applicable unless the provision for paid-up insurance contained in the policy is sufficient under section 7900 and its proviso to render it inapplicable. By that proviso "the holder of such policy shall be entitled to paid-up or extended insurance the net value of which shall be equal to that provided for in this article." The article referred to is, of course, the one containing sections 7897 to 7900 inclusive.

We take it that the proviso means noth-

ing else than that, in order to determine the amount of paid-up insurance which the policy must have provided for in order to render section 7897 inapplicable, we must first ascertain the net value of the policy computed in accordance with the provisions of the article, and then ascertain how much paid-up insurance can be bought with the net value so ascertained. The insured was entitled to as much paid-up insurance as could be purchased with the net value so ascertained. *Nichols v. Mutual Life Ins. Co.*, 176 Mo. 355, 381, 75 S. W. 664, 62 L. R. A. 657.

If then we ascertain what "net value" is provided for "in this article," we can easily find the answer to our question.

We have examined the article carefully and find that the only place "net value" is provided for is section 7897 and section 7898. Section 7897 prescribes the rule for computing the net value of the policy and provides that in certain event three-fourths of the result of such computation shall be applied toward purchasing temporary or term insurance for the full amount of the policy. So far as the facts of this case are concerned, the rule of section 7897 is the same as to endowment insurance. Section 7898 prescribes a rule for ascertaining net value exactly like that prescribed by section 7897, and provides that at any time after the payment of three annual premiums, and not later than 60 days from the beginning of the temporary insurance provided for in section 7897, the legal holder of a policy may demand, and the company shall issue, its paid-up policy, which in case of an ordinary life policy shall be for such an amount as can be purchased with three-fourths of the net value of the regular policy at the age and date of lapse.

As above mentioned, section 7898 is inapplicable to the case at bar because the legal holder of the policy did not demand paid-up insurance. If either is applicable, it is section 7897. They are both referred to at this point merely to show the only manner in which the article provided for "net value." Now, in so far as they refer to "net value," the said sections are to be read together. It has been held that section 7898 clearly indicates that the policies contemplated by section 7897 are such as will admit of the holder obtaining a paid-up policy under section 7898. *Westerman v. Supreme Lodge, K. of P.*, 196 Mo. 670, 729, 94 S. W. 470, 5 L. R. A. (N. S.) 1114. And that "net value" as used in our nonforfeiture statutes is a technical term, to be given its technical meaning, and that it has but one meaning. *Rose v. Franklin Life Insurance Company* (not yet officially reported) 132 S. W. 613, which is but another way of saying that "net value," as provided for "in this article," is the same as that provided for in section 7897.

Now, the parties have stipulated in their agreed statement of fact that on May 21,

1908 (the time of default), three-fourths of the net value of said policy, computed upon the Actuaries' or Combined Experience Table of Mortality, with 4 per cent. interest per annum, is \$47.86.

It is apparent upon reading this stipulation that the "net value" of which said \$47.86 is three-fourths was computed in the manner provided in the article containing the sections under consideration, and is the only "net value" of the policy in suit, contemplated by said article, according to our construction. It is therefore the net value "provided for in this article" which the paid-up insurance provided for in the policy must have had in order to be sufficient to make inapplicable section 7897, under which plaintiff is entitled to the full amount of the policy.

As it is stipulated in the agreed statement of facts that the net value of the paid-up insurance provided for in the policy is only \$42.79, it is plain that the said paid-up insurance is insufficient to render section 7897 inapplicable, and it is therefore applicable, and under it the plaintiff was entitled to the full amount of the policy, and the finding and judgment of the trial court were correct and should be affirmed.

In arriving at the above conclusion, we have considered the contention of counsel for defendant that the words "net value" should be taken to mean the provision for the amount of paid-up insurance the insured would have been entitled to if he had made demand therefor during his lifetime, as provided in the latter part of section 7898; but we cannot agree with it. That section provides that in case of a continued payment endowment policy the paid-up insurance which the insured would have been entitled to demand during his lifetime would have been "for an amount bearing such proportion to the amount of the original policy as the number of complete annual premiums actually paid shall bear to the number of such annual premiums stipulated to be paid." The method of computing the amount so provided for has no relation whatever to "net value" as the term is generally understood and as it is used in our insurance statutes. It is an arbitrary apportionment not based upon the general purpose of our nonforfeiture laws, which is to provide, in case the insured shall make default after he has paid three annual premiums, that at least three-fourths of the reserve or net value accumulated out of his payments shall be applied toward purchasing extended or paid-up insurance, and not be appropriated by the insurance company. *Rose v. Franklin Life Ins. Co.*, *supra*.

While we have no right or inclination to criticise the provision, still we do not feel justified in holding that the words "net value" as used in the proviso to section 7900 point to and mean said provision, when there are other provisions in the article which respond to the call of the words in question by using and dealing expressly with them. Nei-

ther does it follow, as counsel suggests, that, because under section 7898 the insured could by demanding same have obtained paid-up insurance of an amount computed regardless of "net value," therefore provision in the policy entitling him to the same amount of paid-up insurance without demand would be a sufficient compliance with section 7900 to render section 7897 inapplicable.

Section 7898 has no application to this case; the insured having made no demand as thereby contemplated. And in *Cravens v. Insurance Co.*, supra, it was held that, even though the provision in the policy was more liberal than that of section 7898, still, if it did not comply with the provisions of section 7900, it was insufficient. The court held in that case, that notwithstanding the statute made a provision that a party should be entitled to paid-up insurance of a certain amount upon demand made within 60 days, a provision in the policy that he should have paid-up insurance of that amount upon a demand made within six months was not a compliance with section 7900. We appreciate that that holding was based upon the statutory requirement that the provision for paid-up insurance must be "unconditional"; but we think it demonstrates that the power of the insured to contract away his rights is limited, and that giving him by contract what he might have obtained under section 7898 is not necessarily all that section 7900 contemplates.

We believe that the construction which we have given to section 7900 not only conforms to the strict letter of that section, but is in absolute harmony with the spirit and purposes of our nonforfeiture laws.

The judgment will be affirmed. REYNOLDS, P. J., concurs. NORTONI, J., dissents. Judge NORTONI deems this decision contrary to the decision of the Supreme Court in *Nichols v. Mutual Life Ins. Co.*, 176 Mo. 355, 75 S. W. 664, 62 L. R. A. 637, and requests that the cause be certified to the Supreme Court. It is so ordered.

NORTONI, J. (dissenting). It is conceded the policy contained a provision by which nonforfeitable paid-up insurance was vouchsafed to insured of a net value equal to that which he could demand under section 7898, Rev. St. 1899. Indeed, under that section, the insured could demand paid-up insurance in the amount of \$111 only; whereas, the provision contained in the policy for an automatic commutation assured to him paid-up insurance to the amount of \$118. Of course the net value of a promise to pay \$118 is greater than one to pay \$111, and therefore no one denies or disputes the proposition that by the provision contained in the policy it was stipulated the insured should have paid-up insurance of a net value in excess of that which he was authorized to demand if he chose to demand a policy of that character. The four sections of the statute set forth in the opinion are in pari materia and

must therefore be read and interpreted together. Both the words "paid-up insurance" and "extended insurance" are technical terms which possess and signify a separate and distinct meaning peculiar to each in the insurance law. *Nichols v. Mut. Life Ins. Co.*, 176 Mo. 355, 75 S. W. 664, 62 L. R. A. 637. The legislative mandate touching the construction of statutes is that technical terms and words shall be given their appropriate and peculiar meaning in accord with their technical import. Section 8057, Rev. St. 1909. In view of these precepts, I am persuaded that the words "extended insurance" and "paid-up insurance," employed in the proviso of section 7900, Rev. St. 1899, refer, the one to section 7897, which contemplates and deals with "extended insurance," and the other to section 7898, which deals with "paid-up insurance" alone. Indeed, the proviso speaks of "paid-up" or "extended insurance" as provided for "in this article." There is but one section of the article which provides for "extended insurance," and that is section 7897; and another and distinct section provides for "paid-up insurance," that is, section 7898. All of these sections are to be read together, as they deal with the same subject under different circumstances therein suggested, and the concluding words of the proviso to section 7900 essentially refers to both; for it employs the technical terms of "extended insurance" and "paid-up insurance," which is the subject-matter of the two separate sections, 7897 and 7898. Besides, the concluding words of the proviso to section 7900 expressly refer to "paid-up insurance" and "extended insurance," the net value of which shall be equal to "that provided for in this article."

Although section 7897 does provide a standard—the Combined Experience Table of Mortality—by which, through computation, the net value of a policy is to be ascertained, no one can doubt that a policy may have a net value though it is not computed under that particular statute. In other words, it is clear that a "paid-up" policy "for an amount bearing such proportion to the amount of the original policy as the number of the complete annual premiums actually paid shall bear to the number of such annual premiums stipulated to be paid," as is provided for in section 7898, has a net value though it is not actually computed at all. This, in my opinion, is the net value contemplated by the Legislature when speaking of "paid-up insurance" in the proviso to section 7900, Rev. St. 1899. The relevant words of that proviso are "provided * * * in all instances where three annual premiums shall have been paid on a policy of insurance, the holder of such policy shall be entitled to paid-up or extended insurance, the net value of which shall be equal to that provided for in this article." The net value of what? The net value of extended insurance as provided for in this article if the provision for automatic commutation contained in the policy relates

to extended insurance. As the only section of the article relating to extended insurance is section 7897, the validity of a provision for extended insurance contained in a policy would necessarily be determined under section 7897; but, as that section omits to deal with "paid-up insurance," it is without application here. Section 7898 does provide for "paid-up insurance," and it is the only section in the article which touches on that subject-matter. It seems, therefore, if the policy contains a provision, as does this one, for an automatic commutation to nonforfeitable paid-up insurance upon the insured ceasing payment of the premiums as they fall due, such paid-up insurance is sufficient to satisfy the statute if it, the paid-up policy, is equal to the net value of the paid-up insurance provided for "in this article," which is mentioned alone in section 7898.

Furthermore, in construing the statutes, the intention of the Legislature is to be ascertained and effectuated. To this end, it is competent to look into the prior state of the law and examine the amendments in order to ascertain the purpose of the change of phraseology. Our most recent prior statute on the subject was passed in 1895. See Laws Mo. 1895, p. 197. By this act the statute of 1889 was amended, and in express terms the reader is referred by the amendment to section 5856, Rev. St. 1889, for information on the question of net value. It was provided that the paid-up policy which might be stipulated for in the policy should have a net value equal to that provided in section 5856, which section in all material respects is the same as section 7897, Rev. St. 1899, and furnished the combined experience table as the standard for ascertaining the net value. It appears, too, the proviso of section 7900, under consideration, first came into our law by the amendment of 1895; but, instead of the proviso employing the words "in this article" at that time, it referred in express terms to section 5856 for the standard of net value. Afterwards, in 1899 (see Laws Mo. 1899, p. 348), the statute was again amended by inserting the words "or extended" immediately after the words "paid-up insurance," and the reference to section 5856 was stricken out. In lieu of the express reference to one section of the article for a standard to which the net value of the paid-up policy is to be the equivalent, the Legislature added the words "in this article." This, to my mind, manifests an intention on the part of the lawmakers to refer the matter of extended insurance provided for in a policy to the then section on extended insurance, which was section 5856, Rev. St. 1889, for the equivalent in net value and refer the matter of paid-up insurance to section 5857, Rev. St. 1889, which alone provided for paid-up insurance, for the standard by which an equivalent in net value is required to be given; for both of these sections employing the technical

terms of extended and paid-up insurance are part of the same article. By reference to the statute above referred to, it will appear they are in all material respects the same as those set forth in the opinion in the order named.

I respectfully dissent from the reasoning of the court for the reasons suggested, in that it omits to reckon with the words "paid-up insurance" and "extended insurance," employed in the proviso of section 7900, as technical terms. These terms, in my opinion, relate alone to the two separate sections of the article for an ascertainment of the net value of the insurance which is required to be vouchsafed in the policy in order to relieve it from the operation of sections 7897 and 7899. As it appears from the opinion the policy contains a provision assuring paid-up insurance equivalent in net value to that provided for in section 7898, which alone deals with paid-up insurance, it seems on this hypothesis it should be treated as if relieved from the operation of other sections of the article. I deem the opinion and judgment of the court to be in conflict with the judgment of the Supreme Court in *Nichols v. Mutual Life Ins. Co.*, 176 Mo. 355, 75 S. W. 664, 82 L. R. A. 657, for the reasons stated, and request that the case be certified to the Supreme Court for final determination.

OSMER v. LE MAY-WEGMANN BROKERAGE CO.

(St. Louis Court of Appeals. Missouri. Jan. 24, 1911. Rehearing Denied Feb. 7, 1911.)

1. CORPORATIONS (§ 388*)—CONTRACTS—RIGHT OF STOCKHOLDER TO URGE ULTRA VIRES.

If a contract of a corporation be ultra vires, a stockholder may object to its enforcement; but he must be prompt in raising the objection against a creditor, or he will be estopped by acquiescence.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. § 1564; Dec. Dig. § 388.*]

2. CORPORATIONS (§ 388*) — CONTRACTS — RIGHT OF CORPORATION TO URGE ULTRA VIRES.

A corporation cannot repudiate a contract as ultra vires, where the other party has changed his position in reliance on the validity of the contract.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 1556-1558; Dec. Dig. § 388.*]

3. PROPERTY (§ 9*)—EVIDENCE—CONTINUANCE OF OWNERSHIP OF STOCK.

Where three persons are shown to have once owned stock of a corporation, and nothing to the contrary appears, the presumption is that the ownership still exists.

[Ed. Note.—For other cases, see Property, Dec. Dig. § 9; Evidence, Cent. Dig. § 87.]

4. CORPORATIONS (§ 425*)—OFFICERS—POWERS—NOTES.

Where three stockholders owned the entire capital stock of the corporation, and as its officers and directors managed its business, and one of them, who was president, with the knowledge of the others, entered into a contract on behalf of the corporation, giving notes signed by himself for the corporation, and another of

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes 134 S.W.—5

such persons, as treasurer of the corporation, procured an extension of time under a changed agreement, the notes and contract could not be repudiated, upon the ground that the board of directors had not authorized them.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 1697-1701; Dec. Dig. § 425.*]

5. CORPORATIONS (§ 388*) — ULTRA VIRES ACTS—ESTOPPEL.

Where the possession of certain patent rights and tools was given to a corporation under an agreement providing that, in consideration of 24 notes of the corporation, the entire interest and title in the patent right shall be assigned to the corporation, but in case of nonpayment the title shall revert to the seller, the corporation received such a beneficial interest that it was estopped to rescind the transaction as ultra vires.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. § 1557; Dec. Dig. § 388.*]

Appeal from St. Louis Circuit Court; George C. Hitchcock, Judge.

Action by William H. Osmer against the Le May-Wegmann Brokerage Company. From a judgment for plaintiff, defendant appeals. Affirmed.

George Safford, for appellant. Ernest C. Dodge, for respondent.

REYNOLDS, P. J. The appellant, Le May-Wegmann Brokerage Company, was incorporated under article 9, c. 12, of the Revised Statutes of 1899 (Ann. St. 1906, pp. 1064, 1082), relating to the incorporation of manufacturing and business companies; the certificate of incorporation issued by the Secretary of State bearing date 28th of March, 1906. It was capitalized at \$25,000; the stock divided into 250 shares, of the par value of \$100 each. The incorporators and first board of directors named were George Wegmann, owner of 50 shares, Louis J. Le May, 130 shares, and Henry Wegmann, Jr., 70 shares; it being stated that all of the capital stock had been subscribed by these parties and 60 per cent. thereof actually paid in. The object and purpose of the corporation is stated to be "to buy, sell, and handle all kinds of groceries, teas, coffees, canned goods, dried fruits, candies, and all and singular the merchandise usually traded in by brokers selling to the grocer trade." On the 22d of March, 1907, a written agreement was entered into wherein it is recited that plaintiff (party of the first part) is the owner of certain patents covering improved washboards, and that defendant (party of the second part) is desirous of acquiring the sole and exclusive right to manufacture and sell the patented articles, and also the privilege of purchasing the letters patent, with any other inventions appertaining to them which the party of the first part may develop and patent. It thereupon recites: "The party of the first part tenders, transfers, and leases to the party of the second part, subject, however, to the conditions and stipulations hereinafter named and set forth, and made

part of this agreement, the sole and exclusive control of all the letters patent aforesaid, as the same may appertain to the sole and exclusive right to manufacture and sell the said patent washboards throughout the United States and the territories thereof, granting to him [it] the same benefits, immunities, and privileges as would have accrued to the party of the first part, under like conditions, had this transfer and lease not have been made." Following this the agreement provides: "In consideration of the premises herein set forth and the benefits to be derived by this transfer and lease, party of the second part has this day given to the party of the first part their [its] 24 promissory notes, serially numbered from 1 to 24, inclusive, each due and payable in numerical rotation as follows." Proceeding, the agreement describes the notes, and continues: That it is further stipulated that upon default in payment or failure to pay any of the notes for a period of two days after they have become due and payable, then and in that event all the rights under the contract conferred on the party of the second part shall terminate at once and revert to the party of the first part, and the party of the second part agrees to forfeit and surrender to the party of the first part any and all claims for money paid, or of any character whatever in connection with this lease, the rights in which shall immediately revert to the party of the first part. It is then provided that, upon the payment of each of the promissory notes as they become due and payable, the party of the first part binds himself, his heirs, etc., upon payment of the last or final note, the preceding notes having been paid, to assign to the party of the second part all his right, title, and interest in and to the letters patent before referred to, by the assignment vesting in the party of the second part the sole and exclusive ownership thereof and all rights thereunder. It is further set out that the party of the first part loans and tenders the use of certain described tools to the party of the second part for a period of 34 months from date of the agreement, unless the agreement terminates before that time, in which case the tools, etc., are to be immediately returnable; the party of the second part agreeing to take care of these tools and keep them insured in the amount of \$269, while the tools are committed to it, and that upon the payment of the 24 notes, the party of the first part agrees, by bill of sale, to transfer all these tools to the party of the second part. The party of the first part finally agrees to lease and sell to the party of the second part, and including the same in conditions of lease and agreement, any and all patents in relation to washboards that he may hereafter obtain. This agreement was signed by the plaintiff, Osmer, and in the

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

name of the defendant corporation by Louis J. Le May as its president. On the same date of this agreement the 24 notes referred to in it were signed in the name of the corporation by Louis J. Le May, its president, being negotiable promissory notes payable to the order of plaintiff, and were delivered by the president of the defendant to plaintiff, who at the time delivered to the defendant—apparently the delivery being made to its president—the letters patent covering the invention, and also turned over to the officers of defendant the tools and machinery referred to in the agreement.

By a supplemental agreement of date December 21, 1907, to the effect that upon the payment upon the 15th of each succeeding month by defendant of 10 cents for each dozen of washboards manufactured and sold by it during each month from November 1, 1907, to June 1, 1908 (it appearing that only 6 of the notes had been paid, some of the remaining 18 being in default, and defendant desiring an extension on all of the unpaid notes), the time of payment of all was extended to June 22, 1908, providing, however, that any sums paid in the meantime, under the above provision for payment of what is practically a royalty, should be credited on the notes in the order of their maturity; it being stipulated that, with this exception, the agreement of March 22, 1907, should remain in full force. This agreement was signed by plaintiff, and in the name of the defendant by George Wegmann, its treasurer.

Among other notes which appear not to have been paid after the execution of this supplemental agreement was the last one, numbered 24, for \$100. This action was accordingly commenced on it before a justice of the peace, resulting in a judgment for plaintiff, whereupon defendant appealed to the circuit court and the case was there tried before the court, a jury being waived. There were no pleadings in the case, the only papers filed before the justice, as well as in the circuit court, being the note itself and an affidavit of George Wegmann, as the treasurer of the company, in which it is set up that the words, "Le May-Wegmann Brokerage Company, per Louis J. Le May, President," written and printed on the note, were written and printed by Louis J. Le May, then the president of the defendant company, and delivered to plaintiff by him; that Le May never had any authority to sign or deliver the paper; that the execution and delivery of it was not authorized by the company; that the company never had any power under its charter to sign or deliver the paper or to transact the business, purchase or lease the property, or enter into the contract in consideration of which the paper was executed and delivered; and that the defendant corporation never signed, executed, or delivered the paper.

At the trial the note was introduced in

evidence over the objection of defendant that it was beyond the scope of the authority of the company to make it, and it was not shown that the party who executed and delivered it had any authority from the corporation to do it. Defendant saved exception to the overruling of the objection. Plaintiff, testifying in his own behalf, identified the note and first agreement as having been signed by Louis J. Le May and the supplemental agreement as having been signed by George Wegmann; he testifying that he had also signed the agreements, and that the note in evidence was one of the notes referred to in it, and was a part of the consideration for the contract. He further testified that he delivered the letters patent referred to, and that they are still in the possession of defendant, although the legal title to them is still in him (plaintiff). He further testified that he knew these parties as officers of defendant, the one as president, the other as treasurer, and knew Henry Wegmann as manager, having charge of the men engaged in work at the offices or plant of the defendant, and that he had turned over to defendant the tools and machinery referred to, and that they, along with the patents, are still in the possession of defendant. At the suggestion of defendant's counsel, the agreements referred to were introduced in evidence, as well as the articles of association of defendant. It was stipulated by counsel at the trial that washboards were bought, sold, and handled by grocers and by brokers dealing through the grocer trade, and that brokers generally do not sell to the grocer trade the rights to manufacture washboards or patent rights; that they do not usually do that; that this is not one of the things which they usually do; that the only meeting the corporation ever held was the first meeting of the directors, and the meeting necessary to form a corporation, and that they had held no other meeting since; that the corporation was composed of the three incorporators, and that George Wegmann is the officer who has been making all the returns required by law to the Secretary of State. This is all the testimony in the case.

At the conclusion, defendant asked various instructions, which in the view we take of it are unnecessary to set out, they being to the effect that the plaintiff could not recover, as the contract between plaintiff and defendant was ultra vires the corporation and was executory, and that it did not appear that the officers who had signed the notes and the contract were authorized by the directors or stockholders to do so. They were refused. At the request of the defendant the court made a finding of facts, which, in substance, after finding the incorporation of the defendant and reciting the purposes for which it was organized, found that the buying and selling of washboards was included within the purposes for which the corporation was organized; that on the 22d of March, 1907,

plaintiff was the owner of the letters patent issued to him by the United States, giving him the exclusive right to make, use, and sell the kind of washboards specified in the patents, and that he was also at that time the owner of certain machinery and tools necessary or useful in the manufacture of washboards under the patents; that the contract was entered into on the consideration of the notes set out; that these notes were executed by the then president of the corporation and delivered to plaintiff, who thereupon delivered to defendant the machinery and tools mentioned in the contract; that thereupon the defendant company entered upon the manufacture of washboards under the letters patent, using the machinery and tools for the purpose; that by the contract plaintiff reserved to himself the legal title to the letters patent and property transferred until such time as the entire purchase price, as evidenced by the notes, had been paid, but that otherwise the sale was a complete one so far as the plaintiff was concerned, including the delivery and acceptance by defendant of the letters patent and tools; that subsequently defendant had paid 8 of the 24 notes given to plaintiff for the purchase price, but had refused to pay the remaining 16 notes, each for \$100, and that this suit was for the recovery of one of them; that the corporation consisted of three stockholders, naming them as in the articles, and that all of them were directors and officers of the corporation; that the defendant still retains possession of the machinery and tools delivered to it under the contract, and still has the use and benefit of the exclusive right to make, use, and sell washboards under the letters patent transferred to it by the contract; and that plaintiff had never elected to rescind the contract for failure to pay the purchase price, nor sought to recover from the defendant either the property or the letters patent assigned to defendant under the terms of the contract.

As his conclusion of law on these facts, the court held that the defense of ultra vires was not available to the defendant, and rendered judgment in favor of plaintiff; the learned trial judge concluding as follows: "In the opinion of the court, to sustain a defense of ultra vires on the foregoing facts would permit a fraud to be perpetrated on plaintiff which courts should not countenance. As stated in the case of *Russell v. Cassidy*, 108 Mo. App., loc. cit. 580 [84 S. W. 171]: 'The present action is upon a note of which prima facie, and in absence of testimony to the opposite effect, defendant received the benefit, and it would be inequitable and unjust to permit the defendant to question the power of the payee to accept the note from him. The maker of a note cannot defend an action on the note brought by a corporation or its privy on the ground that the corporation had no corporate power to take the note. *Bank v. Gillilan*, 72 Mo. 77,' etc. In this

case the maker of the note should not be permitted to defend an action on its note on the ground that it had no corporate power to make it. In the case of *Seymour v. Spring Forest Cem. Ass'n*, 144 N. Y. 333 [39 N. E. 365, 28 L. R. A. 859], the New York court states that: 'That kind of plunder, which holds onto the property but pleads the doctrine of ultra vires against the obligation to pay for it, has no recognition or support in the law of this state.' In the opinion of the court, the rule announced in the New York case is a good one to apply to the facts in the present case." Following the finding of fact and conclusion of law, the court rendered judgment for plaintiff; and it appears by the record that defendant excepted to the "decree and judgment and the form thereof," and motions for new trial and in arrest were duly filed, overruled, and exception saved. Whereupon defendant duly perfected appeal to this court, filing its bill of exceptions, which had been duly signed by the trial judge.

As will be noticed, the defense rests entirely upon the plea of ultra vires. One of the earliest of the writers on the subject of ultra vires, Brice, in the second American edition (1880), edited and annotated by Green (section 4, p. 783 and following), lays down as the true view of the relation of corporations and creditors, when considering the doctrine of ultra vires as applied to the corporations themselves and to creditors and other third parties, that in the first place, if the act is ultra vires, a corporator may raise the objection, whether against a corporation or creditor or other contracting party attempting to enforce such act or his alleged claims or rights resulting therefrom; but, secondly, if a corporator desires protection against the party who has thus dealt with the corporation, he must have been prompt and energetic in repudiating the transaction, "as he can be bound by acquiescence, so that if he do not quickly object, and give his objection vitality, the creditor will be justified in assuming that he consents"; third, that a corporation "may refuse to carry out such a transaction, but after it has been completed, and probably even after it has been merely, though substantially, part performed, it is estopped from raising the objection." Continuing under this latter head, the author says (loc. cit. 784): "But when a transaction of the kind now in consideration is complete on the part of the other contracting party, every principle of common sense and equity requires that the corporation should not be permitted to repudiate payment therefor, or the other due completion thereof by itself, on the ground that the transaction, though admitted to be within its possible capacities, is outside its actual powers then called into existence. The very defense discloses fraud; discloses what no court of equity has ever allowed a party to rely on, namely, his own laches or

chicanery; discloses that the objector could have given, and can now give himself the capacity which he pretends to be without, and could have done that which, if done, would cut away the ground whereon his objection rests. It is submitted, therefore, that when such a transaction is completed, on one side, it is then too late for the corporation to attempt to wriggle out of that stipulated for on its side." Discussing the question as to whether the rule applies when the transaction has been only partly performed, and remarking that no decision is expressly in point, the author suggests that the solution depends upon the principle indicated, namely, "that if there has been 'substantial' part performance, such a course of conduct by the corporation, and such action by the other side as to show that both parties intended the due carrying out of the transaction, then it is too late for the corporation to object to the invalidity of the matter, and if it does so it will be in exactly the same position as if it refused to carry out any other binding contract."

The present view of the courts is to the same effect; the authorities on the matter being very fully compiled in 29 Am. & Eng. Ency. of Law (2d Ed.) under the title "Ultra Vires." There, at page 46, it is said that the ground upon which the defense of ultra vires is most generally included is that of estoppel; that the corporation or other party to the contract, having received the fruits thereof, should not be permitted to plead want of power in the corporation and thus escape liability, and that, generally speaking, the rule of ultra vires prevails in full force only where the contracts of corporations remain wholly executory. As was held by our own Supreme Court, in *First National Bank of Kansas City v. Guardian Trust Co.*, 187 Mo. 494, 86 S. W. 109, 70 L. R. A. 79, the defense of ultra vires should not, as a general rule prevail, whether interposed for or against a corporation, when it would not advance justice, but, on the contrary would accomplish a legal wrong; that the defense is never sustained out of regard for a defendant, but only where an imperative rule of public policy requires it; that a contract merely in excess of the power granted to a private corporation, but which is not expressly forbidden either by its charter or the general statutory law, is binding on the company on the principle of estoppel, so that it cannot be avoided by the corporation as ultra vires without a return of the consideration received, if it has been fully performed by the one party and its consideration received by the corporation. In line with this decision of our Supreme Court are the cases of *Cass County v. Mercantile Town Mut. Ins. Co.*, 188 Mo. 1, 86 S. W. 237; *Kansas City ex rel. v. Schroeder*, 196 Mo. 281, 93 S. W. 405; *Adams v. Farmers' Mut. Ins. Co.*, 115 Mo. App. 21, 90 S. W. 747.

In the *Cass County Case*, supra, our Supreme Court, referring to the case of *City of Goodland v. Bank*, 74 Mo. App. 385, approves the statement found in that case, to the effect that the courts of our state have repeatedly declared that a violation of a charter cannot be taken advantage of collaterally or incidentally, but only on a direct proceeding instituted for that purpose, and adds that it has further been declared by our courts that in a collateral proceeding to declare the ultra vires acts of a trading corporation void, it must be shown to be the intention of the charter, as gathered from its terms, not only to restrict the business of the corporation to certain things, but in addition to declare that when it exceeds these restrictions, the act should be void. "If," says the court (loc. cit. 188 Mo. 15, 86 S. W. 241), "such intention does not exist in the charter, the state alone can question such acts as ultra vires, except when the contract is against public policy or good morals."

Without going further into a discussion or citation of authorities, it is sufficient to say, as to the case at bar, that it presents no merit whatever, and is so obviously an attempt, under a plea of ultra vires, to perpetrate a fraud, that no court would twist a salutary rule underlying the doctrine of ultra vires into such a vicious use as to allow a defendant corporation to escape from liability on a contract of which it has enjoyed and still retains the benefits. It is in evidence that the corporation defendant is composed of but three stockholders; but three men are named as stockholders in the articles of incorporation, and while the record is silent as to whether any new parties have come in, the fact of ownership of the stock, once shown to exist, and nothing to the contrary appearing, carries the presumption that it still exists. *Bank v. Trust Co.*, supra, 187 Mo., loc. cit. 525, 86 S. W. 109, 70 L. R. A. 79. The corporation or directors had but one meeting, yet have carried on business for over three years, in the active management of which every one of them participated. Yet counsel for defendant does not hesitate, at the trial, to object to the note, on the ground that it does not appear that the board met and authorized its execution. It is one of these very stockholders, himself an officer, who signed the contract extending time of payment of the notes, who ventures to set up, by affidavit, the want of power to do what he did. If he had no authority from his company to sign this supplemental agreement, and on the faith of it obtained an extension of time of payment of the notes, he committed a fraud. We absolve this treasurer from any such charge; for beyond all question his act was valid and within his authority, as was the act of the president in signing the note. All the stockholders, all the directors, every officer, were privy to the whole transaction, two of them active agents

in it. His zeal should not have led the treasurer into signing the affidavit.

Even if the transaction be considered a conditional sale on the part of plaintiff, the right of defendant, in such case, to become the absolute owner of the patents and of the tools became absolute upon compliance upon its part with the terms of the contract. These are rights of which no act of plaintiff could divest it, and which, in the absence of any stipulation in the contract restraining it, defendant could transfer by sale or mortgage. Upon the performance of the condition of the sale, the title to the property would vest in the vendee, or, in the event that he has sold or mortgaged it, in his vendee or mortgagee, without further bill of sale—vest so completely that he could maintain replevin to recover possession. Williston on Sales, § 331, citing and quoting Carpenter v. Scott, 13 R. I. 477, loc. cit. 479.

It may be that by electing to sue on the notes plaintiff would cut himself off from any right to recover either the letters patent, tools, or machinery. Upon this we express no opinion, as it involves a view of the contract not presented to us nor to the learned trial court. At all events the plaintiff, upon his part, has fully performed the contract, so far as the real consideration of these notes was concerned; that is, he has turned over to defendant corporation the sole and exclusive right of sale of washboards under his letters patent. Undoubtedly the right to sell washboards is within the corporate right of the defendant company, and defendant had that exclusive right by virtue of the contract ever since that right was granted to it by the contract, which, until assignment of the letters patent, constituted defendant sole licensee to sell the patented articles. That defendant could not itself manufacture them would not impair its right to their exclusive sale.

We hold that there has been such a complete compliance with this contract on the part of plaintiff that this defendant, represented as it was in the whole transaction by all of its stockholders, and all of its officers, and all of its directors, and having enjoyed all the benefits thereof, cannot at this late day, and for the first time, when called on to pay, claim lack of corporate authority to enter into the contract. Such a defense in such a case is so redolent of fraud that it will not be tolerated. The defense in this case is so flimsy, and the appeal so lacking in merit, that, if we had been asked to impose the statutory penalty for prosecuting a vexatious appeal, we would have been very much inclined to do so.

The judgment of the circuit court is affirmed.

NORTONI and CAULFIELD, JJ., concur.

HAWVER v. SPRINGFIELD TRACTION CO.

(Springfield Court of Appeals. Missouri. Feb. 6, 1911.)

1. APPEAL AND ERROR (§ 979*)—DISCRETION OF TRIAL COURT—GRANTING NEW TRIAL.

Discretion in granting one new trial, where the weight of the evidence is involved, will not be interfered with on appeal unless abused.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3871-3873; Dec. Dig. § 979.*]

2. NEW TRIAL (§ 72*)—INSUFFICIENCY OF EVIDENCE.

In an action against a street car company for damages caused by colliding with plaintiff's automobile, grant of new trial on the ground that the verdict for defendant was against the weight of the evidence held not an abuse of discretion.

[Ed. Note.—For other cases, see New Trial, Cent. Dig. §§ 146-148; Dec. Dig. § 72.*]

Appeal from Circuit Court, Greene County; James T. Neville, Judge.

Action by A. W. Hawver against the Springfield Traction Company. From an order granting a new trial on the ground that the verdict for defendant was against the weight of the evidence, defendant appeals. Affirmed.

Delaney & Delaney, for appellant. Mann, Johnson & Todd, for respondent.

NIXON, P. J. This case is here on an appeal by defendant from an order of the circuit court of Greene county granting plaintiff a new trial on the ground that the verdict of the jury in favor of defendant was against the weight of the evidence.

The petition charges that plaintiff while operating his automobile on South street in the city of Springfield, Mo., and while attempting to get from South street into Pickwick street (or alley), stopped his machine on the east side of South street with the rear wheels across the track of the defendant's street railroad to permit certain vehicles to pass out of Pickwick alley; and while in said position, exercising due care on his part, the servants of the defendant in charge of one of its street cars negligently ran upon and greatly damaged said automobile, when said servants saw, or by the exercise of ordinary care might have seen, said automobile standing on said track in time to have avoided a collision by stopping said car. The prayer is for damages in the sum of \$700.

The testimony of the plaintiff was that he conducted a jewelry store on South street, located a short distance from the intersection of South street and Pickwick alley; that on the morning in question he came north on South street in his automobile, and stopped the machine in front of his store, went into the store, came out and looked down South street for cars, and saw none, though one

could see about 3 blocks; that he intended to go into Pickwick alley and backed his machine some 30 feet south; that this alley was narrow—15 feet wide between the curbs, and only 10 feet wide between the gutters where the water runs down into the gutter at each side—and, as two vehicles were coming down the alley toward South street, he stopped and waited two or three minutes; that the front of his machine was turned toward the northeast; that the space between the east curb on South street and the east rail of defendant's track was 17 feet 7 inches, and that his automobile was 11 feet 6 inches in length; that the left back wheel was on the east rail of the track; that as the second vehicle was emerging from the alley into South street, the street car struck the back of his automobile, an 1,800-pound machine, smashing the body, wrecking the frame, wrenching two of the wheels and demolishing one, ruining the tire or casing, breaking one spring, and smashing the lamps, as they were jammed into a buggy; that the force of the impact moved the automobile clear around—25 or 30 feet—so that it faced southeast after the collision.

E. L. Maurice, a witness for the plaintiff, testified that he was in front of his store on South street some 200 or 300 feet south of Pickwick alley, and gave substantially the same evidence as to the position of the automobile, and stated that when the street car was within about 75 feet of the automobile he was watching it (the street car), and noticed there was no slack in the speed.

Dr. J. C. Matthews, called on behalf of the plaintiff, testified that when the street car was 200 or 250 feet from the back end of the automobile, the motorman sounded a vigorous alarm; that the street car was then running 8 or 9 miles an hour and never slackened, and he saw there would be a collision.

Orley Hawver, for the plaintiff, stated that he had had experience in running automobiles and had studied and observed to see how fast street cars were going, and he testified that he saw the car in question approaching the point of collision and that it was exceeding 7 or 8 miles an hour; that South street along the block in question is practically level, and that a car running at said rate of speed can be stopped within 30 to 35 feet.

Defendant offered the testimony of two witnesses. That of E. T. Munier went only to the question of the damage done to the automobile. The other witness in his deposition stated that he was the motorman on the street car in question; that he first saw the automobile when he was 60 feet from it and that it was about 3 feet from the east rail of the car tracks; that when he was 30 feet from the automobile, it backed

onto the track, and that, to prevent a collision, he "reversed the street car and applied the brakes"; that his car, when 60 feet from the automobile, was moving at the rate of about 2 miles an hour—going very slow; that his car moved about 6 or 8 feet after the collision, and that he applied the brakes and did everything in his power to stop before the collision occurred; that the brakes and appliances were all in good shape and the tracks were dry.

The law is that courts have large discretionary powers in granting one new trial under the statute (section 725, Rev. St. 1899 [Ann. St. 1906, p. 715]), especially where the weight of the evidence is involved, and an appellate court will not interfere with such discretion unless it appears to have been unwisely exercised—so unwisely as to amount to an abuse thereof. *Johnson v. Grayson* (Mo. Sup.) 130 S. W., loc. cit. 676, and cases cited; *Dent v. Springfield Traction Co.*, 145 Mo. App., loc. cit. 66, 129 S. W. 1044. We have given a fair statement of the evidence adduced at the trial and there is an entire absence of anything that would lead an appellate court, under the authorities cited, to hold that the trial court in this case so abused the discretion accorded it as to warrant a reversal. The judgment is therefore affirmed. All concur.

NELSON v. ALPORT et al.

(Kansas City Court of Appeals. Missouri.
Jan. 30, 1911.)

1. APPEAL AND ERROR (§ 274*)—EXCEPTIONS BELOW—SUFFICIENCY.

Where plaintiff actually introduced or offered to introduce specific evidence on a plea in abatement and on a trial of such plea the evidence was stricken out, and, the plea being overruled, plaintiff "offered the same evidence as he had offered on the plea," an exception by defendant to the ruling of the court "in admitting said evidence" did not present for review any error in the mode of offering the evidence.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1631-1645; Dec. Dig. § 274; * Trial, Cent. Dig. § 258.]

2. APPEAL AND ERROR (§ 691*)—RECORD—EVIDENCE.

Appellant, to obtain a review of rulings of the court admitting testimony, must incorporate the evidence in the record.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 2900; Dec. Dig. § 691.*]

3. APPEAL AND ERROR (§ 663*)—RECORD—CONCLUSIVENESS.

Where plaintiff, on the trial of the merits offered the evidence which he had previously offered on a trial of a plea in abatement, and such mode of offer was not objected to, a formal recital in the bill of exceptions that it contained all the evidence when in fact it did not contain the evidence offered on the plea was not controlling.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2853-2855; Dec. Dig. § 663.*]

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

4. APPEAL AND ERROR (§ 206*)—QUESTIONS REVIEWABLE—RULINGS ON EVIDENCE.

A party objecting to the form of offering evidence must object to the offer, and an exception following the admission of the evidence is not alone sufficient.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1142, 1283-1289; Dec. Dig. § 206.*]

Appeal from Circuit Court, Jackson County; John G. Park, Judge.

Action by William R. Nelson against Bernard Alport and another. From a judgment for plaintiff, defendants appeal. Affirmed.

T. A. Frank Jones, for appellants. Douglass & Watson, for respondent.

ELLISON, J. This action is for unlawful detainer, and was begun before a justice of the peace. It was removed to the circuit court of Jackson county by certiorari, where judgment was rendered for the plaintiff. When the case reached the circuit court, a plea in abatement was filed, setting up that the same matter was then pending in another action in that court. A trial was had on the plea in abatement. The record shows that the plaintiff introduced evidence on that trial, but on verbal motion of defendant it was stricken out; the court holding that it was applicable to the merits, but not to the plea in abatement. Plaintiff then, in addition, stated to the court in detail what he could prove and offered to prove it, but the court refused the offer. A finding was nevertheless made for plaintiff, based, we presume, upon the insufficiency of the evidence of defendant to support his plea. The record shows that the case was then immediately taken up on the merits and judgment rendered for the plaintiff.

On this appeal all question as to the plea in abatement is withdrawn, and the ground for reversal is that there is no evidence upon which to base the judgment on the merits. The sole ground for this contention is the wording of the bill of exceptions, which in this respect reads as follows: "The case coming on for trial now upon the merits, the jury is waived by agreement between the parties, and the plaintiff offered the same evidence as he offered on the plea in abatement, which evidence the court admits, and the finding and judgment are for the plaintiff for the possession of the property. To which action and ruling of the court in admitting said evidence the defendants then and there at the time duly excepted." Defendant insists that without the evidence of what plaintiff offered to prove in the trial on the plea in abatement there is nothing to support the judgment. And he contends that that evidence cannot be considered for the reason that it was never actually given—that it never materialized further than a mere offer to prove. The sole question presented is whether the record sustains defendant's view.

We think it does not. The case had just been heard on the plea in abatement. Evidence was actually introduced by plaintiff, and then stricken out. There was then set out a detailed statement purporting to recite facts, which plaintiff offered to prove, and the court refused the offer. Then immediately on entering on the trial of the merits plaintiff offered the same evidence he had offered on the plea in abatement, which evidence the court admitted. The record shows that defendant excepted to the "ruling of the court in admitting said evidence." Here, then, is a record stating that the court admitted the evidence which had before been set out in an offer in the trial of the plea in abatement. No objection or exception was made to the offer. The only exception was to the "evidence." There is no doubt but that the offer of evidence as set out in the offer in the trial of the plea in abatement was taken by the parties as the actual evidence, defendant excepting to the admissibility of the evidence.

That we have the correct view is shown by the motion for new trial. There defendant does not give any intimation of the point presented here. The causes stated in the motion are the usual ones, that the court erred in admitting incompetent, immaterial, and irrelevant evidence; and because the judgment of the court is against the evidence and the weight of the evidence, etc. If we should be wrong in stating that the record, taken in entirety, shows that the parties took the evidence offered as and for that actually introduced, defendant would still fail in his point; for it is plain as language can make it that the evidence offered was actually admitted. If it does not appear in the bill of exceptions, it can only hurt him whose duty it was to preserve it, and that is defendant. If it was actually admitted and defendant excepted to its being admitted, it must have been omitted from the transcript by defendant. We do not regard the formal closing of the bill of exceptions as to its being all the evidence as influencing any other construction of the record than we have given.

It will also be observed that defendant did not object to the offer made by plaintiff. He should have objected and stated the grounds of his objection. An exception alone is not sufficient.

Judgment affirmed. All concur.

KIMBLE v. McDERMOTT et al.
(Kansas City Court of Appeals. Missouri.
Jan., 1911.)

1. PRINCIPAL AND AGENT (§ 184*)—PERSONS LIABLE—AGENT.

Where defendant's act in seizing property, as to which there was a contract between plaintiff and defendant's wife, was tortious and un-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

justifiable, replevin will lie against defendant, though he only acted as agent for his wife.

[Ed. Note.—For other cases, see Principal and Agent, Dec. Dig. § 184.*]

2. PRINCIPAL AND AGENT (§ 184*)—PERSONS LIABLE—AGENTS.

An agent is not liable to replevin, if his possession is in good faith.

[Ed. Note.—For other cases, see Principal and Agent, Dec. Dig. § 184.*]

3. REPLEVIN (§ 10*)—POSSESSION OF DEFENDANT—EVIDENCE.

Where defendant's act in seizing hay was tortious, and when replevined the wagon was standing where it was left two days previous, without change in its location, the evidence was sufficient to show that defendant was in possession of the property, so that replevin would lie.

[Ed. Note.—For other cases, see Replevin, Cent. Dig. § 81; Dec. Dig. § 10.*]

Appeal from Circuit Court, Bates County; C. A. Denton, Judge.

Replevin by George R. Kimble against Ed McDermott and others. From a judgment for plaintiff, defendants appeal. Affirmed.

Thomas J. Smith, for appellants. J. S. Briery, C. W. Sloan, and D. C. Chastain, for respondent.

BROADDUS, P. J. This is a suit in replevin instituted in a justice court. An appeal was taken from the judgment of that court to the circuit court, where, on trial anew, the plaintiff recovered, and the defendant Ed McDermott appealed.

It appears from the evidence that Mrs. McDermott was the owner of a farm in Cass county, which she leased for a time to plaintiff. Among the stipulations in the lease, it was provided that plaintiff should cut the first crop of hay produced on the farm in proper season, care for it properly, and deliver in alternate loads, direct from the field, the one-half by weight to the lessor on her premises, as directed. Mrs. McDermott, after the making of the lease, had scales for weighing erected on her farm, but not upon that part leased. About the 23d of June, 1910, plaintiff began the delivery of the hay mentioned, after having it weighed upon said scales. The defendant Edward McDermott acted as the agent of his wife in receiving the hay. These deliveries were continued from time to time until on or about the 2d day of July, when plaintiff brought two loads, one for himself and one for Mrs. McDermott, which defendant weighed. Later in the day plaintiff brought two other loads for weighing and delivery, while defendant was absent, but, coming soon afterwards, plaintiff complained at being delayed, whereupon defendant said that if plaintiff did not give him notice when he was going to make a delivery, he might go to Coleman or somewhere else and weigh the hay. On the following day both Mrs. McDermott and defendant were away from home, for which reason plaintiff had two loads weighed at Coleman, one of which was delivered in Mrs.

McDermott's barn. On the next day plaintiff with his hired man came to deliver another load of hay in the barn. The defendant told the man to drive on the scales and weigh. The man stopped and said: "The hay has been weighed." Defendant then said: "Drive on and weigh, or furnish me the evidence of the weight." At this time plaintiff, who had opened the gate leading to the barn, directed his man to unload, at which defendant again asked him to drive on the scales and weigh, or furnish evidence of weight. It was shown that the hired man said he had weighed the load at Coleman, and had not yet weighed the wagon. Defendant then said: "You can't unload the hay into the barn until you weigh it, or furnish me the evidence of weight." Defendant procured a lock and got to the gate before the driver did and locked it, and said, "You can't take the wagon and the hay out." Defendant testified that plaintiff said to his man, "Drive out, John," and he started the team towards the gate; that he said to plaintiff: "The contract don't allow you to take that hay out of here; you have got to leave that here;" that he then stepped back to the scales and got a lock and locked the gate; that then plaintiff told his man to unhook, as he wanted to take the team out; that he then said to plaintiff: "All right, all we want is the hay;" and that he told plaintiff he only wanted the hay, and that he did not want the team and wagon. This suit was instituted on the 5th of July. The return on the writ does not show that the property was taken from the possession of the defendant, but the evidence shows that it was in the same place where it was left on the 3d of July, two days before, and that the hay was unloaded into the barn after the constable took possession of the wagon. On the pleadings and evidence, under the direction of the court, the jury returned a verdict for plaintiff, and assessed his damages at one cent.

It is insisted by appellant, as the undisputed facts show, that defendant was acting in receiving the hay as the agent of his wife, and, his acts being within the scope of his agency, he was not personally liable for them. It is held that: "When an officer wrongfully levies upon the property of a stranger, he is the proper party defendant in an action of replevin, even though the property levied upon be left with a third person as bailee." *Talbot v. Magee*, 59 Mo. App. 347. In a case where the defendants were the attorneys endeavoring to collect a claim against plaintiff, they recovered a judgment on the claim, and had it secured by a chattel mortgage on a lot of brick, and had the sheriff to take possession of the brick for their client, and bring them to a place designated by the latter, and pile them up outside of an inclosure for their client, it is held that they did not render themselves personally liable for honest and legitimate service for their client.

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

Myers v. Lingenfeiter & Hudson, 81 Mo. App. 251. In **Talbot v. Magee**, *supra*, the doctrine is also announced that: "Any person having the unlawful possession of personal property belonging to another is the proper party from whom to replevy it, whether he claims as owner, agent, custodian, trustee, or in another capacity." But the agent is not liable if his possession is in good faith. Such is the general rule. **Cobbey on Replevin**, § 431. Under the circumstances of this case, the defendant's act was characterized by a wanton disregard of the rights of the plaintiff, and not within the contemplation of his agency, and as such his possession was not in good faith.

It is further contended that there was no evidence that defendant was in possession of the property on the date when the writ was issued; therefore the plaintiff was not entitled to recover. But appellant is mistaken. The wagon was standing in the lot where it was left two days previously, and, as there had been no change in its location, there could have been no actual change in such possession, or that any other person was detaining it. Upon defendant's own testimony, his act was tortious and unjustifiable, and plaintiff had no peaceable remedy other than a resort to the courts.

Finding no error, the cause is affirmed. All concur.

ENGEL v. POWELL et al.

(Kansas City Court of Appeals. Missouri. Jan., 1911.)

1. VENDOR AND PURCHASER (§ 338*)—DEFICIT IN ACREAGE—RIGHTS OF PURCHASER.

On a sale of land equity will relieve against fraudulent representations or mistake as to quantity.

[Ed. Note.—For other cases, see **Vendor and Purchaser**, Dec. Dig. § 338.*]

2. EQUITY (§ 6*)—JURISDICTION—MISTAKE.

Equity relieves against mistake of one or both parties to a written agreement, which would defeat the real agreement.

[Ed. Note.—For other cases, see **Equity**, Dec. Dig. § 6.*]

3. EQUITY (§ 3*)—JURISDICTION—GROUNDS.

Equity jurisdiction depends upon existence of equitable interest and inadequacy of legal remedies.

[Ed. Note.—For other cases, see **Equity**, Cent. Dig. §§ 7-12; Dec. Dig. § 3.*]

4. VENDOR AND PURCHASER (§ 341*)—DEFICIT IN ACREAGE—EVIDENCE.

One suing for a deficit in the acreage of land sold him could show agreement for the sale and the vendors' representations made when and before the contract and deed were made, where the deed described an irregular tract and recited an acreage larger than a subsequent survey disclosed.

[Ed. Note.—For other cases, see **Vendor and Purchaser**, Dec. Dig. § 341.*]

5. EVIDENCE (§ 213*)—OFFER TO COMPROMISE.

One suing for a deficit in the acreage of land could not show that defendants' grantor offered to settle if defendants would release him,

but that defendants refused to do so unless reimbursed for legal expense.

[Ed. Note.—For other cases, see **Evidence**, Cent. Dig. § 745; Dec. Dig. § 213.*]

6. EVIDENCE (§ 213*)—OFFERS TO COMPROMISE.

Declaration that evidence tending to show an offer to compromise was not offered for that purpose does not render it competent.

[Ed. Note.—For other cases, see **Evidence**, Dec. Dig. § 213.*]

Appeal from Circuit Court, Livingston County; Arch. B. Davis, Judge.

Action by George Engel against Robert F. Powell and another. Judgment for defendants, and plaintiff appeals. Reversed and remanded.

J. H. Denny, for appellant. Percival Birch and W. M. Williams, for respondents.

BROADDUS, P. J. This is a suit in equity wherein plaintiff seeks to recover for the deficiency of 16.13 acres of land, the difference between the actual amount purchased and that conveyed by defendants to the plaintiff. For convenience we will denominate defendants as synonymous with that of defendant.

On the 20th day of January, 1908, and for a period of nine years prior thereto, the defendant was the owner of a tract of land situated partly in Howard and partly in Chariton county, on which date by a written contract he sold to plaintiff, and in which the land was described as follows: "All that part of the northwest quarter of section 27 lying west of the county road leading from Glasgow to Salisbury; also the south half of the northeast quarter of section 28, and the northeast quarter of the northeast quarter of section 28, all in township 52, range 17, containing 255.84 acres." In the deed subsequently made by defendant conveying the land to plaintiff, the land is described as follows: "All the south half of the northeast quarter, and the northeast quarter of the northeast quarter, of section 28, and all that part of the northwest quarter of section 27 which lies west of the public road leading from Salisbury to Glasgow, all in township 52, range 17, reserving a right of way along the northern boundary of the above land leading to the land now owned by G. Nellesen, and being the same tract of land acquired by party of the first part by deed from Wm. E. White and wife, dated February 16, 1899, recorded in Book 56, at page 218, Deed Records of Howard County, Missouri, and containing in all 255.84 acres." The defendant had placed the land in the hands of a real estate agent for sale, listing it at 256 acres at \$65 per acre, and both defendant and his agent represented to plaintiff, who it appears relied upon such representations, that the tract contained said number of acres. The plaintiff at one time asked defendant if he knew exactly how much land he had in the farm, to

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

which defendant replied that it contained 253 acres with a fraction more or less, but that the fraction did not amount to as much as one acre. It was shown that plaintiff lived in another county and was practically unacquainted with the land, although he had seen it twice before he bought it. It will be seen by the description that the tract was irregular in shape. In the negotiations which led up to the purchase and sale of the land, the defendant fixed his price at \$65 per acre; the plaintiff offering to pay him \$60 per acre. It was finally agreed that they would split the difference in the offering and selling price, and the price was fixed at \$62.50 per acre. At the time of writing the contract, defendant produced the deed from his grantor which gave the number of acres of the land as 255.84. At the time the deed was executed on the 13th day of February, 1908, at the direction of the defendant, the consideration in money and a note for \$3,500 was paid over to defendant's wife. In March following, plaintiff went into possession of the land and began to make improvements. In the following December, when he received his receipts for taxes paid on the land, he ascertained that one called for 118 acres in Chariton county and one for 133 acres in Howard county, making a total of 246 acres. Afterwards he caused it to be surveyed and ascertained that there were only 239.71 acres in all. The plaintiff offered to prove that his attorney went to see Mr. White, the person from whom defendant had purchased the land, and that White offered to pay \$750 in settlement of the matter, provided defendant would consent to release him, but that defendant refused his consent to such settlement unless White would also pay him \$50, the amount of a debt which he had incurred in consulting his lawyer. This offer was refused by the court. The court also struck out from the evidence all prior and contemporaneous agreements and representations made by defendant as to the number of acres in the tract of land. The contract has no stipulation as to the value of the land per acre, but recites a total consideration of the sum of \$16,000. It also appeared that defendant did not himself know there was a deficit in the number of acres in the tract, at the time he made the deed to plaintiff. The plaintiff alleges and shows the insolvency of the husband and makes his wife a party to the proceedings for the purpose of reaching the property she received as a gift from her husband. The action is not based on a breach of warranty, but upon the ground that the plaintiff purchased the land on the representation of defendant that the tract contained 255.84 acres, and that by mistake, oversight, or omission the deed conveying the land to him did not expressly warrant to plaintiff said number of acres. The finding and judgment were for the defendant, from which plaintiff appealed.

In a case at law where the facts were similar to these, the grantee sued to recover from his grantor the value of the deficit in the land conveyed. The court held that: If the plaintiff desired the deed to show a sale by the acre, or that the tract was warranted to contain a certain number of acres, he should have had it expressed in the deed, and that the deed "will measure his rights and liability, and the transaction will be a sale of the tract of land described for a stated price in solido." *Hendricks v. Vivion*, 118 Mo. App. 417, 94 S. W. 318. And such seems to be the well-settled law of the state in such cases. But there are numerous cases in equity the courts afford a remedy where there has been fraudulent representations or mistake as to the quantity of land in a certain tract conveyed. It is held that: "False statements and representations made by the vendor, positively and as of his own knowledge, as to the number of acres in a certain tract of land, when the tract is being negotiated by the acre, are not regarded as expressions of opinion, but are considered statements of fact and as such constitute fraud." *Judd v. Walker*, 215 Mo. 312, 114 S. W. 979. The opinion cites numerous decisions of the Supreme and appellate courts of the state which hold to the same effect. As the case is the last expression of the Supreme Court on the question, we refrain from calling attention to any prior ones.

The courts of equity afford relief in cases of mistake as well as in cases of fraud. *Hendricks v. Vivion*, supra. Equity affords relief where the written agreement does not, through mistake of both or either party to it, express the real agreement. *Gottfried v. Bray*, 208 Mo. 652, 106 S. W. 639. In Alabama it is held that: "It appearing that the vendor represented that the tract contained about 25 acres more than it really did contain, the mistake is so gross and palpable that equity will afford the vendee relief by abatement of the purchase price." *Hodges v. Denny*, 86 Ala. 226, 5 South. 492. In a Kentucky case the facts were as follows: "In the negotiations the vendor represented that the land contained 90 acres, and a survey showed that quantity. A deed was given containing 90 acres 'more or less,' and thereafter it was discovered that through an error in calls the tract contained 78 acres, and the purchaser sued in equity for relief against the deficiency on the ground of mistake or fraud. Held, that a contention that the purchaser got all he bargained for, and that there was no loss of any part of the property, was not pertinent, though it might be in an action for breach of warranty, since the gist of the present action was mistake or fraud." *Boggs v. Bush*, 137 Ky. 95, 122 S. W. 220. In Texas it is held that: "Where land is sold by the acre, and the parties are under a mutual mistake as to the quantity conveyed, equity will grant the purchaser a

proportionate abatement of the price." And that: "The purchaser is not precluded by a recital of 'more or less' in the deed from showing, under an allegation of fraud or mistake, an agreement contemporaneous with the execution of the deed, making the transaction a sale by the acre." *Franco-Texan Land Co. v. Simpson*, 1 Tex. Civ. App. 600, 20 S. W. 953.

It is generally understood that equity jurisdiction depends on two facts, the existence of equitable interests and the inadequacy of legal remedies. There can be no doubt but what plaintiff has such interest as disclosed by the evidence, and that he has no legal remedy. It follows, therefore, that the court committed error in striking out the evidence as to the agreement made between plaintiff and defendant, and the latter's representations as to the quantity of land in the tract conveyed, made at and prior to the time of the making of the contract and the deed for the sale and conveyance of the land.

The action of the court in excluding the evidence of what occurred when plaintiff was seeking to have the matter in controversy settled, with White, the defendant's grantor, is approved. The declarations made at the time of the offer that it was not made to show an offer of compromise, but for the purpose of showing that defendant was not acting in good faith, did not make it competent evidence. The purpose for which it was offered did not render that competent which from its nature was forbidden by the law. Offers to compromise are universally held to be incompetent evidence for all purposes, upon the theory that it would be against public policy to admit such evidence, as its tendency would be to encourage litigation, and thus prevent peaceable settlement.

Under plaintiff's allegations he was entitled to the relief prayed for. The cause is reversed and remanded, with directions to enter judgment for the amount of the deficiency at \$62.50 per acre, and that he have the amount credited on the note held by the wife for the balance of the purchase money. All concur.

POWELL et al. v. CITY OF COLUMBIA.

(Kansas City Court of Appeals. Missouri. Jan., 1911.)

1. MUNICIPAL CORPORATIONS (§ 404*) — CHANGE OF GRADE OF STREET—EVIDENCE.

In an action for damages for a change of grade of a street, evidence that water stood on the street after the improvement, as it had done before, did not prove special damages to the abutting property, but merely tended to lessen benefits, and its admission was not erroneous, though special damages were not alleged.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. §§ 989-999; Dec. Dig. § 404.*]

2. TRIAL (§ 296*) — INSTRUCTIONS — CURE OF ERROR.

The error, if any, in an instruction in an action for damages for changing the grade of a street, that the streets belong to the owners of the abutting property, subject to the easement of the city for a highway, and that, under the Constitution, the city may not change the grade of any street until a jury has ascertained the damages sustained, and such damages have been paid, is obviated by a charge that the jury should assess plaintiff's damages at the excess of the market value of his property immediately before the grading was commenced, over the market value immediately after the grading was finished, less any special benefits.

[Ed. Note.—For other cases, see *Trial*, Cent. Dig. §§ 705-713; Dec. Dig. § 296.*]

3. MUNICIPAL CORPORATIONS (§ 404*) — CHANGE OF GRADE OF STREET—DAMAGES—INSTRUCTIONS—"PECULIAR"—"SPECIAL."

An instruction, in an action for damages for change of grade of a street, that the jury should assess plaintiff's damage at the excess of the market value immediately before the grading was commenced, over the market value thereof immediately after the grading was finished, less the value "of any special benefits * * * which are peculiar" to the property, is not erroneous for the use of the word "peculiar," which is simply synonymous with the word "special."

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. §§ 989-999; Dec. Dig. § 404.*]

For other definitions, see *Words and Phrases*, vol. 6, p. 5256; vol. 7, pp. 6569-6570.]

4. MUNICIPAL CORPORATIONS (§ 396*) — CHANGE OF GRADE OF STREETS—DAMAGES—SPECIAL BENEFITS.

The benefits that may be considered, in reduction of damages to abutting property by a change of grade of a street, are only the special benefits conferred on the property by the grading of the street, as distinguished from the benefits to all the property in the locality, and not the benefits conferred by the paving and curbing of the street.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. §§ 945-951; Dec. Dig. § 396.*]

Appeal from Circuit Court, Boone County; Nick M. Bradley, Special Judge.

Action by Elizabeth M. Powell and another against the City of Columbia. From a judgment for plaintiffs, defendant appeals. Affirmed.

H. A. Collier, E. W. Hinton, and W. H. Rothwell, for appellant. Charles J. Walker and A. W. Walker, for respondents.

BROADDUS, P. J. The plaintiffs' action is to recover damages alleged to have been caused to their property by the city of Columbia in grading down the natural surface of Paquin street to conform to the established grade. The plaintiffs' property consisted of a residence fronting 62 feet on Matthews street and extending back along the south line of Paquin street 166 feet. Plaintiffs' residence fronts east on Matthews street. On the west end of the lot there are some fruit trees and a barn, where plaintiffs kept their horse and vehicle. Prior to the grading, plaintiffs' access to their barn

was from Paquin street. The condition of the street after it was graded prevented such access by reason of the steepness of the approach thereto, and plaintiffs were compelled to reach their barn by entering the premises in front on Matthews street. Before the paving was done, there was a sag in Paquin street, east of the intersection of the two streets, in which water in rainy seasons accumulated, so that it extended to Matthews street. Plaintiffs introduced evidence to show the extent of their injury, and defendants introduced evidence of a countercharacter, and tending to show that plaintiffs had been benefited, rather than injured, by the improvement. The jury by consent of the parties were permitted, in charge of the sheriff, to visit the locality in dispute.

In the examination of Elizabeth Powell, she was asked: "What has been the condition of the street next to your property since it was paved, with reference to mud, and whether it accumulated on it?" This was objected to, as no special damages were pleaded. The objection was overruled, and witness answered: "Parties can go around another way; they usually do after a big rain. After a big rain the water is standing from our place to the property opposite. There is always mud there; it is always muddy and sloppy around the property in rainy weather," etc. Defendant introduced evidence to show that the street was in bad condition, and the water stood on it before grading, and that the drainage was improved by the grading. A photograph was introduced by defendant, showing a pool of water covering the street at the east end of the plaintiffs' property.

The court instructed the jury as follows:

"The court instructs the jury that every street of the defendant city belongs to the owners of the property abutting thereon to the center line of such street, subject to the easement of the city therein for a public highway, and the court further instructs you that under the Constitution of this state the city of Columbia has no right to change the grade of any street, until it has caused a jury or board of freeholders to ascertain what, if any, damage will be sustained by property abutting on said street, and until it has further paid the amount of such damage, if any, to the owners of such abutting property.

"Therefore, if you believe from the evidence that Paquin avenue was at all times mentioned in the petition one of the legally established streets of the city of Columbia, and that the plaintiffs are and were at all said times the owners of the lot mentioned abutting on said street, and that during the year 1907 the defendant city, pursuant to the ordinances read in evidence, did cut down and lower the grade of Paquin street abutting on said lot without first causing a jury or board of freeholders to ascertain what, if any, damage would be sustained by the abut-

ting property, and that plaintiffs' lot was damaged by cutting down and lowering the grade of said street, then your verdict must be for the plaintiffs for such amount as you may find to have been sustained, not exceeding \$825.

"(2) The court instructs the jury that if under the evidence and instructions your verdict be for the plaintiffs, then you should assess plaintiffs' damage at such amount as you may find the market value of plaintiffs' property immediately before said grading was commenced exceeded the market value thereof immediately after said grading was finished, if any, less the value of any special benefits you may find were conferred on plaintiffs' property by the grading, that is, benefits which are *peculiar* to plaintiffs' property, and not common to all property of that locality; but you must not consider any benefits to plaintiffs' property which are common to all property of that locality, nor any benefits whatever conferred by the paving and curbing of Paquin avenue."

The plaintiffs recovered a judgment for \$325, and defendant appealed.

Much stress is given to the alleged error of the court in admitting evidence of Elizabeth Powell, over the objection of the defendant. The argument is that it goes to prove special damages; none being alleged in the petition. *Macy v. Carter*, 67 Mo. App. 323; *State ex rel. v. Blackman*, 51 Mo. 319. We do not think the objection is well taken, as the evidence did not tend to prove damages, but only to show that water stood on the street after, as it did before, the improvement, which was not an element of damages. Its only effect would be to lessen benefits.

The first paragraph in instruction No. 1 given for plaintiffs was improper and altogether unnecessary. But we do not think it could have worked any harm, as the second and concluding paragraph let the jury down from the dizzy heights of constitutional law, and told them in plain and unmistakable and familiar language what duty they should perform, if they found that the plaintiffs' lot had been damaged by the lowering of the grade of the street, viz., to return a verdict for plaintiffs for such an amount as they might find they had sustained.

The criticism of plaintiffs' second instruction is that it was error to tell the jury that the benefits to be considered in the reduction of damages must be peculiar to plaintiffs' property. The word was not italicized in the instruction. It was used in the sense as synonymous with "special." One is the synonym of the other. *Railroad v. Brick Co.*, 198 Mo., loc. cit. 714, 98 S. W. 1011. Secondly, it was misleading in telling the jury that they could not consider any benefits whatever conferred by the paving and curbing of Paquin avenue. It is held that: "Where the grading, paving, and curbing benefits the abutting property more than the

cost of the work evidenced by the tax bills, the city may set off such excess of benefits against the damage for changing the grade." *Carroll v. City of Marshall*, 99 Mo. App. 464, 73 S. W. 1102. It is, however, held in a later decision that such benefits are not proper subjects to set off. *Investment Co. v. St. Joseph*, 191 Mo., loc. cit. 470, 471, 90 S. W. 763.

Finding no error in the record, the cause is affirmed. All concur.

CASTLE v. TERRY et al.

(Kansas City Court of Appeals. Missouri. Jan., 1911.)

1. APPEAL AND ERROR (§ 1009*)—REVIEW—FINDINGS—CONCLUSIVENESS.

The Court of Appeals will defer to a trial judge's findings on a bill in equity.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3970; Dec. Dig. § 1009.*]

2. EXECUTION (§ 163*) — PROCEEDING TO QUASH—EVIDENCE—SUFFICIENCY.

On motion to quash an execution, a finding that the creditor had agreed to assume the claim involved held against the weight of the evidence.

[Ed. Note.—For other cases, see Execution, Dec. Dig. § 163.*]

Appeal from Circuit Court, Callaway County; N. D. Thurmond, Judge.

Proceeding by Fred F. Castle against W. R. Terry and another, to quash an execution. From a judgment for Castle, Terry and another appeal. Reversed.

Harris & Hay, for appellants.

BROADDUS, P. J. This is an appeal from a judgment of the circuit court sustaining a motion to quash an execution.

It is alleged in the motion that in the latter part of the year 1906, the respondent and his partner, C. B. Herring, contracted to erect for the appellant a certain building in the city of Fulton; that after beginning the work of erection the original plans for its construction were changed, at the instance of appellant, which increased the amount of work and material necessary for its completion; that there arose a dispute between the parties as to the amount appellant owed for the additional work; that, while said dispute was pending, the La Crosse Lumber Company instituted a suit against respondent Castle and his partner for a claim for material which had been used by them in the said building; that, while it was pending, and on the day the case was set for trial, appellant Terry, M. F. Bell, the architect for the construction of the building, and David H. Harris, the agent and attorney for the lumber company, and respondent, met together in the office of the said Harris, where they went from the justice courtroom, and an agreement was entered into in reference

to said demand of the lumber company and other matters of dispute; that it was agreed that appellant Terry should pay the said lumber bill in full settlement of all demands made by respondent and his partner; that appellant should pay the claim of J. W. Cook for hardware used in the building; and that the lumber company would accept appellant Terry for this debt and dismiss the said suit. There are further allegations in the motion to the effect that Terry did pay the said bill for lumber, but that he and the lumber company conspired together to violate the terms of said agreement; that the suit was not dismissed, but continued until the next day, on which judgment was rendered against respondent and partner for the sum of \$140.06; that afterwards appellant Terry procured an assignment of said judgment to himself, and had it certified to the office of the circuit clerk of the county, and caused the execution in controversy to be issued and placed in the hands of the sheriff. Appellant denied that it was agreed, between the plaintiff in the motion and his partner, on the one part, and himself and Harris, the agent of the La Crosse Lumber Company, that appellant Terry should pay to the said lumber company its bill in full, in consideration of all demands made by respondent and his partner against the said Terry for the erection of said building, and that the said lumber company would accept him as the debtor for the claim sued on, and would dismiss the suit. The evidence disclosed that the contract between appellant Terry and respondent Castle and his partner, Herring, was that they were to erect the house mentioned for the consideration price of \$1,800, but that during the course of its construction some changes were made, at the request of Terry, which increased its cost. Terry and respondent Castle and his partner disagreed as to the amount of this additional cost, which was then arbitrated by the architect Bell, who fixed the amount at \$282.80, which raised the total cost of the house to \$2,082.80. At the time this arbitration was made, Terry had paid on the contract price \$1,559.64; subsequently he paid, at the request of Castle & Herring, \$400 on the demand of the La Crosse Lumber Company, which at the time amounted to \$673.16. Subsequently Terry paid on said bill, on the order of Castle & Herring, the sum of \$123.16, which still left the sum of \$140.06 unpaid. By the two payments to the lumber company, Terry discharged his indebtedness to Castle & Herring for the cost of his house, including the amount found by the arbitrator for the charges extra. This left the \$140.06 unpaid on the lumber company's bill, and some other indebtednesses against the building, among which were that of Jack Herring for \$52.50, and one to J. W. Cook, neither of which are in issue here. Herring

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

brought suit to enforce his lien, and obtained judgment, which Terry paid. The lumber company also instituted its suit to enforce a lien against the building, as stated in the motion.

The plaintiff stands alone as a witness testifying to the fact that said arrangement was made, that Terry would assume to pay the said bill of the lumber company in consideration of a difference between them as to what was due from Terry to Castle & Herring, and that the lumber company would dismiss its suit. Plaintiff called his partner as a witness, who testified that he was not present on such occasion. General Bell testified that he was not present at any such alleged occasion, and so did Harris, the attorney for the lumber company, and that, as its agent and attorney, he made no agreement to dismiss said suit.

Defendant's evidence was that he did not enter into any such agreement; that he paid the judgment after it was rendered, and had it assigned to himself.

There are some other circumstances in evidence which apparently tend to support respondent. The agent of the lumber company stated that, before judgment was rendered on its account in the justice court, Terry agreed to pay its claim. Herring, the partner, also stated that Terry, at some time, the date of which he was unable to state, did agree to pay said demand of the lumber company, and that the agreement was in settlement of a dispute between the parties as to the amount of the indebtedness of Terry to the partners, Castle & Herring. The justice's docket recites that the case was postponed for trial to the succeeding day, at the request of the parties.

The evidence that Terry promised the agent of the lumber company that he would pay its demand is not of much, if any, probative force under the circumstances, as Terry would have to pay the bill in any event, as it was a lien on his building, and he may have very naturally allowed it to let judgment go, as he could afterwards pay it off, and have it assigned to him, as it appears he actually did.

Herring's statement that at one time Terry agreed to pay the said bill on a settlement of a dispute of the amount due by Terry to himself and Castle is flatly contradicted by the evidence of the arbitration settlement that was made, which was reduced to writing at the time. The recitation in the justice's record that the case was postponed until the next day, at the request of the parties, indicates that such postponement was had for some purpose or other. It might be construed as going to show that the parties were negotiating a settlement, as Castle alleges. But it is not very conclusive, treating it as an independent circumstance; and its force, if any, is very much weakened by rea-

son of the fact that Mr. Harris, the attorney and agent of the lumber company, did appear next day and take judgment for his client, which does not seem to us probable, if the postponement was made in pursuance of said alleged agreement, or to give time for the parties to negotiate such an agreement. Harris could have had no sufficient motive in taking a judgment against Castle & Herring, who were insolvent, if Terry, who was solvent, had agreed to pay the debt. On the other hand, we have the statement of the architect Bell, Mr. Harris, and Terry, and the settlement by arbitration by General Bell, of the disputed differences between the parties, all going to show that the agreement testified to by Castle did not take place, and that Mr. Castle was mistaken in reference to that matter.

This proceeding, although denominated a motion to quash an execution, is in fact a bill in equity. In such cases it is usual for the appellate court to defer much to the finding of the trial judge, but in a case like this, where the preponderance is so overwhelmingly against the finding of the judge, we feel that it is our duty to hold otherwise.

Therefore the judgment is reversed. All concur.

BOYCE et al. v. GINGRICH et al.

(Kansas City Court of Appeals. Missouri. Jan., 1911.)

1. EVIDENCE (§ 474*)—OPINION EVIDENCE—MARKET PRICE.

The market price of land is controlled by the price at which it is generally selling, and one who knows by personal knowledge or by being informed as to the selling price of land in a locality is competent to testify as to value of land there.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 2217; Dec. Dig. § 474.*]

2. EVIDENCE (§ 498½*)—OPINION EVIDENCE—MARKET PRICE.

Where a farmer went to a sister state to find out what land was selling for in a locality there and acquired all the information that any one could have, the admission of his testimony as to its value was in the discretion of the court.

[Ed. Note.—For other cases, see Evidence, Dec. Dig. § 498½.*]

3. FRAUD (§ 59*)—EXCHANGE OF LAND—MEASURE OF DAMAGES.

The measure of damages for fraud inducing one to convey his land in consideration of other land is the difference between the actual market value of the other land at the time of the conveyance and what would have been its value at that time had it been in point of quality, location, and value as represented.

[Ed. Note.—For other cases, see Fraud, Cent. Dig. §§ 60-62; Dec. Dig. § 59.*]

4. FRAUD (§ 60*)—ELEMENT OF DAMAGES.

The benefits of a bargain are proper elements of damages in cases based on fraud.

[Ed. Note.—For other cases, see Fraud, Cent. Dig. § 65; Dec. Dig. § 60.*]

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

5. FRAUD (§ 52*)—EXCHANGE OF PROPERTY—DAMAGES—EVIDENCE.

In an action for damages for fraud inducing one to convey his land in exchange for other lands based on fraudulent representations as to the quality, location, and value of the other lands, the value of the land conveyed by plaintiff for the other land is not in issue; the parties having examined such land.

[Ed. Note.—For other cases, see Fraud, Dec. Dig. § 52.*]

Error to Circuit Court, Boone County; N. D. Thurman, Judge.

Action by Maude B. Boyce and another against John L. Gingrich and another. There was a judgment for plaintiffs, and defendants bring error. Affirmed.

F. G. Harris, Ralph T. Finley, and N. T. Gentry, for plaintiffs in error. E. W. Hinton and Harris & Hay, for defendants in error.

BROADDUS, P. J. This is an action to recover damages for fraudulent representations in the exchange of real estate. The facts are: That in the month of July, 1909, plaintiff Maude B. Boyce was the owner of certain real property in the city of Columbia, Mo. Her husband, acting as her agent, authorized the defendant Daugherty to sell or exchange it at the listed price of \$7,500. Daugherty was a man engaged in the real estate business, in whom the plaintiffs had full confidence. He was also the agent of his codefendant Gingrich for the purpose of assisting him in the sale of a tract of land which he owned, consisting of 160 acres situated in Woodson county, Kan., and which was listed at the price of \$9,600. Daugherty communicated to Gingrich that he had plaintiff's property, consisting of a house and lot, for sale or exchange. Daugherty showed Gingrich plaintiff's property and gave him the price, and the latter expressed himself as willing to trade his property for that of plaintiffs. The plaintiffs, who lived in the country some distance from Columbia, were notified by Daugherty that he had a prospective buyer for their property. Boyce, the husband, came to Columbia and found Gingrich and Daugherty in the latter's office. Daugherty represented to Boyce that he had an advantageous trade for him in Kansas, and referred to the 160-acre tract owned by Gingrich, which he wished to exchange for the house and lot. Boyce, being unacquainted with the Kansas land, and his wife's health being such that he could not leave home to go and see the land, stated that if any trade was made he would have to rely on the word of the defendants. Both defendants assured Boyce that they would correctly describe the land to him; Daugherty saying, "I will tell you the truth about it," and Gingrich that they would "treat him like a brother." The description and representation of Daugherty as testified to by Boyce was that: "He (Daugherty) said it was in good shape, five

miles from Yates Center, good fences, good barn, and good orchard. He said the house was in good condition, and that the adjoining lands sold for from \$60 to \$70 per acre, and that this land was worth \$60 an acre. Mr. Gingrich said just the same as Mr. Daugherty did. Their descriptions were the same as to the improvement of the property, the value and prices that neighboring lands were selling for"—and that he was induced to make an exchange of properties upon the faith of said representations of defendants. At the time there was an incumbrance of \$4,600 upon the Boyce property and \$3,500 upon Gingrich's land. It was considered by the parties that Boyce had an equity of \$2,900 in the property in Columbia, and that Gingrich had an equity of \$6,100 in his Kansas property. For this difference between the equities, Boyce agreed to let Gingrich have all the crops then on the Kansas land at the value of \$300, and that the Boyces would execute notes secured in the Kansas land for \$2,900—all of which was embraced in a contract written and signed by the parties. Boyce went home, taking with him a copy of the contract and blank deed. Not returning as was expected, Daugherty telephoned and asked Mrs. Boyce why Boyce did not come in and close the deal. Mrs. Boyce testified that: "I answered the phone and told him I thought he was out of the notion; that he did not want to trade without seeing the property. And he (Daugherty) went on and told that the property was in good shape, and that he had been over it and was just from there," etc. He made representations similar to those made to Mr. Boyce. She stated that she would not have made a deed to her place had it not been for these representations of Daugherty. Afterwards the deeds were executed by the respective parties and the deal closed.

Boyce went upon the land, and his evidence is: That it did not come up to the representations made by the defendants. It was seven miles from Yates Center. That the house had only three finished rooms, and a place for two others. That the fences were of no value. That the orchard was not as good as represented. And that the value of the farm did not exceed \$35 per acre, and the neighboring lands were selling for from \$25 to \$40 an acre. Other witnesses testified similarly. Defendants objected to the competency of Boyce as a witness to the value of the Kansas land, which the court overruled. The question asked was this: "After you had made inquiry and learned the price of neighboring land and what it had been selling for and seen the condition of the property as to improvements, etc., and location from Yates Center, what did you consider the place reasonably worth?" The defendants in their testimony denied having made any false representations, but that the Kan-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

sas land was as they had represented it to the Boyces, and also introduced other evidence tending to show that plaintiffs had not been damaged by reason of the exchange. They offered evidence for the purpose of showing that the house and lot in Columbia was worth only \$4,500 at the time of the trade, and also evidence to show that the trading value of real estate is less than the cash market value. The court refused the offer. The defendants objected to two instructions given for plaintiffs, but particularly to that numbered 5, which reads as follows: "You are further instructed that, should you find for plaintiffs, the measure of damages is such sum or amount, as you may, from the evidence, believe was the difference between the actual market value of the land conveyed to plaintiffs at the time it was conveyed to the plaintiffs, and what would have been its value at the time had it been in point of quality, condition, location, and value as represented by defendants, not exceeding the sum of \$4,000." The plaintiffs recovered judgment for \$3,000, and defendants each sued out his separate writ of error.

The ruling of the court in admitting the evidence of Mr. Boyce as to the value of the Kansas land is urged as a serious error. Mr. Boyce was a farmer, and as such we presume he had the usual knowledge possessed by farmers concerning the nature, quality, and productiveness of soils, but as such he would have to possess additional information before he would be allowed to speak as to market values. This knowledge he could not obtain by the study of any particular science, because it is not a matter of science. Land is not a commodity that has a general market value. The price of land is subject to various conditions, such as location, character of soil, and climate. A real estate agent at Columbia would not as such be a competent witness as to the market value of land in Kansas. This statement goes to show that testimony of this sort is not admitted upon the theory that the witness is a skilled expert, but merely because he has knowledge of the prices at which land is selling in a given locality. We are of the opinion that such knowledge acquired in the ordinary manner would be sufficient. The market value of land is controlled by the price at which it is generally selling, and any person who knows, whether by personal knowledge or by being informed, as to the selling price of the land in that locality, is competent to speak as to its value. The witness was a farmer, and when he went to Kansas he made it his business to find out what land was selling for in the locality. In this way he had all the information any one could have had. The admission of his evidence was largely one of discretion in the court, which the appellate courts do not in-

terfere with unless absurd, which we do not think it was in this instance. *Spring Co. v. Edgar*, 99 U. S. 645, 25 L. Ed. 487; *Bryan v. Town of Bradford*, 50 Conn. 248.

The defendant's offer to prove that there is a difference between the market cash value of real estate and its trading value was properly rejected. The professed object for the introduction of this testimony was: First, that "it was proper to prove that, as this transaction was a trade, and not a sale, the plaintiffs had not been damaged at all, as the valuations were fixed, not on a cash basis, but with reference to other property which might or might not realize the sum mentioned"; and, secondly, to show that plaintiffs were not damaged to the amount they claimed to have been. The proposed evidence was not admissible, as it could not affect the measure of damages. The measure of damages was properly expressed in instruction numbered 5 given at plaintiffs' instance. It will be observed that the court limited the amount of plaintiffs' recovery to the difference between the value of the Kansas land at the time it was conveyed to plaintiffs and what would have been its value if it had been in point of quality, location, and value as represented by defendants. The defendants' assumption is that in the exchange of lands the exaggerations or representations as to value are greater than when the transaction is based on cash sales, and that, such being the case, the difference in the actual value of the properties exchanged is or ought to be the measure of damages. This rule, if enforced, would eliminate the element of gain, if any, the party might have in the contract itself, and confine his damages to compensation for actual loss. In support of the theory we are referred to *Thompson v. Newell*, 118 Mo. App. 405, 94 S. W. 557, where we find this expression: "The basic principle is compensation for actual loss sustained as the direct result of the wrong." This was but a statement of elementary law, and used in its general sense.

It is well established in this state that the benefits or gains of a bargain are proper elements of damages in cases of *ex delicto* based upon fraud and deceit. *Kendrick v. Ryus*, 225 Mo. 150, 123 S. W. 937; *Hawaan v. McLean*, 139 Mo. App. 429, 122 S. W. 1094; *Caldwell v. Henry*, 78 Mo., loc. cit. 257; *Warner v. Winfrey*, 142 Mo. App. 298, 126 S. W. 216. And the value of the Columbia property was not an issue in the case. *Chase v. Rusk*, 90 Mo. App. 25; *Kendrick v. Ryus*, *supra*; *Warner v. Winfrey*, *supra*.

All the instructions given for plaintiffs are in harmony with the theories of the appellate courts of the state on the subject. There are other suggestions of error, but they are not serious enough to demand special attention.

Affirmed as to both defendants in error. All concur.

WITTY v. SPRINGFIELD TRACTION CO.
(Springfield Court of Appeals. Missouri. Feb. 6, 1911.)

1. APPEAL AND ERROR (§ 1051*)—REVIEW—HARMLESS ERROR—ADMISSION OF EVIDENCE.

Where defendant stipulated that its liability should depend upon the outcome of an appeal in another case which was decided adversely to it, the reading of the stipulation and the mandate to the jury, neither of which showed the amount of damages, was not prejudicial, for the defendant had conceded its liability.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4153-4160; Dec. Dig. § 1051.*]

2. EVIDENCE (§ 548*)—OPINION EVIDENCE—HYPOTHETICAL QUESTIONS.

Where a physician who had treated an injured woman was asked as an expert what would be the effect of a woman being thrown out of a seat in a street car upon the lower end of her spine and buttocks, there was nothing in the question requiring him to commingle knowledge gained as a physician with his opinion as an expert.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 2376; Dec. Dig. § 548.*]

3. EVIDENCE (§ 550*)—OPINION EVIDENCE—EXAMINATION OF EXPERTS—OPINIONS BASED ON TESTIMONY OF OTHERS.

Where a plaintiff in a personal injury case had testified as to her fall from a seat in a street car, and had described the resultant injuries, the foundation was broad enough for expert medical opinion upon similar facts.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 2366, 2367; Dec. Dig. § 550.*]

4. EVIDENCE (§ 528*)—OPINION EVIDENCE—HYPOTHETICAL QUESTION.

A physician testifying as an expert with respect to a described injury may give the probable results of the injury, or the causes which might produce certain described conditions.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 2335-2337; Dec. Dig. § 528.*]

5. EVIDENCE (§ 560*)—EXPERTS—BIAS.

In an action for personal injuries, where the testimony of a medical expert for defendant conflicted with that of the expert for plaintiff, it was permissible to contradict him by reason of bias that he held a similar position with a mining company.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 2380; Dec. Dig. § 560.*]

6. DAMAGES (§ 130*)—MEASURE—EXCESSIVE DAMAGES.

An award of \$1,500 damages was not excessive where it appeared that before the accident plaintiff, a woman, was in good health and could do housework, but that since she has been nervous and constantly suffered pain, and that her bowels have not properly performed their function, owing to an injury to her spine.

[Ed. Note.—For other cases, see Damages, Cent. Dig. §§ 357-367; Dec. Dig. § 130.*]

Appeal from Circuit Court, Greene County; James T. Neville, Judge.

Action by Maud E. Witty against the Springfield Traction Company. From a judgment for plaintiff, defendant appeals. Affirmed.

Delaney & Delaney, for appellant. Leonard Walker and Frank B. Williams, for respondent.

COX, J. Action for damages for an injury resulting to plaintiff from a collision of defendant's street car with an iron electric tower in the center of the square in the city of Springfield. As a result of this collision plaintiff alleges that she was thrown from her seat and was seriously injured, having received a serious blow in the back, another in the region of the abdomen, another in the region of the lower end of the spine, as a result of which she had become impaired in health, her nervous system was shocked, and she had become an invalid, and would remain so during her life. Trial by jury and verdict for plaintiff for \$1,500, and defendant has appealed.

This is a companion case to the case of *Wolven v. Springfield Traction Co.*, 143 Mo. App. 643, 128 S. W. 512, and, after the trial of the *Wolven* Case, the attorneys in this case filed a stipulation that this case should abide the decision in the *Wolven* Case, which had been appealed, and, if the judgment in that case should be affirmed, then the only question that should be tried in this case would be the question of damages. The *Wolven* Case was affirmed, and thereafter this case was called for trial, and at the trial this stipulation and also the mandate of the Court of Appeals showing the affirmation of the judgment in the *Wolven* Case were offered in evidence over defendant's objection, and this is now assigned as error. It is contended that the reading of this stipulation and the mandate to the jury were prejudicial to defendant. We are unable to see how this could be so, for defendant had already agreed that, if the *Wolven* Case was affirmed, it would concede its liability in this case, and would try only the question of damages. Neither the stipulation nor the mandate read to the jury showed the amount of the judgment in the *Wolven* Case, and it could not therefore prejudice the jury against the defendant on the question of the amount of damages which it should be required to pay the plaintiff in this case.

Dr. Ruyle had testified on behalf of plaintiff, and was asked the following question: "Doctor, a person thrown out of a seat in a street car with some force and violence, alighting on the lower end of the spine and striking that, or the buttocks, against the floor of the car—a woman, a female person—what would be the effect upon a person so thrown out of the seat?" Objection was made to this question upon the ground that it assumes and places witness in both the rôles of physician in waiting and expert at the same time, and because the question is not based upon the facts proved. The basis is not sufficiently broad upon which to predicate an opinion. There is nothing in this question to show that to answer it the physician would be required to base his answer upon information secured while attending

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Fed'r Indexes

the patient, and to commingle that with his judgment as an expert. Neither is the objection that it was not based upon the facts proven well taken, for the plaintiff had previously testified that she had been thrown from the seat as indicated by the question. The latter part of the objection that the basis is not sufficiently broad upon which to predicate an opinion is not well taken. The plaintiff had described the manner of her fall, and had also stated that she had been in good health prior to the time of the injury; that she had suffered constantly since the injury and had been unable to defecate properly, being compelled to remove the fecal matter mechanically, and, in answering the question, the doctor had stated that, if the blows were severe they might produce concussion of the brain, a shake-up of the nervous system, possible paralysis of the lower parts, and might cause paralysis of the rectum and paralyze the sphincter muscle, so as to destroy the power to expel the fecal matter. We see no objection to the question or its answer. A physician may testify as to the probable results of a described injury, or may detail the causes which might produce certain described conditions. *Holloway v. Kansas City*, 184 Mo. 19, 39, 82 S. W. 89.

Contention is also made by appellant that witnesses for plaintiff were allowed to detail her conversations and conduct long after the injury, and under circumstances which show that they could not have been part of the *res gestæ*, or the natural expressions resulting from pain. A careful reading of the testimony fails to show that any testimony of this character was admitted over defendant's objection. Hence there could be no error in this respect.

Dr. Smith had testified as a witness on behalf of defendant, and on cross-examination plaintiff's counsel was permitted to ask him if he had not occupied a similar relation to the Central Coal & Coke Company at Macon, Mo., that he now occupied to the defendant, and defendant assigns the admission of this testimony on cross-examination as error. For the purpose of affecting the credibility of a witness, it is always competent to show the feeling of the witness for or against a party litigant and his bias or prejudice if such there be. *State v. Darling*, 202 Mo. 150, 100 S. W. 631; *Czozowzka v. Railway*, 121 Mo. 201, 25 S. W. 911; *State v. Pruett*, 144 Mo. 92, 45 S. W. 1114. In this case the testimony of Dr. Smith was to some extent in conflict with that of Dr. Ruyle, who had testified on behalf of plaintiff, and we can see no reason why on cross-examination it was not permissible to show that Dr. Smith had been for a long time sustaining to other corporations or parties a relation similar to the relation he now sustains to defendant. Especially should this be true where, as in this case, there is some conflict in the testi-

mony of expert witnesses whose testimony is largely an expression of opinion, for it is common knowledge that any person is liable to be affected—often unconsciously—in his judgment by his personal interest, and the relation which he may sustain to the parties, and the fact that he may have sustained a similar relation to other parties and the time of its duration may very properly be considered for the same reason.

Contention is also made that the court erred in refusing certain instructions asked by the defendant. These instructions were for the purpose of withdrawing from the jury the consideration of the testimony elicited from Dr. Smith on cross-examination as to his former employment by another corporation, but what we have said in relation to the admission of that testimony disposes of the objection to these instructions.

It is finally contended that the damages assessed are excessive. We have gone carefully over the testimony with a view of ascertaining whether there is any force in this position. The evidence on the part of plaintiff shows that she was severely injured; that she had been in good health previous to the accident, and had had no trouble in digesting her food or in the movement of her bowels; that she had done her own housework, and was generally in good health; that since the accident she had constantly suffered pain, and as a result of the injury to the stomach she was unable to properly digest food and by reason of the injury to the lower end of the spine, resulting in paralysis of the rectum, the fecal matter had since been required to be removed mechanically; that she had suffered pain constantly from the time of the injury, and was still suffering; was nervous, and the evidence would also warrant the jury in finding that this condition was likely to continue indefinitely, and, if the jury believed this testimony, we cannot say that the amount of the verdict—\$1,500—was excessive.

The judgment will be affirmed. All concur.

DAVIS et al. v. GROSS et al.

(Kansas City Court of Appeals. Missouri.
Jan. 30, 1911. Rehearing Denied Feb.
18, 1911.)

1. BROKERS (§ 8*)—EMPLOYMENT—EVIDENCE.

In an action for brokers' commissions, evidence held to sustain a finding that plaintiffs were employed to secure the property for defendants.

[Ed. Note.—For other cases, see *Brokers*, Cent Dig. § 9; Dec. Dig. § 8*]

2. BROKERS (§ 85*)—ACTION FOR COMMISSIONS—EVIDENCE.

In an action for brokers' commissions for securing a purchase of certain real estate for defendants at a partition sale, evidence that at the sale one of the plaintiffs was instrumental in stopping the bidding of an adverse bidder on the ground that he was unwilling to comply

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

with the terms of the sale, and thereby rendered the service in accordance with his duty as representative of the defendants, was admissible.

[Ed. Note.—For other cases, see *Brokers*, Cent. Dig. §§ 106-115; Dec. Dig. § 85.*]

3. BROKERS (§ 85*)—ACTIONS FOR COMMISSIONS—EVIDENCE.

Where defendants employed plaintiffs to secure certain property about to be sold at a partition sale, evidence that plaintiffs agreed not to have any other bidders at the sale than defendants was admissible.

[Ed. Note.—For other cases, see *Brokers*, Cent. Dig. §§ 106-115; Dec. Dig. § 85.*]

Appeal from Circuit Court, Jackson County; Thos. J. Seehorn, Judge.

Action by John Davis and another against Samuel Gross and others. Judgment for plaintiffs, and defendants appeal. Affirmed.

James M. Chaney and Hal R. Lebrecht, for appellants. Joseph A. Guthrie and Geo. S. Bryant, Jr., for respondents.

ELLISON, J. Plaintiffs are real estate agents and brought this action for commission on the purchase of real estate in Kansas City. They recovered judgment in the circuit court.

The petition alleged that defendants desired to invest in property; that plaintiff Davis was looking for a suitable purchase; that he discovered the Brevoort Hotel could be had by purchase at a partition sale and notified defendants; that it was agreed that plaintiffs should advise them of the time and place of sale, and if it was bid in by defendants they would pay plaintiffs the customary commission.

Since the verdict was for plaintiffs, we will assume the facts to be as the evidence in their behalf tended to prove them. It appears that defendants wanted to invest in some real estate in Kansas City, and plaintiff Davis was looking for property that would suit them. In July or August, 1908, he saw an advertisement of property known as the Brevoort Hotel, by his coplaintiff, Rowland, who was a real estate agent. He called on the latter and obtained a price of \$13,000 which he placed before defendants. It suited the latter, and they said they would buy. Up to this time it was not understood that defendants were to pay any commission on the sale; it being the custom for sellers to settle for commissions to agents procuring the sale. But it became known that the title to this property was in three parties, and that it was then the subject of a partition suit in the Jackson county circuit court and was to be sold at a partition sale in the following October. Plaintiffs informed defendants of this situation, and also stated to them that, that being the condition, no commission could be paid by the seller, and, if defendants purchased, they must pay a commission to them. Plaintiffs stated that they would not look out, or seek, for other purchasers, and would notify defendants of

the day of sale and take them to the sale, and, as expressed by one of the witnesses, "Mr. Gross and Mr. Rowland was to bid in the property." Defendants agreed to pay a commission. Plaintiff Davis and defendants went to plaintiff Rowland's office and agreed to pay a commission on whatever price the land sold for at the partition sale. Plaintiffs notified defendants of the sale; but, a day or two before it was to take place, they informed plaintiffs that they would not attend the sale and would not buy. They returned the abstract plaintiffs furnished them. Plaintiffs protested that, in view of their agreement to buy, they (plaintiffs) had not sought other purchasers, etc. Plaintiffs felt that all was not right, and Rowland said he would go by for them on the day of sale and, at least, perform his part of the contract. He did go by and learned from Mr. Gross that his wife had gone to the courthouse; the latter telling him "to be there." He went to the courthouse, met Mrs. Gross, and introduced her to the commissioner and others interested in the sale. Something was again said about the commission and no objection from her. She suggested that Rowland do the bidding, when he said it would be better that she do it, which she did. She got the property for \$12,675. The terms of the sale were that \$4,000 was to be paid in cash, and during the bidding Rowland inquired of a bidder if he was prepared to put up that amount in cash, and found that he only proposed to pay \$1,000. Believing this to be unfair competition, he raised the question of the propriety of this man bidding, and he was ruled out.

We consider that the evidence given in behalf of plaintiffs amply supports the verdict. In our opinion the testimony of Mrs. Gross herself is sufficient to sustain it. She admits that she knew plaintiffs were expecting a commission from her, and with that knowledge she attended the sale with Rowland and asked him to bid for her. She admitted, before the sale, when informed by plaintiffs that they must pay a commission, she remained silent.

The objection to the testimony of Rowland that he was instrumental in stopping the bidding from the man who could not comply with the terms of the sale was not well taken. It was certainly unfair to defendants that a bidder who, confessedly, would not comply with the terms of the sale, should compete with them. And it was valuable service to defendants for Rowland to stop him. It was but a part of his duty as a representative of defendants, and its tendency, happening, as it did, in the presence of Mrs. Gross, was to show his agency and performance of service as declared upon in the petition.

The objection to evidence that plaintiffs would not have any other bidders at the

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sale than defendants was not well taken. It was merely an agreement to consider defendants as the prospective buyers and that they would represent them and not look out for others. It was only a statement of what good faith to defendants required. We can see nothing improper in it. But it is said that this objection and the one as to the disqualified bidder were not within the contract stated in the petition, and *McMillen v. City of Columbia*, 122 Mo. App. 34, 97 S. W. 953, is cited. We do not see that the case has any application. It was well remarked by the trial court that plaintiffs were not required to plead their evidence.

We have given careful consideration to the extended argument in defendants' favor; but, in view of the finding on facts, cannot allow it sufficient force, under the law, to overturn the judgment.

The instructions sufficiently submitted the issues, and we can do nothing less than affirm the judgment. All concur.

DAZEY v. ELVIN et al.

(Springfield Court of Appeals. Missouri. Feb. 6, 1911.)

1. JUDGMENT (§ 137*)—DEFAULTS—SETTING ASIDE—STATUTES.

Under the direct provisions of Rev. St. 1909, § 2094, the circuit court in its discretion may before final judgment set aside a default, and allow the action to be defended.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 262-264; Dec. Dig. § 137.*]

2. JUDGMENT (§ 139*)—DEFAULTS—SETTING ASIDE—DISCRETION OF COURT—EXERCISE OF DISCRETION.

It was not an abuse of the trial court's discretion to allow one claiming to be a bona fide purchaser of land without notice to intervene and defend an action against the land after default, even though a lis pendens had been filed, for the lis pendens only prevented him from holding the land to the plaintiff's injury, and, if he had a defense, he should be allowed to maintain it.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 265-268; Dec. Dig. § 139.*]

3. SPECIFIC PERFORMANCE (§ 8*)—NATURE—DISCRETION OF COURT.

Specific performance of a contract is not a matter of right, but rests in the sound discretion of a court of equity, which should consider the interests of all parties concerned.

[Ed. Note.—For other cases, see Specific Performance, Cent. Dig. §§ 17, 18; Dec. Dig. § 8.*]

4. SPECIFIC PERFORMANCE (§ 4*)—NATURE—EXISTENCE OF OTHER REMEDY.

One who has an adequate remedy at law cannot have specific performance of a contract, and hence one cannot have specific performance of a contract which would subject land in the hands of an innocent purchaser to the payment of damages for a breach of contract, if the one who broke the contract is solvent, and a money judgment against him can be collected, and the only relief sought is money damages with a lien on land to secure it.

[Ed. Note.—For other cases, see Specific Performance, Cent. Dig. § 4; Dec. Dig. § 4.*]

5. SPECIFIC PERFORMANCE (§ 119*)—RELIEF—BURDEN OF PROOF.

Where a petition seeking specific performance of a contract which would subject lands now in the hands of an innocent purchaser to the burden of a debt alleged that the seller was insolvent, which was put in issue by a general denial, the burden of proving insolvency is upon the plaintiff, for his right to specific performance depends upon insolvency.

[Ed. Note.—For other cases, see Specific Performance, Cent. Dig. §§ 382, 383; Dec. Dig. § 119.*]

6. APPEAL AND ERROR (§§ 181, 281*)—PRESENTATION OF GROUNDS OF REVIEW IN LOWER COURT—FAILURE.

Error not presented at trial or in the motion for new trial cannot be raised on appeal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1141-1160, 1650-1661; Dec. Dig. §§ 181, 281.*]

Appeal from Circuit Court, Barton County; B. G. Thurman, Judge.

Action by J. E. Dazey against Frank Elvin and another, in which F. A. Laurence intervened. From a judgment for defendants, plaintiff appeals. Affirmed.

Cole, Burnett & Moore, for appellant. Thos. J. Smith, for respondents.

COX, J. The essential facts out of which this litigation grew are as follows: On December 23, 1907, the following contract was entered into between plaintiff and defendant Frank Elvin: "Findley, Illinois, December 23, 1907. I have this day sold to Frank Elvin my livery stock in Pontiac, Ill., for the sum of six thousand dollars to be paid in the following manner—\$500.00 cash, \$500.00 on or before April 1st, 1908, \$2,000.00 in merchantable notes, \$3,000.00 secured by mtge. on south half of Sec. 15, Ozark T. P. Barton Co., Mo., to run for a period of five years from Dec. 1st, 1907, int. at the rate of five per cent payable semi-annually. Said livery stock is to remain in possession of J. E. Dazey until deal is consummated. J. E. Dazey. Frank Elvin." Defendant Frank Elvin refused to comply with this contract and conveyed the land mentioned therein to his brother, J. C. Elvin, and also executed some form of statement setting forth that one J. H. Harlow was the owner of a one-third interest in the land. The deed to J. C. Elvin and the statement as to Harlow's interest were filed for record in Barton county. On defendant Frank Elvin's refusal to comply with the contract upon his part, plaintiff sold the livery stock mentioned in the contract at public auction, from which sale he realized \$4,559.35, for which he gave proper credit, then brought this suit alleging the facts above set out, and further alleging that the conveyances of the property were fraudulent, alleged the insolvency of Frank Elvin, and prayed an accounting and a decree of specific performance requiring defendant Frank Elvin to execute the mortgage pro-

vided for in his contract and for general relief. Personal service was had upon defendants Frank Elvin and J. C. Elvin, and a lis pendens was filed by plaintiff. On April 15, 1908, default judgment was entered for plaintiff. The cause was continued for two terms without final judgment having been rendered, and on January 11, 1909, F. A. Laurence was on his own application, and against plaintiff's objection, made a party defendant on the ground that he claimed to be the owner of the land described in the contract, and by leave of the court filed an answer which was a general denial and a plea that he had purchased the land from J. C. Elvin, that J. C. Elvin had purchased from Frank Elvin, and that both Laurence and J. C. Elvin bought in good faith without actual knowledge of plaintiff's claim for a lien on the land. Upon motion of defendant Laurence, the default judgment was set aside, and a hearing had on the question as to whether plaintiff's demand against Frank Elvin should be enforced against the land. The court heard the testimony and dismissed plaintiff's bill, and he has appealed.

As a preliminary question, plaintiff insists error was committed by the court in permitting Laurence to be made a party and to defend in this case after default judgment had been entered. Laurence purchased the land after the suit was begun, but, as he claimed to have purchased the land in good faith for value and without actual knowledge of the pending suit, it was within the power of the court in the exercise of a wise discretion to permit him to come in and defend any time before final judgment. Rev. St. 1909, § 2094. And we do not think that discretion was unwisely exercised in this case. If it were true, as claimed by Laurence, that he had paid value for the land without actual knowledge of plaintiff's claim, it was but fair to him that plaintiff should be required to show some ground for fastening his claim upon this land before he should be permitted to subject it to the payment of his debt, and thus deprive Laurence of his title thereto. The filing of lis pendens—which filing was admitted by defendant Laurence—precluded Laurence from holding the land against plaintiff if to do so would work injury to plaintiff. The fact, however, that Laurence claimed to have purchased the land in good faith and without actual knowledge of plaintiff's claim, made it the duty of the court to protect Laurence's interest in this land if it could be done without injury to plaintiff. Whether this judgment should stand or fall must therefore depend upon whether plaintiff has shown himself entitled to equitable relief by a decree for specific performance, or for a money judgment and a lien upon this land to enforce it.

Specific performance of a contract is not awarded by a court of equity as a matter of right, but rests in the sound discretion of the court; and whether it will be granted

or withheld in a given case must be determined by the facts of that case. *Davis v. Petty*, 147 Mo. 374, 48 S. W. 944; *Brevator v. Creech*, 186 Mo. 558, 572, 85 S. W. 527; *Sease v. Cleveland Foundry Co.*, 141 Mo. 488, 42 S. W. 1064; *Gottfried v. Bray*, 208 Mo. 652, 660, 106 S. W. 639. When a party asks specific performance, it is the duty of the court to consider the interests of everybody concerned, and if, under the circumstances of the case, it would be inequitable to enforce specific performance, such relief will be denied. *Veth v. Gierth*, 92 Mo. 97, 104, 4 S. W. 432.

One of the requisites to the exercise of equitable jurisdiction is the absence of an adequate remedy at law. Equity does not supplant the law, but only lends its aid when the legal remedy is in some way inadequate. The real end sought to be attained in this case is damages for a breach of contract and security for such damages. Why should the security be exacted, and what reason is there for asking a court of equity to enforce it as a lien upon the land in question? If defendant Frank Elvin, who breached his contract, is solvent so that a money judgment can be collected by execution, then plaintiff has an adequate remedy at law, and there is no occasion for him to apply to a court of equity for protection. There is no testimony whatever in this case as to whether defendant Frank Elvin was solvent or insolvent. Plaintiff charged him to be insolvent, but this is put in issue by the answer of Laurence, and, since plaintiff is only seeking to recover and enforce collection of a money judgment, the burden was upon him to prove the insolvency of Frank Elvin in order to place himself in a position to insist upon his right to have his demand made a lien upon the land Frank Elvin had agreed to pledge as security for his debt to plaintiff. Having failed to do this, he has failed to show any ground for equitable relief. Especially is this true when to grant the relief demanded would result in robbing the defendant Laurence of his title to the land. Such a result ought not to be fostered unless there was some necessity for it.

It is finally insisted by plaintiff that, if he is not entitled to specific performance, he is, at least, entitled to a money judgment against Frank Elvin. The difficulty in plaintiff's way upon that proposition is that the record in this case fails to show that such relief was specifically asked at the hands of the trial court. Neither did the plaintiff in his motion for new trial call the attention of the trial court to the fact that he might be entitled to a money judgment. Not having called the trial court's attention to this matter, he is not now in a position to insist upon it here. *Sweet v. Maupin*, 65 Mo. 65; *Lynch v. Railroad*, 208 Mo. 1, loc. cit. 44, 106 S. W. 68.

The judgment will be affirmed. All concur.

BRIGHTWELL v. KANSAS CITY.

(Kansas City Court of Appeals. Missouri.
Jan. 30, 1911. Rehearing Denied
Feb. 13, 1911.)

1. MUNICIPAL CORPORATIONS (§ 747*)—LIABILITY—EXERCISE OF GOVERNMENTAL FUNCTION.

Rev. St. 1899, § 6067, provides that whenever any city desires to establish a park, etc., the common council, etc., is authorized to purchase or condemn land in such city for that purpose. Section 6075 gives the board of park commissioners power to establish, etc., within such park district all boulevards as they may deem proper, and for such purposes gives them jurisdiction over such of the streets as they deem necessary to give convenient access to the parks. The Kansas City Charter and Ordinances 1893, art. 10, requires by section 5 the board of park commissioners to adopt a system of public parks, and to designate lands to be appropriated for that purpose, and to select routes for boulevards, and further provides that special assessments for parks and boulevards shall be subject to the same rebate on payment, the same penalties for nonpayment, and shall be enforced in the same manner as general taxes levied by the city. *Held*, that while a municipal act will be classed as ministerial if it is substantially of a local or corporate nature, though it relates in a general way to a function of government, in levying an assessment for park purposes, the city acted in a governmental capacity, so that it was not liable in damages for the failure of its treasurer to issue a certificate to a purchaser at a sale of property under an assessment levied to maintain parks and boulevards.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 1570-1577; Dec. Dig. § 747.*]

Appeal from Circuit Court, Jackson County; James H. Slover, Judge.

Action by John A. Brightwell against Kansas City. From a judgment for plaintiff, defendant appeals. Reversed.

John G. Park, A. F. Smith, and I. D. Hook, for appellant. B. D. Davis and L. A. Laughlin, for respondent.

JOHNSON, J. This is an action to recover damages from the defendant city on the ground that it failed and refused to issue to plaintiff a certificate of purchase for land bought by him at a sale under a delinquent tax bill. In 1899 defendant levied a special assessment "upon all real estate, exclusive of improvements thereon, in the Westport Park district in Kansas City, Mo., for the purpose of maintaining, adorning, constructing, repairing, and otherwise improving parks, parkways, boulevards, and avenues located in Westport Park district," etc. A number of property owners in the district refused to pay the assessment, and in November, 1899, the city sold the property of the delinquents, and at this sale plaintiff purchased a lot for which he paid the city \$32.29, and became entitled to a certificate of purchase. No certificate was issued, and in December following certain property owners in the district brought suit in the circuit court of Jackson county against the city, the city

treasurer, and the purchasers at the sale to cancel and set aside the assessment and the sales thereunder on the ground that the proceedings were in violation of the Constitution of the state, and obtained a temporary injunction restraining the city and its treasurer from issuing certificates to the respective purchasers. Plaintiff was one of the purchasers against whom the injunction was issued. The suit was not finally tried in the circuit court until 1905, when a trial resulted in a judgment for the defendants and the injunction was dissolved. The property owners appealed to the Supreme Court, and in 1908 that court affirmed the judgment holding the proceedings constitutional and the assessment valid. *Corrigan v. Kansas City*, 211 Mo. 608, 111 S. W. 115. Plaintiff made repeated demands of the different city treasurers for a certificate of purchase, but these were refused, and in 1909 he instituted the present suit for damages against the city alone. A jury was waived, and after hearing the evidence the court rendered judgment for plaintiff for \$131. Defendant appealed.

As we view the case, the decisive question at issue is whether the city should be held to respond in damages for the failure of its treasurer to perform the purely ministerial act of issuing a certificate to a purchaser at a sale of property under an assessment levied for the maintenance of parks and boulevards. And the answer to this question in our opinion depends on the answer to be given another question, viz.: In levying the assessment was the city acting in a governmental or a ministerial capacity? If it was acting in the former capacity, it cannot be held liable for the torts of its officer in refusing to perform a ministerial act the law charges him with the duty of performing, but, if the city acted in the latter capacity, it must be held responsible for such torts. Pertinent statutory provisions are as follows:

"Sec. 6067. (Rev. St. 1899 [Ann. St. 1906, p. 3049].) Parks, How Established.—Whenever any city desires to establish a park or pleasure grounds, the common council or mayor and board of aldermen of such city is hereby authorized and empowered to purchase or condemn lands in such city or within one mile thereof for that purpose, and shall by ordinance describe the metes and bounds of such lands to be purchased or condemned."

"Sec. 6075. Power to Establish Roads, etc.—Such board of park commissioners shall have power and authority to establish, open, grade, pave and otherwise improve, in such manner and with such material as they may deem proper, within such park district, all such roads, boulevards and avenues as they may determine to be necessary or proper and useful to the inhabitants of such park

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

district; and, for these purposes, shall have jurisdiction over and may take possession of such of the streets in such city as they may deem necessary to afford to the inhabitants of such city convenient means of access to such parks." Ann. St. 1906, p. 3053.

The charter of the city provided (Charter and Ordinances of Kansas City 1893, § 5, art. 10): "Said board of park commissioners shall have power, and it shall be its duty, to devise and adopt a system of public parks, parkways and boulevards, for the use of the city and its inhabitants, and to select and designate lands to be used and appropriated for such purposes, within or without the city limits, and to select routes and streets for boulevards. * * * Further the charter and ordinances provided that special assessments for parks and boulevards should be subject to the same rebates on payment, the same penalties for nonpayment, and should be collected and enforced in the same manner as general taxes levied by the city. It is manifest that the state and municipal legislation relating to the establishment and maintenance in large cities of public parks, boulevards, and playgrounds is founded on the conviction that such institutions are a public necessity just as streets, sewers, police, and fire protection are necessary to the general public welfare. This view of the importance of such institutions and of their indispensableness in large centers of population is supported by the weight of authority in this state and other jurisdictions, and invests them with the character and attributes of general public necessities to municipalities of classes to which large cities belong as distinguished from mere utilities of special local value.

In 2 Abbott on Municipal Corporations, 1098, the author says: "The expenditure of public moneys for objects having for their purpose the protection and betterment of the good morals and health of the people has always been regarded, not only legitimate, but praiseworthy. The opportunity for diversion and amusement in the open air is an object of such character, and may be effected through the establishment and maintenance of public parks and boulevards." In *Shoemaker v. United States*, 147 U. S. 282, 13 Sup. Ct. 361, 37 L. Ed. 170, the court, speaking through Mr. Justice Shiras, say: "In the memory of men now living a proposition to take private property without the consent of the owner for a public park and to assess a proportionate part of the cost upon real estate benefited thereby would have been regarded as a novel exercise of legislative power. * * * There is now scarcely a city of any considerable size in the entire country that does not have such parks. The validity of the legislative acts erecting such parks and providing for their cost has been uniformly upheld. * * * Land taken in a city for public parks and squares, by authority of law, whether advantageous to

the public for recreation, health or business, is taken for a public use." In *Wilson v. Lambert*, 168 U. S. 611, 18 Sup. Ct. 217, 42 L. Ed. 599, the same court speaks approvingly of a New York decision holding "that the taking the grounds of individuals in a city to convert into a public square is taking the property for public use as much so as if such grounds were converted into a street; and the fact of the damages being assessed upon the owners of adjoining property, instead of being levied as a general tax upon the city, is no evidence that the property is not taken for public use," and gives voice to the view that "the effort made to distinguish between streets and highways as constituting proper subjects of taxation for special benefits, and public parks, as matters of such a general nature as not to justify special assessment, does not appear to us to be successful." Our own Supreme Court has this to say on the subject in *Kansas City v. Ward*, 134 Mo., loc. cit. 177, 35 S. W. 601: "Public parks in densely populated cities are manifestly essential to the health, comfort, and prosperity of their citizens. It is universally conceded, and not disputed in this case, that such improvements are a public use, within the meaning of the Constitution, for the purposes of which the land of the citizen may be taken upon payment of a just compensation. *County Court v. Griswold*, 58 Mo. 175; *Shoemaker v. United States*, 147 U. S. 297 [13 Sup. Ct. 361, 37 L. Ed. 170]; and cases cited."

Having ascertained that the acquisition by the city of property for park and boulevard purposes was for the public good and the public use, we pass to the question of whether the city in the performance of such service to the public was acting as an agency of government or in its private or corporate character for securing a mere special local advantage. As to acts of the latter character the rule thus is stated in 2 Dillon on Munic. Corp. (4th Ed.) § 980: "The doctrine may be considered as established where a given duty is a corporate one; that is, one which rests upon the municipality in respect of its special or local interests, and not as a public agency, and is absolute and perfect, and not discretionary or judicial in its nature, and is one owing to the plaintiff, or in the performance of which he is specially interested, that the corporation is liable in a civil action for the damages resulting to individuals by its neglect to perform the duty, or for the want of proper care or want of reasonable skill of its officers or servants acting under its direction or authority in the execution of such a duty; and, with the qualifications stated, it is liable, on the same principles and to the same extent, as an individual or private corporation would be under like circumstances. For illustration, if a city neglects its ministerial duty to cause its sewers to be kept free from obstructions, to the injury of a person who has an interest in the

performance of that duty, it is liable, as we shall see, to an action for the damages thereby occasioned." In the characterization of a given municipal act it is not enough to constitute such act legislative that it be found to relate in a general way to a function of government. If substantially it is of a local or corporate nature, it will be classed as ministerial. We recognized and applied this test in *Young v. Railroad*, 126 Mo. App. 1, 103 S. W. 135, where we held the city liable for the negligence of servants cleaning the streets. But even this test applied to the case in hand does not divest the municipal acts of condemning property for public use and providing for its payment of their real character as acts of a purely governmental nature. There is a strong, and, we think, perfect, analogy between such acts and those relating to laying out a street or sewer and condemning property therefor. No one would have the hardihood to contend that such functions were not legislative and judicial in their nature, and we perceive no difference between them and the functions in question. In the construction of a street or sewer the city acts ministerially, and is liable for the torts of its servants, but in planning and procuring the land for such improvements it acts as an agency of government, and is not liable for the torts of its servants. So with its parks and boulevards. In planning them, in condemning the necessary land, and in levying special taxes to pay for such land, the functions are those pertaining to sovereignty, but in the subsequent work required to convert raw land into parks and boulevards the city acts in its private corporate capacity.

Plaintiff has no cause of action against the city. He was not without remedy, but his action, whether at law or in equity, should have been against the recalcitrant officer, and not against the municipality.

The judgment is reversed. All concur.

ROBERTS v. WABASH R. CO.

(Kansas City Court of Appeals. Missouri.
Jan. 16, 1911. Rehearing. Denied
Feb. 18, 1911.)

1. EVIDENCE (§ 243*)—DECLARATIONS BY AGENT—ADMISSIBILITY.

An agent's declarations concerning a matter within the scope of his agency are admissible only when made at the time of the occurrence to which they relate.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 908-915; Dec. Dig. § 243.*]

2. MASTER AND SERVANT (§ 190*)—INCOMPETENCY OF EMPLOYE—NOTICE IMPUTED TO EMPLOYER.

A vice principal's knowledge of an employee's incompetency is imputed to the employer.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 473, 474; Dec. Dig. § 190.*]

3. EVIDENCE (§ 244*)—DECLARATIONS BY AGENT—ADMISSIBILITY.

On suit against a railway company for an assault by its operator, it was improper to permit plaintiff to show a subsequent declaration by the general passenger agent tending to show the operator's quarrelsomeness.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 916-936; Dec. Dig. § 244.*]

4. CARRIERS (§ 327*)—RIGHTS OF PASSENGERS.

A passenger has no right to enter a private telegraph office in a station without invitation.

[Ed. Note.—For other cases, see Carriers, Dec. Dig. § 327.*]

5. TRIAL (§ 253*)—INSTRUCTIONS.

On suit against a railway company, an instruction that plaintiff's entry into a private telegraph office in the station without invitation would not authorize assaulting or forcibly ejecting him was improper, as ignoring the company's theory that the operator first asked plaintiff to leave.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 584-586; Dec. Dig. § 253.*]

6. CARRIERS (§ 283*)—ASSAULTS UPON PASSENGERS—LIABILITY.

A railway company is liable for assault upon a passenger by its operator, though incidentally he worked as operator for an independent telegraph company, and though the passenger called to send a private message.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. § 1123; Dec. Dig. § 283.*]

7. APPEAL AND ERROR (§§ 904, 905*)—REVIEW—SCOPE.

Appellate courts cannot pass upon the weight or credibility of evidence.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3901-3907; Dec. Dig. §§ 904, 905.*]

Appeal from Circuit Court, Adair County; Nat. M. Shelton, Judge.

Action by James L. Roberts against the Wabash Railroad Company. Judgment for plaintiff, and defendant appeals. Reversed and remanded.

James L. Minnis and Higbee & Mills, for appellant. Campbell & Ellison, C. E. Murrell, R. M. Reynolds, and Geo. N. Davis, for respondent.

BROADBUDS, P. J. The plaintiff sues the defendant for damages for an assault committed on him by the defendant's agent at Salisbury, where he was to change cars from the Glasgow branch of defendant's railroad to its main line.

The plaintiff was a young man of slight build. Burkhardt, the agent, alleged to have committed the assault, was a large, heavy man. On the morning of the day of the occurrence plaintiff took passage from Glasgow by way of Salisbury to Macon, Mo. When he arrived at Salisbury for the purpose of sending a telegram to his sister-in-law at Macon, he went to the ticket window of the ladies' room in the defendant's station, and inquired in reference to sending a telegram, whereupon a young man about 17 years of age stepped up to the window, and asked him if he wanted to buy a ticket.

Plaintiff said "No," that he wanted to send a telegram. He was told by the young man to come around on the inside of the office, and he would give him a telegram blank. Plaintiff went as directed, and sat down and started to write his message. For the purpose of ascertaining the time when the train would reach Macon, he looked around for some one to inform him, when he discovered there was no one in the room but defendant's operator, who appeared to be busy, whereupon he got up and went out and saw the young man, and spoke to him about the matter, who said to him: "You go back in there where you were, and ask the operator. He will tell you. I don't know." Plaintiff returned to the office and waited until the operator, Mr. Burkhardt, who at that time had finished the business at which he had been engaged, and said to him: "Would you please, sir, tell me what time the train gets into Macon this afternoon?" Whereupon the agent turned to him, and said: "What in the hell are you asking me such a God damn fool question for?" To which the plaintiff replied: "I beg your pardon, sir. I simply wanted to know what time the train gets to Macon this afternoon." The operator said: "Don't you see I am too God damn busy to answer such fool questions as that? God damn you, get out of here I tell you." Plaintiff again repeated his inquiry as to when the train would arrive at Macon, and said, if the operator would tell him, he would get out. The operator said, "Don't you hear me?" and again cursed him and threatened to put him out. Plaintiff then said, "I was told to come in here by your man, and I can't send the message unless I know what time the train gets to Macon," to which the operator replied, "I will put you out then, God damn you, if you won't get out," and grabbed plaintiff under the chin with his arm and began dragging him out, his heels touching the floor. According to plaintiff's description of the affair: "He began dragging me out and jerking me, just as he got one hand under my chin. He grabbed me either by the vest or collar, one. * * * I know when I got out of the station my tie was half undone. I said to him, 'Let me get my umbrella if you are going to put me out.'" Burkhardt then swore again and said: "I will throw your umbrella out after I throw you out." He stated that his neck was slightly abraded in the scuffle.

Plaintiff testified as to a conversation he had with a Mr. Watts, the defendant's general passenger agent, in reference to the treatment he had received at the hands of Burkhardt. At first defendant objected to the proof offered that Watts was such agent, but afterwards the objection was withdrawn. Plaintiff was then asked where the conversation occurred, and what Mr. Watts said. Defendant objected to the competency of such evidence on the ground that it was not shown that he was then acting in the line

of his duty. The objection was overruled, and the witness was permitted to answer. He stated that he was introduced to Mr. Watts in the lobby of a hotel at Moberly; that Watts asked him: "Is your name Roberts? * * * Are you from Marshall? You are the man who had trouble with our man Burkhardt at Salisbury. I don't know what is the matter with that damn fellow Burkhardt. He is always getting into scraps, and we always have trouble with him." It appeared that Burkhardt was acting in the double capacity as operator of both the Western Union Telegraph Company and the defendant.

The defendant, instead of reciting the facts upon which it relies, most of its statement is taken up with excerpts from the testimony. This mode of presenting a case to this court is not very satisfactory, and imposes upon us the duty practically to go over the entire record in order to get a proper understanding of the case, which we can do just as effectually without as with the aid of such a statement. However, we gather from the record that there was a sharp conflict between the testimony of plaintiff and that of defendant. Burkhardt testified substantially that: While he was engaged telegraphing, some one came to the window and inquired to know what time the train would arrive at Macon; that, being busy he said to him, "kinder abrupt" that he would wait on him in a minute; that he continued with his work, and in a short time the chair in which he was sitting was pulled around, which had the effect of throwing his hand off the instrument he was working; that he reached up and caught plaintiff and took him and set him out the office door and into the waiting room; that as he attempted to close the door plaintiff rushed back to get into the door, but that he fastened it against him; and that plaintiff then asked for his umbrella and hat, which he handed out through the window.

Two of defendant's conductors who were present testified at the trial. Conductor Malone stated that there was no commotion, that he heard no abusive language or threats on the part of Burkhardt. He was asked to describe how Burkhardt had hold of plaintiff. His answer was that: "About as near as I could describe it, it put me in mind of a girl about 12 years old carrying a child about four years old in the house he didn't want to go." His testimony was that at the time plaintiff asked Burkhardt about the time of the arrival of the train at Macon he was getting orders for his train. Shields, the other conductor, testified that he went to the window of the men's waiting room with the intention of asking Burkhardt what was on board; that "this little man Roberts was at the window with his hands and cane and making pretty much of a to do trying to get Burkhardt to come over and wait on him"; that he passed by him and went into the

room, and he supposed that plaintiff slipped in after him; that plaintiff walked up and put his hand on Burkhardt's shoulders, and said he would demand an answer; that Burkhardt looked up and said, "You get out there where you came from, and I will wait on you when I get ready"; that plaintiff still insisted on an answer; that Burkhardt then arose and pulled up plaintiff and walked out with him; that it was done in less time than it took him to tell it; that "he picked him up like a child would a rag doll"; and that Burkhardt used no profane or abusive language.

The plaintiff recovered in the sum of \$50 compensatory and \$250 punitive damages. The defendant appealed.

It is contended by appellant that the court committed error in admitting the testimony as to what Watts, the general passenger agent of defendant, said about Burkhardt. It is a rule of law that declarations of an agent in relation to a matter within the scope of his agency are admissible only when made at the time of the occurrence to which they relate. *McDermott v. Railroad Co.*, 73 Mo. 516, 39 Am. Rep. 526; *O'Bryan v. Kinney*, 74 Mo. 125; *Frye v. Railway Co.*, 200 Mo. 377, 98 S. W. 566, 8 L. R. A. (N. S.) 1069. While such is the well-established rule, it is also as well established that a railroad company or any other master is chargeable with the knowledge of the incompetency of one of its employes when it is shown that the vice principal had such knowledge. *McDermott v. Railroad Co.*, *supra*. "Language used by the superintendent of a street railway company, admitting and justifying an assault of one of its drivers, was held to bind the company." *Malecek v. Railway Co.*, 57 Mo. 17. The admission of the evidence was incompetent under the first three cases cited. Whether the rule in the *Malecek* Case is in conflict with the subsequent decisions cited it is not necessary to decide, but perhaps it is admissible to say that the rule that the statements of the vice principal of a corporation ought to be admissible whether they be a part of the *res gestæ* or not. The rule as to natural persons is that admissions or statements as to the subject-matter made by a party at any time are admissible against him. And, as a corporation cannot speak except by its vice principal, his statements and admissions ought to be placed upon the same footing as those of a natural person, otherwise we have two different rules of evidence governing the admission of evidence as to a given transaction, in which the discrimination is in favor of the corporation. For instance in a suit by A. against C., a corporation, it is competent to prove what A. said about the matter in dispute, whether it be a part of the *res gestæ* or not, but it is not competent to prove what the vice principal said except it be confined to the occurrence—the *res gestæ*.

Defendant claims that the court committed error in giving instruction numbered 1 at the instance of the plaintiff. It reads as follows: "The court instructs the jury that in this case it is not necessary that plaintiff should have received a special invitation from any employé or servant of the defendant to enter into the private office of said defendant for the purpose of transacting business, and the fact that plaintiff may have entered said office without any special invitation, if you find from the evidence he did so, would of itself give defendant no right to assault or forcibly eject the plaintiff, if you find from the evidence defendant did assault or forcibly eject him." The objection is well taken. In the first place, we do not think that plaintiff had any right to enter the office where the telegraph operator was engaged in performing the duties of his position without an invitation to do so. The duties of a telegraph operator for a railroad are of such grave importance that it is necessary that at times his attention should be entirely directed to matters that connect him with the operation of trains, both those carrying freight and passengers and their safe conduct, upon which depend, not only the safety of the property of the carrier, but also the property of the shipper, as well as the security of the persons and lives of the passengers. We cannot imagine a duty that demands more careful attention than required that of such a servant. An interruption at a critical moment is liable to so distract the attention of the operator, as to cause him to commit an error causing a collision of trains or produce other dire mishap resulting in a great loss of property and endangering the lives of passengers. And we do not think that under certain circumstances the operator would not have the right to eject a passenger or any other person from his private office if they should remain against his will if he did not use unnecessary force. The instruction was prejudicial, for it left out of consideration the defendant's evidence to the effect, that plaintiff had been invited by the operator while he was busy with his instrument to leave and that he would wait on him when he had time. If this was true, which was a matter for the jury to say, whether the operator had the right to eject him under the circumstances. And the instruction is in conflict with that of defendant numbered 1, which is to the effect, in part, that, if plaintiff went into the operator's office with or without invitation, it was his duty to have left the office if invited to do so, otherwise the operator had the right to eject him by the exercise of reasonable force.

The contention is made that the operator at the time was not in the performance of his duties as the agent of the company, but in the line of his duty as agent of the telegraph company. The facts are otherwise. We gather from the evidence that he was

engaged in manipulating his instrument in connection with the operation of trains of the defendant. Because he was solicited by plaintiff to send a private message to Macon does not go to show that he was engaged in telegraphing for the telegraph company. It proves nothing. He was the employe, and, as the evidence tends to show, subject to be discharged at the will of the defendant. The duties he performed for the telegraph company were merely incidental and subservient to his employment as agent of the defendant. The case falls within the rule in the case of *Standard Oil Co. v. Anderson*, 212 U. S. 215, 29 Sup. Ct. 252, 53 L. Ed. 480.

Many other errors are assigned which upon examination we deem not well taken. Finally, it is insisted that the court acted arbitrarily in overruling defendant's motion for a nonsuit, and that it was such an abuse of discretion that this court should review its action. The rule is that appellate courts are bound by certain limitations, among which is one that they have no authority to pass upon the weight or credibility of evidence. It is contended by defendant that under the facts and circumstances of the case the plaintiff should not have prevailed. So we think, but, as the plaintiff testified that the operator of the defendant cursed, abused, and assaulted him in a violent manner, it was for the jury to accept his evidence as true, notwithstanding the great preponderance of the evidence on the part of the defendant was otherwise. In our opinion the plaintiff made a weak showing, but that was a matter for the trial court to consider. That court, having before it the witnesses and hearing most of them testify in person, was a far better judge of the weight and credibility of their evidence than we can possibly be. On account of the error mentioned, we think the cause should be reversed.

Reversed and remanded. All concur

ASMUS v. UNITED RYS. CO. OF ST. LOUIS et al.

(Springfield Court of Appeals. Missouri. Jan. 3, 1911. Rehearing Denied Feb. 6, 1911.)

1. STREET RAILROADS (§ 117*)—OBSTRUCTIONS IN STREET—SWITCH—LIABILITY OF COMPANY—QUESTION FOR JURY.

In an action against a street railway company for the death of a teamster alleged to have been caused by the maintenance of an unbroken main line switch, the question of negligence in maintaining such a switch *held*, under the evidence, to be one for the jury.

[Ed. Note.—For other cases, see *Street Railroads*, Dec. Dig. § 117.*]

2. APPEAL AND ERROR (§ 856*)—REVIEW—GROUNDS FOR SUSTAINING DECISION NOT CONSIDERED.

Where a petition in an action against a street railway company for wrongful death caused by the maintenance of a negligently con-

structed switch in the street failed to allege that the company was wrongfully in the streets, but proceeded upon the theory that it was rightfully there, the plaintiff cannot support a judgment upon the theory that defendant showed no license to use the streets, and hence the switch was a common nuisance.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 3406-3434; Dec. Dig. § 856.*]

3. JURY (§ 53*)—QUALIFICATIONS—PRIOR SERVICE WITHIN YEAR.

A juror drawn for one week's service who served on a jury the first of the week is not disqualified from serving again the latter part of the week, as having served on a jury within the year.

[Ed. Note.—For other cases, see *Jury*, Cent. Dig. § 259; Dec. Dig. § 53.*]

4. APPEAL AND ERROR (§ 1050*)—REVIEW—HARMLESS ERROR—WRONGFUL DEATH—EVIDENCE—REVERSIBLE ERROR.

Where a wife in an action against a street railway company for the wrongful death of her husband testified that she had five minor children, it was not reversible error.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 4153-4166; Dec. Dig. § 1050.*]

5. STREET RAILROADS (§ 86*)—OBSTRUCTIONS IN STREETS—SWITCH—LIABILITY OF COMPANY.

A street railway which maintains a dangerous switch on a street is guilty of negligence, even though it does not practically prevent public use of the highway.

[Ed. Note.—For other cases, see *Street Railroads*, Cent. Dig. §§ 173-187; Dec. Dig. § 86.*]

6. STREET RAILROADS (§ 86*)—OPERATION—DUTY TO REPAIR STREETS NEAR TRACKS—STATUTE.

Under the charter of the city of St. Louis, street car companies are required to keep the streets within a certain distance of their rails in repair, and to keep the street as near even with the top of the rails as possible, and a company is liable for its failure both to the city and a private person.

[Ed. Note.—For other cases, see *Street Railroads*, Cent. Dig. §§ 173-187; Dec. Dig. § 86.*]

7. TRIAL (§ 256*)—INSTRUCTIONS—REQUESTS—NECESSITY.

Where a defendant street railway company failed to request the trial court to define the meaning of technical words used in the instructions, it cannot complain of a failure to define such terms.

[Ed. Note.—For other cases, see *Trial*, Cent. Dig. §§ 628-641; Dec. Dig. § 256.*]

8. STREET RAILROADS (§ 118*)—OBSTRUCTIONS IN STREET—SWITCH—LIABILITY OF COMPANY—INSTRUCTIONS.

Where the petition in an action against a street railway company for a wrongful death charged that it was caused by defendant's negligence in maintaining a dangerous switch in the street, an instruction for plaintiff limiting the right to recover upon a finding by the jury that defendant failed to use ordinary care in installing and using the switch, where it could have used a safer one, and one on the part of the defendant that, even though they found deceased met his death because of the sunken condition of the pavement near the switch that the verdict should be for the defendant, if the switch was necessary for the purpose it was used, properly presented the issues to the jury.

[Ed. Note.—For other cases, see *Street Railroads*, Cent. Dig. §§ 258-269; Dec. Dig. § 118.*]

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

9. STREET RAILROADS (§ 118*)—OPERATION—INSTRUCTIONS—APPLICABILITY TO PLEADINGS.

Where the petition in an action against a street railway company for wrongful death charged only that it was caused by the defendant's negligence in maintaining a dangerous switch in the street, an instruction which charged the jury that the St. Louis city charter required street car companies to keep the street in repair for one foot outside the rails, and, if this was not done and such failure caused the injury, the plaintiff might recover, was erroneous in allowing for negligence not complained of in the petition.

[Ed. Note.—For other cases, see Street Railroads, Cent. Dig. §§ 258-269; Dec. Dig. § 118.*]

10. APPEAL AND ERROR (§ 882*)—REVIEW—HARMLESS ERROR—INSTRUCTIONS—PERSONS REQUESTING.

In an action against a city and a street railroad, where an erroneous instruction given at the request of the city was prejudicial to the railroad, a judgment in favor of the plaintiff against the railroad will be reversed.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3591-3610; Dec. Dig. § 882.*]

Appeal from St. Louis Circuit Court; Eugene McQuillin, Judge.

Action by Sabina Asmus against the United Railways Company of St. Louis and another. From a judgment for plaintiff, the United Railways appealed to the St. Louis Court of Appeals, from which the cause was transferred to the Springfield Court of Appeals. Reversed and remanded.

Glendy B. Arnold (Boyle & Priest, of counsel), for appellant. Robert L. McLaran, for respondent.

GRAY, J. Plaintiff instituted this suit in the circuit court of the city of St. Louis on the 18th day of November, 1908, to recover damages alleged to have been sustained by her on account of the death of her husband, which the petition alleges to have been caused by the negligence of the appellant, a street railway company, and the city of St. Louis, in maintaining in Washington avenue, a public street in said city, at its intersection with Fourteenth street, a dangerous obstruction in the form of a switch, which was used by appellant in switching cars from its line on Washington avenue to its tracks in said Fourteenth street. The petition alleges that plaintiff's husband, while driving his wagon across said switch, on the 17th day of August, 1908, was jolted off the seat into the street, striking his head with great force against the pavement, inflicting injuries from which he died. The answer of the appellant is a general denial, coupled with a plea of contributory negligence, and also alleging that the switch used was the best and most approved device known, and was in common use, and used at the intersection of said streets as a necessary means to conduct its business under and by virtue of the laws of the state and the ordinances

of the city of St. Louis. The answer of the city was a general denial, and also a plea of contributory negligence, and alleging that the switch in use was the best and most approved device, and of the best pattern and construction known, and was in common and general use. On trial before a jury a verdict of \$8,500 was returned against the appellant, but the verdict was in favor of the city of St. Louis. The street car company appealed from the judgment to the St. Louis Court of Appeals, and the cause is in this court on transfer from the St. Louis court.

The appellant maintains that evidence of negligence not alleged in the petition was admitted by the court, and that the instructions also authorized a recovery for such negligence. In order that a fair understanding of this question may be had, we quote the following from the petition:

"For her cause of action, plaintiff states that at all times hereinafter mentioned and for a long time prior thereto defendant, United Railways Company of St. Louis, owned, maintained, operated, and controlled a line of street car tracks laid and constructed along Washington avenue, one of the public streets of the said city of St. Louis, said street and said tracks running from east to west; that said defendant, United Railways Company of St. Louis, also owned, maintained, operated, and controlled a certain other line of street car tracks laid and constructed along Fourteenth street, a public street of said city of St. Louis, running from north to south; that said Fourteenth street crosses said Washington avenue at about a right angle.

"Plaintiff further states that the said tracks of the said defendant which are laid on Fourteenth street are on that part of said street which is immediately south of said Washington avenue, and that, as said tracks on Fourteenth street approach said Washington avenue from the south, they make a curve or bend to the west, and run into and connect with said defendant's said tracks on Washington avenue.

"Plaintiff further states that the most western rail of the tracks on Fourteenth street connects with the most southern rail of the tracks on Washington avenue; that as said most western rail of the Fourteenth street tracks gradually curves towards and approaches the said most southern rail of the Washington avenue tracks, and as said most western rail is running in a westwardly direction, almost parallel to said Washington avenue tracks, defendant, United Railways Company, has at all times herein mentioned, and for a long time prior thereto, owned, maintained, and controlled an iron or steel guard or flange extending along the north side of said most western rail of the said Fourteenth street track for a distance of about four feet, said guard or flange having

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

a height of about two inches above the top of the said rail and of the adjoining granite blocks with which said Washington avenue is paved; that on the north side of the said most southern rail of the said tracks on Washington avenue said last-named defendant at all times herein mentioned and for a long time prior thereto has owned, maintained, and controlled another iron or steel guard or flange, which commences at a point about $1\frac{1}{2}$ or 2 feet east of the point of connection of the said western rail of the Fourteenth street tracks with said most southern rail of said Washington avenue tracks, and extends thence westwardly along the north side of said most southern rail for a distance of about 5 or 6 feet, said last-mentioned guard or flange having a height of about $2\frac{1}{2}$ or 3 inches above the top of said rails, and of the adjoining granite pavement of said street, said two flanges overlapping one another to the extent of about $1\frac{1}{2}$ feet; said guards or flanges being about parallel to each other and about 5 inches apart.

"Plaintiff further states that at all times herein mentioned, and for a long time prior thereto, the pavement of said Washington avenue, on both sides of and adjoining the two said rails at the places where said flanges are constructed and maintained, as aforesaid, had become and was out of repair, in that it was worn, sunken, depressed for a distance of about six inches on each side of said rails from the wear and tear incident to the usual and ordinary uses of said street.

"Plaintiff further states that the said iron or steel guards or flanges, extending along the said rails as aforesaid, were at all times herein mentioned firmly attached and fastened to said rails and said street, and were firm, rigid, and unyielding; that said guards or flanges, extending above said rails and said street as above set forth, constituted dangerous obstructions in said public street known as Washington avenue; that the wheels of wagons and other ordinary vehicles of travel passing along and across said street were liable and apt to strike against said flanges or to become caught between the same, greatly shaking, jarring, and jolting such vehicles, and thereby endangering the lives and limbs of persons riding therein; that said flanges are made more dangerous by reason of the aforesaid worn, sunken, and depressed condition of the pavement of Washington avenue.

"Plaintiff further states that said defendant United Railways Company of St. Louis at all times herein mentioned, and for a long time prior thereto, had knowledge of the said dangerous condition caused by said flanges as aforesaid, or by the exercise of reasonable care would have had such knowledge, and that said defendant wrongfully, unlawfully, improperly, unskillfully, negligently, and carelessly kept and maintained said flanges, and permitted them to remain in said street in said dangerous condition."

During the trial the defendants objected to testimony tending to prove that the street immediately adjoining the rails of the track was out of repair, caused by the fact that the blocks used in paving had become worn, for the reason that the petition did not charge that the injury was caused by the condition of the pavement. The trial court agreed with the defendants and suggested to plaintiff to amend the petition, so that the evidence would be proper. The record does not show any amendment was made. The court, however, permitted the testimony to go before the jury over the objections and exceptions of the defendants.

Washington avenue runs east and west, intersecting Fourteenth street at right angles. The appellant operated a double-track street railway line in Washington avenue east and west of Fourteenth street, and a double-track line in Fourteenth street connecting with the Washington avenue line. The Washington avenue line at the time complained of was much used by the appellant and its cars were run at short intervals over each track thereon. No regular car service was maintained over the Fourteenth street tracks, but they were used solely for emergency and temporary purposes. There were no tracks on Fourteenth street north of Washington avenue, and as the Fourteenth street tracks approached Washington avenue they curved westwardly and connected with the tracks on that avenue. The most westwardly rail on Fourteenth street connected with the most southwardly rail on Washington avenue, and at the place where the rails came together defendant had installed and maintained a certain switch, known as an "unbroken main line switch." A part of that switch was a guard along the north side of the most southern rail on Washington avenue, and another guard or flange on the south side of said rail. The guard or flange on the north side of the rail was 4 feet long, and projected about $2\frac{1}{2}$ inches above the top of the rail. The flange or guard on the south side of the rail was 6 feet long, and projected about 2 inches above the top of the rail.

The plaintiff's evidence tends to prove that on the 17th day of October, 1908, and about 1:30 in the afternoon, plaintiff's husband was driving a stake wagon, drawn by two horses, along that portion of Washington avenue west of Fourteenth street. He was driving eastwardly, and was on the north side of the south track. His wagon was loaded with election booths, and his horses were proceeding at a slow trot. The seat of the wagon, and upon which he was sitting at the time of the accident, was an unusually high seat, and may fairly be said that the testimony shows there was greater danger of being thrown from such a seat by a jolt of the wagon, than had the seat been an ordinary one. The plaintiff's evidence further tends to show that, as the deceased approached Fourteenth street, he endeavored to cross

diagonally from the north side to the south side thereof, apparently with the intention of going south on Fourteenth street, and in making the crossing the right front wheel of his wagon struck the projecting flanges of the switch, and as a result thereof he was jolted and thrown from the wagon onto the pavement of Washington avenue; that the wheels of the wagon passed over him and he received injuries from which he died.

It was the contention of the respondent that the defendants were guilty of negligence in maintaining at the point the "unbroken main line switch"; that it was a switch of unusual construction, and was not in general use; that the tongue of the switch is set on top of the rail and the guard is also higher than the rails and higher than the guard of the ordinary switch. The plaintiff claimed that the street car company should have used a switch known as "tongue-mate" switch. In the tongue-mate switch, the tongue or switch point is set down in a groove so that the top of the tongue is nearly level with the top of the rail; while the tongue of the unbroken main line switch is set on top of the rail, and the guard is some higher than the guard of the tongue-mate switch. The track lines on Fourteenth street were used for the purpose of switching onto them defective cars which might become defective while in use on the Washington avenue line; and, if the travel on the Washington avenue line became obstructed, cars could be switched onto the Fourteenth street line and routed so that traffic would not be delayed.

The defendants contended that the switch in use was the one best adapted for the purposes, and also offered evidence tending to prove that the other switch had at one time been maintained at the point, and that complaint was made, on account of the noise made in passing over the switch, and it was taken up and the unbroken main line switch installed. There is no dispute about the following facts: The unbroken main line switch left the track on Washington avenue in such condition that cars would run smoothly over the track at the point, without any jar or jolting caused by running over a switch. In other words, in operating the Washington avenue line, the switch in no wise interfered with the wheels of the car, but the same ran smoothly over the track without interference, that in vehicles passing east and west over Washington avenue there was less danger of injury than in the use of the tongue-mate switch, as the distance between the flange and the rail was sufficient to permit the wheels of the vehicle to pass through without interference; while in the tongue-mate switch vehicles were likely to become fastened in the switch. The evidence also shows that in the use of the tongue-mate switch it is necessary to have several joints, and that the car in passing over the same, makes considerable noise, and there is more or less jolting of the passen-

gers, and, in addition thereto, the car sometimes does not follow the main line, but is deflected onto the switch. On the other hand, the testimony shows that in crossing the street diagonally the main line switch, on account of extending above the rails, is more of an obstruction to the vehicle than the tongue-mate switch. The defendants undertook to prove that the unbroken main line switch was necessary at the point where the accident occurred. But witnesses admitted that the tongue-mate switch was also in common use for such purposes. And it may be said that the evidence shows that the tongue-mate switch was gradually taking the place of the unbroken main line switch for the purposes for which they are used. From the above statement of the facts, it is readily observed that the question of plaintiff's right to recover is a very close one. It may also be said from the evidence that, if plaintiff was entitled to go to the jury from the fact that her husband was jolted from his seat while attempting to drive diagonally across the switch, she would also have been entitled to go to the jury had the tongue-mate switch been used, and had his wheel caught in it while driving parallel with the car track on Washington avenue. If he had lost his life under the latter circumstances, the plaintiff's testimony would have tended to show that, where the unbroken main line switch is used, there is no danger incurred in driving parallel with the switch; while, where the tongue-mate switch is used, the wheels of vehicles are liable to become caught in attempting to drive parallel and through the same.

There was another thing the defendant had a right to take into consideration, and that was the safety of its passengers. The undisputed evidence is that in the use of the unbroken main line switch there is absolutely no danger to passengers while the car is passing over the same; while there is some danger in the use of the tongue-mate switch, due to the fact that cars sometimes become deflected and one of the wheels leave the main track and cause the car to become derailed. From the above, it must be admitted, if plaintiff is entitled to go to the jury at all, it is on the theory that the question is one about which the minds of reasonable man may differ. We will say, however, were it not for the fact that the testimony tends to prove that the tongue-mate switch at the time complained of was much more in common use and was gradually taking the place of the unbroken main line switch, we would not hesitate to hold that the plaintiff failed to make out a case. But we are not prepared to say that such evidence was not sufficient to support a verdict when the same was returned where the case was properly tried, and under instructions clearly defining the issues. We therefore hold the court did not err in submitting the case to the jury.

The respondent contends that the appellant did not show any right or license to

occupy the streets of the city with its tracks, and therefore the switch was a public nuisance, and the defendant liable, regardless of negligence. The petition does not present such an issue, but is drawn upon the theory that the appellant was rightfully on the streets. The question is settled in the case of *Huff v. Railway Co.*, 213 Mo. 495, 111 S. W. 1145.

The appellant contends in this court that the judgment should be reversed and the cause remanded because the court overruled its challenges to two jurors. The grounds of the challenge were that each of the jurors had served on a jury in said court within 12 months next preceding the trial of this case. The evidence shows that the jurors had been drawn for one week's service, and that during the week they had served on a jury, and the plaintiff's case was called during the same week. On the 5th day of December of this year, and in the case of *Paula F. Blyson-Spencer v. This Appellant*, 132 S. W. 1175, this court decided the point against the appellant, and we reaffirm our decision in that case.

During the trial the court permitted the plaintiff to testify that she had five minor children, and appellant contends that reversible error was committed thereby. This point is also ruled against appellant on the authority of *Fisher v. Central Lead Co.*, 156 Mo. 479, 56 S. W. 1107, and cases therein cited.

It is next insisted by the appellant the mere fact that the switch was dangerous to travel in the street did not make the appellant guilty of negligence in using the same, and appellant was not liable unless the danger was so great as to practically withdraw the thoroughfare from public use, and cites in support thereof *Morie v. Transit Co.*, 116 Mo. App. 12, 91 S. W. 962; *Seibert v. Railroad Co.*, 188 Mo. 657, 87 S. W. 995, 70 L. R. A. 72; *Brown v. Railroad Co.*, 137 Mo. 529, 38 S. W. 1099; *Tate v. Railroad Co.*, 64 Mo. 149, and *Grattis v. Railroad Co.*, 153 Mo. 380, 55 S. W. 108, 48 L. R. A. 399, 77 Am. St. Rep. 721.

The case of *Morie v. Transit Co.* does not so hold. That case recognizes the general doctrine that every switch or street car track in a street more or less obstructs the use of the street, and the mere fact that it does so does not render the railroad company or the city liable to damages. But that it is the duty of railway companies in using the streets of a city for its tracks and switches to exercise ordinary care and not to use an appliance that is dangerous, if by the exercise of ordinary care a proper and safer appliance could be installed. In *Seibert v. Railroad Co.* a different question was presented. In that case, under an ordinance of the city, passed by authority of the charter, the street car company had erected a safety gate at a point where its track crossed the public street. In the erection of the gate

certain obstructions were made in the street for the supports of the gate. The court held that the gate was there as a necessary device to save human lives, and therefore the company had a right to use the part of the street for that purpose, and pedestrians using the street had to recognize that condition and govern themselves accordingly. In the *Brown and Tate Cases* no question of negligence was presented. And in the case of *Grattis v. Railroad Co.* nothing can be found in support of appellant's position. If the danger was so great as to practically withdraw the thoroughfare from public use, then under no circumstances would the city or the street car company be authorized to occupy the streets, and the above decisions cited by the appellant so hold. In this country the public streets are for the use of "whomsoever will," and no individual or corporation has the right to erect or maintain thereon obstructions so dangerous in themselves as to practically withdraw the street from public use. On the other hand, the operation of street cars and vehicles over the public streets is lawful, and the operators thereof, so far as others using the streets are concerned, are only bound to exercise ordinary care to prevent injuries. *Huff v. Railroad*, 213 Mo. 495, 111 S. W. 1145; *Morie v. Transit Co.*, 116 Mo. App. 12, 91 S. W. 962; *Griveaud v. Railroad Co.*, 33 Mo. App. 458; *Miller v. Railroad Co.*, 108 Md. 84, 69 Atl. 636, 17 L. R. A. (N. S.) 978; *Groves v. Railroad*, 109 Ky. 76, 58 S. W. 508, 52 L. R. A. 448; *Note to Slater v. Railroad Co.*, 15 L. R. A. (N. S.) 840; *Citizens' Ry. & Light Co. v. Forepaugh & Sells Bros. Shows (Iowa)* 128 N. W. 357.

It is next contended by appellant that it is not liable for the condition of the street immediately adjoining its rails. Under the charter of the city of St. Louis, street car companies are required to keep the street within a certain distance of their rails in repair, and to keep the surface of the street as near the top of the rails as practical. It is the contention of the appellant that it is liable to the city for a failure so to do, but not to any third person. Without discussing this question, we say the rule is otherwise, as shown by the following authorities: *Huff v. Railroad*, 213 Mo. 495, 111 S. W. 1145; *Citizens' Ry. Co. v. Forepaugh & Sells Bros. Shows*, supra; *Schuster v. Street Car Co.*, 118 App. Div. 197, 102 N. Y. Supp. 1064; *Doyle v. New York*, 58 App. Div. 588, 69 N. Y. Supp. 120; *Miller v. Railway Co.*, supra; *Hyde v. Boston R. Co.*, 186 Mass. 115, 71 N. E. 118; *Zanesville v. Fannan*, 53 Ohio St. 605, 42 N. E. 708, 53 Am. St. Rep. 664; *Kincaid v. Walla Walla Traction Co. (Wash.)* 106 Pac. 918.

The court in its instructions did not define the terms, "dangerous appliance," "dangerous obstruction," and "public nuisance." The appellant did not ask to have the terms defined, and therefore it is not in position to

complain in this court. *Harmon v. Donohoe*, 153 Mo. 283, 54 S. W. 453; *Dysart-Cook Mule Co. v. Reed*, 114 Mo. App. 290, 89 S. W. 591.

This brings us to the serious question in this case. In behalf of the plaintiff the court gave an instruction fairly presenting the issues to the jury. As we have said, all the evidence of the plaintiff tended to prove that, if the tongue-mate switch had been used instead of the one that was used, the accident would not have happened, and the negligence of the appellant of which plaintiff complained was the use of the improper switch. The instruction of the plaintiff limited the right to recover upon the finding by the jury that the defendant failed to exercise ordinary care in installing and using the switch in question, when by the exercise of ordinary care it could have used a safer one. In behalf of the appellant, the court told the jury: "Although you find from the evidence that deceased came to his death by being jolted or thrown from his wagon through a combination of causes resulting from the worn, sunken and depressed condition of the pavement, together with his wagon coming in contact with the switch, if you further find from the evidence that said switch and appliance maintained at said point were of the type and character described in the foregoing instruction, and were necessary for the purpose for which the same were used, your verdict must be for the defendant, United Railways Company." We believe these two instructions fairly presented the act of negligence complained of in the petition to the jury. While the petition in one part states that the street was in such condition that the rails extended above the top of the pavement, yet, when it alleges the cause of the injury, it is not charged to that defect, but specifically to the act of the appellant in maintaining the improper switch. At the request of the city, and over the objections and exception of the appellant, the court gave the following instruction: "The charter of the city of St. Louis imposes upon street railroad companies the duty to keep the street between the rails and to the extent of 12 inches outside of each rail of their tracks in the streets of said city in repair, and as nearly on a level with such rails as practicable, and if you believe and find from the evidence that the defendant, United Railways Company, owned and maintained street railroad tracks and switch flanges in Washington avenue near Fourteenth street, in said city on the 17th day of August, 1908, and that the street between its rails or within a distance of 12 inches outside of its rails at or about the point where its most southern rail on Washington avenue connected with its most western rail on Fourteenth street was then out of repair, and not as nearly on a level with such rails as practicable and that such condition was known, or by the exercise of ordinary care

might have been known, to said United Railways Company in time to have repaired the same, and that Robert Asmus, while exercising ordinary care for his own safety, was injured by reason of his wagon colliding with the switch flange at said point, and that such flange constituted a dangerous obstruction and a public nuisance, and that his wagon would not have collided therewith but for such condition of the street, then your verdict will be against said United Railways Company." This instruction is erroneous from every point of view. It told the jury if the obstruction was a dangerous one and a public nuisance, and that the wagon would not have collided with the same but for the condition of the street, the verdict should be for the city, but against the appellant. In other words, the instruction plainly told the jury that the city was under no obligations to maintain its street in a reasonably safe condition at the point where such duty to repair was by law placed on the appellant. The reversible error found in the instruction, however, is that it tells the jury that, if the death of plaintiff's husband was caused by the condition of the street, then the railway company is liable. In other words, the instruction told the jury that it was the duty of the railroad company to keep the street between the rails, and to the extent of 12 inches outside of each rail, in repair, and as nearly on a level with the rails as practical, and, if the jury found that the railway company did not so keep the street in repair, and that such condition was known or by the exercise of ordinary care might have been known by the company in time to have repaired the same, and the plaintiff's husband was injured by reason of his wagon colliding with the switch flange, and that the switch flange constituted a dangerous obstruction and a public nuisance, and that his wagon would not have collided therewith but for such condition of the street, then the verdict should be against the railway company. As we have heretofore stated, the negligent act of the defendant complained of was in maintaining an improper switch, and not in permitting the street to be out of repair. The instruction permitted a recovery on a ground of negligence not complained of in the petition. It is not necessary to cite authorities to sustain the proposition that, where the petition alleges a specific act of negligence, the right to recover must be limited to the act alleged.

The respondent says that this instruction was not given at its request, but at the request of the city of St. Louis, and therefore it is not responsible for the error. In *Huff v. Railroad*, supra, the court said: "While this instruction was asked by and given on behalf of the railway company, still it operated with equal prejudice against her and in favor of the city."

For the error in giving instruction No. C

in behalf of the city of St. Louis, the judgment of the trial court will be reversed and the cause remanded. All concur.

MORRIS v. SAILER.

(Kansas City Court of Appeals. Missouri.
Jan. 30, 1911.)

1. LIBEL AND SLANDER (§ 123*)—TRIAL—QUESTIONS FOR JURY—DUTY OF COURT.

Though the jury is the judge both of the law and fact in libel cases, the question whether the matter charged as libel is capable of that interpretation is for the court.

[Ed. Note.—For other cases, see Libel and Slander, Cent. Dig. § 357; Dec. Dig. § 123.*]

2. LIBEL AND SLANDER (§ 97*)—CONSTRUCTION OF LANGUAGE—DEMURRER.

The proper way to raise the question whether matter charged as libel is capable of that interpretation is by demurrer.

[Ed. Note.—For other cases, see Libel and Slander, Cent. Dig. § 234; Dec. Dig. § 97.*]

3. LIBEL AND SLANDER (§ 123*)—MEANING OF PUBLICATION—QUESTION FOR JURY.

Where the words in a publication are susceptible of both a libelous and an innocent meaning, the question how they were used is for the jury.

[Ed. Note.—For other cases, see Libel and Slander, Cent. Dig. § 357; Dec. Dig. § 123.*]

4. LIBEL AND SLANDER (§§ 19, 123*)—LIBELOUS NEWSPAPER ARTICLE—CONSTRUCTION OF WHOLE.

A newspaper article which in commenting on a candidate for alderman advised the voters not to support him because he was for higher telephone rates, and stated he could not escape responsibility by saying that he merely sold space in his newspaper, "for an editor who barters his space and advocates an unrighteous cause will sell his influence at the first opportunity" is capable of a libelous meaning, and a further statement that "therefore we infer he advocated the increase because he believed in it" does not give meaning to the whole publication and make it harmless, for intricacies of language will not allow the libeler to escape, the natural construction and not the ingeniously possible one being the rule, and hence the rest of the publication can only render the meaning ambiguous, and a question for the jury.

[Ed. Note.—For other cases, see Libel and Slander, Cent. Dig. §§ 99, 357; Dec. Dig. §§ 19, 123.*]

5. LIBEL AND SLANDER (§ 2*)—JUSTIFICATION—INNOCENT MOTIVE.

The absence of intent to publish a libel is no excuse, for one is presumed to intend the natural consequences of his act.

[Ed. Note.—For other cases, see Libel and Slander, Cent. Dig. § 110; Dec. Dig. § 2.*]

6. LIBEL AND SLANDER (§ 48*)—PRIVILEGE—CANDIDATE FOR OFFICE—NEWSPAPER.

The fact that the one libeled is a candidate for office and the one libeling is a newspaper is no justification; for, while the press can serve a great good by presenting matters of public import, yet it must keep within the limits of the truth.

[Ed. Note.—For other cases, see Libel and Slander, Cent. Dig. § 143; Dec. Dig. § 43.*]

Appeal from Circuit Court, Cole County; Wm. H. Martin, Judge.

Action by J. Frank Morris against Joseph Sailer. From a judgment for defendant on

demurrer to the complaint, plaintiff appeals. Reversed and remanded.

Silver & Dumm, for appellant. Irwin & Calfee, for respondent.

ELLISON, J. Plaintiff instituted this action by filing a petition charging defendant with libeling him. The latter demurred to the petition on the ground that it did not state a cause of action. The demurrer was sustained by the trial court, and, plaintiff refusing to plead further, judgment was rendered against him and he thereupon appealed.

The petition alleges that on the 4th of April, 1910, defendant was publisher of a newspaper in Jefferson City called the "Daily Post," and on that day plaintiff was a candidate for the office of city councilman for that city from the First ward therein. That late on the evening of the day preceding the election defendant wrongfully, wickedly, and maliciously printed and published of and concerning plaintiff the following false, libelous, and defamatory words:

"Elect Kaullen in the First.

"His Opponent Openly Espoused Cause of Higher Telephone Rates—Only

"Safe Way for Citizens of First Ward to Meet Issue

"Is to Vote for Peter Kaullen.

"The people of the First Ward will remember that one of the candidates for alderman in that ward, Frank Morris, was formerly editor of the Tribune, and openly espoused the cause of higher telephone rates through the medium of his paper. Up to the time he went out of business he was heartily advocating an increase in telephone rates. Is he a safe man to clothe with the power to increase rates and fasten the unjust burden upon the people? If he advocated it through the medium of his paper would he not vote for it if in the council? He cannot escape by saying he merely sold space, for an editor who barters his space and advocates an unrighteous cause will sell his influence at the first opportunity, therefore we infer that he advocated the increase because he believed in it, and believing in it we have the right to assume he would vote for such an ordinance had he the opportunity.

"There is but one safe way for the people to meet the issue, and that is by electing Peter Kaullen, whom the people know they can safely trust."

It is then charged that, after printing such matter in his paper, defendant caused 1,000 copies of the paper to be distributed and sold in Jefferson City to the public generally. While in actions for libel the jury, under the direction of the court, are to determine both the law and the fact, yet, if the matters charged as libel are incapable of constituting that offense, it is the province of the

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Index.

court to so declare; and a demurrer is a proper procedure to bring up the question. *Diener v. Star-Chronicle Pub. Co.* (Mo.) 132 S. W. 1143; *Branch v. Knapp & Co.*, 222 Mo. 580, 596, 121 S. W. 93; *Ukman v. Daily Record*, 189 Mo. 378, 88 S. W. 60; *Heller v. Pulitzer Pub. Co.*, 153 Mo. 206, 214, 54 S. W. 457. But, if the words are subject to two meanings—one libelous and the other not—it is for the jury to say whether they were used in the sense charged by the plaintiff. *Richardson v. Thorpe*, 73 N. H. 532, 63 Atl. 580; *Sanderson v. Caldwell*, 45 N. Y. 398, 6 Am. Rep. 106; *Gaither v. Advertiser Co.*, 102 Ala. 458, 14 South. 788; *Sharpe v. Larson*, 67 Minn. 428, 70 N. W. 1, 554. "The mere capability of the libelous meaning is all that the court need pass on. Whether such meaning was in fact conveyed to the readers is a jury question." *Scofield v. Milwaukee Free Press*, 126 Wis. 81, 105 N. W. 227, 2 L. R. A. (N. S.) 691. If the words are capable of a libelous meaning, "however improbable it may appear, the jury should say whether they may be so understood." *Morrison v. Smith*, 177 N. Y. 366, 69 N. E. 725.

In the light of the law, what ought a court to say of the words published by defendant? The publication stated that plaintiff had been an editor of a paper, and through his paper had advocated an increase in telephone rates; that he could not escape responsibility for that by saying he merely sold space in his paper, "for an editor who barbers his space and advocates an unrighteous cause will sell his influence at the first opportunity." Keeping within the bounds of reason, can any one say that such language is incapable of a libelous meaning, is incapable of interpretation, by the readers of the paper, that plaintiff's influence, as a city councilman, would be for sale? It seems to us it would be fairer to assert that such words in the circumstances in which they were published come nearer being incapable of an innocent meaning than a libelous one. There is enough in the words accompanying those just quoted to prevent our saying they are libelous as a matter of law, but we do say that, giving defendant the benefit of an interpretation influenced by the entire publication, they have a stronger tendency to show defendant to be guilty of libel than innocent of it. But, conceding that defendant really did not intend to charge libelous matter, that would not excuse him. "Want of actual intent to vilify is no excuse" (*Hallam v. Post Pub. Co.* [C. C.] 55 Fed. 456), for "a sane man is presumed to intend the natural and necessary consequences of his act, whether that act be a publication or any other act" (*Wynne v. Parsons*, 57 Conn. 73, 17 Atl. 862; 18 Am. & Eng. Ency. [2d Ed.] 994). The question is, In what sense the readers understood it? *Caruth v. Richeson*, 96 Mo. 183, 190, 9 S. W. 633. The words must be understood by the court in the same sense the rest of mankind would understand them. *McGinnis v. Knapp & Co.*, 106 Mo. 131, 140, 141, 18 S.

W. 1134. An innocent intention will not overcome an accomplished wrong.

Nor is there anything to uphold the ruling of the trial court in the suggestion that, plaintiff being a candidate for public office, and defendant a publisher of a newspaper, it was his privilege, in duty to the public, to make the publication; and, though subject to defamatory interpretation, it was necessary that the publication be made for the information of the general public and thereby become a matter of discussion by the electors, who would be assisted in making up their minds as to plaintiff's fitness for the position he was seeking. Undoubtedly the public press have a grave duty to perform for the public, the value of which cannot be measured. It is capable of the greatest good and at the same time the greatest evil of any single influence on our civilization. It is the duty of the courts to promote the former by every just consideration for the welfare of the public, and to restrain the latter by certain punishment for every malicious overstepping of the privilege of free and fair discussion of a public character. The press has the high privilege of discussion of the merits of a candidate and of his fitness for the office he seeks; but it must keep within the bounds of truth. There is no privilege in falsehood. Our Supreme Court in *Smith v. Burrus*, 106 Mo. 94, 16 S. W. 881, 18 L. R. A. 59, 27 Am. St. Rep. 329, decided that defamation of a candidate for office was not privileged, even though made in good faith, and quoted with approval the following from *Rearick v. Wilcox*, 81 Ill. 77: "While the qualification and fitness of a candidate for office might properly be discussed with freedom by the press of the country, we are aware of no case that goes so far as to hold that the private character of a person who is a candidate for office can be destroyed by the publication of a libelous article in a newspaper, notwithstanding the election may be attended with that excitement and feeling that not unfrequently enters into our elections. * * * The law required appellee as the publisher of a journal to publish facts, and not libelous articles. The character and reputation of appellant was as sacred, and as much entitled to protection, when a candidate for office, as at any other time." The Supreme Court of Ohio said in reference to the same subject that: "In our opinion a person who enters a public office or becomes a candidate for one, no more surrenders to the public his private character than he does his private property. Remedy by due course of law for injury to each is secured by the same constitutional guaranty, and the one is no less inviolable than the other. To hold otherwise would in our judgment drive reputable men from public positions and fill their places with others having no regard for their reputation, and thus defeat the purpose of the rule contended for, and overturn the reason upon which it is sought to sustain it." *Publishing Co. v.*

Maloney, 50 Ohio St. 71, 83 N. E. 921. It will be noticed that the words following, and in the same sentence with, the statement that an editor "will sell his influence at the first opportunity," is the further statement, by way of a conclusion from what has gone before, that, therefore, it is inferred he advocated an increase in telephone rates because he believed in it, and that, if he believes in it, he will vote for an ordinance to that effect if elected. From this it is argued that honest motives were ascribed to plaintiff which repel any suggestion of defamation in other parts of the publication. Those words, said to give a meaning to the others, do not so far control the entire charge as to render it, as a whole, incapable of libel. The most that can be said is that they make the meaning ambiguous, and thereby make a case for the jury as one of fact, and not for the court as one of law. If artfulness in expression were to be a road of escape, the defamer would go free in a large proportion of instances. "The law cannot be evaded by any of the artful and disguised modes in which men attempt to conceal libelous or slanderous meanings." *McGinnis v. Knapp & Co.*, 109 Mo. 131, 141, 18 S. W. 1184, 1136. In *State v. Norton*, 89 Me. 290, 36 Atl. 394, it was said that "the libeler cannot defame and escape the consequences by any dexterity in style." And that "it is not the ingeniously possible construction, but the plainly normal construction, which determines the question of libel or no libel in written words which are maliciously published."

It follows that for error in sustaining defendant's demurrer the judgment will be reversed and the cause remanded. All concur.

CHRISTENSEN v. NEW YORK LIFE INS. CO.

(Springfield Court of Appeals. Missouri. Jan. 8, 1911. Rehearing Denied Feb. 6, 1911.)

1. INSURANCE (§ 350*)—LIFE INSURANCE—CONSTRUCTION OF POLICY.

Rev. St. 1899, § 7897 (Ann. St. 1906, p. 3752), provided that no life policy issued after August 1, 1879, should after payment upon it of three annual payments be forfeited for non-payment of premium, but that the net value of the policy when the premium became due and not paid should be computed and taken as a net single premium for temporary insurance for the full amount of the policy. Section 6946, Rev. St. 1909, enacted in 1903, provided that the insurer could deduct, not only the amount of insured's debt to it on account of premiums, but all debts. A policy was issued in 1901, and after the enactment of section 6946 was pledged with the insurer as security for a loan made on it at that time, and in 1905 default was made in payment of premium and interest on the loan. The right of assured to the loan, the duty of the insurer to make it, the amount thereof, the rate of interest, and all conditions thereof, were provided for in the policy, and the insurer was bound to grant the loan upon such terms on insured's application. *Held*, that the granting of the loan did not constitute a

new contract so as to be governed by section 6946, but was a part of the policy issued before the enactment of such section, and hence the insurer, upon foreclosing the policy for default in payment of premium and interest and providing for extended insurance, could not deduct the amount of the loan, but only the debt for premiums.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 893, 894; Dec. Dig. § 350.*]

2. INSURANCE (§ 350*)—POLICIES—STATUTORY PROVISIONS—ESTOPPEL.

The statute in force when the policy was issued, being a part of the contract, could not be waived or changed by contract, and though insured received the policy returned by the insurer after foreclosure with the indorsement thereon of the terms of foreclosure and the amount and time of the extended insurance granted, computed according to section 6946, Rev. St. 1909, and retained the policy until his death, without complaint, there was no estoppel which would preclude his representative from recovering on the policy of extended insurance, which, had the proper method of computation been observed, would have been in force at insured's death.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 892, 893; Dec. Dig. § 350.*]

Appeal from St. Louis Circuit Court; Daniel D. Fisher, Judge.

Action by Rose E. Christensen against the New York Life Insurance Company. Judgment for plaintiff, and defendant appeals. Affirmed.

Judson & Green, for appellant. James J. O'Donohoe, for respondent.

COX, J. Action upon an insurance policy, trial by the court upon an agreed statement of facts and depositions, judgment for plaintiff for \$741.60, and defendant has appealed.

The policy sued upon was issued December 21, 1901, to Anton Christensen, the husband of plaintiff, for the sum of \$1,000. The premium of \$52.20 was to be paid annually upon the 18th day of December. Premiums were paid up to and including December 18, 1904. On March 7, 1905, the assured procured a loan, under the terms of the policy, for \$133. The premium, falling due December 18, 1905, and the interest on the loan, due at that time, were not paid, and no subsequent payment was made upon either the premium on the policy or interest on the loan. The policy of insurance had been pledged to the defendant as security for the loan. On June 11, 1906, the defendant, proceeding under the terms of the policy, foreclosed it, and, in accordance with its terms, returned it to the assured with an indorsement thereon that extended insurance to the amount of \$367 was granted to expire January 18, 1907.

The merits of this appeal center upon one proposition, and that is whether this policy is to be construed under the law in existence at the date of its issue, or under the law as it existed at the time the assured secured the loan. The law in force at the date the policy was issued, necessary to be considered, was

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

section 7897, Rev. St. 1899 (Ann. St. 1906, p. 3752), which is as follows: "Policies Non-forfeitable, When—No policies of insurance on life hereafter issued by any life insurance company authorized to do business in this state, on or after the first day of August, A. D. 1879, shall, after payment upon it of three annual payments, be forfeited or become void, by reason of nonpayment of premiums thereof, but it shall be subject to the following rules of commutation, to wit: The net value of the policy, when the premium becomes due, and is not paid, shall be computed upon the actuaries' or combined experience table of mortality, with four per cent. interest per annum, and after deducting from three-fourths of such net value, any notes or other evidence of indebtedness to the company, given on account of past premium payments on said policies, issued to the insured, which indebtedness shall be then canceled, the balance shall be taken as a net single premium for temporary insurance for the full amount written in the policy; and the term for which said temporary insurance shall be in force shall be determined by the age of the person whose life is insured at the time of default of premium, and the assumption of mortality and interest aforesaid. * * *

It is conceded that, if the policy in suit is to be construed under this section, the premiums paid by the assured would extend his insurance beyond the date of his death, and that plaintiff should recover; but it is contended by appellant that this policy is to be construed under the above section as amended by the Legislature in 1903 (Acts 1903, p. 208), which section is now section 6946, Rev. St. 1909. Under the statute as amended, the company could deduct not only the amount of the assured's indebtedness to it on account of premiums, but all indebtedness. The question at issue is whether, in computing the amount to be used for the purchase of the extended insurance, the amount of the loan should be deducted from the amount of premiums paid and earnings of the policy. When the defendant foreclosed its lien upon the policy for the loan, after default by the assured in the payment of premiums and interest, it deducted the amount of the loan and gave extended insurance for the value of the remainder of the assured's interest, and now contends that under the statute as amended in 1903 it had that right. Under the statute as it existed prior to 1903, it was held that no debts could be deducted except loans that had been made for the purpose of paying premiums upon the policy; that as to all other debts, owing by the assured to the company, the company and the assured occupied the relation of ordinary debtor and creditor; and that such indebtedness could not be considered in determining the amount of extended insurance to which the assured

was entitled. *Smith v. Insurance Co.*, 173 Mo. 329, 72 S. W. 935; *Burridge v. Insurance Co.*, 211 Mo. 158, 109 S. W. 560.

In this case the policy was issued before the amendment to the statute, and the loan was made after the amendment, and the merits of this case turn upon the question as to whether the granting of the loan constituted a new contract so as to bring into play the statute as amended.

Neither the statute nor this amendment is, in any sense, retroactive. The statute itself was enacted for the benefit of the assured, and we should bear this in mind in construing the terms of this policy and the loan made under it. The right of the assured to the loan and the duty of the company to make it, the amount thereof, the rate of interest to be charged therefor, and all the terms and conditions of the loan, are provided for in the policy, and all the assured had to do to secure it was to apply for it, and, when he did apply, the company was bound, by its contract, to grant it upon the terms provided in the policy. The loan was therefore contemplated when the policy was issued, and the terms of the contract between the parties in relation to it were found in the policy itself, and hence the loan contract is to be construed as a part of the policy, and not as an independent contract made when the loan was applied for and the money furnished. *Burridge v. Insurance Co.*, 211 Mo., loc. cit. 174, 109 S. W. 560. Hence it follows that this policy is to be construed, and the rights of the parties under it determined, under the statute as it existed prior to the amendment of 1903, and hence the policy was in force at the time the insured died, unless, as now contended by defendant, he was estopped from invoking the aid of the statute.

The contention of estoppel is based upon the fact that when the defendant foreclosed the policy it indorsed thereon the terms of the foreclosure, and stated the amount and time of the extended insurance that was granted the assured under it, and returned the policy to him with this indorsement upon it, and that he retained it until the day of his death without any complaint. We do not think there is any occasion for the application of the doctrine of estoppel in this case. This policy is to be construed by the terms of the statute, and not by the agreement of the parties. The statute must be read into the contract and be considered a part of it. The statute was enacted for the general good, and its terms cannot be waived, or changed, by contract, and, if parties cannot by express contract abrogate the statute, the same result cannot be accomplished under the guise of an estoppel.

It is conceded that, if the policy is to be construed under the statute as it existed prior to the amendment of 1903, and the doc-

trine of estoppel does not apply, the judgment is right.

The result is that the judgment should be affirmed, and it is so ordered. All concur.

PASCHEDAG v. METROPOLITAN LIFE INS. CO.

(St. Louis Court of Appeals. Missouri. Jan. 24, 1911. Rehearing Denied Feb. 7, 1911.)

1. INSURANCE (§ 350*)—LIFE INSURANCE—DEFAULT—EXTENDED INSURANCE—PLEDGE OF POLICY TO INSURER FOR LOAN.

Rev. St. 1899, § 7897 (Ann. St. 1906, p. 3752), provided that no life policy should after payment of three annual payments be forfeited for nonpayment of premium, but that the net value of the policy, when the premium became due and was not paid, should be computed and taken as the net single premium for temporary insurance for the full amount of the policy. *Held* that, though an insured may pledge his policy and the cash surrender value thereof to a third person the insurer cannot contract with insured to that effect either when the loan is provided for in the policy in the first instance or by a subsequent amendment thereto, if the loan contract involves an appropriation of the net value of the policy mentioned in the statute.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 892, 893; Dec. Dig. § 350.*]

2. INSURANCE (§ 350*)—LIFE INSURANCE—EXTENDED INSURANCE—STATUTORY PROVISIONS.

Rev. St. 1899, § 7900 (Ann. St. 1906, p. 3753), provides that section 7897 shall not apply to a policy containing a provision for an unconditional surrender value at least equal to the net single premium for the temporary insurance provided for. *Held*, that a provision of a life policy giving insured an option as to a cash value for a greater amount than the net single premium provided for, upon surrender and release of the policy within six months after default in payment of any premium, provided there should be no unpaid loan through the operation of another option, did not provide an unconditional surrender value within the statute; it not operating as an automatic conversion of the policy into a cash surrender value which might be had at any time by insured within the period of limitation, and the policy was not exempted from section 7897 (page 3752).

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 892, 893; Dec. Dig. § 350.*]

3. INSURANCE (§ 350*)—LIFE INSURANCE—CANCELLATION OF POLICY—DEFAULT IN PAYMENT OF PREMIUM AND INTEREST ON LOAN.

A loan having been given on such policies by the insurer on a pledge of the policies by a contract which, though it did not expressly provide for payment of the loan, implied an agreement to such effect by reciting the matter as a loan to bear interest until a definite time, insured reserving the right to pay the loan at any time and take up the policies, and the insurer having canceled the policies pledged for failure to pay a premium and interest on the loan and having appropriated the cash surrender value of the policies as provided in the contract for loan instead of issuing extended insurance as required by the statute, the transaction should not be treated as though the policies had been surrendered for their cash surrender value and the subject-matter of the provision of the policies in respect thereto fully consummated because insured actually received the en-

tire amount which he might have had under any theory as the cash surrender value of the policies.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 892, 893; Dec. Dig. § 350.*]

4. INSURANCE (§ 350*)—LIFE INSURANCE—EXTENDED INSURANCE—STATUTORY PROVISIONS.

Rev. St. 1909, § 6946, provided that the insurer could deduct, not only insured's debt for premiums, but all debts. Policies were issued in 1901 and 1902, and after the enactment of section 6946 were pledged with the insurer as security for a loan made at that time, and subsequently default was made in payment of a premium and interest on the loan. The right of assured to the loan was provided for in the policies. *Held*, that the granting of the loan did not constitute a new contract so as to be governed by section 6946, but was a part of the policy issued before the enactment of such section, and the parties' rights were determinable under section 7897, Rev. St. 1899 (Ann. St. 1906, p. 3752).

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 892, 893; Dec. Dig. § 350.*]

5. INSURANCE (§ 350*)—LIFE INSURANCE—FORFEITURE—STATUTORY PROVISION.

Rev. St. 1899, § 7900 (Ann. St. 1906, p. 3755), provides that the preceding sections relating to nonforfeiture of life policies shall not apply if a policy be surrendered to the company for a consideration adequate in the judgment of a legal holder thereof. *Held* that, while an insured under the section may surrender his policy and terminate the relation of insurer and insured for a consideration in his judgment adequate therefor, such consideration must be given by the insurer for such a surrender, and not for some other purpose, and where policies were pledged to the insurer by insured for a loan, with the intent of repaying it and receiving back the policies, that he received an adequate consideration would not relieve the insurer, upon subsequent default in payment of premium and interest on the loan, from issuing extended insurance required by the preceding nonforfeiture provisions of the statute.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 892, 893; Dec. Dig. § 350.*]

6. INSURANCE (§ 672*)—LIFE INSURANCE—ACTIONS ON POLICY—DEDUCTIONS OF UNPAID PREMIUMS—PLEADING—JUDGMENT.

Rev. St. 1899, § 7899 (Ann. St. 1906, p. 3754), provides that if the death of insured occur within the term of temporary insurance, and no condition of the insurance other than payment of premium has been violated, the company may deduct from the amount insured the amount of all premiums that had been forborne at insured's death, including the whole of the year's premium in which the death occurred, but that such premium shall in no case exceed the ordinary life premium for the age of issue with 6 per cent. interest. *Held*, that in an action on policies, where defendant makes no claim of such premiums in its answer, and the evidence, while it shows that they were unpaid, does not show the amount of an ordinary life premium at the age of issue of the policies, there can be no deduction therefor.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 1789; Dec. Dig. § 672.*]

Appeal from St. Louis Circuit Court; Eugene McQuillin, Judge.

Action by Lulu M. Paschedag, administratrix of Theodore W. Paschedag, against the Metropolitan Life Insurance Company. Judgment for plaintiff, and defendant appeals. Affirmed.

Nathan Frank, Richard A. Jones, and Max W. Oliver, for appellant. Kinealy & Kinealy, for respondent.

NORTONI, J. This is a suit on two policies of life insurance. Plaintiff recovered: the amount of the policies and interest, less the amount of a certain loan made by defendant thereon, together with accrued interest, and defendant prosecutes the appeal.

Plaintiff is the administratrix of her deceased husband, the insured, and defendant is an incorporated life insurance company. The policies in suit were issued and delivered in this state, and it is conceded that they are Missouri contracts subject to our nonforfeiture statutes as expounded by the decisions of the Supreme Court of Missouri. The policies are for \$1,000 each and were issued to plaintiff's husband, Theodore W. Paschedag, and payable to his personal representatives, the one, on April 9, 1901, in consideration of a stipulated annual premium of \$29.07, payable in advance each year, and the second on November 6, 1902, in consideration of a stipulated annual premium of \$29.57, payable in advance each year. The petition is in two counts, the first of which declares upon the policy first issued, and the second upon the policy issued at the later date. It is averred in the petition that, though the insured owned the policies, and they were in force at the time of his death, both were then in the possession of defendant.

It appears the insured paid the first six premiums promptly each year on the first policy as they fell due; that is to say, he paid the premiums of \$29.07 each on April 9, 1901, the date of issue, and on April 9, 1902, 1903, 1904, 1905, and 1906. He likewise paid each premium of \$29.57 promptly in cash on the second policy; that is, the first premium on November 6, 1902, and likewise on November 6, 1903, 1904, and 1905. Six complete annual premiums were paid on the first policy, and four complete annual premiums on the second policy, when the insured negotiated a loan on both policies June 26, 1907, for the full amount of the cash surrender value of each policy on the next ensuing date for the payment of annual premiums. The nonforfeiture statutes (sections 7897, 7898, 7899, and 7900, Rev. St. 1899 [Ann St. 1906, pp. 3752, 3755]) were in force at the time the policies were issued, and each of the policies contained a provision for a cash surrender value at least equal to the net single premium for the temporary insurance provided for in section 7897. Indeed, it is conceded that each policy contained a provision for a cash surrender value slightly in excess of that required under our statutes in order to exempt a policy from the application of the nonforfeiture laws. Both policies also contained provisions denominated "concessions" as to the amount which the company would loan the insured thereon. It is stipulated in the policy that,

after three or more full annual premiums are paid, the company will grant the insured a loan thereon not to exceed the amount stated below in column (a) bearing 5 per cent. interest, payable annually in advance, upon receiving satisfactory assignment of the policy as collateral security, provided that premiums have been paid in full for the policy for the year next ensuing the year named in the table as fixing the amount of the loan. According to this table, at the end of six years, the insured was entitled to a loan of \$124 on the first policy, for on this six annual premiums had been paid at the time, and this amount is identical with the cash surrender value of the same policy stipulated for at the end of seven years; that is to say, while \$124 was the loan value of the first policy after the payment of six annual premiums, the same amount, \$124, was the cash surrender value provided therein at the end of the succeeding year. As to the second policy on which only four premiums had been paid when the loan was negotiated, the loan value provided for therein is \$80 at the end of four years, and this is the identical amount which the policy stipulates as a cash surrender value at the end of the fifth year. On June 26, 1907, after having paid six premiums on the first policy and four on the second, insured negotiated a loan with defendant company on the two policies for the amount of \$124 on the first and \$81 on the second, at 5 per cent. interest, etc., and by written contract of that date pledged the two policies for its repayment at the company's office in New York as thereafter provided. Among other things, this loan contract provides that, if the insured shall default in the payment of the interest on the loan when due or any subsequent premium on the policies, then, after 90 days' grace shall have expired, the company is authorized to cancel the policies and appropriate the cash surrender value thereof to the payment of the loan without notice to the insured. Though the loan contract does not in express terms provide for a repayment of the loan except "as hereinafter provided," it proceeds throughout as an agreement concerning collateral and vouchsafes to the insured the right to pay the indebtedness involved in the loan at any time and redeem the policies so pledged. In other words, it appears to be an agreement by which the policies and their cash surrender value are pledged to defendant company for a repayment of the loan if the insured shall default in the payment of interest thereon or in the payment of any subsequent premiums on the policies; but it contains no positive and direct promise on the part of insured in express terms to repay the loan except in so far as it appoints defendant and authorizes it to appropriate the cash surrender value of the policies to that purpose. But the insured is given an express option therein to repay the loan at any time and take up the policies so

pledged. The insured defaulted in the payment of the next annual premium of \$29.07 on April 9, 1908, and on June 26th of that year defaulted as well in payment of both the principal of, and interest on, the loan. After 30 days of grace had elapsed with respect to this policy, defendant company marked it canceled, filed it away among such papers in its office, and appropriated the \$124 cash surrender value thereon then accrued to the payment of the loan pro tanto. Insured likewise defaulted in the payment of the next annual premium falling due on the second policy on November 6, 1906, and on June 26, 1907, defaulted as to the payment of interest and the amount of the loan on that policy. Thereafter, when more than 30 days of grace had expired, defendant marked the second policy canceled in accordance with the conditions of the loan contract, deposited it among the files of the company, and appropriated the cash surrender value of \$80 to the payment of the loan thereon. Another premium on this policy fell due on November 6, 1908, thereafter and was unpaid by insured, who died on November 15, 1908.

The policies were issued in the first instance to the insured payable to his personal representatives, and plaintiff, his wife, as such, had no vested right therein; but she afterward qualified as his administratrix and prosecutes this suit on the theory that, though the defaults in the premiums occurred as above stated, the insurance nevertheless continued in force under the provision of our nonforfeiture statute, and this too notwithstanding the loan negotiated by the insured and the pledge of the policies and the cash surrender value and subsequent appropriation thereof to the payment of the loan. It seems, though an insured may pledge his policies and the cash surrender value thereof to a third party under a competent contract for a loan, our Supreme Court by construction of our nonforfeiture statute (section 7897) denies the right of the company issuing the policy to consummate a valid contract with the insured to that effect either when the loan is provided for in the policy in the first instance, as in *Burridge v. New York Life Ins. Co.*, 211 Mo. 158, 109 S. W. 560, or by a subsequent amendment thereto between the insurance company and the insured, as in *Smith v. Life Ins. Co.*, 173 Mo. 329, 72 S. W. 935, if the loan contract involves the right of the insurance company to appropriate the net value of the policy stipulated for in the nonforfeiture statutes which may be applied as a net single premium for the purchase of extended insurance. Though it seems to be a strained construction of the nonforfeiture statutes, which infringes the freedom of contract between parties and inhibits the right of the insured to negotiate a loan on his policy as collateral even years after the contract of insurance was entered into on

the same terms with the insurance company which would be valid in the circumstances of a third party, such is nevertheless the law of this state, and plaintiff's cause of action may be sustained if the policies possessed sufficient net value to purchase extended insurance beyond the date of the death of the insured. For, though the company canceled the policies and applied the cash surrender value thereof to the payment of the loan, it acquired no right to do so under the decisions referred to by virtue of the loan contract if there be a net value otherwise available to purchase extended insurance, because this contract found its origin in the policy provision for a loan in the first instance, and such provisions purport to authorize the company to appropriate the net value of the insurance to a purpose other than that contemplated by the nonforfeiture statutes. It is conceded in this case the loan made was not granted for or the money employed for past premium payments on the policies. In other words, it was a cash loan to the insured which was in no manner employed for the payment of premiums to keep the insurance in force. It is conceded, too, that three-fourths of the net value of each of the policies at the time of the default in the payment of the first premiums above referred to computed upon the actuaries' or combined experience table of mortality, with 4 per cent. interest per annum thereon, as provided in section 7897, Rev. St. 1899, taken as a net single premium, would purchase temporary insurance for the amounts written in each policy for a period of time quite beyond the date of insured's death, which was November 15, 1908, and therefore the right of recovery in plaintiff exists notwithstanding the loan and attempted cancellation of the policies.

It is argued that, as each of the policies contained a provision for a cash surrender value even greater than the net single premium for temporary insurance provided for in section 7897, then under the provisions of section 7900 the policies are exempted from the operation of section 7897 on extended insurance, especially in view of the fact that the insured had actually received such cash surrender value. We believe it to be true that both policies contained a provision for a cash surrender value equal to, if not greater than, that required by section 7897, and it is true enough that section 7900 exempts policies which contain a provision for an unconditional surrender value at least equal to the net single premium for temporary insurance provided for in section 7897 from the influence of that section. But, by the express terms of the statute, such provision for a cash surrender value must be unconditional so that it will automatically invest the insured with his right to the cash surrender value at the time he defaults in the payment of the premium. The rule of decision in respect of these provisions in the policy which are said to render the prior

nonforfeiture sections inapplicable requires the insurance company to conform the policy provision strictly to the statute. See *Cravens v. Insurance Co.*, 148 Mo. 583, 50 S. W. 519, 53 L. R. A. 305, 71 Am. St. Rep. 623. The condition contained in each policy in this case with respect to its cash surrender value is as follows: The insured is given an option as to "a cash value for the amounts stated below in column (b), upon surrender and satisfactory release of this policy, within six months after the time of default in the payment of any premium, provided there be no unpaid loan through the operation of the first option." The subjoined column referred to therein by the letter "b" indicates a sufficient cash surrender value, it is true; but the provision of the policy quoted is not unconditional in the sense of the statute. It does not operate an automatic conversion of the policy into a cash surrender value which may be had at any time by the insured, for by an express provision therein it limits his right to the cash surrender value of the policy to his surrendering and executing a satisfactory release of the policy within six months after the time of default. It is entirely clear that the limitation therein quoted to the effect that the cash surrender value should be applied for within six months is a condition on the right of insured to have the cash surrender value of the policy at any time he applies therefor unless its subject-matter become barred by the statute of limitation. See *Smith v. Mut. Ben. Ins. Co.*, 173 Mo. 329, 338, 72 S. W. 935. The right under consideration is further conditioned by the express words of the provision quoted on the fact of there being no unpaid loan on the policy at the time. The provision of the policy relied upon says, in substance, the cash surrender value is available to the insured "provided there be no unpaid loan through the operation of the first option." This, too, imposes a condition which the statute forbids. See *Whittaker v. Insurance Co.*, 133 Mo. App. 664, 114 S. W. 53.

But this matter as to the form of the provision for a cash surrender of the policy is really beside the case for the reason such a provision, even if otherwise sufficient, is without influence here, where the question presented relates entirely to a loan on the policy. However, on this feature of the policy an argument is advanced to the effect that, such provision in the policies having been actually carried out by the payment of the full amount of the cash surrender value for the policies under the loan contract and such policies surrendered, the matter should be treated as though the provision for a competent cash surrender value is actually consummate. In other words, it is said the insured actually received the entire amount which he might have had under any theory as the cash surrender value of the policy, and his rights should there-

fore be determined as though the policy had been surrendered for its cash surrender value, and the subject-matter of the provision of the policy with respect thereto is now fully consummated notwithstanding its form. This argument predicates in part upon the fact that the loan contract contains no express promise on the part of insured to repay the loan. Because of this, it is said the contract, fairly construed, manifests the intention of both parties to terminate the relation of insurer and insured by the company paying and the insured accepting the cash surrender value for his policy. It is true enough the loan contract does not expressly provide for a repayment of the loan except in so far as it authorizes defendant to appropriate the cash surrender value of the policy to that purpose; but it nevertheless implies an agreement to that effect, for it recites the matter as a loan to bear interest until a definite time and pledges the policies as collateral security therefor. Both parties understood at the time that they were making a loan, and nothing appears whereby the intention is manifested to terminate the relation of insurer and insured by defendant paying to the insured the cash surrender value of the policies for their surrender and cancellation. Indeed, the intention that the relation of insurer and insured was to continue, and not be thus terminated at the time the transaction took place, is obvious, for the insured reserves the right to pay the loan at any time and take up the policies, etc., and, besides, it appears from defendant's proof that it notified him to pay the premiums thereafter falling due as though its relation of insurer continued and the policies remained in force notwithstanding it held possession of both. Under such circumstances, it is clear the matter ought not to be determined as a consummate surrender of the policies for their cash value unless no heed whatever is to be given to the intention of the parties. To consummate the settlement by paying the cash value for the policies involves the idea of assent, of course, to such a transaction on the part of both and manifests a purpose as well to terminate the relation of insurer and insured which theretofore obtained. It may not be declared, where neither of these elements appear, and the transaction is expressly denominated a loan, that it was a surrender.

At the time both the policies in suit were issued, our nonforfeiture law (sections 7897 to 7900, inclusive, Rev. St. 1899) were in force and became parcel of the contracts of insurance. As the law then stood, section 7897 authorized insurance companies to deduct from three-fourths of the net value of the policy any notes or other evidences of indebtedness to the company given by the insured on account of past premium payments on the policies. While the law so stood, under the decided cases, it became a part of the contracts of insurance with the

company, and no other indebtedness than that for past premium payments could be so deducted. *Smith v. Insurance Co.*, 173 Mo. 329, 72 S. W. 935; *Burridge v. Insurance Co.*, 211 Mo. 158, 109 S. W. 560. Afterward, in 1903, the statute was so amended as to authorize the company to deduct from three-fourths of such net value any evidence of indebtedness to the company, etc. By this amendment the limitation upon such indebtedness to the payment of past premiums was eliminated, and it seems any indebtedness to the company may be deducted under the amended statute. But the statute as so amended expressly provides a rule as to policies thereafter issued only. See *Laws Mo. 1903*, p. 208 (*Ann. St. 1906*, § 7897), as amended (*Rev. St. 1909*, § 6946). The loan involved here was made June 28, 1907, after this amendment, and it is argued the rights of the parties should be determined according to the amended statute for the reason such amendment manifests the public policy of the state on the question at the time of the loan. Though the proposition that the public policy of the state is thus manifested in the amended statute is entirely sound, it is wholly without influence on the facts here, for the rights of the parties are to be determined under the contract of insurance in the first instance. This is the theory of the decided cases on the subject. It is obvious the amendment is not retrospective in its operation under the settled rules of law, and, as the policies in the first instance stipulated for the loan which was afterwards negotiated and made thereunder, the whole matter and the rights of the parties with respect thereto are to be determined under the statutes of 1899, which become parcel of the contract of insurance by virtue of their being the then law of the state. See *Burridge v. Insurance Co.*, 211 Mo. 158, 109 S. W. 560. The case last cited is not precisely in point in its facts, though the language of the opinion and the principle portrayed in the decision is controlling here. However, see *Christenson v. N. Y. Life Ins. Co.*, 134 S. W. 100, for a judgment directly in point by the Springfield Court of Appeals.

It is next argued that, by the loan contract and the surrender of the policies to defendant at the time the loan was made, it appears the insured accepted the proceeds of the loan as an adequate equivalent in his judgment for his rights in the premises, and therefore, as he was the sole beneficiary, the policy having been payable to his personal representatives, its subject-matter is relieved from the operation of the nonforfeiture provisions of the statutes by virtue of section 7900, which provides, among other things, that the three preceding sections as to nonforfeiture, etc., shall be inapplicable if the policy shall be surrendered to the company "for a consideration adequate in the judgment of a legal holder thereof." But, of course, this involves, too, a transaction

where the parties contemplate a cessation of the insurance contract at the time. By the express provision of the statute, the insured may surrender the policy and terminate the relation of insurer and insured for any consideration which in his judgment is adequate therefor; but the consideration must be given by the company for such a surrender, and not for some other purpose. The provision of the statute referred to is without influence here for the reason the matter of surrendering the policy in the sense of the statute for an adequate consideration was not in contemplation of the parties. Indeed, it is clear the parties did not intend to terminate the relation of insurer and insured by this transaction, for insured reserved the right to pay the loan and redeem the pledge of the policies, and defendant proceeded to notify him when the subsequent payment fell due as though the insurance were still in force and not then surrendered for such a consideration as was deemed adequate in the judgment of the insured. See, in this connection, *Burridge v. Insurance Co.*, 211 Mo. 158, 109 S. W. 560. Where the transaction is denominated by the parties as a loan and the pledge of the policies and their dealings touching the matter manifest they did not intend the policy was thereby surrendered in the sense of the statute referred to for a consideration adequate in the judgment of the insured, the court is not justified in saying the transaction was a surrender. For a case directly in point, see *Raymond v. Insurance Co.*, 86 Mo. App. 391.

The court gave judgment for plaintiff for the amount of the two policies with 6 per cent. interest thereon after the institution of the suit, less the amount of the loan with accrued interest thereon at the rate of 6 per cent. It is argued here the court should have also deducted from the policies the one premium of \$29.07, due April 9, 1908, on which the insured had defaulted, and the two premiums of \$29.57 each on the second policy, one due November 6, 1907, and one due November 6, 1908, on both of which the insured had defaulted after the date of the loan and prior to his death on November 15, 1908. This argument is justified by the express words of section 7899, *Rev. St. 1899*, which authorizes the court, when the death of the insured occurs within the term of the insurance covered by the net value of the policy, to give judgment for the insurance notwithstanding the default in premiums, etc. By this section, among other things, it is provided that the company shall have the right to deduct from the amount insured in the policy the amount compounded at 6 per cent. interest per annum of all the premiums that had been forborne at the time of the decease, including the whole of the year's premium in which the death occurs. But it is further provided therein that such premiums shall in no case exceed the ordinary life premium for the age of issue with interest as

last aforesaid. This statute is parcel of the contract of insurance in this case as well as the others, and the rights of the parties ought in justice to be determined accordingly. But it seems defendant omitted to lay any claim to these premiums in its answer, and, while the proof shows they were unpaid as suggested, there is no evidence in the case as to what an ordinary life premium at the age of issue of the policies is. The policies in suit here are not ordinary life policies, but, on the contrary, are 20-payment life policies with an endowment feature annexed. Though the amount of the defaulted premiums amply appears in the proof, we may not reckon with them, for by express mandate of the statute they may exceed, and no doubt do, the ordinary life premium for policies at the age these were issued. Had the proof been made as to what the ordinary life premium on such policies is, we would order a remittitur from the judgment for the amount of the three premiums as of the ordinary life class at the age of issue accumulated with interest at 6 per cent. This we are unable to do, however, on the proof in the case.

The judgment should be affirmed.

It is so ordered.

REYNOLDS, P. J., and CAULFIELD, J., concur.

JEROME v. UNITED RYS. CO. OF ST. LOUIS.

(St. Louis Court of Appeals. Missouri. Jan. 24, 1911.)

1. CARRIERS (§ 303*)—INJURY TO PASSENGER—SETTING DOWN PASSENGERS.

Where the conductor and motorman had stopped the car to permit a passenger to alight, and knew or were bound to know that she was in the very act of alighting, they should not only hold the car stationary a reasonable length of time for her to alight, but should exercise a high degree of care to ascertain whether she had reached a place of safety before putting the car in motion.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 1228-1229; Dec. Dig. § 303.*]

2. EVIDENCE (§ 506*)—EXPERT TESTIMONY—PHYSICIANS.

A physician, who has been examined as to both objective and subjective symptoms, may state whether plaintiff will suffer pain from the injury in the future; such testimony not being an invasion of the province of the jury.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 2309; Dec. Dig. § 506.*]

3. EVIDENCE (§ 528*)—EXPERT TESTIMONY—PHYSICIANS.

A physician, duly qualified as an expert, may as a general rule testify as to the probable results of an injury.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 2335-2337; Dec. Dig. § 528.*]

4. EVIDENCE (§ 506*)—EXPERT TESTIMONY—PHYSICIANS.

The testimony of a physician that the injury to plaintiff's foot was traumatic was not

objectionable, as calling for a matter within the province of the jury, though there was evidence tending to show that the condition of plaintiff's foot resulted from dropsy.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 2309; Dec. Dig. § 506.*]

5. EVIDENCE (§ 528*)—EXPERT TESTIMONY—PHYSICIANS.

An attending physician, who has examined a wound, can express an opinion whether or not it resulted from a burn or a cut of a knife.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 2335-2337; Dec. Dig. § 528.*]

6. EVIDENCE (§ 493*)—OPINION EVIDENCE—CAUSE AND EFFECT.

A mother, who has raised several children and has had experience with burns, may express an opinion that a scar appears to have been caused by a burn.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 2275-2282; Dec. Dig. § 493.*]

Appeal from St. Louis Circuit Court; George H. Williams, Judge.

Action by Lizzie E. Jerome against United Railways Company of St. Louis. From a judgment for plaintiff, defendant appeals. Affirmed.

Geo. T. Priest and R. E. Blodgett (Boyle & Priest, of counsel), for appellant. George Safford, for respondent.

NORTONI, J. This is a suit for damages accrued to plaintiff on account of personal injuries received through the alleged negligence of defendant. Plaintiff recovered, and defendant prosecutes the appeal.

It appears plaintiff, a lady about 60 years of age, was a passenger on defendant's street car, operated by it on Olive street, in the city of St. Louis. She was seated in the forward portion of the car. Upon approaching Theresa avenue, which was her destination, she gave the signal for the car to stop to permit her to alight. In pursuance of the signal, the car came to a stop at the usual place for discharging and receiving passengers, and because of its crowded condition plaintiff passed out of the front door to alight from the platform there provided for such purpose. The evidence tends to prove that she proceeded with reasonable diligence and exercised ordinary care for her own safety; but, while she was in the very act of alighting, the power was turned on and the car started forward. It is said the conductor, who was on the rear platform, sounded the bell for the motorman to move forward, which signal was complied with, and the car started in motion while plaintiff was about to alight. Because of this fact, she was precipitated upon the ground with great force and received numerous painful and permanent injuries.

Among other things, the court instructed the jury, for plaintiff, that if she was a passenger on the car, and it stopped at Theresa avenue for the purpose of permitting her to alight therefrom, and that she

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

proceeded to alight from the car with reasonable expedition, and the servants and agents of defendant, whose duty it was to control the motion of the car, while she was in the act of so doing, and before she had fully alighted therefrom, without giving her warning to that effect, caused the car to start forward with a sudden jerk, and thereby directly and proximately caused her injury, then the finding should be for plaintiff, provided she was exercising ordinary care at the time. It is argued the instruction is erroneous, in that it omits to require the jury to find, further, that the car was not stopped a reasonable length of time to permit plaintiff to alight. The argument is without merit on the facts of the case; for, though it is true the duty rests upon defendant to stop its car a reasonable length of time for passengers to alight, and the passengers are presumed to act with due diligence in that regard, the doctrine is without influence here, for it appears the car stopped upon plaintiff's signal with the purpose to permit her to alight. In such circumstances, the high degree of care which the law devolves upon the carrier of passengers is not fulfilled unless its servants, before starting the car, see and know that the passenger in the act of alighting has succeeded in doing so in safety, and that he or she is not in such a situation as to be imperilled by the sudden starting of the car. *Thompson's Com. on Neg.* § 3520; *Nelson v. Met. St. R. Co.*, 113 Mo. App. 702, 88 S. W. 1119; *Bell v. Central, etc., R. Co.*, 125 Mo. App. 660, 103 S. W. 144; *Murphy v. Met. St. R. Co.*, 125 Mo. App. 269, 102 S. W. 64; *Hurley v. Met. St. R. Co.*, 120 Mo. App. 262, 96 S. W. 714. Both the conductor and motorman must have known in this case that plaintiff was then in the very act of alighting from the car; for it is conclusively shown that the car stopped to permit her to do so, and it appears she was under the very eye of the motorman, who was stationed on the front platform, when the car was suddenly started forward by him. In such circumstances, those operating the car should not only hold it stationary a reasonable length of time for the passenger to alight, but should exercise high care as well to the end of ascertaining the fact of the passenger's safety before putting the car in motion to her peril. See *Bell v. Central, etc., R. Co.*, 125 Mo. App. 660, 103 S. W. 144, and authorities *supra*.

Two physicians, Dr. Simon and Dr. Konzelmann, who had made personal examinations with respect to plaintiff's injuries, qualified as expert witnesses at the trial. After describing plaintiff's condition, etc., each of these professional gentlemen were permitted to express an expert opinion, based solely upon the objective symptoms which they discovered from an examination of plaintiff's injuries, to the effect that she would suffer pain therefrom in the future. From

examination made and the objective symptoms discovered, these witnesses said they were able to state whether or not she would suffer pain therefrom in the future. After so stating, the court permitted them to express the opinion, over defendant's objection and exception, that plaintiff would suffer future pain from the injuries said to have been received through defendant's negligence. It is earnestly argued the court erred in so doing, for the reason the expert opinion so given was but the conclusion of the witnesses, and invaded the province of the jury. No one can doubt that a physician, duly qualified as an expert, may, as a general rule, testify to the probable results of an injury. *Rogers on Expert Testimony* (2d Ed.) p. 122, § 50; *Louisville, etc., Ry. Co. v. Lucas*, 119 Ind. 583, 584, 21 N. E. 968, 6 L. R. A. 193; *McClain v. Brooklyn, etc., Ry. Co.*, 116 N. Y. 459, 22 N. E. 1062; *Lincoln v. Saratoga, etc., R. Co.*, 23 Wend. (N. Y.) 425; *Abbot v. Dwinnell*, 74 Wis. 514, 43 N. W. 496; *Rossier v. Met. St. R. Co.*, 125 Mo. App. 159, 164, 101 S. W. 1111. We entertain no doubt whatever that it was competent for the physicians to express the opinion that plaintiff would suffer pain in the future from her injuries. This in no respect invaded the province of the jury, for it was a matter about which laymen are not competent to exercise an intelligent judgment, in the absence of enlightenment from those who are peculiarly learned with respect to injuries and the probable results which they will entail.

It appears, among other injuries, plaintiff received a severe sprain of the ankle, and her foot was much swollen thereafter. Dr. Konzelmann, though he qualified as an expert as well, was her attending physician, having been called immediately after plaintiff was injured. This witness gave testimony with respect to the swollen condition of plaintiff's foot, and was permitted to testify, over defendant's objection and exception, that the swollen condition of the foot was traumatic; that is to say, that it resulted from violence. The purpose of this opinion evidence was to exclude the idea that such swelling was edemic; for the theory of defendant as to the swelling is that plaintiff was dropsical, and there is evidence tending to support it. In other words, there is evidence in the record tending to support the theory that a considerable part of the apparent swelling resulted from a dropsical or edematic condition, independent of the injury. In view of this, it is argued the court erred in permitting Dr. Konzelmann to state his opinion to the effect that plaintiff's swollen foot was traumatic and resulted from violence; for it is said such was the very issue before the jury, and his evidence touching that particular matter is but a conclusion, and therefore incompetent.

To a complete understanding of the question presented, we copy from the record the

distinction between an edemic and traumatic condition, which was related on the trial as follows: "An edema, as we speak of edema, is a condition where a watery fluid deposits itself beneath the skin, causing it to become big and puffy also. It is a swelling, of course; but it is quite different from a swelling that is traumatic, like from a blow. If you put your finger on it and press, it would leave a pit, and it is quite easy for the physician to distinguish the edema. The swelling has very different symptoms from that caused by a blow, or injuries where the swelling is the direct result of the blow, with the blood congestions and deposits." Dr. Konzelmann, who was plaintiff's attending physician, stated that he was able to determine by looking at the swelling whether it was traumatic or edemic in character. After so stating, plaintiff's counsel propounded the following question to the witness: "Q. I will ask you to state whether or not the swelling you noticed was caused by trauma; that is to say, violence?" Over the objection and exception of defendant, the court permitted the witness to answer that the injury was traumatic. It is argued this was error, because it permitted the physician to answer the very question in issue before the jury. Upon mature consideration of the matter, we are persuaded the argument is unsound; for the reason the doctor's statement did not purport to say that the swollen condition resulted from the street car injury, but only went to the nature of the injury as descriptive thereof in a general sense.

The case of *Glasgow v. Met. St. R. Co.*, 191 Mo. 347, 358, 359, 360, 361, 89 S. W. 915, relied upon by defendant, is not precisely in point, and we believe the rule of that case should not be extended. In the case referred to, the injury involved occurred as a result of an alleged fall from a street car. The fact that plaintiff fell from the car at all, however, was denied, and therefore an issue throughout the case. One expert witness in that case was permitted to answer that in his opinion it was a severe fall that caused plaintiff's injury. Another expert was permitted to state in substance that in his opinion plaintiff's injury was the result of, or was caused by, the alleged fall. These questions and answers were condemned, because they went beyond the realm of expert testimony, and invaded the province of the jury, through the witness expressing a conclusion as to how the injury was caused. It is said in the opinion that it would be entirely proper, had the experts said the injury might have resulted from a fall, or it might have resulted from another cause, as it appeared in the case the present condition was within the range of probability traceable to a cause other than the fall. "But," said the court, "the testimony of these expert witnesses went to establish the fact of the alleged fall, which was not a fact they learned from the medical books. Thus the weight of their tes-

timony went into the scales on the question of whether or not there was an accident." *Glasgow v. Railroad Co.*, 191 Mo. 347, 361, 89 S. W. 915. See, also, to the same effect, *Smart v. Kansas City*, 208 Mo. 162, 163, 105 S. W. 709, 14 L. R. A. (N. S.) 565, 123 Am. St. Rep. 415; *Lawson's Expert Ev.* (2d Ed.) 173. See, also, *Rogers' Expert Testimony* (2d Ed.) 129. That what caused an injury is a question for the jury, generally speaking, is undoubted; and it is certain, in a case where the fact that plaintiff was injured at all through the fault of defendant is wholly denied, such opinion evidence as that above discussed should be condemned.

But the question and answer under consideration here are of a different class entirely; for, instead of going to the effect that the swollen condition of plaintiff's foot appeared to be the result of a fall from a street car, the question required, and the witness answered, only that the swelling was traumatic. In other words, it appeared to be the result of violence of some character, as distinguished from a dropsical condition. It is always competent for the attending physician to state the nature and character of the injury, and no more than that was done here. No one can doubt that an attending physician, who has examined the hurt, can express an opinion as to whether or not it resulted from a burn or the cut of a knife. Indeed, if the physician did not know so much as a fact acquired through impressions made on his mind, aided by professional learning at the time he examined and treated the plaintiff, then he was hardly able to prescribe for the patient in the first instance. Such testimony almost, if not quite, savors of fact, and not of opinion, in the full sense of that term. Even a nonexpert, a mother, who has raised several children and had experience with burns, may express her opinion that a scar appears to be caused by a burn. *State v. Nieuhaus*, 217 Mo. 332, 117 S. W. 73. See, also, *Rogers' Expert Testimony* (2d Ed.) 127.

But it is suggested the difference between a burn or a cut with a sharp instrument, such as a knife, is obviously distinguishable by persons possessing no scientific knowledge on the subject, and therefore the illustration is not valid. Though the difference between a burn and a cut may be obvious to a nonexpert, it is certainly no more so than that between a traumatic and edemic swelling to one learned in the sciences of medicine and surgery, and such a witness violates no intelligent rule of procedure by merely stating that the injury treated by him appeared to be traumatic, or occasioned by violence. *Robinson v. St. Louis & S. R. Co.*, 103 Mo. App. 110, 77 S. W. 498; *Torreyson v. United Rys. Co.*, 144 Mo. App. 626, 636, 129 S. W. 409. Had the witness stated that the injury appeared to result from being suddenly thrown from a street car with great force, it would fall within the rule of the *Glasgow* case; but, as it is, only the nature and char-

acter of the swelling were described, without suggesting the particular cause.

The judgment should be affirmed. It is so ordered.

REYNOLDS, P. J., and CAULFIELD, J., concur.

**FIRST NAT. BANK OF JEFFERSON CITY
v. ASEL**

(Kansas City Court of Appeals. Missouri.
Jan., 1911.)

**1. BILLS AND NOTES (§ 485*)—ADMISSIONS—
FAILURE TO DENY UNDER OATH.**

Where the answer denying liability in an action on a negotiable promissory note was not sworn to, the execution of the note was admitted.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. §§ 1542-1554; Dec. Dig. § 485;* Pleading, Cent. Dig. § 703.]

2. CONTRACTS (§ 47*)—CONSIDERATION—NECESSITY.

Want of consideration is always a defense to a contract.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 220, 221, 256-258; Dec. Dig. § 47.*]

3. EVIDENCE (§ 423*)—PAROL EVIDENCE VARYING WRITTEN CONTRACT.

That a note was executed in consideration of certain shares of stock which were transferred to the maker under an agreement that his ownership should be merely nominal, and that the note should be executed for another's accommodation, did not constitute a defense to an action on the note; such facts varying the terms of the note.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 1962; Dec. Dig. § 423.*]

Appeal from Circuit Court, Cole County; Wm. H. Martin, Judge.

Action by the First National Bank of Jefferson City, Mo., against C. H. Asel. From a judgment for plaintiff, defendant appeals. Affirmed.

Irwin & Calfee, for appellant. Pope & Lahman, for respondent.

BROADDUS, P. J. This is an action by plaintiff to recover of the defendant the amount and interest of a promissory note alleged to be due to plaintiff from defendant. The note reads as follows: "\$1,000.00. Jefferson City, Mo., April 12, 1907. On demand after date I promise to pay to the order of the First National Bank of Jefferson City, one thousand and no 100 dollars, for value received, negotiable and payable without defalcation or discount, at the First National Bank, with interest at the rate of six per cent. per annum from date. C. H. Asel." At the same time, defendant in connection with said note executed the following: "Having executed my note as above, and being desirous of securing the same I hereby pledge, as collateral security, two shares stock in Jefferson City Opera House Co. * * * Now, in default of payment of said note at ma-

turity, I hereby authorize said bank to sell the same at public or private sale, or otherwise, at its option, on the nonperformance of this promise, without notice, and apply the proceeds to the payment of the above note; and, in case the proceeds of said sale are not sufficient to cover the amount of the above note, I agree to pay the balance on demand, it being required, on payment of the amount loaned as specified above, and at any time before said collateral security shall have been sold, to surrender the same to me. C. H. Asel." There are two payments of interest indorsed on said instrument. The defendant answered in part as follows: "Comes now the defendant for his second amended answer to plaintiff's petition, and admits that plaintiff is, and was at the dates mentioned in its petition, a corporation organized and existing under the laws of the United States concerning the organization of national banks and doing business as such in the city of Jefferson, in Cole county, Missouri, but denies that he has paid interest on the note described in plaintiff's petition up to April 12th, 1908; and denies that he is indebted to plaintiff on the note sued upon in the sum of \$1,000.00 or any other amount, and avers the fact to be that he has not at any time, nor does he now, recognize any liability of any kind to plaintiff on said note, that respecting each and every other allegation in plaintiff's petition, defendant avers that he has no knowledge or information of the matters therein stated sufficient to form a belief, and therefore denies each and all of said allegations. For other and further answer to plaintiff's petition, defendant states that the promissory note, described in plaintiff's petition, is and was wholly without consideration, and that the same is not and never was binding upon defendant, that plaintiff accepted said note with full knowledge of its infirmities, and well knew at the time said note was executed and delivered that the same was wholly without consideration. Defendant for further answer to plaintiff's petition says that the only pretended consideration for the note described in plaintiff's petition was the transfer to defendant of certain shares of the capital stock of the Jefferson City Opera House Company of the par value of \$2,500 and that there was no other consideration whatever for said note, that the said stock was held and owned by Will J. Edwards, and that Edson L. Burch, acting for and on behalf of himself and the plaintiff bank, persuaded and induced the defendant herein to sign the promissory note for the purpose of transferring to the defendant the nominal ownership of the said stock so held by the said Will J. Edwards, and not otherwise, and that it was agreed and understood by and between Edson L. Burch and this defendant that the making of said note was

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

for accommodation purposes only, and that defendant was not liable upon said note for any amount whatever, and that defendant was not to be the actual owner of said stock, and that defendant never claimed, nor does he now claim, the ownership of said stock which was placed in his name on the books of the company aforesaid; that the certificates of said stock have never been in his possession; that the same have remained and still are in the possession of plaintiff bank; that the said stock at the time of the said transfer was and is valueless; and that plaintiff bank knew the consideration for said note, and accepted said note with full knowledge of its infirmities and with full knowledge of the consideration for which it was given, and knew that said note was an accommodation note and without consideration at the time it accepted the same." Other parts of said answer were struck out by the court. The purport of this part of the answer when analyzed is that it undertakes to contradict and vary the terms of the note in suit, and the attached writing placing the two shares of stock as security for the loan, and the further plea that defendant executed the note and attached writing without knowing the contents, etc.

The action of the court in striking out that part of said answer was eminently proper. The matters therein stated did not show such fraud as is referred to in *Main v. Hall*, 127 Mo. App. 713, 106 S. W. 1099; *Broyles v. Absher*, 107 Mo. App. 168, 80 S. W. 703; *Och v. Railway Co.*, 130 Mo. 27, 81 S. W. 962, 36 L. R. A. 442. These cases refer to instances where the party was induced to sign the writing by a trick wherein he was made to believe that he was signing another and different paper. Defendant knew what he was signing, and his effort is to contradict the writing itself and to attach a meaning to it different from what it plainly imports. And we think the court might have rendered judgment for plaintiff on the remaining allegations in defendant's answer without violating any rule of law, as they do not constitute any defense to the note. But the court did practically the same thing in hearing defendant's evidence in support of his answer, and then directing the jury to return a verdict for plaintiff for the amount of the note and interest, less credits.

As that part of defendant's answer on which the case was tried not being sworn to, the execution of the note stood confessed. There was no plea of payment. The contention is that it was without consideration, but there is no fact set out showing that there was want of consideration. The admitted consideration was certain shares of stock in the Jefferson City Opera House Company, which it is alleged were merely assigned to defendant to be held by him nominally and not really,

and that was the contract made at the time of the execution and transfer of said note. It is always in order to plead want of consideration as a defense to the enforcement of a contract. But defendant is not trying to allege want of consideration as such. He does not allege that the said capital stock which was the consideration for the execution of the note was without value, but that he did not receive them except nominally, and that he repudiates their ownership, that it was the understanding at the time that his ownership was to be merely nominal, and that the making of the note was for accommodation purposes only, and that he was not to be liable thereon for any amount whatever. This is all against the letter of the contract, and does not constitute any defense to the note. The plaintiff was entitled to a judgment on the pleadings, as well as on the pleadings and the evidence.

Affirmed. All concur.

FIRST NAT. BANK OF JEFFERSON CITY v. ASEL.

(Kansas City Court of Appeals. Missouri.
Jan., 1911.)

Appeal from Circuit Court, Cole County; Wm. H. Martin, Judge.

Action by the First National Bank of Jefferson City, Mo., against G. G. Asel. From a judgment for plaintiff, defendant appeals. Affirmed.

Irwin & Calfee, for appellant. Pope & Lahman, for respondent.

BROADBUSH, P. J. This is a suit on a promissory note for \$2,500 executed by defendant and payable to plaintiff.

The note is similar in form and only different as to amount to that described in the case of plaintiff herein against C. H. Asel (134 S. W. 110), to which was attached also a similar paper transferring five shares of stock in the Jefferson City Opera House Company to defendant.

The language of the answer set up as a defense is similar in all respects with that in said case, *supra*.

For the reasons given as therein, the judgment herein is affirmed. All concur.

LORD & BUSHNELL CO. v. TEXAS & N. O. R. CO.

(St. Louis Court of Appeals. Missouri. Jan.
24, 1911.)

1. CARRIERS (§ 73*)—DIVERSION OF SHIPMENT —RIGHTS OF SHIPPER.

A shipper has the right to stop or divert a car at an intermediate point.

[Ed. Note.—For other cases, see *Carriers*, Cent. Dig. § 248; Dec. Dig. § 73.*]

2. CARRIERS (§ 46*)—CONTRACT FOR SHIPMENT —LAWS GOVERNING.

Ordinarily a shipment contract is governed by the laws of the state where it is made.

[Ed. Note.—For other cases, see *Carriers*, Cent. Dig. § 220; Dec. Dig. § 46.*]

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

3. CARRIERS (§ 177*)—CONNECTING CARRIERS—CONTRACT FOR SHIPMENT—LAWS GOVERNING.

A domestic law making an initial carrier liable for negligence of connecting carriers does not apply to a contract of shipment made in another state.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. § 778; Dec. Dig. § 177.*]

4. CARRIERS (§ 178*)—CONNECTING CARRIERS—LIABILITY OF INITIAL CARRIER.

At common law an initial carrier's liability for safe and reasonably prompt carriage of freight ends with its line and use of ordinary care in delivering to the connecting carrier, but the liability may be extended beyond the line by special contract.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. § 760; Dec. Dig. § 173.*]

5. CARRIERS (§ 170*)—CONNECTING CARRIERS—LIABILITY OF INITIAL CARRIER.

An initial carrier's obligation to carry freight beyond its line can be shown by usage or conduct.

[Ed. Note.—For other cases, see Carriers, Dec. Dig. § 170.*]

6. CARRIERS (§ 174*)—CONNECTING CARRIERS—PERFORMANCE OF INITIAL CARRIER'S DUTY.

An initial carrier of freight destined beyond its line undertaking only to transport to the point most convenient to the destination reached by its line performs its duty by delivering to the connecting carrier.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. § 747; Dec. Dig. § 174.*]

7. CARRIERS (§ 180*)—CONNECTING CARRIERS—LIABILITY OF INITIAL CARRIER.

Where an initial carrier contracts for a through shipment, the connecting carriers are regarded as its agents making it liable for their negligence, notwithstanding a provision in a contract exempting it from liability beyond its line.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. § 817; Dec. Dig. § 180.*]

8. CARRIERS (§ 180*)—CONNECTING CARRIERS—EFFECT OF CONTRACT.

An initial carrier's contract to transport from a point on its line to C. via a certain connecting carrier "at" K., an intermediate point beyond the initial carrier's line, is a contract for through shipment, making the initial carrier liable for negligence of a connecting carrier in preventing exercise of the shipper's right to divert the shipment at K. by taking the car over another route, notwithstanding a provision in the contract exempting it from liability for connecting carrier's negligence.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. § 817; Dec. Dig. § 180.*]

9. CARRIERS (§ 79*)—FREIGHT—ROUTING DIRECTIONS—EFFECT.

A carrier must conform to the shipper's routing directions, except as to perishable goods, where conformity would cause injury to the shipment.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. § 274; Dec. Dig. § 79.*]

10. CARRIERS (§ 173*)—FREIGHT—ROUTING DIRECTIONS.

A shipper suing on a contract for through shipment can recover for a connecting carrier's failure to comply with a routing direction preventing a diversion of the shipment as a negligent breach of defendant's contract obligation.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 760-763; Dec. Dig. § 173.*]

11. JUSTICES OF THE PEACE (§ 91*)—PLEADING—REQUISITES.

Formal pleadings are not required in justice's court, and much latitude is allowed in the statement of a cause of action; it being sufficient if the statement affords reasonable notice to the adversary of the claim relied on and operates to bar another suit on the same cause of action.

[Ed. Note.—For other cases, see Justices of the Peace, Cent. Dig. §§ 807-823; Dec. Dig. § 91.*]

12. CARRIERS (§ 184*)—CONNECTING CARRIERS—PLEADING—VARIANCE.

A variance between allegation that defendant carrier agreed to carry freight to an intermediate point and there deliver to a connecting carrier, and proof of a through shipment via the connecting line "at" that point, was immaterial, especially where the bill of lading was filed with the statement.

[Ed. Note.—For other cases, see Carriers, Dec. Dig. § 184.*]

13. PLEADING (§ 388*)—IMMATERIAL VARIANCE—EFFECT.

Under the express terms of Rev. St. 1909, §§ 1846, 1847, when a variance is immaterial, a court can find the facts according to the evidence.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. § 1307; Dec. Dig. § 388.*]

Appeal from St. Louis Circuit Court; George H. Williams, Judge.

Action by the Lord & Bushnell Company against the Texas & New Orleans Railroad Company. Judgment for plaintiff, and defendant appeals. Affirmed.

Lee W. Hagerman and C. S. Burg, for appellant. J. M. Lashly and Glendy B. Arnold, for respondent.

NORTONI, J. This is a suit for damages accrued to plaintiff through the breach of a contract of carriage. Plaintiff recovered, and defendant prosecutes the appeal.

Plaintiff is an incorporated company engaged in the lumber business in the city of Chicago, Ill., and defendant is an incorporated railroad company engaged in the business of a common carrier of goods between the towns of Hyatt and Dallas, Tex. It appears plaintiff's consignor consigned a carload of lumber to it over defendant's railroad at Hyatt, Tex., for delivery to plaintiff at Chicago, Ill., with routing directions via Chicago, Rock Island & Pacific Railway Company at Kansas City, Mo. Of course, plaintiff had the right to stop or divert the car at an intermediate point on the route, and it attempted to do so at Kansas City for the purpose of furnishing the lumber therein to its customer, Swift & Co., at that place. But, instead of sending the car through Kansas City according to the directions on the bill of lading, defendant's connecting carrier, the Chicago, Rock Island & Pacific Railway Company, transported it through St. Joseph, Mo., and made delivery to plaintiff at Chicago. Because of this an expense of \$98.04 was entailed on plaintiff in transporting the car back from Chicago to Kansas City. By this

suit plaintiff seeks to recover this amount, and declares upon the contract of carriage for the recovery. The breach of such contract alleged is that defendant failed to observe its provision or shipping direction thereon to transport the lumber through Kansas City where it might be intercepted.

Defendant company owns and operates a line of railroads in the state of Texas, the city of Dallas in that state being its northern terminus, at which point it connects with the Chicago, Rock Island & Pacific Railway Company. It appears the Chicago, Rock Island & Pacific Railway Company proceeds from Dallas, Tex., to Topeka, Kan., and thence maintains two lines, one through Kansas City, Mo., and another through St. Joseph, Mo., which presently converge east of both places and run into Chicago, Ill. The shipment of lumber involved here should have been transported through Kansas City by the Chicago, Rock Island & Pacific Railway Company, defendant's connecting carrier, but, as said, it was forwarded through St. Joseph instead. The contract of affreightment was entered into in the state of Texas by plaintiff's consignor and agent for its benefit, and ordinarily should be controlled by the Texas law, but the statutes of that state are not in evidence, and it is obvious that our statute declaring the liability of the initial carrier for the negligent acts of connecting lines is without influence. It is therefore conceded that the rights of the parties are to be declared as at common law; that is to say, the contract of affreightment sued upon is to be interpreted and the matter in judgment determined in accord with the principles of the common law which attend the public carriers of goods. There can be no doubt of the proposition that a common carrier performs the full measure of its obligation under the common law by accepting and carrying goods to the end of its line. It is therefore true that under the American rule by receiving goods for transportation to a point beyond its line the carrier engages only to carry them safely and within a reasonable time to the end of the line, and exercise ordinary care in delivering the consignment to the next connecting carrier for further transportation. But it is nevertheless competent for such a carrier to enter into a special contract to carry goods to a point even beyond its own line, and, if it does so, the duty to comply is thus of course devolved upon it (the initial carrier). It may be, too, a usage of its business or certain language or conduct shows the railroad undertook to carry the goods and deliver the same beyond the terminus of its line, in which event the obligation may be enforced as well. *Crouch v. L. & N. R. Co.*, 42 Mo. App. 248; *Hutchinson on Carriers* (3d Ed.) § 236. No usage or other conduct suggested appears in this case, and it is argued that the contract of affreightment sued upon is insufficient to show the initial carrier under-

took to transport the lumber beyond Dallas, Tex., the terminus of its own line.

It is conceded the negligence involved here which entailed plaintiff's loss was that of the connecting carrier, the Chicago, Rock Island & Pacific Railway Company, in omitting to observe the stipulation in the bill of lading to transport the lumber through Kansas City, and that defendant initial carrier properly delivered the same in due time at Dallas, Tex., to such connecting carrier. In view of these facts, it is urged that there can be no recovery against this defendant, the initial carrier, for the negligent inattention to duty by the Chicago, Rock Island & Pacific Railway Company because this defendant incorporated in the bill of lading a provision to the effect that its liability should cease upon delivery to its next connecting line, and such is parcel of the agreement. It is undoubted that where the place of destination is not upon the carrier's road, and it receives goods and undertakes only to transport them by its own route to the point most convenient to the destination reached by it and there to deliver to or forward over another road, the carrier performs the full measure of its duty by making the delivery to the connecting carrier as was done in this case. *Hutchinson on Carriers* (3d Ed.) § 243; *Coates v. United States Express Co.*, 45 Mo. 238. It is no doubt true as well that it may properly stipulate against liability in some cases after the goods pass into the possession of another or connecting carrier. But, while the carrier may by express contract stipulate against liability for goods while in the hands of connecting carriers, he may not relieve himself from the obligation to answer for the negligence of such connecting carrier even at common law, if his undertaking in the first instance was one for a through shipment. In such circumstances, where the initial carrier has contracted for a through shipment, the connecting carriers are regarded as its agents in performing the task, and such initial carrier must respond for their negligence notwithstanding a stipulation in the contract of affreightment exempting it from liability beyond the terminus of its own line. *Hutchinson on Carriers* (3d Ed.) 240; *Lawson on Contracts*, § 235; *G. & H. R. Co. v. Allison*, 59 Tex. 193; *Condict v. Grand Trunk R. Co.*, 54 N. Y. 500; *Cincinnati, etc., R. Co. v. Pontius*, 19 Ohio St. 221, 2 Am. Rep. 391. Though the bill of lading involved here so exempted defendant for the negligent conduct of its connecting carrier, the Chicago, Rock Island & Pacific Railway Company, it appears on its face to be a through contract of affreightment from Hyatt, Tex., to Chicago, Ill., "for delivery to Lord & Bushnell or their assigns at Chicago, Illinois." Besides this, the shipping direction thereon says the shipment is "From Hyatt, Texas, to Chicago, Illinois, via Chicago, Rock Island & Pacific at Kansas City." Under the accepted rule of decisions in this state, the

express words above quoted render this one a through bill of lading. See *Western Sash & Door Co. v. C., R. I. & P. R. Co.*, 177 Mo. 641, 78 S. W. 998. Such being true, it was breached through the negligence of the Chicago, Rock Island & Pacific Company by failing to observe the direction to transport the car through Kansas City, and thus occasioned plaintiff's loss as a consequence which entailed liability on defendant initial carrier to respond therefor in damages to it. No one can doubt the proposition that it is the duty of the carrier and its agents to faithfully conform to shipping directions as to routing, unless it be in the case of perishable goods, when situate in the stress of circumstances, where such directions may not be complied with and preserve the property intact. *Weaver v. Southern R. Co.*, 135 Mo. App. 210, 115 S. W. 500. If it be suggested that the negligence of defendant's connecting carrier is not available in this action on the contract, the answer is that the form of the action concerns the remedy only, and in no respect affects the right or obligation of the parties. No doubt the form of the action in contract may invoke other and distinct rules for the admeasurement of damages as was said in *Trout v. Watkins Livery Co.*, 130 S. W. 136, but no point is made on that score here, and the question will not be noticed. The right of the plaintiff to invoke the inattention to the shipping instruction as a negligent breach of defendant's contractual obligation in the circumstances of the case is not to be doubted in either form of action. *Hutchinson on Carriers* (3d Ed.) § 204.

But it is argued plaintiff's petition declares upon one contract and the recovery was had on another. It may be said of this that the suit originated before a justice of the peace where formal pleadings are not required, and much latitude is indulged in the statement of a cause of action. In such cases it is sufficient if the statement affords reasonable notice to the adverse party of the claim he is called upon to meet and will operate to bar another suit on the same cause of action. It is true the statement alleges that defendant by its written contract undertook to transport the lumber to Kansas City, and there deliver it to the Chicago, Rock Island & Pacific Railway Company, and the proof shows the contract was for a through transportation to Chicago, via the Chicago, Rock Island & Pacific Railway Company at Kansas City. It is shown, also, in proof that defendant's line terminates at Dallas, Tex., and that the car of lumber was given into possession of its connecting carrier at that point, but nothing appears to this effect in the bill of lading, and it does substantially entail an obligation upon defendant to see that the lumber was in the possession of the Chicago, Rock Island & Pacific Railway Company at Kansas City. This obligation was not complied with, and, though it ap-

pears there is a variance in the proof made from the allegation in the petition, it is an immaterial one in the sense of the statute, for it could not have misled defendant to its prejudice, especially in view of the fact that the bill of lading itself was filed with the statement as the basis of the suit under the justice of the peace practice. When a variance is immaterial, as in this case, the court is expressly authorized to find the facts according to the evidence. See sections 1846, 1847, Rev. St. 1909. It is true, if the cause of action were unproved not in some particular only but in its entire scope and meaning, it should not be deemed a case of variance, but a failure of proof and so, too, if the evidence introduced actually disproved the substantive allegation relied upon. See section 2021, Rev. St. 1909. But here the substance of the cause of action was the negligent breach of the contractual undertaking which required the car of lumber to be at Kansas City in charge of the connecting carrier. The contract stipulated that it should be so and the mere fact that it revealed in the case further a through contract to Chicago is immaterial when the substantial rights of the parties are considered. We say this especially in view of the fact that the case originated before a justice of the peace where no formal pleadings are required and in view of the statute authorizing the instrument sued upon before the justice to be filed as the basis of the suit, which was done in this case, though it was annexed to a loosely drawn paper, as is usual in such cases, purporting to be a statement of the cause of action as well.

The other questions in the brief were not presented to the trial court, and we therefore decline to consider them, for the reason this court is one of review only.

The judgment should be affirmed. It is so ordered.

REYNOLDS, P. J., and CAULFIELD, J., concur.

PENNELL v. CHICAGO, R. I. & P. RY. CO.

(Kansas City Court of Appeals. Missouri. Jan. 30, 1911. Rehearing Denied Feb. 13, 1911.)

1. RAILROADS (§ 348*)—INJURIES AT CROSSING—EVIDENCE.

In an action for injuries at a railroad crossing, evidence held to show that plaintiff was guilty of contributory negligence and could not recover.

[Ed. Note.—For other cases, see *Railroads*, Cent. Dig. §§ 1144-1149; Dec. Dig. § 348.*]

2. RAILROADS (§ 346*)—ACCIDENTS AT CROSSINGS—HUMANITARIAN DOCTRINE.

Under the humanitarian rule, the burden is on the plaintiff to prove that defendant's trainmen saw, or should have seen, that he was going into a dangerous position on the track at a crossing and was unmindful of the danger, and that they had means at hand for saving

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

him, and, had they made a reasonable use of such means, would have saved him.

[Ed. Note.—For other cases, see *Railroads*, Cent. Dig. § 1121; Dec. Dig. § 346.*]

3. RAILROADS (§ 346*)—ACCIDENT AT CROSSING—HUMANITARIAN DOCTRINE—PRESUMPTIONS.

It cannot be presumed, from the mere fact that a train was being negligently run and struck plaintiff at a crossing, that the defendant's servants were guilty of negligence under the last chance doctrine.

[Ed. Note.—For other cases, see *Railroads*, Cent. Dig. § 1119; Dec. Dig. § 346.*]

4. RAILROADS (§ 348*)—INJURIES AT CROSSING—HUMANITARIAN DOCTRINE.

In an action for injuries at a crossing, evidence considered, and held, that defendant was not guilty of negligence under the last chance doctrine.

[Ed. Note.—For other cases, see *Railroads*, Cent. Dig. § 1144; Dec. Dig. § 348.*]

Appeal from Circuit Court, Jackson County; W. O. Thomas, Judge.

Action by Arthur Pennell against the Chicago, Rock Island & Pacific Railway Company. From a judgment for plaintiff, defendant appeals. Reversed.

M. A. Low and Seebree, Conrad & Wendorff, for appellant. John C. Nipp and John L. Wheeler, for respondent.

JOHNSON, J. This is an action for damages for personal injuries alleged to have been caused by the negligence of defendant in the operation of one of its trains over a street crossing in Kansas City. The appeal is prosecuted by defendant from a judgment of \$1,000 recovered by plaintiff in the circuit court, where the cause was tried before a jury.

The injury occurred between 11 and 12 o'clock in the morning of December 7, 1908, at the intersection of Tenth and Hickory streets. Tenth street runs east and west and is occupied by four tracks of the Union Pacific Railway Company, which are used by trains of defendant as well as by trains of the owner. The engine of a passenger train of defendant coming west from the Union Station on the main line (which was the third track from the south) struck plaintiff and inflicted the injuries of which he complains. The locality is in a business district, and plaintiff, a mechanical engineer, was returning from a business visit to a manufacturing concern. He was a man past middle life, but was in good health and in full possession of his senses. He walked with a cane but was not crippled and was active for a man of his age. He states: "I was in very good health and enjoying very good health and could walk eight or ten miles if necessary. * * * My nervous system was quite good. * * * I was not walking fast; walking about 2½ miles per hour." He started to cross Tenth street from the southwest corner of its intersection with Hickory, and proceeded north on the west

side of the latter street until he reached the first railroad track, where he stopped to allow an east-bound train on the second track to go by. As soon as that track was clear, he resumed his progress, and, when on the second track, looked, so he states, east and west on the third track and saw no train approaching from either direction. He went onto the third track, the main line, and then for the first time became aware that a train was coming from the east and was almost upon him. He jumped back, but not far enough to reach a place of safety. Some part of the locomotive struck his right leg and threw him away from the south side of the track. Witnesses for plaintiff estimate the speed of the train at 8 or 10 miles per hour and state that the bell of the engine was not ringing. There were gates at this crossing and a watchtower equipped with a gong to give warning of the approach of trains; but some of the witnesses say the gates were not down and the gong was silent. Ordinances of the city limiting the speed of trains to six miles per hour and requiring the watchman stationed in the watchtower to give warning of approaching trains were pleaded in the petition and introduced in evidence. The negligence pleaded consists of the acts of running the train at speed in excess of that permitted by the ordinance and in failing to give warning either by ringing the bell of the engine or the gong on the watchtower. Further, it is alleged "that the defendant, its agents, servants, and employes, saw, or by the exercise of ordinary care, skill, and diligence, could have seen, plaintiff in a position of imminent peril of being struck by said locomotive and train of cars, upon and in dangerous proximity to said track upon which said locomotive and train of cars were being run and operated, in time, by the exercise of ordinary skill and diligence, to have warned plaintiff of his danger, by sounding the bell or whistle, of the approach of said locomotive and train of cars, and of his danger of being struck by said locomotive and train of cars, in time, by the exercise of ordinary care, skill, and diligence, to have enabled plaintiff to have kept out, or gotten out, of said position of peril."

We have stated the facts in evidence most favorable to the cause of action asserted, and in the view we take of the case find no occasion to refer to the evidence of defendant. We shall concede that the watchman in the tower was negligent in not giving warning, and that the operators of the engine were negligent in running at excessive speed and in failing to ring the bell. But such acts, in so far as they might have operated to lure plaintiff into a perilous position, were commingled with negligence of plaintiff himself, the existence of which is indisputably established by his own evidence. At the time he says he looked to the east and saw no train,

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

he was about 16 feet from the center of the main track and some 10 or 11 feet from the danger line. At that moment the engine was not over 60 feet from the place of collision and was in plain view since the track was straight and level. There were no obstructions to vision, and it was broad daylight. Plaintiff's statement that the train was not in sight is contradicted by all the witnesses and by the plain physical fact that it must have been at or near the point we have stated. We cannot accord any evidentiary weight to that statement. To do so would be to give credence to what common experience and common sense pronounce impossible. Courts are not bound to give weight to that which has no weight, substance to that which is insubstantial, nor attempt to create something out of nothing. Had plaintiff looked towards the east, he must have seen the train, and, if he failed to see what was in plain sight, it was because he did not look. In either event, his own negligence was the cause of the perilous position in which he discovered himself when too late to avoid injury. His own evidence affords him no cause of action on account of negligence of defendant that may have co-operated to place him in danger, and we pass to the question of whether he has a case to go to the jury under the rules and principles of the humanitarian doctrine.

The burden is on the plaintiff to prove that defendant's servants—the operators of the engine or the watchman—saw, or should have seen, that he was going into a dangerous position and was unmindful of the danger, and that they had the means at hand for saving him, and, had they made reasonable use of such means, would have saved him. We have no right to assume, from the mere facts that the train was being negligently run and struck plaintiff, that defendant's servants were guilty of negligence under the "last chance" doctrine. To support a cause of action founded on such negligence, it must appear affirmatively from the evidence that there was something in the appearance of plaintiff as he approached the track to disclose that he was unaware of the presence of the train, and if not specially warned would proceed heedlessly into danger. So far as plaintiff's testimony is in the nature of an admission against his own interest, we take him at his word. He asserts that he was giving due attention to his way, and that he looked in the direction of the train when at a place only 10 or 11 feet from the danger line. Grant that defendant's servants should have been observing him, what was there in such conduct to suggest to ordinary care that he was oblivious to his real situation? His actions showed he knew what he was doing, and the engineer certainly was justified in acting on the belief that a man who looked directly at the

approaching train and was in apparent possession of unimpaired faculties would not deliberately walk into danger, but would stop in a place of safety. There is no evidence tending to show an appearance of peril until plaintiff actually entered on the path of the train. At that moment the train was not over 25 feet from the place of collision, and the engineer, had he been never so diligent, could have done nothing to save the unfortunate man. In his zeal to exculpate himself from the imputation of negligence, plaintiff has pictured a situation free from the suggestion of peril until a time when knowledge thereof would have been unavailing. As we said before, we shall hold him to his admissions, and in so doing we say that he cannot hold defendant liable for the failure of its servants to observe a thing his own evidence shows was not open to observation.

The learned trial judge erred in overruling defendant's request for a peremptory instruction.

The judgment is reversed. All concur.

LAUGHLIN et al. v. EXCELSIOR POWDER MFG. CO. et al.

(Kansas City Court of Appeals. Missouri. Jan. 30, 1911. Rehearing Denied Feb. 13, 1911.)

1. ATTORNEY AND CLIENT (§ 180*)—ATTORNEY'S LIEN—NECESSITY OF NOTICE.

Where plaintiffs, as attorneys, sued under a contract for a contingent fee for injuries sustained by their client, the filing of the suit dispensed with the necessity of giving defendant notice of the attorney's lien on the cause of action, conferred by Rev. St. 1909, § 965, as a prerequisite to the enforcement of such lien in case of a private settlement with the client.

[Ed. Note.—For other cases, see Attorney and Client, Cent. Dig. §§ 830-392; Dec. Dig. § 180.*]

2. ATTORNEY AND CLIENT (§ 180*)—ATTORNEY'S LIEN—ENFORCEMENT.

Where attorneys acquired a lien on their client's cause of action, pursuant to a contract to prosecute the action for a contingent fee, conferred by Rev. St. 1909, § 965, the act of the defendant in obtaining a release of the cause of action, which destroyed the attorney's lien after it attached, made such defendant liable to the attorneys in an independent action.

[Ed. Note.—For other cases, see Attorney and Client, Cent. Dig. § 412; Dec. Dig. § 180.*]

3. PRINCIPAL AND AGENT (§ 175*)—UNAUTHORIZED ACTS OF AGENT—RATIFICATION.

Where a principal profits by an unauthorized act or contract of his agent, the law imposes on him the burdens of the act or contract on the theory that a party having enjoyed a benefit must take it cum onere.

[Ed. Note.—For other cases, see Principal and Agent, Cent. Dig. §§ 662-668; Dec. Dig. § 175.*]

4. PRINCIPAL AND AGENT (§ 175*)—RATIFICATION OF UNAUTHORIZED ACTS—JOINT TORT-FEASORS.

The rule that where a principal profits by the unauthorized acts or contracts of his agent, or ratifies the same, he takes the benefits cum onere, does not apply as between joint tort-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

feasors, who are jointly and severally liable whether they acted in concert or independently: there being no contractual or confidential relation between them.

[Ed. Note.—For other cases, see Principal and Agent, Cent. Dig. §§ 662-668; Dec. Dig. § 173.*]

5. TORTS (§ 22*)—JOINT TORT-FEASORS—LIABILITY.

In a joint tort, each joint tort-feasor is considered as sanctioning the acts of the others, thereby making them his own, and hence each is liable for the whole damage, and there can be no separate estimate of the injury committed by each.

[Ed. Note.—For other cases, see Torts, Cent. Dig. §§ 29, 31; Dec. Dig. § 22.*]

6. ACTION (§ 53*)—SPLITTING CAUSE OF ACTION.

A person injured by a joint tort has but one cause of action, and, while he may prosecute the same against all or only one of the wrongdoers, he cannot split the same.

[Ed. Note.—For other cases, see Action, Cent. Dig. §§ 565-592; Dec. Dig. § 53.*]

7. RELEASE (§ 29*)—JOINT TORT-FEASORS—DEFENSE—RELEASE OF ONE.

Since there is but a single indivisible cause of action against several joint tort-feasors, a valid release of one releases all.

[Ed. Note.—For other cases, see Release, Cent. Dig. §§ 64-70; Dec. Dig. § 29.*]

8. RELEASE (§ 29*)—JOINT TORT-FEASORS—RELEASE—FSTOPPEL.

The release of one tort-feasor estops plaintiff to deny liability of the one so released; the law presuming that that one committed the whole trespass and occasioned the whole injury.

[Ed. Note.—For other cases, see Release, Cent. Dig. §§ 64-70; Dec. Dig. § 29.*]

9. ATTORNEY AND CLIENT (§ 190*)—ATTORNEY'S LIEN—JOINT TORT-FEASORS—RELEASE—EFFECT.

Plaintiffs' client, having a claim against a powder company and a railway company, as joint tort-feasors, for an injury sustained by an explosion, employed plaintiffs to prosecute his cause of action on a contingent fee. Plaintiffs sued the powder company alone, after which the client, without plaintiffs' knowledge or consent, released for a pecuniary consideration the railway company, whereupon the powder company successfully pleaded such release as a defense to its liability. Held, that when the client settled his demand against the railway company he confessed he had no cause of action against the powder company, and, in the absence of fraud, plaintiffs could not collect their fee from the powder company.

[Ed. Note.—For other cases, see Attorney and Client, Cent. Dig. § 412; Dec. Dig. § 190.*]

Appeal from Circuit Court, Jackson County; Hermann Brumback, Judge.

Action by Louis A. Laughlin and another against the Excelsior Powder Manufacturing Company and another. Judgment for defendants, and plaintiffs appeal. Affirmed.

B. D. Davis, for appellants. Lathrop, Morrow, Fox & Moore, for respondent Kansas City Southern Ry. Co. Kinealy & Kinealy and E. Wright Taylor, for respondent Excelsior Powder Mfg. Co.

JOHNSON, J. Plaintiffs, practicing lawyers in Kansas City, brought this suit under the provisions of section 965, Rev. St. 1909,

to recover an attorney's fee of the defendants, the Excelsior Powder Manufacturing Company and the Kansas City Southern Railway Company. The defendants separately demurred to the petition, both demurrers were sustained, and plaintiffs appealed.

Material facts alleged in the petition are as follows: A train porter employed by the defendant railway company was injured, while on duty, by an explosion of powder, and, claiming that his injury was caused by the negligence of both defendants, employed plaintiffs to prosecute his cause of action. The contract of employment was in writing, and by its terms plaintiffs were to receive as compensation for their services "50 per cent. of whatever amount said attorneys obtain in settlement of said claim either by suit or compromise." Further, it was agreed "that, in case said first party (the client) shall settle or compromise said claim otherwise than through said attorneys, then said attorneys shall be entitled to a fee equal to that received by said first party, but said fee shall, in no event, be less than \$100." Pursuant to this contract, plaintiffs, on November 20, 1908, commenced a damage suit for their client in the circuit court of Jackson county against the defendant powder company alone and caused summons to be issued and served. In February, 1909, plaintiff "compromised and settled and released the cause of action upon which said suit was brought, and without the knowledge or consent of these plaintiffs, by receiving therefor the sum of \$85 from the said Kansas City Southern Railway Company." Afterward the powder company pleaded this release as a bar to the pending action, and "such proceedings were had in said suit that it was dismissed because of said release." It is not claimed that notice of lien was served by plaintiffs on either of the present defendants.

The sole assignment of error in the brief of plaintiffs is that "the court erred in sustaining the separate demurrer of defendant Excelsior Powder Manufacturing Company." Plaintiffs appear to have abandoned their demand against the railway company, and we shall confine our inquiry to the only error assigned and discussed in the briefs.

The filing of suit against the powder company dispensed with the necessity of giving the notice of lien required by section 965, Rev. St. 1909 (Taylor v. Railway, 207 Mo. 495, 105 S. W. 740), and we sanction the contention of plaintiffs that "any act of said defendant which destroyed the attorney's lien after it attached to the cause of action made said defendant liable to the attorneys in an independent action." Yonge v. St. Louis Transit Co., 109 Mo. App. 235, 84 S. W. 184; Taylor v. Transit Co., 198 Mo. 715, 97 S. W. 155; Curtis v. Railway, 118 Mo. App. 341, 94 S. W. 762. But we do not accept as

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

sound the further proposition that "by pleading the release of the Kansas City Southern Railway Company as a bar to the further prosecution of the suit, and thereby electing to avail itself of the provisions of that contract, the defendant powder company took the benefit conferred by the release cum onere."

When a principal profits by an unauthorized act or contract of his agent, the law imposes on him the burdens of the act or contract, not so much on the ground of implied authority as on "the more reasonable ground that the party having enjoyed a benefit must take it cum onere." *Mundorff v. Wickersham*, 63 Pa. 89, 3 Am. Rep. 531. Plaintiffs rely on this rule, but we think it has no present application. In no sense do joint tort-feasors stand in any contractual or confidential relation to each other. They are jointly and separately liable whether they acted in concert or independently. *Hubbard v. Railway*, 173 Mo., loc. cit. 256, 72 S. W. 1073.

In a joint tort each is considered as sanctioning the acts of the others, thereby making them his own. Therefore each is liable for the whole damage, and there can be no separate estimate of the injury committed by each. The injured person has but one cause of action, and, while he may prosecute his action against all or only one of the wrongdoers, he cannot split his cause. A valid release of one tort-feasor releases all, for the reason that, having but one indivisible cause of action, a plaintiff in receiving satisfaction of part of his demand satisfies the whole, unless he should be permitted to split his cause, which, as we have said, is a thing the law will not permit him to do. And, further, the release of one tort-feasor operates as an estoppel of the plaintiffs to deny the liability of the one released. *Tompkins v. Railroad*, 66 Cal. 163, 4 Pac. 1165. "The law considers that the one who has paid for the injury committed the whole trespass and occasioned the whole injury, and that he has therefore satisfied the plaintiff for the whole injury which he received." *Gilpatrick v. Hunter*, 24 Me. 18, 41 Am. Dec. 370. "It does not lie in the mouth of such a plaintiff to say he has no cause of action against one who paid him for his injuries, for the law presumes that the one who paid committed the whole trespass and occasioned the whole injury." *Hubbard v. Railway*, supra.

When plaintiffs' client settled his demand against the railway company, he solemnly and conclusively confessed that he had no cause of action against the powder company. He would be estopped from repudiating that confession, and if he made the settlement in good faith, and not fraudulently for the purpose of defrauding his attorneys, they, likewise, are estopped from asserting that he had a cause of action against the powder

company. *Curtis v. Railway*, supra. There is no suggestion of such fraud in the petition, and we must hold that plaintiffs are not entitled to collect their fee from the powder company. Their rights are derivative and are no greater than their source, viz., the cause of their client.

The judgment is affirmed. All concur.

INDEPENDENCE SASH, DOOR & LUMBER CO. v. BRADFELD et al.

(Kansas City Court of Appeals. Missouri. Jan. 30, 1911. Rehearing Denied Feb. 13, 1911.)

1. APPEAL AND ERROR (§ 882*)—ESTOPPEL TO ALLEGE ERROR—VARIANCE.

Where the petition of a materialman to enforce his lien alleges that the contract for the building was made with a husband and wife, which is admitted by the answer, the court on appeal will hold the admission conclusive, though the evidence was that the contract was signed by the husband alone, as against the husband's contention that there was a variance.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3596; Dec. Dig. § 882.*]

2. MECHANICS' LIENS (§ 154*)—VERIFICATION OF NOTICE—SIGNATURE.

A lien notice filed by a corporation, verified by E. C. H., "Secretary," is sufficiently verified, as the word, "secretary," is merely descriptive of the official title.

[Ed. Note.—For other cases, see Mechanics' Liens, Cent. Dig. §§ 261-267; Dec. Dig. § 154.*]

3. MECHANICS' LIENS (§ 124*)—STATUTES—NOTICE OF LIEN—SERVICE.

As the mechanic's lien statutes are highly remedial, and should be given a liberal construction, though they require a subcontractor or materialman to serve notice on the owner, owners, or agent of the property, an honest mistake in ascertaining and stating the names of all the owners in the notice will not defeat the lien, and hence the service of lien notice on one of two co-owners of property affected thereby is sufficient to hold his interest or estate subject to the lien.

[Ed. Note.—For other cases, see Mechanics' Liens, Cent. Dig. § 165; Dec. Dig. § 124.*]

4. HUSBAND AND WIFE (§ 207*)—CONVEYANCE TO HUSBAND AND WIFE—RIGHTS OF WIFE—MARRIED WOMAN'S ACT.

Under a conveyance of land to a husband and wife since the married woman's act of 1889 (Rev. St. 1889, §§ 6856-6870), each of the grantees has an interest, not only in the inheritance, but also in the possession, which he or she may sue alone to protect.

[Ed. Note.—For other cases, see Husband and Wife, Cent. Dig. §§ 756-758; Dec. Dig. § 207.*]

5. MECHANICS' LIENS (§ 57*)—ESTATES SUBJECT—ESTATES BY THE ENTIRETY.

Where a conveyance of land was made to a husband and wife since the married woman's act of 1889 (Rev. St. 1889, §§ 6856-6870), each of the grantees is an owner within the mechanic's lien laws, and may, by contract, subject his or her estate to a lien for improvements on the land, though the other does not join in the contract.

[Ed. Note.—For other cases, see Mechanics' Liens, Cent. Dig. §§ 64-74; Dec. Dig. § 57.*]

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

Appeal from Circuit Court, Jackson County; Walter A. Powell, Judge.

Action by the Independence Sash, Door & Lumber Company against J. J. Bradfield and others. From a judgment for plaintiff, defendants appeal. Affirmed.

David I. White and I. J. Ringolsky, for appellants. W. B. Kelley and Horace Shelley, for respondent.

JOHNSON, J. Action to enforce a mechanic's lien. Plaintiff, a materialman, furnished material for a building erected by Hugh W. Heinzelman and Mary A. Heinzelman, husband and wife, on land they purchased in 1907, and held as tenants by the entirety. Plaintiff furnished the material under contract with the contractor (defendant Bradfield) who, it is admitted, erected the building under a contract with both tenants. The petition alleges "that said property was at the date of furnishing said material, and now is, the property of the defendants Hugh W. Heinzelman and Mary A. Heinzelman, and the said J. J. Bradfield was the original contractor with the said Hugh W. and Mary A. Heinzelman for the erection of said building." The lien paper alleged that Hugh Heinzelman was the owner, and did not mention the fact that his wife had an interest in the property or was a party to the contract for the improvement. It was verified by E. C. Harrington, who appended the word "secretary" to his signature. Notice of the lien was addressed to and served on the husband alone. On these facts the court rendered judgment in favor of defendant Mary Heinzelman, and adjudged that "all the right, title, and interest of the said defendant Hugh W. Heinzelman" be charged with the lien, etc. The cause is before us on the appeal of the defendant Hugh.

Four propositions are argued by counsel of the appealing defendant, viz.: First. "There was a variance between the material allegations in the plaintiff's petition and the proof." Second. "There was no verification as required by law of the lien filed with the clerk of the circuit court of Jackson county, Missouri, and the court erred in admitting the lien paper offered in evidence by the plaintiff over the objection of the defendants." Third. "The notice of the subcontractor of its intention to file a lien on the property should have been served on all of the owners." Fourth. "As the property in question was owned jointly by Mary A. Heinzelman and Hugh W. Heinzelman in an estate by the entirety, the court erred in rendering judgment in favor of Mary A. Heinzelman and against Hugh W. Heinzelman. The judgment, if at all, should have been rendered against them both or against neither." We shall determine these questions in the order stated.

1. This point rests on the contention that the petition alleges a joint contract between

the contractor and the two owners, while the proof shows that the contract was made by only one of the owners—the defendant Hugh. It sufficiently answers the point to say that the contract as pleaded was admitted at the trial by counsel for defendants, as appears in the following quotation from the proceedings: "Q. Who did you make this contract with?" Counsel for defendants: "I object to that. The petition charges that the contract was made with Hugh W. Heinzelman and Mary A. Heinzelman and the answer admits it." We shall not go behind that admission despite the fact subsequently developed that the contract was signed by the husband alone. That fact is not inconsistent with the admission, and it is a settled rule of practice that an admission of fact, on which the cause is tried in the circuit court, is binding on the parties in the appellate court.

2. The affidavit was sufficiently signed. *Laswell v. Church*, 46 Mo. 279. The addition to the signature of the official title of the affiant should be regarded as merely descriptive. The case of *Norman v. Horn*, 36 Mo. App. 419, is not in point. There the signature and oath appeared to have been made by a partnership, and it was properly held that a partnership, as such, could not make an affidavit. "It would be just as reasonable," say the court, "to hold that a corporation, as such, could make an affidavit, as to hold that a firm could." In the present case the instrument does not bear the attempted verification of a partnership or corporation, but of an individual who might be held liable for perjury for a false affidavit knowingly made.

3. The mechanic's lien statutes are highly remedial, and should be given a liberal construction. Though they require a subcontractor or materialman to serve notice on "the owner, owners, or agent" of the property, they contemplate that an honest mistake may be made in ascertaining the names of all the owners and intend that the lien shall not be lost in consequence of such mistake in the lien paper or notice. *Sash & Door Works v. Shade*, 137 Mo. App., loc. cit. 23, 118 S. W. 1196. In *Lumber Co. v. Stoddard*, 113 Mo. App. 306, 88 S. W. 774, the St. Louis Court of Appeals properly held that service of notice on one of two co-owners of the property was sufficient to hold his interest or estate subject to the lien. For reasons which our discussion of defendant's final proposition will make apparent, we think this rule should obtain in the present case and hold, as did the learned trial judge, that the notice was effective as to the interest or estate of the appealing defendant.

4. The ownership of the land being acquired by the appealing defendant and his wife in 1907, their relations to each other and to strangers, as tenants by the entirety were subject to the provisions of the married wo-

man's act of 1889 (Rev. St. 1889, §§ 6856-6870). *Holmes v. Kansas City*, 209 Mo. 518, 108 S. W. 9, 1134, 123 Am. St. Rep. 495; *Bains v. Bullock*, 129 Mo. 117, 31 S. W. 342; *Arnold v. Willis*, 128 Mo. 145, 30 S. W. 517. Prior to that legislation the common-law rules pertaining to the peculiar estate under consideration prevailed in this state, and during the joint lives of the tenants they were considered as a unit in the ownership of the estate—and the husband was the unit. *Hough v. Light & Fuel Co.*, 127 Mo. App. 570, 106 S. W. 547, and cases cited. The statute changed this rule and now the wife during coverture is recognized as having an interest, not only in the inheritance, but in the possession which she may enforce and protect in actions prosecuted by her alone. *Holmes v. Kansas City*, supra.

In *Bains v. Bullock*, supra, the Supreme Court say: "The marital control by the husband over the real estate of his wife is removed, and she is given the power to sue 'at law or in equity with or without her husband being joined with her as a party.' The right to sue in her own name seems to be unlimited. That she has the right to sue in ejectment to recover possession of her land has been decided. *Arnold v. Willis*, supra."

As the law now stands each of the tenants, during their joint lives, has an interest in the inheritance, and, as to strangers, each has a present right of possession which may be enforced either at law or in equity. Each is an "owner" within the purview of the mechanic's lien statutes, and, by contract, may subject his or her estate to liens for improvements erected on the land. Such is our ruling in *Nold v. Ozenberger* (decided at this term) 133 S. W. 349, and we reaffirm here what was said by Broadbuss, P. J., in that case.

The judgment is affirmed. All concur.

STATE ex rel. SMITH et al. v. DYKEMAN et al., Judges.

(Springfield Court of Appeals. Missouri. Feb. 6, 1911.)

1. CERTIORARI (§ 1*)—NATURE AND SCOPE OF REMEDY.

Certiorari is to give relief to an injured party when the court or a body charged to have acted has proceeded without jurisdiction or has exceeded its jurisdiction or has rendered a judgment or made an order not authorized by law; but this writ cannot be used as a substitute for appeal or writ of error.

[Ed. Note.—For other cases, see *Certiorari*, Cent. Dig. § 1; Dec. Dig. § 1.*]

For other definitions, see *Words and Phrases*, vol. 2, pp. 1035-1041; vol. 8, p. 7598.]

2. INTOXICATING LIQUORS (§ 108*)—REVOCATION OF LICENSE—CERTIORARI.

On certiorari to review the proceedings of the county court in revoking the relator's dramshop license, the court can only examine the

record certified to it, and, if by a fair construction it appears that the county court acted within its authority in revoking the license of relators, their order must stand, and, if not, it must fall.

[Ed. Note.—For other cases, see *Intoxicating Liquors*, Cent. Dig. § 118; Dec. Dig. § 108.*]

3. INTOXICATING LIQUORS (§§ 99, 106*)—LICENSE—NATURE OF RIGHTS CONFERRED—IN GENERAL.

A license to sell liquor is in no sense a contract with the state, but is a mere permit to do an act that would otherwise be unlawful and is subject at all times to the provisions of the law relating thereto, whereby it may be revoked at any time for a violation of the statute.

[Ed. Note.—For other cases, see *Intoxicating Liquors*, Cent. Dig. §§ 103, 113, 115; Dec. Dig. §§ 99, 106.*]

4. INTOXICATING LIQUORS (§ 108*)—LICENSES—REVOCATION—PROCEEDINGS.

In proceedings before the county court to revoke a dramshop license, no exact form of procedure is necessary except that five days' notice of the hearing must be given to the licensee, and the court in its proceedings does not conduct a judicial trial, and hence the proceedings are not required to be as formal as would be required in a judicial trial involving life, liberty, or property; all that is required being that the record shall show that the court acted within its authority.

[Ed. Note.—For other cases, see *Intoxicating Liquors*, Cent. Dig. §§ 116-118; Dec. Dig. § 108.*]

5. INTOXICATING LIQUORS (§ 106*)—LICENSES—REVOCATION—GROUND—SINGLE SUNDAY SALE.

That persons licensed to sell intoxicating liquors violated the law on one occasion by selling liquor on Sunday is not sufficient ground for a revocation of their license under Rev. St. 1890, § 3012 (Ann. St. 1903, p. 1727), which provides for a revocation of a dramshop license for not keeping an orderly house.

[Ed. Note.—For other cases, see *Intoxicating Liquors*, Cent. Dig. §§ 113, 115; Dec. Dig. § 106.*]

6. DISORDERLY HOUSE (§ 4*)—NATURE AND ELEMENT OF OFFENSE.

It is essential to constitute a disorderly house that the acts resulting from its conduct must either create some disturbance or tend to promote disturbance or breach of the peace or violation of the law, or must promote immorality; and a single act of such character is not enough, but there must be a continuation of the acts at least for a short time.

[Ed. Note.—For other cases, see *Disorderly House*, Cent. Dig. §§ 4, 9-13; Dec. Dig. § 4.*]

7. INTOXICATING LIQUORS (§ 106*)—LICENSES—REVOCATION—VIOLATION OF LAW—DISORDERLY HOUSE.

Where parties licensed to conduct a saloon rent to another a floor over their saloon to be used as a house of prostitution to be conducted in connection with the saloon, the character of a part of the building is determined by the character of the whole, and the house is a disorderly one, warranting revocation of the liquor license.

[Ed. Note.—For other cases, see *Intoxicating Liquors*, Cent. Dig. §§ 113, 115; Dec. Dig. § 106.*]

8. INTOXICATING LIQUORS (§ 108*)—LICENSES—REVOCATION—PROCEEDINGS—FINDINGS.

In a hearing for the revocation of a dramshop license, it is not necessary that the court should make any specific findings of fact; a

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

general finding that the licensees were violating the law being sufficient.

[Ed. Note.—For other cases, see *Intoxicating Liquors*, Cent. Dig. §§ 116-118; Dec. Dig. § 108.*]

9. INTOXICATING LIQUORS (§ 108*)—LICENSEES—REVOCATION—VIOLATION OF LAW—DISORDERLY HOUSE—FINDINGS.

In certiorari to review the proceedings of the county court revoking liquor license, special findings held sufficient to sustain a general finding that relators were conducting a disorderly house in violation of Rev. St. 1899, § 3012 (Ann. St. 1906, p. 1727).

[Ed. Note.—For other cases, see *Intoxicating Liquors*, Cent. Dig. §§ 116-118; Dec. Dig. § 108.*]

Appeal from Circuit Court, Jasper County; David E. Blair, Judge.

Petition by John Smith and Melvin Sherman for a writ of certiorari to review the action of C. W. Dykeman and others. Judges of the County Court of Jasper County, in revoking a dramshop license. From a judgment sustaining the proceedings of the county court, the relators appeal. Affirmed.

Clay & Davis, for appellants. Byron H. Coon, for respondents.

COX, J. Relators were licensed dramshop keepers in the city of Joplin, and on July, 19, 1910, the county court, after a hearing upon a complaint filed by Guy T. Humes, mayor of the city of Joplin, revoked the dramshop license of relators. The relators then proceeded by certiorari in the circuit court for the purpose of having the orders of the county court revoking their license quashed and set aside. The circuit court refused to quash the proceedings of the county court, and the relators have appealed to this court.

The office of a writ of certiorari is to give relief to an injured party when the court, or a body charged to have acted to his injury, has proceeded without jurisdiction, or has exceeded its jurisdiction, or has rendered a judgment or made an order which it was not authorized by law to make; but this writ cannot be used as a substitute for appeal or writ of error. *State ex rel. v. Reynolds*, 190 Mo. 576, 588, 89 S. W. 877, and cases there cited. It therefore follows that we can only examine the record certified to us, and if, by a fair construction thereof, it shall appear that the county court acted within its authority in revoking the license of relators in this case, their order must stand, and, if not, it must fall.

A license to sell liquor is in no sense a contract with the state, but is a mere permit to do an act that would otherwise be unlawful, and is subject at all times to the police powers of the state government. The party receiving such a license takes it subject to all the provisions of the law relating thereto, and knows when he secures the license that it may be revoked at any time for the cause

mentioned in the statute. The power to revoke in this case is lodged with the county court, and the statute merely provides that, if the licensee shall not at all times keep an orderly house, the county court may, upon the application of any person, revoke the license. No form of procedure is provided except that five days' notice of the hearing must be given the accused. In the hearing the county court merely conducts an investigation for the purpose of satisfying their own judgment as to whether or not the licensee has kept a disorderly house and are in no sense conducting a judicial trial. *Higgins v. Talty*, 157 Mo. 280, 57 S. W. 724. The proceedings, therefore, are not required to be as formal and exact as would be the case in a judicial trial involving interference with life, liberty, or property. *Barnett v. County Court*, 171 Mo. App. 688, 703, 86 S. W. 575. All that is required is that the record shall show that the court acted within its authority. Whether the county court did so act in this case must depend upon whether or not the facts found by the court, by a fair construction, show that relators kept a disorderly house.

The record recites that relators were served with notice five days before the hearing, but neither appeared. The court heard the testimony and made the following findings: "(1) That the said John Smith and Melvin Sherman have violated the law in selling intoxicating liquors on the 1st day of the week, commonly called Sunday, to wit, the ——— day of June, 1910. (2) That said dramshop operated by John Smith and Melvin Sherman was connected and has been for a long period of time by a dumb waiter running from the dramshop on the first floor to the second floor of said building, and that said dumb waiter is and was used for the purpose of sending up intoxicating drinks of all characters to the inmates and visitors in said rooms above said dramshop. (3) That said John Smith and Melvin Sherman have been and are renting the second floor of the said building in which said dramshop is located to Ray Sheldon for the purpose of operating and conducting therein a house of prostitution, and that the same woman is living above said saloon now that has lived there for the past several months, and that the reputation of said woman for virtue and chastity is bad, and that there are several women who live and occupy rooms on said second floor at this date and have lived there for a long period of time, and that diverse men congregate in said rooms above said saloon, and that whisky and beer are sent up into said rooms with the knowledge and consent of the said John Smith and Melvin Sherman by the use of the said dumb waiter. And it appearing to the court that in all things said, the matter having been ful-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Red'r Indexes

ly considered, the said John Smith and Melvin Shermin have been guilty of violating section 3012, Rev. St. Mo. 1899." Following this finding is the order revoking the license.

The fact that relators had on one occasion violated the law by selling liquor on Sunday is not shown to have any connection with the other facts found, and it may therefore be eliminated, as it, standing alone, is not sufficient. *State ex rel. v. Lichta*, 130 Mo. App. 284, 109 S. W. 825. The other facts found are all connected and must be considered together. Do they show that relators kept a disorderly house?

Our statute does not define a "disorderly house," and we must therefore look to the common law for a definition of the term. It has been variously defined. Wharton defines it to be a house kept in such a way as to disturb, annoy, or scandalize the public generally, or the inhabitants of a particular vicinity, or the passers in a particular highway. This definition is quoted approvingly in *State ex rel. v. Lichta*, 130 Mo. App. 284, 109 S. W. 825, and in *Hawkins v. Lutton*, 95 Wis. 492, 70 N. W. 483, 60 Am. St. Rep. 131. In *Price v. State*, 96 Ala. 1, 11 South. 123, the court, in defining the offense of keeping a disorderly house, says: "It is enough that the acts done at such house are of the character charged and contrary to law and subversive of public morals." In *Thatcher v. State*, 48 Ark. 60, 2 S. W. 343, this language is used: "A disturbance of the peace is not necessary. A house may be disorderly because it draws together idle, vicious, dissolute, or immoral persons who engage in unlawful or immoral practices, thereby endangering the public peace and promoting immorality. It has been said that 'if the doors of a house are practically open to the public, alluring the young and unwary into it to indulge in or witness anything corrupting to their virtue or general good morals, the keeper cannot excuse himself by alleging that the public are not disturbed'"—citing 1 Bishop's Criminal Law (6th Ed.) §§ 1107-1120; Wharton's Criminal Law (9th Ed.) §§ 1449-1456; *State v. Williams*, 30 N. J. Law, 104; *Commonwealth v. Cobb*, 120 Mass. 356. In *Commonwealth v. Bessler*, 97 Ky. 493, 30 S. W. 1012, this language is used: "The offense of keeping a disorderly house consists of a repetition of improper conduct." In *Commonwealth v. Goodall*, 165 Mass. 538, 43 N. E. 520, it is said: "The common-law offense of keeping a disorderly house may be proved in various ways—by showing that the accused kept a common bawdy house, a common gambling house, or a disorderly place of entertainment."

It will be seen at once that it would be very difficult to frame a definition of the term "disorderly house" that would fit the facts in every case; but there are some elements that seem to be essential in all cases. One is that a single act is not enough, but

there must be a continuation of the acts for a short time at least. Another is that the continued acts must either create some disturbance or must tend to promote disturbances or breaches of the peace, or violations of the law, or must promote immorality. Applying these tests to the case at bar, what have we? Relators are operating a saloon in a two-story building of which they have entire control. The room immediately over the saloon is rented by them to another party for the purpose of having a bawdy house conducted therein, and they then provide or maintain an elevator or "dumb waiter" that is used for the purpose of conveying liquor from the saloon to the inmates and frequenters of the bawdy house above. The bawdy house was a disorderly house per se, and its maintenance is forbidden by our statute. The relators, by renting the room over their saloon to be used as a house of prostitution, were particeps criminis in maintaining it. *State v. McClain*, 92 Mo. App. 456; *Cahn v. State*, 110 Ala. 56, 20 South. 380; *Engeman v. State*, 54 N. J. Law, 274, 23 Atl. 676; *Commonwealth v. Cobb*, 120 Mass. 356. In legal contemplation, therefore, and for the purposes of the investigation conducted by the county court in this case, the relators' position is the same as if they had run the house of prostitution themselves.

If the saloon and the bawdy house were operated in conjunction, so that either assisted the other, they should both be considered as parts of a general business, and, though one be located on the first floor and the other on the second floor, they should both be regarded as parts of the same house, and what transpired in both the upper and lower rooms should be considered in determining the character of the house kept in either room. *State v. Lee*, 80 Iowa, 75, 45 N. W. 545, 20 Am. St. Rep. 401.

It is a matter of common knowledge that frequenters of a bawdy house are usually patrons of saloons also, and, when these relators established a bawdy house over their saloon and maintained an elevator for the purpose of conveying liquor from the saloon to the inmates and frequenters of the bawdy house above, it is but fair to assume that their purpose in locating the bawdy house in such close proximity to the saloon and connecting the two as they did was to increase the sales from the saloon, and this necessarily made the relators interested in the patronage of the bawdy house as they were interested in the patronage of the saloon; hence the bawdy house became an adjunct of the saloon, and the fact that the two had been maintained in this way for several months by relators would cause the saloon as well as the bawdy house to become a public scandal and a continual promoter of immorality, and is thus brought within the common-law definition of a "disorderly house." The inference that the place,

including the saloon, had become notoriously offensive, gained some strength from the fact that the mayor of the city filed the complaint against the relators in this case.

The court in its finding, does not set out specifically that the saloon had become a public scandal; but the facts which it did find show that such must have been a necessary result, and these specific findings are followed by a general one that relators had violated section 3012, Rev. St. 1899 (Ann. St. 1906, p. 1727), which statute makes it unlawful for a dramshop keeper to keep a disorderly house. It was not necessary that the court should have made any specific finding of facts. A general finding that relators were conducting a disorderly house would have been sufficient, and, since this general finding was made, it must stand unless the specific findings upon which it is based contradict it, or are insufficient to support it. In our judgment the specific findings in this case support the general one, and the record is sufficient to show the authority of the county court to make the order revoking relators' license, and the trial court rightly so held.

The judgment will be affirmed. All concur.

CHAMLEE v. PLANTERS' HOTEL CO.

(St. Louis Court of Appeals. Missouri. Jan. 24, 1911. Rehearing Denied Feb. 7, 1911.)

1. MASTER AND SERVANT (§ 89*)—INJURIES TO SERVANT—LIABILITY.

A master is not liable for negligent injuries to a servant, unless the servant at the time was engaged in the performance of a duty within the scope of his employment.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 153-156; Dec. Dig. § 89.*]

2. MASTER AND SERVANT (§ 284*)—INJURY TO SERVANT—SCOPE OF EMPLOYMENT—QUESTION FOR JURY.

In an action for injuries to an employé, while operating a passenger elevator, caused by the fall of the elevator, evidence held to justify a finding that the employé was at the time acting within the scope of his employment.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 1005; Dec. Dig. § 284.*]

3. MASTER AND SERVANT (§ 217*)—INJURY TO SERVANT—ASSUMPTION OF RISK.

A danger arising from a defect in machinery, discoverable by ordinary care of the master, but which is neither known nor obvious to the servant, is not a risk incident to the employment of one engaged to operate the machinery, or instruct others in so doing.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 574-600; Dec. Dig. § 217.*]

4. MASTER AND SERVANT (§ 217*)—INJURY TO SERVANT—ASSUMPTION OF RISK.

An employé engaged in the line of his duty in operating a passenger elevator, and instructing another in operating it, was injured by the fall of the elevator. The person he was to instruct had reported that the elevator was "dead." The employé did not know of the

defect that caused the fall of the elevator, and employés about the elevator understood, by the expression "dead," merely that the power was off. Held, that the employé did not assume the risk of injury.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 574-600; Dec. Dig. § 217.*]

5. MASTER AND SERVANT (§ 226*)—INJURY TO SERVANT—ASSUMPTION OF RISK.

Except where an injury to a servant results from the particular mode in which he uses an appliance furnished him, a servant does not assume a risk arising from the master's negligence, but he assumes only such risks as are ordinarily incident to the employment.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 659-687; Dec. Dig. § 226.*]

6. MASTER AND SERVANT (§ 234*)—INJURY TO SERVANT—CONTRIBUTORY NEGLIGENCE.

A servant's knowledge of abnormal conditions pertaining to the place in, or the appliance with, which he is to work, must be determined, in applying the law of contributory negligence, by reference to the usual standard of what an ordinarily prudent person might do under like circumstances.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 684-686, 706-709; Dec. Dig. § 234.*]

7. PLEADING (§ 387*)—ISSUES, PROOF, AND VARIANCE.

A party cannot sue on one cause of action and recover on another.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 1300-1304; Dec. Dig. § 387.*]

8. TRIAL (§ 169*)—DIRECTION OF VERDICT—WHEN AUTHORIZED.

Where a cause of action to which the proof is directed is unproved in its entire scope, the court must direct a verdict for defendant, but it must not do so when the proof is defective or does not precisely conform to the averments in some particular only.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 381-389; Dec. Dig. § 169.*]

9. MASTER AND SERVANT (§ 264*)—INJURY TO SERVANT—ISSUES, PROOF, AND VARIANCE.

Where, in an action for injuries to a servant while operating a passenger elevator, the allegations of the petition, that the servant was required as part of his duty to operate the elevator, and that the master negligently directed him to use the elevator, knowing its defective condition, were proved, and evidence received without objection showed that he was injured while instructing another, and that such act was in the line of his employment, the variance between the petition and the proof must be disregarded, under Rev. St. 1909, §§ 1846, 1847, requiring the court to disregard a variance, unless it has misled the adverse party, and to charge the jury to find the facts in accordance with the evidence.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 861-876; Dec. Dig. § 264.*]

10. COURTS (§ 91*)—DECISIONS—CONTROLLING DECISIONS.

The Court of Appeals must conform to the last decision of the Supreme Court on the subject.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 325, 326; Dec. Dig. § 91.*]

11. APPEAL AND ERROR (§ 215*)—QUESTIONS REVIEWABLE—INSTRUCTIONS—OBJECTIONS—EXCEPTIONS.

An instruction will not be reviewed on appeal, where the party complaining did not ob-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

ject, but merely excepted to the giving of the instruction.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1309-1814; Dec. Dig. § 215; * Trial, Cent. Dig. §§ 683-685, 695.]

12. MASTER AND SERVANT (§ 273*)—INJURY TO SERVANT—EVIDENCE—ADMISSIBILITY.

Where, in an action for injuries to an employé while operating a passenger elevator, caused by the fall of the elevator, the employé testified that on being informed by a new operator that the elevator was "dead," he went into the elevator to ascertain whether it was "dead" by the misuse of the hand line, or whether it was out of order, evidence that the word "dead" was understood by the employés about the elevator to signify that the power was off was properly received.

[Ed. Note.—For other cases, see Master and Servant, Dec. Dig. § 273.*]

13. EVIDENCE (§ 265*)—PLEADINGS AS EVIDENCE.

A pleading of a party introduced in evidence by the adverse party must be considered by the jury as a whole; but, while they must do so, admissions made by the pleader, and allegations against the interests of the adverse party, are not of equal probative force.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 1036; Dec. Dig. § 265.*]

14. DAMAGES (§ 132*)—PERSONAL INJURIES—EXCESSIVE DAMAGES.

An active, intelligent young man, of fair earning capacity, lost his foot through having it crushed. He was confined to the hospital for many months and suffered great pain of body and mind. His earning capacity was essentially diminished, and he was crippled for life. He would continue to suffer pain. *Held*, that a verdict for \$6,000, was not excessive.

[Ed. Note.—For other cases, see Damages, Cent. Dig. §§ 178, 372-385, 396; Dec. Dig. § 132.*]

Appeal from St. Louis Circuit Court; George H. Williams, Judge.

Action by Jarrett W. Chamlee against the Planters' Hotel Company. From a judgment for plaintiff, defendant appeals. Affirmed.

Percy Werner, for appellant. Earl M. Pirkey, for respondent.

NORTONI, J. This is a suit for damages accrued to plaintiff on account of personal injuries received through defendant's negligence. Plaintiff recovered, and defendant prosecutes the appeal.

Defendant owns and conducts a hotel in the city of St. Louis, and plaintiff was in its employ at the time of his injury, as head ashman, and with other duties pertaining to the operation of an elevator. It appears that, though plaintiff was originally employed for the purpose of cleaning up and removing ashes from the engine room of the hotel and given the title of head ashman, he was also directed by his superior, the engineer, to operate the employés' passenger elevator, in the absence of the regular elevator boy, and to see that such elevator was kept in operation. Plaintiff had been in the employ of defendant seven months at the time of his injury, and had recently been charged with the duty of instructing one Smith, the operator

of the elevator referred to, who had been in the service but three days. The testimony for plaintiff tends to prove that as he was passing from the engine room toward the elevator he met Smith, the elevator boy, and Smith said to him, "The elevator is dead," whereupon plaintiff, together with Smith, went into the elevator and proceeded to operate it, we believe, to ascertain the fact with respect to the complaint of Smith, communicated in the word "dead." By the word "dead" plaintiff inferred the elevator was motionless, because the power was not properly applied through pulling the line as it should be, and, as Smith had been in the service for only a few days, he thought possibly he had pulled up on the line which communicated the power when he should have pulled it down. The elevator is one of those which operates by hydraulic power furnished by means of water pressure in a large cylinder attached. The power is communicated, for the purpose of moving the car, through pulling a line which passes perpendicularly through same. It is in evidence that, for the purpose of moving the elevator upward, the line is to be pulled down, and for the purpose of moving it downward, the line is to be pulled up, and plaintiff thought the car had refused to respond under the hand of Smith because the power was misapplied. Upon entering the car, together with Smith, plaintiff applied the power by properly pulling the line, and it proceeded properly from the basement to the third floor, where a stop was made for one of the chambermaids, who came into the car with a bundle of linen and was conveyed to the ninth floor. After the chambermaid went out, the car proceeded without any trouble to the eleventh, or top-most, floor of the building. Plaintiff then reversed the car by pulling the line upward, and it proceeded down as usual to the third floor, where a stop was made for an employé en route to the basement for ice. After thus stopping at the third floor, plaintiff again applied the power, and the car proceeded downward a few feet, when his attention was attracted by the rattling of the safety catches beneath, spoken of in the evidence as "dogs." These safety appliances are affixed beneath the elevator for the purpose of catching and holding it in event of a fall. Plaintiff was advised that these appliances were slightly out of order, and that they sometimes caught in the sides of the elevator shaft when they should not, but it appears no danger inhered in such defect, and he had been advised by the chief engineer how to dislodge them by the use of a Stilson wrench when such catching occurred. Upon noticing the rattling of the safety catches, as though they were scraping on the sides of the elevator shaft, he returned the car a few feet upwards to the third floor for the purpose, we presume, of permitting the safety catches to readjust

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

themselves, as it does not appear he did anything pertaining thereto except to move the car upward a few feet, and then start it again on its downward course. It appears plaintiff properly applied the power by pulling the line, to the end of lowering the car to the basement after this stop was made, and when it was a few feet below the third floor, the car suddenly dropped to a point just below the halfway landing between the first and second floors of the building, at which point it stopped and rebounded with great force. Through the sudden stoppage and rebound of the elevator, plaintiff was thrown from his position at the line upon the floor of the car, with one of his feet extended, so that it was caught and crushed beneath the doorstep of the elevator and the sill of the halfway landing referred to. There is no suggestion in the case that plaintiff came to his injury primarily through the defective safety catches, but, on the contrary, it appears conclusively the sudden fall and rebound of the car were occasioned by the fact that the cylinder attachment thereto was defective, in that it permitted an intake of air through the valves, which occasioned such a disturbance of the automatic arrangement as to precipitate the car forward and cause its rebound, notwithstanding all effort to control it. Such is the negligence relied upon in the petition for a recovery, and it is established by the proof beyond controversy. It appears, too, that defendant had full knowledge for some days of the defective cylinder and valves, and that plaintiff was wholly unadvised with respect to that particular defect. Indeed, defendant's negligence in respect to this matter is conceded, and it stands as an uncontroverted fact in the case; but, it is said, though defendant was negligent as suggested, such negligence is not available to plaintiff as a cause of action against it, for the reason he was a mere volunteer, in that he was not performing a duty for defendant, at the time of his injury, within the scope of his employment. There can be no doubt of the general proposition that the master is not liable to respond to his servant for injuries received through his negligence, unless the servant was at the time of injury engaged in the performance of some duty pertaining to the master's business, within the scope of the employment; and, of course the principle obtains as well with respect of those engaged in the operation of elevators as in other cases. *Stagg v. Edward Westen Tea, etc., Co.*, 169 Mo. 489, 69 S. W. 391; 4 *Thompson's Com. on Neg.* § 3907.

The argument for defendant is that the court should have directed a verdict for it, because as head ashman and an elevator supply, plaintiff was not required to operate the elevator in the circumstances stated, and stepped aside from the line of his duty to volunteer to do so at the time of his injury. The argument and the principle invoked are put forward in a manner which evinces care-

ful thought and extreme nicety, but it is clearly unsound on the facts of the case. Though it appears plaintiff was employed as head ashman and for certain general utility purposes, it appears, too, that he was instructed by the engineer, who employed him, to run this particular elevator involved at such times as the regular elevator boy had gone to lunch, and to see that the elevator was kept in operation. Both plaintiff and defendant's engineer, who employed him, recited the facts and the duties of his employment to the same effect, and, furthermore, it appears from the testimony of these two witnesses that plaintiff was directed by the engineer to instruct or teach Smith, the new elevator boy, who had been in the service only three days, how to run it. Larkin, the engineer, said, when plaintiff was not engaged in looking after the two men under him engaged in removing ashes, "it was his duty, by my instruction, to see that those elevators were kept in operation at all times, because we were having considerable trouble to get proficient men in the way of operators." The same witness said, too, that plaintiff was working over Smith, the elevator boy, because "if Smith should leave the elevator, I would hold Chamlee (plaintiff) partially responsible for keeping it in operation." Indeed, it appears throughout the testimony of plaintiff and his superior, the engineer, that plaintiff was to keep the elevators in operation not only when the elevator boy was out to lunch, but at all times, and especially was he charged with the duty of instructing or "breaking in" the new boy, Smith, and this, of course, implied that he should ascertain the difficulty with the elevator, or run it, for the purpose of demonstration, on Smith's complaint that it was "dead," unless such word conveyed information or suggested to him that it was out of order and dangerous. It is entirely clear that the evidence tends to prove plaintiff was acting within the scope of his employment at the time he was injured.

But, it is said, though plaintiff was in the line of his duty, it appears from his own testimony that he knew the elevator was out of order and dangerous, for the reason Smith told him it was "dead" at the time he entered upon its operation. The argument is not that plaintiff's right of recovery should be denied on the theory of his contributory negligence as a matter of law, for it does not appear that the danger was threatening and obvious, and that he acted rashly in encountering it. The precise argument on this score is that, as plaintiff entered the elevator with the information it was "dead," he knew it to be out of order, and therefore, on entering the car with the purpose of investigating the trouble or testing the fact, he assumed the risk of so doing, if the duty to test the elevator was within the scope of his employment. It may be said of this argument, first, that it predicates on a false premise, for,

though Smith said the elevator was "dead," it does not appear plaintiff knew it was out of order. The matter is to be determined in the circumstances of the case, and in view of the fact that Smith was but a beginner, possessed of limited information about the operation of the elevator. Plaintiff knew this, and it appears, too, that he did not know of the defect which occasioned the car to misbehave, and therefore presumed that Smith had made some mistake in pulling the line or attempting to apply the power. Moreover, it is proved in the case that the employees in the engine room and about the elevator understood the word "dead" to signify not that it was out of repair, but merely that the power was off. Of course, the mere fact that Smith said the elevator was "dead" would indicate no danger to one who understood from that word the power was off; but, on the contrary, it would suggest precisely what plaintiff conceived—that the inexperienced boy had made some mistake in pulling the line by which the power was communicated or discontinued. Of course, a danger that lies in defective machinery, affixed for the purpose of furnishing the motive power of an elevator, which defect is discoverable by the exercise of ordinary care on the part of the master, and is neither known nor obvious to the servant, is not a risk incident to the employment of one engaged to operate the elevator, or instruct others in so doing. It may be that one engaged to ascertain the defect and repair it would take the risk as one incident to such employment in the circumstances of the case presented, if he should be injured while attempting to ascertain the difficulty. But if such be true, it is because of the implied assent to a risk which he must know inhered in the very task he undertook to perform, and because of the mode and manner adopted by him in performing it.

The principle is without influence on the facts in judgment, however, for the reason plaintiff was not engaged in the precise task suggested; for his duty of keeping the elevator in operation and instructing Smith neither forewarned him of a dangerous defect nor implied that he should make more than a casual examination in the usual way to ascertain why the car was "dead." In these circumstances, plaintiff's rights are not to be summarily determined, as if he had undertaken by his contract of employment to perform the particular task of ascertaining and repairing the defect which, of course, implies both knowledge and assent. The defective cylinder and valves, it appears, were well known to defendant and were wholly unknown to plaintiff, and nothing in the case suggests that he might have ascertained the fact with respect to them by a casual inspection, if he were required to make one. Plaintiff's knowledge of the defective safety catches is beside the case entirely, for they in no manner contributed to his injury, and the

precise question for decision arises on the argument that plaintiff assumed the risk of injury from the defective cylinder and valves, of which defect he had no knowledge. We believe in every case the doctrine of assumed risk proceeds on the theory of assent, and, of course, one may not assent to a risk of which he had no knowledge, unless it be in those cases where the danger is so open and obvious that every ordinarily circumspect person must know it. *Lee v. Railroad*, 112 Mo. App. 372, 87 S. W. 12; *Garaci v. Hill O'Meara Const. Co.*, 124 Mo. App. 709, 102 S. W. 594. But, be this as it may, the rule of decision obtains in this state to the effect that, except in cases where the injury results from the particular mode or manner in which the servant uses the appliance (*Harris v. Railroad Co.*, 146 Mo. App. 524, 124 S. W. 576), the servant will not be declared to have assumed a risk which arises from the master's negligence. Under this rule, the servant is said to assume only such risks as are ordinarily incident to the employment, and the matter of his knowledge about abnormal conditions pertaining to the place or appliances is to be determined, under the law of contributory negligence, by reference to the usual standard of what an ordinarily prudent person might do under like circumstances. See *Wendler v. People's House Furn. Co.*, 165 Mo. 527, 65 S. W. 787; *Dakan v. Chase, etc., Merc. Co.*, 197 Mo. 238, 94 S. W. 944; *Curtis v. McNair*, 173 Mo. 270, 73 S. W. 167; *Blundell v. Elevator Mfg. Co.*, 189 Mo. 552, 88 S. W. 103. It is obvious plaintiff did not assume the risk.

Another argument advanced is to the effect plaintiff is not entitled to recover on the allegation of his petition, for the reason he does not aver therein that it was any part of his duty to perform the service in which he was engaged at the time of his injury. It is true, the proof shows the scope of plaintiff's duties to be somewhat broader than the petition avers. It is averred in the petition that plaintiff was employed by defendant as a common laborer for the performance of sundry service, a part of which was the occasional operation of the elevator, and that defendant negligently directed him to use the elevator when it knew of its defective condition. The allegation, with respect to what plaintiff was doing at the time he was injured, is to the effect that he was engaged in the discharge of the duty of his employment in operating the elevator for the ordinary and usual purpose of carrying employees from one floor of the hotel to another. The argument is that the petition does not aver plaintiff was engaged in any duty pertaining to the instruction of Smith, the elevator boy, or pertaining to his supervision in endeavoring to ascertain the cause of the elevator being "dead." In so far as the petition avers plaintiff was engaged in carrying employees from one floor of the hotel to another, the allegation is proved, for the

evidence discloses such to be the fact. So this averment is not unproved. But, true enough, the evidence goes quite beyond it and shows plaintiff was engaged as well in the duty pertaining to his supervision of Smith through demonstrating that the elevator would operate under his management after Smith said it was "dead." This evidence was received without either objection or exception on the part of defendant. It certainly does not disprove the cause of action relied upon, for the cause of action asserted is plaintiff's primary right to the exercise of ordinary care on the part of defendant for his safety, and defendant's violation of that right by omitting to perform the obligation which the law laid upon it. *Rice v. C., B. & Q. R. R. Co.*, 131 S. W. 374; *Pomeroy's Code Remedies* (4th Ed.) p. 459, § 346 et seq.; *Litton v. C., B. & Q. R. Co.*, 111 Mo. App. 140, 149, 85 S. W. 978. It is true, a party cannot sue on one cause of action and recover on another. *Chitty v. Railroad Co.*, 148 Mo. 64, 75, 49 S. W. 868. And, of course, if a cause of action to which the proof is directed is unproved in its entire scope and meaning, the court should direct a verdict for defendant; but not so, however, when the proof is deficient, or does not precisely conform to the averments in some particular, or particulars, only. Section 2021, Rev. St. 1909; *Litton v. C., B. & Q. R. Co.*, 111 Mo. App. 140, 85 S. W. 978; *Hensler v. Stix*, 113 Mo. App. 162, 88 S. W. 108. Here it appears, instead of there being a failure of proof or the case being one where the facts in evidence disprove the allegation of the petition, all averred were proved, and even more. And this, too, without objection or exception on the part of defendant. The evidence tending to show plaintiff went into the elevator at a time when it was in charge of the elevator boy, and that in so doing he was within the scope of his duties which pertained to the supervision of Smith, though going somewhat beyond the averment of the petition, pertains to nothing more than a detail relating to his cause of action and, at most, could present nothing more than a question of variance. The statute commands in respect to variances that "no variance between the allegation in the pleading and the proof shall be deemed material, unless it has actually misled the adverse party, to his prejudice, in maintaining his action or defense upon the merits; when it shall be alleged that a party has been so misled, that fact shall be proved to the satisfaction of the court, by affidavit showing in what respect he has been misled, and thereupon the court may order the pleading to be amended upon such terms as shall be just." Section 1846, Rev. St. 1909. And further: "When the variance between the allegation in the pleading and the proof is not material, the court may direct the facts to be found according to the evidence, or may order an immediate amendment without costs." Section

1847, Rev. St. 1909. Though a slight but unimportant variance appears in the proof made from the averment of the petition with respect to the duty plaintiff was performing at the time of his injury, it is obvious defendant was not misled thereby, for it appears he was within the scope of his employment. Even if it were more important, it should be disregarded on appeal, for, besides omitting to make the affidavit as required by the statute, defendant omitted to object or except to the testimony when received. By the express statutory provision above quoted, it was the duty of the court to direct the facts to be found in accordance with the evidence so received, and defendant waived its right to complain on that score through omitting to object or except to such testimony as went beyond the averment. *Hensler v. Stix*, 113 Mo. App. 162, 88 S. W. 108; *Litton v. C., B. & Q. R. Co.*, 111 Mo. App. 140, 85 S. W. 978; *Mellor v. Mo. Pac. R. Co.*, 105 Mo. 455, 16 S. W. 849, 10 L. R. A. 36; *Chouquette v. So. Elec. R. Co.*, 152 Mo. 257, 53 S. W. 897.

Defendant levels an argument against the instructions given by the court at plaintiff's instance; but it may not be considered, for the reason that, though defendant excepted to the giving of these instructions, it does not appear it objected to the action of the court as well in so doing. The proposition has been recently decided by our Supreme Court in the case of *Sheets v. Ins. Co.*, 228 Mo. 613, 126 S. W. 413, and under the Constitution it is the duty of this court to conform its rulings in all respects on any question of law or equity to the last decision of the Supreme Court on the subject. It is no doubt true that before that decision the profession generally understood an instruction given would be reviewed on appeal if an exception thereto appeared, even though an objection were not otherwise exemplified in the bill of exceptions. Be this as it may, and whatever may be our views on the subject, this court is without authority to overrule the proposition announced in the authority referred to, but, on the contrary, is in duty bound to conform its ruling to the same effect. We have heretofore considered the question and declined to examine the sufficiency of instructions given when no objection thereto appeared in the bill of exceptions, though it did appear an exception was saved. These rulings were likewise based on the ruling of the Supreme Court in *Sheets v. Ins. Co.*, supra. See *Monroe v. United Rys., etc.*, 133 S. W. 645; *Stevens v. Knights of Modern Maccabees*, 132 S. W. 757. When the superior court of the state recedes from the proposition, we will do likewise; but until then the rule is to be enforced.

The court permitted the engineer and others employed about the elevator in the Planters' Hotel to give testimony as to the meaning of the word "dead," employed with re-

spect to the elevators there. It is said the word signified the power by which the elevator was operated had been discontinued or detached. It is argued this was error, for the reason that, whatever meaning the word signified when thus employed, it appeared from plaintiff's evidence he knew the elevator was out of order at the time he entered the same with Smith. Plaintiff said that when he was informed by Smith the elevator was "dead," he thought the hand line had been misapplied, and went into the elevator to see whether Smith "had worked the hand line wrong—whether it was dead or not—to see whether it was out of order." Though plaintiff did say, among other things, that he went upon it to ascertain whether the elevator was "dead" by the misuse of the hand line, or if it were out of order, we believe it is obvious that he and all others understood the word "dead" to mean no more than that the power was disconnected, and the mere fact he said he intended to see whether it was "dead," in the sense suggested, or out of order does not show that he understood the elevator was out of order. We see no error in the ruling of the court pertaining to this matter.

Plaintiff introduced defendant's abandoned answer, in which it admitted the elevator was out of repair at the time and that it knew of the fact, but pleaded as well that plaintiff had full knowledge to the same effect, and was therefore negligent in attempting to operate it in its known condition. This answer further averred that plaintiff went into the elevator as a volunteer, when it was not part of his duties to do so, etc. On this feature of the case, defendant requested, and the court refused, to instruct as follows: "The court instructs the jury that the abandoned answer of the defendant, which has been introduced in evidence by the plaintiff, must be considered as a whole, and that the admissions which defendant has made in it, if any, are binding on the defendant only as made, and no further. And you are further instructed that such parts in said answer as are against the plaintiff, if any, are to be considered by the jury equally with such other parts." It is argued the court should have given this instruction, for the reason defendant's abandoned answer, if introduced by plaintiff in evidence, was adopted by him cum onere. There can be no doubt of the general proposition that the answer so in-

troduced in evidence should be considered by the jury as a whole, but, nevertheless, the court properly refused defendant's instruction to that effect, for the reason it was misleading, in that it employed the word "equally" in the concluding line thereof. Furthermore, the instruction, to have been entirely fair, should have told the jury the admissions contained in the answer against defendant were presumed to be true. But the real error in the instruction lies in the concluding portion thereof, which goes to the effect that such parts of the answer as were against the interests of plaintiff, if any, are to be considered by the jury equally with those parts which contained admissions against the interests of defendant. While it was for the jury to consider the whole answer and all of its parts, it is not true that the portions thereof, which averred plaintiff had full knowledge of the condition of the elevator and that he was a volunteer in the performance of the task at the time of his injury outside of his line of duty, were to be considered of equal probative force against plaintiff's interest, as were the admissions therein made by defendant pertaining to the negligence charged. The instruction tended to so direct the jury, and was properly refused. *Kersting v. White*, 107 Mo. App. 265, 266, 281, 282, 80 S. W. 730. It would be a harsh rule, indeed, which would operate to bind plaintiff, through statements made about his conduct by another, equally with admissions made by the same party about his own conduct, on any given question.

It appears plaintiff is a young man, bright, active, and intelligent, of fair earning capacity, and that his injury is not only permanent, but severe. He lost the use of his foot through having it crushed by the elevator, and was confined to the hospital for many months; suffered great pain of body and distress of mind. His earning capacity is essentially diminished by the permanency of the injury, and he is, furthermore, disfigured and crippled for life. It appears that he will continue to suffer pain, etc. The verdict of \$6,000, in these circumstances, is not, in our judgment, excessive, and it should be approved.

The judgment should be affirmed. It is so ordered.

REYNOLDS, P. J., and CAULFIELD, J., concur.

GINNOCHIO v. ILLINOIS CENT. R. CO.

(St. Louis Court of Appeals. Missouri. Jan. 24, 1911. Rehearing Denied Feb. 7, 1911.)

1. APPEAL AND ERROR (§ 639*)—RECORD—ABSTRACT—OMISSIONS.

Where an appeal is in the short form authorized by statute, and the certified copy of the judgment of the lower court was filed in time, giving the Supreme Court jurisdiction in the first instance, on a failure to recite the judgment in the printed abstract, it will be read into the abstract by the Supreme Court in the interests of justice.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 2787; Dec. Dig. § 639.*]

2. EVIDENCE (§ 35*)—JUDICIAL NOTICE—LAWS OF SISTER STATE.

In an action under the Illinois statute giving a right of action for wrongful death of a section hand, the Missouri courts cannot take judicial notice of the state of the Illinois law as to the reciprocal duties of the decedent and the railroad company, his employer, but the law and precedents adjudged must be pleaded and proved as facts, even though the statute giving the right of action was given in evidence.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 35, 51; Dec. Dig. § 35.* Appeal and Error, Cent. Dig. § 2959.]

3. EVIDENCE (§ 80*)—PRESUMPTION—LAW OF OTHER STATES.

Unless it is known as a historical fact that a foreign state was settled from countries other than those which are the source of the common law and were subject to organized and civilized communities emanating from jurisdictions other than those from which the common law is obtained, the presumption is that the law of a foreign state is the same as that in Missouri except as to statute.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 101; Dec. Dig. § 80.* Common Law, Cent. Dig. §§ 14-16.]

4. MASTER AND SERVANT (§ 137*)—INJURY TO SERVANT—SECTION HAND—NEGLIGENCE—DUTY TO KEEP LOOKOUT.

A section hand, working on the track in a railroad yard, stepped aside to let a switch engine and cars pass, and immediately went back to work by order of the foreman, who then went away. The engine went up a short distance and came back pushing a car in front of it, without signals or lookout, and struck and killed the section hand, who was at work with his back to the danger. *Held* that, there being no showing that any of the train crew actually saw the danger of deceased in time to prevent the accident, the railroad company was not liable for his death; the company owing no duty to a section hand except to avoid injuring him after discovering his peril.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 270, 274; Dec. Dig. § 137.*]

5. MASTER AND SERVANT (§ 236*)—INJURY TO SERVANT—CONTRIBUTORY NEGLIGENCE.

The decedent also was negligent in failing to look out for his own safety when he must have known that the switch engine was at work near him.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 739; Dec. Dig. § 236.*]

6. MASTER AND SERVANT (§ 236*)—INJURY TO SERVANT—SECTION HANDS—ASSUMPTION OF RISK.

So far as section hands are concerned, the railroad is regarded, under the law, as entitled

to a clear track, and the sectionmen are required to look out for their own safety.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 739; Dec. Dig. § 236.*]

7. MASTER AND SERVANT (§ 137*)—INJURY TO SERVANT—SECTION HANDS—WARNING—APPROACHING TRAINS.

A railroad company assumes no obligation to warn section hands of approaching trains, or otherwise look out for their well-being, except where they are actually seen to be in peril and oblivious to threatened danger.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 270, 274; Dec. Dig. § 137.*]

Appeal from St. Louis Circuit Court; Eugene McQuillin, Judge.

Action by Domenico Glinnochio, administrator of — Finnazzo, deceased, against the Illinois Central Railroad Company. From a judgment for plaintiff, defendant appeals. Reversed.

Watts, Williams & Dines and Wm. R. Gentry, for appellant. Joseph Wheelless, for respondent.

NORTONI, J. This is a suit for damages alleged to have accrued to plaintiff, administrator for the use and benefit of the widow of his deceased, under the wrongful death statute of the state of Illinois. Plaintiff recovered a judgment in the amount of \$5,000, and defendant prosecutes the appeal.

Before looking into the merits of the controversy, it is essential to first dispose of a matter preliminary to the right of the court to review the appeal. It is argued by plaintiff that, as defendant's abstract of the record on file here omits to recite the fact of the judgment given against it in the court below, we are precluded from reviewing the merits of the case for the reason defendant has not complied with the statute by filing an abstract of the entire record in this court. It is true the printed abstract is deficient in the matter suggested. But the appeal is in the short form authorized by the statute, and a duly certified copy of the judgment itself, together with the order granting the appeal, is on file here. The certified copy of the judgment and order referred to appear to have been filed in due time, and the filing of such judgment and order conferred jurisdiction on this court in the first instance. This being true, we ought not to decline to review the merits of the case because of the omission of the printed abstract to recite the fact that a judgment was given in the cause when it conclusively appears from the record on file that such judgment was had. It has been ruled several times that, though the abstract of record omits to recite the fact of the judgment, the court will look to the short transcript on file and supply the deficiency by reading it into the abstract in the interests of justice. *Bank v. Hutton*, 224 Mo. 42, 51, 123 S. W. 47; *Coleman v. Roberts*, 214 Mo. 634, 114 S. W. 39; *Booth v. St.*

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

Louis, I. M., etc., R. Co., 217 Mo. 710, 117 S. W. 1094; *Alt v. Dines*, 227 Mo. 418, 126 S. W. 1035. See, also, *Stone v. St. Louis Union Trust Co.*, 130 S. W. 825.

The suit is prosecuted by the administrator of one Finnazzo, deceased, who came to his death while in the employ of defendant as a section hand, engaged in the performance of his duties in defendant's switching yards at Du Quoin, Ill. It proceeds under the wrongful death statute of the state of Illinois, which was pleaded and proved in the case, and authorizes a suit by such administrator for the use and benefit of the widow of deceased, who it appears resides in Italy. Deceased was a resident of the state of Illinois, where he entered into the contract of hire with defendant and afterward came to his death. In view of these facts, it is argued by plaintiff the question pertaining to the reciprocal duties of defendant and the deceased touching the right of recovery, aside from the wrongful death statute itself, is to be considered and determined under the adjudicated law of the state of Illinois pertaining to the relation of master and servant and especially reflecting the view of the courts of that state as to the reciprocal rights and duties of section men and railroads when the injury or death occurs in circumstances similar to those involved here. The proposition is entirely sound when it is made to appear in the case what the adjudicated law of the foreign state is. Such was the case relied upon by plaintiff in support of the argument put forward. See *Fogarty v. St. Louis Transfer Co.*, 180 Mo. 490, 79 S. W. 664. In that case the reported decisions of the Supreme Court of Illinois were introduced in evidence at the trial and therefore properly before our own Supreme Court for consideration. But in the case now in judgment, though plaintiff introduced in evidence the wrongful death statute of the state of Illinois to the end of showing the transmission to the administrator of a right of recovery in circumstances where the deceased himself might have maintained an action had death not ensued, he omitted to introduce any evidence of the state of the law of Illinois touching the reciprocal duties of the deceased and his employer to the end of disclosing under what circumstances a cause of action might have accrued to the deceased had death not ensued from his injury. In this situation, the question of liability or non-liability is to be determined as it arises under the law of the forum defining and fixing the rights and duties of the parties, for we are not permitted to take judicial notice of the law of a sister state. If a party relies upon the law of a sister state for his right of recovery or defense, such law and the adjudicated precedents thereon are a matter of fact which the rule of practice requires to be both pleaded and proved. *Morton v. Supreme Council, etc.*, 100 Mo. App. 76, 89,

73 S. W. 259; *Garrett v. Conklin*, 52 Mo. App. 654. Unless it be where it is known as a historical fact that the foreign state was peopled by countries other than the source of the common law and were subject to organized and civilized communities emanating from jurisdictions other than those from whence the common law obtained, the presumption goes to the effect that the law of a foreign state is identical with that which obtains in Missouri except as to statute. In this view, nothing appearing in evidence to the contrary, the law of Illinois touching the rights and obligations of defendant and deceased, aside from the statute referred to, is presumed to be the same as that of this state. *Tennent v. Insurance Co.*, 133 Mo. App. 345, 112 S. W. 754. The case will therefore be disposed of and determined in accord with the decisions of our court which purport to interpret and apply the principles of the common law pertaining to the relation of master and servant and the reciprocal duties entailed when the contract of employment involves, and the injury is received while performing, the service of a section hand on a railroad.

Under the more recent decisions of our Supreme Court, it is obvious that plaintiff may not recover in this suit for the reasons: First, there appears no negligence on the part of defendant available as a cause of action to deceased had he survived his injury; and, second, his own conduct was such as to preclude the right on the ground that it contributed to the injury. As before stated, deceased was a section hand in the employ of defendant and engaged in performing the duties of such occupation on its track at Du Quoin, Ill., when he came to his death. Du Quoin is a small station at which are maintained several switch tracks by defendant, and the locomotive which occasioned the deceased's injury and death was engaged in switching cars in the yards at that point. The time of the injury was about 8 o'clock in the morning, and, besides being in broad daylight, the view was open and unobstructed either way on the tracks for a long distance. Deceased and several of his associates were engaged in driving spikes into the ties adjacent to rails of the track, and the locomotive with three cars attached passed by them to the north. As the locomotive approached, deceased and his companions stepped aside from the track in order to permit it to pass. Immediately after the passing of the locomotive and cars, the foreman, Morris, ordered the men to resume their work and walked away to another part of the yards. It appears the locomotive with cars attached proceeded north of where deceased and others were working only about 100 feet and stopped, at which point it disconnected two of the cars and returned to the southward with one car only, which was pushed before it. Deceased was standing with his back to-

ward the approaching car so being pushed forward by the locomotive engaged in driving a spike and was run upon and killed.

It is conceded throughout the case that neither the engineer nor fireman saw the deceased while on the track either at the time of approaching him or at the time he was run upon for the reason the car, which was being pushed before the locomotive, obstructed their view. It appears, too, that no watchman was stationed on the car for the purpose of warning, and that no signal was given of the approach of the train by sounding the whistle or ringing the bell. In the circumstances stated, if the question were open and untrammelled by decisions of the superior court of the state, we would be inclined to say that the precepts of ordinary care required the engineer to give some signal of warning that he was about to approach the men working on the track, for he knew they were thereabout, at least having passed them standing on the right of way but two or three minutes before when he moved the three cars to the northward. Especially is this true in view of the fact that upon disconnecting two of the cars the engineer approached the point from the north where the men were seen assembled only a few moments before both with his view obscured by the car in front of the engine and without a man stationed on such car as a lookout. It would seem that the engineer should have anticipated as a fact within the reasonable probabilities of the case that the section men had resumed their work on the track and the consequent possibility of injury if suddenly approached without a signal of warning. We believe the principle reflected in the cases of *Hinzeman v. Mo. Pac. R. Co.*, 182 Mo. 611, 81 S. W. 1134, and *Hinzeman v. Mo. Pac. R. Co.*, 199 Mo. 56, 94 S. W. 973, authorizes the submission of both the questions of defendant's negligence and the contributory negligence of deceased to the jury in the circumstances stated. But the just doctrine of those cases is much impaired by the Supreme Court in banc in the more recent decision of *Degonia v. St. Louis, I. M., etc., R. Co.*, 224 Mo. 564, 123 S. W. 807. While the prior state of authority in Missouri recognized and enforced the right of a section hand to the exercise of ordinary care for his safety in circumstances which might imply injury as within the range of reasonable probability unless signals or warning were given for his benefit, that doctrine is entirely repudiated by the judgment in the *Degonia Case*, unless it be in a case where the engineer actually saw the section hand in a perilous situation in time to have averted the injury by checking or stopping the engine. We say this because the *Degonia Case* rejects the rule of the *Hinzeman Cases*, which declared it the duty of the engineer to sound a warning to a section hand who was seen to be in a danger-

ous situation and oblivious thereto, though the time were too short to stop the train and avert his injury.

It seems that the more recent decisions of our Supreme Court adopt the view of the Supreme Court of the United States reflected in *Aerkfetz v. Humphreys*, 145 U. S. 418, 12 Sup. Ct. 835, 36 L. Ed. 758, and the Supreme Court of Massachusetts in *Riccio v. N. Y., N. H., etc., R. Co.*, 189 Mass. 358, 75 N. E. 704, to the effect: First, that because of the peculiar nature of the employment the railroad owes no duty to the section hand other than to avert his injury after the engineer has actually seen his perilous situation; and, second, that, if a sectionman is run upon and injured while performing his task, he is to be regarded negligent in not looking out for the train. In other words, the doctrine is that, in so far as sectionmen are concerned, the railroad is to be regarded under the law as entitled to a clear track, and such employees are to look out for their own safety, for there is a valid distinction in so far as the matter of duty pertains toward men engaged for the purpose of repairing the tracks and a stranger or other person who is not familiar with the operation of the road. The authorities referred to seize upon this distinction and press it forward, together with the fact that in the very nature of things those operating railroad trains ought not be required at all times to be looking out for sectionmen and sounding alarms for their benefit, for it is said to be commonly known that sectionmen remain upon the track engaged in their work until the very approach of the train with which they are presumed to be familiar and step aside to let it pass. It is reasoned that by entering into such an employment the sectionman undertakes to look out for his own safety, and the railroad assumes no obligation to warn him of approaching trains, or otherwise look out for his well-being, except it be in circumstances where he is actually seen to be in peril and oblivious to threatening danger. Besides the cases above cited, see the following authorities in point: *Cahill v. Chicago & A. R. Co.*, 205 Mo. 393, 103 S. W. 532; *Degonia v. St. Louis, I. M., etc., R. Co.*, 224 Mo. 564, 123 S. W. 807; *Van Dyke v. Mo. Pac. R. Co.* (Sup.) 130 S. W. 1. See, also, *Hitz v. St. Louis, etc., R. Co.* (Springfield Court of Appeals; not yet officially reported) 133 S. W. 397. However, the *Degonia Case*, supra, as we understand it, goes quite beyond this and announces the rule that there is no obligation on the part of the railroad master to sound a warning for a sectionman seen to be in peril and oblivious to danger which may be enforced as actionable negligence, unless the case reveals that the injury might have been averted after the engineer actually saw the man in a situation of peril so as to invoke the humanitarian rule. The repudiation of the doctrine of the *Hinzeman Cases* by the

Supreme Court in the Degonia Case evinces this to be true, for the proposition above stated was affirmed in those cases and rejected in the Degonia decision. See *Degonia v. Railroad Co.*, 224 Mo. 564, 596, et seq., 123 S. W. 807.

It would seem that the rule of nonliability in cases circumstanced as this one should proceed, if at all, upon the theory of assumed risk, for by the reasoning of the authorities the rule exempting the master from actionable negligence in omitting to give signals is said to flow from the peculiar nature of the employment, in that the sectionman undertakes to look out for his own safety, and that the railroad does not undertake to give warning of the approach of trains. In such circumstances, it appears that the employé assents to the risk incident to the usual operation of the road and undertakes in his contract of hire to look out for his own safety, while the master is thereby relieved from the obligation to signal the servant as it would a stranger on the track. But, though the courts are enforcing the rule with great strictness, the judgments seem to be predicated on the theory both that there is no negligence on the part of the master in omitting to warn the sectionman unless he is actually seen in danger, and that if he is injured in such circumstances he should suffer the consequences as though he was negligent in failing to perform his part of the undertaking which devolves the duty upon him to look out for the danger which is known to be ever present on a railroad. If the nonliability of the railroad company is to be based upon the score of negligence and contributory negligence as the cases seem to hold, we believe the true ground of the doctrine to be that suggested by the Springfield Court of Appeals in *Hitz v. St. Louis, etc., R. Co.*, supra, which goes to the effect that the engineer is not required to anticipate, as a matter within the range of reasonable probabilities, that sectionmen will remain upon the track in the very face of known danger from approaching trains, and, if they do, it is at their own risk, though signals are not given.

Some of the cases lay stress upon the fact that sectionmen know the schedule time of trains and are required to govern themselves accordingly. It is true defendant's engine in this instance was not operating on schedule time, and this particular feature of some of the cases is absent; but it appears that the engine was engaged in switching in defend-

ant's yards, with which deceased was entirely familiar. He was a man about 30 years of age and had been in defendant's employ on the section at Du Quoin, Ill., for more than two years, and his view was unobstructed for a distance quite beyond anything essential to the purpose of the case. It is obvious that one engaged on the track in switching yards where a locomotive is known to be moving cars backward and forward is possessed of notice and knowledge of probable danger equal to that possessed by one who encounters scheduled trains, if not more so. In the case of an engine so switching, it seems that the warning of danger is ever present, while, with trains approaching on a regular schedule, it is occasional only. The locomotive and car which occasioned the injury and death of plaintiff's decedent were at the time running about four miles an hour, which is about the rate of a fast walk for a man. It is therefore entirely clear that with the slightest attention to the movement of the locomotive deceased could have gotten out of the way had he been watching it and not awaiting signals which, under the decisions, the law did not require to be given. But it is unnecessary to reason minutely on the details of fact which are conclusively established, for the reason that under the law of such cases as now determined in this state defendant owed deceased no duty to warn him of the approaching train, unless the engineer actually saw him in a position of danger in time to have averted the injury. It is conclusively shown that neither the engineer nor fireman nor others on the locomotive saw the deceased after starting the train southward before he was injured. Moreover, under the doctrine of the same authorities above cited, if defendant owed deceased any duty in the circumstances of the case, then his negligence in omitting to look out for his own safety when he knew the engine was switching thereabout is such as precludes a right of recovery.

The Constitution commands that the Courts of Appeals shall be guided by the last previous ruling of the Supreme Court on any question of law or equity.

In view of this command, it becomes our duty to reverse the judgment and declare there is no right of recovery for the reasons above stated. It is so ordered.

REYNOLDS, P. J., and CAULFIELD, J., concur.

JONES LUMBER CO. v. HOWARD.

(Court of Appeals of Kentucky. Feb. 17, 1911.)

1. EVIDENCE (§ 472*)—COMPETENCY—UNDERSTANDING AS TO CONTRACT.

A company sued on an oral contract to drive its logs could not show, on an issue whether plaintiff was to drive logs sold by him without charge, what its manager understood the contract to be.

[Ed. Note.—For other cases, see Evidence, Dec. Dig. § 472.*]

2. LOGS AND LOGGING (§ 15*)—CONTRACTS—RIGHT TO COMPENSATION.

Where a log driver's compensation depended on the quantity of logs coming out of a creek while he was working, and not on what he actually drove, there could be no deduction for logs driven while other persons were employed.

[Ed. Note.—For other cases, see Logs and Logging, Dec. Dig. § 15.*]

3. APPEAL AND ERROR (§ 999*)—FINDINGS—CONCLUSIVENESS.

Findings supported by evidence are conclusive on appeal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3912; Dec. Dig. § 999.*]

Appeal from Circuit Court, Bell County. Action by Elisha Howard against the Jones Lumber Company. Judgment for plaintiff, and defendant appeals. Affirmed.

Wm. Low, for appellant. O. V. Riley and N. R. Patterson, for appellee.

O'REAR, J. Appellee sold appellant a lot of saw logs in Pucketts creek, a tributary of Cumberland river. The logs were accepted and paid for. After they were sold, appellee was hired by appellant to run all its logs out of Pucketts creek into the river. Appellant had quite a quantity of other logs in Pucketts. Appellant was to pay appellee \$1 a thousand feet for all logs so run out during the existence of his contract. Four hundred and nineteen thousand feet of logs were run out of the creek in that time. Appellant refused to pay for the logs run that it had purchased from appellee, on the ground that it had construed the contract to be that he was to deliver his logs into the river. The question whether such was the contract was appropriately submitted to the jury, who found that it was not. We agree with the jury upon the evidence. Appellant's manager, Golden, offered to testify what he understood the contract to be. The testimony was rejected. Appellant complains on that score. What Golden understood was not relevant as evidence. He did not make the contract with appellee. Another agent represented appellant in that transaction. The contract was not in writing. What was said between the parties then was relevant, but what either may have understood was not relevant evidence under the issues of this case.

The contract to run out the logs was for a year, it seems. All the logs were not run out in that time. Appellant's agent in charge

and appellee discussed at the end of the year whether another would take the job, but they finally agreed that appellee would go ahead and finish it. Notwithstanding, it seems appellant did have others to work on the job. Now it is said that for logs run out whilst the latter persons were working at them there should have been deducted the sum represented by their measurement. Appellee's contract was not to be paid for such logs as he should run out of the creek. His pay depended not on what he actually put out, but on the quantity that came out while he was working at them. Many floated out without his doing anything toward getting them out. Nevertheless, he was required by his contract to be on hand with workmen whenever there came a tide in the creek, to see that appellant's logs did not stand on the shores and riffles. Appellant could not disappoint him of his contract by voluntarily putting other men in the job to help get out the logs. Appellee seems to have performed his part of the contract, and was entitled to receive the pay for it.

The facts were found by the verdict. The evidence warranted their finding. The facts so found in the light of the evidence must be accepted by this court as the facts of the case.

Judgment affirmed.

GATLIFF v. COMMONWEALTH.

(Court of Appeals of Kentucky. Feb. 16, 1911.)

1. HOMICIDE (§ 244*)—EVIDENCE—WEIGHT AND SUFFICIENCY—SELF-DEFENSE.

Evidence held to support a conviction for homicide, where the defendant, while drunk and disorderly, shot and killed an officer whom he knew had come to arrest him.

[Ed. Note.—For other cases, see Homicide, Dec. Dig. § 244.*]

2. CRIMINAL LAW (§ 1156*)—APPEAL—DISCRETION OF LOWER COURT.

Where affidavits of two persons were filed, alleging that a juror who sat in a homicide case had, before his acceptance as a juror, expressed an opinion that defendant was guilty, and these statements were denied by the juror's own affidavit, the refusal of the judge to set aside the verdict of guilty will not be disturbed on appeal.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 3070; Dec. Dig. § 1156.*]

Appeal from Circuit Court, Bell County.

Moses Gatliff was convicted of homicide, and he appeals. Affirmed.

N. J. Weller, for appellant. Jas. Breathitt, Atty. Gen., and Tom B. McGregor, Asst. Atty. Gen., for the Commonwealth.

CARROLL, J. The appellant shot and killed Gord Givens, a deputy sheriff, who was attempting to arrest him for being drunk and disorderly in his presence, thereby committing a public offense. Under the indictment charging him with this crime, he was

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

found guilty by the jury who tried him, and his punishment fixed at imprisonment in the state penitentiary for life.

It appears from the evidence that Gatliff, who was drunk, went early in the morning to the house of Mrs. Bowers, where his wife was visiting, and commenced cursing and abusing his wife and others about the premises, at the same time flourishing a pistol in a dangerous and reckless manner. His conduct so alarmed the inmates of the house that one of them went after Givens, a deputy sheriff, who lived in the neighborhood, to get him to come and arrest him. It is very clear from the evidence that Gatliff knew that an officer had been sent for, as he said more than once in his drunken frenzy that if an officer came he would kill him. The officer, after receiving the message that his services were needed, went immediately to the house where Gatliff was, and as soon as he opened the door the shooting between them commenced. The officer was only shot once, but the wound proved fatal; while Gatliff was seriously wounded by the officer, who was also armed with a pistol. Gatliff testifies that he did not know that Givens was an officer, and that he was quiet and orderly when Givens came in the house, and that Givens commenced shooting at him without any provocation, and that he shot and killed him in self-defense. But the weight of the evidence is to the effect that Gatliff fired the first shot, and the one that killed the officer, and it is plain that he knew or believed that Givens was the officer that had been sent for. There is also evidence that, when the officer arrived, Gatliff was behaving himself in such a disorderly manner as to authorize his arrest by the officer for an offense committed in his presence.

Briefly stated, the theory of the commonwealth is that Gatliff, who was drunk and disorderly, was expecting an officer to come and arrest him, and shot Givens as soon as he entered the door; while the claim of the defense is that Givens went into the room where Gatliff was, and without warning shot him while he was quietly sitting in a chair, and that Gatliff only fired in self-defense. The instructions are those usually given in cases where the crime committed is the killing of an officer.

The principal objection urged to them is that Gatliff had not committed any offense in the presence or hearing of the officer, and therefore, when the officer attempted to arrest him without a warrant, he occupied the same position as a private individual would who attempted under similar circumstances to make an arrest. In short, the instructions are assailed upon the ground that there was no evidence tending to show that Gatliff was committing any offense when the officer arrived, or to show that Gatliff resisted

the arrest, or killed Givens in an effort to prevent being arrested. But there was evidence introduced by the commonwealth upon all of these propositions sufficient to justify the instructions, and to authorize the jury in finding (1) that Gatliff, at the time the officer arrived, was committing a public offense by his drunken and disorderly conduct; (2) that he knew Givens was an officer and had come to arrest him; (3) that he fired the shot that killed him before the officer had an opportunity to tell him the purpose of his visit, or that he came to put him under arrest; (4) that he killed the officer to prevent being arrested.

Another ground relied on for a new trial is that one of the jurors who sat in the case had formed and expressed the opinion that Gatliff was guilty before he was accepted as a juror. In support of this ground the affidavits of two persons were filed; but their statements were positively denied in an affidavit made by the juror. The trial judge, who was doubtless acquainted with the parties, did not regard these affidavits as sufficient to authorize him to set aside the verdict, and we are not disposed to disturb his ruling upon this point. The court should be well satisfied of the interest or prejudice of a juror before setting aside the verdict on the ground that he had expressed an opinion concerning the guilt of the accused. After a verdict of conviction has been returned, it is often not difficult to obtain affidavits of this character; and it would result in the miscarriage of justice in many cases if the verdict should be set aside on account of an alleged expression of opinion by a juror. While a verdict should not be permitted to stand when it is shown that it was brought about or contributed to by the interest or prejudice of a juror, the evidence of this fact, to be available, should be made to appear in a very satisfactory manner.

The judgment is affirmed.

LINNEMAN & MOORE v. ALLISON & YATES.

(Court of Appeals of Kentucky. Feb. 16, 1911.)

1. CONTRACTS (§ 117*)—SALE OF BUSINESS—VALIDITY.

A contract, upon selling the good will of a business, not to again pursue it, or not to pursue it in the entire country, is against public policy, though such a contract is valid where the agreement only restrained the conduct of the business in such extent of territory as would be necessary to protect the purchaser, if the other party would not be thereby prevented from pursuing his business.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 554-569; Dec. Dig. § 117*.]

2. CONTRACTS (§ 117*)—SALE OF BUSINESS—RESUMPTION OF BUSINESS.

When defendant sold his undertaking business, including the good will, and agreed not

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

to engage in such business within 50 miles of the city for a certain period, he did a large business in the adjoining counties as well as in the city. Plaintiff, after purchasing, also did business in the surrounding counties. Held that, since defendant would necessarily compete with plaintiff by engaging in the undertaking business within 50 miles of the city, his covenant not to do so was reasonable and enforceable.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 554-569; Dec. Dig. § 117.*]

Appeal from Circuit Court, Kenton County, Common Law and Equity Division.

Suit by Allison & Yates against Linneman & Moore. From a judgment for plaintiffs, defendants appeal. Affirmed.

William A. Byrne and Byrne & Read, for appellants. John L. Rich, for appellees.

CLAY, C. On July 10, 1907, appellant Gus W. Menninger, who was then engaged in the livery and undertaking business in the city of Covington, sold his entire business, including all personal property used in connection therewith and certain real property where the business was conducted, to appellees, Allison & Yates, for the recited consideration of \$37,500. Appellant Menninger included in the sale his good will, and agreed not to engage in the undertaking or livery business, directly or indirectly, within 50 miles of Covington for a period of 10 years from the signing of the contract. In the year 1908 Menninger again engaged in the livery and undertaking business in the city of Covington. To this end he formed a partnership with appellant Maria Moore, and they proceeded to conduct and did conduct such business under the firm name of Linneman & Moore.

Appellees brought this action for the purpose of enjoining appellant Menninger from engaging in the undertaking and livery business with appellant Maria Moore, or with any one else, or at all, within 50 miles of the city of Covington for a period of 10 years from July 10, 1907; also to enjoin him from permitting or suffering the appellant Maria Moore, or any one else, from using his name in the conduct of such business; and also to enjoin the appellant Maria Moore from engaging with said Menninger in said business. Upon the institution of the action a temporary injunction was awarded appellees, and upon final hearing this injunction was made permanent. From the judgment so entered this appeal is prosecuted.

Appellants insist that the contract by which Menninger agreed not to engage in the livery or undertaking business within 50 miles of the city of Covington for a period of 10 years is in restraint of trade, and, therefore, void as against public policy. The principal reasons for holding contracts in restraint of trade void are (1) injury to the public, by being deprived of the restricted

party's industry, and (2) injury to the party himself, by being precluded from pursuing his occupation, and thus being prevented from supporting himself and family. Where, therefore, the contract is general—i. e., not to pursue one's trade at all, or not to pursue it in the entire realm or country—both objections arise, and the contract is clearly against public policy. On the other hand, it is also the policy of the law to permit men of full age and competent understanding to have the utmost liberty of contracting; and where the contract imposes a restraint reasonable as to both time and space, it is the policy of the law to uphold and enforce such a contract.

The point of difficulty is to determine what is a reasonable time or what is a reasonable distance within which the prohibitory stipulation may lawfully have effect. A stipulation that another shall not pursue his trade or employment at such a distance from the place of business of the person to be protected that it could not possibly affect or injure him, would be unreasonable. On the other hand, a stipulation is unobjectionable and binding which imposes a restraint to only such an extent of territory as may be necessary for the protection of the party making the stipulation, provided it does not violate the two indispensable conditions—that the other party be not prevented from pursuing his calling, and that the country be not deprived of the benefits of his exertions. *Oregon Steam Navigation Co. v. Windsor*, 20 Wall. 69, 22 L. Ed. 315; *Sutton v. Head*, 86 Ky. 156, 5 S. W. 410, 9 Am. St. Rep. 274.

The proof in this case shows that Menninger was an extensive advertiser and did a large business, not only in the city of Covington, but in the adjoining counties. He frequently conducted funerals as far as 30 miles from Covington, and occasionally at a greater distance. Appellees are also engaged in doing business, not only in Covington, but in the surrounding counties. If, then, Menninger should locate at any point within 50 miles of Covington, he would necessarily come in competition with appellees. That being true, it follows that the restriction as to territory was reasonably necessary for the protection of appellees.

Nor will Menninger be deprived of an opportunity to pursue his business, or the country be deprived of the benefits of his exertions; for outside of the restricted boundary there is plenty of territory left wherein he may engage in business, and at the expiration of the time limit he may also engage in business in the city of Covington. We therefore conclude that the restriction contained in the contract in question is reasonable, and that the chancellor properly granted the relief prayed for.

Judgment affirmed.

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r indexes

**WALTON BRICK CO. v. ANDERSON
FOUNDRY & MACHINE WORKS.†**

(Court of Appeals of Kentucky. Feb. 15, 1911.)

1. EQUITY (§ 377*)—JURY TRIAL—JUDICIAL DISCRETION.

In equity cases, it is within the chancellor's discretion to direct jury trial of an issue of fact.

[Ed. Note.—For other cases, see Equity, Cent. Dig. §§ 788-793; Dec. Dig. § 377.*]

2. EQUITY (§ 381*)—VERDICT—EQUITABLE ISSUES—CONCLUSIVENESS.

A verdict on an equitable issue is advisory, and not conclusive.

[Ed. Note.—For other cases, see Equity, Cent. Dig. §§ 813-817; Dec. Dig. § 381.*]

3. EQUITY (§ 381*)—LEGAL ISSUES—CONCLUSIVENESS.

A verdict on a legal issue in an equitable action is conclusive between the parties, unless set aside on motion for new trial as palpably against the evidence.

[Ed. Note.—For other cases, see Equity, Cent. Dig. §§ 813-817; Dec. Dig. § 381.*]

4. SALES (§ 441*)—WARRANTIES—EVIDENCE.

Evidence held to show that brick-making machinery complied with the seller's warranty that the buyer's clay, if properly burned, would make brick equal to samples submitted by the seller.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 1277-1283; Dec. Dig. § 441.*]

Appeal from Circuit Court, Boone County.

Action by the Anderson Foundry & Machine Works against the Walton Brick Company. Judgment for plaintiff, and defendant appeals. Affirmed.

J. G. Tomlin and Jno. L. Vest, for appellant. Harry Brent Mackoy and Mackoy & Mackoy, for appellee.

CLAY, C. Appellee, Anderson Foundry & Machine Works, on February 24, 1908, sold to appellant, Walton Brick Company, certain machinery for making brick. For this machinery the Walton Brick Company agreed to pay \$4,063.50. Of this sum \$2,133.50 was to be paid upon the arrival of the machinery at Walton, Ky., and the balance when said machinery was in proper working order and making at the rate of 2,000 perfectly formed brick per hour. The machinery arrived at Walton in March, 1908. Thereupon appellant paid to appellee \$2,031.75. On June 29, 1908, after the machinery had been installed and had been making brick for several weeks, it paid the additional sum of \$1,000. The balance, \$1,031.75, was not paid, and appellee brought this action against appellant for the purpose of enforcing a mechanic's and materialman's lien. During the trial it was admitted that appellant, at the request of appellee, had furnished certain small articles of the value of \$68.20. Upon final submission of the case, the chancellor gave judgment in favor of appellee for the sum of \$1,031.75,

subject to a credit of \$68.20, and also adjudged appellee a lien upon certain real property, machinery, etc., constituting the brick-manufacturing plant owned by appellant. From that judgment this appeal is prosecuted.

Briefly stated, the facts are as follows: About 10 days before the contract of purchase was entered into, appellee submitted to appellant a proposition, in writing, by which it agreed to furnish certain machinery designated therein. This proposition contained certain guaranties. Those that are material to this case are as follows: "Our proposition also contemplates that in event you favor us with order that we will send a competent engineer to your plant free of cost to yourself, who will make a lay-out for your buildings, show you what changes are necessary in order to install the above-named machinery, and he will then make a detailed drawing and furnish you with blue prints, so that any carpenter or millwright can install the machinery such as we would send you, and when you are ready to operate same we will also agree to furnish you a first-class man both as an engineer and as a brick maker for the starting up of your plant, to see that the machinery fulfills the guaranty that we will give with same. However, the expense of the man sent will be \$5.00 per day and his car fare to and from Anderson, and wish to state you can use him as few or as many days as you desire. Our guaranty contemplates that, if for any reason the machinery furnished should not do what we claim for it, all we ask will be the return of same to cars, and we will refund any and all money that had been paid upon same. The terms of the sale would be one-half cash when all the machinery has arrived upon car in your city, balance after machinery is started and guaranty fulfilled in accordance with contract that we would enter into. Also wish to state that we will guarantee your material to make brick equal to the samples that we have submitted made from the same material, provided, of course, that it is burned in a manner and with the equipment necessary for burning dry-pressed brick. What we wish to convey is that we guarantee that your clay, properly burned, will make brick similar to the samples that we have submitted, referring to the same clay that you shipped us for making up the samples."

The contract of sale was on one of the ordinary forms employed by appellee. Appellant, being in doubt as to whether the foregoing guaranties were contained in the contract, declined to take the machinery. Appellee, upon being informed of the ground of objection, telegraphed to appellant, directing it to make appellee's letter of February 14th a part of the contract. Appellant defended on the ground that there was

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

† Rehearing denied March 18, 1911.

an absolute failure all along the line of the guaranties made by appellee. It also sought to recover damages by way of counterclaim and set-off. Upon the completion of the pleadings and the calling of the case for trial, appellant moved to have certain issues out of chancery submitted to the jury. This motion the court granted. Of the issues submitted, Nos. 1, 2, 3, and 5 were prepared by counsel for appellant. No. 4, involving the item of \$68.20, which was submitted by appellee, was not submitted to the jury. The following are the questions submitted, and the finding of the jury thereon:

"To Question 1: Will the clay upon the land of the defendant Walton Brick Company, at Walton, Ky., when properly burned, make brick equal to the samples furnished by plaintiff to defendant? Answer: Yes (by eleven).

"To Question 2: Was the brick press, or any part thereof, furnished by plaintiff to the defendant, a new or secondhand press; and, if secondhand, how much less was it worth than if it had been new? Answer: Yes; but worth as much as one mentioned in contract.

"To Question 3: Were the brick that were made by the plaintiff for the defendant in its yards at Walton, Ky., made in such a manner that they could be burned into dry-pressed brick equal to samples furnished by plaintiff to defendant? Answer: Can't agree."

"To Question 5: Was, or not, the man furnished by plaintiff to defendant, to operate said machinery, a competent man to properly adjust and operate the said machinery? Answer: Yes (by ten).

"To Question 6: Was, or not, said machinery furnished defendant by plaintiff at the yard of the Walton Brick Company, at Walton, Ky., sufficient and proper machinery, when properly adjusted and operated, to make, when properly burned, brick equal to the sample furnished by plaintiff to defendant? Answer: Yes."

It is conceded by counsel for appellant that the evidence on the trial tending to prove the quality of the machinery and the qualifications of appellee's expert were sufficient for that purpose. These matters embraced three of the questions submitted. That being true, the only questions left for consideration are Nos. 1 and 3, which we again state in full:

"To Question 1: Will the clay upon the land of the defendant Walton Brick Company, at Walton, Ky., when properly burned, make brick equal to the samples furnished by plaintiff to defendant? Answer: Yes (by eleven)."

"To Question 3: Were the brick that were made by the plaintiff for the defendant in its yards at Walton, Ky., made in such a manner that they could be burned into dry-pressed brick equal to samples fur-

nished by plaintiff to defendant? Answer: Can't agree."

As to question No. 1, the finding of the jury was in favor of appellee. The jury could not agree upon an answer to question No. 3. Upon these questions the evidence, in brief, is as follows:

Some time prior to the purchase of the machinery, J. D. Mayhugh, appellant's president, sent some of the clay owned by appellant to Chisholm, Boyd & White Company, of Chicago, one of appellee's competitors. There a test was made, which showed that the clay would make good pressed brick. Appellant also sent some of the clay to appellee. Appellee sent it to a brick concern in Chicago. Its test also showed that good brick could be made out of appellant's clay. Aside from this testimony, appellee's manager and Messrs. McLaughlin and Kautz, the latter two being experts and in the employment of other companies at the time, all testified that the clay could and did make good dry-pressed brick. A. J. Flood, president, and Leslie W. Flood, erecting engineer, of the Chisholm, Boyd & White Company, testified to the same effect. On the contrary, J. D. Mayhugh, appellant's president, testified that the clay would not make good dry-pressed brick. Mayhugh, however, had had no experience previous to that obtained in operating appellant's plant. Mr. Rusche, the appellant's burner, also gave it as his opinion that the clay would not make good dry-pressed brick. He had, however, practically no experience in the making of dry-pressed brick, but had been in the soft-mud brick business a great many years. Baxter and Stillwaugh, who made tests with the same clay in their kilns at Newport, Ky., and Hamilton, Ohio, also testified to the same effect. Upon cross-examination, Stillwaugh admitted writing to Mayhugh a letter, which is in evidence and wherein he used the following expression: "The good bricks sent are off the top of the kiln, where they got plenty of fire, and it would take a very hot fire to burn them." In another letter he said: "You can make some very nice brick when the clay is worked up good; but they will not burn hard only where there is a very hot fire." Baxter also admitted he had gotten some good brick out of the test made by him, and he stated that the percentage of good brick would have been larger if he had burned the brick at a different time from his own.

Appellant places particular force and emphasis upon the fact that about 200,000 brick were made and placed in its kiln, and the evidence shows that none of them were good dry-pressed brick. On the other hand, appellee's contention is that the kiln was not properly prepared for burning dry-pressed brick, and that the brick were improperly burned. The evidence shows that dry-pressed brick require a very different treatment and altogether different kind of kiln from

that used in making soft-mud brick. In order to get the requisite heat for dry-pressed brick, it is necessary to have a permanent walled, down-draft kiln. Appellant used a mud-daubed kiln, which was altogether insufficient for the purpose. While it is true that appellant's failure with the machinery and the expert in charge to get even a small percentage of good dry-pressed brick is a strong circumstance tending to show that the clay would not, even if properly burned, make good dry-pressed brick, it is by no means conclusive of the question, as so many elements enter into the manufacture of good brick. It is manifest that question No. 3 had only an indirect bearing upon the character of the clay and the character of the machinery. Upon this question the jury did not agree; but they did agree that the machinery was all right, and that the clay, if properly burned, would make brick equal to the samples furnished by appellee to appellant. In a case of purely equitable cognizance, the chancellor had the discretionary power to direct an issue of fact to be tried by a jury; and its verdict is, generally speaking, treated by the chancellor as conclusive between the parties. But it is not necessarily conclusive, for the reason that the chancellor simply seeks the advice of the jury to aid him in coming to a correct conclusion on a disputed question of fact. This principle, however, does not apply where there is a distinct legal issue made in an equitable action. In such a case the verdict of the jury is conclusive between the parties, unless the court, upon a motion for a new trial, is satisfied that it is palpably against the evidence. *Hill v. Phillips' Adm'r*, 87 Ky. 169, 7 S. W. 917; *Baxter v. Knox*, 31 S. W. 284, 17 Ky. Law Rep. 489; *Small v. Reeves*, 104 Ky. 289, 48 S. W. 726, 20 Ky. Law Rep. 504.

As the real issue in this case was whether or not appellant's clay, if properly burned, would make brick equal to the samples furnished by appellee to appellant, and as this question was decided by the jury adversely to appellant's contention, and we are unable, upon a careful review of all the evidence, to say that its finding is flagrantly against the evidence, we conclude that the judgment should be affirmed; and it is so ordered.

LASSING, J., not sitting.

HITE v. HITE.

(Court of Appeals of Kentucky. Feb. 15, 1911.)
HUSBAND AND WIFE (§ 281*)—SETTLEMENT
CONTRACT—ACTION TO ENFORCE—DIVORCE A
MENSA—COUNSEL FEES.

Where a wife sued her husband to enforce a contract for separate maintenance and for a divorce a mensa as a mere incident to a judgment enforcing the contract, she was not enti-

tled, in addition, to an allowance for attorney's fees under Ky. St. § 900 (Russell's St. § 2687), relating to divorce and alimony.

[Ed. Note.—For other cases, see Husband and Wife, Dec. Dig. § 281.*]

Appeal from Circuit Court, Jefferson County, Chancery Branch, First Division.

Action by Mamie H. Hite against Louis Hite. From a judgment denying plaintiff attorney's fees, she appeals. Affirmed.

See, also, 124 S. W. 815.

Helm Bruce, Helm & Helm, and Carroll & Middleton, for appellant. Johnson & Hieatt, for appellee.

SETTLE, J. This action was brought by the appellant for the enforcement of a written contract made by her with appellee, her then husband, which provided, among other things, that, "should it be necessary and proper for Mamie Hite, the said wife, to separate herself from and live apart from her husband, by reason of any such conduct as would justify her separation from him," he would pay her for the support of herself and children the sum of \$5,000 per year, give her any home in which they might be living, with its contents and appurtenances; and in case of his death during such separation, in addition to such portion of his estate as the law would entitle her to, one-third of the income derived by him under the will of his father. The petition contained a statement of facts showing a necessity for placing appellee's estate in the hands of a receiver, the issual of injunctions against various persons, alleged to be holding his property, to restrain them from delivering it to him, and also grounds for a divorce a mensa et thoro. After much litigation a judgment was rendered in the court below requiring appellee, in performance of the contract referred to, to pay appellant \$5,000 per annum, and granting the latter the divorce prayed for. The judgment also allowed appellant, in addition to ordinary costs, \$3,000 as an attorney's fee; but the judgment as to the attorney fee was later changed by the court to the allowance of a reasonable attorney's fee; the fixing of the amount thereof being reserved for proof. Shortly thereafter appellee entered a motion to set aside so much of the judgment as provided for the subsequent allowance to appellant of a reasonable attorney's fee. Appellee prosecuted an appeal from so much of the judgment as enforced the contract, and upon consideration of the appeal this court affirmed the judgment. *Hite v. Hite*, 138 Ky. 529, 124 S. W. 815. Upon the return of the case to the circuit court, the matter of an allowance to appellant of an attorney's fee came on for hearing on her motion therefor; but the court by the judgment rendered refused to allow her the attorney fee, and sustained the motion of appellee, made the previous year, to set aside

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

so much of the original judgment as allowed her a reasonable attorney fee and reserved the fixing of the amount thereof. Appellant complains of the judgment refusing her the attorney fee, and by this appeal seeks its reversal.

It is apparent from the written opinion of the judge of the circuit court that, in refusing appellant an attorney fee, he proceeded upon the theory that, by the enforcement in all its essential parts of the contract she made with appellee, appellant got more than she could have secured by way of alimony, and that the judgment for a divorce a mensa was a mere incident to the judgment enforcing the contract which was the principal and controlling thing sought in the action; therefore the fact that she was granted a divorce a mensa, in addition to the judgment enforcing the contract, did not have the effect of giving to the case the character of an action for divorce or alimony so as to bring it within the terms of section 900, Ky. St. (Russell's St. § 2687), which provides: "In actions for alimony and divorce, the husband shall pay the costs of each party, unless it shall appear in the action that the wife is in fault and has ample estate to pay the same."

In this conclusion we concur. Manifestly, the statute confines the allowance of the wife's costs, which may include an attorney's fee, to cases for alimony and divorce. An action to enforce a contract, brought by the wife against the husband, is not the character of case in which an attorney's fee is allowed by the statute, even when one of its objects is a divorce for the wife and the divorce is granted. In the case at bar the property rights of the parties were fixed by contract to take effect in case of a separation and divorce. Their respective rights and liabilities under the contract are therefore to be measured and determined by its terms; and, though it was made in contemplation of a separation and of the probability of a suit by the wife for a divorce, it does not fix upon the husband liability for an attorney's fee in the event of such suit. The existence of the facts that authorize an enforcement of the contract for appellant's benefit also entitle her to the divorce from bed and board. The divorce being asked in the same action, it resulted with the enforcement of the contract; and the services rendered by her attorneys in procuring the enforcement of the contract were equally efficient in procuring the divorce. It is impossible to segregate them, and the affidavits filed by appellant in support of her motion for the allowance of an attorney's fee do not show what part of the services rendered her by her attorneys were performed in obtaining the divorce, apart from what they did in obtaining for her the relief secured by the enforcement of the contract.

In the case of *Woodruff v. Woodruff*, 121

Ky. 784, 90 S. W. 266, 91 S. W. 265, 28 Ky. Law Rep. 757, 1082, we had under consideration substantially such a contract as is presented in this case. In that case, as in this, the husband and wife after a separation resumed their marital relations, following the execution of a contract between them, the purpose of which "was to secure the wife in alimony, if the husband was again unfaithful, and to prevent his wasting his estate in squandering it to defeat her claim." The wife sought the enforcement of the contract, but did not ask a divorce; the answer of the husband resisted the enforcement of the contract on the ground that it was void because against public policy, and by way of counterclaim sought a divorce from the wife. The amount secured the wife by the contract was only \$50 per month in lieu of dower and for the support of herself and children. In the case at bar the amount secured to appellant was \$5,000 per annum, and after his death one-third of his income under the will of his father to which she could not have asserted any right under the law. In the *Woodruff Case* we enforced the contract for the wife and refused the husband a divorce, and, in response to the wife's claim to an attorney's fee against the husband, we, in an extension of the opinion, said: "This action is not strictly an action for divorce or alimony. It is to recover upon a contract and was allowed upon that ground. * * * As attorney's fees are not allowed by statute to be recovered in an action upon contract, the opinion should not be extended on this point." It is manifest that the language of the opinion in the case, *supra*, restricts the allowance of attorney's fees exclusively to actions for divorce and alimony; and in the more recent case of *Siddens v. Siddens*, 101 S. W. 377, 31 Ky. Law Rep. 66, we recognized and applied the same principle, although the action was one by the wife for both divorce and enforcement of the contract.

The rule thus announced being conclusive of the case at bar, the judgment is affirmed.

MILLER, J., not sitting.

LOUISVILLE & N. R. CO. v. IRBY.

(Court of Appeals of Kentucky. Feb. 14, 1911.)

APPEAL AND ERROR (§ 1214*)—REVERSAL—RETRIAL—EVIDENCE.

Where a judgment is reversed, the case is not to be retried on the testimony at the former trial, but is to be governed by testimony introduced on the new trial.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4715; Dec. Dig. § 1214.*]

On petition for modification of opinion. Overruled.

For former opinion, see 132 S. W. 303.

NUNN, J. Appellant filed a petition for a modification of the opinion in this case

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

(132 S. W. 393), and insists that the court misconstrued the testimony as to whose duty it was to give the signal for the separation of the cars at the time Irby was injured. Conceding this to be true, which we do not decide, the case is not to be tried upon the testimony of the last trial, but is to be governed by the testimony on the future trial, and, if there should be a conflict on this point, then the court should also submit that issue to the jury.

The opinion is modified to this extent, and the petition for modification is overruled as to other matters.

HART'S ADM'R v. LOUISVILLE RY. CO.†
(Court of Appeals of Kentucky. Feb. 14, 1911.)
APPEAL AND ERROR (§ 927*)—RECORD—PRE-SUMPTIONS.

The court, on appeal from a dismissal at the close of the opening statement of plaintiff's counsel, must presume that the action was correct, in the absence of a bill of exceptions disclosing the reason of the dismissal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 8748; Dec. Dig. § 927.*]

Appeal from Circuit Court, Jefferson County, Common Pleas Branch, Third Division.

Action by Edward Hart's Administrator against the Louisville Railway Company. From a judgment of dismissal, plaintiff appeals. Affirmed.

Edwards, Ogden & Peak, for appellant. Fairleigh, Straus & Fairleigh and Howard B. Lee, for appellee.

NUNN, J. Edward Hart was killed by the alleged negligence of the city of Louisville and appellee. An action was instituted for the recovery of damages, and a jury was impaneled to try the case. After appellant's counsel made a statement of the case, the court entered the following order: "At the conclusion of the plaintiff's opening statement to the jury, the defendant Louisville Railway Company moved the court to dismiss the petition herein as to it, to which the plaintiff objected. The court, being advised, ordered said motion be and is sustained, to which plaintiff excepts." There was no bill of exceptions tendered or filed, and we therefore have no means of knowing what was contained in the statement of counsel for appellant, or of ascertaining in any particular the reason for the court's action.

It appears that appellee filed an answer to the petition of appellant, by the first paragraph of which it controverted the allegations of the petition; that by the second it pleaded contributory negligence on the part of Edward Hart; and that by the third it set forth a settlement in which it claimed it paid \$1,000 to Patrick Hart, the father and only heir of Edward Hart, in full satisfaction of the claim, and pleaded it in bar

of appellant's right to recover. It was also alleged in this last paragraph that Christ Schneider was illegally appointed administrator, that he had no right to act as such, that his appointment was made by the county court before two terms had convened after the death of Edward Hart, and that the appointment was not made at the request of Patrick Hart, who had not waived his right to be appointed the administrator. Appellee filed a demurrer to this paragraph, and the court rendered a written opinion in passing upon it, which is filed in the record, in which he decided that the settlement was not a bar to this action, that the administrator alone had the right to bring such actions and settle the damages, but overruled the demurrer because of the later allegations contained therein with reference to the illegal appointment of appellant as administrator. This opinion was delivered by a judge other than the one who presided at the trial and made the order which we have copied herein.

The record does not show whether the presiding judge at the trial differed from the former judge and decided that the settlement with Patrick Hart was a bar to the prosecution of this action or not. There is nothing in the record with reference to this matter, or with reference to what the statement of counsel for appellant was upon which the court acted in dismissing the action. If that order had shown that the court dismissed the action because it considered the settlement with Patrick Hart a bar to this proceeding, then the question argued by counsel on this appeal would have been properly presented; but from the record as it is we cannot say that, only by implication. There should have been a bill of exceptions, as required by the Code, informing us why the court dismissed the action, and, in the absence of this, we must presume the action of the lower court was correct.

For these reasons, the judgment of the lower court is affirmed.

EASTERN KENTUCKY TELEPHONE & TELEGRAPH CO. v. HARDWICK et al.

(Court of Appeals of Kentucky. Feb. 14, 1911.)
ELECTION OF REMEDIES (§ 7*)—ACTS CONSTITUTING ELECTION.

Persons who furnished a telephone company money to construct telephone lines, under an agreement that they were to receive the receipts of the company until the money advanced by them was repaid, did not, by bringing an action for damages for failure of the company to keep its lines in repair, and by failing to attempt to collect the rent or tolls, waive their rights to the receipts, or abandon the clauses of the contract entitling them to relief, or waive their lien upon the property given by a provision of the contract in case of the company's failure to deliver the receipts according to the terms of the contract.

[Ed. Note.—For other cases, see Election of Remedies, Cent. Dig. § 12; Dec. Dig. § 7.*]

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

† Rehearing denied April 13, 1911.

Appeal from Circuit Court, Powell County. Action by J. H. Hardwick and others against the Eastern Kentucky Telephone & Telegraph Company. From a judgment for plaintiffs, defendant appeals. Affirmed.

John D. Atkinson and Henry Watson, for appellant. C. F. Spencer and R. L. Greene, for appellees.

CARROLL, J. This is the second appeal of this case. The opinion on the former appeal may be found in 106 S. W. 307, 32 Ky. Law Rep. 582. As stated in that opinion, in March, 1906, the appellees furnished the money to construct the telephone lines, under an agreement that they were to receive the receipts of the company until the money advanced by them was repaid. In February, 1907, Hardwick and Fuller brought suit against the company to recover the money they had advanced, on the ground that the company had failed to properly maintain the telephone lines, and had permitted them to get out of repair to such an extent as to destroy the value of the telephones, with the result that Hardwick and Fuller could not collect their money out of the receipts. An issue was made upon the question as to whether or not the company had exercised ordinary care to keep its telephones and lines in good order, and upon a trial a judgment was rendered in favor of Hardwick and Fuller for the amount claimed.

In reversing the case the court proceeded upon the theory that, as Hardwick and Fuller had agreed to look to the receipts of the company for the payment of their debt, they were only entitled to recover in that action the amount they had been damaged by the failure of the company to keep its lines and telephones in such condition as that the receipts would be of some value, and said: "The company was bound to Hardwick and Fuller, to use ordinary care to keep and maintain its telephones and lines in order; and, if it failed to exercise such care, it is liable to Hardwick and Fuller for the damages they thereby sustained. The measure of damages is the amount that the rents were reduced by reason of the negligence of the company. As this will necessitate an accounting with each customer, the case should be transferred to equity and referred to the commissioner, to ascertain what reductions the several customers were entitled to under the principles we have indicated; and judgment should be rendered against the company in favor of Hardwick and Fuller for the amount of the deductions. But no deduction will be allowed, except where the company failed to remedy the defect in a reasonable time after it had notice of the trouble. * * * The sum recovered herein by plaintiffs must stand as a credit on their debt and interest."

Upon a return of the case, and at the March term, 1908, of the Powell circuit court,

Hardwick and Fuller filed a supplemental petition, in which they stated that the company had, after the institution of the original action, placed their telephone lines in good repair, and had proceeded to and did collect all the rents and tolls that had accrued on the lines since the institution of that action, which amounted to something like the sum of \$1,000, and that it refused to turn this money over to them, or to apply it to the payment of their debt. The company admitted that it had collected \$454.90, and on March 26, 1908, a judgment was rendered in favor of Hardwick and Fuller for this amount, and the cause was referred to the commissioner, to ascertain and report the amount lost by reason of the company permitting its lines and telephones to remain out of repair, and the amount that should have been earned. At the June term, 1908, the commissioner reported that the amount that had been or should have been collected by the company was \$968.65.

Thereupon Hardwick and Fuller filed a supplemental petition, seeking to recover the full amount of their debt, and to enforce the lien against the lines as provided in the contract, which stipulated that "it is understood that the line built, with all its equipment, is to belong to first party (telephone company) absolutely, second party (Hardwick and Fuller) owning nothing in same, unless, however, they should fall upon demand, or within a reasonable time after demand, to deliver to said Hardwick and Fuller said receipts for said payment of rents and tolls as above named, in which event they may have a prior lien, and may assert said lien in any court in Powell county upon that part of the telephone system built above the river towards Stanton." Under the supplemental pleadings filed, and after receiving the report of the commissioner and hearing the evidence introduced, the court rendered a judgment against the company for the full amount of the debt, with interest thereon, to be credited by the amount paid. It was further adjudged that Hardwick and Fuller had by the terms of the contract a lien, and it was ordered that the lien be enforced, and that the property upon which the lien existed be sold to satisfy the balance due on the debt.

The company complains of this judgment upon the ground that Hardwick and Fuller by the institution of their action waived the right to the receipts, and, furthermore, that by their failure to attempt to collect any of the rents or tolls they abandoned the clauses of the contract entitling them to relief, and that by their election to sue for a breach of the contract and their refusal to collect the receipts they had elected to waive their lien upon the property.

There is no merit in any of these contentions. The substance of the agreement between the parties was that the company should keep its lines in good order, and

that out of the receipts Hardwick and Fuller should be repaid the amount advanced by them and that upon the failure of the company to keep its lines in good order, or to deliver to Hardwick and Fuller the receipts, they should have a lien upon the property. As the company committed a breach of its contract in failing to keep its lines in good order, and in failing to turn over the receipts to Hardwick and Fuller, they had the right to bring a suit for the full amount of their debt, and enforce their lien upon the property.

This relief the court granted, and the judgment is affirmed.

CONLEY et al. v. FAIRCHILD.

(Court of Appeals of Kentucky. Feb. 14, 1911.)

1. EASEMENTS (§ 18*)—CREATION—WAYS OF NECESSITY.

Where, on the purchase of land from which there was no passway to the public road except over the grantor's land, the purchaser moved on the land, and used the passway before a deed was made, at which time a contract was executed whereby the grantor gave the grantee a passway so long as he should remain the owner of the land over which the passway lay, the grantee was entitled to continue his use of the passway after the death of the grantor.

[Ed. Note.—For other cases, see Easements, Cent. Dig. § 50; Dec. Dig. § 18.*]

2. EASEMENTS (§ 18*)—CREATION—GRANT.

A grantee of land acquires title as appurtenant thereto to a way of necessity over adjoining land owned by the grantor, though it is not named in the conveyance, and whether the grantee has another outlet or not.

[Ed. Note.—For other cases, see Easements, Cent. Dig. § 53; Dec. Dig. § 18.*]

Appeal from Circuit Court, Magoffin County. Suit by Samuel Fairchild against Sarah Conley and others. From a judgment for plaintiff, defendants appeal. Affirmed.

McGuire & McGuire, R. H. Cooper, and J. H. Sublett, for appellants. John H. Gardner, for appellee.

LASSING, J. This appeal involves the right of appellee to a passway over the lands of appellant. Appellant's father was the owner of a large body of land in Magoffin county, Ky., and some time prior to 1883 sold off a small tract to one Ezekiel Gullet. In 1883 he sold, by title bond, another tract to John Fairchild, father of appellee, and still another tract to appellee in the same year. Appellee purchased of his father the lands for which he held a title bond from appellant's father, and in April, 1884, received a deed for the land which he and his father had purchased from Louis P. Conley, the father of appellant. At the same time that the deed was executed, the following writing was executed by Louis P. Conley and his wife, and delivered to John Fairchild: "For a good and valuable consideration, to wit,

ten dollars, in price of land this day conveyed to Samuel W. Fairchild, I hereby agree and bind myself to give said Fairchild a passway over my lands that is a good way for a wagon road leading from the land this day conveyed to said Fairchild by me and my wife to Licking River; that is so long as I remain the owner of said land said way to be open to said Fairchild at his pleasure and without stop or hindrance on my part. Witness my hand this 19th April, 1884. L. P. Conley, Sarah Conley." The passway described in the pleadings was used without objection until the death of Louis P. Conley, when appellant, having become the owner of a portion of the land over which the passway run, attempted to close it. The effort brought on a lawsuit, of which this appeal is the offspring. The evidence shows that Gullet had no other passway from his purchase to the public road except over the lands of appellant's father, and that he used the passway in dispute, along with appellee, as long as he owned the land. Appellee bought Gullet's land, and relies upon and claims said passway as an appurtenance to the Gullet land; and he also pleads that when he contracted for his own land in 1883 there was no other passway from it to the public road except over the land of appellant's father, and that this sale to him carried with it a right to go to and from it to the public road.

The chancellor held in favor of appellee, and adjudged him entitled to the passway. We are of opinion that this judgment was right for the twofold reason: First, because the evidence shows that, before the deed was made to appellee, he had moved upon his purchase and was using the passway in question, not under any written contract, but under his agreement of purchase that it belonged to him as an outlet to his land; and, second, because it passed with the Gullet land to the appellee. It will not do to say that a right or appurtenance which belonged to Gullet's land did not pass with its conveyance because not especially set out or named in the conveyance. The true rule would seem to be that it did pass unless expressly reserved. Appellee knew that the passway belonged to the Gullet land and was for its use, and the knowledge of its existence may have induced him to buy it, or pay more for it than he would otherwise have been willing to pay. The fact that appellee had another outlet or outlets cannot militate against his right to this one, and we have not considered the evidence as to the availability or suitability of other outlets. The decided weight of the evidence supports appellee's contention that the writing relied upon by appellant was not executed to him, or at his request, but to his father, without his knowledge.

On the whole case, considering the fact

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

that appellant's father owned all of this land, to which there was no good outlet, if any at all, and that, before the execution of the writing relied upon by appellant, the appellee and his vendor, Gullet, were using this passway to their land as a matter of right, we are of opinion that the writing which was executed under the circumstances set out in the evidence cannot in any way abridge the rights of appellee to the use of said passway.

Judgment affirmed.

CHESAPEAKE & O. RY. CO. v. SELSOR.
(Court of Appeals of Kentucky. Feb. 10, 1911.)

1. CARRIERS (§ 353*)—TRESPASSERS.

One who boards a train after the conductor has rightfully refused to carry him because of his intoxication may be ejected, though he has a ticket.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. § 1415; Dec. Dig. § 353.*]

2. CARRIERS (§ 236*)—DISORDERLY PERSONS—DUTY TO RECEIVE.

A carrier need not receive as a passenger one who is intoxicated or otherwise in an improper condition.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 968-972; Dec. Dig. § 236.*]

3. CARRIERS (§ 236*)—DISORDERLY PERSONS—STATUTORY PROVISION—EFFECT.

Ky. St. § 806 (Russell's St. § 5350), providing for punishment and ejection of disorderly passengers, was enacted for the protection of the carrier, and applies only to persons received on a train, and does not change the common-law rule as to what passengers carriers must receive.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 968-972; Dec. Dig. § 236.*]

Appeal from circuit court, Lewis County.

Action by M. D. Selsor against the Chesapeake & Ohio Railway Company. Judgment for plaintiff, and defendant appeals. Reversed, and new trial ordered.

Worthington, Cochran & Browning, for appellant. A. D. Cole and Jno. E. Littleton, for appellee.

HOBSON, C. J. M. D. Selsor brought this suit against the Chesapeake & Ohio Railway Company, charging that he bought a ticket at Vanceburg, Ky., to go to South Portsmouth, Ky., on April 3, 1910, that he got on board the regular passenger train to go to South Portsmouth, and that the conductor stopped the train and ejected him from it. An answer was filed by the defendant putting in issue the allegations of the petition, and pleading affirmatively facts to warrant his ejection from the train. On a hearing of the case there was a verdict and judgment in his favor for the sum of \$200. The railroad company appeals.

The facts in the case are few and simple, and there is little conflict in the evidence. The plaintiff bought his ticket from the tick-

et agent, and, when the train came, started to get on the train. The conductor saw him, and told him not to get on the train, that he would not carry him. He then went up to the smoker and got on the car, when the brakeman saw him, stopped the train, and put him off. The conductor testified that he told him not to get on the train, that he could not carry him because he was in a very drunken condition, and a young man was leading him. Other witnesses say that he was staggering drunk or helplessly intoxicated, while others say that he was drinking, but not boisterous, and was able to walk. On this evidence the court gave the jury these instructions:

"(1) The jury are instructed that if they shall believe from the evidence that the plaintiff, M. D. Selsor, purchased from the agent of defendant at Vanceburg, Ky., a ticket over the defendant's railroad from said point to Portsmouth on April 3, 1910, and offered to become a passenger on defendant's train on the said day on the ticket so purchased, and the defendant refused to accept him as a passenger, and expelled him from the train after he had entered thereon for the purpose of becoming a passenger, then the law is for the plaintiff, and the jury will find for him such a sum of money as will fairly and reasonably compensate plaintiff for humiliation or mortification, if any, to which he may have been subjected by reason of his being removed from the train, not exceeding, however, the sum of \$2,000, the amount claimed in the petition. But, if the jury shall believe from the evidence as indicated in instruction No. 2, they will find for defendant, although they may believe the plaintiff was expelled from defendant's train or refused passage thereon as indicated in this instruction.

"(2) The jury are instructed that it is a public offense for any person while riding on a passenger train in this state to be drunk thereon to the annoyance of other passengers on said train, and it is the right and duty of the conductor in charge of a train upon which such offense is committed either to put the person so offending off the train, or to give notice of such offense to some peace officer at the first stopping place where any such peace officer may be, and it is the duty of such peace officer when so notified by such conductor to arrest such offender, and carry him to the most convenient magistrate of the county in which the arrest is made, and in expelling the offender from the train the conductor has the right to use such force as is reasonably necessary therefor, if the conviction be forcibly resisted. And if the jury shall believe from the evidence that the plaintiff, M. D. Selsor, at the time and upon the occasion when he was expelled from the defendant's passenger train on April 3, 1910, mentioned in the evidence, if he was

so expelled therefrom, was intoxicated to such an extent as to be an annoyance or offensive to passengers on the train, then the defendant had the right to refuse to accept the plaintiff as a passenger on its train, and to expel him from the train if he got on same in such condition, and if plaintiff was in the condition aforesaid, and was expelled from defendant's train for that reason, the law is for the defendant, and the jury will so find."

It is undisputed in the evidence that the conductor told the plaintiff not to get on the train, that he could not carry him, and that the plaintiff after he was so told by the conductor, in violation of the conductor's instructions, went upon the car. When he so went upon the car, although he had a ticket, he was a trespasser, if the conductor was right in refusing to carry him, and in this event he cannot recover anything for his ejection from the train. The carrier was not obliged to receive the plaintiff as a passenger on its train if he was drunk, although he had bought a ticket. Persons who are not in a proper condition to be received on the train may be refused admittance by the carrier. Section 806, Ky. St. (Russell's St. § 5350), applies to passengers who have been received on the train. It has no application to persons who present themselves to be received. The statute was intended for the protection of the carrier, and not to change the common-law rule as to what persons the carrier is bound to receive. The case of *C. & O. R. R. Co. v. Crank*, 128 Ky. 329, 108 S. W. 276, 16 L. R. A. (N. S.) 197, is not like this case. There the passenger was on the train. He had been accepted as a passenger, and was ejected from the train while on his journey. Section 806, Ky. St., is as follows: "If any person while riding on a passenger or other train, shall, in the hearing or presence of other passengers, and to their annoyance, use or utter obscene or profane language, or behave in a boisterous or riotous manner, or obtain, or attempt to obtain money or property from any passenger by any game or device, he shall be fined for each offense not less than twenty-five nor more than one hundred dollars, or imprisoned in the county jail not less than ten nor more than fifty days, or both so fined and imprisoned; and it shall be the duty of the conductor in charge of any train upon which there is a person who has violated the provisions of this section either to put such person off the train, or to give notice of such violation to some peace officer at the first stopping place where any such officer may be." The statute was applicable in the *Crank* case, but it has no application here. The question here is simply: Did the conductor have the right to refuse to receive the plaintiff as a passenger on the train? *Louisville, etc., R. R. Co. v. McNally*, 105 S. W. 124, 31 Ky. Law Rep. 1357, is on all fours with this case. There it was held that

the court should instruct the jury that if the plaintiff, when he offered to get on the train, was so far intoxicated as to affect his conduct, the conductor had a right to refuse to receive him on the car, and the jury should find for the defendant. In lieu of the instructions given, the court should have instructed the jury as above indicated. Judgment reversed, and cause remanded for a new trial.

ILLINOIS CENT. R. CO. v. HURT et ux.
(Court of Appeals of Kentucky. Feb. 10, 1911.)

1. CARRIERS (§ 318*)—INJURY TO PASSENGERS
—EVIDENCE—SUFFICIENCY.

Evidence held to sustain a finding that a female passenger was injured in alighting from a moving train.

[Ed. Note.—For other cases, see *Carriers*, Cent. Dig. § 1314; Dec. Dig. § 318.*]

2. CARRIERS (§ 318*)—INJURY TO PASSENGERS
—PROXIMATE CAUSE.

That a passenger strained in alighting from a moving train began suffering immediately, and after continuous pain for several days miscarried, warrants a finding that the strain proximately caused the miscarriage.

[Ed. Note.—For other cases, see *Carriers*, Dec. Dig. § 318.*]

3. APPEAL AND ERROR (§ 1068*)—HARMLESS
ERROR—INSTRUCTIONS.

Error in authorizing recovery for permanent personal injury was harmless where the award was only sufficient to cover pain suffered.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. § 4228; Dec. Dig. § 1068.*]

Appeal from Circuit Court, Ohio County.
Action by James Hurt and wife against the Illinois Central Railroad Company. Judgment for plaintiffs, and defendant appeals. Affirmed.

H. P. Taylor, Blewett Lee, C. L. Sivley, and Trabue, Doolan & Cox, for appellant. Heavrin and Woodward, for appellees.

CLAY, C. James Hurt and Louellen Hurt are husband and wife. They brought this action to recover damages for personal injuries which they charged Louellen Hurt sustained through the negligence of appellant, Illinois Central Railroad Company. The jury returned a verdict in their favor for \$600, and the railroad company appeals.

Three grounds are relied upon for reversal: (1) Error of the trial court in failing to award the appellant a peremptory. (2) The verdict was flagrantly against the evidence. (3) Error in the court's instructions in permitting a recovery for permanent injury.

On December 12, 1909, Louellen Hurt, together with her husband, James Hurt, M. V. Hurt, and William Ingram, boarded appellant's train at Rockport for the purpose of going to McHenry. The train stopped at McHenry. There were several passengers for that point, some of whom got off, but before all the passengers alighted several

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

others boarded the train. Their coming into the car delayed Mrs. Hurt. When she reached the steps, the train was in motion. She claims that she walked to the steps as fast as she could. She describes the manner in which she got off as follows: "The conductor just barely caught my arm here, and, when I hit the ground, I went back this way, and I straightened on up, and Mr. Ingram says to me, 'Did they hurt you?' He boarded with us a long time, and he said to me, 'Did they hurt you?' and I said, 'No, sir.'" Before she got home, her side began hurting her. Her ankle also pained her. In a day or two she sent for a physician, who visited her a few times. On December 29th she had a miscarriage. Her physician testified that she showed symptoms of a miscarriage which might have resulted from a fall or a jerk. She had suffered a miscarriage once before. After the injury she was unable to do any work, and was not able to work at the time of the trial. The witnesses M. V. Hurt and William Ingram testified that Mrs. Hurt was jerked backward when she alighted from the train. Five trainmen, including the auditor and others, and one other witness testified that Mrs. Hurt was assisted in getting off by the conductor and brakeman; that the train at the time was moving very slowly, if at all; and that Mrs. Hurt was gently lowered to the platform. Mrs. Agnes Hurt, the mother-in-law of Louellen Hurt, stated on cross-examination that Louellen Hurt said to her, "They lifted her off the platform just as easy." Two physicians who testified for appellant stated that 90 per cent. of the women who had once miscarried would miscarry again; that appellee's mishap may have occurred from any of her exertions during the day with as much probability as from alighting from the train.

It is earnestly insisted by appellant that Mrs. Hurt's own account of the manner in which she was taken off the train does not show that she was jerked or thrown, and that, when she testified to the fact of miscarriage as a result of her alighting from the train, she simply stated a conclusion, and no facts upon which to base it. While it is true that she did not state that she was jerked or thrown, she says, "And, when I hit the ground, I went back this way, and I straightened on up." Her language shows that she indicated to the jury how she went back and how she straightened up. Furthermore, the very fact that one of the parties present asked her if she was hurt would indicate that there was something connected with the way in which she got off from which it might be inferred that she was hurt. Her two witnesses stated that she was thrown or jerked back. Any one who has had any experience in assisting a woman in alighting from a moving train

will be inclined to believe this statement. While numerically considered, the weight of the evidence is to the effect that Mrs. Hurt was gently lowered to the platform, when we consider Mrs. Hurt's evidence and that of her witnesses in connection with the attending circumstances we cannot say either that there was no evidence that she was jerked, or that the finding of the jury upon that question was flagrantly against the evidence. We also conclude that inasmuch as she began experiencing pain immediately after she got off the train, which continued for several days, and that she then suffered a miscarriage, the jury was authorized to find from the evidence that the miscarriage was the natural and proximate result of the shock she experienced when she alighted from the train, in spite of appellant's evidence to the effect that she had theretofore miscarried, and would probably miscarry again, and that the miscarriage might have resulted from some other cause.

As the jury awarded appellee only \$600, it is perfectly apparent that they allowed her nothing for permanent injury. The amount awarded was no more than sufficient to compensate her for the mental and physical suffering incident to the miscarriage. That being true, appellant's substantial rights were not prejudiced by the instruction which authorized a recovery for permanent injury. Judgment affirmed.

RECCIUS v. WEBER et al†

(Court of Appeals of Kentucky. Feb. 9, 1911.)

DEDICATION (§ 18*)—ALLEYS.

An owner of land fronting on a street divided it into lots fronting on the street, leaving a 10-foot alley in the rear. He conveyed the lots with the understanding that the alley was for the common benefit of all purchasers. A deed to a purchaser made subsequent to a sale of some of the lots referred to the alley as having been established for the use of the property owners abutting thereon. *Held*, that the alley was dedicated for the use of the owners of the lots, and one of them could not obstruct it by the erection of buildings.

[Ed. Note.—For other cases, see Dedication, Cent. Dig. §§ 33-36; Dec. Dig. § 18.*]

Appeal from Circuit Court, Jefferson County, Chancery Branch, Second Division.

Action by Louisa Weber and another against Frank Reccius. From a judgment for plaintiffs, defendant appeals. Affirmed.

B. F. Gardner, for appellant. Lee Hamilton, for appellees.

LASSING, J. One Alexander Cassella was the owner of a lot or parcel of ground in Louisville, Ky., on the corner of Garland avenue and Twenty-Eighth street, fronting 150 feet on Garland avenue by 200 feet on Twenty-Eighth street. For the purpose of effecting a sale of it, he caused this parcel of ground to be cut up into seven lots, each

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes 134 S.W.—10

† Rehearing denied April 13, 1911.

fronting on Twenty-Eighth street, five of them having a frontage of 30 feet each and two 25 feet each. An alley or passway, 10 feet in width, was cut off of the back end of these lots, so that each was 140 feet in depth. The appellant, Reccius, bought the two 25-foot lots, and the appellees the other lots. Reccius built, or caused to be built, a stable or shed on the the passway or alley in the rear of his lots, and thus closed it to the use of the other owners. To compel him to remove the building and open the passway, this suit was brought.

His deeds call for a lot 50 feet on Twenty-Eighth street by 140 feet deep. It is not claimed for him that any part of this alley is covered by his deeds; but he seems to rest his right to hold and use it on the theory that it has not been dedicated to and accepted by the city, and that, therefore, no one but his vendor can maintain such a suit. When appellant bought his lots, he was advised of the existence of this passway. Cassella told him of it. His deed called for it. All the owners, including appellant, bought with the understanding that the alley or passway was retained for their common use. The deed to appellee Hofmeister, made some years after appellant's deed, in describing the property conveyed, refers to this alley in the following language: "Thence southwardly along said line of 28th street 30 feet, and extending back westwardly, of that width throughout between lines parallel with Garland avenue, 140 feet to a private alley 10 feet wide, heretofore established by first party for the use and benefit of the property owners abutting thereon." This language so plainly shows a dedication of this alley for the use and benefit of the lot owners that further comment is deemed unnecessary. The grantee Cassella could not deny its dedication if he would.

A question similar to that here presented was before this court in the case of *Alexander v. Tebeau*, 132 Ky. 487, 116 S. W. 356, and the court held, on facts no stronger than those here presented, that they were sufficient to show a dedication of the alley to a public purpose. The case of *Brizzaloro v. Senour*, 82 Ky. 353, relied upon by appellant, is not in point. The facts are entirely dissimilar.

Viewed from any standpoint, the judgment of the lower court was right; and it is therefore affirmed.

COURTNEY SHOE CO. v. E. W. CURD & SON.

(Court of Appeals of Kentucky. Feb. 14, 1911.)

1. EVIDENCE (§ 448*)—WRITING—EXPLANATION BY PAROL.

Where a postal card was sent by a seller to a buyer acknowledging receipt of an order and promising prompt and careful attention,

parol evidence was inadmissible to explain the same.

[Ed. Note.—For other cases, see Evidence, Dec. Dig. § 448*.]

2. SALES (§ 23*)—ACCEPTANCE—RECEIPT OF ORDER—ACKNOWLEDGMENT—EFFECT.

Plaintiff, a drummer, secured an order from defendants for certain stock shoes, and also for sample shoes at a large discount in the price. Plaintiff sent defendant a postal card acknowledging receipt of the order, and stating that it would receive "our prompt and careful attention." A few days later, plaintiff wrote defendants a letter rejecting so much of the order as provided for sample shoes, stating that the drummer had no authority to sell the samples. Held, that the postal card was a mere acknowledgment of the receipt of the order and a promise that it should receive attention, and did not constitute an acceptance of the order.

[Ed. Note.—For other cases, see Sales, Cent. Dig. § 46; Dec. Dig. § 23*.]

Appeal from Circuit Court, Barren County.

Action by the Courtney Shoe Company against E. W. Curd & Son. Judgment on a verdict in favor of defendant on a counterclaim, and plaintiff appeals. Reversed and remanded.

W. R. Gardner and Gardner & Jones, for appellant. V. H. Baird and Baird, Richardson & Summers, for appellee.

HOBSON, C. J. The Courtney Shoe Company is a wholesale house doing business in St. Louis, Mo. E. W. Curd & Son are merchants doing business at Cave City, Ky. On August 22, 1909, Curd & Son gave W. B. Yater, a traveling salesman of the Courtney Shoe Company, two orders, one for stock shoes amounting to \$49.15, the other for sample shoes amounting to \$1,772.35; both to be shipped as soon as it could. The order though made on the 22d, was dated the 21st, as the 22d was Sunday. It was mailed to the house by the drummer, reaching the house on August 23d; the house then wrote Curd & Son the following card: "St. Louis, Mo. August 23, 1909. Dear Sirs: Your order of 8/21—09 to our Mr. Yater is at hand and will receive our prompt and careful attention. Thanking you for same, and hoping to merit your future favors, we are, Yours truly, The Courtney Shoe Co." On August 31st the Courtney Shoe Company wrote Curd & Son a letter in which they rejected the order for sample shoes amounting to \$1,772.35, telling them that the drummer had no authority to sell the samples, and that they could not accept the order. The stock shoes to the amount of \$49.15 were shipped, and, Curd & Son refusing to pay for them, the Courtney Shoe Company brought this suit to recover the price. Curd & Son pleaded as a counterclaim the failure of the plaintiff to fill the order for the sample shoes, alleging that the order was accepted by the house, and that it had thereafter refused to fill the order to their damage in the sum of \$1,083.20. Issue was joined on the counter-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

claim, and on a trial of the case before a jury there was a verdict for the defendant on the counterclaim, fixing the damages at \$250. The court entered judgment on the verdict, and the plaintiff appeals.

The proof for the plaintiff showed that, when the drummer's order reached the house, the card above quoted was mailed to the customer to acknowledge the receipt of the order, according to a custom of the house; that the order was then referred to the officer who passed on orders; that he on the same day, as soon as the order reached him, marked it rejected, and mailed it to the drummer, directing him to return it to the customer. The drummer, on receiving the letter, returned it to the house, asking the house to send it to the customer, and immediately thereupon the letter of August 31st was written and mailed. The proof for the plaintiff was also to the effect that such cards are in common use among wholesale merchants, and are mailed simply to let the customer know that his order has been received from the drummer, before they are passed on by the house. On the other hand, the proof for the defendant was to the effect that such cards were often the only notice that the customer received, before he received notice that the goods were shipped, and that in this case the defendant received no other notice than the card, as to the order for stock shoes, \$49.15. On this proof the court told the jury that they should find for the defendant unless the card quoted was intended as an acceptance of the order, when it was sent by the plaintiff, thus submitting to the jury the effect of the card. The rule is that the construction of a writing is for the court. It is only when parol evidence is admissible to explain a writing that the matter may be submitted to the jury. In 1 Greenleaf on Evidence, § 278, the rule is thus stated: "The terms of every written instrument are to be understood in their plain, ordinary, and popular sense, unless they have generally, in respect to the subject-matter, as by the known usage of trade, or the like, acquired a peculiar sense, distinct from the popular sense of the same words; or unless the context evidently points out that, in the particular instance, and in order to effectuate the immediate intention of the parties, it should be understood in some other and peculiar sense."

There were no technical words used in the card. There is no proof of any usage of trade by which the words used have acquired a peculiar sense distinct from their popular sense. The words are therefore to be understood in their plain, ordinary, and popular sense, and what they mean is a question for the court. In *Manier v. Appling*, 112 Ala. 663, 20 South. 978, the Supreme Court of Alabama had before it the question whether a card acknowledging the receipt of an order sent in by a drummer, and stating that "the

same shall receive prompt attention," was an acceptance of the order. Holding that it was not, the court said: "The response, and the only response, the defendants made, was an acknowledgment by postal card of the receipt of the order or proposal, accompanied by the expression, 'the same shall have prompt attention'; and it is this response, it is insisted, constituted an acceptance of the proposal, converting the proposal and acceptance into a contract of sale. Unless these words, 'the same shall have prompt attention,' are deflected from their natural, ordinary meaning, they cannot be construed into an acceptance of the proposal of the plaintiff, converting the two into a concluded or completed contract. The operative words are 'attention' and 'prompt.' The latter, when read in connection with the terms of the proposal that the shoes should be shipped on the succeeding 15th of June, signifies, and was intended to signify, no more than that attention would be given in time to meet this term. If given within that time, it was as speedy as the nature or necessities of the transaction required. Promise to give the proposal attention was not a promise of acceptance; it was not an assent to it. It was no more than a courteous promise to give it consideration, and this we do not doubt is the sense in which it is generally, if not universally, employed in transactions of this character." In *Rees v. Warwick*, 2 Barn & Ald. 113, the person who was notified that a bill of exchange had been drawn upon him replied that it should "have attention." It was held that this did not as a matter of law import an acceptance of the bill. In *Cheboygan Paper Co. v. Swigart Paper Co.*, 140 Ill. App. 314, an order had been sent in by a drummer for certain goods. The house wrote a letter acknowledging the receipt of the order, and saying "same has gone forward to the mill for their attention." The court said: "This language cannot, in the opinion of a majority of the court, be held an acceptance of or an assent to plaintiff's order, nor more than a statement that the writer had sent the order to the defendant for its attention." In *Jordon v. Patterson*, 67 Conn. 473, 35 Atl. 521, the plaintiff sent the defendants 14 separate orders for goods. The defendants replied acknowledging and describing the orders received, expressing their thanks therefor, and subsequently delivered a portion of the goods, but declined to deliver the remainder. It was held, as a matter of law, that the order was accepted; but the ruling is based not so much on the language of the letter as the conduct of the parties. To same effect, see *Bauman v. McManus*, 75 Kan. 106, 89 Pac. 15, 10 L. R. A. (N. S.) 1138, where, upon the receipt of an order sent in by a drummer, the house sent a card like that before us, and afterward both parties by their conduct treated the order as accepted.

*The opinion is rested not so much on the card as on the subsequent letters written by the parties.

In the case at bar, if the plaintiff's letter of August 23d, rejecting the order, had been mailed to defendant directly, and not to the drummer, it is hard to believe that this controversy would have arisen. It is true the card uses the words "our prompt and careful attention"; but the addition of the word "careful" adds nothing to the sense, nor do the concluding words of the card thanking Curd & Son for the order and hoping to merit future favors. These are simply the usual expressions of merchants on receiving an order, and throw little light on the question of its acceptance or rejection. The promise to give the order attention was simply a promise to do what the plaintiff did. They did give it attention and rejected it. It is insisted that they did not reject it in a reasonable time, that eight days was an unreasonable delay; but the delay is explained by the fact that the letter was sent first to the drummer to forward to the customer, according to a custom of the house, and that he returned it to the house for it to write the customer, and this caused the delay which ensued. The order of the drummer was subject to the approval of the house. *Chas. Brown Grocery Co. v. Beckett*, 57 S. W. 458; *John Matthews Apparatus Co. v. Renz & Henry*, 61 S. W. 10; *Seven Hills Chautauqua v. Chase Bros.*, 81 S. W. 238; *L. A. Becker Co. v. Alvey*, 86 S. W. 974. The drummer had no authority to sell the samples. His action did not bind the house. It was promptly repudiated when it reached the house, and the defendant should not recover damages against the plaintiff for the refusal to deliver these goods upon the order taken by the drummer at a large discount below the regular selling price.

The question, when such an order is accepted, is not without importance. Until it is accepted it may be countermanded by the buyer. When it is once accepted, and the buyer's right to countermand is at an end, the seller cannot revoke the acceptance without the consent of the buyer. It is generally held that, if the seller does not formally accept the order, it is subject to countermand, until it is accepted by the shipment of the goods, but that it cannot be countermanded after the goods are shipped. *North-west Thresher Co. v. Kubicek*, 82 Neb. 485, 118 N. W. 94; *Main v. Tracey*, 86 Ark. 27, 109 S. W. 1015; *Zieme v. Parish*, 74 Kan. 542, 87 Pac. 685; *McCormick H. M. Co. v. Markert*, 107 Iowa. 340, 78 N. W. 33; *Star Union Line v. Boston Medical Inst.*, 126 Ill. App. 106. In determining what is an acceptance where there is nothing in the conduct of the parties to show an acceptance in fact of the order, we think it is a safe and sound rule that the words of the writing

shall be taken in their plain, ordinary, and popular sense, and that they should not be strained to express a meaning they do not naturally convey.

We therefore conclude that there was no acceptance of the order for the sample shoes, and that the court should have instructed the jury peremptorily to find for the plaintiff the amount of their claim sued for.

Judgment reversed, and cause remanded for further proceedings consistent herewith.

DOODY et al. v. BOWMAN et al.

(Court of Appeals of Kentucky, Feb. 9, 1911.)

1. INTOXICATING LIQUORS (§ 33*)—LOCAL OPTION ELECTION—PETITION AND ORDER.

Under Ky. St. § 2554 (Russell's St. § 4054), providing that the judge shall at the next regular term after receiving a petition for a local option election make an order therefor, the order cannot be made at the same term that the petition is received.

[Ed. Note.—For other cases, see *Intoxicating Liquors*, Dec. Dig. § 33.*]

2. INTOXICATING LIQUORS (§ 37*)—LOCAL OPTION ELECTION—CONTEST—NOTICE.

Under Ky. St. § 2568 (Russell's St. § 4063), providing that contestants of a local option election shall within 10 days after the election file with the clerk a written statement of grounds of contest, serve a copy on the judge, and publish notice thereof, the published notice need not copy the statement of grounds, but merely state that such statement has been filed.

[Ed. Note.—For other cases, see *Intoxicating Liquors*, Dec. Dig. § 37.*]

3. INTOXICATING LIQUORS (§ 37*)—LOCAL OPTION ELECTION—CONTEST—ESTOPPEL.

Citizens were not estopped from contesting a local option election by participating in it.

[Ed. Note.—For other cases, see *Intoxicating Liquors*, Dec. Dig. § 37.*]

Appeal from Circuit Court, Marion County.

Proceedings by B. F. Bowman and others against M. Doody and others to contest a local option election. From a judgment for contestants, contestees appeal. Affirmed.

Finley Shuck and Ben Spalding, for appellants. Lafe S. Pence, H. W. Rives, and Jno. R. Thomas, for appellees.

CARROLL, J. In this local option case the ground of contest was that the order calling the election was made on the same day that the petition was filed. Section 2554, Ky. St. (Russell's St. § 4054), provides that: "Upon application, by written petition, signed by a number of legal voters in each precinct of the territory to be affected, equal to twenty-five per cent. of the votes cast in each of said precincts at the last preceding general election, * * * it shall be the duty of the judge of the county court in such county, at the next regular term thereof after receiving said petition, to make an order on his order-book directing an election to be held. * * *

In *Wilson v. Hines*, 99 Ky. 221, 35 S. W.

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

627, 37 S. W. 148, 18 Ky. Law Rep. 233, which was also a local option contest, the petition was filed on the same day that the order directing the election to be held was made, and it was held that the order calling the election was unauthorized and void; the court saying: "In our opinion it was intended that the petition should be received in court, and there made a matter of record by the proper order entered on the order book, showing that it has been received and filed and the purpose of it, and that the order for the election should be made at the next regular term of the court thereafter." And this case was followed in *Cress v. Commonwealth*, 37 S. W. 493, 18 Ky. Law Rep. 633; *Smith v. Patton*, 103 Ky. 444, 45 S. W. 459, 20 Ky. Law Rep. 165. In *Locke v. Commonwealth*, 113 Ky. 804, 69 S. W. 763, 24 Ky. Law Rep. 654, the petition was not filed in court at a term preceding the one at which the election was ordered, and the court said: "The petition not having been properly filed, and the county judge having no authority to order the election, it was void." In view of these decisions, it is manifest that, if they are permitted to stand, the election must be held void. Counsel criticize the construction placed on the statute in the cases mentioned, but they have been too long adhered to to justify us in departing from the rule announced. The observance of it does not work any hardship or impose any unreasonable duty upon petitioners who desire to call an election. It is just as easy and convenient to file the petition at a regular, or a special, term, as it was held in *Smith v. Patton*, supra, might be done, and have the election ordered at the next regular term, as it is to file the petition on the same day upon which the order calling the election is made.

But counsel insist that the notice given of the contest was not sufficient. The election was held on August 11, 1910, and on August 16th more than 10 persons, citizens of and legal voters in the territory in which the election was held, filed in the office of the county clerk a notice signed by them, stating that "the undersigned citizens and legal voters of the city of Lebanon, Kentucky, in which an election was held on the 11th day of August, 1910, on the question of whether or not intoxicating liquors should be sold in said city, and in which election a majority of the votes as counted by the canvassing board have been counted in favor of the sale of such liquors, now protest against the issuance or recording of any certificate, and contest the result of said pretended election upon the following grounds, viz.: First, because it is shown by the records of the Marion county court that the petition for said election was filed on the 6th day of June, 1910, a regular term of the Marion county court, and on the same day and in the same order the said election was ordered by said court to be held on August 11th, 1910, and no other order of court filing said petition

or ordering said election was made or entered at any regular or special term of said court, and for said reason the said pretended election was and is absolutely void and of no effect, and no vote cast thereat should be counted as a legal vote, and no certificate of such result can be received or legally recorded." On the same day a copy of this notice was delivered to the judge of the Marion county court. On August 20, 1910, the following notice was delivered to the county judge: "To Whom It May Concern: Notice is hereby given that B. F. Bowman, and others (giving their names) on August 16th, 1910, filed in the office of the clerk of the Marion county court a statement of contest and grounds thereof, contesting the result of the local option election held in and for the city of Lebanon on August 11, 1910, under order of the Marion county court at the June term, 1910, thereof, and will prosecute and maintain the said contest as provided by law in such cases. Said contestants above named and each of them give you this notice that you shall not permit or record the certificates upon the records of the Marion county court." Copies of this last-mentioned notice on the day of its delivery to the county judge were posted, one at the courthouse door and three others at public places in the city of Lebanon, and were caused to be published in a newspaper published in the city of Lebanon in two consecutive issues thereof, issued first after the notice was given.

Section 2566, Ky. St. (Russell's St. § 4063), regulating the procedure for the contest of local option elections, provides: "(2) Any number of the citizens and legal voters, but not less than ten, of the county, city, town, district or precinct in which the election has been held, shall have the right to contest any election held under this law, and shall be designated the contestants. Such contestants shall, within ten days after the final action of the examining board, file in the office of the clerk of the county court a written statement of the grounds of the contest, and shall cause a copy thereof to be served on the county judge, and shall give notice thereof by written or printed notices to be posted at the court house door of the county, and in three or more public places in the county, city, town, district or precinct in which the election has been held, and shall cause the same to be published in some newspaper of the county, when possible, for two consecutive issues, commencing not later than the first issue of the paper after filing the statement. When a notice of the contest shall be executed on the county judge, the certificate shall not be recorded. (3) Any number of the citizens and legal voters, not less than ten, of the county, town, district, city or precinct in which the election has been held, may resist the contest by filing in the office of the clerk of the county court a statement controverting the grounds of the contestants.

and may state any additional grounds to sustain the election, and they shall be designated as the contestees." It seems to us that the requirements of this statute were fully and accurately complied with by the contestants. A written statement of the grounds of contest was filed in the office of the clerk of the county court within 10 days after the final action of the examining board, and within the said 10 days a copy of this statement was served on the county judge. Within the said 10 days notice of the fact that the statement was filed in the office of the county clerk was published in the manner required by the statute. The statute does not require the publication of a copy of the written statement setting out the grounds of contest that is filed with the county clerk. It is only necessary that notice of the fact that this statement has been filed shall be published, and this notice need not contain the grounds of the contest. Evidently the only reason for requiring the publication of the notice was to apprise the public of the fact that the election would be contested, so that any person desiring to controvert the grounds of contest might have opportunity to do so. *Derickson v. Conlee*, 133 Ky. 373, 117 S. W. 955.

It is further insisted that the contestants were estopped from contesting the election because they participated in it; but this point is not well taken. *Elliott v. Burke*, 113 Ky. 479, 68 S. W. 445, 24 Ky. Law Rep. 292.

Wherefore the judgment is affirmed.

O'REAR, J., not sitting.

WILLIS et al. v. WHAYNE.

(Court of Appeals of Kentucky. Feb. 9, 1911.)

1. LANDLORD AND TENANT (§ 290*)—RECOVERY OF PREMISES BY LANDLORD—FORCIBLE DETAINER.

In forcible detainer proceedings, where a brother of the lessee, during the continuance of the lease, fenced in a portion of the land and rented a portion of it to another, and it does not appear that the lessee took any steps to prevent his brother from entering on the land, his consent may be implied from the circumstances.

[Ed. Note.—For other cases, see *Landlord and Tenant*, Cent. Dig. §§ 1207-1216; Dec. Dig. § 290.*]

2. LANDLORD AND TENANT (§ 290*)—RECOVERY OF PREMISES BY LANDLORD—FORCIBLE DETAINER.

Where a lessor, in putting his lessee in possession, pointed out the boundaries of the tract, of which no one else was in possession at the time, the lessee's possession extended to the whole tract, so far as it affected the right of the lessor to recover, at the expiration of the term, in forcible detainer proceedings.

[Ed. Note.—For other cases, see *Landlord and Tenant*, Cent. Dig. §§ 1207-1216; Dec. Dig. § 290.*]

3. LANDLORD AND TENANT (§ 80*)—TERMINATION OF LEASE—DUTY TO SURRENDER POSSESSION.

Where a lessee consents to the taking possession of part of the leased premises by a

third person, the latter holds under the lessee, and at the termination of the tenancy is bound to surrender the leased premises.

[Ed. Note.—For other cases, see *Landlord and Tenant*, Cent. Dig. §§ 254-257; Dec. Dig. § 80.*]

4. LANDLORD AND TENANT (§ 291*)—RECOVERY OF POSSESSION BY LANDLORD—FORCIBLE DETAINER.

Where a third person forcibly takes possession of a part of leased premises without the consent of the lessee, the lessor at the expiration of the term may maintain forcible entry proceedings under Civ. Code Prac. § 452, subsec. 4, defining a "forcible detainer" as the refusal of a person who has made a forcible entry on the possession of a tenant for a term to deliver possession to the landlord, on demand, after the term expired.

[Ed. Note.—For other cases, see *Landlord and Tenant*, Cent. Dig. §§ 1232, 1233; Dec. Dig. § 291.*]

For other definitions, see *Words and Phrases*, vol. 3, pp. 2872, 2873.]

5. LANDLORD AND TENANT (§ 291*)—RECOVERY OF POSSESSION BY LANDLORD—FORCIBLE DETAINER.

Since deeds are admissible in evidence in forcible detainer proceedings by a landlord only to show the extent of possession, and not to show the right of possession, the court will not consider whether there was a mistake in the calls of a deed affecting the tract in question.

[Ed. Note.—For other cases, see *Landlord and Tenant*, Dec. Dig. § 291.*]

6. LANDLORD AND TENANT (§ 288*)—RECOVERY OF POSSESSION BY LANDLORD—FORCIBLE DETAINER.

A lessor may properly seek to recover possession of the leased premises from a third person claiming title by forcible detainer proceedings rather than by ejectment or an action to quiet title; the judgment in the forcible detainer proceeding involving only the question of possession, leaving the right to the land to be determined by proper action.

[Ed. Note.—For other cases, see *Landlord and Tenant*, Cent. Dig. § 1205; Dec. Dig. § 288.*]

Appeal from Circuit Court, McLean County.

Forcible detainer proceedings by D. M. Wayne against Henry Willis and another. From a judgment for plaintiff, defendants appeal. Affirmed.

Milton Clark, for appellants. Joe H. Miller, for appellee.

CLAY, C. This is a forcible detainer proceeding brought by appellee, D. M. Wayne, against appellants, Henry Willis and J. S. Willis, to recover possession of a tract of about 50 acres of land. The action was first tried before the county judge, who held that appellants were guilty of forcible detainer. On traverse to the circuit court, the same judgment was entered. From that judgment this appeal is prosecuted.

Many years ago, one Ezekiel Fleming owned a large body of land in McLean county lying on the waters of Cypress creek. On September 24, 1879, Fleming conveyed to S. H. Brown, who is referred to in the record as Hale Brown, 100 acres of this land, by deed, giving the courses and distances

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

of the land. On July 1, 1881, Fleming executed to Brown another deed for the same tract of land, for the purpose of correcting mistakes in the former deed. Subsequently, Ezekiel Fleming died, and an action was brought for the purpose of selling the remainder of his land to pay his debts. In the year 1884 a large tract of land owned by the decedent was sold, and appellee and his brother, W. I. Whayne, became the purchasers thereof. In the year 1908 the land was divided between them; appellee taking that portion involved in this controversy. According to the evidence, neither appellee's deed nor that of appellant Henry Willis covers the land in controversy. Upon the hearing of the case the court made the following finding of law and facts: "I find from the evidence that in 1903 the plaintiff, D. M. Whayne, and his brother, W. I. Whayne, leased to the defendant J. S. Willis a tract of land containing 50 acres, which was situated and lying in front of the double log house on the Fleming place and lying between the Greenville road and what was formerly known as the Hale Brown farm and the land of R. C. Bryant, which was then in the woods and uninclosed by fence, and he, since 1884, has been exercising ownership over all the land, and cutting timber off of it, and claiming same to well-marked boundary, and, when leased to the defendant J. S. Willis, he (J. S. Willis) began cutting timber on the land and clearing it, and he cleared part of the land, while acting under his lease contract, down to the land of R. C. Bryant, and I further find that, by the consent of defendant J. S. Willis, defendant Henry Willis entered upon the tract of land which J. S. Willis had leased from plaintiff, and he began to clear certain parts of the land leased by plaintiff to J. S. Willis, and at the expiration of the term of lease defendant Henry Willis was in possession by the consent of defendant J. S. Willis of a large part of the 50 acres which had been leased by J. S. Willis from plaintiff, and when J. S. Willis vacated possession he left defendant Henry Willis in possession, and Henry Willis refuses to surrender possession of a large part of the tract to plaintiff. From these findings of fact I conclude that defendants are guilty of the forcible entry and detainer complained of in the warrant, and a writ of restitution may issue."

It is earnestly insisted on this appeal that there was no evidence of possession on the part of appellee, nor was there any evidence tending to show that appellant Henry Willis entered upon the tract in controversy by consent of his brother, J. S. Willis. The testimony for appellee is to the effect that, when he rented the 50 acres of land to J. S. Willis, he pointed out to him the land in front of the double log house on the Fleming land and lying between the Calhoun and Greenville roads and the farm known as the Hale

Brown farm. When appellee purchased the Fleming land, he and Hale Brown agreed that the line as claimed by appellee to be the dividing line should be the dividing line, and it was marked as such. It was this dividing line that he pointed out as one of the boundaries of the 50-acre tract leased to J. S. Willis. Willis' lease was not to expire until the year 1910. J. S. Willis entered upon the land and began to cut timber thereon, and actually cleared a part of the land in controversy. At that time neither Henry Willis nor his vendor had possession. Later on Henry Willis ran a wire fence around a portion of the land, and subsequently ran another wire fence, so as to include more land. His purpose in doing this was to get the number of acres called for by his deed. Furthermore, appellant Henry Willis afterwards rented 15 acres of the land, which his brother J. S. Willis had leased, to a man by the name of Whoberry. This land, however, is not involved in this controversy. While there is no direct proof of the fact that J. S. Willis, by express words, consented to his brother's fencing in a portion of the leased premises, it does not appear that he took any steps to prevent his brother from entering upon the land; indeed, he seems to have acquiesced in the arrangement, and we think his consent may be implied from the circumstances.

We are also of the opinion that, when appellee leased to J. S. Willis the 50 acres in controversy, and pointed out the Hale Brown line as one of the lines of the 50 acres, and put J. S. Willis in possession, and J. S. Willis began clearing the land, he was in possession of the whole 50 acres up to the Hale Brown line, as claimed by appellee. There was no one else in possession at that time. Appellant Henry Willis did not purchase until after J. S. Willis had been put in possession. When Henry Willis built the two wire fences, he intruded himself upon the possession of his brother, J. S. Willis, who had possession by virtue of the lease executed to him by appellee and his brother. Such possession on the part of J. S. Willis was sufficient, we think, to support an action of forcible detainer against his brother, Henry Willis, and appellee had the same right to maintain a similar proceeding upon the termination of the lease and the failure and refusal of J. S. Willis and Henry Willis to surrender the land.

If, as a matter of fact, J. S. Willis consented to Henry Willis' taking possession of a part of the leased premises, Henry Willis held under J. S. Willis, and upon the termination of the tenancy it was his duty to surrender the leased premises. If, however, he forcibly took possession of a part of the leased premises, then this action by appellee is authorized by subsection 4, § 452, Civ. Code Prac., which is as follows: "A forcible detainer is * * * the refusal of a person

who has made a forcible entry upon the possession of a tenant for a term to deliver possession to the landlord, upon demand, after the term expired; and, if the term expires whilst a writ of forcible entry sued out by the tenant is pending, the landlord may, at his cost and for his benefit, prosecute it in the name of the tenant."

Upon the whole case, we see no reason to disturb the trial court's finding of facts, or the principles of law upon which he based his conclusions.

It is earnestly insisted by counsel for appellant that the calls of the last deed made by Fleming to Hale Brown show that a mistake was made; and that this is further evidenced by the fact that his deed calls for 100 acres of land, whereas he now has only 62½ acres. This fact might have some bearing upon the right of possession; but deeds, in a proceeding of this kind, cannot be introduced for the purpose of showing the right of possession, but only the extent of possession. *Beauchamp v. Morris*, 4 Bibb, 312. Manifestly, therefore, the court could not enter into the question of whether or not there was a mistake in the deed. In an action involving the title to the land in controversy, that question might be properly presented.

Appellants complain, too, that this is simply a proceeding to recover land by forcible detainer, instead of an action in ejectment or an action to quiet title. This, however, is not true. The only question concluded by the judgment in this case is the question of possession. The right to the land may yet be determined by proper action.

Judgment affirmed.

CITY OF LOUISVILLE v. UEBELHOR.

(Court of Appeals of Kentucky. Feb. 8, 1911.)

1. MUNICIPAL CORPORATIONS (§ 821*)—TORTS—SIDEWALKS—INJURIES—ACTIONS—JURY QUESTION—NEGLIGENCE.

Where a hole in a flat stone sidewalk into which plaintiff stepped when injured was four or five inches deep, the question of whether the sidewalk was in a reasonably safe condition was for the jury.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. § 1748; Dec. Dig. § 821.*]

2. MUNICIPAL CORPORATIONS (§ 768*)—STREETS—DEFECT.

A smooth worn place in a stone sidewalk, about two inches deep, was not such a defect as would constitute negligence, so as to make a city liable for injuries resulting from stepping therein.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. § 1624; Dec. Dig. § 768.*]

3. MUNICIPAL CORPORATIONS (§ 763*)—STREETS.

A city does not insure the safety of its streets, and is only bound to make the sidewalks reasonably safe for pedestrians by keep-

ing them in that condition which is usually regarded as reasonably safe.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. § 1612; Dec. Dig. § 763.*]

4. MUNICIPAL CORPORATIONS (§ 818*)—SIDEWALKS—INJURIES—ACTIONS—ADMISSION OF EVIDENCE—CONDITION OF SIDEWALK.

In an action against a city for injuries from stepping into a hole in a sidewalk in August, 1907, evidence as to the measurement of the hole at the time of trial, in October, 1900, and that the hole had not been repaired up to that time, was admissible in evidence in connection with an offer to show that the hole was in the same condition as when the accident occurred.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. § 1733; Dec. Dig. § 818.*]

5. TRIAL (§ 248*)—INSTRUCTIONS—ABSTRACT INSTRUCTIONS.

Requested instructions which were academic discussions of the law were properly refused, though correct.

[Ed. Note.—For other cases, see *Trial*, Cent. Dig. §§ 582, 583; Dec. Dig. § 248.*]

Appeal from Circuit Court, Jefferson County, Common Pleas Branch, Second Division.

Action by Katherine Uebelhor against the City of Louisville. From a judgment for plaintiff, defendant appeals. Reversed and remanded for a new trial.

Leon P. Lewis, Clayton B. Blakey, and Huston Quin, for appellant. J. J. Kavanaugh, for appellee.

O'REAR, J. Appellee sued the city of Louisville for damages for her personal injury, caused, it is alleged, by her falling on a street crossing at Preston and Market streets in Louisville. She claims there was a hole or depression in the stones constituting the crossing, and as she alighted from a street car at night she stepped in the hole, lost her balance, and fell, severely spraining an ankle. The issue tried out was whether the hole or depression was such as constituted an unsafe state of the crossing. The crossing was made of large flat stones laid end to end. Wagons passing over them had worn away two of the stones at their joints, making a concave depression from 1 or 1½ inches to 4 or 5 inches deep; that is, the evidence of the plaintiff showed that it was 4 or 5 inches deep, while the evidence of the city showed the former. If it was as much as the latter, it was a question for the jury whether that was such a condition as was not reasonably safe for a street crossing. If it was only an inch and a half or two inches, a smooth worn place in the stones, it would not be in such a condition as indicates neglect of the crossing by the city. The city does not insure the safety of its streets, and it is not reasonable to place upon it the burden of maintaining at all times and under hazard every street crossing and sidewalk in a perfect condition. It is only required to be reasonably safe for use as a

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

footway for pedestrians. There must be some point short of perfection. Therefore that is not actionable negligence. We know as a matter of common knowledge that such depressions in a street as slight unevenness, caused by wear, of an inch or so, are quite common in all cities. That which is so customary may be regarded as ordinarily safe, and that is the standard. It was, then, a very material question in this case as to the extent of the depression.

The accident occurred in August, 1907. The suit was begun in January, 1908. The trial was had October, 1909. The defendant offered to show that the same crossing was in existence when the suit was tried, without repair or material change. If there had occurred any change, the depression would show some increase. The purpose of the evidence was to admit measurements of the depression as of the date of the trial, and perhaps to have the jury view the place. But the trial court rejected the offered testimony on the ground that the period of comparison was too remote from that of the accident. The lapse of time was of itself alone not so material. It depends on the nature of the thing to be described, and the conditions to which it has been subjected in the meantime. Stone such as that crossing was made of was as little subject to change as anything fitted for such use well could be. At any rate, when it was offered to show that it was in substantially the same condition as it was when the injury occurred, it was competent to then show its present condition. The purpose of all the evidence being to place before the eyes of the jury the identical situation at the time of the incident in controversy, that which is the most reliable ought to be given preference. Witnesses detailing the event as they saw it a year or two before are apt to forget, or their views may be exaggerated. If the hole or depression were measured, and its exact proportions given to the jury, or if they themselves had looked at it, it must be conceded that such evidence is of a more convincing character than statements of witnesses long afterward based upon estimates made from casual observation, no matter how honest the witnesses might be. The evidence tending to show a continuity of conditions from the time of the injury to that of the suit, and then evidence of the exact conditions at the time of the suit, was relevant and receivable as tending to prove the exact condition at the time of the injury. *Wigmore, Ev. § 437; Dean v. Shanon, 72 Conn. 667, 45 Atl. 963; Hunt v. Dubuque, 96 Iowa, 314, 65 N. W. 319; Jacksonville, etc., R. R. v. Southworth, 135 Ill. 250, 25 N. E. 1093; Alsop v. Adams, 10 Ky. Law Rep. 362.* The ruling of the court rejecting the offered evidence was prejudicial error.

Instructions offered by the defendant were

objectionable in that they were academic discussions of the law, and, even though correct, should not have been given to the jury. They were argumentative in addition. The instructions given by the court were proper. Reversed and remanded for a new trial.

DURHAM'S ADM'R et al. v. CLAY.

(Court of Appeals of Kentucky. Feb. 7, 1911.)

1. WILLS (§ 588*)—CONSTRUCTION—RESIDUARY CLAUSE.

A will, after making several legacies, directed a sale of stock and payment of a fixed amount of the proceeds to a church, and provided that the "money left of the sale of stock and the legacies, herein mentioned" should be paid to one of the legatees. A codicil disposed of after-acquired property. *Held*, that the residuary clause is not general, and applies only to the remainder of the proceeds of the stock.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 1280; Dec. Dig. § 588.*]

2. WILLS (§ 578*)—GENERAL RESIDUARY CLAUSE—OPERATION.

A general residuary clause passes after-acquired property, real or personal.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 1260; Dec. Dig. § 578.*]

3. WILLS (§ 767*)—DEVISES—ADEMPTION.

A devise of land afterwards sold is adeemed, except that under the express terms of Ky. St. § 2068 (Russell's St. § 3844), a conversion does not adeem a devise to an heir unless so intended.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 1986; Dec. Dig. § 767.*]

4. WILLS (§ 767*)—BEQUESTS—ADEMPTION.

A specific bequest is adeemed by a change in the property's form only when the change is material.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 1986; Dec. Dig. § 767.*]

5. EXECUTORS AND ADMINISTRATORS (§ 327*)—POWER OF SALE—EXERCISE.

Where a will directs the sale of land without providing who shall sell, a court of chancery will direct a sale, if in fact, the administrator with the will annexed would not have such power.

[Ed. Note.—For other cases, see Executors and Administrators, Dec. Dig. § 327.*]

6. WILLS (§ 767*)—LEGATEES—ADEMPTION.

A bequest of the proceeds of land on the death of a life tenant was not adeemed by testatrix's sale of the land, so far as the proceeds remained in specie, and could be identified, as in an investment in notes.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 1986; Dec. Dig. § 767.*]

7. WILLS (§ 767*)—ADEMPTION.

Testator's investment in land of money specifically bequeathed adeems the bequest.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 1986; Dec. Dig. § 767.*]

8. WILLS (§ 866*)—PARTIAL INTESACY—UNDEVISED LAND.

Undevised land passes to testator's heirs at law.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 2200; Dec. Dig. § 866.*]

Appeal from Circuit Court, Nicholas County.

Action between Ellen Lane Durham's ad-

*For other cases see same topic and section NUMBER in Dec. Dig. & Ann. Dig. Key No. Series & Rep'r Indexes

ministrator and others and Sallie Harper Scott Clay. From the judgment, the administrator and others appeal. Reversed and remanded, with directions.

Strother & Wycoff, Chas. D. Grubbs, Robert H. Winn, and J. J. Osborne, for appellants. Holmes & Ross and John P. McCartney, for appellee.

LASSING, J. John B. Durham, of Nicholas county, Ky., was twice married. By his first wife he had three children. By his second wife he had no children. His second wife had some property of her own, and in March, 1904, made a will, in which she disposed of this property. Thereafter her husband died, and by his will gave to her 62 acres of land. In January, 1905, after she had acquired this land from her husband's estate, she wrote a codicil to her will, in which she attempted to dispose of this land. Some time following the execution of this codicil, she sold the land, and invested the proceeds, along with other money which she then had in bank, in purchase-money and mortgage notes, and land. Upon her death her will was duly probated, and this litigation grows out of a dispute arising among the respective claimants to the estate left by her. It is the contention of the grandchildren, they being the only descendants and heirs at law of the three children of her husband's first wife, that they take the money which the testatrix realized out of the sale of the land; whereas, the heirs at law of testatrix claim that they take the proceeds of this sale as undivided estate; and the devisee, Sallie Scott Clay, insists that all of this property passes to her under the residuary clause in the original will. The trial judge was of opinion, and so held, that the proceeds of the sale of the land all passed under the residuary clause in the original will to Sallie Scott Clay, and the heirs at law of testatrix, as well as those of her husband, named as devisees in the codicil, ask a reversal of the judgment of the lower court, and that such construction be placed upon the will and its codicil as will award them the property in litigation.

The following is the will and codicil:

"First. I give and bequeath to Sallie Harper Scott, (called by adoption Sallie Durham) the sum of \$500, more or less, now in the Deposit Bank of Carlisle, which is mine by inheritance. Should I invest said \$500 in any kind of property, then the property is to be hers at my death.

"I also give and bequeath to said Sallie Harper Scott, my solid gold watch, my sewing machine, my largest zinc trunk with contents, also, as much of my bedding, consisting of beds, bedding, etc., as she may desire, also one pair of gold rimmed glasses and her selection of dishes outside of those mentioned in this will, also wardrobe.

"Second. I give and bequeath to Bert Dur-

ham two shares in the Moorefield Deposit Bank, and one pair of gold rimmed glasses and my large dictionary, also my china press and book case.

"Third. I give to John Bascom Durham, two shares in the Moorefield Deposit Bank, and a zinc trunk, second size which he once asked of me.

"Fourth. I give to Annie Durham my silver tea set and what dishes she and said Sallie Scott may agree upon, there must be no dispute or hard feelings indulged in over my effects.

"Fifth. I give to Allie Graves Grubbs my self-interpreting Bible, should she die without heirs, it is to be given Allie Woodson Armstrong.

"Sixth. I give to Jennie Graves Armstrong my large Japan bowl and large cake bowl and silver ladle.

"Seventh. I give to Susan Gregory a set (one-half dozen) of silver teaspoons with 'Lane' engraved on bowl of each spoon. To Mae Stone one silver souvenir spoon with 'Lane' engraved in bowl.

"Last. There are many other things not specified in the foregoing writing that I wish given as keepsakes to such of my friends as desire them.

"I desire that my stock may be sold and the sum of \$25 be given the Christian Church at Bethel where my membership now is.

"I also desire a helper calf, or the money to buy one be given Ellen —, Colored, daughter of Henry (Dora) Owings. To Lucy Owings some of my clothing, etc.

"The money left of the sale of stock and the legacies herein mentioned is to be paid over to Sallie Harper Scott, the girl above mentioned, whom I raised. It is my desire and prayer that each one who is heir by this will may be satisfied. I beseech Bert Durham and John Bascom Durham to see that said Sallie Harper Scott never suffers for the necessities of life while they live.

"Written under my hand this day March third, nineteen hundred and four.

"[Attest] Ellen Lane Durham."

"Codicil, March 18, 1905.

"Since making my will in March, 1904, I have fallen heir by the death of my dear husband John B. Durham, to sixty-two acres of land lying southwest of the home tract on which said John B. Durham resided. The boundary of which is mentioned in the will of said John B. Durham. I do hereby will to Bert Durham during his life, one-half interest in said lands, and to Sallie Scott, the girl we raised, an interest in the other half of said tract as long as she remains single. Should said Sallie Scott marry, Bert Durham is to use her half of the land during his life and to see that said Sallie Scott never suffers for the necessities of life. At the death of Bert Durham the land is to be sold and the money equally divided among John B. Durham, Charles Ditzler Durham, Jennie

Armstrong and Allie Grubbs. Should Jennie Armstrong die before Bert Durham, her daughter Allie Woodson Armstrong is to be her heir and the money paid to her when she becomes of age."

We will first determine the rights of appellee, Sallie Harper Scott Clay, for, if the judgment as to her is correct, it is unnecessary to enter upon a consideration of the controversy between the Durham and the Lane claimants. The clause of the will, under which appellee claims title is found in the latter part of the original will, and is in this language: "The money left of the sale of stock and the legacies herein mentioned is to be paid over to Sallie Harper Scott, the girl above mentioned, whom I have raised." For her it is argued that this residuary clause is general in its nature, or at least general or broad enough to support her claim to the proceeds of the sale of this after-acquired land. Page on Wills, § 505, defines a residuary clause of a will to be: "That part which makes disposition of the residuum of part or all of testator's property; that is, that part thereof not otherwise disposed of by will. A general residuary clause disposes of all of the residuum of testator's property; while a particular residuum clause disposes only of the residuum of certain specified property." Schouler, in the recent edition of his work on Wills and Administration, p. 248, § 519, says: "A residuary bequest of personal property operates upon all the personal estate which the testator may have at his death, and prima facie carries with it not only whatever remains undisposed of by his will, but whatever despite the will falls of disposition in the event from one cause or another. Nevertheless, this presumption is liable in any case to be rebutted; and where the will shows that the testator meant that the residuary gift should take only a limited effect, that meaning must operate."

Section 4839, Ky. St. (Russell's St. § 3962), provides that, "A will shall be construed, with reference to the real and personal estate comprised in it, to speak and take effect as if it had been executed immediately before the death of the testator unless a contrary intention shall appear by the will." There being no contrary intention expressed in the will under consideration, and treating it as speaking of a date immediately preceding the death of testatrix, the proceeds of sale of this real estate undoubtedly pass under this residuary clause if it is general in its nature, and the codicil does not stand.

When this will was written testatrix was disposing of many articles of personal property, including some money in bank. The money in bank she had given to Sallie Harper Scott in item 1 of her will. In the last clause she recites that there are many other things not specified in the foregoing writing—evidently by "things" referring to articles of household furniture and wear—

that she wished given as keepsakes to her friends. She then directs that certain stock which she owns be sold, and, of the proceeds realized from this sale, \$25 given to the church; and this bequest to the church is followed by the clause under consideration. It does not say the rest and residue of my estate, or language susceptible of as broad a construction or interpretation as this language would justify. But it is specific in its nature, and directs that the money left of the sale of stock is to be paid over to appellee. The language used, when fairly and reasonably interpreted, would not justify or support the contention that the testatrix intended by it to pass to appellee any property except such as should remain of the sale of the stock after the special bequest to the church had been satisfied. She did not contemplate that any other property would pass to appellee under this clause of her will. That she placed this construction upon the will is evidenced by the further fact that thereafter, when she acquired other property of the value of at least \$5,000, she, in a codicil, attempted to dispose of it. If it had been her intention that this after-acquired property should go as a part of her estate to appellee, and that such devise was covered by this residuary clause, then the draft of the codicil was wholly unnecessary. An examination of this codicil shows that the testatrix did not want appellee to have this property. She merely desired her to have the use of a half of it as long as she remained single, and that after she married that she should have a beneficial interest in the net proceeds from the rental of half of the land during the life of Bert Durham. If the residuary clause was general in its nature, it would cover and pass title to all after-acquired property, whether it was real or personal estate, at decedent's death, so that the fact that the land was sold and the proceeds converted into money in no wise enlarges appellee's rights under the will. We are clearly of opinion that by the clause under consideration the testatrix did not intend to give to appellee any property whatever other than such money as should be realized from a sale of her stock, after the special bequest to the church had been satisfied.

This brings us to a consideration of the point in dispute between the Durham and the Lane claimants. Each contend that the property in question did not pass under the residuary clause above referred to, but they differ in their application of the law to the facts presented controlling the disposition of this after-acquired property. Of course, if it had not been sold by the testatrix in her lifetime, it would have, under the will, upon the death of Bert Durham, been sold, and the proceeds divided among the Durham heirs therein designated. But Bert Durham died before the testatrix, and Sallie Harper Scott, the girl whom testatrix had raised and for whom she was making provision in

her will, having married, the period fixed under the codicil for the sale of this after-acquired land and the distribution of the proceeds thereof arrived. In fact, under the terms and provisions of the codicil, each of the events designated in the codicil which postponed its sale having occurred, either prior to the death of testatrix or almost immediately thereafter, if the land had not been sold by testatrix in her lifetime, the Durham heirs, to whom the proceeds were willed, could have demanded a sale of this land at any time in order that the proceeds might be divided, among them as directed. The fact that it was sold by testatrix has brought about and produced this controversy.

It is claimed for the Lane heirs that, inasmuch as the land was sold by testatrix in her lifetime and converted into money, and this money used by her in the purchase of notes and other real estate, that this gift or devise was adeemed, and that there being no general residuary clause in the will, it passes to them as undevised estate. For the Durham claimants it is contended that this devise to them was not of real estate but of personalty; that they had no claim whatever upon the land, but merely an interest in the proceeds arising from a sale thereof whenever such a sale should be made; that, inasmuch as it was a money bequest, and testatrix sold the land herself rather than wait for it to be sold at Bert Durham's death, as provided for in the codicil, they are still entitled to the money received by her for it so long as they can trace and identify it. In other words, they insist that the sale of this land by testatrix, and the conversion of it into money, does not destroy or adeem the legacy, but that they are still entitled to the money if they can trace and identify it. This they have attempted to do, and as to how well they have succeeded in its identification we will consider hereafter.

The authorities agree that, where real estate has been devised to one not an heir, and thereafter sold by the testator, such act operates as an ademption or revocation of such devise. And, indeed, this rule would be universal in its application but for certain statutory enactments which have changed it in so far as heirs are concerned; section 2068, Ky. St. (Russell's St. § 3844), in this state having to this extent modified the general or common-law rule, and similar statutes in other states having accomplished the same result there. But as to personalty a different rule of construction obtains, and where personal property is bequeathed, although it is slightly changed in form by the testator, so long as it remains in specie or kind the legacy is not adeemed. Many illustrations of changes of this character that may be made are cited in Page on Wills, § 781. From the authorities it may be stated as a general rule that a specific bequest of personal property is not adeemed by a slight change or alteration therein; though, if the

change is radical or material, it operates as an ademption.

In the case under consideration the bequest to the Durham children was the proceeds of the sale of certain real estate; that is, a money bequest. Were these bequests adeemed by a sale of this property by the testatrix in her lifetime, and the investment of the proceeds of such sale in other real estate, mortgage notes, etc.? Applying the rule above announced, if this property has been kept in specie and can be traced and identified, then it would seem that the legacy is not adeemed; otherwise, it is.

The case of *Miller's Ex'r v. Malone*, 109 Ky. 133, 58 S. W. 708, 22 Ky. Law Rep. 635, 95 Am. St. Rep. 338, decided by this court in 1900, is in many respects similar to the case under consideration. In that case the testatrix gave a house and lot in Shelbyville to her executor in trust to sell and divide the proceeds of sale among the children of H. C. Malone. The children of H. C. Malone were not heirs of testatrix. They were strangers to her blood. After she had made this will she sold the house and lot, received \$200 in cash, and took notes for the balance of the purchase money. It was contended in that case that the sale of the house and lot by the testatrix worked an ademption of the legacy, but, upon reviewing the case here, this court held that it did not, at least to the extent of the proceeds of the sale which were identified; that is, the purchase-money notes which were taken. There was no showing in that case as to what became of the \$200 that was paid in cash, and inferentially this court decided that there was an ademption as to this portion of the proceeds of the sale, for the reason that it was not traced out and identified. The only appreciable difference between that case and the case at bar is that a trustee was directed to sell in that case, whereas the testatrix in the case at bar directed that the sale be made after the expiration of the life estate of Bert Durham. This is not a substantial difference, because where a will directs land to be sold without making any provision as to who shall sell it, a court of chancery will direct its sale in order to effectuate the will and purpose of the testator, if, in fact, the administrator with the will annexed would not be clothed with such power.

The proof shows that the land in question was sold by the testatrix for \$5,000—\$2,500 cash and \$2,500 on one year's time; that she collected from this sale in all \$5,150, which sum she deposited in bank to her credit, where she already had on deposit the money which she bequeathed to Sallie Harper Scott. At the time of her death she had on hand land notes of the value of \$4,241.62, and a house and lot for which she had paid \$1,400, making a total of \$5,641.62. In their answer the Durham claimants assert that the money realized from the sale of this land and the interest on the \$2,500 for one

year, together with the money which the testatrix had in bank at that time, is the same money which was used by testatrix in the purchase of the notes and the house referred to; and the proof which they offered in support of this contention establishes the fact.

In the case of *Nooe v. Vannoy*, 6 N. C. 185, which was cited with approval in the case of *Miller's Ex'r v. Malone*, the court said: "As the proceeds of the sale of the property is given, it follows that if such part thereof as is specified, can be traced out and identified, at the time of the death of the testator, the legacy will take effect, and there will be no ademption, or only a partial one." In that case the will provided: "I further give to my children, by a former marriage, the proceeds of the sale of my town property in the town of Wilkesboro, or so much thereof as is herein specified, to wit, to my son, Joel Alfred, \$200," etc. The testator sold the property mentioned, and it was claimed that the sale was an ademption of the legacy.

The case at bar is not distinguishable from *Miller v. Malone*, above referred to, and on the authority of that case the legacy to the Durham children was not adeemed by the sale of the property by testatrix, at least so far as the proceeds arising from that sale can be traced out and identified. From the evidence in this case it is apparent that the money realized from the sale of this land was placed in bank along with other money which testatrix then had on deposit in said bank, and was invested by her in notes which, at the date of her death, amounted to \$4,241.62. The balance thereof, to wit, \$1,400, was invested in a house and lot. Of the money invested in these notes, at least \$500, under the first paragraph or clause of the will, under the rule which we have announced, belonged to Sallie Harper Scott Clay. So that there is in fact, of the proceeds of the sale of this land, traced into these notes, the sum of \$3,741.62. The balance of the purchase money realized from the sale of this land was invested in the house and lot, for which testatrix paid \$1,400.

The question here arises, May money specifically bequeathed be invested in real estate by the testator without adeeming the bequest, even though the money is accurately traced into the real estate? As stated, where a legacy of personal property is changed, it does not operate as an ademption so long as it remains in specie, and the change is not radical. But we have been unable to find any case that has extended the rule to the extent of permitting personal property to be converted into real estate without its operating as an ademption.

The Durhams rest their right to recover upon the theory that the bequest to them

was not real estate, but the proceeds thereof—money arising from the sale of the land. We hold that they are entitled to have and receive so much of the bequest as remains in specie and has been traced and identified, but no more. If, when testatrix sold the land, she had placed the money in bank to her credit as a time deposit, and received a certificate therefor from the bank, this certificate would certainly represent the proceeds of the sale. And we are unable to draw a distinction between lending the money to a bank on a certificate of deposit and buying land notes with it. A certificate of deposit and the notes alike represent the money; but not so with real estate. The notes, like the certificate, call for so much money—the proceeds of the sale, or part of it. While the deed to the land does not represent money, but evidences title in the holder to the land.

Testatrix had on deposit in the Carlisle Deposit Bank to her credit at the date of her death the sum of \$139.28. This sum, under item 1, together with \$500 which was in bank and used by the testatrix in the purchase of the notes in question, belongs to appellee. The balance of the proceeds of the sale of the land, which has been identified and traced into the notes held by testatrix at her death, passes, under the codicil, to the Durham claimants. The house and lot in Carlisle, not having been disposed of by testatrix in her will, passes as undivided estate to her heirs at law, the Lane claimants. We are of opinion, that inasmuch as \$3,741.62 of the proceeds of this sale has been traced directly into these notes that were on hand at the death of testatrix, the legacy to the Durham claimants to this extent was not adeemed; and that they are entitled to have and receive this amount. But as to the money which was invested in real estate there was an ademption. There is no authority in the will given to sell any land other than the 62 acres specifically named. If we should hold that the proceeds of this sale, traced into the purchase of this house and lot, passed to the Durham claimants, they would receive it as real estate, and not as personal property.

Judgment reversed and cause remanded, with instructions to enter a judgment in conformity with this opinion.

BOARD OF EDUCATION OF MERCER COUNTY v. RANKIN.

(Court of Appeals of Kentucky. Feb. 16, 1911.)

ATTORNEY AND CLIENT (§ 153*)—ACTS OF ATTORNEY—VALUE OF SERVICES—MISCONDUCT.

Plaintiff, as attorney for the county school superintendent, sued school book publishers and others on their bond for breach thereof, and recovered judgment for \$10,000. The superintendent with plaintiff's knowledge made a compromise agreement, by which he accepted a note

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

for \$2,200 to him as superintendent, to be paid when the Court of Appeals should determine that the judgment in that suit was a bar to certain proceedings on the same bond by the superintendent of another county. Following the execution of the note, plaintiff, as counsel for the superintendent, satisfied the judgment in full on the margin. The superintendent's successor thereafter instituted proceedings to cancel such satisfaction, and to enforce the judgment in full, in which she received no assistance from plaintiff, but, being subsequently successful, collected the judgment. *Held*, that plaintiff should have resisted his client's attempt to make such settlement, and that by his failure to do so he destroyed the value of his services in procuring the judgment and could not recover fees therefor against the county board of education.

[Ed. Note.—For other cases, see Attorney and Client, Cent. Dig. §§ 299, 300; Dec. Dig. § 153.*]

Appeal from Circuit Court, Mercer County.

Action by C. E. Rankin against the County Board of Education of Mercer County, Kentucky. Judgment for plaintiff, and defendant appeals. Reversed and remanded, with instructions to dismiss.

See, also, 132 S. W. 1026.

E. H. Galther, for appellant. Wm. L. Whittinghill, for appellee.

LASSING, J. In 1905, C. E. Rankin, as attorney for H. H. Walker, superintendent of schools in Mercer county, Ky., brought a suit in the Mercer circuit court against D. C. Heath & Co., school book publishers and sellers, and B. F. Graziani, their surety, wherein it was sought to recover of said book company the sum of \$10,000 for an alleged breach of its bond. When the case was called for trial, the defendant book company entered a demurrer to the petition, and, at the same time, filed an answer, traversing the material portions thereof, and entered a plea of abatement; this latter being based upon the pendency of a similar action in the Mason circuit court. The plea in abatement was later withdrawn, and a plea entered to the jurisdiction of the court. This was overruled, and the case went to trial upon depositions that had theretofore been taken in Columbus, Ohio, and the testimony of one W. S. Smythe, an agent of the book company, who was introduced as a witness for plaintiff on the question of the quality of the books. At the conclusion of this evidence, a verdict for \$10,000 was rendered in favor of plaintiff. On the day following the rendition of the verdict, the county superintendent, with the knowledge of his attorney, entered into a compromise agreement with the attorney for the defendant company, by the terms of which a note for \$2,200 was executed to the plaintiff as superintendent, to be paid when the Court of Appeals should determine that the judgment rendered in the Mercer circuit court was a bar to the proceedings in the Mason circuit court. The note, by the terms of the agreement, was to be held until this

question was finally decided against the claim of Mason county, when it was to be paid. Following the execution of this note, appellee, as counsel for the superintendent, wrote upon the margin of the judgment the following indorsement: "This judgment is satisfied in full, this May 17, 1905." This was signed by Walker for the commonwealth and as superintendent of schools. On the 1st of January, 1906, Walker was succeeded in office by Miss Ora L. Adams, and, in making a settlement with Walker, she learned of the compromise agreement. She thereupon brought suit to have it set aside, the indorsement of satisfaction upon the judgment canceled, and such proceedings had and orders made as would enable her to collect the \$10,000. This suit was resisted by the book company upon various grounds, and upon a full hearing in the circuit court the prayer of the petition was granted. The case was appealed and affirmed by this court; the opinion being found in 129 Ky. 835, 113 S. W. 69, under the style of D. C. Heath & Co. v. Commonwealth. The judgment was finally collected, and, as Rankin, who had represented the former superintendent, Walker, and Miss Adams, the present superintendent, were unable to agree what, if any, compensation he should have for his services in bringing the original suit, a suit was instituted by him against the board of education for Mercer county to recover \$1,000 as the reasonable value of the service rendered by him. The board of education for answer pleaded the facts as developed in the suit of Heath & Co. v. Commonwealth, *supra*, and denied that the services rendered by him were worth \$1,000, or any sum whatever; and pleaded, further, that after the rendition of the judgment for \$10,000 he and his client Walker entered into the compromise agreement by which they accepted, in satisfaction of the judgment, the note for \$2,200, and that he agreed with his client to look to said note for his compensation; and that, if the plaintiff was entitled to any sum whatever, it was only a reasonable fee for services in so conducting the case as to get this note from the book company. They charged, in substance, that a fraud was practiced upon the commonwealth in the compromise settlement agreed upon, and that, because thereof, no fee whatever should be paid. The reply traversed the allegations of fraud and all other material allegations set up in the answer. Upon the two issues, the fraudulent settlement of the original judgment and the value of the services rendered, the case went to trial. The burden being upon the defendants to substantiate their charge of fraud, upon the conclusion of the testimony, the court was of opinion that they had failed to make out their case, and instructed the jury that the only question for their consideration was the value of the services rendered by

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plaintiff to defendant. Plaintiff testified as to the value of his services, and, at the conclusion thereof, the court instructed the jury as follows: "You will find for plaintiff, Rankin, the reasonable value, according to the testimony, of his services as attorney for the plaintiff, in the case of H. H. Walker as superintendent of schools against D. C. Heath & Co. and B. F. Graziani, not exceeding \$1,000, the amount claimed in the petition." The jury found for plaintiff the full amount sued for, and, judgment having been entered thereon, the board of education appeals.

Two questions are presented for our consideration: First, was the compromise arrangement entered into between former superintendent Walker and the company a fraudulent transaction? And, second, if so, to what extent was appellee connected therewith, and how far should he be held answerable therefor?

It is argued, in defense of the superintendent and his counsel, that, inasmuch as there was a similar suit pending in another county, they entertained grave doubts as to whether or not they would ever be able to collect any sum whatever on the judgment, and that therefore they were acting for what they regarded as the best interests of the schools of Mercer county in making the settlement which they did.

The bond of the book company had been violated, and the commonwealth was entitled to this money for the use of either Mason or Mercer county. The only open question was between the two counties, as to which should have the benefit of it. Walker and his counsel, appellee, stood as the representatives of the commonwealth in Mercer county, the one a public official, and the other his chosen adviser. Of the former the commonwealth expected that character of service which a faithful official will render, and of the latter the commonwealth had the right to expect that he would see to it that the superintendent was properly advised and represented, so that the interests of the commonwealth would be protected.

As decided in the case of Heath & Co. v. Commonwealth, there was no authority in law for making such a compromise as was attempted to be made, and, if they had permitted the record in the Mercer circuit court to show the character of compromise that had been entered into, little trouble would have been experienced. But the arrangement was so made that it appeared from the record as though the full amount of the judgment had been paid, for it could be satisfied only by paying it. And in this lies the mischief. Whether wittingly or not, the superintendent and appellee were in reality aiding the book company to defeat the commonwealth in the collection of \$7,800 of its judgment debt. This is the effect of the agreement into which they entered, for, as the record in the Mercer circuit court showed

that the judgment had been satisfied, the plea of this fact in the Mason circuit court would have been a good plea in bar; and, as the bond provided that there could be but one recovery, the commonwealth, if the true facts had not been disclosed, would have lost just this amount of money. The net result of appellee's services to superintendent Walker, and through him the commonwealth, was that, if the suit has not been filed to have the indorsement on the record canceled and the unwarranted agreement set aside, this loss of \$7,800 would have been sustained.

Walker was dead at the date of the trial, and we have no statement from him as to why the compromise agreement was entered into. Appellee says that he was opposed to it, and, in fact, regarded it as not amounting to anything. Unfortunately this does not help him. He should not have prepared the indorsement that was put upon the record; he should not have acted as intermediary between the book company and the superintendent; he should not have consented to be the custodian of the note; he should not have maintained a secrecy about the transaction; and he should have made the record show the true transaction. All of these acts on his part contradict his testimony that he was opposed to the arrangement and advised against it. He was employed to represent his client, and, through him, the commonwealth, and to protect and preserve her interests, and he failed to discharge his whole duty when he sat quietly by and saw his client do an act which he knew to be wrong, or unlawful, or unauthorized. He is not entitled to compensation for services in which he failed to discharge the duty which the law and his oath imposed upon him. If the superintendent was proceeding in ignorance of the law, it was the duty of appellee to have correctly advised him and guided him aright. He should not have knowingly permitted his client to enter into the kind and character of agreement which he did. He knew that this money did not belong to Walker, but to the commonwealth, and when he permitted him to barter it away for a paltry sum, less than one-fourth the amount of the judgment, upon terms of uncertainty as to its payment, he was himself guilty of neglect of duty; and this especially in the light of the testimony which he gives, to the effect that he did not regard it as a binding contract, or of any force and effect. Instead of lending his sanction to this transaction, he should have resisted its execution, and, had he done so with any degree of firmness, we have no doubt but that the result would have been different.

Compensation for a lawyer's services is not always measured by the value of the service rendered. Good services, honestly and faithfully performed, frequently produce no good or valuable results; but for such services the lawyer is, nevertheless, entitled to pay. But, where he so acts as to cause a

loss, he should be denied compensation. Up to the date of the rendition of the judgment, appellee's services had been satisfactory. Whether the arrangement as to the compromise agreement had been entered into before the judgment was taken or not is immaterial. Every step that was taken, as appears from the record, was taken in the interest of protecting and perfecting the commonwealth's right, and hence we pass without consideration the contention that the arrangement to compromise this judgment was entered into some time before it was taken. Appellee's failure of duty attached when he permitted the arrangement to be entered into as above set out. By permitting the compromise, he not only completely destroyed the value of the services he had rendered the commonwealth up to that time, but, in fact, placed her in a worse position than she would have been in if nothing at all had been done; for, in order to collect this money, it was first necessary for the commonwealth, by suit, to have removed from the record the indorsement which the superintendent, with the knowledge of appellee, had placed thereon. This effort on the part of the commonwealth was successful at the end of a vexatious and expensive litigation, in which she received no aid, counsel, or assistance in any wise from appellee. Having not only destroyed the value of the services rendered in procuring the judgment, by permitting the compromise to be entered into, but put the state to a big expense to clear the record, we are constrained to hold that appellee is entitled to no compensation whatever for his services. And, instead of instructing the jury as he did, the trial judge should have instructed it that the facts, as developed in the case of *Heath & Co. v. Commonwealth*, were such as showed that appellee was entitled to no compensation for advising, or at least permitting, his client Walker to close that litigation in the way and manner in which he did.

A judgment should have been rendered in favor of appellant, and plaintiff's petition dismissed.

The cause is reversed and remanded, with instructions so to do.

GAMBILL v. COMMONWEALTH.

(Court of Appeals of Kentucky. Feb. 16, 1911.)

1. INTOXICATING LIQUORS (§ 132*)—OFFENSES—STATUTES APPLICABLE.

Ky. St. § 2558a (Russell's St. § 3646), prohibiting the sale of liquors by wholesale, except manufacturers selling liquors of their own make to a wholesale dealer or a licensed retail dealer, where the sale of liquor has been prohibited by special act, or by vote of the people under the local option law, applies to all wholesale dealers, except manufacturers selling liquor of their own manufacture to a wholesale dealer or a licensed retail dealer, and amends Acts

1873, c. 40, prohibiting the sale of liquor in a designated county subject to specified exemptions.

[Ed. Note.—For other cases, see *Intoxicating Liquors*, Dec. Dig. § 132.*]

2. INTOXICATING LIQUORS (§ 204*)—INDICTMENT—SUFFICIENCY.

An indictment alleging that accused sold intoxicating liquors in Breathitt county, "contrary to the local prohibitory laws now in force in said county," refers to Acts 1873, c. 40, prohibiting the sale of intoxicating liquors in the county, and Ky. St. § 2558a (Russell's St. § 3646), prohibiting the sale by wholesale of intoxicating liquors, except manufacturers selling liquors of their own make to a wholesale dealer or a licensed retail dealer, and charges an offense.

[Ed. Note.—For other cases, see *Intoxicating Liquors*, Dec. Dig. § 204.*]

3. INTOXICATING LIQUORS (§ 222*)—INDICTMENT—REQUISITES.

An indictment for a violation of the local option law need not allege that accused does not come within the exceptions, nor need it negative the provisos the law contains, because these are matters of defense which the prosecution need not anticipate.

[Ed. Note.—For other cases, see *Intoxicating Liquors*, Cent. Dig. §§ 240-248; Dec. Dig. § 222.*]

4. INTOXICATING LIQUORS (§ 224*)—LOCAL OPTION LAW—VIOLATION—EVIDENCE.

The prosecution on a trial for a violation of the local option law need not prove that accused does not come within the class excluded from the operation of the statute, but need only show that a sale was made, and accused must then show that he belongs to the excepted class.

[Ed. Note.—For other cases, see *Intoxicating Liquors*, Dec. Dig. § 224.*]

5. INTOXICATING LIQUORS (§ 224*)—VIOLATION OF LOCAL OPTION LAW—EVIDENCE.

Where, on a trial for a violation of Acts 1873, c. 40, as amended by Ky. St. § 2558a (Russell's St. § 3646), prohibiting the sale of liquor by wholesale, except manufacturers selling liquors of their own make to a wholesale dealer or a licensed retail dealer, the prosecution showed a sale of liquor by accused, it was incumbent on accused to show that he was a manufacturer, and that the prosecutor was either a wholesale dealer or a licensed retail dealer.

[Ed. Note.—For other cases, see *Intoxicating Liquors*, Dec. Dig. § 224.*]

Appeal from Circuit Court, Breathitt County.

W. B. Gambill was convicted of violating the local option laws, and he appeals. Affirmed.

Redwine & Patton, for appellant. James Breathitt, Atty. Gen., and Tom B. McGregor, Asst. Atty. Gen., for the Commonwealth.

CLAY, C. Appellant, W. B. Gambill, was indicted by the grand jury of Breathitt county for the offense of selling spirituous, vinous, malt, and intoxicating liquors and mixtures thereof to Berry Turner, "contrary to the local prohibitory laws now in force in said county." The jury found him guilty, and fixed his punishment at a fine of \$100. From the judgment of conviction he appeals.

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r indexes

Berry Turner, the prosecuting witness, testified that within one year from the finding of the indictment he purchased from appellant, in Breathitt county, 6½ gallons of whisky, and paid him therefor. Upon the conclusion of this evidence, appellant asked a peremptory instruction, which the court declined to give. Thereupon appellant testified that he was a registered distiller, and that he sold Berry Turner 6½ gallons of whisky which he (appellant) had manufactured. The sale was made at his place of business, and the whisky was not drunk on his premises or adjacent thereto.

It is insisted by appellant that the only local prohibition law in force in Breathitt county is contained in volume 1, p. 127, of the Acts of 1873; that under that act distillers are exempt from its provisions, except in so far as the law then prevailing applied to distillers, and that under the law then prevailing distillers had the right to sell of their own manufacture at their place of business in quantities not less than a quart. In this connection it is insisted that section 2558a Ky. St. (Russell's St. § 3646) has no application to a place where there is a special prohibition law in force, but is confined in its operation to places where the sale of liquor has been prohibited by a vote of the people under the local option law. That section is as follows: "It shall be unlawful to sell by wholesale any spirituous, vinous, malt, or other intoxicating liquors, regardless of the name by which it is called (except manufacturers selling liquors of their own make at the place of manufacture to a wholesale dealer or a licensed retail dealer) in any county, district, precinct, town or city, where the sale of such liquor has been prohibited by special act of the General Assembly, or by vote of the people under the local option law. Any person violating this act shall be deemed guilty of violating the local option law, and shall be subject to trial and punishment according to the provisions of the same and its amendments."

It will be observed that, by its express terms, it is made to apply, not only where the sale of liquor has been prohibited by a vote of the people under the local option law, but also where the sale of liquor has been prohibited by a special act of the General Assembly. It was within the power of the Legislature to enact this section, and to amend the local prohibition act applying to Breathitt county by prescribing the manner of procedure, the quantity of liquor to be sold, and the penalties to be inflicted. *Thompson v. Commonwealth*, 103 Ky. 685, 45 S. W. 1039, 46 S. W. 492, 698, 20 Ky. Law Rep. 397; *Crigler v. Commonwealth*, 120 Ky. 512, 87 S. W. 276, 27 Ky. Law Rep. 918. When, therefore, the indictment concluded with the words "contrary to the local prohibition laws now in force in said county,"

it meant the local prohibition laws as amended by section 2558a. That section applies to all wholesale dealers, except manufacturers selling liquor of their own manufacture at the place of manufacture to a wholesale dealer or a licensed retail dealer. We therefore conclude that the indictment was sufficient to charge appellant with the offense under the foregoing section of the statute.

It is also insisted that the commonwealth failed to make out a case against appellant, because it did not show that Berry Turner was not a wholesale dealer or a licensed retail dealer. The law is well settled, however, that in an indictment for a violation of the local option law, it is not necessary to state in the indictment that the defendant does not come within the exceptions, or to negative the provisos it contains. These are matters of defense which the prosecutor need not anticipate. *Combast v. Commonwealth*, 137 Ky. 495, 125 S. W. 1092; *Thompson v. Commonwealth*, supra. It being unnecessary for the commonwealth to allege that the defendant does not come within a class excluded from the operation of the statute, it necessarily follows that the commonwealth is not required to offer any proof to that effect. All that is necessary in such a case is to show that a sale was made. It then devolves upon the defendant to show that he belongs to the excepted class. Following this rule, it was not necessary in the case under consideration for the commonwealth to show that Berry Turner was not a wholesale dealer and not a licensed retail dealer. It was incumbent upon appellant to show, not only that he was a manufacturer, but that the prosecuting witness was either a wholesale dealer or a licensed retail dealer. This he failed to do. It follows that his conviction was proper.

Judgment affirmed.

THOMASON v. THOMASON et al.

(Court of Appeals of Kentucky. Feb. 9, 1911.)

1. DIVORCE (§ 43*)—GROUNDS—INSANITY.

Where a wife was of sound mind when she committed adultery, the fact that she subsequently became insane by reason of fear that she had a loathsome disease and by contemplation of her conduct, did not preclude the husband from obtaining a divorce.

[Ed. Note.—For other cases, see *Divorce*, Cent. Dig. §§ 142, 143; Dec. Dig. § 43.*]

2. DIVORCE (§ 249*)—DISPOSITION OF PROPERTY—STATUTES.

Civ. Code Prac. § 425, provides that every judgment for divorce shall restore any property which either party may have obtained, from or through the other during marriage, in consideration thereof. A husband became involved, and sold a part of his land to pay debts. He and his wife conveyed, without consideration, the balance to a third person, who, without consideration, conveyed it to the wife. The conveyance was not in fraud of creditors or any one else. *Held*, that the wife obtained title by reason of the marital relation, so that the court,

granting the husband a divorce, must restore the land to him.

[Ed. Note.—For other cases, see Divorce, Cent. Dig. §§ 701-712; Dec. Dig. § 249.*]

Appeal from Circuit Court, Bourbon County.

Action by A. B. Thomason against Lottie Allen Thomason and another. From a judgment of dismissal, plaintiff appeals. Reversed and remanded.

Hazelrigg & Hazelrigg and Talbott & Whitely, for appellant. Denis Dundon, for appellees.

NUNN, J. Appellant brought this action against his wife, Lottie Allen Thomason, for a divorce from the bonds of matrimony, and for the restoration of a survey of 50 or 60 acres of land, the deed to which his wife received by reason of her marital relation with him. The ground alleged for the divorce was adultery, and such lewd, lascivious behavior on the part of the wife as to prove her to be unchaste. Lottie Allen Thomason did not answer the petition, but the court appointed an attorney to defend for her. A great mass of testimony was introduced on the trial by deposition, and the lower court dismissed appellant's action, from which judgment he has appealed.

This is an unfortunate case, and all the witnesses seem to be reputable and good citizens. Their differences appear to be misunderstandings, but it would be of no benefit to undertake to discuss their testimony in detail and reconcile their differences. One cannot read the record in this case without coming to the conclusion that appellant clearly sustained the charges in his petition. It is undertaken to avoid this by showing that appellee was of unsound mind. This is shown; but, according to the testimony, this unsoundness of mind did not occur until after she was guilty of the acts alleged. It appears that after her improper conduct she became infected by poison oak, which affected her privates and other parts of her body, and she concluded that she had some loathsome disease; that she thought about this and her immoral conduct until her mind became unbalanced. She was of sound mind and responsible for her conduct when she committed the improper acts, and we are of the opinion that appellant was entitled to a divorce.

But one other question remains to be determined, and that is whether or not appellant is entitled to have the title to the land restored to him. Section 425 of the Civil Code of Practice is as follows: "Every judgment for a divorce from the bonds of matrimony shall contain an order restoring any property not disposed of at the commencement of the action, which either party may have obtained, directly or indirectly, from or

through the other, during marriage, in consideration or by reason thereof; and any property so obtained, without valuable consideration, shall be deemed to have been obtained by reason of marriage," etc. The facts with reference to the land transaction are, in substance, as follows: Appellant owned 70 or 80 acres, became involved to some extent, and sold a few acres to pay his debts, and he and his wife conveyed the balance to a third person, without consideration, and that person conveyed, without consideration, to appellant's wife. Under these facts there can be no doubt but appellee obtained the title to the land by reason of the marital relation existing between her and appellant. If she cannot be said to have received it directly, she can be regarded as having obtained it indirectly and without consideration. *Irwin v. Irwin*, 107 Ky. 24, 52 S. W. 927, 21 Ky. Law Rep. 622. Appellant did not make the conveyance to defraud creditors, nor any one else, so far as the record shows, as was done in the case of *Lankford v. Lankford*, 117 S. W. 962. Under the facts and the law of the case, appellant is clearly entitled to have the title to the land restored to him.

For these reasons, the judgment of the lower court is reversed, and remanded for further proceedings consistent herewith.

LOUISVILLE & N. R. CO. v. SEWELL. (Court of Appeals of Kentucky. Feb. 8, 1911.)

1. MASTER AND SERVANT (§ 145*)—RAILROAD RULES—CONSTRUCTION—"ET CETERA"—"ETC."

Where a railroad rule provided that, when trackmen were making repairs in the nature of obstructions, such as laying new steel, making a heavy raise in the track, etc., a flagman should be sent in each direction and a torpedo placed on the rail, the term "et cetera" meant other repairs which should constitute obstructions similar in character to those specified and did not make the rule applicable to a hand car, being propelled by trackmen to their place of employment.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 288; Dec. Dig. § 145.*]

For other definitions, see Words and Phrases, vol. 3, pp. 2511, 2512; vol. 8, p. 7655.]

2. MASTER AND SERVANT (§ 286*)—INJURIES TO SERVANT—RULES—CONSTRUCTION—QUESTION FOR COURT.

Where certain railroad rules were offered in evidence in an action for injuries to a railroad trackman in a collision, the construction of the rules was for the court.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 1036; Dec. Dig. § 286.*]

3. MASTER AND SERVANT (§ 145*)—INJURIES TO SERVANT—RAILROADS—RULES—CONSTRUCTION.

A railroad rule, that green signifies caution and is a signal to go slow, means that caution should be exercised from the moment the signal is reached, and that the train should be run slowly until the cause is ascertained and passed in safety, and is not subject to a construction that trackmen were at work 2,700 feet away, and that if the speed is reduced so that

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

the train would be under control in that distance the rule is complied with.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 288; Dec. Dig. § 145.*]

4. APPEAL AND ERROR (§ 1033*)—ERROR FAVORABLE TO COMPLAINING PARTY.

Where the court should have charged the jury as a matter of law that a railroad rule required caution and slow speed from the moment a green signal was reached, an instruction submitting to the jury the question whether such signal was to notify the engineer that he was not to expect any obstruction closer than 2,700 feet from the flag was not prejudicial to defendant.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4058; Dec. Dig. § 1033.*]

5. APPEAL AND ERROR (§ 837*)—REVIEW—CONSIDERATION OF EVIDENCE.

On appeal from a judgment for plaintiff, the case is to be tested as to the correctness of the instructions in plaintiff's behalf, as well as on the rulings in overruling defendant's motion for a peremptory instruction on the plaintiff's evidence which the verdict found to be true.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3264; Dec. Dig. § 837.*]

6. MASTER AND SERVANT (§ 286*)—INJURIES TO SERVANT—NEGLIGENCE—QUESTION FOR JURY.

In an action for injuries to a railroad track foreman, in a collision between his hand car and a passenger train running against it in disregard of a slow signal, previously set out, defendant's negligence held properly submitted to the jury.

[Ed. Note.—For other cases, see Master and Servant, Dec. Dig. § 286.*]

7. MASTER AND SERVANT (§ 282*)—INJURY TO SERVANT—PUNITIVE DAMAGES—GROSS NEGLIGENCE.

Where defendant's engineer operated a fast passenger train at high speed around a curve and through certain cuts onto a track where he could see but a few yards ahead, disregarding a caution signal, and ran into a hand car with workmen going to their work, injuring plaintiff, he was guilty of gross negligence, authorizing a recovery of punitive damages.

[Ed. Note.—For other cases, see Master & Servant, Cent. Dig. §§ 997-999; Dec. Dig. § 282.*]

8. EXCEPTIONS, BILL OF (§ 6*)—CONTENTS—STIPULATIONS AS TO AMOUNT OF RECOVERY.

Where, at the close of the trial, the parties stipulated the amount of the verdict, and the court, at their request, allowed the jury to sign the same as their verdict, reserving to defendant exceptions to the instructions given, the court could include such stipulation in defendant's bill of exceptions, though settled at a succeeding term on an order extending the time; defendant claiming that the verdict was excessive.

[Ed. Note.—For other cases, see Exceptions, Bill of, Dec. Dig. § 6.*]

9. APPEAL AND ERROR (§ 883*)—RIGHT TO ALLEGE ERROR—STIPULATED VERDICT.

Where, during the trial of an action for injuries to a servant, the parties stipulated the amount of the verdict, defendant would not be heard to assert on appeal that the verdict was excessive.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3611; Dec. Dig. § 883.*]

Appeal from Circuit Court, Boyle County. Action by E. H. Sewell against the Louisville & Nashville Railroad Company. Judge

ment for plaintiff, and defendant appeals. Affirmed.

Benjamin D. Warfield, Chas. R. McDowell, and Chas. Rodes, for appellant. Robt. Harding, Jno. W. Rawlings, Emmett Puryear, and Greene, Van Winkle & Schoolfield, for appellee.

O'REAR, J. Appellee was section foreman, working on appellant's road in Boyle county. The boarding car was stationed at Mechanicsburg, where there was a station and siding, but not a telegraph office. He was required to begin work at 6 o'clock in the morning, with his crew of men, who went from the boarding car to the point at which they were at work, some two miles distant, on a hand car. There was a fast through passenger train to pass Mechanicsburg at 5:09 a. m. On August 23, 1907, appellee was awakened by the cook at 5:30, and breakfasted and started out with his men about 6 a. m. He knew, or could have known, that the passenger train had not passed; but there was no way to learn how late it was. So he started on his way, going in the same direction the passenger train was to go. The track was straight for a quarter of a mile west of Mechanicsburg, when it made a curve through a cut, and then curved again in the other direction through another cut. Appellee caused a green flag to be stuck up on the side of the track near Mechanicsburg on the engineer's side, sent a man ahead to flag any train that might be coming from the opposite direction, and then proceeded on the way with his car and crew. After they had gone about 1,700 feet through the first cut and around the curve, the passenger train came up rapidly behind them, without warning, it is claimed, running at a speed of about 40 miles an hour. When discovered it was about 175 feet from the hand car. The men jumped from the car, but were unable to remove it from the track owing to the proximity and speed of the approaching train. The locomotive struck the car, throwing it to one side and demolishing it. Splinters, gravel, and cinders were thrown from the wreckage, and appellee contends, and offered evidence to show, that some of the debris struck him in the eye. A splinter and cinders and other foreign substances were subsequently removed from his eye, but he claims that it was left impaired as to its vision, while the eyeball and the lower lid by the healing of the wound caused by the splinter adhered permanently. He was awarded damages in the sum of \$2,000 by the verdict of the jury and judgment of the court in this trial of the action brought by him for the negligent running of the passenger train without observing and obeying his signal.

A rule of the company was put in evidence

stating that "green signifies caution, and is a signal to go slow." Rule 26. A witness for appellant, the engineer in charge of the locomotive, testified that a green flag on the side of the track indicated that trackmen were at work 2,700 feet away, and that if the speed was reduced so as to have the train under control at 2,700 feet distance that is all that was required. This evidence was based, doubtless, on rule 226, which rule, however, the court refused to admit. That rule is: "When making repairs which are in the nature of obstructions, and requiring a considerable length of time, such as laying new steel, making a heavy raise in the track, etc., a flagman must be sent in each direction a distance of 90 rails, or 2,700 feet, where a red flag on a standard staff will be put up, and a torpedo placed on the rail, or 3,600 feet from the obstruction, where a green flag on a standard staff will be placed; he will then return to the red flag and work near it until the approach of the train. When the engineer has acknowledged the red flag, as per rule 201, the torpedo can be removed until the train has passed, but must be replaced immediately. If the view is obstructed, or if on descending grade, the flagman must go as much further as may be necessary to reach a point where he is absolutely sure he can be seen by the engineer at a sufficient distance in which to make a safe stop. When the obstructions are of a very temporary nature, the green flags may be omitted, but the red flags and torpedo must be used as directed above. In all cases the standard staff with horizontal arm must be used. It must be firmly and conspicuously placed in the ground on the engineer's side of the track for approaching trains. Double track: As trains may, at any time, be detoured from the usual track, the full measure of protection must be observed, in each direction, before obstructing track that is ordinarily used for traffic in one direction only." The action of the court in rejecting this rule, and the refusal of the court to instruct the jury relative to the absence of a red flag, and to appellee's duty regarding the placing of same, are relied on as error and ground for reversal.

Rule 226 was properly rejected. Appellee was not then at work on repairs which were "in the nature of obstructions, and requiring a considerable length of time, such as laying new steel, making a heavy raise in the track, etc.," which necessitated the observance of that rule by him. He had not reached the place of work, nor was the track obstructed in any of the ways indicated. But it is insisted that the presence of the hand car on the train track was itself such an obstruction. The rule specifies the character of the obstructions which would necessitate the observance of that rule. The words "et cetera" mean other obstructions similar to and of the character of those specified. The construction of written rules is generally

for the court. *C. N. O. & T. P. Ry. Co. v. Lovell*, 141 Ky. 260, 132 S. W. 569. So, in construing rule 226, it was for the court to say whether the conditions shown justified its application, as well as to define rule 26. The latter did not admit of the interpretation put on it by appellant's engineer. It is imperative, and admits of no qualification. It commands caution from the moment it is reached, as well as requires the train from that point to go slow until the cause is ascertained and passed in safety. The court should have so instructed the jury. Instead, the instructions left it to the jury to say whether this green signal was to notify the engineer that he was not to expect any obstruction closer than 2,700 feet from the flag. But the error was committed in appellant's favor, and of course it will not be heard to complain of that fact.

Appellee was compelled to go to his work on the hand car, taking his men and their tools, etc. They had to pass over the main track. They had to begin work at 6 o'clock, a. m. They did not know and could not learn when the train would pass, as it was then an hour late. They were required to protect themselves, as well as the oncoming train, from danger by avoiding a collision. They ought not, reasonably, to have stopped the train, as by signaling it by a red flag, or by a flagman, to a standstill until the hand car proceeded to its journey's end. It was required instead that such caution signal would be given the engineer of the train as would enable him to get his train under control, and by whistle or bell warn the car out of his way. The course suggested, if the rule had been observed, was well calculated to prevent an accident of this character. Appellee's evidence is that the engineer did not "acknowledge" the green signal by whistling, as he should; that he did not proceed with caution, nor slacken the speed of the train until too late and until appellee and his fellow workmen were placed in imminent peril. The case must be tested on appeal as to the correctness of the instructions on the plaintiff's behalf, as well as on the ruling of the court in overruling defendant's motion for a peremptory instruction, on the plaintiff's evidence, as the verdict for him found the facts to be as outlined in his evidence. We conclude that the peremptory instruction was properly overruled, and that the case was submitted under unobjectionable instructions so far as defendant is concerned.

It was gross negligence, evidencing a reckless disregard of the lives of those ahead on the track, for the engineer to dash at such high speed around the curve and through the cuts onto a track which he could not see but a few yards ahead, disregarding the caution signal placed for his guidance, and which he admits that he saw. Therefore the instruction allowing punitive damages was proper.

Appellant contends, in addition, that the

verdict is excessive, and flagrantly against the evidence. The bill of exceptions shows that the amount of the verdict was agreed to by the attorneys representing the plaintiff and the defendant, and the court asked to allow the jury to sign it as their verdict; the defendant saving exceptions to all instructions given. The court indicated that he regarded the amount agreed on as excessive, but said he would allow it if agreed to by the parties, but that such excessiveness should not constitute a ground for new trial. Thereupon the verdict was signed by the jury as though it was their finding. Notwithstanding, the motion for new trial did rely on the fact that the verdict was excessive.

It is insisted by appellant that the interpolation of the alleged agreement into the bill of exceptions by the court was irregular, because the bill was not made up (on an order extending the time) until the succeeding term. It was competent and proper for the trial judge to incorporate into the bill any fact occurring on the trial affecting its regularity and conduct, whenever the bill was presented to him for signature, if it did not already contain the statement. The stipulation is a waiver of the error in the amount of the verdict, if it was an error. Appellant closed that question when it substituted its own consent for the jury's judgment. It will not now be heard to say that the nominal verdict, in fact its own agreement, was the result of passion or prejudice on the part of the jury. The verdict so made is as binding, subject to the exceptions reserved in the stipulation, as would be a consent judgment.

Perceiving no error prejudicial to any substantial legal right of appellant, the judgment is affirmed.

RANDOLPH et al. v. BALLARD COUNTY BANK.

(Court of Appeals of Kentucky. Feb. 8, 1911.)

1. CORPORATIONS (§ 450*)—ORGANIZATION—COMMON LAW.

There being no right at common law to incorporate trading or manufacturing corporations, and the Constitution providing against their creation by special law, when incorporated under the general law by articles placing a limit on the corporation's indebtedness, the incurring of indebtedness in excess of the limit is an express violation of law.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 1793-1795; Dec. Dig. § 450.*]

2. CORPORATIONS (§ 337*)—DEBT LIMIT—EXCESS—LIABILITY OF DIRECTORS.

At common law, directors of a corporation contracting an indebtedness in excess of its charter limit would not render them personally liable to creditors of the corporation.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. § 1455; Dec. Dig. § 337.*]

3. CORPORATIONS (§ 337*)—EXCESS OF DEBT LIMIT—LIABILITY OF DIRECTORS.

Ky. St. § 550 (Russell's St. § 2134), declares that if the officers of a corporation shall violate any of the provisions of the article they shall be individually liable for any loss resulting to any person from such failure, etc. The articles of a printing corporation limited its indebtedness to \$500. It became indebted to plaintiff bank for \$300, and its managing officer was permitted to so manage its business that it became further indebted to the bank on an overdraft for \$1,429.31, for which it gave its note and then made a general assignment. *Held*, that the directors were responsible for the acts of the manager, and were individually liable to the bank for the amount of its debt in excess of the authorized indebtedness.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. § 1455; Dec. Dig. § 337.*]

4. BANKS AND BANKING (§ 116*)—OFFICERS—NOTICE TO OFFICERS—CONCLUSIVENESS—ADVERSE INTEREST.

Where the cashier of plaintiff bank was also president of a printing corporation, and as such permitted the corporation to become indebted to the bank in excess of the corporation's charter debt limit, the cashier's knowledge of such debt limit was not notice to the bank.

[Ed. Note.—For other cases, see Banks and Banking, Cent. Dig. §§ 282-287; Dec. Dig. § 116.*]

Appeal from Circuit Court, Ballard County. Action by the Ballard County Bank against L. H. Randolph and others. Judgment for plaintiff, and defendants appeal. Affirmed.

Jess F. Nichols and J. B. Wickliffe, for appellants. F. L. Turner, for appellee.

O'REAR, J. The Ballard News Printing Company was an incorporated company under the laws of this state. Appellants and W. F. Purdy were its directors. In its articles of incorporation the limit of its indebtedness was fixed at \$500. It became indebted to appellant bank on April 7, 1905, \$300, evidenced by note; and on February 6, 1909, it executed another note to the bank for \$1,429.31. The latter was to close an overdraft. The company made a general assignment for the benefit of creditors. Its assets amounted to about \$200. This suit was brought by the bank against the printing company to recover judgment for \$500 upon the notes sued upon, and against all the directors to recover the balance of the notes because of their violation of section 550, Ky. St. (Russell's St. § 2134). W. F. Purdy was cashier of the bank at the time the debts sued on were created. He was also a director of the printing company, and its president and general manager. The directors sued, other than Purdy, filed answer contesting their liability, alleging that the indebtedness on behalf of the printing company to the bank was created by Purdy alone and without their consent or knowledge, although they admit in the pleadings that they consented to the execution of the last-named note on the assurance of Purdy that it was desired for appearance sake to prevent

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

trouble with the bank examiner, who was shortly expected, and under the promise by Purdy to finally cancel and return the note. The court sustained a demurrer to the answer, and, as it was not amended so as to improve the defense asserted, rendered judgment in behalf of the bank against the printing company for \$500 subject to credit by the amount ordered paid over by the assignee, and rendered judgment against each of the directors for the excess of the bank's two notes above \$500. The directors, save Purdy, appeal.

Any number of persons not less than three are empowered by statute to become incorporated for doing business, such as includes that engaged in by the Ballard Printing Company, by complying with the requirements of the chapter on private corporations. Ky. St. c. 32, § 538 (section 2121). Among other things required to be stated by the incorporators in their articles is "the highest amount of indebtedness or liability which the corporation may at any time incur." Subdivision 8 of section 539, Ky. St. (section 2122, Russell's St.). Section 550, Ky. St. reads: "If the directors or officers of any corporation shall fail or refuse to comply with, or shall violate any of the provisions of this article, those so failing, refusing or violating shall be jointly and severally individually liable for any loss or damage resulting to any person from such failure, refusal or violation, and, in addition thereto, the persons so liable shall be each punished by a fine of not less than one hundred dollars nor more than one thousand dollars." There was not a right at common law to incorporate trading or manufacturing companies. They were created by act of Parliament, and in this country for a long time by special act of the Legislature. It was usual, at least always permissible, for the Legislature to limit in the act the amount of indebtedness which the corporation might incur. Under the existing Constitution of this state, special legislation of that class is prohibited, and the Legislature has provided instead by general law for such incorporation. The law now, as before, creates the corporate being, endows it with powers, and sets upon it limitations. It may not exceed either. When incorporated under the general law now the corporation's powers are derived from the state, and are as if the particular corporation was named in the statute, and its articles agreeable with the statute were embodied therein. So when the statute allows not less than so many to engage in a particular business, upon terms prescribed by the statute, or to be set forth in the articles adopted, what is thereby allowed is allowed by the statute, and what is thereby forbidden is forbidden by the statute. To engage in the business as a corporation without becoming incorporated under the statute is to violate the provisions of the article on corporations. To exceed that which

the statute allows is not less a violation of the same. So, when the articles of incorporation place a limit on the indebtedness which the corporation may incur, to exceed the limit is to violate the chapter on incorporations, as it would be to engage in a business not authorized by its charter or the statute. Notwithstanding trading corporations were not the creations of the common law, it took cognizance of them, and fixed the liabilities of their officers and agents for acts *ultra vires*. It has, accordingly, been held that at the common law, if directors contracted indebtedness in excess of the limit prescribed by the corporation's charter, it was not sufficient to render them liable to creditors of the corporation. *Frost Mfg. Co. v. Foster*, 76 Iowa, 535, 41 N. W. 212. And where directors of a bank issued notes in excess of the authority given by the law of its incorporation they were held not personally liable. *Sandford v. McArthur*, 18 B. Mon. 411.

Perhaps no other manner of doing business has grown as much in the last century as that through corporations. No more useful expedient has been devised. At the same time, they have developed many opportunities for fraud and imposition, which, owing to the rules of the common law governing the liabilities of their officers, often went unpunished and unrequited. One of the problems of this situation has been to fix a just liability, a legal responsibility, either upon the corporation, or its officers, without unnecessarily impairing the utility or discouraging the existence of this great commercial agency. And it is yet an unsolved problem. Still, our legislation was aimed to conserve the utility of incorporations, with strict accountability of their officers to those dealing with them, as well as to their stockholders and the general public. In several instances the statutes have placed upon directors and other officers of corporations a personal liability, which did not exist at the common law. There is, we apprehend, a threefold object in this. One was to protect those dealing with the corporation. Another was to protect stockholders. The third was to protect the public, as insolvent, irresponsible corporate trading bodies would be more apt to break and thereby endanger credit and commercial stability. To hold directors to stricter conduct in discharging their official duties would tend to strengthen corporate concerns and lessen the chance for their becoming insolvent.

The aim of this advanced legislation could not have been to curtail the duty of corporate directors, or even to preserve the immunity that they enjoyed at the common law. It was intended, we think, to enlarge duty by extending responsibility. Stockholders have little or no direct control of the corporation's affairs; the public dealing with it have none. Directors alone have the power of control. If directors allow managing

officers of the corporation to exceed, or otherwise violate, the charter of the company, or any provisions of the statute regulating corporations (which are to be regarded as being read into the charter of each corporation doing business under the statute), it is intended by section 550, *supra*, to hold them personally liable for the defection. They are immune from personal liability when they do their duty imposed by the statute; when they neglect that duty, or willfully violate it, they are made liable for the consequences.

It is argued that such a strict rule will deter responsible men from assuming the office of directors in private corporations, as they generally do not receive pay for such services. That may be. But, then, the public would know the character of men whom they had to deal with. Persons dealing with the corporation would not be misled into relying upon the business integrity and ability of a directorate, composed of capable, successful men, who did not in fact exercise their capability in the corporate affairs, but left the management to incompetent or unworthy subalterns.

The directors of a trading or commercial corporation are in truth managing their own business, in a sense. They have availed themselves of a privilege accorded by law of doing the business as an artificial person. They ought to know at least the legal limitations upon the powers of the corporate being by which they ply their business. When they exceed their legal powers, or suffer their managing officers to do so, if, notwithstanding, they are as free from personal liability for such excesses as if they had strictly observed the statute and their charter limitation, then the statute imposing limitations is not a protection either to stockholders or creditors. Such a rule would be to place a premium upon negligence in directors of corporations; would reward their indifference to duty; would give them the benefit of such action if it turned out profitably for the corporation; but impose no liability on them if it turned out likewise. The public policy is indicated by the statute. It is to hold directors responsible for excesses or other breaches of the statute, including the charter of the company given by the statute. It rewards the faithful and diligent director by immunizing him from personal liability for the corporation obligations. It punishes his negligence or breach of duty, whether it be an act of malfeasance, or nonfeasance, whereby the law of the corporation's being is violated. Let directors of commercial corporations understand that under our statute they are active, not passive, trustees; that they must at least use ordinary care and diligence in managing the corporation's affairs, as if they were their own; and that if they turn over its management to somebody else, and the

latter exceeds the corporation's charter, it is the same as if the directors themselves had exceeded it, as in truth, and in legal intentment, the act of their agents concerning a duty particularly imposed upon the directors is their own act in the matter.

The answer admitted that the managing officer of the printing company ran its business without the knowledge or control of the directors concerning the creation of liabilities in excess of the charter limit. It admitted that when their attention was called to the fact they ratified it by executing for the corporation the note sued on, which was three times greater than the company's power to legally incur; that they did this to deceive the bank officials, and to impose on the representatives of the public whose duty was to examine into the character of the bank's assets and to require them to be made good, if they were not good. This, on a small scale, is a feature of wild-cat financiering, done under the guise of corporate action, presumably sanctioned and safeguarded by law, that has brought reproach upon commerce, and serious public embarrassment. Now let them lie in the bed they have made. It was violating their trust to turn over the corporation's entire management, directorate and all, to another; it was wrong to allow the charter limitation to be exceeded; it was wrong to make the note of the corporation in violation of the law, and especially so as to deceive and mislead the public and public officials; it is not an excuse that the directors had neglected their duty, or had attempted to abdicate its discharge to another; it is not an excuse, either, that their agent induced them to ratify the act so as to benefit somebody else.

But it is contended that Purdy was the cashier of the bank as well as president of the printing company. The bank is charged with notice of the limitation in the printing company's charter, as well as with notice that Purdy was violating it. Not so. Purdy's position as agent of the bank would impute knowledge to it which he possessed only upon reasonable presumption that he would divulge to it his knowledge. His dual position renders it more probable that he would not have disclosed his knowledge in this instance. His personal interest was contrary to that of the bank; he was actually deceiving it, it seems, in the transaction. But, whether he was actively misleading the bank or not, it is contrary to probability that he would have divulged to it matter within his knowledge which if divulged would have prevented the consummation of his transaction with it. Therefore the presumption does not obtain that he did impart his knowledge to the bank. Presumptions of a fact are based upon probabilities, not improbabilities.

Judgment affirmed.

HUGHES v. ROBERTS et al.

(Court of Appeals of Kentucky. Feb. 8, 1911.)

SCHOOLS AND SCHOOL DISTRICTS (§ 97*)—PUBLIC SCHOOLS—DISTRICT TAXATION BONDS—ELECTION.

Where an election for the purpose of issuing bonds to improve the property of a school district was held under Ky. St. § 4481 (Russell's St. § 5758), which requires that the board of trustees shall appoint two judges, a clerk, and a sheriff to hold the election, and was regular, save that it was held by one clerk and one judge, there was not a substantial compliance with the statute; Ky. St. § 448 (Russell's St. § 541), providing that words purporting to give authority to several public officers must be taken as giving authority to a majority, and the election was void.

[Ed. Note.—For other cases, see *Schools and School Districts*, Dec. Dig. § 97.*]

Appeal from Circuit Court, Henry County.

Suit by A. R. Hughes against Sanford Roberts and others, as the Board of Trustees, to enjoin them from issuing certain bonds. From a judgment sustaining a demurrer to the petition, plaintiff appeals. Reversed and remanded.

R. D. Jackson, for appellant. Turner & Turner, for appellees.

MILLER, J. Pursuant to a resolution regularly and properly adopted and notice given by the board of trustees of the Bethlehem white graded common school district No. 24, in Henry county, an election was held in that school district on September 12, 1910, under section 4481 of the Kentucky Statutes (Russell's St. § 5758), to determine the question whether or not the trustees should issue bonds of their district in an amount not exceeding \$2,000, for the purpose of providing suitable grounds, school buildings, furniture, and apparatus for said district. The appellant Hughes, as a citizen, resident, and taxpayer of the district, instituted this suit against the board of trustees, asking that they be enjoined and restrained from issuing the bonds, upon the sole ground that the election was held and conducted by one clerk and one judge, instead of by two judges, a clerk, and a sheriff, as the law requires. The circuit judge sustained a demurrer to the petition, and the plaintiff appeals.

It is conceded by the appellant that the action of the trustees in calling the election was regular; that the notice was sufficient and properly posted; that the requisite two-thirds of the voters who voted cast their votes in favor of the proposition; and that there are no constitutional inhibitions which stand in the way of the issuing of the bonds, provided the election which authorized them was a valid election.

The proceedings, except in the number of the election officers, was in strict compliance with the statute as construed in *Arbuckle*

v. McKinney, 97 S. W. 408, 30 Ky. Law Rep. 55. The statute, however, requires that the board shall appoint two judges, a clerk, and a sheriff, to hold the election, who shall be first duly sworn before acting, and shall be housekeepers and taxpayers resident in the district for which they are appointed. There is no suggestion of fraud, or of any unfair advantage having been taken of any one; on the contrary, it is admitted that the election was regularly and quietly conducted, and fully and fairly expressed the will of the voters of the district.

The general rule is well established that mere irregularities in the conduct of an election will not render it void; and it has been held that the holding of an election by persons who were not officers de jure, but who had colorable authority and who acted de facto in good faith, was not so grave an irregularity as to avoid the election. However, when it comes to the imposition of a tax, the prescribed authority which authorizes the execution of that great power should be carefully followed in every material respect. In *Judge of Campbell County Court v. Taylor*, 8 Bush, 208, this court said: "The power to tax is a high governmental power, but fortunately for the people it cannot be exercised by legislative authority without limit; and when the Legislature grants that high power to another tribunal it can only be exercised in strict conformity to the terms in which the power is granted, and a departure in any material part will be fatal to the attempt to exercise it." This language was quoted with approval in *Bowling Green & Madisonville R. R. Co. v. Warren County Court*, 10 Bush, 724. And in *Mays v. Slemmons*, 14 Ky. Law Rep. 660, 663, Judge Barbour, speaking for the superior court, said: "We are aware that in matters of this kind the courts are inclined to give the statute a liberal construction in aid of its beneficent purposes. But we must not lose sight of the fact that in the taking of private property for public uses, no matter how meritorious the object may be, the forms prescribed by law must in their true spirit be followed. Here the requirements of the law are simple. They can be as easily followed as disregarded, and it is far better that the public inconvenience growing out of the delay should be suffered than that the constitutional rights of the citizen should be imperiled."

Appellee relies, however, upon *Trustees of Common School District No. 88 v. Garvey*, 80 Ky. 159, and other similar cases, as authority to sustain this election. In the *Garvey* Case the statute required that the school commissioner, or some one chosen by a majority of the voters present and voting, should act as judge of the election. The commissioner did not serve, and, mistaking his authority, directed Gayle to act as judge of

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

the election, and Gayle did so without having been elected by the voters. Furthermore, many of the votes were recorded by the voters themselves and by other unauthorized persons. The court upheld the election upon the theory that Gayle was a de facto officer acting by the common consent of all persons interested in the election. There is, however, a marked distinction, in principle, between the Garvey Case and the case at bar, in this: In the Garvey Case the law required but one election officer; and Gayle, although he was not elected in the manner pointed out by the statute, was, nevertheless, a de facto officer, recognized as such, and thereby satisfied the statute which required only one election officer. In the case at bar, however, the statute required that there should be four officers of election, when there were, in fact, only two officers of any kind. If, in this case, two other officers had served by common consent, we might then have had a case similar to the Garvey Case. But, if two officers could lawfully hold an election where four should have acted, we see no reason why one officer could not do so, and thus destroy one of the safeguards which the statute has thrown around the people for their protection in this important matter of taxation.

In *State v. Taylor*, 108 N. C. 196, 12 S. E. 1005, 12 L. R. A. 202, 23 Am. St. Rep. 51, the court said: "An essential element of a valid election is that it shall be held by lawful authority, substantially as prescribed by law. It is not sufficient that it be simply conducted honestly; it must as well have legal sanction. The statutory provisions and regulations in respect to public elections in this state must be observed and prevail, certainly in their substance. Otherwise the election will be void and so treated. Therefore the contention that, if the election in question was simply conducted fairly and honestly, it was valid, is unfounded."

The Legislature has not left the question an open one. Section 448 of the Kentucky Statutes (Russell's St. § 5a1), provides as follows: "Words purporting to give authority to three or more public officers or other persons shall be construed as giving such authority to a majority of such officers or persons." If a minority of the required number of election officers could lawfully hold an election, then the other minority might also hold a separate and different election at the same time. In matters of such vital importance as the imposition of a tax upon the property of the citizens, we are of opinion that the statute should, in this respect, be substantially complied with, and that such an election must be held by, at least, a majority of the election officers prescribed by the statute.

Wherefore the judgment, sustaining the demurrer to the petition, is reversed; and

the cause is remanded, with instructions to overrule said demurrer, and for further proceedings consistent with this opinion.

W. B. SAMUELS & CO. v. T. M. GILMORE & CO.

(Court of Appeals of Kentucky. Feb. 8, 1911.)

1. APPEAL AND ERROR (§ 1097*)—MANDATE—LAW OF CASE—CHANGE IN FACTS.

The rule that an opinion on a former appeal is the law of the case is not changed by the introduction of evidence on retrial which is merely cumulative of the evidence offered before.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4358-4368; Dec. Dig. § 1097.*]

2. APPEAL AND ERROR (§ 1195*)—MANDATE—LAW OF CASE—QUESTIONS DETERMINED.

Where an opinion on a former appeal, which enunciated the law of the case, found that a contract of the defendant corporation had really been entered into by the secretary and treasurer, instead of the president, all question as to the president's mental capacity was out of the case, regardless of a modification on that point upon petition for rehearing.

[Ed. Note.—For other cases, see Appeal and Error, Dec. Dig. § 1195.*]

3. TRIAL (§ 139*)—PROVINCE OF JURY—INFERENCE FROM EVIDENCE.

Where there is evidence to support an issue, it should be submitted to the jury; but otherwise not.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 338; Dec. Dig. § 139.*]

4. APPEAL AND ERROR (§ 1195*)—MANDATE—LAW OF CASE—SAME FACTS.

Where the opinion on a former appeal found there was no evidence of fraud, and the evidence on retrial was no stronger, it was proper not to submit it to the jury.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4661-4665; Dec. Dig. § 1195.*]

Appeal from Circuit Court, Nelson County.

Action by T. M. Gilmore & Co. against W. B. Samuels & Co. From a judgment for plaintiff, defendant appeals. Affirmed.

Nat. W. Halstead, John W. Lewis, and D. A. McCandless, for appellant. John A. Fulton, J. S. Kelley, and R. C. Cherry, for appellee.

MILLER, J. T. M. Gilmore & Co. brought this suit against W. B. Samuels & Co. to recover commissions for selling 3,266 barrels of whisky at 50 cents per barrel. The provisions of the contract and the several defenses interposed by W. B. Samuels & Co. are set forth in detail in the opinion of this court delivered upon a former appeal, and may be found in 135 Ky. 706, 123 S. W. 271. The answer presented four specific affirmative defenses: (1) That the writing sued on was not the act and deed of the defendant company, and that it was not bound by the unauthorized act of its president, Mrs. M. A. Samuels; (2) that at the time of the execution of this writing Mrs. Samuels was not competent to contract; (3) that she was overreached and deceived in its execution by T. M. Gilmore,

the president of the plaintiff company; and (4) that the contract was without consideration. Upon the first trial the circuit court peremptorily instructed the jury to find for Samuels & Co., which was done, and the petition was dismissed. Upon the appeal this court held that a peremptory instruction should have been given the jury to find in favor of Gilmore & Co., and reversed the judgment for further proceedings. Upon the second trial the circuit court peremptorily instructed the jury to find for the plaintiff, Gilmore & Co., which it did; and from a judgment in plaintiff's behalf, the defendant Samuels & Co. prosecutes this appeal.

The opinion upon the former appeal fully discusses the evidence and the law of the case, and it need not be repeated here. It is sufficient to say that on the second trial the evidence was not, in any material respect, different from the evidence heard upon the first trial. It is conceded by counsel for appellant that the former opinion disposed of the first and fourth defenses above specified; but it is contended that the second defense, which raised the question of the mental capacity of Mrs. Samuels to make the contract, and the third defense, which alleged that she was overreached and deceived in its execution, were still open questions and should have been sent to the jury under proper instructions. As above stated, the evidence upon this trial was substantially a repetition of the evidence upon the former trial, with the exception that appellant introduced three new witnesses, Hall, McLain, and Miller, upon the issue raised as to the mental capacity of Mrs. Samuels to make the contract. But their testimony is cumulative merely of the testimony of eight other witnesses who testified upon the same point.

Appellant insists, however, that this court never intended, by its opinion upon the former appeal, to deny to appellant the right of a trial by jury upon these two issues; and, in support of that position, it bases its argument, in part, upon the fact that a controlling sentence in the former opinion was modified upon a petition for a rehearing, but that the modification was not known to, or brought to the attention of, the circuit judge or of counsel who tried the case. The modification referred to in the former opinion is found on page 723 of 135 Ky., 123 S. W. 271. The original sentence is found in that paragraph of the opinion which deals with the question of the mental capacity of Mrs. Samuels, and reads as follows: "But, in order that it may avail itself of this right, it must be clearly established that the said contracting agent did not, at the time the contract was entered into, have sufficient capacity to know and understand what he was doing, and that this fact was not known to other officers or agents of the company, or, if known to them, they did not know that such officer was attempting to act or represent the company." In response to a petition for a

rehearing, however, this court struck from the quoted sentence the following portion thereof: "And that this fact was not known to other officers or agents of the company, or, if known to them, they did not know that such officer was attempting to act for or represent the company"—thus leaving that sentence of the opinion when corrected, and as the opinion of the court upon this point, to read as follows: "But, in order that it may avail itself of this right, it must be clearly established that the said contracting agent did not, at the time the contract was entered into, have sufficient capacity to know and understand what he was doing."

We do not see that this modification of the opinion in any respect strengthens the appellant's position under the facts of this case and the former opinion, which applied the law under those facts; for it is therein clearly pointed out that this court rested its decision upon the fact that the contract had, in effect, been made by Mrs. Samuels' son, H. M. Samuels, who was the secretary, treasurer, and manager of the company. The court not only reached the conclusion that Mrs. Samuels knew and understood what she was doing at the time she signed the contract, but, upon the other branch of the question, it said: "But even if the evidence led us to entertain a contrary view, and to hold that she did not at that time have mental capacity to contract, still defendant must fail in its contention for the further reason that in its execution the secretary and treasurer of the company, who was also a director and had the active management and control of its affairs, participated. In fact, he assisted in the draft of the contract and discussed its terms and provisions, and not until they were acceptable to him was his mother, the president, conferred with in regard thereto. Here, then, we have a contract entered into between plaintiff and defendant in which the defendant is represented, not only by the president, whose capacity to contract is questioned, but by another officer of the company, her son, H. M. Samuels, who had equal authority to represent it, and whose mental ability is in no wise impaired. He and his mother owned practically all of the stock of this corporation. In its welfare and success he was most vitally interested. If he had not wanted the contract executed, or the company had not been satisfied with its terms and provisions, instead of going to his mother and requesting her to enter into it for the company, he should have objected to her signing it; and, if he regarded her as mentally incompetent to transact business, he should have so stated to the plaintiff. The fact that he did not object to plaintiff seeing his mother and discussing the matter with her, and contracting with her relative thereto, is another evidence that he did not regard his mother as incompetent to transact business; and that neither they nor their attorney so regarded her is fur-

ther evidenced by the fact that when, a few days after the contract had been entered into, the company through its president notified Edelen & Co. that they would not carry out the contract, the ground upon which they sought to escape liability was not want of capacity upon the part of its president, who made the contract, but because she had not first obtained authority so to do from the board of directors."

It is clear, therefore, that the former opinion held that although, as a matter of fact, Mrs. Samuels may not have had the mental capacity to understand the contract when she executed it, the presence and joint act of her son, who was secretary, treasurer, and manager of the company, took the case out of the operation of the rule which avoids a contract entered into by one while mentally incapacitated to do so, because it was, in reality, the act of the manager. In this we think the former opinion was clearly right, and we must adhere to that ruling.

In support of the second ground urged for a reversal, that Mrs. Samuels was overreached and deceived by Gilmore when she signed the contract, it is contended that there is some evidence to support that charge, and that the question should have been submitted to the jury for decision. In the former opinion we said that there was nothing in the record to justify the charge that a fraud was practiced upon the president, M. A. Samuels, in the execution of the contract; and there is nothing in the record upon this appeal which strengthens the appellant's case in that respect. There is abundant authority sustaining the proposition that, where there is any evidence to support a question in issue, it is error not to submit that question to the jury; but, where there is a total failure of evidence to support a given proposition, it is error to submit that proposition to the jury. *Bannon v. Patrick Bannon Sewer Pipe Co.*, 136 Ky. 572, 119 S. W. 1170, 124 S. W. 843. Upon the former appeal this court was of opinion that there was no evidence of fraud; and we are of opinion that the case in that respect is no stronger for appellant upon this appeal. That being true, the circuit judge properly refused to submit that question to the jury.

Appellant assigns a further ground for reversal in the seventh ground for a new trial, which claims that the court erred in its judgment in giving the appellee double the amount it was entitled to recover under the proof. This ground, however, has not been argued, either orally or in the briefs, and we are not advised of any specific error committed by the circuit court in that respect. On the contrary, the contract is in writing, and by its terms it sustains the judgment in every respect.

Wherefore the judgment of the lower court is affirmed, with damages.

COOPER v. WALKER et al.

(Court of Appeals of Kentucky. Feb. 8, 1911.)

1. DEEDS (§ 76*)—EFFECT OF INVALIDITY—COLLATERAL ATTACK.

In an action against a guardian for an accounting, evidence that at the time plaintiff's father made a deed to her mother, who afterwards married the guardian, her father was mentally incapable of making a deed, is inadmissible, as the deed could not be collaterally attacked in such proceeding.

[Ed. Note.—For other cases, see *Deeds*, Cent. Dig. § 203; Dec. Dig. § 76.*]

2. HUSBAND AND WIFE (§ 11*)—PERSONALTY OF WIFE—REDUCTION TO HUSBAND'S POSSESSION—EFFECT.

Where a husband in 1891 or 1892 reduced the personal property of his wife to possession, it became his property under the law then in force.

[Ed. Note.—For other cases, see *Husband and Wife*, Cent. Dig. § 51; Dec. Dig. § 11.*]

Appeal from Circuit Court, Johnson County.

Action by *Permella Cooper* against *B. K. Walker* and others. From a judgment for defendants, plaintiff appeals. Affirmed.

J. Morgan Chinn and *C. B. Wheeler*, for appellant. *Vaughan, Howes & Howes*, for appellees.

CLAY, C. Appellant, *Permella Cooper*, brought this action against appellee *B. K. Walker*, her statutory guardian, *H. S. Howes* and *C. M. Cooper*, sureties on his guardian's bond, and also against *Martha J. Davis*, the administratrix of *W. W. Stafford*, deceased, for moneys which she alleged her guardian had received and had not accounted for. She also charged that *Walker* turned over to *W. W. Stafford* \$400 of her money without lawful right or authority to do so. *Walker, Howes, and Cooper* filed a joint answer, traversing the allegations of the petition. *Martha J. Davis*, as administratrix, filed a separate answer, in which she, after traversing the allegations of the petition, set up affirmatively that *B. K. Walker*, as an individual, had entered into a contract with *W. W. Stafford*, by which *Stafford* agreed, in consideration of the sum of \$400, to take appellant into his family, give her a common school education, and clothe and treat her in all respects as he did his own children, until appellant married or died; that it was agreed that, should appellant marry, the \$400 should become the absolute property of *W. W. Stafford*; that appellant resided with said *W. W. Stafford* and his family for a period of 7½ years, during which time she was treated in all respects as one of *Stafford's* own children, up to the date of her marriage in April, 1904. Subsequently, *Martha J. Davis*, as administratrix, filed an amended answer and counterclaim, in which she charged that it was agreed between *Walker* and *Stafford* that *Walker* was to keep an account of the \$400 expended; that of said amount all was ex-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

pended for appellant's maintenance and support except the sum of \$159.54. She also pleaded that it was worth \$100 per year to keep and board appellant during the time she lived with Stafford, and that she, as administratrix, was entitled to recover the sum of \$700, less the sum of \$159.54. The affirmative matter in the original answer of Martha J. Davis was denied by reply, while the allegations of the amended answer and counterclaim were controverted of record. The chancellor denied appellant the relief prayed for, and also dismissed the counterclaim of Martha J. Davis, administratrix. From that judgment this appeal is prosecuted.

The facts disclosed in the record are as follows: The appellant was the only child of Thomas Preston, who died in the year 1888. The day before he died Preston conveyed a house and lot that he owned to his wife, the mother of appellant. In August, 1889, appellant's mother married appellee B. K. Walker. Two or three years later she and Walker sold the house and lot for \$600. In addition to this sum, appellant's mother received from her father's estate the sum of \$300. Out of this sum an execution against her father for \$127.04 was paid, making the amount realized from her father's estate \$172.96. Taking this sum of \$772, Walker and his wife moved to Morehead. There Walker engaged in the livery business with a brother-in-law, Ben Spradlin, and continued the business for four or five years. While there, Walker bought a lot for \$100 and took the deed thereto in his own name. Subsequently he built a house thereon. The other property which Walker received from his wife was consumed by him and his wife. While at Morehead Mrs. Walker contracted consumption. They then returned to Paintsville, where she lingered for about a year, and then died. During that time Walker devoted himself chiefly to nursing and taking care of his wife. Upon the death of his wife, Walker kept appellant, who was about eight years old, for a period of one year. Finding that he could not provide for her and give her the attention she required, he arranged with W. W. Stafford to take her into his family as one of his children. To that end he sold the house and lot in Morehead for \$450. The notes for the deferred payment amounted to \$400. These notes he turned over to W. W. Stafford. The contract, which he entered into with Stafford for the care and maintenance of appellant, is as follows: "This article of agreement, made and entered into this 23d day of December, 1896, between W. W. Stafford of the first part and B. K. Walker of the second part, witnesseth: That the party of the first part for and in consideration of notes this day assigned to said party of the first part by party of the second part on F. P. Blair, amounting to the sum of four hundred (\$400.00) dollars, the party of the first part agrees to take Permella (Beady) Preston as one of his own family and to treat

her as one of his own family and to treat her as such, to give her a common school education, clothe and treat her in all respects as he does his own children until she marries or dies, and he further agrees to keep an account with her and in case of her death before her marriage he agrees to pay to the said B. K. Walker all that is left or unspent of the four hundred dollars. Witness our hands and seals the day and year first above written. W. W. Stafford. B. K. Walker."

Upon the execution of the foregoing contract, appellant went to the home of W. W. Stafford, where she remained until her marriage, in 1904. While there she was clothed and boarded by Mr. and Mrs. Stafford. She was sent to the public schools while they were in session, and, with the exception of one term, attended the subscription school, which was conducted after the closing of the public school. In addition to this, she was also given instruction in music. During, perhaps, two years of the time appellant was at the Stafford home, Mrs. Stafford had a servant who cooked and did the housework. When there was no servant, Mrs. Stafford did the cooking, while appellant and Mrs. Stafford's two daughters assisted with the housework at such times as they were not engaged at school. It is also shown that appellant did the milking at times. It does not appear, however, that she was called upon to do more than the Stafford children were required to do.

There was some evidence tending to show that Thomas Preston, at the time he deeded the \$600 house and lot to his wife, was mentally incapable of making a deed. It is therefore insisted that the deed was void, and that the proceeds of the sale, upon the death of Thomas Preston's widow, descended to appellant; and that, that being true, the money was appellant's, and Walker, as her guardian, had no right to make with Stafford the contract for her support and maintenance. Even if the deed in question was voidable, it could not be collaterally attacked in this action. The only way to set it aside would be by direct action brought for that purpose. In this action, therefore, the deed must be construed as valid. That being true, the proceeds of the sale of the house and lot became the property of appellant's mother, subject to Walker's marital rights therein. It appears that Walker took possession not only of the sum received from the sale of the house and lot, but of the money which Mrs. Walker received from her father, and used the money for the purpose of engaging in and transacting the business of a liveryman, and for the purpose of buying the lot in Morehead. Having reduced the personal property to possession, it became his under the law then in force. *McKay v. Mays*, 29 S. W. 327, 16 Ky. Law Rep. 862; *Daniel v. Brandenburg*, 20 S. W. 255, 14 Ky. Law Rep. 310.

That being true, the \$450 which appellee Walker realized from the sale of the house

and lot in Morehead was his property and not that of appellant. Notwithstanding this fact, he acted most generously towards appellant, for he took \$400 of the sum so realized and gave it to W. W. Stafford under the agreement that Stafford was to take care of and maintain appellant as one of his own children. As appellee Walker had the right to make the contract in question for appellant's benefit, and, as the evidence shows that the contract was faithfully carried out by Mr. and Mrs. Stafford, and that Walker as guardian never received any property belonging to appellant, it follows that appellant has failed to show any right of recovery against appellees.

Judgment affirmed.

**PLEASANT J. POTTER COLLEGE v.
GEORGE A. COLLETT & BRO.**

(Court of Appeals of Kentucky. Feb. 16, 1911.)

1. CONTRACTS (§ 284*)—PERFORMANCE—APPROVAL OF ARCHITECT—CONDITION PRECEDENT.

Where a contractor for a building was to be paid 85 per cent. of the contract price during its construction, payments to be made on warrants of the architect, and the architect, after issuing warrants for three amounts, died, such warrants for the balance of an uncontradicted claim are not a condition precedent to the contractor's recovery of the balance.

[Ed. Note.—For other cases, see Contracts, Dec. Dig. § 284.*]

2. CONTRACTS (§ 350*)—BREACH—EVIDENCE—SUFFICIENCY.

Evidence held sufficient to sustain a judgment for the plaintiff for the balance claimed under a building contract.

[Ed. Note.—For other cases, see Contracts, Dec. Dig. § 350.*]

Appeal from Circuit Court, Warren County.

Action by George A. Collett & Bro. against the Pleasant J. Potter College. Judgment for plaintiffs, and the defendant appeals. Affirmed.

Sims & Rodas, for appellant. Wright & McElroy, for appellees.

NUNN, J. In 1889 appellant, Pleasant J. Potter College, was organized in Bowling Green, Ky., and incorporated. It elected a president, treasurer, and board of directors, and had a building erected for school purposes. Appellees were awarded the contract for furnishing the brick and erecting the building at the price of \$8.50 per thousand brick, same to be measured as specified in the contract, after the building was completed. Eighty-five per cent. of the contract price was to be paid during the construction of the building. The brick placed in the building at the contract price amounted to \$7,591.47, and appellees were paid, at one time \$1,500, at another \$2,500, and at another \$2,000, during the progress of the work on the build-

ing. Afterwards, in 1894, \$381.85 were paid on the claim, and in 1897 certificates for five shares of stock in the corporation at \$25 per share, were issued to appellees and credited on the contract price, thus leaving \$1,084.61 still due, for which this action was instituted. The trial in the lower court resulted in favor of appellees for the amount sued for. Appellant denied owing the claim, and pleaded the statute of limitations and laches.

It was agreed that all the payments made to appellees were to be made upon warrants of the architect, E. S. McDonald, of Louisville, Ky. We suppose the main purpose of this was to prevent appellees from collecting over 85 per cent. of the contract price before the building was completed. The architect did issue warrants for the three amounts that were paid during the construction of the building, but did not issue any for the \$381.85, nor has he ever issued any for the payment of the balance of the contract price, and he is now dead. J. E. Potter, the treasurer of appellant, and who made all the payments to appellees, testified that he made the payments as credited, and says that they are all that have ever been made. He also testified that McDonald, representing appellant, and John L. Stout, representing appellees, made a calculation of the brick in the building as specified in the contract, and that there were only a few dollars difference in their figures; that the number of brick in the building, if paid for at the contract price, would amount to \$7,591.47; that the amount sued for was the balance due appellees, and would have been paid long ago, if he had had any funds of the corporation in his hands. He stated that he had requested appellees to wait on him, and promised frequently before the suit was brought to pay it. Appellee George A. Collett testified to the claim as alleged, and stated that he had deferred this action by reason of the frequent promises of Mr. Potter to pay and by his request for time. He stated that the \$381.85 credit was paid under the following circumstances: He owed Silas Taylor, a colored man, for some brick used to complete the building, \$381.85, and gave him an order upon J. A. Potter, the treasurer, for that amount, and Potter gave Taylor a check for it, and he entered the credit of that date. He also credited it with \$125 in 1897, when the certificates of stock were issued to him. Appellant claims that this balance due appellees must have been paid soon after the college was completed; that the corporation borrowed \$4,000 in cash at that time, and executed a mortgage, for the purpose of paying all claims against the property. There is no testimony, however, to the effect that appellees' claim was paid; but we are asked to assume that it was, as the president and several directors of the college and members of the building committee have since died, and, as it claims, it is unable to make proof of

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

payment. Several members of the building committee and of the corporation are still alive; but they do not attempt to make proof of payment.

Appellant further contends that the fact that appellees have no warrant from the architect for the payment of this balance is strong evidence of their having no claim against the college. This is a slight circumstance in its favor; but the fact that his whole claim was \$7,591.47, and that warrants were issued for only three payments, which amounted to only \$6,000, is uncontradicted. It cannot be contended that, because appellees received no warrants from the architect for more than \$6,000 of his claim, he must lose the balance. If a warrant from the architect was an absolute prerequisite to payment, and if he had been paid when the mortgage for \$4,000 was issued, as claimed, appellant should have the warrant which the architect issued for the balance of the claim, which it appears it has not, as it is not presented. We do not concede that a warrant was absolutely necessary to enable appellees to recover the balance due them. The purpose of the warrants was to enable appellant to protect itself—to enable it to know when it had paid as much as 85 per cent. of the contract price during the construction of the building. But after the completion and acceptance of the building by the appellant, appellees were entitled to the balance due them, and the failure of the architect to give them a warrant for it will not defeat them in their attempt to collect it. Appellees' claim is proved, and ought not to be defeated on mere suspicion, as is attempted to be done.

The claim due appellees was upon a written contract, and we are of the opinion that the payment of the \$381.85 in 1894 prevented the statutes of limitations from defeating the claim, as the statute began to run from that date.

For these reasons, the judgment of the lower court is affirmed.

THURMAN v. COMMONWEALTH.

(Court of Appeals of Kentucky. Feb. 17, 1911.)

1. CRIMINAL LAW (§ 1151*)—RULINGS ON APPLICATION FOR CONTINUANCE—DISCRETION OF COURT—REVIEW.

A ruling on an application for a continuance under Cr. Code Prac. §§ 188, 189, authorizing the court on sufficient cause shown, to postpone the trial, will not be disturbed unless the trial court abused its discretion.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3045-3049; Dec. Dig. § 1151.*]

2. CRIMINAL LAW (§ 594*)—CONTINUANCE—GROUNDS.

Where all the witnesses who were present at the killing appeared and testified, and there was nothing justifying the pretense that any other persons knew anything about the facts of the case, the refusal to grant a continuance on

the ground of the absence of witnesses was not erroneous.

[Ed. Note.—For other cases, see Criminal Law, Dec. Dig. § 594.*]

3. JURY (§ 149*)—MISCONDUCT OF BYSTANDER—DISCHARGE OF JURY.

A bystander began to shake hands with the jurors while they were in the box, and while the judge was on the bench, and the attorneys were present, and he said to each juror as he shook hands with him that he should give accused a fair deal. Before he had succeeded in shaking hands with all the jurors, he was admonished by the court in the presence of the jury, and was stopped by the sheriff. He then took his seat near accused and his counsel. *Held*, that the court properly refused to discharge the jury on the ground that the conduct of the bystander was prejudicial to accused.

[Ed. Note.—For other cases, see Jury, Cent. Dig. §§ 635-637; Dec. Dig. § 149.*]

4. HOMICIDE (§ 309*)—EVIDENCE—INSTRUCTIONS.

Where accused left the house where the difficulty with decedent started, and went into the yard where he had an altercation with a third person over a pistol, and on obtaining possession of the pistol, he returned to the house, and renewed the difficulty with decedent and shot him, a charge that if accused in sudden heat and passion, or in sudden affray and without malice, and not in his necessary, or reasonably apparent necessary self-defense, killed decedent, he was guilty of voluntary manslaughter, sufficiently covered the issue of manslaughter.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 649-656; Dec. Dig. § 309.*]

Appeal from Circuit Court, Bell County.

Sam Thurman was convicted of murder, and he appeals. Affirmed.

O. V. Riley, E. N. Ingram, and J. G. Rollins, for appellant. Jas. Breathitt, Atty. Gen., and Tom B. McGregor, Asst. Atty. Gen., for the Commonwealth.

MILLER, J. On September 26, 1910, appellant, Thurman, shot and killed Sam Johnson. Thurman was indicted the next day for wilful murder, and his trial set for October 5th. When the case was called on October 6th it was reassigned to October 19th for trial, and it was then tried. The jury found appellant guilty, and fixed his punishment at confinement in the penitentiary for life.

The tragedy occurred in a gambling house conducted by the deceased in Middlesboro, on a Sunday about midnight, or shortly thereafter. Johnson and Thurman, with several other friends of Johnson, had assembled in the latter's room for the purpose of gambling. They had been gambling several hours, and Thurman, evidently being in bad humor by reason of his losses, tore the cards and threw them on the floor. The cards belonged to Johnson, and he remonstrated with Thurman, at the same time calling him a vile name; and according to some of the witnesses Johnson started towards Thurman in a menacing manner. Thurman says he

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes.

pushed Johnson back with his hand to keep him off of him, while some of the other witnesses say Thurman slapped Johnson in the face. Thurman attempted to leave the room, but, in his haste, he stumbled and fell to the floor; whereupon Johnson, who was pursuing him, cut Thurman severely in the back. Friends immediately interfered, one of them holding Johnson in the room, while others carried Thurman down the steps into the yard. Thurman's pistol had been lying upon a bed in the room during the game, and when the fight occurred Alexander, one of the men who escorted Thurman down the steps, procured the pistol in some way and carried it with him into the yard. Thurman knew Alexander had the pistol, and demanded that he give it up. This Alexander refused to do, for fear Thurman would injure some one; but Thurman drew his knife, and, threatening to cut Alexander's throat, Alexander gave him the pistol; Thurman saying at the time that he would kill the man who had cut him. When Thurman recovered the pistol he pointed it towards the second-story window of Johnson's room, evidently for the purpose of firing at Johnson if he could see him; but, as Johnson remained out of sight, Thurman forced open the lower door at the bottom of the steps, bounded up the stairs, and either forced open the door at the top of the stairs, or found it open with Johnson standing directly in the opening. A pistol shot was heard, and when those in the back yard went to the scene they found Johnson stretched upon the floor with a bullet hole through his forehead. He died within a few minutes thereafter. Thurman testified that Johnson struck him with a shovel when he entered the door at the top of the stairs, and that he shot Johnson in self-defense and to prevent the latter from killing him with the shovel. Some of the witnesses testified that a spade or a shovel was found lying on the floor some three or four feet away, while a majority of the witnesses testified that there was a shovel resting against the wall some distance away.

The court instructed the jury upon the law as to murder, voluntary manslaughter, and the right of self-defense. The court also defined malice, and gave the usual instruction as to reasonable doubt. No objection is taken to the instructions that were given. It is insisted, however, that the judgment should be reversed upon any one of three grounds, namely: (1) That the court erred in refusing to continue the case on the showing made by appellant in his affidavit; (2) that the court should have discharged the jury for the misconduct of a bystander who talked with several of the jurors during the trial; and (3) that the court did not give all the law of the case.

1. When the case was called for trial on October 17th the appellant moved the court for a continuance, and, in support of his motion, filed his own affidavit to the effect that

he had been confined in jail ever since the killing of Johnson, and that for that reason he had had no opportunity to make sufficient preparation for his defense. By way of specification he stated that there were a number of other men in the yard back of the saloon when the killing occurred, but that he did not know the names of any of them, and had not had time to find out who they were, except that one of them was named Smith, whose home was in Harlan county, Ky.; that Smith would truthfully state, under oath, that he was in the back yard at the time of the killing, and that just before the shot was fired Smith saw Thurman and Johnson through the window, and that Johnson had a dirt shovel in his hand raised as if to strike Thurman, who shot Johnson as the shovel came down upon Thurman. Clearly the affidavit did not show a case of diligence on the part of appellant that would require the court to grant him a continuance. The discretion lodged with the trial court in continuing a criminal case is covered by sections 188 and 189 of the Criminal Code of Practice, and this court has uniformly held that, unless it appears that the trial court abused its discretion in declining to continue the trial of a criminal case, it will not set aside a judgment of conviction for that reason. We do not think there was any abuse of discretion in this case. All the witnesses who were present at the killing appeared and testified on one side or the other, and there is nothing shown in the evidence to justify even a pretense that any other persons were in the back yard of the saloon, or knew anything about the facts of the case, except those who had been in the room and who testified. The killing occurred after midnight, when it was extremely improbable that any persons other than those present in the room would have known anything about it; and, if any others had been present, the witnesses would have known it. No one of them corroborates appellant in the slightest degree in this respect.

2. During the progress of the trial, Sam Waldon, a colored man, came into the courtroom before the session of the court had opened, but while the jury was in the box, the judge on the bench, and the attorneys for the appellant and appellee were present, and began to shake hands with the jurors, and to say to each, as he shook hands with him, "Give him the fair deal; give him justice." Before Waldon had shaken hands with all of the jurors, he was admonished by the court, in the presence of the jury, and stopped by the sheriff from further communication with the jurors; whereupon Waldon took his seat near appellant and his counsel. Counsel for appellant moved the court to withdraw the case from the jury and to discharge it, because of the conduct of Waldon; but the court overruled the motion. It is claimed that this unusual conduct of Waldon prejudiced the appellant with the jury. Thur-

man and Johnson, as well as Waldon, were colored men. At most, the expression used by Waldon is of doubtful meaning and application. It is difficult to say whether it was meant to favor Thurman, or to injure him in the eyes of the jury. At any rate, he was promptly rebuked by the judge, and we do not see that Waldon's act in any way prejudiced the appellant. From the fact that Waldon took a seat near appellant and his counsel, it would seem that he was a friend of Thurman, and had intended by his action to befriend him. No other fact has been developed in connection with this incident that would even tend to show that Waldon's action had been detrimental to the rights of Thurman. We conclude that the circuit court properly declined to discharge the jury.

3. In the second instruction the jury were told that, if the defendant "in sudden heat and passion or in sudden affray, and without previous malice, and not in his necessary, or reasonably apparent necessary self-defense, so shot and wounded Sam Johnson, as that he then and there died thereby, then the defendant is guilty of voluntary manslaughter, included in the indictment herein, and you ought to so find." It is insisted that the court should have enlarged this instruction by incorporating in it the idea that, if Thurman acted upon some provocation which was reasonably calculated to excite his passions beyond the power of self-control, they should not find him guilty of murder, but should find him guilty of voluntary manslaughter, as provided in said instruction. We are of opinion that the instruction as given covered the case under the evidence. Thurman had left the house where the difficulty started, had gone downstairs into the yard where he had another altercation with Alexander over the pistol, and had then gone back upstairs and renewed the difficulty with Johnson. In giving the instruction covering the effect of appellant's acts if done in sudden heat and passion, and without previous malice, and in his necessary self-defense, we are of opinion that his case was fully and fairly presented to the jury.

The judgment is affirmed.

HOLLIS et al. v. WEISSINGER, County Judge, et al.†

(Court of Appeals of Kentucky. Feb. 8, 1911.)

1. COUNTIES (§ 113*)—FISCAL COURT—POWERS—PURCHASE OF AUTOMOBILE—STATUTES.

Ky. St. § 1840 (Russell's St. § 2975), authorizes the fiscal court to appropriate county funds for the construction of highways and the erection and repair of bridges, and section 4318 (section 5462) authorizes the road supervisor or overseer, on the order of the county judge, to hire wagons, teams, etc., for use on the public road, and either to hire or purchase for such use such tools and implements as may be

necessary to perform the work. Section 4318a (section 5463) allows for the overseers the purchase by the fiscal court of suitable tools for keeping the roads in repair. *Held*, that the fiscal court of a county had no authority to purchase an automobile for the use of the members of the court in inspecting county roads, and to provide for the services of a chauffeur and for the storage and care of the machine in a public garage.

[Ed. Note.—For other cases, see Counties, Dec. Dig. § 113.*]

2. COUNTIES (§ 113*)—COUNTY BUILDINGS—EQUIPMENT—ELECTRIC FANS.

Under Ky. St. § 1840 (Russell's St. § 2975), making it the duty of a fiscal court to erect and keep in repair necessary public buildings and a convenient place for holding court at the county seat, the fiscal court had authority to appropriate money to provide fans operated by electricity in the office of the county court clerk.

[Ed. Note.—For other cases, see Counties, Dec. Dig. § 113.*]

Appeal from Circuit Court, Jefferson County, Chancery Branch, Second Division.

Suit by S. S. Hollis and others against Muir Weissinger, County Judge, and others. Decree for defendants, and complainants appeal. Reversed in part.

Robt. L. Page, for appellants. Jno. H. Sullivan and A. Scott Bullitt, for appellees. Trabue, Doolan & Cox, amici curiae.

SETTLE, J. Following appropriations by the Jefferson county fiscal court, out of the county's funds, of \$4,300, for the purchase of an automobile for the use of members of that court in inspecting and supervising the county roads; \$75 per month for the services of a chauffeur to operate the automobile; \$25 per month for its storage and care in a public garage; also a sum sufficient to pay for casualty insurance thereon; and of a further sum sufficient to provide fans, operated by electricity, for the office of the county court clerk—the appellants, S. S. Hollis and R. O. Dorsey, who are taxpayers of Jefferson county, justices of the peace therein, and members of the fiscal court, brought this action in the court below against appellees, the judge of the Jefferson county court and remaining justices of the peace, constituting, with appellants, the fiscal court of the county, to enjoin them and the fiscal court, as such, from expending the moneys or any part thereof so appropriated, to the purposes indicated or any of them. The injunction was asked on the ground that the several orders making the appropriations in question are void and that the fiscal court had neither jurisdiction nor power to so appropriate or expend the funds of the county. Appellees by answer denied the alleged invalidity of the appropriations; averred the necessity therefor, and the jurisdiction and authority of the fiscal court to make them. Appellants filed a demurrer to the answer which the circuit court overruled, and dismissed the action. From the judgment

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

† Rehearing denied March 15, 1911.

manifesting these rulings, the latter have appealed.

It appears from the record that the fiscal court of Jefferson county is composed of the county judge and eight magistrates, four of whom are elected from the city of Louisville, and four from the county outside of the city. Four of the members of the court voted for the appropriations referred to, and only two, the appellants Hollis and Dorsey, against them. The county judge did not vote, and could not have done so except in case of a tie. It is patent, therefore, that a majority of the members of the fiscal court present voted for the appropriations; but the question to be determined is: Did the fiscal court have the power to make them?

It is argued for appellees that the fiscal court had the power to make the appropriations, and that they were necessary. The latter argument, as applied to the fiscal court's need of the automobile, is based upon the theory that, as there are about 500 miles of macadamized roads and 300 miles of dirt roads in Jefferson county, maintained at an annual expense of \$70,000, all under the direct management of the fiscal court and committees composed of its members, the use of the automobile is required to enable the committees to travel quickly from place to place in inspecting and controlling the work of construction, reconstruction, or repairing constantly under way, often in many different places at the same time, on the public roads of the county; and that the saving of time that would thus be made and the greater amount of work accomplished by the committees would justify the cost of the automobile, the hire of the chauffeur, and other expense attending its use, included in the appropriation. This argument would be entitled to great weight, if the matter of the appropriation for the purchase of the automobile had been merely a question of necessity addressed to the discretion of the fiscal court; but it can have no effect upon our decision of the case, if the appropriation or expenditure of the county's funds by the fiscal court for the automobile was unauthorized by law. If we reach the conclusion that the fiscal court was without power to so apply the funds of the county, the question of whether the purchase of the automobile was necessary need not be considered nor decided.

In considering the question here presented, it must first of all be borne in mind that the fiscal court is a court of limited jurisdiction, and, therefore, without power to appropriate or expend county funds, except as authorized by statute. Perhaps no clearer expression of our views upon this subject can be given than that stated in the case of *Jefferson County v. Peter*, 127 Ky. 453, 105 S. W. 887. "Taxes may be levied for public purposes. They cannot be levied for private purposes, although they may incidentally

and indirectly benefit the public. Laws authorizing the appropriation of public funds will not be extended by construction beyond the natural and fair meaning of the words used. The powers of the fiscal court are derived entirely from the statute." *Kline v. Jefferson County*, 101 S. W. 356, 30 Ky. Law Rep. 1344; *Morgantown Deposit Bank v. Johnson*, 108 Ky. 507, 56 S. W. 825, 22 Ky. Law Rep. 210; *Jefferson County v. Young*, 120 Ky. 456, 86 S. W. 985; *Mitchell v. Henry County*, 100 S. W. 220, 124 Ky. 833, 30 Ky. Law Rep. 1051.

By section 1834, Ky. St. (section 2970, Russell's St.), exercise of the corporate powers of the counties of the state is confided to the fiscal courts thereof. Section 1839 (section 3017) confers upon the fiscal court authority to impose and levy taxes; but the powers and duties of the fiscal courts of the state to make provisions for maintaining the public roads in their respective counties are conferred by section 1840, Ky. St. (section 2975, Russell's St.), which is as follows: "The fiscal court shall have jurisdiction to appropriate county funds authorized by law to be appropriated; to erect and keep in repair necessary public buildings, secure a sufficient jail and a comfortable and convenient place for holding court at the county seat; to erect and keep in repair bridges and other structures and superintend the same; to regulate and control the fiscal affairs and property of the county; to make provisions for the maintenance of the poor and provide a poor house and farm and provide for the care, treatment, and maintenance of the sick and poor, and provide a hospital for said purpose, or contract with any hospital in the county to do so, and provide for the good condition of the highways in the county, and to appropriate county funds to make provision to secure immigration into the county, and to advertise the resources of the county, and to appropriate county funds for the benefit of colleges and for infirmaries for the sick located in the county, and to execute all of its orders consistent with the law and within its jurisdiction, and shall have jurisdiction of all such other matters relating to the levying of taxes as is by any special act now conferred upon the county court of levy and claims."

In *Jefferson County v. Young*, 120 Ky. 456, 86 S. W. 985, we had before us for decision the question whether the fiscal court of Jefferson county had authority to appropriate, out of the county funds, \$2,000 to be used in paying for certain maps which had been made by the county surveyor under a contract with the fiscal court. It was contended by the fiscal court that such authority was conferred by section 1840, and that the maps were required to enable the county assessor and his deputies to properly assess for taxation all lands in the county. We, however, rejected this contention, holding that although given authority by the section, supra,

to levy taxes and supervise their collection, the fiscal court was without authority to assess the property of the county for taxation; that work being done by the county assessor for state purposes and his assessment, when supervised as required by law, used by the fiscal court as the basis for the levy of taxes made by it for county purposes. Moreover, that the fiscal court derived no power from that section, or any other provision of the statute, to employ a surveyor to make maps or to purchase maps of land made by such surveyor, in order to enable the county assessor to fix the boundary of lands to be assessed for taxation in Jefferson county. In commenting, in the opinion, upon the provisions of section 1840 of the statute, we in part said: "It will be observed that the fiscal court is authorized by the statute to appropriate the county funds authorized by law to be appropriated, * * * and that it had jurisdiction of all such other matters relating to the levying of taxes as is by special act conferred on the court of claims or county court. It is impossible to read this section, which so carefully enumerates what the fiscal court may do, without concluding that the Legislature intended to restrict the fiscal court to the things named, and such matters as were incidental thereto. The power to regulate and control the fiscal affairs and property of the county must be read in connection with the other provisions of the section. If these words were intended to give the fiscal court unlimited jurisdiction over the fiscal affairs of the county, then it was entirely unnecessary to stipulate in such detail what powers the fiscal court might exercise. * * * If the fiscal court had made an order employing a man in each magisterial district, at an annual salary, to go around with the assessor and see that no property was omitted from assessment, it would hardly be claimed that this was within the power of the fiscal court, although the court believed that the additional revenue thus derived by the county would more than pay the expense."

We are unable, from our reading of the statute under consideration, to find that it empowers the fiscal court to appropriate county funds for the purchase of an automobile, or that such power may be inferred from the language used. The mere fact that it confers upon the fiscal court authority "to provide for the good condition of the highways of the county" would no more give that court the power to purchase an automobile for the use of those charged with the duty of supervising work upon the highways, than does the provision of the statute conferring upon the fiscal court "jurisdiction of all such other matters relating to the levying of taxes as is by special act now conferred on the county court of levy and claims" confer upon it the power to purchase maps for the

use of the assessor in assessing for taxation the lands of the county.

It is, however, insisted for appellees that, in addition to the power conferred upon the fiscal court with respect to public roads, contained in section 1840, Ky. St., other powers are given it in relation to such roads by sections 4318 and 4318a, Ky. St. (sections 5462, 5463, Russell's St.), and that all these sections, read together, confer on the fiscal court all the powers claimed for it.

Section 4318, which applies to roads maintained under the tax system, authorizes a road supervisor or overseer, on the order of the county judge entered of record, to "hire wagons, plows, scrapers and teams, and procure forage for same"; and to either "hire or purchase for the county such tools and implements as may be necessary and suitable to perform the work," which he may be having done "by hired hands, delinquents or convicts." The section further provides how the tools and implements shall be kept, makes the supervisor responsible on his bond therefor, and requires him to "keep duplicate orders and report to the court at its September term each year an itemized account of all moneys expended by him for the foregoing purposes." Section 4318a provides that the fiscal court in each county, wherein the dirt and gravel roads are worked by hands allotted to same, shall have the right to purchase out of the road and bridge funds of the county and furnish to each overseer of roads such tools, as the court may think proper to be used in keeping the roads in repair, and defines the duties of the overseer with respect to their preservation.

It will readily be seen that neither of the sections last mentioned confers upon the fiscal court the power claimed for it by counsel for appellees. Section 4318 only allows the road supervisor or overseer upon the order of the county judge to hire wagons, plows, scrapers, and teams for use on the public roads, and either to hire or purchase, for such use, such tools and implements—the latter term including plows, scrapers, and rollers—as may be necessary and suitable to perform the work required. Section 4318a only allows for overseers and their allotment of hands the purchase by the fiscal court of such tools as it may think suitable for use in keeping the public roads in repair. We do not find in either of these sections, in section 1840 or elsewhere, any authority given the fiscal court to purchase a wagon or other vehicle to be used in maintaining the public roads of the county; it may hire, but cannot purchase, a wagon or other vehicle for such purpose, and, if no power exists in the fiscal court to purchase a wagon or other vehicle for use in keeping in good condition the public roads of the county, upon what theory can it logically be claimed that it may purchase an automobile for the use of members or committees of

the fiscal court to travel over the county to inspect its roads or supervise work thereon? If the declaration contained in section 1840 of the statute, requiring the fiscal court to "provide for the good condition of the highways of the county," conferred on that court all the authority claimed by appellees for it, the Legislature would not have gone to the labor and trouble of specifying in such detail, as in sections 4318 and 4318a, what powers with respect to the purchase of tools and implements for use on the public roads it might exercise. Obviously, the provisions of the two sections last named are in the main but limitations upon the general power conferred on the fiscal court by section 1840.

It appears from the record that the public roads of Jefferson county are maintained by taxation, and that much of the work of constructing, reconstructing, and repairing them is done by contract under the supervision of overseers or committees appointed by the fiscal court from among its members. A civil engineer is employed by the fiscal court to prepare plans and specifications for road and bridge work, and men are employed to make measurements of stone or other metal used on the roads and to perform other necessary duties connected with road work. All such persons the fiscal court may lawfully employ and compensate under the general powers appertaining to the maintenance of the public highways, conferred on it by statute; but it has not the power or right to provide the civil engineer, other employes, or committees of the court, charged with the duty of inspecting or supervising road work, conveyances of any kind to travel over the county in the performance of their work or duties. As well argued by counsel for appellants, if the fiscal court has authority to purchase an automobile for a committee of the court, it may purchase one for the use of each member of the court upon whom it has imposed the duty of inspecting work done on the roads of the county.

It may not be improper to say that, when the several statutes from which the fiscal courts of the state derive their powers were enacted, the automobile was not in common use; it could not, therefore, have been contemplated by the Legislature that the use of such a vehicle would be necessary in keeping in good condition the roads of the state. That the automobile has rendered conspicuous service in awakening a sentiment favorable to the improvement of roadways in every part of the country cannot be questioned, and this is so because automobiles can only be used where the roads are in good condition. But however much the automobile may have contributed to the improvement of the public highways, and whatever might be its value to the fiscal court of Jefferson county, the several statutes from which that court derives its powers over the fiscal affairs of that county and control over the public roads thereof do not permit its pur-

chase of an automobile or any other kind of vehicle for the use of members of the court or any employe of the county, in the performance of any duty of inspection or supervision required of them. If we are correct in the conclusion that the fiscal court's purchase of the automobile was unauthorized and illegal, it necessarily follows that the appropriations for paying the chauffeur, the casualty insurance, and garage storage were also unauthorized and illegal.

We are of opinion, however, that, in making the appropriation for installing electric fans in the office of the county court clerk, the fiscal court did not exceed its powers. Section 1840, Ky. St., makes it the duty of that court to erect and keep in repair necessary public buildings, a sufficient jail, and a comfortable and convenient place for holding court at the county seat. The county court clerk's office of Jefferson county is in the courthouse and near the chamber in which the sessions of the county court are held. It appears from the record that it is largely filled with the many records that would naturally accumulate in a clerk's office having the great amount of business that is transacted in a county like Jefferson, containing, as it does, Louisville, the largest city in the state. In addition, it further appears that the work of the office requires the assistance and presence of many deputy clerks and that the office is almost constantly occupied by a large number of persons having the right to be there on business; also, that the ventilation of the office is such as to often make the atmosphere therein, especially in warm weather, impure and conducive to ill health. Such being the situation in the clerk's office, and the fiscal court being advised from the facts before it that the placing of electric fans therein would greatly ameliorate the existing conditions and add to the comfort and health of the office force and persons constantly thronging the office on matters of business, we think it properly made the appropriation in question. Electric fans are in common use and recognized as a necessity in public buildings, and in this instance they were indispensably so, because of the unusually uncomfortable and unhealthy condition referred to and the great number of persons affected thereby. As the clerk's office is a part of the Jefferson county courthouse, we know of no provision of the statute that would prevent the fiscal court from furnishing it with heat, light, electric fans, or other appliances for the comfort and convenience of the clerk, his office force, and others having business therein, as it does the courtrooms, halls, or other parts of the courthouse. Indeed, the duty imposed upon the fiscal court by the statute to care for and make comfortable and convenient the courthouse in our opinion conferred upon it authority to place the electric fans in the clerk's office; and, the matter being one that addressed itself to the discretion of that

court, no reason is perceived for declaring the appropriation for the fans an abuse of such discretion.

In *Simons v. Gregory*, 120 Ky. 123, 85 S. W. 751, 27 Ky. Law Rep. 509, we held that the fiscal court of Jefferson county, under the general statutory power requiring it to care for and make comfortable and convenient the courthouse, had the power to place in the courthouse, and pay for, an elevator; it being necessary as a convenience in such a building.

For the reasons indicated, the judgment of the circuit court, in so far as it refused the injunction preventing the furnishing of the electric fans for the clerk's office, is affirmed; but in other respects it is reversed, and cause remanded, with directions to that court to grant the injunction restraining the fiscal court from purchasing or making an appropriation for the purchase of the automobile and other expenses incidental to its use.

MILLER, J., not sitting.

MIDDLETON et al. v. FIELDS et al.
(Court of Appeals of Kentucky. Feb. 16, 1911.)

1. TENANCY IN COMMON (§ 15*)—ADVERSE POSSESSION.

Limitations do not run in favor of one joint owner in exclusive possession, unless his possession was adverse to the other joint owners, who had notice of his claim of ownership of the whole.

[Ed. Note.—For other cases, see *Tenancy in Common*, Cent. Dig. §§ 45-52; Dec. Dig. § 15.*]

2. PARTITION (§ 77*)—SALE OR ACTUAL PARTITION.

The court in partition may not compel an adult to sell his land, or compel one to purchase against his will, except where the property cannot be divided without materially impairing its value.

[Ed. Note.—For other cases, see *Partition*, Cent. Dig. §§ 211-223; Dec. Dig. § 77.*]

3. DOWER (§ 59*)—ELECTION.

A widow cannot be allotted both homestead and dower in her husband's estate, but she may select which she wants.

[Ed. Note.—For other cases, see *Dower*, Cent. Dig. § 207; Dec. Dig. § 59.*]

4. PARTITION (§ 78*)—JUDGMENT.

The court in partition should so allot the land that parties owning adjoining lands should receive land contiguous thereto, provided it can be done without material detriment to the interests of the others.

[Ed. Note.—For other cases, see *Partition*, Cent. Dig. §§ 265-273; Dec. Dig. § 78.*]

Appeal from Circuit Court, Harlan County.

Action by Elijah Fields and others against Green Middleton and others for partition. From a judgment awarding relief, defendants appeal. Reversed and remanded.

W. F. Hall, for appellants. Clay & Carter, for appellees.

NUNN, J. Elijah Fields, Narcissus Middleton, and Robert Middleton brought this action against appellants for the purpose of having about 100 acres of land, which belonged to Wm. Middleton in his lifetime, divided among them. One Turner patented the land, and sold and conveyed to Walter Middleton, his son-in-law, for life, and at his death it was to go to his children, who were 13 in number at the time of his death. Walter Middleton, however, sold the land to Wm. Middleton, and made him an absolute conveyance. Wm. Middleton was a son of Walter, and he purchased and received conveyances from nine of his brothers and sisters, and resided upon the land for many years. It appears that three of the interests, which he never purchased, were purchased, one by his widow and the others by two of his children, after his death. The widow sold the interest she bought to one of the children. Wm. Middleton left 12 children, some of whom sold their interests. Some of the heirs attempt to defeat the interests of their uncles and aunts, which they had purchased as stated, by reason of their having been in the actual possession of the land for more than 30 years. The statute does not run in such cases, unless it be made to appear clearly that the possession of the joint owner, such as Wm. Middleton was, was adverse to the other joint owners, and that they had notice or information of his claim of ownership of the whole. This does not appear in this case.

The lower court decided in favor of these interests, and directed that the land be divided among the parties in interest, giving the widow a homestead. It appears that three of the children now own, by separate purchase, the three interests of their uncles and aunts, children of Walter Middleton, and that the court did not take this into consideration in ordering the division, but directed the commissioner to take proof as to the amount they paid for each of the interests, and directed the other parties in interest to refund to them the amount they paid therefor, when the owners of the interests were seeking to have their interests allotted to them adjoining their other interests in their father's estate, and some of the other heirs objected to this because they did not want to buy and pay for land they did not want. This was error of the court. We know of no law to compel an adult to sell his land, or to compel one to purchase against his will, except in cases where property cannot be divided without materially impairing its value.

In one place in its judgment, the court allowed the widow a homestead, and in another it speaks of it as dower. The petition asked that she be allotted dower. A widow cannot be allotted both homestead and dower in her husband's estate. She has a right to select either, and on a return of the case the

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

court should have her select which she wants and adjudge it to her. The court should also allot the three one-thirteenthths to the parties to whom they belong adjoining their other interests, if it can be done without material detriment to the interests of the others.

For these reasons, the judgment of the lower court is reversed, and remanded for further proceedings consistent herewith.

VANCE v. GRAY et al.

(Court of Appeals of Kentucky. Feb. 14, 1911.)

1. QUIETING TITLE (§ 12*)—POSSESSION OF PLAINTIFF.

Though plaintiff in a suit to quiet title was not in possession, defendant having made his answer a counterclaim and sought to have his title quieted, the question of title may be settled.

[Ed. Note.—For other cases, see Quieting Title, Cent. Dig. §§ 8-12, 44; Dec. Dig. § 12.*]

2. BOUNDARIES (§ 48*)—CONFLICTING GRANTS—ACQUIESCENCE.

Parents conveyed certain premises to each of their three children, but the land as described in the deed to G. lapped over the other two tracts, and included a portion of each, but under such deed there had been actual occupancy for more than 40 years, and improvements had been made, and the property passed into other hands. *Held*, in a suit to quiet title, that those claiming under the G. deed had good title, and that there would be no apportionment of the land.

[Ed. Note.—For other cases, see Boundaries, Cent. Dig. §§ 232-242; Dec. Dig. § 48.*]

Appeal from Circuit Court, Jackson County.

Action by J. P. Vance against Henry C. Gray and others. From a judgment in favor of defendants, plaintiff appeals. Affirmed.

Hazlewood & Johnson, for appellant. E. E. Hogg, for appellees.

LASSING, J. On January 28, 1871, Thomas M. Bennett and wife conveyed to a daughter Sarah A. Bennett, for the stated consideration of \$100, a boundary of land supposed to contain 100 acres. On the same day, for \$150, they conveyed to a son, James R. Bennett, two tracts of land, one containing 50 acres, more or less, and the other 100 acres. Also, on the same day, they conveyed, for the stated consideration of \$616.66%, to Margaret J. Gray, a daughter, the following described boundary: "Beginning at the mouth of the Rocky Fork, thence down the creek with the meander to Smith's line, thence with Smith's line to the top of the ridge, thence to the beginning so as to contain two hundred by survey, also two hundred acres on the North side of the War Fork of Station Camp creek. Beginning at two pines corner to Pinkston's hundred-acre survey, thence with the same S. 38 E. 95 poles to two spotted oaks, thence so as to include two hundred acres by survey out of Ambrose survey of five hundred and fifty acres survey, with

the appurtenances thereunto belonging unto said Margaret J. Gray, her heirs and assigns forever, and the said Thomas M. Bennett and Mary Bennett, his wife, do hereby warrant and defend the aforesaid against the title claim of all persons whatever," etc.

On February 25, 1887, Sarah A. Bennett, who had in the meantime married J. R. Durham, conveyed her tract to J. P. Vance. On October 23, 1897, Margaret J. Gray and her husband conveyed a part of her land, supposed to contain 110 acres, to Henry C. Gray, and another part, supposed to contain 100 acres, to W. T. Gray. Henry C. and W. T. Gray were the children of Margaret Gray. Each of the Gray boys built upon the land deeded to him by his mother, cleared portions thereof, and, while they were so occupying it, James P. Vance, conceiving that he was the owner of the land of which they were in possession, brought suit to quiet his title thereto. The Grays answered, denying that they were claiming title to any of plaintiff's land, and alleged that they were the owners thereof, and asked that their title to the same be quieted. Thereafter, the county surveyor for Johnson county made a survey of the land conveyed by Thomas M. Bennett to his three children; but, as the trial court could get little aid from this survey, he directed R. S. Blakeman, of Barbourville, Knox county, Ky., to go upon the ground, make a survey, and ascertain the boundary lines to the deeds made by Thomas M. Bennett to his three children, and report to court. This was done, and from such report it is apparent that the grantor, Thomas M. Bennett, did not have as much land as he thought he did, and that the lines to these deeds overlapped, so that the boundary called for in the Gray deed includes a part of the land conveyed by the Sarah A. Bennett deed. In a supplemental report, the surveyor suggests that, as there is a shortage in the whole number of acres sought to be conveyed by Thomas M. Bennett, this shortage should be borne ratably by the respective claimants.

Upon a consideration of the pleadings, proof, and report of the surveyor, the court was of the opinion that the Grays had a good title to the land claimed by them, and he therefore dismissed plaintiff's petition and entered a judgment quieting the title to the respective lands claimed by the Grays, as set out in the pleadings. From that judgment this appeal is prosecuted.

For appellees it is urged that the judgment must stand for two reasons: First, because it is a suit to quiet title, and appellant, in his pleadings and proof, neither claims nor shows possession of the land in controversy; and, second, because immediately upon receipt of their deed, their father and mother settled upon this land and have held it ever since, claiming the 200 acres under their deed, while neither appellant nor his vendor

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

has ever been in the actual possession of any portion of this land.

The first proposition, as advanced by appellees, is sound, and would be tenable here but for the fact that they have made their answer a counterclaim against appellant and sought to have their title quieted. This brings the title before us, and, under the authority of *Magowan v. Branham*, etc., 95 Ky. 581, 26 S. W. 803, 16 Ky. Law Rep. 233, and *Johnson v. Farris*, 140 Ky. 435, 131 S. W. 183, decided October 27, 1910, we will settle the question of superiority of title as it is here on the counterclaim of appellees.

Upon the second ground relied upon by appellees to uphold the judgment, we are furnished no precedent among the vast number of adjudicated cases in this state upon the subject of land titles. The converse of the question was before us in the case of *Smith & Preston v. Prewit*, 2 A. K. Marsh. 155. In that case there had been a grant of 2,000 acres to one Barnes, and a similar grant to one Boyd. From the calls in the patents, each took from his outside boundary line, and it was evident that the inside lines joined. The boundary covered by the two patents was largely in excess of 4,000 acres. Each owner insisted that the other should have his 2,000 acres run off to him, and that he should be adjudged the owner of the balance. The court, upon the state of the record, adjudged to each his 2,000 acres, the surplus to be divided equally between them. This case was followed in the later case of *Respass v. Parmer's Heirs*, 5 J. J. Marsh. 648, where the dispute arose over the sale of a patent supposed to contain 1,000 acres, 500 having been sold to one man and 500 to another. The deeds called for unmarked corners on the dividing line, but for distances equal to the length of the patent line. The tract contained more than 1,000 acres, and the court held that the surplus should be divided equally between the claimants.

In each of these cases the outside lines were well defined, and the intent in each was to convey all the land between the outside boundary lines, and the court, in order to effectuate this intent, divided equally the surplus land. But here we have a shortage in the land. The lines of the Gray deed evidently lapped over into the other two tracts, and include a considerable portion of each, and especially of the tract now claimed by appellant. If we were back at the parting of the ways and the original grantors were before us, and the conditions had not been changed, the case might possibly be worked out along the lines mapped out in the case of *Smith & Preston v. Prewit*, supra. But here, after the lapse of 40 years, during which time conditions have changed, the property passed into other hands, and improvements been made thereon, it will readily be seen that upon no just or equitable principle could the rule adopted in those

cases be applied. Mrs. Gray and her husband paid more than four times as much for their land as appellant's vendor paid for his, and yet they received only a fourth more land. The discrepancy in price is accounted for by William Gray, who testifies that he was to receive his choice of 500 acres out of the survey supposed to contain 550 acres. It is fully made to appear that, after his wife received her deed, they took actual possession of the land, and have occupied and held it ever since; while appellant and his vendor have never been in the actual possession of any of it, and now claim only through their deeds. Under the deeds from their remote vendor, Bennett, they each had constructive possession of the land covered by the deeds. The Grays have fortified their position by adding to their constructive possession an actual occupancy for more than 40 years. And while the outside boundaries of the land claimed to be covered by their deed are not very well defined, they were laying claim to it under their deed, and, in our opinion, in adjudging the title thereto good, the Chancellor reached the right conclusion.

Judgment affirmed.

LOUISVILLE RY. CO. v. BRYANT.

(Court of Appeals of Kentucky. Feb. 9, 1911.)

1. CONTINUANCE (§§ 23, 26, 37*)—ABSENCE OF WITNESS—APPLICATION—REQUISITES.

To support a motion for a continuance for absence of a witness, authorized by Civ. Code Prac. § 315, it must be shown that the evidence expected to be produced by the witness is material and believed by affiant to be true. The expected evidence must be set out, and the applying party must show diligence in his efforts to secure the attendance of the witness.

[Ed. Note.—For other cases, see Continuance, Cent. Dig. §§ 63-71, 74-93, 120; Dec. Dig. § 23, 26, 37.*]

2. CONTINUANCE (§ 26*)—ABSENCE OF WITNESS—DILIGENCE TO SECURE ATTENDANCE.

Where an action for injuries was filed against a street railway company, and defendant permitted its motorman, who was charged with the negligence in question, to leave its employ, and also to leave the state without having a subpoena issued for him or attempting to have him served with a subpoena, and took no steps to procure his attendance for 8 months and about 15 days before the case was to be called for trial, the diligence was not sufficient to justify a continuance because of the absence of the witness.

[Ed. Note.—For other cases, see Continuance, Cent. Dig. §§ 74-93; Dec. Dig. § 26.*]

3. CONTINUANCE (§ 33*)—DENIAL—ABSENCE OF WITNESS—AFFIDAVIT AS WITNESS' DEPOSITION.

Where the court, on denying a continuance for absence of a witness, permitted the affidavit for the continuance, stating what defendant expected to prove by the witness, to be read to the jury as the witness' deposition, as authorized by Civ. Code Prac. § 315, defendant was not prejudiced by denial of the continuance.

[Ed. Note.—For other cases, see Continuance, Dec. Dig. § 33.*]

4. APPEAL AND ERROR (§ 906*)—ABSENCE OF WITNESS—DENIAL OF CONTINUANCE—EXERCISE OF DISCRETION.

Denial of a continuance in the exercise of the trial court's discretion will not be disturbed on appeal unless it appears that the discretion has been abused, especially where the trial court has permitted the affidavit offered in support of the motion to be read as the witness' deposition.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3837; Dec. Dig. § 906.*]

5. STREET RAILROADS (§ 95*)—INJURIES TO PEDESTRIAN—ACTION—INSTRUCTIONS—DUTY OF MOTORMAN.

In an action for injuries to a child by being run over by a street car while crossing a street, it was the duty of the court, in defining the duties of the motorman approaching a public crossing, where persons might reasonably be expected to be, to charge the jury that the motorman was bound to keep a lookout ahead of him for persons and vehicles on the track, and that if he failed to keep such lookout, and plaintiff was thereby injured, the jury should find for plaintiff.

[Ed. Note.—For other cases, see Street Railroads, Cent. Dig. § 202; Dec. Dig. § 95.*]

6. APPEAL AND ERROR (§ 882*)—RIGHT TO ALLEGE ERROR—REQUESTED INSTRUCTIONS SIMILAR TO THOSE OBJECTED TO.

Defendant was not entitled to object on appeal to an instruction embodying a similar proposition to that contained in an instruction requested by defendant.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3602-3604; Dec. Dig. § 882.*]

7. TRIAL (§ 200*)—REQUESTED INSTRUCTIONS—INSTRUCTIONS ELSEWHERE GIVEN.

A requested charge, which is covered by an instruction already given, is properly refused.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 651-659; Dec. Dig. § 200.*]

8. APPEAL AND ERROR (§ 1004*)—REVIEW—EXCESSIVE VERDICT.

A verdict, though seemingly excessive, will not be disturbed on that ground alone, unless it is so excessive as to indicate passion or prejudice.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3944-3947; Dec. Dig. § 1004.*]

9. DAMAGES (§ 132*)—PERSONAL INJURIES—EXCESSIVE VERDICT.

Plaintiff, a boy four years old, was run over by a street car at a crossing. His right leg was so mangled that it had to be amputated halfway between the knee and the hip. His arm was lacerated, and his back and head bruised. The injury to the arm resulted in an enlargement of the ulna, which the physician testified was probably permanent. *Held*, that a verdict for \$11,000 was not so excessive as to indicate passion or prejudice.

[Ed. Note.—For other cases, see Damages, Cent. Dig. §§ 178, 372-385; Dec. Dig. § 132.*]

Appeal from Circuit Court, Jefferson County, Common Pleas Branch, Second Division.

Action by Jesse English Bryant against the Louisville Railway Company. Judgment for plaintiff, and defendant appeals. Affirmed.

Fairleigh, Straus & Fairleigh and Howard B. Lee, for appellant. David W. Baird, Popham, Webster & Trusty, and Kohn, Baird, Sloss & Kohn, for appellee.

LASSING, J. This is an appeal from the judgment of the Jefferson circuit court, awarding Jesse English Bryant, a boy four years old, \$11,000 in damages for injuries received by him in being negligently run over by one of appellant's cars. The accident occurred on the morning of June 14, 1906, while appellee was attempting to cross from the south side of Broadway, at its intersection with Seventh street, to the north side. According to appellee's testimony, an east-bound car was approaching the crossing on Broadway, and a north-bound car was approaching on Seventh street. The Seventh street car stopped to permit the Broadway car to pass, and its motorman signaled the motorman of the Broadway car to go ahead. Having been given the right of way by the Seventh street car, the Broadway car passed over both the west and east crossing of Seventh street without slackening its speed, and, as appellee was attempting to cross the street on the east crossing, he was run down and injured. His right leg was so mangled and mashed from the foot up that it had to be amputated halfway between the knee and hip. His arm was lacerated, and his back and head bruised. The injury to his arm resulted in an enlargement of the ulna, and this injury the doctor testified is probably permanent. Appellee's testimony tended to show that the rate of speed at which this car was traveling at the time it passed over Seventh street was excessive, that no signal of the car's approach to this crossing was given, and that the motorman, at the time he was crossing over Seventh street, was looking in the direction of the Seventh street car instead of ahead of him. Appellant's theory is that appellee ran into the side of the car as it was passing over the crossing, and fell under the car, and was run over by the hind trucks thereof; that, at the time, the car was proceeding slowly and with due care; and that the motorman could not by any possibility have avoided injuring appellee. Each theory was presented to the jury under proper instructions. The jury accepted the theory of appellee as to how the accident occurred; and, from a careful consideration of the evidence, we are constrained to say that the weight thereof supports the finding of the jury.

Three grounds are relied upon for reversal: First, that appellant should have been granted a continuance in order to secure the personal attendance of the motorman who was in charge of the car at the time the accident occurred; second, that the court erred in instructing the jury; and, third, that the damages are excessive.

Section 315, Civ. Code Prac., regulates the procedure where a continuance is sought because of the absence of a witness. To justify or support the motion, it must be made to appear that the evidence is material and

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

believed by affiant to be true. What is expected to be proven must be set out, and the party seeking the postponement must show diligence in his efforts to procure the attendance of the witness. The facts in this case scarcely bring it within the requirements of the rule. The suit was filed in July, 1909, and no steps were taken by appellant to secure the attendance of the witness until February 28, 1910, about 15 days before the case was to be called for trial. Defendant, all the time from July 24, 1909, when it was served with summons, though knowing the importance of the testimony of this witness, had permitted him to leave its employ and leave the state without having a subpoena issued for him or attempting to have him served with one. In fact, from the affidavit it appears that they had paid no attention to him or his whereabouts, and did not know that he had left the state until about February 28th. This conduct on the part of appellant can scarcely be treated as the exercise of due diligence on its part. But the court gave appellant the benefit of the doubt upon this point, and permitted the statement in the affidavit as to what the absent witness would say to be read to the jury as his deposition; and this was all that appellant was entitled to under the Code provision and the repeated provisions of this court. *Hutton v. First National Bank*, 45 S. W. 668, 20 Ky. Law Rep. 225; *M. & L. R. R. Co. v. Herrick*, 13 Bush, 122. An application for a continuance is always addressed to the sound discretion of the court, and, unless it is made clearly to appear that this discretion has been abused, the ruling of the trial court will not be disturbed where he has permitted the affidavit offered in support of the motion for a continuance to be read as a deposition. *McClurg v. Igleheart*, 33 S. W. 80, 17 Ky. Law Rep. 913.

The objection to the instructions is that so much of instruction No. 1 as told the jury that it was the duty of defendant's motorman to keep a lookout ahead for persons or vehicles on the track, and that if he failed to keep such lookout, and by reason thereof plaintiff was injured, they should find for him, was unauthorized under the pleadings and proof in this case. We cannot agree with this contention for the twofold reason: First, because, in defining the duties of a motorman in approaching a public crossing where persons, adults as well as children, might reasonably be expected to be, it was the duty of the court, under the repeated decisions of this court, to include among the duties of the motorman that of keeping a lookout. The law requires this of him, and the court would have fallen short of his duty if he had failed to instruct the jury upon this point. And, second, because so much of the instruction given as is objected to was asked for by defendant in the instructions which it asked

and the court refused to give. It is well settled that where an instruction is asked for, and the same idea is embraced in an instruction given, no ground of complaint is afforded. The instructions as given presented the law of the case, as warranted by the pleadings and proof, and were as favorable to the defendant as it was entitled to have them.

The real complaint of appellant is that the verdict is grossly excessive. It is large; but, under the circumstances, we are not prepared to say that it is excessive. Appellee is left a cripple for life, and while, as argued, he may take and die of any of the diseases to which children are subject, it is equally true that he may live a long life, and suffer and be inconvenienced because of the negligence of appellant. His sphere of activity has been very much circumscribed. He must make his living by the exercise of his mental powers rather than by manual labor. With one leg gone and an elbow enlarged, his prospects for making much of a success in life are, to say the least, not flattering.

In *Louisville & Nashville R. R. Co. v. Popp*, 96 Ky. 99, 27 S. W. 992, 16 Ky. Law Rep. 369, a recovery of \$10,000 for the loss of a leg was upheld by this court. In that case the injured boy was under eight years of age. In *Chesapeake & Ohio R. R. Co. v. Davis*, 60 S. W. 14, 22 Ky. Law Rep. 1156, a recovery of \$10,000 for the loss of one foot by a nine year old boy was sustained. In *Louisville & Nashville R. R. Co. v. Mitchell*, 87 Ky. 327, 8 S. W. 706, 10 Ky. Law Rep. 211, a recovery of \$10,000 as compensation was upheld in favor of a brakeman who had lost a foot above the ankle. And in *South Covington & Cincinnati Street Ry. Co. v. Weber*, 82 S. W. 986, 26 Ky. Law Rep. 922, a verdict of \$10,000 in favor of a girl four and a half years old, for the loss of one arm and an injury to the hand of the other arm, was upheld. In these cases, and many others to which reference might be made, the court might have been of opinion that the verdict was large, or even excessive; but, as said in the case of *Cox's Adm'r v. Louisville & Atlantic R. R. Co.*, 137 Ky. 388, 125 S. W. 1056: "It being peculiarly the province of the jury to fix the amount, their finding should never be disturbed unless it is made clearly to appear that it could not have been based upon the evidence, but must have been the result of caprice, passion, or prejudice."

The rule is that, although a verdict may seem excessive, it will never be disturbed on that ground alone, unless it is made to appear that it is so excessive as to lead to the belief that it is the result of passion or prejudice. Viewed in this light, it certainly cannot be said that the verdict in the case under consideration should be disturbed.

Judgment affirmed.

LOUISVILLE & N. R. CO. v. McMILLEN.†
(Court of Appeals of Kentucky. Feb. 14, 1911.)

1. MASTER AND SERVANT (§ 265*)—INJURIES TO SERVANT.

Where the servant of a railroad while working under a bridge when a train was passing over it was injured by being struck by a piece of iron from a freight car door, the burden was not on the servant to show that the car had not been inspected, or that a car door on that train was minus the piece of iron in question.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. §§ 877-908; Dec. Dig. § 265.*]

2. MASTER AND SERVANT (§ 203*)—ASSUMPTION OF RISK.

A servant assumes all the ordinary risks of his employment.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. §§ 538-543; Dec. Dig. § 203.*]

3. MASTER AND SERVANT (§ 216*)—ASSUMPTION OF RISK.

A servant does not assume risks occasioned by the negligence of other servants not his fellow servants.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. §§ 567-573; Dec. Dig. § 216.*]

4. MASTER AND SERVANT (§ 111*)—INJURIES TO SERVANT.

Where a servant of a railroad while working under a bridge when a train was passing on the bridge was struck by a piece of iron from a freight car door, if the train was sent out with a loose piece of iron, or if it was discovered or could have been by the use of ordinary care, it was negligence.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. §§ 215-217; Dec. Dig. § 111.*]

5. DAMAGES (§ 131*)—PERSONAL INJURIES.

Where plaintiff was confined to his bed about 10 months, and had pains all the time in his back and one leg, and was compelled to use crutches, a verdict for \$2,000 was not excessive.

[Ed. Note.—For other cases, see *Damages*, Cent. Dig. §§ 357-371; Dec. Dig. § 131.*]

Appeal from Circuit Court, Bullitt County.

Action by William McMillen against the Louisville & Nashville Railroad Company. From a judgment in favor of plaintiff, defendant appeals. Affirmed.

Charles Carroll, Charles H. Moorman, J. F. Combs, and Benjamin D. Warfield, for appellant. Ben Chapeze, for appellee.

NUNN, J. Appellee was running a pumping station at night for appellant at a point on its road where it crossed Rolling Fork river, the line between the counties of Hardin and Bullitt. He had been so engaged for about 20 months, when on the night of July 21, 1909, he passed from the pumphouse into a coal bin to get some coal to fire the furnace, and while stooping to shovel up the coal something hit him just below the small of the back, and rendered him senseless, in which condition he remained, according to his testimony, from 30 minutes to 2 hours, the exact time not known. When he recovered, he called for a person who was in the

pumphouse, who came out and found him sitting upon the floor of the bin with his head leaning forward and a flat piece of iron, about the size of a person's two hands, by his side. Appellee crawled to the pumphouse a few steps away, and remained there about 15 minutes, when he, assisted by Waverly French and Wm. Bryant, who happened to be at the pumphouse, started for home with his wife and children. Appellee used a plank in walking, and the witnesses described to the jury how he used it, but it is not made plain to the court just how he used it, other than he held it with both hands. According to appellee's testimony, he remained at home about two months, and was confined to his bed most of that time by reason of his injuries. He testified that he had pains in the lower part of his back and right leg all the time; that at the end of the two months, when he did get out, he was compelled to use crutches in order to walk, and was using them at the time of the trial in the lower court. He was corroborated in these statements by French, Bryant, and four or five of his neighbors. Two physicians also supported him in his statements, but were contradicted by at least two other physicians who testified for appellant, and swore that they examined appellee soon after he received his professed injuries, and found nothing wrong with him, except his right leg was slightly smaller than the other, and that this had been caused by nonuse. A freight train passed upon the bridge at the time appellee was getting the coal, and all the witnesses swore that the piece of iron found by his side when he was hurt came off of a freight car door; that it fastened to the bottom of the door for it to slide on when it was opened or closed. Appellee said he heard it strike the pumphouse and the next instant it struck him, and knocked him senseless. The witnesses fix the height of the bridge at from 20 to 30 feet. Appellant also pleaded contributory negligence on the part of appellee, and proved by two of the managers of its pumping stations that they had warned appellee not to go into the coal bin when a train was passing on the bridge. Appellee denied this, but says that he knew it was somewhat dangerous, and that he seldom went out when a train was going by; that he did not know a train was passing at the time he arrived at the coal bin; that it was dark, and he saw no lights; that the train entered upon the bridge after he went into the coal bin, and that he thought he would get his coal before he returned to the pumphouse, as he needed it to fire with.

The lower court gave the jury three instructions. The first, which fixed the only basis upon which appellant might recover, is as follows: "The court instructs the jury that if they shall believe from the evidence

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

† Rehearing denied April 13, 1911.

that the plaintiff was struck and injured by the piece of iron exhibited in evidence, or a piece of iron similar thereto, and that said piece of iron was caused to fall from one of the defendant's trains by negligence upon the part of its agents and servants in charge of said train, or upon the part of the agents and servants whose duty it was to inspect said train, then the law of the case is for the plaintiff, and the jury should so find." As we understand counsel's brief, they do not object to the form or substance of the instructions given, but claim that it was the court's duty to give only a peremptory instruction in behalf of appellant. Their first reason for this contention is that there was no proof showing that this piece of iron was negligently allowed to fall from the train; and the second is that the testimony showed that appellee was malingering. The testimony shows that this piece of iron fell and struck appellee while a freight train was crossing the bridge, and that it was a piece of iron which belonged on the door of a freight car. As we understand the law, it was not required of appellee to show that the car had not been inspected and made safe to go out on the road, or that a car door upon that particular train was minus the piece of iron exhibited to the jury. This burden was upon appellant, and it did prove by its conductor, who was in the caboose, and its engineer, who was in the engine cab, that they did not see or hear any iron fall; and it further proved by its two car inspectors in Bowling Green where the train arrived three or four hours after the accident that they inspected the train and found nothing wrong with the cars.

When appellee entered into the employment of appellant, he assumed all the ordinary risks incident to that employment, but he did not assume the risks occasioned by the negligence of other employes who were not his fellow servants. If this train was sent out on the road with a loose piece of iron attached to it, or if it was discovered or could have been by the use of ordinary care after the train was out by those in charge, it was negligence in permitting it to be moved in that condition, and it was their duty to make reasonable inspections for the purpose of ascertaining this fact, if it existed, and, if they failed to do so, they were guilty of negligence. The train was shown to have been under the management of appellant, or its servants, and the accident was such as in the ordinary course of things would not have happened if those having the management, use, and care had exercised reasonable diligence. It appears in the case of *L. & N. R. Co. v. Clark*, 106 S. W. 1184, 32 Ky. Law Rep. 736, that a lump of coal fell from a tender and struck Clark, a brakeman, upon the head. His evidence showed that fact, and the railroad

company claimed that it also devolved upon him to prove the tender was improperly loaded, but this court said it devolved upon the railroad company.

There was no evidence that appellee was guilty of contributory negligence. The question of his malingering was before the jury. If his injuries were as great and as permanent as the testimony tends to establish, the verdict for \$2,000 is small.

For these reasons, the judgment of the lower court is affirmed.

CAMPBELL v. KERRICK et al.

(Court of Appeals of Kentucky. Feb. 15, 1911.)

1. INSANE PERSONS (§ 61*)—CONVEYANCES.

The deed of a person of unsound mind is not void but voidable.

[Ed. Note.—For other cases, see *Insane Persons*, Cent. Dig. §§ 93-99; Dec. Dig. § 61.*]

2. INSANE PERSONS (§ 61*)—CONVEYANCES.

The deed of a person of unsound mind will not be set aside as against a bona fide purchaser for value without notice of the grantor's soundness of mind.

[Ed. Note.—For other cases, see *Insane Persons*, Cent. Dig. §§ 93-99; Dec. Dig. § 61.*]

3. INSANE PERSONS (§ 61*)—CONVEYANCES.

Where defendant did not know when he purchased that his grantor's grantor was of unsound mind at the time he conveyed, or know of any alleged fraud, and it did not appear that such original grantor was of unsound mind at the time of the conveyance to defendant, he was a bona fide purchaser.

[Ed. Note.—For other cases, see *Insane Persons*, Cent. Dig. §§ 93-99; Dec. Dig. § 61.*]

4. INSANE PERSONS (§ 89*)—RIGHTS OF ACTION.

Where one of unsound mind was induced by fraud to sell his land for an inadequate consideration, he would be entitled to recover the difference between the price received and the reasonable market value, where the land has since passed to a bona fide purchaser.

[Ed. Note.—For other cases, see *Insane Persons*, Cent. Dig. §§ 151-156; Dec. Dig. § 89.*]

5. CANCELLATION OF INSTRUMENTS (§ 37*)—FRAUD.

In a suit to cancel a deed for fraud, where the petition alleged that defendant induced plaintiff to convey the land by fraud, an objection to the petition because it did not allege in express terms that plaintiff owned the land he conveyed was untenable.

[Ed. Note.—For other cases, see *Cancellation of Instruments*, Cent. Dig. §§ 68-81; Dec. Dig. § 37.*]

6. ESTOPPEL (§ 32*)—ESTOPPEL BY DEED.

Where a grantee conveyed the land and was subsequently sued by his grantor for rescission on the ground of fraud, and he demurred to the petition, he could not urge that the petition was insufficient for failing to allege that plaintiff owned the land when he conveyed it.

[Ed. Note.—For other cases, see *Estoppel*, Cent. Dig. § 81; Dec. Dig. § 32.*]

Appeal from Circuit Court, Hardin County.

Action by J. J. Campbell against W. T. Kerrick and another. From a judgment in favor of defendants, plaintiff appeals. Reversed in part, and affirmed in part.

W. A. Barry and G. K. Holbert, for appellant. Irwin & Irwin, S. H. Bush, and L. A. Faurest, for appellees.

SETTLE, J. On the 15th day of June, 1908, the appellant, J. J. Campbell, by deed of general warranty, sold and conveyed to the appellee W. T. Kerrick a tract of land on Valley creek in Hardin county containing 60¼ acres. The consideration expressed in the deed was \$1,084.50, and its cash payment therein acknowledged. On February 27, 1909, Kerrick by a like deed sold and conveyed the same tract of land to the appellee Isaac Tabb, at the cash price of \$1,475. Both deeds were duly recorded in the office of the clerk of the Hardin county court. This action was brought in the Hardin circuit court by appellant to obtain a rescission of the contract whereby he sold and conveyed the land to the appellee Kerrick, the cancellation of the deed to Kerrick, and that made by the latter to Tabb; but appellant asked, if in the opinion of the court this relief would not be proper, that he be given a personal judgment against the appellee Kerrick for the difference between the amount paid him by Kerrick for the land and its alleged value at the time of the sale. It was, in substance, alleged in the petition that the land was purchased by the appellee Kerrick of appellant at a grossly inadequate price; that appellant at the time of its sale and conveyance was of unsound mind and by reason thereof incompetent to understand the transaction or to contract; that his unsoundness of mind was then known to Kerrick; and that the latter by fraud and misrepresentation took advantage thereof and induced him to enter into the contract. Each of the appellees filed a demurrer to the petition, both of which the circuit court sustained; and, appellant refusing to plead further, the action was dismissed. Appellant excepted to the ruling on the demurrers and also to the judgment; hence this appeal.

We are clearly of opinion that the circuit court did not err in sustaining the demurrer of the appellee Tabb. The petition fails to state a cause of action as to him. We have repeatedly held that the deed of a person of unsound mind is not void, but merely voidable, and, this being true, it will not be set aside as to a bona fide purchaser for value and without notice of the unsoundness of mind of the grantor. This is especially true as to a second purchaser of the land. In *Arnett's Committee v. Owens*, 85 S. W. 151, 23 Ky. Law Rep. 1409, we said: "The contract of a person of unsound mind, like that of an infant, is not void, but voidable only, if made before inquest. If a second purchaser for value and without notice purchases from a first purchaser who is charged with notice, he thereby becomes a bona fide purchaser and is entitled to protection. Where a deed is not void ab initio, but only voidable, the title passes to the grantee, and conse-

quently a sale by him to a bona fide purchaser without notice passes the title." *Logan v. Vanarsdall*, 86 S. W. 981, 27 Ky. Law Rep. 822; 6 Cyc. 319; *Breckenridge's Heirs v. Ormsby*, 1 J. J. Marsh. 236, 19 Am. Dec. 71; *Rusk v. Fenton*, 14 Bush, 490, 29 Am. Rep. 413. In *Logan v. Vanarsdall*, supra, we held that, where the grantor before the conveyance had been adjudged a lunatic, that fact, though conclusive evidence that such was his condition at the time of the inquest, was only prima facie evidence that such was his condition at the time of the sale and conveyance; and, being a mere presumption, it could be overcome by oral testimony.

It is not alleged in the petition that the appellee Isaac Tabb knew when he purchased the land from Kerrick that appellant was of unsound mind or incapable of making a contract when he sold and conveyed the land to Kerrick, or that he was a party to or knew of the alleged fraud by which the latter obtained the deed from appellant; it is not even alleged that appellant was a person of unsound mind or incapable of contracting when Kerrick sold and conveyed the land to the appellee Tabb, or, if such was then his condition, that it was known to Tabb. He must therefore be regarded a bona fide purchaser of the land and without notice of appellant's alleged mental incapacity to contract when he sold it to Kerrick.

As the facts averred in the petition, though confessed by appellee Tabb's demurrer, showed that he acquired an apparently good title to the land by the deed from Kerrick, and appellant, after the demurrer was sustained, failed to amend his petition, its dismissal by the circuit court, in so far as it affected the appellee Tabb, was eminently proper. We are, however, unable to approve the action of the circuit court in sustaining the demurrer and dismissing the petition as to the appellee Kerrick, for we think it stated a cause of action as to him; not by way of showing appellant entitled to the rescission asked, as that would not be proper in view of the fact that the title to the land has passed from Kerrick to Tabb, an innocent purchaser, but as entitling appellant to a judgment against Kerrick by way of damages, for the difference between the consideration paid for the land and what it was then reasonably worth, if it was in fact worth more than was paid.

The averments of the petition fairly manifest the following facts which are admitted by the appellee Kerrick's demurrer: (1) That at the time of the sale and conveyance of the land to the latter appellant was of unsound mind, owing to his extreme age and marital troubles, and by reason thereof mentally incapable of making the contract. (2) That the appellee Kerrick at that time knew of his unsoundness of mind and consequent incapacity to make a contract and by fraud and misrepresentation induced him to sell and convey him (Kerrick) the land. (3) That

the consideration paid by the latter for the land was grossly inadequate.

If the foregoing facts should be established by proof, they would entitle appellant to some sort of relief, and why not to compensation to the extent of the loss he sustained through the fraud of the appellee Kerrick by which he was induced to part with the land at a sum far less than its value? In such a case we think the measure of damages would be the difference, if any, between the price received by appellant for the land and its reasonable market value at the time.

Generally speaking, mere inadequacy of price will not of itself entitle a grantor to a rescission or to damages; but if, as alleged in this case, it is coupled with such acts on the part of the grantee as would constitute an overreaching of or fraud upon the grantor, it gives great weight to the right of the latter to relief. Especially would this be so, if, as here further alleged, the grantor by reason of infirmity of mind were incapable of contracting; for to make a contract it is essential that the parties be capable of understanding its terms and legally competent to obligate themselves thereby. As said in *Matthis v. O'Brien*, 139 Ky. —, 126 S. W. 156: "The law will not interfere with the right of competent parties to contract as they please, or set its disapproval on the wide-awake, vigilant, and enterprising citizen who makes a good bargain. Nor will it come to the relief of those who with their eyes open understandingly and freely make a bad bargain. * * * But obviously, to inspire and promote justice and fair dealing between man and man, there must be a place at which the courts in good conscience will interfere to protect the weak from the strong, and lend aid to those whose conditions and necessities have been taken advantage of. Otherwise the unscrupulous and avaricious would prey and thrive at will upon the needs and misfortunes of the helpless, dependent, and simple-minded." The averments of the petition call for the application of the principle announced in the case, *supra*, and, if proved, following the return of the case to the circuit court and a denial of the averments of the petition by answer, appellant's recovery should be regulated by the measure of damages previously indicated.

We see no force in the contention of appellee Kerrick's counsel that the petition is fatally defective in that it fails to allege in express terms that appellant was the owner of the land he sold and conveyed Kerrick. The objection is a very technical one, and, in view of all that is averred in the petition, wholly untenable; but it does not lie in Kerrick's mouth to urge it, as his only claim of title to the land came through the deed from appellant, and that title he passed to the appellee Tabb by the deed made him, all of

which is confessed by his demurrer to the petition.

It is unnecessary to consider the contentions of appellee Kerrick's counsel bearing on the question of rescission, as that character of relief cannot be granted appellant, and has, in fact, been abandoned by him.

For the reasons indicated the judgment is affirmed as to the appellee Tabb, and reversed as to the appellee Kerrick, and cause remanded, with directions to the circuit court to overrule the latter's demurrer to the petition and for further proceedings consistent with the opinion.

LANG v. BACH.

(Court of Appeals of Kentucky. Feb. 14, 1911.)

1. APPEAL AND ERROR (§ 205*)—PRESENTATION OF QUESTIONS IN LOWER COURT—ADMISSIONS TO EVIDENCE.

In an action for the price of timber, the court's action in sustaining an objection to the question whether witness went on the land at the direction of plaintiff, and showed another person the trees which plaintiff had sold, so that the latter could brand them with defendant's brand, cannot be considered on appeal, where no avowal was made.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 1282; Dec. Dig. § 205.*]

2. APPEAL AND ERROR (§ 837*)—RECORDS—BILL OF EXCEPTIONS—MATTERS CONSIDERED.

A deposition which the court refused to permit to be read in evidence, but which it made a part of the bill of exceptions, may be properly considered by the Court of Appeals.

[Ed. Note.—For other cases, see Appeal and Error, Dec. Dig. § 837.*]

3. LOGS AND LOGGING (§ 3*) — SALES OF STANDING TIMBER—ACTION FOR PRICE—EVIDENCE.

In an action for the price of timber within a certain boundary which plaintiff sold to defendant, the deposition that the defendant employed the witness to brand the timber, and plaintiff agreed to furnish a man to show him the boundary line, and did furnish a man and witness branded the timber inside the line pointed out to him, was erroneously excluded.

[Ed. Note.—For other cases, see Logs and Logging, Dec. Dig. § 3.*]

4. TRIAL (§ 423*)—WAIVER OF ERROR—INSTRUCTIONS.

Where defendant objected and excepted to four instructions given by the court, and asked for time to prepare other instructions, but the court declined to give any time, a recital in the bill of exceptions that the court called the attention of the defendant's counsel to the second instruction, and he agreed that it was the law on that issue, and expressed himself as satisfied with the instruction, but did not state that he consented thereto, does not show that he waived his right to complain of any error in the instructions.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 984; Dec. Dig. § 423.*]

5. LOGS AND LOGGING (§ 3*)—SALES OF STANDING TIMBER—ACTIONS FOR PRICE.

Where plaintiff sold to defendant trees outside of the boundary described in the petition in an action for the price, and defendant was enjoined from cutting some of the trees and removing staves which he had made from others, he had a right to recover on counterclaim, not

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

only for the trees left standing, but for those which he had cut and made into staves.

[Ed. Note.—For other cases, see Logs and Logging, Dec. Dig. § 3.*]

6. LOGS AND LOGGING (§ 3*)—SALES OF STANDING TIMBER—ACTION FOR PRICE—INSTRUCTIONS.

In an action for the price of timber where defendant counterclaims for trees included in the sale, which he had been enjoined from cutting and staves which he had made from other trees, which he was enjoined from removing by a third person, instructions that, if plaintiff sold defendant timber outside of the boundary described in the petition, the jury should give defendant credit therefor of its value then in the trees, and that if the standing trees complained of by the defendant are outside the boundaries described in the petition, and plaintiff showed the trees to defendant and included them in the sale, their value in the trees at the time of the sale should be credited on the judgment, were erroneous as calculating to mislead and confuse the jury, since the latter instruction excluded defendant's right to recover on his counterclaim for trees, included in the sale, already cut by him.

[Ed. Note.—For other cases, see Logs and Logging, Dec. Dig. § 3.*]

7. APPEAL AND ERROR (§ 518*)—RECORD—BILL OF EXCEPTIONS—QUESTIONS SUBMITTED.

An amended answer and counterclaim which the court refused to permit to be filed cannot be considered on appeal where they are not made a part of the record, either by order of the court or by being embraced in the bill of exceptions.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2342-2355; Dec. Dig. § 518.*]

8. TRIAL (§ 2*)—CONSOLIDATION OF CAUSES.

Where an action for the price of timber is commenced while a suit is pending against defendant to enjoin the removal of trees which he claimed were included in the sale, the court should consolidate the causes and hear them together.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 3; Dec. Dig. § 2.*]

9. INTEREST (§ 13*)—LIQUIDATED DEMANDS—NECESSITY FOR WRITTEN CONTRACT.

There was no error in giving judgment for interest notwithstanding the verdict in an action for the price of timber, since a liquidated claim, whether oral or written, carries with it interest from the time it was due, in the absence of any agreement to the contrary.

[Ed. Note.—For other cases, see Interest, Cent. Dig. § 25; Dec. Dig. § 13.*]

Appeal from Circuit Court, Breathitt County.

Action by J. J. C. Bach against J. E. Lang. Judgment in favor of plaintiff. Defendant appeals. Reversed and remanded for new trial.

G. W. Fleenor, for appellant. C. A. Bach, Grannis Bach, and Kash & Kash, for appellee.

CLAY, C. Appellee, J. J. C. Bach, brought this action against appellant, J. E. Lang, to recover \$300, the purchase price of certain timber which he alleged he had sold to Lang, and for which the latter had failed and refused to pay. The petition sets forth the tracts of land on which the timber was located. A credit of \$51.60 was admitted. After denying certain allegations of the pe-

tition, appellant alleged in his answer that he bought of appellee all the white oak trees on all of the land on the falling grounds or falling waters of Ben Smith branch of South fork of Quicksand creek, excluding all of the timber on the right-hand side of Boat Gunwale branch, from its mouth up to where the pipe line crosses the Boat Gunwale branch, and excluding all of Bear Wallow branch; that of the timber so purchased by him he had cut about 100 trees, but, when he proceeded to cut other trees which appellee had sold him, the Kentucky Union Company, a corporation, enjoined him from cutting 75 or 80 of them, as well as from removing 49 trees which he had already cut and made into staves, and he also charged that it cost him \$2.25 per tree to have the 49 trees manufactured into staves, making \$110.25 which he pleaded as an off-set and counterclaim against appellee. In addition to this, he alleged that the trees which he was enjoined from cutting were the best in size and quality of the timber he bought from appellee, and were worth at least \$1 per tree more than the trees he had cut, or the sum of \$125, which he also pleaded as a set-off and counterclaim against appellee. By amended answer appellant set forth the fact that he had been enjoined by the Kentucky Union Company from cutting or removing a portion of the timber sold him by appellee, and that the issues in that action should be determined before the present case was tried. Appellee did not demur to the answer or amended answer, but filed a reply controverting their allegations. The effect of the reply, however, was to admit the title of the Kentucky Union Company to any timber that lay outside of the boundary set forth in the petition, although it denies that the Kentucky Union Company had enjoined appellant from cutting or removing any timber that appellee had sold him. A trial before a jury resulted in a verdict for appellee for the sum of \$300, without interest, less a credit of \$51.60, and \$41 for trees left standing. Appellee asked for a judgment for interest notwithstanding the verdict. This the court allowed, and judgment was entered accordingly. From that judgment this appeal is prosecuted.

According to the evidence for appellee, he went upon the land in question, and pointed out the boundary lines of the timber he sold appellant, and appellant cut from this boundary all the white oak trees. He never sold to appellant any trees outside of this boundary, or any of the trees which appellant was enjoined from cutting or removing. According to the evidence for appellant and his witnesses, the boundary lines as pointed out to him by appellee included timber in addition to that which appellee claims was sold him. There were 49 trees which appellant had cut and made into staves, and also 41 trees still

left standing. Appellee agreed to send Cam Tharp along to show the timber and the lines, so the timber could be branded.

While Cam Tharp was on the stand, he was asked by the attorney for appellant on cross-examination to state whether or not he went upon the land at the direction of appellee and showed Dillard Gabbard the trees which appellee had sold, so that he could brand the trees with defendant's brand. To this question appellee objected, and the court sustained the objection. As no avowal was made, we cannot pass upon the propriety of the court's action. The court also refused to permit the deposition of Dillard Gabbard to be read in evidence. This deposition is made a part of the bill of exceptions, and may be properly considered by this court. According to the testimony of this witness, appellant employed him to brand the timber. Appellee agreed to furnish a man to show him the lines. He did furnish Cam Tharp, and the witness branded the timber inside the lines which Tharp showed him.

We think the court erred in excluding this evidence from the consideration of the jury. While it is true appellee did not sell appellant any branded trees, he did sell him all the white oak trees within a certain boundary which he pointed out in a general way. If, then, he did as a matter of fact agree to furnish a party to point out the lines more particularly, and this party pointed out the lines, and appellant had the trees branded within the lines so pointed out, these were all facts which the jury could properly take into consideration in determining what timber was actually sold.

The court instructed the jury as follows:

"The court instructs the jury that they must find for the plaintiff \$300 sued for, and may in their discretion allow interest thereon from the maturity of said contract until paid subject to the credit of \$51.60 paid through Hargis Bros.

"The defendant cannot recover anything on his counterclaim unless the jury shall believe from the evidence that the plaintiff in fact sold him timber outside of the two boundaries set out in the petition. If the jury so believes from the evidence, then they shall give the defendant credit therefor of its value standing on the tree, such as the defendant has not already received.

"The jury cannot consider the evidence offered as to the branding of the timber.

"If the jury believes from the evidence that the 41 standing trees complained of by the defendant or any number of them are outside of the two boundaries of the plaintiff as set out in the petition, and shall further believe from the evidence that the plaintiff showed these trees to the defendant and included them in the sale, then their value in the tree at the time of said sale should be credited on the judgment as directed in the first instruction, but, unless the jury shall

believe the said trees were so included in the sale, nothing can be allowed the defendant for their value."

To these instructions counsel for appellant objected and excepted, and asked for time to prepare other instructions. The court declined to give any time. The bill of exceptions then goes on to state that the court called the attention of appellant's counsel to the second instruction, and that counsel agreed with the court that it was the law on that issue and expressed himself as satisfied with the instruction. The fact remains, however, that appellant's counsel did object and except to the instructions. While he may have agreed that the second instruction was the law of the case, the bill of exceptions does not state that he consented thereto; on the contrary, he objected to all the instructions. That being true, he did not waive his right to complain of any error in the instructions merely because he was under the mistaken belief that one of them properly presented one of the issues involved. If, as a matter of fact, appellee sold to appellant any trees outside of the two boundaries described in the petition, and appellant had been enjoined from cutting certain of these trees and removing the staves which he had made from certain others of such trees, he had a right to recover on his counterclaim, not only for the trees left standing, but for those which he had cut and made into staves. While the second paragraph of the second instruction apparently conforms to this idea of the law, yet when considered in connection with the last instruction, which permits a recovery on the counterclaim for only the 41 standing trees, it is manifest that the instructions were calculated to mislead and confuse the jury. That being true, the giving of such instructions was prejudicial error.

While it is true that appellant by an amended answer and counterclaim asked that the Kentucky Union Company be made a party to the action and required to litigate its title to certain trees which appellant claims appellee sold him, and the court refused to permit this amended answer and counterclaim to be filed, we cannot consider this alleged error for the reason that the amended answer and counterclaim was not made a part of the record, either by order of the court or by being embraced in the bill of exceptions. However, if the issues involved in that action have not been decided, the court should, on the return of this case, consolidate the two cases and hear them together. This is the only way by which substantial justice can be done all the parties to this action. If, as a matter of fact, appellee sold appellant timber outside of the two boundaries described in the petition, and the Kentucky Union Company has superior title thereto, appellant should not be required to pay for the timber twice. On the other hand, if there is no failure of title as to any portion of the timber which appellant claims appel-

lee sold him, then appellant cannot reap the benefit of such purchase and at the same time sustain a counterclaim against appellee.

The court did not err in giving judgment for interest notwithstanding the verdict of the jury. While in the earlier opinions the allowance of interest was made to depend upon the fact that the claim was liquidated and supported by a written contract, the law is now well settled that a liquidated claim, whether oral or written, carries with it, as a matter of law, interest from the time it was due, in the absence of any agreement to the contrary. *Henderson Cotton Mfg. Co. v. Lowell Machine Shops*, 86 Ky. 668, 7 S. W. 142, 9 Ky. Law Rep. 831. On the next trial the court should authorize the recovery of interest on the difference between \$300, and the amount of the credit of \$51.60 added to any sum which the jury may allow appellant by way of counterclaim from December 31, 1903. The court in lieu of the instructions given will instruct the jury as herein indicated.

Judgment reversed and cause remanded for a new trial consistent with this opinion.

F. HAAG & BRO. et al. v. REICHERT et al.
(Court of Appeals of Kentucky. Feb. 15, 1911.)

1. ASSIGNMENTS (§ 19*)—CONTRACTS ASSIGNABLE.

A contract which involves a personal liability, a relation of personal confidence, or which calls for the skill or experience of one of the parties is not assignable.

[Ed. Note.—For other cases, see Assignments, Cent. Dig. §§ 28-31; Dec. Dig. § 19.*]

2. CONTRACTS (§ 280*)—PERFORMANCE—PERSONAL CONTRACT.

Where a person undertakes to do work for another which requires no special skill, and he has not been selected on account of his personal qualifications, he may have the work done by an equally competent third person, as that does not amount to an assignment of his liability, since he remains liable.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 1251, 1251½; Dec. Dig. § 280.*]

3. ASSIGNMENTS (§ 109*)—EFFECT—PARTIES.

Where a contract involving personal liability or skill of one of the parties is assigned by that party with the consent of the other party, there is, in effect, a new contract, in which the same acts are to be performed by a third person.

[Ed. Note.—For other cases, see Assignments, Cent. Dig. § 188; Dec. Dig. § 109.*]

4. ASSIGNMENTS (§ 94*)—CONTRACTS—EFFECT.

An agent negotiating for the purchase of land for his principal assigned his contract to a third person who had acquired a half interest in the land, and the agent by agreement with the owners who had knowledge of the assignment continued to perform the services resulting in profit to them. *Held*, that the third person was entitled to recover either on the theory that the assignment was of the agent's benefits under his contract, or on the theory that the assignment was assented to.

[Ed. Note.—For other cases, see Assignments, Cent. Dig. §§ 162-165; Dec. Dig. § 94.*]

5. BROKERS (§ 75*)—COMPENSATION—TIME FOR PAYMENT.

The rights of an agent or his assignee to compensation for a sale of land are fixed when the sale has been made, and the payment of the compensation cannot be postponed by any agreement between the principal and a third person to which the agent is not a party.

[Ed. Note.—For other cases, see Brokers, Dec. Dig. § 75.*]

6. APPEAL AND ERROR (§ 359*)—CROSS-APPEAL—POWER TO GRANT.

Under Civ. Code Prac. § 755, authorizing a cross-appeal by an entry on the records of the Court of Appeals, a cross-appeal can be granted only by the Court of Appeals.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1936-1940; Dec. Dig. § 359.*]

Appeal from Circuit Court, Henderson County.

Action by John Reichert and another against F. Haag & Bro. and another. From a judgment for plaintiffs, defendants appeal. Affirmed.

Vance & Heilbronner and N. Powell Taylor, for appellants. Clay & Clay, for appellees.

MILLER, J. Early in 1905 Wiley Reichert and F. Haag & Bro., of Henderson, made a contract for the purchase of the Halliday tract of about 1,800 acres of land in Ballard county for the sum of \$30,000 cash. The deed was drawn and executed and sent to Wiley Reichert and F. Haag & Bro. with a draft for the purchase money. They, however, being unable to raise that amount of money, or unwilling to put so large a sum into one transaction, persuaded John Reichert, the father of Wiley Reichert, to take over their purchase, with the understanding that if F. Haag & Bro. should at any time within six months thereafter repay to John Reichert one-third of the purchase money, with interest, then Reichert would reconvey to F. Haag & Bro. an undivided one-third interest in the land. The appellee James E. Cheatham had negotiated the purchase for Wiley Reichert and the Haags, under a contract by which he was to get one-third of the net profits for his services as agent. In substituting John Reichert as the purchaser, in lieu of Wiley Reichert and the Haags, John Reichert recognized the original contract with Cheatham, and promised to pay Cheatham the one-third of the net profits he should make upon a final sale of the land. F. Haag & Bro. permitted the six months to pass without exercising their right to repurchase the one-third interest in the land from John Reichert. After the expiration of the six months, however, they approached John Reichert for the purpose of repurchasing the one-third interest called for by their contract, but he declined to sell. F. Haag & Bro. then appealed to Cheatham to aid them in persuading John Reichert to carry out the

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

original agreement, and let them repurchase an undivided one-third interest in the land. Through Cheatham's efforts, John Reichert finally agreed to sell the Haags a half interest in the land for one-half of the original purchase price, with accrued interest thereon from the date of purchase, upon condition that Cheatham would release John Reichert from his contract to pay Cheatham his commission of one-third of the net profits to be made upon the final sale of the land. Cheatham agreed to this, and surrendered his contract to John Reichert, whereupon John Reichert conveyed, at the suggestion of F. Haag & Bro., an undivided one-half interest in the land of F. Haag & Bro. and Mann Bros. At the same time F. Haag & Bro. and Mann Bros. executed separate contracts to Cheatham, on March 27, 1906, by which each firm agreed to pay Cheatham one-third of its net profits upon the final sale of the land, as Cheatham's commission for his services rendered in purchasing the land, and for services rendered and which might thereafter be rendered by Cheatham in the management and sale of the land. In pursuance to this agreement, John Reichert conveyed the property to F. Haag & Bro. and Mann Bros., and they executed written contracts to Cheatham, as above indicated. On April 26, 1906, Cheatham sold the benefit of his contract with F. Haag & Bro. to appellee John Reichert for \$1,000, whereupon Cheatham indorsed upon his contract with F. Haag & Bro. the following assignment: "For value received, I have and do hereby assign and transfer the above contract to John Reichert of Henderson, Ky. This April 21, 1906, Jas. E. Cheatham."

Subsequently, on June 29, 1906, F. Haag & Bro. sold their undivided one-fourth interest in the land to Mann Bros. for a consideration of \$11,125. Of this sum \$2,500 was cash, and \$8,625 was the amount of the purchase money which F. Haag & Bro. had agreed to pay for their interest in said land by the terms of their original contract of purchase. In other words, Mann Bros. assumed to pay F. Haag & Bro.'s purchase money, and, in addition thereto, paid them \$2,500 gross profit. At the time of the sale by F. Haag & Bro. to Mann Bros. they made the following indorsement upon the copy of the written contract between F. Haag & Bro. and Cheatham regarding the latter's commissions, to wit: "Neither F. Haag & Bro. nor Mann Bros. recognized any liability to James E. Cheatham under the within contract, but if, upon the final sale of the lands mentioned therein, there should be any liability on the part of F. Haag & Bro. to said Jas. E. Cheatham, under this contract, the said land having this day been sold to Mann Bros., the said liability is to be paid by said Mann Bros., this June 29, 1906. Mann Bros." On August 20, 1907, appellee John Reichert, joining James E. Cheatham as a plaintiff, instituted this suit against F.

Haag & Bro., and subsequently joined Mann Bros., for the purpose of recovering \$838.33, which he claims was one-third of the net profits which F. Haag & Bro. had made upon the sale of their undivided interest in the land to Mann Bros. By an amended petition, Reichert claimed that the \$2,500 cash payment was in reality only two-thirds of the consideration agreed on, and that the real consideration, instead of being \$2,500 in addition to the other consideration expressed in the deed, was \$3,750, and that the amount due as commission under the contract was \$1,250, for which he prayed judgment.

The case was transferred to equity, and upon the trial the chancellor found that the gross profit of the sale by F. Haag & Bro. to Mann Bros. was \$2,500, that the net profit of that sale was \$2,100, and he gave Reichert, as assignee of Cheatham, a judgment against F. Haag & Bro. for \$700 with a like judgment in favor of F. Haag & Bro. over against Mann Bros. From that judgment F. Haag & Bro. and Mann Bros. appealed; and at the same time the circuit court granted John Reichert, as assignee of Cheatham, a cross-appeal from so much of the judgment as failed to allow him the difference between \$700 and \$1,250, which he claimed in his amended petition.

Appellants ask a reversal upon three grounds: (1) That the contract between F. Haag & Bro. and Cheatham was for the rendition of personal services, and was not assignable; (2) that, if the contract was assignable to any extent, it could be only for services theretofore rendered in the purchase of the land, and could not be assigned for services to be thereafter rendered in the management and sale of the land; and (3) that the sale by Haag & Bro. to Mann Bros. was not a final sale such as was within the contemplation of the contract between them, and that Mann Bros. are not now liable thereunder.

Under our view of the case the first and second grounds may be considered together. It is a well-settled general doctrine that a contract is not assignable where it involves a personal liability, a relation of personal confidence, or calls for the skill or experience of one of the parties. One cannot, therefore, assign his liability under such a contract so as to require the other party to accept the performance of the contract from a person who was not originally a party to it. The reason for the rule lies, not only in the right of the person to know to whom he is to look for the satisfaction of his rights under the contract, but also in his right to the benefit which he contemplates from the character, credit, and substance of the person with whom he contracts. If, however, a person undertakes to do work for another, which requires no special skill, and he has not been selected for the work with reference to any personal qualifications, he may have the work done by some equally compe-

tent third person. This, however, is not an assignment of his liability, for he does not cease to be liable if the work is not done by his assignee in accordance with the contract. Furthermore, the general rule has no application in cases where the assignment is assented to by the other party to the contract, in which case there is, in effect, a new contract. It is an agreed rescission of the old contract, and the substitution of a new one in which the same acts are to be performed by different parties. It is apparent, however, that Cheatham's assignment of his contract in this case does not come within either the terms or the spirit of the general rule above laid down, for Cheatham in no way attempts to assign his liability under the contract. He assigned his benefits only. Reichert, the assignee, was the owner of a one-half interest in the land, and Cheatham by agreement of the owners had been and continued to be under Reichert's supervision and control in rendering his services under his contract with the Haags and with Mann Bros. By their conduct the appellants construed the contract as remaining in force, with no one substituted for Cheatham to do Cheatham's work. No attempt was made to so substitute any one for Cheatham, and he not only recognized his liability, but performed his work in discharge of that liability. And, while it is true that the assignment is general in its terms, in that it assigned and transferred "the above contract" to John Reichert, it is evident that the intention and effect of the assignment was to transfer to Reichert the benefit of the contract, and not the liability thereunder. Moreover, although F. Haag & Bro. and Mann Bros. say that they never agreed to the assignment, their acts thereafter were equivalent to an assent to the assignment, since they not only accepted Cheatham's services, but paid one-half of his expenses for repeated trips made at the direction of Reichert. Cheatham subsequently sold the timber on less than one-half of this tract of land to a box company for \$15,000, and for that service he did not claim any extra compensation; on the contrary, all the parties concerned treated that service as having been rendered under the original contract. So, in either view of the case, Cheatham's assignment to Reichert was valid, and must be sustained.

Neither do we concur in the suggestion that the agreement of June 29, 1906, by which Mann Bros. agreed to pay Cheatham's fee in case F. Haag & Bro. should be under any liability therefor by reason of the sale by them to Mann Bros. can affect Reichert's rights under his assignment. Neither Reichert nor Cheatham was a party to that agreement, and neither of them can be bound or affected by it. The rights of Cheatham and Reichert to commissions for the sale of the

land are fixed by the contract of March 27, 1906, between F. Haag & Bro. and Cheatham, and the subsequent assignment of the benefit of that contract to Reichert. And, the sale contemplated by that contract having been made, Cheatham's fee was earned, and its payment cannot be postponed by the agreement of June 29, 1906, which at most contemplates some future, final sale or settlement between F. Haag & Bro. and Mann Bros. That is a matter entirely between the two last-named parties, and cannot be used to affect Cheatham's rights under his contract.

Concerning appellee's contention under their cross-appeal granted by the circuit court that the judgment was for too small a sum, it is sufficient to say that a cross-appeal cannot be granted by the circuit court. It can be granted only by this court. Civ. Code Prac. § 755; *Murphy v. Blandford*, 11 S. W. 715, 11 Ky. Law Rep. 125; *Hancock v. Hancock's Adm'r*, 69 S. W. 757, 24 Ky. Law Rep. 664. And, as no cross-appeal was prayed or granted here, that branch of the case will not be considered.

The judgment of the chancellor is affirmed, with damages.

CREAMER v. LOUISVILLE RY. CO.

(Court of Appeals of Kentucky. Feb. 17, 1911.)

1. APPEAL AND ERROR (§ 989*)—VERDICT—EVIDENCE—SUFFICIENCY.

The court on appeal, reviewing the sufficiency of the evidence to sustain the verdict, will not determine the weight of the evidence, but will only determine whether there is any evidence to support the verdict.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3897; Dec. Dig. § 989.*]

2. APPEAL AND ERROR (§ 1001*)—VERDICT—EVIDENCE—SUFFICIENCY.

In an action for injuries in a collision with a street car, evidence held sufficient to go to the jury on the question whether plaintiff's injuries were caused by the negligence of the motorman or by his own negligence, so that their finding exonerating the defendant will not be disturbed on appeal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3922, 3928-3933; Dec. Dig. § 1001.*]

3. STREET RAILROADS (§ 93*)—OPERATION OF CARS—CARE REQUIRED.

A motorman approaching a car on the adjacent track from which passengers are alighting must keep a sharp lookout for persons who cross the street immediately behind the car, and to have his own car in such control that he may stop it at a moment's notice, and must give timely warning of the approach of his car.

[Ed. Note.—For other cases, see Street Railroads, Cent. Dig. §§ 195-200; Dec. Dig. § 93.*]

4. STREET RAILROADS (§ 93*)—OPERATION OF CARS—CARE REQUIRED.

Where a passenger alighting from a street car and going behind the car to cross the parallel track on which cars were run in the opposite direction exercised ordinary care for his safety, but the motorman operating the car on

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

the parallel track failed to keep a sharp lookout, or to have his car under complete control, or to give timely warning of its approach, and the failure resulted in the car striking the passenger, the passenger could recover.

[Ed. Note.—For other cases, see Street Railroads, Cent. Dig. §§ 185-200; Dec. Dig. § 93.*]

5. STREET RAILROADS (§ 118*)—OPERATION OF CARS—CARE REQUIRED.

Where, in an action for injuries to a street car passenger passing behind the car from which he had just alighted to cross a parallel track in front of an approaching car which struck him, there was no evidence that the motorman saw the passenger, or by ordinary care could have discovered his peril in time to have avoided the accident, but the proof showed that the car was on the passenger as soon as he stepped from behind the car from which he had alighted, a charge that it was the duty of the passenger when he started to cross the parallel track to exercise ordinary care, and if he failed to do so, and by the failure brought about the accident, he could not recover, though the motorman was negligent, was sufficient on the issue of contributory negligence.

[Ed. Note.—For other cases, see Street Railroads, Cent. Dig. §§ 258-269; Dec. Dig. § 118.*]

3. NEGLIGENCE (§ 4*)—"ORDINARY CARE."

"Ordinary care" is that degree of care which ordinarily prudent persons would exercise under like or similar circumstances, and negligence is the failure to exercise such ordinary care.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. § 6; Dec. Dig. § 4.*]

For other definitions, see Words and Phrases, vol. 6, pp. 5029-5042; vol. 8, pp. 7739, 7740.]

7. DAMAGES (§ 95*)—PERSONAL INJURIES—MEASURE OF DAMAGES.

The jury in awarding damages for a personal injury should award plaintiff such sum as will reasonably compensate him for the mental and physical suffering which he has endured, and which it is reasonably certain he may endure, as a result of his injuries, and for the impairment of his ability to labor and earn money, not exceeding the amount sued for, and for his expenses for medical services not exceeding the amount demanded.

[Ed. Note.—For other cases, see Damages, Cent. Dig. §§ 222-229; Dec. Dig. § 95.*]

Appeal from Circuit Court, Jefferson County, Chancery Branch, Second Division.

Action by Marion Creamer against the Louisville Railway Company. From a judgment for defendant, plaintiff appeals. Affirmed.

Edwards, Ogden & Peak, for appellant. Fairleigh, Straus & Fairleigh and Howard B. Lee, for appellee.

SETTLE, J. Appellant, a resident of Sellersburg, Ind., upon reaching the city of Louisville, took a Fourth street south-bound car, operated by appellee, to go to a cooper shop on N street, where he was employed. Upon reaching M street, the car stopped, and appellant got off of it on the west side, and immediately went around the rear end of the car to cross Fourth street to the east side. When in the act of stepping on the second railway track in that street, he was struck by one of the appellee's north-bound cars, as

it passed the one from which he had alighted, and greatly injured upon his head and other parts of the body. Appellant sued appellee in the court below to recover damages for the injuries thus received, alleging that they were caused by the negligence of its servants in charge of the car with which he collided. Appellee by answer denied the negligence complained of, and pleaded contributory negligence on the part of appellant, but for which, it was alleged, he would not have been injured. The plea of contributory negligence was traversed by reply, thereby completing the issues. The trial resulted in a verdict for appellee, and appellant, having been refused a new trial, has appealed.

But two grounds are urged for a reversal: (1) That the verdict was contrary to and not supported by the evidence; (2) that the trial court did not properly instruct the jury. The first ground is without merit. While appellant and nearly all of his numerous witnesses testified that the car by which he was struck was running at a high rate of speed, that its gong or bell gave no warning of its approach, and that the force of the collision, by reason of the speed of the car, was sufficient to knock appellant 10 or 15 feet, the motorman and conductor on each of the cars, as did other witnesses introduced by appellee, testified that it signaled its coming by the sounding of the gong, and that in approaching and passing the other car its speed was reduced to a rate not exceeding 2 miles per hour. Moreover, some of appellee's witnesses testified that appellant came so suddenly from behind the car in which he had been riding and onto the track immediately in front of the car which struck him that the motorman in charge thereof did not have time to stop it before it ran against him. Among these witnesses was the motorman, who further testified that he was maintaining a constant lookout in front of the car, and that, when appellant came from behind the other car and stepped on the track in front of the moving car, it was in four feet of him, and that he (the motorman) made every effort possible to stop the car before it struck him, but was unable to do so. Appellant in testifying failed to state whether he saw the car before it struck him, but did say he did not remember that he looked to see if a car was coming. H. C. May, a passenger on the car in which appellant had been riding, testified that he called to the latter as he was alighting from the car, and warned him that a north-bound car was approaching, but that he did not heed the warning.

It is apparent from the foregoing facts that it cannot fairly be claimed there was no evidence to support the verdict. Whether the verdict was against the weight of the evidence we are not required to determine. It is sufficient to say that there was evidence

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

from which the jury had the right to determine whether appellant's injuries were caused by the negligence of appellee's servants or his own negligence, and their finding exonerating the former from responsibility will not be disturbed, as it was not without support from the evidence, or so contrary thereto as to have been unauthorized.

We are also unable to find any error in the instructions. In order that our approval of them may be better understood, we insert them in the opinion:

"(1) It was the duty of the motorman in charge of defendant's car being operated north on Fourth street near M at the time plaintiff claims he was injured to keep a sharp lookout for persons alighting from the south-bound car which he expected to cross the street immediately behind same, and to have the north-bound car under such control as that it might be stopped at a moment's notice, and to give timely notice or warning of the approach of said car to said place by ringing of bell or gong, and if the jury believe from the evidence that the plaintiff alighted from south-bound car at Fourth and M street on the 8th day of March, 1909, and went behind said car for the purpose of crossing the east track on which there was then being operated a car going north, was exercising ordinary care for his own safety, and further believe from the evidence that the motorman in charge of said north-bound car failed to keep a sharp lookout at said time and place, or failed to have said car under such control as that it might be stopped at a moment's notice, or failed to give timely warning of the approach of said car to said place by ringing the bell or gong, and further believe from the evidence that, by reason of the failure of the motorman in charge of said north-bound car to observe any one or more of these duties the plaintiff was struck by said north-bound car, the law is for the plaintiff, and you should so find.

"(2) It was the duty of the plaintiff when he started across the tracks of the defendant at the place in the evidence referred to to exercise ordinary care for his own safety, and if you believe from the evidence that at the time he failed to exercise ordinary care for his own safety, and by reason of such failure helped to cause or bring about the injuries of which he complains, and that he would not have been injured but for his failure in this respect, if any there was, then the law is for the defendant, and you should so find, although you may believe from the evidence that the motorman was negligent as submitted to you in the first instruction.

"(3) 'Ordinary care' is that degree of care which ordinarily carefully prudent persons usually exercise under like or similar circumstances. 'Negligence' is the failure to exercise ordinary care.

"(4) If you find for the plaintiff, you will award to him such sum in damages as you

believe from the evidence will reasonably compensate him for the mental and physical suffering which he has endured, or which it is reasonably certain he may endure as a result of his injuries, if any, and for the permanent impairment of his ability to labor and earn money, if any proven, not to exceed on that account the sum of \$15,000, and for expenses in medical services, if any proven, not exceeding therefor the sum of \$500, your verdict in all not to exceed the sum of \$15,500, the amount claimed in the petition. If you find for the defendant, you will say so by your verdict, and no more." It will be observed that instruction 1 correctly advised the jury as to the care the law required of appellee's motorman on the north-bound car in approaching and passing the south-bound car from which appellant alighted before receiving his injuries, not only in the matter of keeping a lookout and sounding the car gong, but also in slackening the speed of the car and otherwise so controlling its movements as to enable it to be stopped at a moment's notice, and further told the jury that if they believed from the evidence the motorman failed to perform any of these enumerated duties, and that such failure caused appellant to be injured, they should find for the latter. The jury could not have failed to understand from this instruction that if the performance of the duties required of the motorman would have enabled him to have discovered appellant's peril in time to have stopped the car before it struck him, and his failure to perform them, or any of them, caused the car to strike and injure appellant, it was their duty to find for him.

The instruction applied to the facts of appellant's case the rule announced by this court in *Louisville Railway Co. v. Hudgins*, 124 Ky. 79, 98 S. W. 275, 7 L. R. A. (N. S.) 152, 30 Ky. Law Rep. 318. In that case, as in this, the plaintiff was struck and injured by a car passing a standing one from which she had alighted, and in going around the end of which in attempting to cross the street she came in contact with the passing car. So in that case the opinion laid down with precision the care with which under such circumstances those in charge of the moving car should approach and pass the standing car from which passengers had alighted or were alighting. We think the instruction in the case at bar substantially conformed to the opinion in *Louisville Railway Co. v. Hudgins*, supra.

The second instruction fairly stated the law with respect to contributory negligence, and informed the jury what negligence on the part of appellant would defeat a recovery. We do not understand that this instruction, as far as it goes, is objected to, but it is insisted for appellant that it should have been qualified by the addition of the following words: "Unless you shall believe from the evidence that the employees of defendant on the north-bound car could have seen

plaintiff by the exercise of ordinary care when he came in peril from the car, and by the exercise of ordinary care could have prevented the injury which the plaintiff claims to have sustained, or unless you may believe from the evidence that the inability, if any, of the motorman to stop the car in time to avoid striking plaintiff, was due to the unusual or dangerous speed at which he was running it, if he was so running it, in which event the law is for the plaintiff." The first half of the foregoing instruction offered as an addition to instruction 2 seems to have been in part taken from one approved in *Louisville Railway Co. v. Hudgins*, supra, and the last half from one directed to be given in *Louisville Railway Co. v. Byers*, 130 Ky. 437, 113 S. W. 463. In the *Hudgins* Case there was evidence conducing to show that the car which struck the decedent was going at such a high rate of speed it knocked her 20 feet, that there was an opportunity for the motorman to see her and stop the car before the collision, but that, instead of keeping a lookout ahead, he was looking back at some ladies standing in a door on the side of the street. These facts made the instruction proper in that case and differentiates it from the case at bar, in which there was no evidence tending to show that the motorman on the car which struck appellant saw, or by the use of ordinary care could have seen, him or discovered his peril in time to have stopped it before striking him. On the contrary, the proof both of appellant and appellee was to the effect that the car was on appellant as soon as he stepped from behind the car from which he alighted, and his evidence was directed toward showing that the negligence of the motorman consisted in running the car at too great a rate of speed and failing to give warning by the sounding of the gong of the approach of the car.

The facts in *Louisville Railway Co. v. Byers*, supra, from the opinion of which, as previously stated, the last half of the offered addition to instruction 2 was taken, were unlike those of this case. In that case the car which was an "extra" was being rushed at a speed of 20 or 25 miles an hour to a remote part of Louisville to accommodate the Sunday travel to a park. It ran over and killed the decedent as he was attempting to cross from one side of the street to the other. He was in plain view of the motorman and the car in his view for the distance of a block before it struck him and the gong sounded as the car approached. Though he was a large man, weighing 220 pounds, the car ran at such speed that it knocked his body 40 feet, and ran 75 feet beyond the point of collision before it was stopped. The vital question in the case was whether the speed of the car was what prevented it from being stopped after the deced-

ent got on the track and before it struck him. On the facts of that case the court held that the instruction from which appellant obtained the latter half of the one he offered as an addition to No. 2 in this case should have been given in addition to those used on the trial in that case. We do not think it or the first half taken from the opinion in the *Hudgins* Case applicable here, but, if it could be so held, it is in substance expressed in instruction 1.

We do not understand that instructions 3 and 4, the one defining negligence and ordinary care and the other the measure of damages, are objected to; at any rate, we find them correct, and that the instructions as a whole fairly gave for the guidance of the jury all the law of the case.

Wherefore the judgment is affirmed.

UNION TRUST & SAVINGS CO. OF MAYSVILLE v. TAYLOR et al.

(Court of Appeals of Kentucky. Feb. 9, 1911.)

1. ASSIGNMENTS FOR BENEFIT OF CREDITORS (§ 12*)—CONSTRUCTIVE ASSIGNMENT—ACTS CONSTITUTING—PRESUMPTIONS—"TRANSFER."

A transfer is within Ky. St. § 1910 (Russell's St. § 2104), making every transfer by a debtor in contemplation of insolvency and with a design to prefer a creditor an assignment for the benefit of creditors, when the transferor should know, as a reasonable man, that he was insolvent when the transfer was made, and that its effect would be to prefer one creditor to another; his actual knowledge of insolvency not necessarily being the criterion.

[Ed. Note.—For other cases, see Assignments for Benefit of Creditors, Cent. Dig. §§ 15-19; Dec. Dig. § 12.*]

For other definitions, see Words and Phrases, vol. 8, pp. 7064-7070; vol. 8, p. 7819.]

2. ASSIGNMENTS FOR BENEFIT OF CREDITORS (§ 14*)—CONSTRUCTIVE ASSIGNMENT—ACTS CONSTITUTING—PRIOR DEBT.

A mortgage by an insolvent to secure a debt which had been secured by a prior valid mortgage is not within Ky. St. § 1910 (Russell's St. § 2104), making every transfer by a debtor in contemplation of insolvency and with a design to prefer a creditor an assignment for the benefit of creditors.

[Ed. Note.—For other cases, see Assignments for Benefit of Creditors, Cent. Dig. §§ 21-25; Dec. Dig. § 14.*]

Appeal from Circuit Court, Fleming County.

On petition for rehearing. Opinion modified and extended as stated.

For former opinion, see 129 S. W. 823.

Worthington & Cochran (Garrett S. Wall, of counsel), for appellants Union Trust & Savings Co., First National Bank of Maysville, Ky., Mary R. Wells, Martha Bramel, and W. F. Taylor. Power & Babbitt and Hefin & Grannis, for appellees.

HOBSON, C. J. It is insisted by counsel in the petition for rehearing that the opinion is in conflict with a number of previous

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

decisions of the court. Counsel quote the following sentence from the opinion: "The letters of Marshall, his will, and the other proof in the record leave no doubt in our minds that he did not in fact contemplate being insolvent, or in fact intend to prefer the creditors whom he paid off on May 6th, to his other creditors." See *Union Trust Co., etc., v. Taylor*, 139 Ky. 283, 129 S. W. 828. They insist that, under all the prior decisions of the court, this effectually settles the question that the mortgage of May 4th was not such a transfer as operated as an assignment under the act of 1856. But this sentence is not to be dissociated from the remainder of the paragraph of the opinion in which it occurs. Counsel close their quotation in the middle of a sentence, when the next sentence and those that follow it were plainly written to qualify the words which counsel quote. What we tried to say was that a man could not prevent the application of the statute by shutting his eyes to the truth, and refusing to see what was patent. The operation of the statute does not depend upon what is the secret working of the assignor's mind. His mental processes do not control the statute. When a man knows what he owes, and knows what property he has, and a man of ordinary prudence situated as he is would know that he is insolvent, then, in the contemplation of the statute, he knows that he is insolvent. In other words, he is charged with knowing what a man of ordinary prudence, situated as he is, would know. In like manner, when he makes a transfer when he is insolvent and when a man of ordinary prudence situated as he is would know that the necessary effect of the transfer is to prefer one creditor to another, he will be presumed to intend that which a man of ordinary prudence would have contemplated under like circumstances; or, to put it in other words, if a man of ordinary prudence under like circumstances would know that the transfer would prefer one creditor to the exclusion of others, then the debtor is held to know that the transfer would so operate, and, knowing that this would be the operation of the transaction, he is held to have intended the natural and necessary effects of his own acts. Counsel quote from *Terrill v. Jennings*, 1 Metc. 455; *Millet v. Pottinger*, 4 Metc. 213; *Hampton v. Morris*, 2 Metc. 336; *Heldrich v. Silva*, 89 Ky. 427, 12 S. W. 770, 11 Ky. Law Rep. 645—and insist that these cases hold that the debtor must actually know that he is insolvent, and actually design to prefer one creditor over another. But no such inference may fairly be drawn from these opinions. On the contrary, the court has in a number of cases laid down the standard that he must know what he has reason to know, and must contemplate what he has reason to contemplate.

Thus in *Thompson v. Heffner*, 11 Bush, 360, it was contended that the debtor did

not know that he was insolvent because he did not know that he would have to pay certain debts on which he was surety. After discussing the matter, the court said: "We therefore conclude that he did not know he was insolvent, unless the circumstances were such that he ought to have regarded it as reasonably certain that he would be called upon to pay the debts on which he was surety for his son William." Again, in *McKee v. Scobee*, 80 Ky. 128, where it was insisted that the grantor did not know he was insolvent, the court said: "Whether he knew at the time of the sale he was insolvent must be determined by the facts and circumstances as they are presented." In *Allen v. Dillingham*, 104 Ky. 808, 47 S. W. 1078, 20 Ky. Law Rep. 980, it also said: "Now it is contended for the defendants that Mr. Dillingham did not make the conveyance in contemplation of insolvency, nor with the design to prefer Allen's Sons to the exclusion either in whole or in part of his other creditors. That Mr. Dillingham did not believe at the time of the conveyance that he was then insolvent is in no sense decisive of this point." In *Walker v. Davis*, 43 S. W. 406, 19 Ky. Law Rep. 1314, the court said: "There is but one conclusion to be reached from this record, and that is that Davis was insolvent when he executed the mortgage to Walker & Sengstak; and, crediting Davis as being a man of fair judgment, he could not have failed to know at that time that he was insolvent." In *Northern Bank v. Farmers' Bank*, 111 Ky. 350, 63 S. W. 604, 23 Ky. Law Rep. 696, the debtor Moore had made a deposit in bank of \$4,557.75, as stated in the opinion, "in the usual course of business without actual intention on the part of Moore to give it a preference over his other creditors." Holding this transaction within the statute, the court said: "It has been held that, where a debtor makes a transfer or payment to one of his creditors with the knowledge that he is insolvent, the design to prefer will be presumed, unless the accompanying circumstances show plainly that there was no such intention. This rests upon the presumption that one designs the usual result of his act. But the presumption is not absolute. The intent of the debtor is the essence of the statute. Still the purpose of the statute would be defeated if it were denied application simply because the debtor did not in fact contemplate the necessary effect of his act. If Moore had handed the check for \$4,557.75 to the bank, and directed the proceeds collected and credited on this note, undoubtedly the transaction would have been within the statute. He cannot be allowed to do by indirection the same thing without the same result. His act not only put it in the power of the bank, but imposed on it the necessity of applying the proceeds of the check to the payment of the note; for, if it had failed to do this, it would have released the surety in the note, and, after paying out the money,

it would have had nothing to look to for its debt but the personal obligation of Moore, who was insolvent. The aim of the statute is to secure equality between creditors, and its just purpose cannot be defeated in such a way."

The aim of the statute being to secure equality between creditors, what the debtor's mental attitude may be is not so material under the statute as the real character of the transaction. The law nowhere holds out a premium for supineness and negligence; its standard is ordinary care. It is not usually easy to show what is in fact going on in a man's mind; and so, in cases of this sort, it is a reasonable rule to apply the statute, where, under the facts known to him, a reasonable man would know that he was insolvent, and would know that the effect of his act would be to prefer one creditor to another. This is the rule applied in the opinion, and, as shown, it has been often applied by this court before.

2. Upon a reconsideration of the matter, the court is of opinion that the mortgage given the Trust Company on January 4th created a valid lien to secure the debt of \$2,000, and that as to this debt of \$2,000 the mortgage of May 4th was not within the statute. The opinion heretofore delivered is modified as indicated to the effect that, as the debt of \$2,000 was secured by the prior mortgage, the mortgage of May 4th was not invalid as to this debt of \$2,000. *Meler v. Flinsbach*, 95 Ky. 139, 24 S. W. 235, 15 Ky. Law Rep. 482; *Foley v. Foley*, 108 S. W. 270.

3. The circuit court by its judgment adjudged: (1) That the mortgage of May 4th for \$40,000 was within the statute, and operated as an assignment except to the extent of \$4,171.70 retained for Mrs. Ambler. (2) That the following payments made by Marshall on May 6th and May 7th were within the statute: \$16,822.50 to the Trust Company; \$10,150.75 to the First National Bank of Maysville; \$400 to the Union Trust Company; \$2,043 to W. F. Taylor; \$1,585 to Martha A. Bramel; \$6,108.35 to Mary R. Wells; \$2,161.65 to James N. Kirk; \$3,000 to Logan Marshall—and each of these parties was ordered to pay to the receiver the sum so received with interest from the time he received it. (3) That the Trust Company might present its claim for \$36,000 with interest (the mortgage to secure which was set aside) as a general claim against the estate of R. T. Marshall; that the First National Bank might present its claim of \$4,000, after having first turned over the collateral and the money collected on same to the receiver; that the various creditors, when they had paid in the amounts which they were ordered to pay in, might present their original claims against the estate, and come in pro rata in the general distribution of the estate. Marshall's debts amounted to about \$85,000. By the judgment of the court, the creditors who had gotten the money were required to

bring it back, and the Trust Company and the bank were also required to present their claims amounting to \$40,000, although the securities which they held were set aside as within the statute. The effect of the judgment was to increase Marshall's debts from \$85,000 to \$125,000 and to add \$36,000 to the debt of the Trust Company against Marshall, and \$4,000 to the debt of the bank against Marshall, and to require them to come in pro rata with the other creditors on these sums. This was wrong. When the creditors who had received money, where the payment was within the statute, are required to pay the money back to the receiver with interest, or to secure it to him, the other creditors of Marshall cannot complain, and the bonds secured by the mortgage of May 4th should be paid in full out of the proceeds of the land if the price of the land is sufficient for this purpose, and, if insufficient, so far as it will pay them. The Trust Company should not be required to prove up \$36,000 as a general claim. It should only be required to prove up as a general claim its claim for the money the payment of which was within the statute.

4. The Trust Company, the First National Bank, Mary R. Wells, Martha A. Bramel, W. F. Taylor, and J. N. Kirk superseded the judgment. By the opinion delivered herein, the judgment against the Trust Company was reversed, also the judgment against the First National Bank as to the \$4,000 collateral, and the debt which it secured; but the judgment against the bank as to the payment into court of \$10,150.75, and the judgments against Wells, Bramel, Taylor, and Kirk were affirmed. A judgment for damages was then entered against all the appellants except the Trust Company and the First National Bank. Upon a reconsideration of these matters, we have reached the conclusion that, in view of the fact that the land had been sold, and the other facts shown by the record, it was inequitable to require these parties to pay into court the whole of the money they had received, and then to require them to draw back from the receiver their pro rata, when complete justice will be done if they pay into court all that they received with interest over and above what is coming to them on a distribution of the estate. The court should have entered a judgment requiring them to execute a bond within 30 days to the receiver conditioned for the payment of the money to the receiver when ordered by the court, and provided that, in case they failed to execute the bond, an execution might issue for the money. The court should also refer the case to a commissioner to report the debts, the estate for distribution, and what amount is coming to each creditor; and, on the confirmation of this report, he should order each of the appellants, who have given the bond above referred to, to pay into court the sum which is in his hands over and above his proper pro rata. In this way the fund will bear interest until a distribution is made, the

loss to all the creditors will be less, no injustice will be done to any of them, cost will be avoided, and no undue hardship will be placed upon the creditors who received the money, the payment of which is now adjudged within the statute.

The opinion is modified and extended as above indicated. The judgment as to all the appellants is reversed, and the cause remanded for a judgment and further proceedings consistent herewith. The petition for rehearing in other respects is overruled.

THOMAS v. CONTINENTAL INS. CO. OF NEW YORK.

(Court of Appeals of Kentucky. Feb. 14, 1911.)
INSURANCE (§ 612*)—ACTION ON POLICY—CONDITIONS PRECEDENT.

Where insured, holding a fire policy for \$700 on a house and personalty, was refused payment on the ground of misrepresentation as to his ownership of the property, and, after consulting an attorney of his own selection and another recommended to him by a friend accepted \$350 in compromise of his claim, he cannot recover on the policy on the ground that the agents of the insurer, knowing that he was an ignorant colored man, took advantage of him and overreached and deceived him, without first repaying or tendering back the money received.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 1520-1528; Dec. Dig. § 612.*]

Appeal from Circuit Court, Jefferson County, Common Pleas Branch, First Division.

Action by Frank Thomas against the Continental Insurance Company of New York. From a judgment for defendant, plaintiff appeals. Affirmed.

J. T. A. Baker and J. W. S. Clements, for appellant. Edwards, Ogden & Peak, for appellee.

LASSING, J. In October, 1906, appellant procured from appellee company a policy of insurance upon a house for \$500, and personal property contained therein for \$200. In January, 1908, while the policy was in force, the property was burned. The house was a total loss; the loss of the contents was partial. Following the fire, appellee's agent received notice that the title to the lot upon which the house stood was not in appellant when he procured the insurance, and that, after the insurance had been placed, a chattel mortgage was given upon the personalty covered by the policy. On the ground that the insured had misrepresented the facts as to ownership or title, the company disputed the claim. Thereupon appellant sought the advice of an attorney, and, in company with him, went to see the agents of appellee. Again the grounds for refusal to pay were stated. Shortly thereafter, one Ponder undertook to adjust the loss for appellant, and, after some conferences between Ponder and appellant on the one side and the agents of appellee on the other, a compromise agree-

ment was reached, whereby the company paid to appellant the sum of \$350 in settlement of the claim. This settlement was made on the 21st day of January, 1908. Appellant paid Ponder \$25 for his services, and retained \$325. Thereafter, on January 30, 1908, appellant procured a deed to the lot on which the house had stood, and on February 2, 1909, filed suit, in which he sought to recover of the insurance company the \$700, credited by the money received. He set up in his petition that he was an ignorant, colored man, and that the appellee's agent, knowing this fact, took advantage of his ignorance and overreached and deceived him. Appellee answered, and, in addition to controverting the material allegations of the petition, pleaded affirmatively the facts out of which the dispute arose, the subsequent settlement and adjustment, and that no part of the money had been returned. Appellant then filed an amended petition, in which he pleaded that he did not discover the fraud practiced upon him until after he had spent the money received by him from appellee, and put it out of his power to return it; that, if he had offered to return it, appellee would have refused to accept it. A motion to strike this amended petition from the record was overruled, as was also a demurrer thereto. The reply put in issue the material allegations of the answer, and denied that the \$350 was paid or accepted in full settlement. The affirmative matter in the amended petition was traversed, and, on the issues thus made, the case went to trial. At the conclusion of appellant's testimony the case was taken from the jury on a peremptory instruction and judgment rendered for defendant.

In his testimony appellant shows that he held an option on the property at the time the insurance was taken out. The title was in another. He had the right to close his option, or not, as he saw fit. He was in possession under a lease. He stated: That the morning after the fire he informed the agent of the company that he did not own the property, but was buying it; also, that he had placed a chattel mortgage upon his personal effects in the house. The agent told him that they were not under any liability to pay him, but that any proposition which he had to make would be submitted to the company. That thereafter the Reverend Mr. Sands advised him to get Mr. Ponder to adjust the dispute for him. Before accepting the services of Ponder, he consulted Mr. Fred Forcht, and together he and Forcht, or some one from Forcht's office, went to the office of appellee's agents to discuss the matter with them. Nothing came of this interview; and later he sought out Mr. Ponder and gave him his policy, together with a list of his personal property. Ponder conferred with the agents, and informed appellant that he

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

could do nothing with them. After this report had been made to him, he agreed to and did accept the \$350, and executed the receipt. He took the check for \$350 to the bank, cashed it, gave Ponder \$25, and retained \$325 himself. This is, in substance, his evidence.

The dispute over the validity of the policy was not a trumped up defense but was one which, it appears, the agent of appellee believed to be good. With a knowledge of what the objection of the company was to paying the loss, appellant consulted an attorney of his own selection, and later accepted the services of one recommended by a friend, to adjust the dispute for him. In this no advantage was taken of him by appellee or its agents. On the advice of this man of his own selection, the adjustment was made, and he got the money and signed the release. He may not retain the money and seek to relieve himself of the effect of the discharge. Before he can have any standing in court, he must either pay it back or tender it. *Titus v. Rochester German Insurance Co.*, 97 Ky. 567, 31 S. W. 127, 17 Ky. Law Rep. 385, 28 L. R. A. 478, 53 Am. St. Rep. 426; *L. & N. R. R. Co. v. McElroy*, 100 Ky. 153, 37 S. W. 844, 18 Ky. Law Rep. 730. On this showing, that he had failed to do either, the court properly directed a judgment against him.

Judgment affirmed.

CASPERSON v. MICHAELS.

(Court of Appeals of Kentucky. Feb. 17, 1911.)

1. MASTER AND SERVANT (§ 95*)—MINORS—RIGHT TO EMPLOY.

Act March 18, 1908 (Ky. St. § 331a, subsec. 1 [Russell's St. § 3237]), prohibits employment of children under 14 years old in factories, etc. Subsection 2 (section 3238) permits employment of children between 14 and 16 years of age if a certificate is obtained. Subsection 11 (section 3247) prohibits employment of children under 16 to operate certain machinery. *Held*, that subsection 11 absolutely prohibits employment of children under 16 at such machinery; subsection 2 not extending to such employment.

[Ed. Note.—For other cases, see *Master and Servant*, Dec. Dig. § 95.*]

2. MASTER AND SERVANT (§ 96*)—MINORS—INJURY—DEFENSES.

It is no defense to suit for injury to a child employed at a laundry mangle in violation of Act March 18, 1908 (Ky. St. § 331a, subsec. 11 [Russell's St. § 3247]), while warming her hands on the revolving cylinder before commencing work, that she was injured by a part of the mangle at which she is not expected to work, and while not at work.

[Ed. Note.—For other cases, see *Master and Servant*, Dec. Dig. § 96.*]

3. MASTER AND SERVANT (§ 96*)—MINORS—INJURY—PROXIMATE CAUSE.

The proximate cause of injury to a child employed at a laundry mangle in violation of Act March 18, 1908 (Ky. St. § 331a, subsec. 11

[Russell's St. § 3247]), is such unlawful employment as affecting the employer's liability.

[Ed. Note.—For other cases, see *Master and Servant*, Dec. Dig. § 96.*]

4. APPEAL AND ERROR (§ 1066*)—HARMLESS ERROR—INSTRUCTIONS.

In an action for injury to a child employed to operate a laundry mangle in violation of Act March 18, 1908 (Ky. St. § 331a, subsec. 11 [Russell's St. § 3247]), it was not prejudicial error to instruct that her employment in the laundry was unlawful, though employment at other work in the laundry would not have been unlawful.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. § 4220; Dec. Dig. § 1066.*]

Appeal from Circuit Court, Jefferson County, Common Pleas Branch, Second Division.

Action by Margaret Michaels, by her next friend, against Louis C. Caspersen. Judgment for plaintiff, and defendant appeals. Affirmed.

O'Neal & O'Neal and Edwards, Ogden & Peak, for appellant. Geo. Weissinger Smith, for appellee.

CLAY, C. Appellee, Margaret Michaels, suing by her next friend, brought this action against appellant, Louis C. Caspersen, to recover damages for personal injuries alleged to have been due to the negligence of appellant. The jury returned a verdict in her favor for \$1,500. From the judgment based thereon this appeal is prosecuted.

Appellant, at the time appellee was injured, operated a laundry plant on Portland avenue in the city of Louisville. Among the machines he had in his plant was a large mangle which was used for the purpose of laundering sheets, table cloths, etc. The distance from the front to the rear of the mangle was about 5 feet; its width was about 7 feet, and its height about 4½ feet. The goods were fed into the front part by girls, and were passed through the machine and out at the rear. They then fell upon a table where there were other girls who received and folded them. The front part of the machine was provided with guards. The rear part was open, and there is some evidence that this was necessary for the proper operation of the machine.

Appellee, Margaret Michaels, was 14 years and 5 months old at the time she was injured. She had two sisters who worked in the laundry. Appellant needed additional help, and spoke to one of Margaret's sisters on the subject. The next morning the two sisters brought Margaret to the laundry, and she was immediately put to work at the mangle. Her duty was to feed the cloths into the mangle. She began work about five days before the accident, which occurred on March 18, 1909. On that day she arrived at the laundry a few minutes before 7 o'clock. Upon reaching the laundry she went immediately to the dressing room. Her sisters remained in the dressing room while she went

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

out to the mangle and stood nearby, waiting for the signal to begin her morning's work. The mangle was started at 15 minutes to seven in order to heat it and have it ready for work at 7 o'clock. Appellee describes the accident in the following language: "I was standing there—my hands were cold, but I wasn't shivering though, and I put my fingers up there to get them warm and some one spoke to me, and I turned around and my fingers went on in there, and Sadie Sprinkle happened to be coming out of the door or standing in the door, and she kept pulling on my arm to keep it from going in any further, and my sister—a girl went in and told the other girls that some girl had her hand in the mangle, and they all came out there." She further testified that she had seen a boy with his hands where she had put hers, and she thought she could put her hand up there to get it warm. She did not put her hand on the roller, but merely tapped her fingers on it. In doing this she did not know there was any danger, although she knew the roller was warm and would burn. Her hand was drawn between the revolving cylinder and the top guard, and was severely injured.

In the year 1908 the Legislature passed an act entitled "An act to regulate child labor and to make the provisions thereof effective." Laws 1908, c. 66. This act was approved March 18, 1908, and is set forth in chapter 18 of the Kentucky statutes. The provisions material to this controversy are contained in the various subsections of section 331a. Subsection 1 (Russell's St. § 3237) provides that no child under 14 years of age shall be employed, permitted, or suffered to work in or in connection with any factory, workshop, mine, mercantile establishment, etc. Subsection 2 (Russell's St. § 3238) permits the employment of children between 14 and 16 years of age in the event a certificate of employment is obtained, and prescribes when and under what circumstances a certificate may be issued, and who shall issue the certificate. Subsection 11 (Russell's St. § 3247) provides: "No child under the age of sixteen years shall be employed at sewing belts, or to assist in sewing belts, in any capacity whatever, nor shall any child adjust any belt to any machinery; * * * nor shall they operate or assist in operating laundry machinery. * * *" The trial court submitted the case to the jury on the theory that appellant had violated the provisions of subsection 11 in employing appellee to work at the mangle, and refused to permit appellant to introduce in evidence a certificate authorizing appellee's employment.

One of the questions raised on this appeal is the alleged error of the court in failing to permit the certificate of employment to be introduced in evidence. A careful reading of the section of the statutes, however, convinces us that the certificate of employment referred to in the other subsections of section

331a has no application to cases arising under subsection 11. It is evident that the Legislature regarded the employments referred to in this subsection as being so dangerous that it was best to prohibit entirely children under 16 years of age from being employed at such occupations. To that end it was provided that no child under the age of 16 years should be employed in any capacity enumerated in that subsection. That being true, the court did not err in refusing to permit the certificate of employment to be read to the jury.

It is earnestly insisted, however, that appellee was not injured by virtue of her employment in violation of the statute. In this connection it is argued that appellant had the right to employ appellee in the laundry, just so she was not put to work at any of the machinery therein used; that as she was injured at a part of the machinery where she was not employed to work, and at a time when she was not actually engaged in work, the case is just the same as if she had been employed to mark towels, an employment attended by no danger, and had gone into the machinery room and been injured in the same manner; that if that be true, her right to recover does not depend upon the statute, and her case should be considered from a standpoint entirely independent of the statute; and when so considered, her own evidence shows that the danger of placing her hand on or near the drum was so obvious and apparent that even a child of much tenderer years ought to have known and appreciated the danger. While we appreciate fully the force of appellant's contention, we think the difference between the supposed case and that at bar consists in this: In the supposed case there would be no violation of the statute, and, therefore, no right of action could be predicated on the statute; in the case at bar, however, appellee was employed and put to work at the mangle in violation of the statute. She was actually injured by the mangle at which she had been put to work. It is immaterial that she was injured by that part of the mangle at which she was not expected to work, or that she was injured while not being actually engaged in her customary duties. The purpose of the statute was to protect children, not only from the dangers necessarily incident to their employment in and around machinery of certain kinds, but from injuries which might result from their own thoughtlessness and childish acts. In other words, the purpose of the statute was to prevent their being exposed to danger. Here appellee was on hand, waiting to be summoned to work. She was near the mangle at which she was employed to work. Yielding to her childish instincts she followed the example of a boy who had put his hand near the cylinder for the purpose of warming it, and attempted to do the same thing. It is evident that the statute was designed to protect her under

just such circumstances. Knowing that a child under 16 years of age might be injured while actually employed at work on dangerous machinery, or that he might, in a spirit of play or because of heedlessness that is characteristic of children, touch or come in contact with the machinery in some way, the Legislature made it unlawful to employ children under 16 years of age to work at such machinery. As appellee was, by virtue of her employment, exposed to the danger which resulted in the injuries complained of, we conclude that the proximate cause of her injuries was her employment at the mangle in violation of the statute. That being true, the court did not err in refusing to instruct the jury as if the case were one where no violation of the statute had taken place. *Strafford v. Republic Iron, etc., Co.*, 238 Ill. 371, 87 N. E. 358, 20 L. R. A. (N. S.) 876, 128 Am. St. Rep. 129; *Ornamental Iron Co. v. Green*, 108 Tenn. 161, 65 S. W. 399; *Starnes v. Albion Mfg. Co.*, 147 N. C. 556, 61 S. E. 525, 17 L. R. A. 602.

The court did not err in stating to the jury that appellee, at the time of her injury, was employed by appellant to work in his laundry, and that such employment was forbidden by law, and that the law of the case was for the plaintiff and that the jury should so find, etc. To have been technically correct, the instruction should have stated that plaintiff was employed by the defendant to work at a mangle in his laundry and that such employment was forbidden by law. The failure of the court, however, to specify the mangle did not prejudice appellant's substantial rights, for it was proper to instruct the jury that appellee's employment was contrary to the law; and as a matter of fact, her employment at the mangle was contrary to law. That being true, the latter statement of the instruction was correct, although the previous part of the instruction referred only to the fact that plaintiff was employed by defendant to work in his laundry.

Finding no error in the record prejudicial to the substantial rights of the appellant, the judgment is affirmed.

LOUISVILLE, H. & ST. L. RY. CO. v. STILLWELL.

(Court of Appeals of Kentucky. Feb. 17, 1911.)

1. CARRIERS (§ 321*)—INJURIES TO PASSENGER—ACTION—INSTRUCTION.

An instruction that a carrier is responsible to a passenger in damages if he went on the platform or step of the coach after the signal for the station at which he was to alight, and was thrown to the ground by the violent jerking or bumping of the train by the operation of its movements, which arose from the neglect on the part of said operatives, was erroneous, as authorizing recovery for the injury without stating the condition that the carrier was guilty of negligence.

[Ed. Note.—For other cases, see Carriers, Dec. Dig. § 321.*]

2. CARRIERS (§§ 347, 348*)—INJURIES TO PASSENGERS — CONTRIBUTORY NEGLIGENCE — QUESTION FOR JURY.

Whether a passenger was negligent in leaving the coach and taking a position on the steps while the train was still in motion is a question for the jury, and it was error to instruct that the carrier was liable for injuries from being thrown from the steps by the jerking of the train, unless the passenger was negligent after taking his position on the steps.

[Ed. Note.—For other cases, see Carriers, Dec. Dig. §§ 347, 348.*]

3. TRIAL (§ 296*)—INSTRUCTIONS—CURE BY OTHER INSTRUCTION.

In an action for injuries to a passenger, an abstract instruction on contributory negligence did not cure a defect in an instruction that the passenger had the right to go upon the platform preparatory to alighting, and was entitled to recover for his injuries, unless he was negligent after taking his position on the platform.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 709; Dec. Dig. § 296; Carriers, Cent. Dig. § 1406.]

4. DAMAGES (§ 95*)—MEASURE OF DAMAGES—PERSONAL.

In an action for injuries to a passenger, plaintiff is entitled to such sum in damages, as will fairly compensate him for his mental and physical suffering, and for any permanent reduction of his power to earn money, which was the proximate result of his injury.

[Ed. Note.—For other cases, see Damages, Cent. Dig. §§ 222-229; Dec. Dig. § 95.*]

5. NEGLIGENCE (§ 4*)—ELEMENTS—"ORDINARY CARE."

Negligence is the absence of ordinary care, and ordinary care is that degree of care which an ordinarily prudent person would exercise under circumstances like or similar to those shown.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. § 6; Dec. Dig. § 4.*]

For other definitions, see Words and Phrases, vol. 5, pp. 4743-4763; vol. 8, pp. 7729-7731; vol. 6, pp. 5029-5042; vol. 8, pp. 7739, 7740.]

Appeal from Circuit Court, Breckenridge County.

Action by John W. Stillwell against the Louisville, Henderson & St. Louis Railway Company. From a judgment for plaintiff, defendant appeals. Reversed and remanded for new trial.

R. A. Miller and J. R. Skillman, for appellant. Claude Mercer, for appellee.

CLAY, C. Appellee, John W. Stillwell, brought this action against appellant Louisville, Henderson & St. Louis Railway Company to recover damages for injuries alleged to have been due to appellant's negligence. The jury returned a verdict in his favor for \$700, and from the judgment based thereon the railroad company appeals.

On November 30, 1909, appellee purchased a ticket from Hardinsburg, Ky., entitling him to transportation over appellant's line of railway to a station called Kirk. At about 7:30 p. m. appellee boarded appellant's train. The train was due at Kirk a few minutes before 8 o'clock. Appellee testifies that, upon the approach of the train to Kirk, the usual station signal was sounded by whistle, and

an employé came into the coach where appellee was seated, and cried, "All out for Kirk!" The train then began to slow up preparatory to coming to a stop at Kirk. Appellee arose from his seat, walked to the door of the coach, passed out upon the platform, and took a position upon the steps of the car. While holding to the railing and when within a few feet of the usual stopping place, he claims the engineer in charge of the train violently turned on the air with such force that it precipitated him headlong to the ground. He struck on his left shoulder and side, and received injuries which he claims are permanent. Mr. Jarboe corroborates appellee's statement in regard to the suddenness and force with which the air was applied to the brakes.

The only ground urged for reversal is the failure of the trial court properly to instruct the jury.

Instruction No. 1, given by the court, is as follows: "The court instructs the jury that the plaintiff, John W. Stillwell, is admitted by the defendant to have been a passenger for compensation paid said defendant on the train upon which the said alleged accident occurred; and further instructs it was the duty of the defendant to exercise the greatest degree of care and foresight for his safe arrival at Kirk, Ky., as compared with and limited by that care and diligence of a prudent man engaged in that business, and defendant is responsible to plaintiff in damages for any injury sustained by him, if any, while aboard the defendant's train on the steps or platform of the coach in which he was riding preparatory to alighting therefrom when the train should stop at said station, and if the jury shall believe from the evidence that plaintiff went upon the platform or steps of said coach after the signal sounded by whistle for said station had been announced by the defendant's employes, and he was thrown therefrom to the ground by the violent jerking or bumping of said train, if there was any, by the operation of its movements which arose from the neglect upon the part of said operation, and was thus injured, the jury shall find for him in damages such sum as is warranted by the evidence not to exceed the sum of \$10,000, the amount claimed in the petition." It will be observed that in the above instruction the court told the jury that the defendant was responsible to plaintiff in damages for any injuries sustained by him while aboard defendant's train on the steps or platform of the coach in which he was riding preparatory to alighting therefrom when the train should stop at said station. It may be that the court meant to convey the idea that defendant was responsible only in the event it was guilty of negligence; but there is no qualification attached to the language used. Having told the jury in unequivocal language that defendant was responsible for any injuries sustained by plaintiff, the jury had

the right, under the language employed, to find for plaintiff, and may have done so in spite of the issues submitted by the other instructions. A statement like the one employed has no place in an instruction, and the court in making use of the same erred to the prejudice of appellant's substantial rights.

Instruction No. 4 is as follows: "The court instructs the jury that the plaintiff had the right while the train was in motion to go upon the platform or steps of said coach in which he was riding preparatory to alighting therefrom at Kirk, if he did so after the station of Kirk had been announced by defendant's employes and the train was slowing up preparatory to coming to a stop, provided, if in so doing, he exercised ordinary care for his own safety to avoid injury after arriving upon the platform or steps, and if the jury shall believe from the evidence that plaintiff failed to exercise ordinary care for his own safety, after being upon the platform or steps of said coach, and that in consequence thereof he was injured, as complained of, then the law is for the defendant and the jury should so find; but, on the contrary, if the jury shall believe from the evidence that the plaintiff exercised ordinary care for his own safety when upon the steps or platform of said coach, and he received the injuries complained of, if any, through the negligence of the defendant, as set forth in the foregoing instructions, then the law is for the plaintiff and the jury should so find, as hereinbefore set forth." In the foregoing instruction the court held as a matter of law that plaintiff, after the station of Kirk had been announced and the train was slowing up preparatory to a stop, had a right to leave the car and go out upon the platform or steps, and required of the plaintiff the exercise of ordinary care for his own safety only after he took a position upon the platform or steps of the coach. It is insisted by counsel for appellee that this instruction is authorized by the opinion of this court in *Louisville & Nashville R. R. Co. v. Head*, 59 S. W. 23, 22 Ky. Law Rep. 722, wherein the court used the following language: "Appellant complains of the action of the trial court in refusing a peremptory instruction for defendant. It is insisted that this instruction should have been given on the theory that in going onto the platform of the moving train appellee was guilty of contributory negligence precluding a recovery. The court on the trial gave an instruction submitting to the jury the question of contributory negligence in going upon the platform of a moving train. Unless the court could say as a matter of law that in going onto the platform while the train was in motion, and after the station whistle had sounded, appellee could not recover, the instruction given is correct, and fairly presents the law. We are of opinion that as a legal proposition it is not such contributory neg-

ligence as will defeat a recovery to go onto the platform of a moving train. To go onto the platform while the train is in motion might properly be held in some cases to be such negligence as will defeat a recovery, while in other cases it would not. The facts and circumstances of each case will govern. It was therefore proper to submit to the jury in this case the question of appellee's contributory negligence." In using the language above referred to, the court was discussing the question whether or not the defendant in that action was entitled to a peremptory instruction. The court held that it could not say as a matter of law that in going onto the platform while the train was in motion and after the station whistle had sounded appellee was guilty of contributory negligence. It did hold, however, that the facts of each case must govern, and that the question of contributory negligence was for the jury. Viewed in this light, therefore, the language employed in the above opinion is neither authority for holding, as a matter of law, that a passenger in going upon the platform of a coach while the train is in motion has a right to do so, or that he is guilty of contributory negligence. That being true, it follows that the court in this case erred in telling the jury that plaintiff as a matter of law had a right to go upon the platform or steps of the coach after the whistle had been sounded and the train had begun to slow up preparatory to a stop. Appellant's main contention was that appellee's very act in leaving the coach and in taking a position upon the steps while the train was in motion constituted the contributory negligence complained of, and that this question should have been submitted to the jury. The question was not so much whether appellee exercised ordinary care while standing upon the steps, as it was whether he exercised ordinary care in leaving the coach and taking a position upon the steps. In failing to submit this question to the jury, the court erred to appellant's prejudice; and the abstract instruction on contributory negligence did not cure the defect because the jury did not have the right, under that instruction, to find that appellee was guilty of contributory negligence in leaving the coach and taking a position upon the steps while the train was in motion, when the court had already told them in another instruction that he had the right so to do.

In lieu of the instructions given on the former trial, the court, on the next trial, if the evidence be the same, will instruct the jury as follows:

"(1) If you believe from the evidence that plaintiff exercised ordinary care for his own safety in leaving the car and in taking a position upon the steps thereof and while standing in that position, and that he was thrown from the car by an unusual and un-

necessary jerk of the train, and injured, you will find for the plaintiff.

"(2) If, however, you believe from the evidence that the plaintiff voluntarily attempted to alight from the train before it reached the station, or that he was thrown from it by a usual and necessary jerk of the train, or that he was himself guilty of negligence in leaving the car and taking a position upon the steps, or while standing upon the steps, and that his said negligence, if any, so contributed to his injuries that but for said negligence his injuries, if any, would not have been received, you will find for the defendant.

"(3) If you find for plaintiff, you will award him such sum in damages as will fairly compensate him for his mental and physical suffering, if any, and for the permanent reduction, if any, of his power to earn money which you may believe from the evidence was the proximate result of his injuries, if any.

"(4) Negligence is the absence of ordinary care, and ordinary care is that degree of care which an ordinarily prudent person would exercise under circumstances like or similar to those proved in this case."

Judgment reversed and cause remanded for a new trial consistent with this opinion.

LOUISVILLE & N. R. CO. v. SWEET.

(Court of Appeals of Kentucky. Feb. 17, 1911.)

1. RAILROADS (§ 303*)—PRIVATE CROSSINGS—DUTY TO MAINTAIN.

A railway company's duty to maintain private farm crossings in a reasonably safe condition for travel extends to all persons legally entitled to use the crossings, including one moving a threshing outfit, as well as the landowners.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 959-963; Dec. Dig. § 303.*]

2. RAILROADS (§ 303*)—PRIVATE CROSSINGS—DUTY TO MAINTAIN.

A railway company's duty to maintain crossings in a reasonably safe condition extends to private as well as public highways, in the absence of special agreement to the contrary.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 959-963; Dec. Dig. § 303.*]

3. RAILROADS (§ 350*)—DEFECTIVE CROSSINGS—CONTRIBUTORY NEGLIGENCE—JURY QUESTIONS.

Whether plaintiff was guilty of contributory negligence in attempting to take a threshing outfit across a railway track just before a train was due held, under the evidence, a jury question, in an action for collision with the outfit, which became stalled on the track.

[Ed. Note.—For other cases, see Railroads, Dec. Dig. § 350.*]

Appeal from Circuit Court, Mason County.

Action by B. F. Sweet against the Louisville & Nashville Railroad Company. Judgment for plaintiff, and defendant appeals. Affirmed.

Allan D. Cole and Benjamin D. Warfield, for appellant. Thos. D. Slattery and T. R. Phister, for appellee.

O'REAR, J. Appellee was moving a traction engine and thresher through the country. In passing from one neighborhood where he had been threshing wheat to another section he used a neighborhood road which crosses the Louisville & Nashville Railroad tracks in Mason county. The road probably was not a public highway, but was only a neighborhood passway used as appurtenant to certain farms, including the farm where appellee had just been threshing. As appellee came to the railroad, he stopped and listened for trains, but, hearing none, attempted to cross the track. Owing to the condition of the road at the crossing, described by appellee and his witnesses as being difficult to pass over with the traction engine, it was stalled on the track. The rails of the track were allowed to stand up some six inches above the grade of the highway, because the railway company had failed to put in the ballast or guards along the sides of the rails so as to present a reasonably even surface. This caused the traction engine to slip on the rail as it attempted to cross, so that the engine was thrown to the side of the highway, where, before it could go on, some work was necessary to remove an obstructing rock. When the threshing outfit was caught in this predicament, appellee sent one of his workmen up the road some 200 yards, in the direction a train was due to come soon, to flag the approaching train. The man went as far as he could before the train came along, some 200 yards up the track, when he stood in the middle of the track and waved his hat across the track as a warning to the engineer on the train, which had then come into view. The engineer paid no heed to the warning until too late to avoid striking the thresher. The machine was completely demolished and the traction engine considerably damaged. In this suit by appellee to recover damages for the injury to his property, there was a recovery for the plaintiff.

The principal ground urged as error in the trial is the assumption by the circuit court in its instructions that appellant was under the duty to maintain the crossing in reasonably safe and fit condition for travel. It is contended by appellant that, as the evidence failed to show that the road was a public highway, the duty, if it existed, extended to those only who had the easement across the railroad at that point. We hold that the duty obtained as to all who had a legal right to use the crossing. That includes those rightfully travelling to and from the farms to which the road was an appurtenant. Appellee in using the crossing was as much entitled to do so on the occasion in question as the owners of the land. Appellant had

conceded the right to the crossing by such owners and their servants and licensees by erecting and maintaining the crossing. The owners of the farms would not have been justified in going upon the railroad right of way to make repairs on the crossing. The same principle which requires those operating railroads to maintain the crossings on public highways applies to private passways as well, in the absence of an agreement between the parties to the contrary. The railroad company must be the judge of the grade on which it builds and maintains its tracks, as well as of such reasonable safeguards at crossings as will protect the public using the railway and those using the passway. It would be most inexpedient to allow the public, or neighboring travelers, to interfere with the tracks and grades thereof at crossings by attempting such repairs on them as they thought proper.

It is contended further that appellee was himself negligent in attempting to cross the track near the time when a train was known to be due. Whether he was so negligent was submitted to the jury in the instruction on contributory negligence. We cannot say as a matter of law that his conduct was necessarily negligent. He could not well have known that his engine would skid along the rail instead of mounting it, or that necessarily he would be involved in delay in getting across. The principal apparent danger was that his machine would suffer somewhat by the jolting in making the crossing. The question was one for the jury, and we cannot say that their verdict was against the evidence.

The other grounds urged as error are of immaterial matters which could not have affected the verdict in any probability.

Judgment affirmed.

LOUISVILLE GAS CO. et al. v. KENTUCKY HEATING CO.†

(Court of Appeals of Kentucky. Feb. 14, 1911.)

1. JUDGMENT (§ 720*) — CONCLUSIVENESS — MATTERS CONCLUDED.

Where, in a prior suit by plaintiff to restrain defendant gas company from wasting gas derived from a field from which plaintiff obtained its natural gas, by the operation of a lampblack factory, it was adjudged that defendants operated such factory, they were estopped, by the decree enjoining them from the wasting the gas in such operation, from thereafter litigating the fact that they operated such factory, in an action to recover damages alleged to have been sustained by plaintiff from such waste of gas.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 1251; Dec. Dig. § 720.*]

2. JUDGMENT (§ 619*)—RES JUDICATA—DEFENSES.

Where defendants had an opportunity in a prior suit to urge a particular defense they are concluded by the decree with reference thereto,

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

† Rehearing denied April 13, 1911.

whether they availed themselves of the right to urge it or not.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 1182; Dec. Dig. § 619.*]

3. EVIDENCE (§ 317*)—PRIOR TESTIMONY OF WITNESS.

A witness may not testify as to what other witnesses had stated in their depositions or on the witness stand in a former trial except for purposes of impeachment after proper foundation laid.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 1174–1192; Dec. Dig. § 317.*]

4. TRIAL (§ 207*)—IMPEACHMENT—INSTRUCTION.

Where evidence of prior testimony of witnesses is given to impeach them, it is the court's duty to instruct the jury that the testimony is to be considered only as bearing on the credit of the witness sought to be impeached.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 498–501; Dec. Dig. § 207.*]

5. EVIDENCE (§ 269*)—DECLARATIONS—MOTIVE.

Where, in a suit for damages against defendant gas company for wasting gas drawn from a field from which plaintiff derived its supply, plaintiff claimed that defendant's purpose in organizing another corporation, to operate a lampblack factory in the field, and its method of operation, was solely to ruin plaintiff's business, and not to make lampblack, evidence that the then acting president of defendant company stated on one occasion two years after the acts complained of, that they were in the fight to win, and would spend five or six hundred thousand dollars if necessary to carry their point, was competent to show motive as against the gas company.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 1063–1067; Dec. Dig. § 269.*]

6. EVIDENCE (§ 253*)—DECLARATIONS OF CONSPIRATOR.

Where defendant gas company and certain individuals were sued for damages for wasting gas from a field from which plaintiff obtained its supply, on the theory that they had conspired to waste the gas of the field in order to put plaintiff out of business, a declaration of the acting president of the gas company that they were in the fight to win and would spend five or six hundred thousand dollars, if necessary to carry their point, while admissible against the gas company was not binding on the other defendants in absence of proof that they consented to or aided in the matter.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 994–1002; Dec. Dig. § 253.*]

7. TORTS (§ 27*)—EVIDENCE.

Where plaintiff sued defendants for damages for maliciously wasting gas from a common gas field with intent to injure plaintiff in its business, evidence of a witness that defendant gas company wanted to use him to find out the extent of plaintiff's holdings and business in the gas field, was admissible to connect defendants with the charge of seeking to destroy plaintiff's business, nor was it rendered incompetent because it related to a date a year or more antedating the organization of a separate corporation through which it was claimed the injury was accomplished.

[Ed. Note.—For other cases, see Torts, Cent. Dig. § 34; Dec. Dig. § 27.*]

Appeal from Circuit Court, Hardin County. Action by the Kentucky Heating Company against the Louisville Gas Company and others. Judgment for plaintiff, and defendants appeal. Reversed and remanded.

L. A. Faurest, Fairleigh, Straus & Fairleigh, and Humphrey & Humphrey, for appellants. Matt O'Doherty, McQuown & Brown, and O'Meara & James, for appellee.

NUNN, J. This is the second appeal of this case. The opinion on the former appeal is in 132 Ky. 435, 111 S. W. 374, 33 Ky. Law Rep. 912. The case was reversed upon the former appeal because of errors in the admission of evidence and in the instructions. The judgment appealed from in that case was for \$30,000. Upon the last trial a judgment for \$75,000 was returned in favor of appellee, and the Gas Company and its associate defendants appeal.

Upon the last trial a controversy arose as to how far defendants were concluded by the judgment in the equity suit of the Louisville Gas Company v. Kentucky Heating Company, 117 Ky. 73, 77 S. W. 363, 70 L. R. A. 558, 111 Am. St. Rep. 225, 25 Ky. Law Rep. 1221, it being contended by plaintiff that the defendants were estopped from denying that they operated the lampblack factory because that question had been fully tried out in the equity suit and decided against them; while defendants insisted that they were not precluded by that judgment from showing that they or any of them had no part in its operation. The trial judge held that, because of the judgment in the equity suit, in which all of the defendants were parties defendants, they were estopped from denying that they operated the lampblack factory. This ruling was correct. There must be an end to litigation somewhere, and while every litigant is entitled to one fair and full opportunity in court to present his case, he is entitled to but one, and when he has had his one chance, he is bound and must abide the decision, unless it is set aside or reversed. All the parties to this suit were parties to the equity suit—same plaintiff and same defendants. The plaintiff charged that the defendants had operated a lampblack factory, were then operating it, and would continue to do so, to plaintiff's detriment, unless restrained and prevented from doing so. The defendants joined issue with the plaintiff and sought to prevent the restraining order from being issued. Upon proof heard, they were each and all enjoined from further operating the business. To permit them, or any of them, to now say that they had nothing to do with the operation of the lampblack factory would be, in effect, to nullify the judgment in the equity suit, so far as they are concerned. They had an opportunity to make such defense in that suit, and whether they availed themselves of this right or not, they are bound by the judgment rendered therein. This case must be retried, and upon another trial the court will not only adhere to his ruling upon this point and so instruct the jury, but will not allow any plea by any of the defendants to

the effect that they had nothing to do with the operation of the lampblack factory. The petition charges that the defendants operated the factory, and, as they may not deny this charge, there is no necessity for the introduction of the judgment in the equity suit in evidence, and, upon another trial, this equity judgment may not be introduced for any purpose. The issue is a narrow and simple one: Did the defendants wantonly and maliciously use or waste the gas in operating the lampblack factory for the purpose of injuring appellee? If so, to what extent, if at all, did it injure it? No evidence should be introduced except such as will tend to establish or refute the points in dispute.

Appellants contend that the court erred in permitting the witness McDonald to testify to what several witnesses had stated in their depositions or upon the witness stand, upon the former trials. This was error, as to the testimony of all the witnesses not a party to this action, but not such an error which alone would authorize a reversal of the judgment, as all the parties were introduced upon the trial and testified, in effect, as McDonald said they did. On another trial, however, the court will not permit McDonald to state what other witnesses than the defendants stated in their depositions or while on the witness stand, unless they are asked when on the stand if they did not make certain statements at a certain time and place, and, if they deny it, McDonald or any one may be permitted to show that they did, but the court should then instruct the jury that such testimony is to go only to the credit of the witness who denied making the statement. The statements of defendants, whether made by deposition or orally, may be introduced by appellee as substantive testimony. The testimony of McDonald as to what the witness John Stites said to him relative to what the future policy of the Gas Company toward the Kentucky Heating Company would be is also objected to as incompetent. The theory of the plaintiff is that, in operating the lampblack factory, the defendants were actuated by bad motives and really wanted to destroy plaintiff's business under the guise of operating the factory. Motive is not always easily proved. Frequently disconnected facts and circumstances must be gathered and put together in order to show malice or bad motive. A statement on the part of the then acting president of the Gas Company that they were in the fight to win and would spend five or six hundred thousand dollars if necessary to carry their point, though made two years after the acts complained of, throws some light upon the motive and purpose in operating the lampblack factory in the way in which they did. It

requires no stretch of the imagination to see that a company, willing to spend five or six hundred thousand dollars to gain an advantage over its competitor, would operate a lampblack factory to waste gas for the same purpose. In this light, the testimony was competent; but, of course, only as to the Gas Company, and, when admitted, the jury should have been told that such statements, made by the president of the company, were evidence against the Gas Company only, and the individual defendants were in no wise to be bound by them, unless it be shown that other defendants consented to it or aided in the matter.

The objection of appellants to the evidence of Rev. A. D. Leitchfield, as found in his deposition, is not well taken. Defendants are charged with maliciously wasting the gas with a view of injuring the plaintiff in its business. The evidence of this witness tends to show that the Gas Company was wanting to use him to find out the extent of plaintiff's holdings and business in the gas field. If they were, this is a circumstance tending to establish a link in the chain which would connect defendants with the charge of seeking to destroy plaintiff's business. If such purpose existed, it was important that defendants should get as accurate an insight into the business of plaintiff as possible, and if they were attempting to use Leitchfield for that purpose, it is certainly competent for plaintiff to establish this fact. That his testimony relates to a date a year or more antedating the organization of the Calor Oil & Gas Company does not make his testimony incompetent, for if such a purpose was entertained by the Gas Company, it had to be formed and plans mapped out before anything was done. Hence, the evidence was competent, and it was the province of the jury to determine its weight, when considered in connection with the evidence of the witness Trent, with whom he testified he had talked.

The charters and other records of the company introduced as evidence by appellee, and which were objected to by appellant, may be admitted upon the same theory as the evidence of McDonald and Leitchfield, which was objected to.

The only remaining question is the amount of the verdict. It is not shown by the verdict what part of it is for compensation and what part punitive damages. It is large, and the court is of the opinion that the amount is such as to show passion or prejudice on the part of the jury, and will, therefore, not be permitted to stand.

For this reason, the judgment of the lower court is reversed and remanded for further proceedings consistent herewith.

NEBLETT v. BARRON et al.

(Supreme Court of Texas. Feb. 15, 1911.)

MECHANICS' LIENS (§ 132*)—LABOR CLAIMS—
TIME TO PRESENT.

Plaintiff worked as a farm hand from May 25 to August 6, 1908, but the payment for services was not due until the cotton was sold, and before the cotton was sold it was taken in sequestration proceedings on October 23, 1908, and plaintiff did not present his account until November 7, 1908. Sayles' Ann. Civ. St. 1897, arts. 3339a, 3339b, 3339c, provide for liens for laborers, etc., and that the time for presenting claim should be limited to 30 days after the account had accrued. Held, that the account was filed in time, and plaintiff was entitled to recover in the sequestration proceedings.

[Ed. Note.—For other cases, see *Mechanics' Liens*, Dec. Dig. § 132.*]

Certified Questions from Court of Civil Appeals of Second Supreme Judicial District.

Action by Charles Neblett against H. C. Barron and another. On intervening claim of Adam Caughman for wages, judgment for claimant was reversed by Court of Civil Appeals, and question certified to the Supreme Court. Judgment for claimant.

Daniel & Carlton, for appellant. William Pannill, for appellees.

RAMSEY, J. The matter presented for decision is stated in the following certificate from the Court of Civil Appeals for the Second Supreme Judicial District:

"There is now pending before us on motion for rehearing case No. 6,236. Charles Neblett, Appellant, v. H. C. Barron et al., Appellees, from the county court of Erath county, in which said appellant on October 23, 1908, sued the appellee Barron upon a certain note, and sequestered two mules and also six bales of cotton raised by Barron as a tenant upon the farm of one J. W. Hall during the year 1908. Hall intervened, asserting the landlord's lien upon the cotton. One Adam Caughman also intervened claiming an indebtedness against Barron in the sum of \$39.60 for daily labor, to secure which he also asserted a lien on the cotton sequestered by Neblett. The proof shows that soon after the sequestration Neblett sold the cotton, and on original hearing we affirmed the judgment sustaining the intervention of Hall, but set aside the judgment in Caughman's favor, on the ground that he had not asserted his lien in time, as will be more fully seen from the original opinion, a copy of which will be herewith transmitted. In so determining against the claim of Caughman, however, we seem to be in conflict with the opinion in the case of *Sparks v. Crescent Lumber Co.*, 40 Tex. Civ. App. 222, 89 S. W. 423, by the Court of Civil Appeals for the First district, in which a writ of error appears to have been denied by your honorable court November 24th, 1905. But we have no means of determin-

ing whether in refusing the writ the ruling was approved and, being yet inclined to the construction of the statutes relating to the subject expressed by us on original hearing, we deem it advisable to certify to your honors for determination the question presented by the conflict. Caughman testified that: 'I worked for D. C. Barron as a hired hand from May 25 to August 6, 1908, assisting him in making the crop on the J. W. Hall place for the year 1908, at the rate of one dollar per day, making a total of forty-two dollars for my work which Barron agreed to pay out of the first cotton he sold.' On cross-examination he testified: 'My contract with Mr. Barron was that I was to work by the day and was to receive one dollar per day wages. The work I did was on the one hundred and twenty-five acres rented by Barron from J. W. Hall and worked on the entire one hundred and twenty-five acres in both corn and cotton. This account for my wages has not yet been paid. * * * At the time I filed my account Mr. Neblett had taken possession of the cotton, but I don't know whether it had been sold or not. Mr. Barron had told me that the plaintiff had taken possession, but said nothing as to whether it had been sold. I then made out and filed the account and then gave Barron and Hall a copy. * * * My money was not due until the cotton was sold. My money was to come out of the first cotton sold, and I could not file the account until the money was due. * * * None of the cotton had been sold except what was taken possession of by Mr. Neblett who also took the mules.' The record further shows that Caughman made out and filed his account for record with the County Clerk of Erath county on November 7, 1908.

"Question. Did we err in holding that under Rev. St. arts. 3339a, 3339b, 3339c, that Adam Caughman was too late in his effort to fix the laborer's lien granted by the first article mentioned?"

To properly decide this question requires a construction of articles 3339a, 3339b, and 3339c, Sayles' Texas Civil Statutes of 1897. These articles are as follows:

"Art. 3339a. Whenever any clerk, accountant, bookkeeper, artisan, craftsman, factory operative, mill operative, servant, mechanic, quarryman, or common laborer, farm hand, male or female, may labor or perform any service in any office, store, saloon, hotel, shop, mine, quarry, manufactory, or mill of any character, or on any farm, under or by virtue of any contract or agreement, written or verbal, with any person, employer, firm, corporation, or his, her or their agent or agents, receiver or receivers, trustee or trustees, in order to secure the payment of the amount due by such contract or agreement, written or verbal, the hereinbefore mentioned employes shall have a first lien upon all

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

products, machinery, tools, fixtures, appurtenances, goods, wares, merchandise, chattels, or thing or things of value of whatsoever character that may be created in whole or in part by the labor of such persons or necessarily connected with the performance of such labor or service, which may be owned by or in the possession of the aforesaid employer, person, firm, corporation, or his, her or their agent or agents, receiver or receivers, trustee or trustees; provided, that the lien herein given to a farm hand shall be subordinate to the landlord's lien now provided by law.

"Article 3339b. Whenever any person, employer, firm, corporation, his, her or their agent or agents, receiver or receivers, trustee or trustees, shall fail or refuse to make payments as hereinafter prescribed in this chapter, the said clerk, accountant, bookkeeper, farm hand, artisan, craftsman, operative, servant, mechanic, quarryman, or laborer, who shall have performed service of any character, shall make or have made duplicate accounts of such service, with amount due him, or her for the same, and present or have presented, to aforesaid employer, person, firm, or corporation, his, her or their agent or agents, receiver or receivers, trustee or trustees, one of the aforesaid duplicate accounts within thirty days after the said indebtedness shall have accrued. The other of the said duplicate accounts shall, within the time hereinbefore prescribed, be filed with the county clerk of the county in which said service was rendered, and shall be recorded by the county clerk in a book kept for that purpose. The party or parties presenting the aforesaid account shall make affidavit as to the correctness of the same. A compliance with the foregoing requirements in this article shall be necessary to fix and preserve the lien given under this chapter; and the liens of different persons shall take precedence in the order in which they are filed; provided, that all persons claiming the benefit of this chapter shall have six months within which to bring suit to foreclose the aforesaid lien; and provided, further, that a substantial compliance with the provisions of this article shall be deemed sufficient diligence to fix and secure the lien hereinbefore given; provided, that any purchaser of such products from the owner thereof shall acquire a good title thereto, unless he has at the time of the purchase actual or constructive notice of the claim of such lienholder upon such products, said constructive notice to be given by record of such claim, as provided for in this chapter, or by suit filed.

"Article 3339c. Under the operation of this chapter, all wages, if service is by agreement performed by the day or week, shall be due and payable weekly, or if by the month, shall be due and payable monthly.

All payments to be made in lawful money of the United States."

As we interpret the testimony of Caughman, his employment was not for a fixed or definite time, but, from its nature, was more or less indefinite, but that for such time as he did labor his compensation was fixed and measured at the rate and sum of \$1 per day for the time he so labored. It appears also from his testimony, as contained in the certificate, that the entire amount of his hire was to be paid when the cotton, or the portion of same first disposed of, was sold. Therefore the maturity of his demand was postponed, by contract between him and his employer for several months beyond the completion of his first month's work. To hold that in an employment which might and which frequently would last during the entire year that the employé must within 30 days from the expiration of each month, or in a case to which the terms of the statute might seem to apply, within 30 days from the expiration of each week's service, file and fix his lien, would not only lead to great practical inconvenience, but substantially to a denial of the right of the parties to fix, by contract, the maturity of the wages contracted to be paid. Of course a time for payment might be fixed at a period so remote as to operate as a matter of law as a legal fraud on the rights of other creditors, but we have no such case here presented. As was said by Chief Justice Gill in *Sparks v. Crescent Lumber Co.*, 40 Tex. Civ. App. 222, 89 S. W. 423: "The contention of appellant that article 3339c, fixing a due date for the wages of daily and weekly laborers, being passed for the benefit of other creditors, limited the right of day laborers to agree on a due date, is without merit. There is nothing in its terms which forbids the right to contract as to a due date, or imposes upon such a contract the penalty of forfeiture of the lien. The lien itself is predicated upon a contract and presupposes the right to make it. If they contract to be paid at the end of each day, then for the purpose of fixing the lien the time shall be computed from the end of the week. If the payment is contracted to be paid at the end of each week, the time is computed from the contract due date. So of employment by the month. It is thus apparent that the last-cited article was enacted to free the day laborer of the necessity of computing the time from the close of each day's work." So here, the article last mentioned did not imperatively fix the time of the maturity of Hall's obligation so as to defeat the lien of Caughman if not filed within 30 days from the time he quit his service. While not free from doubt we have concluded that under the facts stated Caughman was not too late in his effort to fix his lien.

PEARCE v. PEARCE.

(Supreme Court of Texas. Feb. 1, 1911.)

1. WILLS (§ 608*)—CONSTRUCTION—ESTATES DEVISED—RULE IN SHELLEY'S CASE.

A devise to testator's daughters and the heirs of their bodies to be born, followed by a clause directing that on the death of either daughter, without heirs of her body, the property given should return to the estate, to be divided between the survivors, is within the rule in Shelley's Case, and the daughters take a fee.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 1372-1378; Dec. Dig. § 608.*]

2. WILLS (§ 602*)—CONSTRUCTION—ESTATES DEVISED—QUALIFIED FEES.

Where a devise to testator's daughters and heirs of their bodies to be born was followed by a clause directing that, on the death of either daughter without heirs of her body, the property given to her should be returned to the estate to be divided between the survivors, and a daughter left issue, a fee simple vested in her, which became absolute upon the birth of the child.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 1354-1359; Dec. Dig. § 602.*]

3. WILLS (§ 191*)—MARRIAGE AND BIRTH OF ISSUE—"MENTIONED."

Under Rev. St. 1895, art. 5345, providing that a will made when testator had no child living, wherein any child he might have is not provided for or mentioned, shall be void on the birth of a child, etc., whether the unborn child is mentioned in the will is to be determined by construing its language with reference to the circumstances and knowledge of the testator, the word "mentioned" meaning "referred to," rather than designated by name, and the failure to make provision must be accidental to avoid the will; and hence the will of a wife, executed when in an advanced state of pregnancy, which devised the bulk of her realty to her husband, and devised her undivided interest in her father's homestead to persons named, which devise was to be void in case of living issue born of her body, mentioned the unborn child, for she must have known the practical certainty that a child would be born to her, and the provision that the devise is to be void in case of issue born obviously refers to the expected child.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 469-478; Dec. Dig. § 191.*]

For other definitions, see Words and Phrases, vol. 5, p. 4476.]

Error to Court of Civil Appeals of Third Supreme Judicial District.

Action by James E. Pearce against Lillian Carrington, a feme sole, and Mignonette C. Pearce, a minor, and others, for partition. From a judgment of the Court of Civil Appeals (124 S. W. 469), on the appeal of M. C. Pearce, reversing a judgment for partition, plaintiff brings error. Judgment of Court of Civil Appeals reversed, and that of the District Court affirmed.

D. H. Doom and N. A. Stedman, for plaintiff in error. A. S. Phelps, for defendant in error.

RAMSEY, J. 1. We think there can be no doubt that Mrs. Mignonette Carrington Pearce obtained a fee-simple title to the land which is the subject of the controversy in this case.

The disposition of this question by the Court of Civil Appeals is, we think, based on satisfactory reasons, well supported by the authorities. We think it should be further held that whether under the will of her father the fee which passed into the land in suit was absolute or was determinable upon the condition of her death without issue, that, since she left issue, a fee-simple estate vested in her and became absolute upon the birth of the child. Rev. St. 1895, art. 627; Chace v. Gregg, 88 Tex. 552, 32 S. W. 520; Laval v. Staffel, 64 Tex. 370; McKee v. McKee (Ky.) 82 S. W. 451; 16 Cyc. pp. 602-604.

2. A more important and difficult question arises, however, as to whether, under the will of Mrs. Pearce, her husband, Jas. E. Pearce, took and acquired a perfect title to the land in controversy, or whether under the law the birth of her daughter, Mignonette, operated a revocation of the will. To solve and determine this question, which is one of first impression in this state, it will be necessary to refer at some length to our statutes and to consider in connection with them the facts of the case.

It appears from the record that Jas. E. Pearce and Mignonette Carrington were married on the 2d day of June, 1900; that the will under consideration was executed on the 9th day of January, 1902; and that the defendant in error, Mignonette C. Pearce, daughter of the said Jas. E. and Mignonette Carrington Pearce, was born on the 26th day of February, 1902, and soon thereafter on, to wit, the 4th day of March, 1902, the said Mignonette Carrington Pearce died. The following clauses of the will of Mrs. Pearce will be sufficient for the purpose of this decision:

Item 1: "To my husband, James E. Pearce, I bequeath lot 12 and adjacent one-half of lot 11, block 108, city of Austin, on which our home is built and which are my individual property together with any and all rights to and interests in the buildings and improvements that may exist on said lot and a half at the time of my death; the same to be held by him in fee simple without condition."

Item 2: "I bequeath to my husband, James E. Pearce, my interest in 1080 acres of Eislín and other surveys now owned jointly by my sister Lillian and myself, together with all the buildings and improvements upon and appurtenant to same, to be held and enjoyed by him in absolute right and fee simple."

Item 4: "I bequeath my one-fourth interest in the homestead lots of my father's estate lots 7, 8 and 9 in block 108, city of Austin, to my mother; in case of her death previous to my own to my two sisters, Lillian and Maude. This section is to be null and void in case of living issue born of my body."

There can be no doubt that, under and by virtue of the terms of article 5333 of our Re-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

vised Statutes, a married woman may execute a will, and that for this purpose she is freed of the usual incidents and disabilities of coverture. If this will is to stand according to its terms, then the husband is entitled to recover the land in controversy. If, tested by the facts, as applied to the law of this state, the birth of a daughter operated, as a matter of law, as a revocation of the will, then the judgment of the Court of Civil Appeals should be affirmed. To determine this question we must refer to the statutes in force in this state having application to this matter. The only articles of our Revised Statutes touching this matter are as follows:

"Art. 5343. When a testator shall have children born and his wife enceinte, the posthumous child, if unprovided for by settlement and pretermitted by his last will and testament, shall succeed to the same portion of the father's estate as such child would have been entitled to if the father had died intestate, toward which portion the devisees and legatees shall contribute proportionately out of the parts devised and bequeathed to them by such last will and testament.

"Art. 5344. If a testator having a child or children born at the time of making his last will and testament shall, at his death, leave a child or children born after the making of such last will and testament, the child or children so after-born and pretermitted shall, unless provided for by settlement, succeed to the same portion of the father's estate as they would have been entitled to if the father had died intestate, toward raising which portion the devisees and legatees shall contribute proportionately out of the parts devised and bequeathed to them by such last will and testament, in the same manner as is provided in article 5343.

"Art. 5345. Every last will and testament made when the testator had no child living, wherein any child he might have is not provided for or mentioned, if at the time of his death he shall leave a child, or leave his wife enceinte of a child which shall be born, shall have no effect during the life of such after-born child, and shall be void unless the child die without having been married and before he shall have attained the age of twenty-one years."

It is the contention of the defendant in error that she was never "mentioned" in the will of her mother, as that term was intended to be construed in the law; nor was any provision made for her. This view is antagonized and resisted by her father, who claims that she was both mentioned and provided for in the will. We think there can be no doubt that, as the law meant that term to be understood, she was mentioned in the will, even if it could be held that she was not provided for in same, and that there was no revocation, and that the estate passed in fee simple to her father, James E. Pearce. We have carefully examined the very learned

and thorough opinion of the Court of Civil Appeals and the authorities upon which this opinion is based. We have not believed that any of these authorities are, as applied to our statute, directly in point; nor do we believe that the conclusion reached by the Court of Civil Appeals is sound.

In the case of Chicago, B. & Q. R. Co. v. Wasserman (C. C.) 22 Fed. 872, Judge Brewer was construing a Nebraska statute, Comp. St. c. 23, § 148. That statute is as follows: "Sec. 148. When any child shall be born after the making of his parent's will and no provisions shall be made therein for him, such child shall have the same share in the estate of the testator as if he had died intestate, and the share of such child shall be assigned to him as provided by law in cases of intestate estate unless it shall be apparent from the will that it was the intention of the testator that no provision should be made for such child." In that case it appeared that when Wasserman made his will his first child was about five years of age, and that his wife was delivered of a child within about 20 days after the will was made. Judge Brewer seems to have no doubt that as a fact independent of the statute Wasserman meant that the wife should take the entire property and would take care of his children; but he says: "But the legal difficulty is this: The statute says that it must be 'apparent' from the will that the testator intended that the unborn child should not be specially provided for. How can any intention as to this child be gathered from the will alone? It simply gives everything to the wife; is silent as to the children. If I could look beyond the will, my conclusion would be instant and unhesitating. Limited to the statute by the instrument itself, what can be gathered therefrom? It is simply a devise of all property to the wife. No reference is made to children, born or unborn. Can I infer from its silence an intention to disinherit? If so, the mere omissions from a will would always stand as proof of an expressed intention. And whatever of apparent hardship there may be in the present case, a fixed and absolute rule prescribed by statute cannot, for such reason alone, be ignored." So that it is apparent from the decision that the statute there was meant to provide that the intention of exclusion of the child must be apparent from the language of the will and could not be aided by extrinsic testimony. That statute, it is obvious, is quite different from our own, in that it is there provided that, tested by the language of the will, it must be apparent therefrom that no provision was intended to be made for the unborn child. That case is distinguishable from the one at bar in other important respects. The will is set out at length in the opinion and contains no kind of reference, express or implied, to any child, or to the possibility of the existence of children; whereas, in the

case before us, in the fourth clause copied above, Mrs. Pearce seems to have had in view the contingency of having living issue born of her body. When the difference in the statutes is considered, and when we test the Wasserman Case, *supra*, by the recitals of the will there considered, the difference is demonstrable.

In the case of *Bressee v. Stiles*, 22 Wis. 120, the court had under consideration a case involving the construction of a statute almost identical with the Nebraska statute. The Wisconsin statute was in this language: "When any child shall be born after the making of his parent's will, and no provision shall be made therein for him, such child shall have the same share in the estate of the testator as if he had died intestate; and the share of such child shall be assigned to him as provided by law in case of intestate estates, unless it shall be apparent from the will that it was the intention of the testator that no such provision should be made for such child." While in that case the will is not set out at length, a summary of its terms is given, and there is no reference, direct or indirect, or by the remotest inference, to the possible existence of other children not then born. It appears that some time thereafter three other children were born. The will was executed April, 1855, and the testator died in August, 1861. In the meantime three children had been born after the making of the will for whom no provision was made, and these facts, it was contended, should raise a strong presumption that it was the intention of the testator that the after-born children should not take any portion of his estate. This contention is met and answered by the court in this language: "But the difficulty with this argument is that we are not permitted to look outside of the will to ascertain the purpose of the testator upon this point. For the statute positively declares that, unless it is apparent from the will itself that it was the intention of the testator that no provision should be made for the after-born children, then they shall share in the estate as though no will had been made."

In the case of *Walker v. Hall*, 34 Pa. 483, Walker's will left his property to his wife, Anna Gray Walker. It contained, however, the following clause: "Having the utmost confidence in her integrity, and believing that, should a child be born to us, she will do the utmost to rear it to the honor and glory of its parents." It was shown that, after the execution of the will, Walker and wife had a child born to them who was living at the death of the father and who survived at the date of the trial. Without a careful reading of the report, this case would seem to be in point and to sustain the contention of the defendant in error. However, when construed with reference to the language of the statute in Pennsylvania, it is not, we think, in point. Originally, by the

act passed the 4th of February, 1748, the rule obtaining in that state was as follows: "That where any person shall, at any time hereafter, make his last will and testament, and afterwards marry, or have a child or children, *not named in any such will*, and die, although such child or children be born after the death of their father, every such person, so far as shall regard the wife after married, or the child or children after born, shall be deemed and construed to die intestate; and such wife, child, or children shall be entitled to like purparts, shares, and dividends of the estate, real and personal, of the deceased, as if he had actually died without any will." It will be noted that in the original report the words, "*not named in any such will*," are italicized, evidently for the reason that there is a conspicuous absence of them in the later act to which attention will be hereafter called. By the act passed the 23d day of March, 1764, the above statute was repealed, and the words, "*not named in any such will*," disappeared. Later, the 19th of April, 1794, the following statute was passed by the Legislature of Pennsylvania and was the act construed by the court in the case last named: "That when any person shall make his last will and testament, and afterwards shall marry, or have a child or children, *not provided for in such will*, and die, leaving a widow and child, or either a widow, or child or children, although such child or children be born after the death of their father, every such person, so far as shall regard the widow, or child or children after born, shall be deemed and construed to die intestate; and such widow, child or children shall be entitled to such purparts, shares, and dividends of the estate, real and personal, of the deceased, as if he had actually died without any will." So that a careful analysis of this case will disclose that the extent of the holding in the *Walker v. Hall* Case was that no provision was by the terms of that will made for the after-born child so as to prevent a revocation of the will. While not stated, it must seem obvious that the court attached some importance to the language, "*not named in such will*," which had appeared in the early statutes and omitted in the latter enactment, and in the fact that its omission evidenced a manifest intention to require provision to be made for the after-born child as the indispensable requisite to prevent a revocation. *Hollingsworth's Appeal*, 51 Pa. 518, simply holds that the decision in that case should be governed by *Walker v. Hall*, *supra*.

In *Waterman v. Hawkins*, 63 Me. 156, the statute under consideration in that case is not set out in *hæc verba*; but, as we gather from the opinion, the statute there provided that "there must be provision made specifically for the unborn child." The court there said: "He cannot be disinherited like a child, or the issue of a deceased child,

when it appears that the omission to refer to him is intentional. Unless he is 'provided for,' the conclusive presumption is that he was not expected, and the law declares that he shall take the same share of his father's estate as if the father had died intestate." In that case the testator died leaving his widow enclinte, and his father surviving him, and the child Gertrude, for whose benefit the suit was brought, was born two months after his death. By the terms of the will in that case he gave his house, and other property, to his wife for her natural life if she remained unmarried, providing that, "in case of her marriage, the same is to become the property of my heirs, and its use to revert to them; and, in any event, after her decease, the same is to descend to my heirs." In that case there was neither a mention of the unborn infant in the will, nor provision made for her, and it was there held that, under the terms of the Maine statute above referred to, such infant would take the same share of her father's estate as if he had died intestate. The opinion in that case also contains the significant remark that: "There is nothing in such a provision to suggest that the child was thought of by the testator. The form of expression would indicate the contrary."

A careful reading of all the cases cited by the Court of Civil Appeals in support of their decision has led us to believe that they are distinguishable from the case at bar, and that, tested with reference to the statute on which they were based, they do not sustain the conclusion reached by them.

We think the true interpretation of our statute is that, in testing and determining whether the unborn child is mentioned in the will, the language of the testator (the testatrix in this case) should be construed and considered with reference to the situation and facts within his knowledge, and having in mind the considerations on which and with reference to which he was then acting. This seems to be the holding of the Supreme Court of Massachusetts in the case of *Peters v. Siders*, 126 Mass. 135, 30 Am. Rep. 671, where the court says: "The judge might well find that the fact that the testatrix was so soon to be delivered of her first child must have been in her mind when the will was made, and could not have been forgotten. There is no suggestion of any mistake of fact or law, or any ignorance on the part of the testatrix, or any oversight of the scribe, as the cause of the omission. The making of the will at that time warrants a presumption that it was made in anticipation of her confinement, and with a purpose that, if the event should prove fatal, her property should go to him on whom would devolve the care and support of the child."

The Supreme Court of Missouri, in the case of *Hockensmith v. Slusher*, 26 Mo. 237, in construing an article of their statute, uses the following language: "This provision of

the statute has been several times before this court for judicial construction, and it may now be considered as settled that the object of it is to produce an intestacy only when the child or the descendant of such child is unknown or forgotten, and thus unintentionally omitted; and the presumption that the omission is unintentional may be rebutted when the tenor of the will or any part of it indicates that the child or grandchild was not forgotten. *Guitar v. Gordon*, 17 Mo. 408; *Beck v. Metz*, 25 Mo. 70; *Terry v. Foster*, 1 Mass. 146 [2 Am. Rep. 6]; *Wild v. Brewer*, 2 Mass. 570; *Church v. Crocker*, 3 Mass. 17; *Wilder v. Goss*, 14 Mass. 359; *Wilson v. Fosket*, 6 Metc. [Mass.] 400 [39 Am. Dec. 736]; *Merrill v. Sanborn*, 2 N. H. 499; *Block v. Block*, 3 Mo. 594. The statute extends only to a case of entire omission, and the mention of a child without a legacy or other provision for him is sufficient to cut him off from a distributive share of the estate (3 Mo. 594; 1 Mass. 146), and whenever the mention of one person, by a natural association of ideas, suggests another, it may reasonably be inferred that the latter was in the mind of the testator and was not forgotten or unintentionally omitted. Thus it has been decided that by the mention of a daughter, though dead at the time of making the will, it will be inferred that her children were not forgotten (17 Mo. 408). The mention of grandchildren will exclude the parent (2 Mass. 570, 3 Mass. 17). Naming a son-in-law is sufficient to show that the daughter was brought to the recollection of the testator (14 Mass. 359); and naming two grandchildren will indicate that their brothers and sisters not named were intentionally omitted (2 N. H. 499)."

In the early case of *Guitar v. Gordon*, 17 Mo. 408, there is the following admirable statement as to the purpose of such a statute as ours as well as the proper rules of interpretation in arriving at the true intent of the same: "Our laws permit every person of sound mind and of competent age to dispose of all his estate, real and personal, saving to the widow her right of dower. He may disinherit his children and bequeath his property to whom he sees fit. The eleventh section of the act concerning wills provides that if any person make his last will, and die, leaving a child or children, or descendants of such child or children (in case of their death), not named or provided for in such will, every such testator, so far as shall regard any such child or children, or their descendants, not provided for, shall be deemed to die intestate. This section has been held only to make provision for children or their descendants, unintentionally omitted by their parents from forgetfulness or any other cause. If a child is expressly excluded from any portion of the estate by the will, he is provided for in the meaning of the act. In such case, it plainly appears that the child was not forgotten. *Block v. Block*, 3 Mo. 408. A law in

Massachusetts directs that, in case a child or children, or their legal representatives, in the event of their death, shall not have a legacy given him, her, or them, by the will of their father or mother, he, she, or they shall have a proportion of the estate of their parents assigned unto him, her, or them, as though such parent had died intestate. Under this statute, it was held that, if the testator, in his will, mentions a son-in-law, and one of his children, it thereby sufficiently appears that the other grandchildren by that son-in-law were in the mind of the testator, and therefore not entitled to come in, as if unintentionally omitted. *Wilder v. Goss*, 14 Mass. 357. If a child is named in a will, and it is known that such child has descendants, it is impossible to say they were not in the mind of the testator. The object of the section must be borne in mind. It is not to prevent parents from disinheriting their children, but merely to make provision for those who may have been unintentionally omitted. Under a statute in New Hampshire, similar in its language to that above cited from the Code of Massachusetts, it was held that a testator, leaving seven grandchildren, children of a deceased son, if in his will he mentions two of these grandchildren, and also their father, the presumption of law was that the other five grandchildren were not omitted through forgetfulness. *Merrill and Wife v. Sanborn*, 2 N. H. 499."

It should be remembered in this case that, as we have seen, the property in question was the separate estate of Mrs. Pearce. Under the law she might deed same, when joined by her husband, to any person for any consideration satisfactory to her, and no child or children could complain. Under the law she is authorized to direct the disposition of the same by will, either to the natural objects of her bounty, or to dedicate it to charity, or to convey it to strangers. And her right so to do cannot be abridged or denied unless inhibited under a fair construction of the statute relied on. We think the true construction of the word "mentioned," in article 5345, is not designation by name, but means referred to or having in mind, and as indicating that the child was in her memory, and that her will was made with reference to its possible existence and early birth, and that it was not overlooked or forgotten. In other words, the true interpretation of the statute is that it should appear either that provision should be made for the child, or that, if no provision was made for such child, it should appear from the will interpreted in the light of all the circumstances that the failure to make such provision was not accidental, due to inadvertence or oversight. When, therefore, tested by this rule, which

seems to find support in the decisions above quoted, and to be intrinsically sound and reasonable, it appears that by the first section of her will Mrs. Pearce devised to her husband, outright, their home place, and, after this is done, in the most unequivocal manner, to make assurance doubly sure, she adds, "the same to be held by him in fee simple without condition." By the second clause of her will she likewise devises to her husband her interest in the land in controversy, and adds, "to be held and enjoyed by him in absolute right and fee simple." By the third item, which we have not yet quoted, she lays upon the husband the duty and obligation of paying her mother the sum of \$200 annually, until her death. Then, in item 4 of her will, she devises her one-fourth interest in the homestead lots of her father's estate, first, to her mother, and, in case of her death previous to her own, to her two sisters, and then provides, "This section is to be null and void in case of living issue born of my body." When it is remembered that by the terms of this will she was making such explicit and unequivocal provision for her husband, when she was making provision for the payment of \$200, annually, to her mother, and devising to her and to her sisters her interest in the old homestead with the saving clause, "to be null and void in case of living issue born of my body," how can it be doubted that she had in mind the almost certainty, according to nature, that within a few weeks there would be issue born to her, and that all these provisions of her will were made with this in mind and with reference to the certainty that a child would be born to her? Naturally, in her condition, in respect to her first born, she would be alternatively in a state of exaltation over the child soon to arrive and in fear of the peril of her coming travail. It was a fact, based on the experience of all her sex, to which she could not close her eyes, and of her recognition of this fact her will contains the most certain and conclusive evidence. This will she had a right to make, and, unless it should be set aside and broken down by law, based upon its fair interpretation under the light of conceded facts, it ought to stand.

We have not deemed it necessary to decide whether the will might not be upheld on the ground that provision had in fact been made therein for the after-born child.

We have concluded, under the state of the record as it comes to us, that there was no revocation, and that the will should be upheld.

It is therefore ordered that the judgment of the Court of Civil Appeals be, and the same is hereby, reversed, and that the judgment of the district court is affirmed.

DAY v. STATE.

(Court of Criminal Appeals of Texas. Dec. 21, 1910. On Motion for Rehearing, Feb. 8, 1911.)

1. INDICTMENT AND INFORMATION (§ 33*)—FORMAL REQUISITES—NECESSITY FOR SIGNATURE OF FOREMAN OF GRAND JURY.

Failure of the foreman of the grand jury to sign an indictment officially does not invalidate it, the provision of Code Cr. Proc. 1895, art. 432, directing that an indictment be so signed, being merely directory, especially in view of article 565, providing that exceptions to the form of an indictment may be taken for the want of any requisite or form prescribed by article 439 (embracing the same provision as article 432 as to signature), except the want of the signature of the foreman of the grand jury.

[Ed. Note.—For other cases, see Indictment and Information, Cent. Dig. §§ 132-137; Dec. Dig. § 33.*]

2. CRIMINAL LAW (§ 1091*)—APPEAL—RESERVATION OF GROUNDS OF REVIEW—SUFFICIENCY OF BILLS OF EXCEPTIONS.

The mere statement in a bill of exceptions of facts as grounds of objections is not equivalent to showing that the matters stated as the grounds of objection are true, and a bill of exceptions objecting to the testimony of a witness as to threats made by accused on the ground that they were general, and because decedent was not present, is insufficient where it does not show that decedent was absent when the statement was made, nor that, tested with reference to other facts, the threats did not refer to decedent.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 2894; Dec. Dig. § 1091.*]

3. HOMICIDE (§ 300*)—MURDER—INSTRUCTIONS—SELF-DEFENSE.

An instruction on a trial for murder as to the right of self-defense on a reasonable apprehension of death or serious bodily injury held to have given accused the full benefit of his claim of self-defense.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 614-632; Dec. Dig. § 300.*]

4. CRIMINAL LAW (§§ 763, 764*)—INSTRUCTIONS—WEIGHT OF TESTIMONY.

A charge that, if the jury believed that the state introduced a witness who testified substantially that accused had told him that there was not a man with decedent's name that had nerve enough to stand up before him with a knife, pistol, or anything else, etc., merely submitted to the jury whether such testimony had been introduced, and whether they should credit it as well as the weight they should give it, and was not a charge that the witness as a matter of fact had testified substantially to such effect and on the weight of the testimony.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1731-1748; Dec. Dig. §§ 763, 764.*]

5. CRIMINAL LAW (§§ 763, 764*)—MURDER—INSTRUCTIONS—WEIGHT OF TESTIMONY.

A charge that if the jury believed that the state introduced at former trials of the case "the following testimony of accused, taken by the stenographer substantially as follows" (setting it out by question and answer), etc., did not invade the province of the jury by charging on the weight of testimony; it being necessary in limiting impeaching testimony to state the substance or purport thereof.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1731-1748; Dec. Dig. §§ 763, 764.*]

Appeal from District Court, Red River County; Ben H. Denton, Judge.

Farris Day was convicted of murder, and he appeals. Affirmed.

E. S. Chambers, B. B. Sturgeon, and J. G. Dudley, for appellant. John A. Mobley, Asst. Atty. Gen., for the State.

RAMSEY, J. The indictment in this case was filed in the district court of Red River county on the 30th day of May, 1907, charging appellant with the murder of one Spencer Holt. The case came to trial on December 13th of last year, and resulted in a conviction of murder in the second degree, assessing appellant's punishment at six years' confinement in the state penitentiary.

The record is quite a voluminous one, and contains, among other things, 17 bills of exception. These, however, for the most part, are so qualified and explained by the court as to show no error, and are of such a character as not to require discussion. The case was submitted in a very lengthy charge in which the jury were instructed with reference to murder in the first degree, murder in the second degree, manslaughter, and self-defense. The jury were also instructed with reference to the doctrine of provoking a difficulty, and numerous matters of testimony offered by way of impeachment was by the court duly and properly limited.

1. Before the case came on to trial, appellant filed a motion reciting his citizenship of Texas and of the Union, and averring that he could not be prosecuted for murder except on a bill of indictment, and the indictment in this case was invalid, in that same was not signed by the foreman of the grand jury as required by article 432 of our Code of Criminal Procedure of 1895, either officially or in person, and has never been signed, but appears in blank. The motion alleges that one H. C. Bailey was foreman of the grand jury, and that he resided in Red River county, and that, having been unsigned, said indictment could not have been legally presented through the foreman without his signature thereto. The motion prayed the court that, if said bill was presented, to require the said foreman of the grand jury, H. C. Bailey, to sign the said bill of indictment officially before he be required to plead to same, and, on failure of said foreman to sign said indictment, that the same be abated. Article 432 of the Code of Criminal Procedure of 1895 directs that the indictment shall be signed officially by the foreman of the grand jury. Upon examination, however, it will be seen that this article does not purport to name the essentials of an indictment, but that same is merely intended as an instruction to the officers as to what they are to do with reference to the preparation of indictments. This same article directs that

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

the names of the witnesses shall be indorsed on the indictment. This provision has in many cases been held to be directory. Article 439 of the Code of Criminal Procedure does set out in detail the requisites of an indictment, and among other requirements there stated is the following provision: Section 9: "It [the indictment] shall be signed officially by the foreman of the grand jury." This article taken alone would seem to indicate that the indictment would be fatally defective if not so officially signed. It will be noted, however, that article 565 of the Code of Criminal Procedure of 1895 directly refers to and expressly limits and controls so much of article 439 as is herein invoked. Article 565, *supra*, is as follows: "Exceptions to the form of indictment or information may be taken for the following causes only: (1) That the indictment or information does not appear to have been presented in the proper court, as required by article 439 or 466. (2) The want of any other requisite or form prescribed by articles 439 and 466, except the want of the signature of the foreman of the grand jury, or in the case of an information, of the signature of the attorney representing the state." It has therefore been held in this state from a very early day that the failure of the foreman of the grand jury to sign an indictment officially does not invalidate same. *Pinson v. State*, 23 Tex. 579; *State v. Powell*, 24 Tex. 135; *Hannah v. State*, 1 Tex. App. 578; *Campbell v. State*, 8 Tex. App. 84; *Jones v. State*, 10 Tex. App. 552; *Weaver v. State*, 19 Tex. App. 547, 53 Am. Rep. 389; *Robinson v. State*, 24 Tex. App. 4, 5 S. W. 509.

2. The next matter of importance relates to the action of the court in respect to the testimony of one Cleve Gulons. In order to make this matter clearly understood, since the bill is very short, we copy it entire: "Be it remembered that on the trial of the above-entitled cause the state offered to prove by the witness Cleve Gulons that the defendant stated to him when he wanted to get his pistol, that he said he would kill some God damned son of a bitch before night, to which the counsel for the defendant objected, for the following reasons, viz.: We object to anything that was said generally without any specific remark concerning any one, and we object to anything he said generally, and the deceased was not present, and the remarks were not directed to any one, and the court overruled the objections and said witness answered. The defendant excepted to said ruling and herewith tenders his bill of exceptions, and asks that the same be signed, sealed, and made a part of the record in said cause, which is accordingly done. This testimony, if not admissible, was withdrawn, and the jury instructed not to consider it for any purpose whatever. Ben H. Denton, Judge." We think this bill is not in such shape as to support appellant's contention. In the first place, it is not shown in the bill

that appellant was absent at the time the statement was made, nor is it shown in the bill that, tested with reference to other facts, the threat did not refer to the deceased. We have uniformly held that the mere statement of facts as grounds of objection is not equivalent to showing that the matters stated as grounds of objection are indeed true. It will further be noted that the bill shows that the court overruled the objections, and that the witness answered. What his answer was does not clearly appear. It does appear what the offered proof of the state was. Whether the answer of the witness supported and coincided with this offered proof we are left to infer. We think clearly the bill is insufficient. Again, since the testimony was withdrawn, it was not of such harmful character as necessarily to operate to appellant's prejudice.

3. Complaint is made of the following paragraph of the court's charge: "If you believe from the evidence that the defendant shot the deceased at the time and place alleged in the indictment, yet, if you further believe that just prior to or at the time of the shooting the defendant was assaulted with a stool, or a knife, or a baseball bat by deceased and his brother, or either of them, or was attacked by deceased and his brother Ivan Holt, or either of them, or both or either of them had made some demonstration as if about to attack him, and that such assault or attack or demonstration (if any) created in the mind of the defendant such a degree of anger, rage, sudden resentment, or terror as to render his mind incapable of cool reflection, and in such a state of mind he shot the deceased, then, if you do not find him justifiable under the instructions given you, he would not be guilty of any higher grade of offense than manslaughter." This is objected to for the reason that if, as claimed by counsel for appellant, appellant had been assaulted or attacked by deceased and his brother, or either of them, or if both or either of them had made a demonstration as if about to attack him, he would have the right to shoot in his own self-defense, and would not have been guilty of any grade of offense whatever, and the court was in error in instructing the jury that notwithstanding they found such an assault or that his adversaries were attacking him, or made a demonstration upon him, that he would be guilty of no higher grade of offense than manslaughter, which they claim meant to the jury that, notwithstanding they had assaulted him or attacked him, yet, if he did the shooting, that it would not have been done in self-defense, and he would have been guilty of manslaughter. It will be noticed that this instruction was given with the qualifying clause that under the conditions named in the charge, if the mind of appellant was aroused to a degree of anger, rage, or sudden resentment such as to render it incapable of cool reflection, and if under instructions thereafter giv-

en they did not find appellant justifiable on self-defense, that he would be guilty of no higher grade of offense than manslaughter. This charge was immediately followed by a lengthy charge on self-defense, in which, among other things, the jury were instructed as follows: "If the defendant just before the shot was fired believed from the words, acts, or conduct of the deceased and his brother, or either of them, that they, or either of them, were seeking to get possession of some weapon or instrument, and it reasonably appeared to the defendant that he was in danger of death or serious bodily injury from the deceased and his brother, or either of them, if they, or either one, did get possession of any such weapon or instrument, then the defendant would have the right to shoot and continue to shoot until such danger or apparent danger had ceased. Now if you believe from the evidence that the defendant killed Spencer Holt, but you further believe that just prior to or at the time of the shooting said Spencer Holt and his brother Ivan Holt, or either of them, had made, or was making, an unlawful attack upon the defendant, or either one or both had done, or was doing, some act or acts which either alone or together with accompanying words of both or either of them produced in the defendant's mind, as viewed from his standpoint, a reasonable apprehension of death or serious bodily injury at the hands of said Spencer Holt and his brother Ivan Holt, or either of them, and that defendant did such killing to protect himself from such danger or apparent danger, then such killing was in justifiable self-defense, and if you so find, or if you have a reasonable doubt as to whether such killing was in justifiable self-defense or not, you will acquit the defendant." We have not infrequently held that it is proper for the court to charge on manslaughter under conditions quite similar to the case before us on the theory that, although the jury may not have believed that the acts and conduct of the deceased were sufficient to justify appellant in acting in self-defense either in respect to real or apparent danger, yet nevertheless his attitude or conduct might be such as to reduce the offense to manslaughter. See *Swain v. State*, 48 Tex. Cr. R. 98, 86 S. W. 335. In this case by this charge appellant was given the full benefit of his claim of self-defense, and an appropriate charge on manslaughter based on certain evidence which the jury might have accredited and believed to be sufficient to have so reduced his offense.

4. Complaint is made of the charge of the court in respect to the instruction with reference to the testimony of one Bryson to the effect that appellant told him that there was not a Holt by the name that had nerve enough to stand up before him with a knife, pistol, or anything else. The objection is that the charge instructs the jury as a matter of fact that the witness Bryson testified

substantially to this effect. It is claimed that this charge is on the weight of the testimony, and instructed the jury what the testimony is upon said issue, and invaded the province of the jury in this respect. This matter is contained in the 35th paragraph of the court's charge, which includes a number of impeaching matters. The particular paragraph is to this effect: "And if you further believe that the state introduced the witness Ben Bryson, and he testified substantially that 'Farris Day told him that there was not a God damned Holt by the name that had nerve enough to stand up before him with a knife or pistol or anything else.'" It will thus be seen that the charge was submitted to the jury to ascertain whether such testimony had been introduced, and whether they should credit the evidence therein referred to as well as the weight they would give it. We attach no importance to the word "substantially." If it had been entirely omitted, it would not have changed the sense of the instruction. After referring to and quoting literally much of this impeaching testimony, the court then charges the jury that the only purpose for which all of this testimony was offered by the state and admitted by the court was that they might consider it for whatever it was worth for the sole purpose of passing upon the credibility of the witness Farris Day, and that such testimony so introduced by the state could not be considered for any other purpose.

5. The next complaint refers to the same section of the court's charge, and relates to appellant's application for a continuance, made at the spring term, 1909, as well as certain testimony given by appellant on a former trial which was reproduced from the stenographer's notes and set out in the charge in detail by question and answer. It is urged that this is a charge on the weight of testimony, and tells the jury what the testimony was upon the former trial in the cause, and does not leave it to the jury to say whether or not such was the testimony. The charge on this last-mentioned matter is as follows: "And if you further believe that the state introduced before you the following testimony of the defendant at the former trials of this case, taken by the stenographer, which is substantially as follows:" This charge, properly construed, does not invade the province of the jury. In order to limit any impeaching testimony, it is indispensable that the substance or purport of same should be stated to the jury so that they may be advised of what it is that is to be limited by them, and, unless it was definite enough to serve this office, the charge so limiting the testimony would be wholly worthless and a defendant in such case justly aggrieved. In no other respect except those above stated is the charge of the court complained of. Considered altogether, it is a fair, adequate, and unexceptional presenta-

tion of every issue arising on the trial of the case. As stated, we have not reviewed many of the questions raised on the appeal, though they have all been carefully considered. In the light of the court's explanation to the several bills of exception, the other matters relied on as grounds of reversal seem to us so clearly unavailable as not to require discussion.

Finding no error in the record, it is ordered that the judgment of conviction be, and the same is hereby, affirmed.

McCORD, J., absent.

On Motion for Rehearing.

PRENDERGAST, J. The motion for rehearing in this case presents nothing which was not decided by the opinion originally delivered herein. It simply takes issue with the decision as made.

The record is quite lengthy but we have carefully gone over the whole of it again on this motion for rehearing and are satisfied with the original opinion herein. We believe that all of the questions were correctly decided thereby. It is therefore ordered that the motion for rehearing be overruled.

NELSON v. STATE

(Court of Criminal Appeals of Texas. Jan. 25, 1911.)

CRIMINAL LAW (§ 1128*)—APPEAL—EX PARTE EVIDENCE.

In a prosecution for unlawfully selling intoxicating liquors, an instrument alleging that the law making such an act a felony in local option territory went into effect after the people of the county had adopted local option, supported by a certified copy of the order of the commissioners' court declaring the result of such election filed in the Court of Appeals by appellant with a motion to dismiss, cannot be considered.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 2952; Dec. Dig. § 1128.*]

Appeal from District Court, Camp County; R. W. Simpson, Judge.

Joe Nelson was convicted of unlawfully engaging in the sale of intoxicating liquors, and he appeals. Affirmed.

J. D. Bass, for appellant. John A. Mobley, Asst. Atty. Gen., for the State.

HARPER, J. In this case appellant was convicted in the district court of Camp county on May 26th of last year of unlawfully engaging in the sale of intoxicating liquors, and his punishment assessed at confinement in the penitentiary for a period of two years.

As the record comes to us it contains neither statement of facts nor bills of exception, and there are but few questions that can be reviewed by us.

1. The indictment charges an offense

against the laws of this state. It follows closely the form approved in *Mizell v. State*, 128 S. W. 125, and negatives the exception contained in the statute.

2. There is an instrument filed in this court moving us to reverse and dismiss the judgment of the lower court, because it is averred that the law making it a felony to engage in the business and occupation of selling intoxicating liquors in local option territory was passed and went into effect after the people of Camp county had voted upon and adopted local option. Attached to this motion and in support of it is filed a certified copy of the order of the commissioners' court declaring the result of said election. It must seem manifest that this cannot be considered by us. If we could consider such ex parte papers at the instance of the appellant, it would follow logically that the state might in this way aid statements of facts or supply their absence. This practice would lead to gross abuses and greatest injustice, and is not to be tolerated.

The judgment is affirmed.

HAYWOOD v. STATE.

(Court of Criminal Appeals of Texas. April 6, 1910. On Motion for Rehearing, Feb. 8, 1911.)

1. CRIMINAL LAW (§ 761*)—INSTRUCTIONS—PRESUMPTION OF FACT.

In a prosecution for rape, an instruction that if at the time prosecutrix was "under the age of 15 years and was not the wife of defendant, you will find the defendant guilty of rape as charged," does not assume that prosecutrix was under the age of 15 years, or that she and the defendant were not married.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1731, 1738, 1754-1764; Dec. Dig. § 761.*]

2. CRIMINAL LAW (§ 398*)—EVIDENCE—SECONDARY EVIDENCE—PEDIGREE—HEARSAY.

Where the father of prosecutrix testified in a prosecution for rape as to her age, an entry of the date of her birth made by him in an ordinary ledger is inadmissible as secondary evidence.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 879-896; Dec. Dig. § 398.*]

3. CRIMINAL LAW (§ 1169*)—HARMLESS ERROR—ADMISSION OF EVIDENCE—AGE.

In a prosecution for rape, where there is no issue as to the age of the prosecutrix, the erroneous admission of secondary evidence of her age is not reversible error.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3137-3143; Dec. Dig. § 1169.*]

On Motion for Rehearing.

4. JURY (§ 116*)—JURY LIST—SUMMONING—DILIGENCE.

The mere absence of veniremen, without any showing of a want of diligence to secure their attendance, is not ground for quashing the venire.

[Ed. Note.—For other cases, see Jury, Cent. Dig. §§ 542, 543; Dec. Dig. § 116.*]

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

5. JURY (§ 120*) — MOTION TO QUASH — GROUNDS—EVIDENCE.

Under a motion to quash a venire "because out of 100 names herein drawn only 17 of said special venire are present in court," evidence going to show that the officer's diligence in summoning the venire was not sufficient is not admissible.

[Ed. Note.—For other cases, see Jury, Dec. Dig. § 120.*]

6. GRAND JURY (§ 34*) — PARTICIPATION OF PROSECUTING ATTORNEY—STATUTES.

Under Code Cr. Proc. art. 414, the county attorney may be present at all times when the grand jury is not deliberating or voting upon a bill of indictment.

[Ed. Note.—For other cases, see Grand Jury, Dec. Dig. § 34.*]

Appeal from District Court, Grayson County; B. L. Jones, Judge.

Dock Haywood was convicted of rape on a girl under 15 years, and he appeals. Affirmed.

C. Huggins and J. P. Cox, Jr., for appellant. John A. Mobley, Asst. Atty. Gen., for the State.

DAVIDSON, P. J. Appellant was convicted of rape on a girl under 15 years of age, and given a life sentence in the penitentiary.

1. Several questions are presented for revision which we deem unnecessary to discuss. The matter with reference to summoning the jury may not occur upon another trial. This matter is set out in bill of exceptions No. 1.

2. In bill of exceptions No. 2 it is urged that parties not authorized to be before the grand jury while they were deliberating upon finding the bill were present. We are of opinion the evidence on this question does not show such to be a fact. The county attorney and two of the assistants were with the grand jury at different times while that body had the witnesses before them, but none of them were present at the time they were deliberating or voting upon the question of finding the bill of indictment; nor does the evidence support the other contention in the bill that the indictment was found by less than nine grand jurors. We find no reason for reversing the judgment upon that bill of exceptions.

3. Bill No. 3 suggests that the evidence is not sufficient to show that the prosecutrix was under 15 years of age and not the wife of the defendant. This applies to the charge of the court, which is as follows: "And if you further believe from the evidence beyond a reasonable doubt that at said time the said Bertha Stacy was under the age of 15 years, and was not the wife of defendant, you will find the defendant guilty of rape as charged in the indictment and assess his punishment at death," etc. The objection to this charge was that the evidence did not show that appellant and the prosecuting witness were not man and wife at the time of the alleged transaction, and that the charge assumed

that fact. We are of opinion that it does not assume the fact that they were not married or that she was under the age of 15 years. In this connection in another contention it is urged that the evidence is not sufficient to show the girl was not the wife of the defendant. This is left as a matter of inference. The strongest evidence is to the effect that the father of the prosecutrix testified that she was single. We are not undertaking to hold here that this would be insufficient, but we suggest that in matters of this sort the statement of facts should show that the parties were not married. It is easily proved, the witnesses were on the stand and before the jury. Matters of this sort should not be left to inference where positive evidence is so easily accessible. We call attention to this, so that matters of this character will not be left as questions of discussion on appeal.

4. By bill of exceptions No. 6 it is made to appear that S. W. Stacy, father of prosecutrix, was used in behalf of the state as a witness, and testified as follows: "This book I have in my hand has been in my possession since Bertha Stacy's birth; it is just an ordinary ledger. There is no date in this book except on the page on which the entry of Bertha's birth is made, and that is on a page about the middle of the book. I made that entry myself; it is correct. I made it just after Bertha was born. The entry of Bertha's birth is about the center of the page, and the entry of Jewel's birth, who is also my child and younger than Bertha, is on the same page and above the entry made for Bertha. On the same page and below the entry made for Bertha's birth is the entry made for the date of the birth of another one of my children who is younger than Jewel. I don't know why I put the entry of Jewel's birth above the entry of Bertha's. The entry of the birth of the third child was placed below the entry of the other two that were older than it." The book was offered in evidence, to which defendant objected on the ground that the same was hearsay, not the best evidence, not a family record, entries not made contemporarily with the births, and the book is not shown to have been in the custody of the witness during all of said time. The court overruled the objections, and the page of the book on which the entries were made was permitted to go before the jury and was as follows: On the top of the page, "Jewel Stacy born July 11th, 1897." Entry on same page and below, "Bertha Stacy born June 28th, 1894." On the same page and below this entry, "Martha Stacy born August 25th, 1900." To which action of the court in overruling defendant's objections and permitting the state to introduce said evidence before the jury, the defendant then and there excepted on the grounds above mentioned.

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

This testimony was inadmissible. We deem it unnecessary to discuss the matter further than to allude to the decision in the recent case of *Rowen v. State* (decided at the present term of court) 57 Tex. Cr. R. 647, 124 S. W. 668. In that case the authorities are collated and reviewed at considerable length by Judge McCord who delivered the opinion of this court. In view of what was said in that decision and the thoroughness of the review of the authorities, we deem it unnecessary to discuss that question further. Under that decision the admission of this testimony is erroneous. However, the question then is, the evidence having been erroneously admitted, should it constitute cause for reversal of this judgment? After careful review of the matter we are of opinion that it does not constitute such cause or reason. In the *Rowen Case*, supra, the question of the age of the prosecutrix was a serious issue and of vital importance. The testimony in that case was conflicting as to whether the prosecutrix was over or under the age of 15 years. Under that state of case it was held that the admission of similar evidence to this was illegal and important. In this case, however, the question of the age of the prosecutrix was not an issue, nor was there any evidence introduced, or contention made on the trial, that she was 15 years of age or over. The evidence clearly discloses that she was under that age. Had there been an issue as to that question, the admission of the evidence complained of in the bill of exceptions would have been reversible. It is not the admission of all illegal evidence which would demand a reversal for its admission. We are, therefore, of opinion that under the circumstances of this case, there being no issue on the question of the age of the prosecutrix, and although erroneously admitted, the introduction of it is not of sufficient importance to require a reversal. Therefore, the judgment is affirmed.

On Motion for Rehearing.

HARPER, J. At the last term of this court the judgment herein was affirmed. Motion for rehearing is filed setting up several grounds why the affirmance was not correct.

1. It is contended the motion to quash the venire should have been sustained. That question was not decided in the former opinion. However, we do not believe, as it is presented, there is any merit in the motion. The ground of the motion is in this language: "Because out of the 100 names herein drawn only 17 of said special venire are present in court." The absence of veniremen is not a ground for quashing the venire. The case of *Horn v. State*, 50 Tex. Cr. R. 404, 97 S. W. 822, and *Logan v. State*, 54 Tex. Cr. R. 74, 111 S. W. 1028, are cited in support of that proposition. These cases are not in point. In each of those cases the motion

was made to quash the venire and service, among other things, because the officers did not exercise diligence in summoning the jurors. But that ground is not suggested here. So far as this motion is concerned, every juror may have been summoned or the diligence of the officer may have been complete. None of these matters were set up in the motion. There was some evidence, however, introduced to the effect that the diligence may not have been sufficient, but under the ground stated in the motion this testimony was not germane. There was no ground set up that would have justified the attack on the officer's manner of summoning the jury or the diligence used by him.

2. It is insisted the court was in error in holding that the age of the prosecutrix was not an issue in the case. We have reviewed the testimony bearing upon this question again in order that we might ascertain whether or not we were wrong. The father testified to the age of the girl, placing her under 15 years of age, and the family physician who was present at her birth stated that she would be 15 years old the coming summer. This is the substance of the evidence introduced except the introduction of the ledger about which the complaint was made in the bill of exceptions. We are still of opinion that as there was no contest as to the age of the girl, that the admission of this erroneous testimony was not of sufficient importance to require a reversal. Where the age becomes an issue this character of testimony is not only erroneous, but would be reversible, as held in the *Rowen Case* cited in the original opinion.

3. Another contention is made that the former opinion is incorrect in holding that the assistant county attorney was not present while the grand jury were deliberating upon their finding. We have re-examined the record carefully, and read it in the light of the decisions of this court in the case of *Stuart v. State*, 35 Tex. Cr. R. 440, 34 S. W. 118, and *Sims v. State*, 45 S. W. 705. It is true that Judge Henderson in the case of *Stuart v. State*, supra, in rendering the opinion, uses language that might be construed to mean if the county attorney was present during the "deliberations and investigations" of a grand jury, the indictment would be quashed, but that was not the real holding, and in a later opinion the same judge states clearly what he meant and held in that case. In *Sims v. State*, supra, Judge Henderson, in discussing the *Stuart Case*, says: "We have heretofore held that whenever the record discloses the fact some person not authorized by law was present when the grand jury was deliberating upon the accusation against the defendant, or voting on the same, the statute was mandatory. In that case we discussed what was meant by the phrase 'deliberating upon the accusation against the defendant,' and we there held, in accordance with definitions, that 'deliberating'

meant the act of weighing and examining the reasons for and against finding a bill; that is, discussing and examining the reasons for and against the proposition of finding a true bill."

The decision of *Sims v. State* is in line with article 414 of the Code of Criminal Procedure which reads: The attorney representing the state may go before the grand jury at any time, except when they are discussing the propriety of finding a bill of indictment or voting upon the same. Construing this article in connection with the provision of article 559, which provides grounds for quashing an indictment, "that some person was present not authorized by law when the grand jury were deliberating upon the accusation against the defendant, or were voting upon the same," the meaning of the two articles are clear that the county attorney may be present at all times except when the grand jury is deliberating upon whether or not they will return a bill of indictment or voting on same.

The record in this case does not affirmatively show that he was present at either of said times, and upon hearing the matter the district judge finds that he was not present when the grand jury were deliberating upon whether or not they would return a bill of indictment or voting on the question.

The motion for rehearing is overruled, and the judgment affirmed.

CORNWELL v. STATE

(Court of Criminal Appeals of Texas. Nov. 23, 1910: On Motion for Rehearing, Feb. 8, 1911.)

1. CRIMINAL LAW (§ 364*)—EVIDENCE—RES GESTÆ.

In a prosecution for a homicide occurring about 10 o'clock at night, evidence that accused, when informed of decedent's death about 10 hours afterwards at the place where he was staying a mile and a half from the place of the killing, said that he was sorry that decedent was dead, and that he, accused, did not intend to kill him, was not *res gestæ*, but hearsay and self-serving, and was properly excluded.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 805-818; Dec. Dig. § 364.*]

2. CRIMINAL LAW (§ 1129*)—APPEAL—ASSIGNMENTS OF ERROR—SUFFICIENCY.

An assignment of error that the court erred in a certain paragraph of its charge, it not being the law, not being clear and being calculated to mislead the jury, but not pointing out in what respect the charge was not the law, wherein it was not clear and in what manner it was calculated to mislead the jury, is too general to present the question for review.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2954-2964; Dec. Dig. § 1129.*]

3. HOMICIDE (§ 286*)—TRIAL—INSTRUCTIONS—INTENT.

On trial for murder, an instruction as to the presumption of intent, where the instrument with which the injury is committed is not one likely to produce death, together with a charge

defining a deadly weapon, held a sufficient charge upon intent with which the wound was inflicted.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 586-591; Dec. Dig. § 286.*]

4. CRIMINAL LAW (§ 1137*)—APPEAL—REVIEW—INSTRUCTIONS—INVITED ERROR.

Where an erroneous charge is given at the instance or invitation of a party, it is not error of which he can complain, and, where a charge as given is the same as one requested, it is not error to refuse the requested charge, nor will it be ground for reversal that the charge given is wrong; it being deemed a charge in compliance with the request.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3007-3010; Dec. Dig. § 1137.*]

Davidson, P. J., dissenting.

Appeal from District Court, Bosque County; O. L. Lockett, Judge.

Burnett Cornwell was convicted of manslaughter, and he appeals. Affirmed.

Mayfield & Word and C. M. Kay, for appellant. John A. Mobley, Asst. Atty. Gen., for the State.

RAMSEY, J. This appeal is prosecuted from a conviction had in the district court of Bosque county on the 11th day of April of this year, in which appellant was found guilty of manslaughter, and his punishment assessed at confinement in the penitentiary for a period of three years.

The evidence shows that appellant and the deceased, John Scarborough, were before the night of the fatal difficulty good friends. They were both young men; the appellant being the younger of the two and much the smaller of the two. The facts in the case briefly show: That on the 21st day of December, 1909, the parties attended an entertainment at the house of one Latham. That those present as guests were in one room of the house which was lighted by one lamp. That in the adjoining room Mr. Latham and some members of the family were seated, in which room there was an open fire. That during the evening some one blew out the light. That it was relighted, and after this appellant blew out the light as often as twice and probably three times. That after he had done so the first time the deceased protested against the light being extinguished, though in no particular words of anger, and without speaking directly to appellant. Appellant persevered, however, and blew out the light again and probably twice after such protest. That during this time one of the witnesses testifies that appellant took his knife from his pocket and opened it, and returned same thus opened to his hip pocket. Another witness speaks of the fact that appellant while in the house took his knife from his pocket, but it does not appear from his testimony distinctly that at this time the knife was open. Soon after the light had been put out the last time, the appellant

asked Scarborough to come out doors. Scarborough went out doors with him, and they went just outside the yard fence where a quarrel ensued between them, in which, among other things, appellant, according to the testimony of some of the witnesses, said to Scarborough, if he did not like what he said, to get on him. That at this juncture Scarborough struck him with his fist and knocked him partly down, and was standing over him in this position, striking, or striking at, him. The evidence further shows that while in this position appellant with his knife cut Scarborough on the legs, one of the wounds severing the femoral artery, from which he bled to death in a few minutes.

The court submitted the issues of murder in the first degree, murder in the second degree, and manslaughter. He also gave a charge on the doctrine of provoking the difficulty, and further instructed the jury, at the request of counsel for appellant, that, if they found from the evidence that defendant cut and stabbed the deceased and thereby killed him; still they should not find him guilty if they believe at the time he cut and stabbed the deceased he did not intend to kill him, and, if they had a reasonable doubt of this fact, they should give him the benefit of such doubt, and find him not guilty. The court also gave a special charge modifying a special instruction requested by counsel for appellant to the effect, in substance, that if they believe from the evidence that the knife which had been introduced in evidence and the manner of its use as shown by the evidence was not a deadly weapon, as defined in the main charge of the court, or if they have a reasonable doubt thereof, they would find the defendant not guilty. The court did not charge on the issue of aggravated assault, and the failure of the court so to do is perhaps in the state of the record the most important and material question arising in the case. In this connection it should be stated further that appellant, who testified in his own behalf, said that at the time he struck deceased he had no intention of killing him; that he was in such position that he could have killed him; that he could have struck him about the throat, near the heart or other vital portions of the body, but his intention and idea was to so wound the deceased as to make him let him alone.

1. The evidence showed that the homicide occurred about 10 o'clock at night of the 21st of December, and that, soon after the encounter between the parties, appellant went to the place where he was staying and remained there alone, and had no information touching the death of appellant until the next morning. In this state of the case appellant proposed to prove by his own testimony and that of one Benton that, when so informed of the death of deceased, he stated that he was sorry he was dead, and that he did not intend to kill him. This was objected to by the state, for the reason that it was too remote, was not *res gestæ*, and was a self-serv-

ing declaration. The evidence shows that the statement was made some 10 hours after the homicide and by the defendant at the place where he was at the time staying, some mile and a half from the place of the killing. We think it too clear for discussion that this testimony was not *res gestæ*, but was both hearsay and self-serving, and that the court did not err in excluding same.

2. The charge of the court on the issue of provoking the difficulty is complained of in this language: "The trial court committed error in the twenty-first paragraph of the main charge wherein he attempts to apply the law of provoking a difficulty. The same is not the law, is not clear, and had the effect and was calculated to mislead the jury." We think these complaints are so general in their character as not to require a review by this court of the matter attempted to be presented. The motion does not point out in what respect the charge was not the law, wherein it was not clear or how and in what manner it was calculated to mislead the jury. The particular paragraph set out in the brief of counsel for appellant has been condemned by this court, but we are not sure that, taking the charge of the court altogether, even if the motion, with sufficient directness, challenged the charge, it would be ground for a new trial. But it seems clear under the authorities that the complaint is so general as not to be sufficient to require a review at our hands. *Pollard v. State*, 125 S. W. 390; *Phillips v. State*, 128 S. W. 1100; *Roma v. State*, 55 Tex. Cr. R. 344, 116 S. W. 598; *Holmes v. State*, 55 Tex. Cr. R. 331, 116 S. W. 571; *Duncan v. State*, 55 Tex. Cr. R. 169, 115 S. W. 837.

3. The next two matters presented as grounds for new trial may be considered together. In the sixth paragraph of the motion it is urged that the court committed error wherein he charged on the means by which the injury was committed and the manner of its use. It is claimed and urged that the intent with which the wound was inflicted in this case was a most vital issue in the case to appellant, and that the court committed error when it charged the jury that, if they believed the manner in which the instrument was used was reasonably calculated to do serious bodily injury, then the law presumes that such was the design and intent of the party committing the injury. In the eighth ground of the motion for new trial, it is averred that error was committed, in that the court should have charged the law of aggravated assault, because, as claimed, all the facts show that, if an offense was committed at all, it was of no higher degree than aggravated assault. We think the charge of the court with reference to the presumption from the use of the weapon in question, taken in connection with his definition of a deadly weapon and the special charges given by the court at the request of counsel for appellant, have suf-

ficiently presented this question. On this subject the court instructed the jury as follows: "You are instructed that the instrument or means by which an injury is committed is to be taken into consideration in judging of the offense, if any, of the party offending. If the instrument or means be one not likely to produce death, it is not to be presumed that death was designed, unless it further appears from the manner in which it was used and the circumstances surrounding and known to the defendant the intention to kill evidently appears. Where a homicide occurs under the immediate influence of sudden passion, and by the use of means or an instrument not in their nature calculated to produce death, the person killing is not deemed guilty of the homicide, unless it appears that there was an intent to kill. Every person is presumed by law to intend whatever would be the reasonable and probable result of his own act and the means used by him, and when an injury is committed and the instrument or means used (or the manner in which it was used was reasonably calculated to do serious bodily injury), and this evidently appears from the evidence, then the law presumes that such was the design and intent of the party committing the injury; but, on the other hand, if the instrument or means used is one not likely to produce death, it is not presumed that death was designed, and, if in this case you believe such to be the facts and the manner in which it was used was such that the evidence does not show an evident intention to kill, then you will consider such facts in connection with the defendant's plea of self-defense." The court defined the term "deadly weapon" in the following language: "A deadly weapon is one which from its size and character and the manner in which it is used is likely to produce death or such serious bodily injury as may probably result in death." That the issue of aggravated assault arose in the case under all the facts we are convinced. It is urged by the state, however, that in the condition of the record that this cannot avail appellant for the reason that the error of the court was invited by him. We think this position of the state is undoubtedly correct. That the doctrine of invited error applies in criminal cases is no longer an open question in this state. This subject came before this court in the case of *Carbough v. State*, 49 Tex. Cr. R. 452, 93 S. W. 738. The opinion in that case is by Judge Davidson, and discloses a careful investigation of the question, and includes a review of practically all of the authorities. In that case the charge of the court complained of was held to be erroneous, and in discussing the matter, after referring to numerous authorities, Judge Davidson says: "These latter cases hold that where a charge has been given, although erroneous, at the request of appellant, he cannot complain. Following and affirming the rule laid down in *Rayley v. Sein* [89 Tex.

63, 83 S. W. 215, 558], supra, where the charge requested and refused has been substantially given in the court's charge, any error arising therefrom cannot be questioned by the party requesting the charge. *Hillsboro v. Jackson*, 18 Tex. Civ. App. 326 [44 S. W. 1010]; *International & G. N. Ry. v. Culpepper*, 19 Tex. Civ. App. 188 [46 S. W. 922]; *Davis v. Davis*, 20 Tex. Civ. App. 312 [49 S. W. 726]; *Hardman v. Crawford*, 64 S. W. 938. These authorities would seem to settle two propositions: First. Where the charge, although erroneous, had been given at the instance or invitation of the party complaining, it is not error of which he can complain, or that would bring about a reversal. Second. Where the charge as given is the same as that requested, it is not error to refuse the requested instruction, nor will the court reverse, because the original charge is wrong. This question was fully discussed by the Supreme Court in *I. & G. N. Ry. v. Sein*, supra, where this language is used: 'It is a general rule that when counsel has requested the court to charge a given proposition of law and it is given, if the charge requested and given is erroneous, such error cannot be taken advantage of by the party whose counsel made the request. The question now before the court is, in substance, if in the course of a trial counsel requests the court to give an instruction to the jury, which is refused, but which in whole or in part is embraced in the charge of the court, can the counsel or the party for whom he acts question the correctness of the charge given by the court in so far as it conforms to the request made? This question has often been before appellate courts, and has uniformly, so far as we are able to find, been held against the right of a party or his counsel upon appeal to call in question a ruling of the trial court which was made at his suggestion; and it has been generally held that when a charge requested, but refused, was embraced in the general charge of the court, any error arising therefrom could not be questioned by the party who requested the charge. *Elliott*, App. Proc. § 627; *Tucker v. Baldwin*, 13 Conn. 136 [33 Am. Dec. 384]; *Alberts v. Vernon*, 96 Mich. 549 [55 N. W. 1022]; *Little Rock & M. Ry. v. Moseley*, 56 Fed. 1009 [6 C. C. A. 225]; *Haggard v. German Ins. Co.*, 53 Mo. App. 106; *Eastman v. Curtis* [67 Vt. 432], 32 Atl. 232; *Stevens v. Crane*, 116 Mo. 408 [22 S. W. 783]; *Silsby v. Michigan Car Co.* [95 Mich. 204], 54 N. W. 761; *Ft. Scott, W. & W. Ry. v. Fortney*, 51 Kan. 287 [32 Pac. 904]. The principle upon which these decisions rest is that, although the charge requested was refused by the court, yet, if the same proposition is embodied in the charge given by the court, it will be presumed that the charge as given was so given in compliance with the request made.' In the later case of *M., K. & T. Ry. v. Eyer et al.* [96 Tex. 72, 70 S. W. 529], supra, the question again came under re-

view before the Supreme Court. Speaking of invited error, Chief Justice Gaines, delivering the opinion of the court, said: "The rule in question is but a deduction from the doctrine of estoppel. Where a party by a request for a ruling leads the court into error, he should be precluded from claiming a reversal of the judgment by reason of the error so committed. To hold otherwise would be to permit him to take advantage of his own wrong. Where the court upon the trial is requested to affirm a proposition of law in the charge, and it is so affirmed, the rule applies." Such was the case of *International & G. N. Railroad Co. v. Sein*, 89 Tex. 63 [33 S. W. 215, 538]. This is the last enunciation of this doctrine that has been called to our attention at the hands of the Supreme Court. Numerous decisions have been cited, *supra*, from this and the Courts of Civil Appeals of this state, affirming the doctrine laid down by these decisions. If the rule is correct, and it seems that the authorities cited settle it, it is not reversible error that there may be some omission or some defect in the requested charge given, and the authorities seem to place it upon the ground that the party complaining is estopped, and by asking the special charge, whether given or refused, affirms the proposition laid down by the court in the charge given. Tested by these authorities and this rule, appellant's assigned error is not well taken." The doctrine of this case is directly affirmed in the more recent case of *Moxie v. State*, 54 Tex. Cr. R. 536, 114 S. W. 378, in which Judge Brooks, speaking for the court, says: "If there was any error in the charge which may be conceded under the authorities of this court, it was an invited error on the part of appellant; and that an error invited by the appellant cannot be complained of is also held by this court. *Carbough v. State*, 49 Tex. Cr. R. 452 [93 S. W. 738]." Now, then, we are confronted with this situation: Under the facts in evidence, considering the relation of the parties, the nature of the knife used, and the testimony of appellant as to his purpose and intent, it may be conceded that the court should have instructed the jury in substance that if they found from the evidence that the appellant did not intend to kill, and that his only purpose was to make deceased get off of him, and that if death resulted without the design of appellant to kill, and if the manner of the use of the instrument did not disclose a purpose to commit murder, then appellant, though his act in striking the deceased was wrongful, would be guilty of no higher offense than aggravated assault, notwithstanding death resulted. But in this condition of the record and with this issue in the case appellant requested the court to instruct the jury that, if these facts existed, appellant would not be guilty, and would be entitled to an acquittal. Confessedly this charge was more favorable to appellant than the law required. The requested charge should not

have been given, and yet, where the appellant has induced the court by requested charge on a given state of facts which would have made him guilty of an aggravated assault to instruct the jury that he should go free, is he in condition then to complain that the judgment should be reversed because the court gives, at his instance, an instruction for acquittal instead of an instruction to convict for aggravated assault? The court could not, without the most obvious contradiction, have given the instruction requested by counsel for appellant to acquit, and at the same time have given an instruction to convict for aggravated assault. We think it clear beyond doubt that the doctrine of invited error applies, and that appellant is in no condition to demand a reversal on the failure of the court to charge the law of aggravated assault, in view of the charge given at his request.

These are practically the only questions of sufficient moment to demand attention at our hands. The evidence in the case is conflicting, and there is abundant testimony, if believed, to not only support a conviction for manslaughter, but to support a judgment for a much higher grade of offense. Finding no error in the record, it is ordered that the judgment of conviction be, and the same is hereby, in all things affirmed.

DAVIDSON, P. J. (dissenting). I think the doctrine of invited error is carried too far by the opinion. The doctrine of invited error, as I understand the authorities, only applies to the phase of the case presented by the special charge requested or given. The question here is, Does the charge on self-defense given at request of appellant preclude assigning error for failure of court to charge on aggravated assault? I am of opinion the court errs in holding the charge given invited the court not to give charge on aggravated assault.

On Motion for Rehearing.

PRENDERGAST, J. We have carefully examined the record again in considering appellant's motion for rehearing, and have concluded that the judgment affirming the case is correct.

A rather brief statement of the case was made in delivering the opinion herein affirming this case. We deem it unnecessary to make a further statement, but a fuller statement would have shown a much stronger case against the appellant.

There are but two questions presented in the motion for rehearing. The first, in substance, is that the lower court erred in giving charges 21 and 22, quoting both of them, on the subject of provoking the difficulty. In the motion for rehearing and argument therein appellant does not attempt to show wherein there was any error in paragraph 21 of the court's charge, taken by itself, but attempts to show error particularly in para-

graph 22 of the court's charge. Now, the record clearly shows that appellant in no way complained of paragraph 22 in the lower court. Hence we cannot and will not review this too late attack on said paragraph 22. This but emphasizes the correctness of the former opinion on this point in the court refusing to consider the too general assignment attempting to complain of charge No. 21.

The other question raised by the motion for rehearing is that the lower court committed reversible error in failing to charge on aggravated assault. This question was fully discussed, and the authorities cited in the former opinion on this subject. We have re-examined the question and the record fully, and are thoroughly convinced that the question was correctly decided in the former opinion.

The motion for rehearing is overruled.

HARPER, J. I concur in the judgment overruling the motion for a rehearing, but not agreeing fully with some of the conclusions that might be drawn from the original opinion if an inference can be drawn therefrom, together with the dissent, that under the doctrine of "invited error," the court would be relieved of giving a charge on every issue raised by the evidence. The court should charge on every phase of the case. If the court is led by defendant to present an issue erroneously, then the doctrine of invited error applies, and only in that case. I do not think the evidence in this case raises the issue of aggravated assault (see *Wilson v. State*, 4 Tex. App. 644) and the court did not err in failing to give in charge the law applicable to aggravated assault.

DAVIDSON, P. J. I adhere to views heretofore expressed.

JOHNSON v. STATE.

(Court of Criminal Appeals of Texas. Dec. 21, 1910. On Motion for Rehearing, Feb. 8, 1911.)

1. JUDGES (§ 30*)—EXCHANGE BY JUDGES OF DIFFERENT DISTRICTS.

Under Const. art. 5, § 11, providing that district judges may exchange or hold court for each other when they deem it expedient, and shall do so when required by law, the judge of another district may sit at the request of the regular judge, though the latter is not disqualified or at the time holding court for the former or another judge.

[Ed. Note.—For other cases, see *Judges*, Cent. Dig. § 143; Dec. Dig. § 30.*]

2. CRIMINAL LAW (§ 1151*)—APPEAL—REVIEW OF DISCRETION—REFUSAL OF CONTINUANCE.

Even if defendant's application for continuance for absence of witness T. was not insufficient, so as to authorize its refusal irrespective of the question of discretion, where, though it alleged issuance of subpoena for T., it averred

request was made to the clerk for subpoenas as shown by defendant's application for subpoenas, attached to the application for continuance, and the attached application for subpoenas did not contain T.'s name, yet an inspection of the entire record making it doubtful whether he was at the place of the events of which it was claimed he would testify, and making it fairly certain that, in any event, it is unlikely he could have testified to anything material, refusal of the application will not be disturbed as an abuse of discretion.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. §§ 3045-3049; Dec. Dig. § 1151.*]

3. CRIMINAL LAW (§ 939*)—NEW TRIAL—NEWLY DISCOVERED EVIDENCE.

The denial of a motion for new trial in a prosecution for larceny of a steer, based on newly discovered evidence, held proper in view of the nature of the evidence and the lack of diligence.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. §§ 2318-2323; Dec. Dig. § 939.*]

4. LARCENY (§ 60*)—SUFFICIENCY OF EVIDENCE.

Evidence on a prosecution for larceny of a steer, the defense being purchase from the owner, held sufficient to sustain a conviction.

[Ed. Note.—For other cases, see *Larceny*, Cent. Dig. § 157; Dec. Dig. § 60.*]

Appeal from District Court, Archer County; Jo A. P. Dickson, Judge.

G. R. Johnson was convicted of theft, and appeals. Affirmed.

W. E. Forgy and Taylor, Jones & Humphrey, for appellant. John A. Mobley, Asst. Atty. Gen., for the State.

RAMSEY, J. By indictment returned into the district court of Archer county on the 5th day of April of this year appellant was charged with the theft of one head of cattle, the property of J. A. Pollan, which was then and there held by J. R. Pollan and Homer Castle for the said J. A. Pollan. Thereafter, on the 18th day of the same month, appellant was convicted on the charge preferred, and his punishment assessed at confinement in the penitentiary for a period of two years.

The evidence showed that up to about the middle of December appellant had for several years resided in Ellis county, and that he had a small place not far from a large pasture owned and occupied by Pollan and Castle; that on or about the 18th or 19th day of December of last year he shipped 19 head of cattle from the town of Ennis to Dundee, in Archer county; that among this lot of cattle was a small Jersey heifer, which had undoubtedly been the property of J. A. Pollan; Pollan claimed he had never sold this property to appellant or any one else. It was appellant's contention that he had bought the animal a short time before the shipment from Pollan. It was shown by the testimony of both J. R. Pollan and Homer Castle that appellant had stated a short time after the animal was shipped that he had cut out this animal and left her at what is known as the "Gwines place," in Ellis county. Appellant claimed on the trial to have paid for this

animal by means of a check on the Ennis National Bank, dated November 29, 1909, said check being made payable to J. A. Pollan or bearer, which was produced in evidence and shown to have been paid through the People's National Bank of Ennis on December 31, 1909. This check bore no indorsement, but the proof was that checks of appellant made payable to bearer were not ordinarily, if ever, required to be indorsed. Pollan definitively and positively denied ever having sold the animal to appellant, and that he had received any check for same, or that he had ever had any connection with the check. The proof further showed that, soon after being arrested, appellant claimed to have paid for the animal in cash, giving as a reason why he knew he had so paid for her that he had borrowed part of the money from his wife, who was with him at the time. Mrs. Johnson was also introduced, who testified to the purchase of the animal on the day named and the payment therefor by check. She also admitted that she had, when the charge was first brought against her husband, stated that her husband had bought the animal, and that she had let her husband have part of the money to pay for her. Both appellant and his wife, however, state that at the time the charge was first brought, in view of the suddenness of the same and their residence among strangers, they were greatly upset, and did not at once recollect the correct method of payment until some time thereafter appellant found this check with other papers which he had thrown into an old stove, when, upon seeing the check, their memories were refreshed, and they remembered the true facts. This check, it should be further stated, was not marked paid until the 31st of December thereafter. Some suspicion was thrown on the check by reason of the fact that it appeared to have been written, or at least some parts of it, with different pencils and probably in a different handwriting. There is no doubt that the check was signed by appellant, and no doubt of its payment at the time when it purports to have been paid, but it was a question of great doubt as to whether it was ever given to Pollan and cashed by him, or whether, in fact, he ever knew anything about it. The evidence further shows that soon after the cattle were shipped appellant returned to Ellis county, and while there the owner of the animal charged appellant in substance with the theft. Appellant at the time said he did not know whether the animal was in Archer county or not, but when he went home he would ascertain and advise him. This statement, however, was denied by appellant. This seems not to have been satisfactory to Mr. Pollan, and on that day he wrote to the sheriff of Archer county and probably a constable near Dundee about his cow, which soon led to his receiving information from the constable that the animal was in appellant's possession in Archer county. Soon

thereafter Mr. Pollan went to Archer county, identified the animal, an affidavit was made against appellant, and in this manner the prosecution arose. There seems to have been an examining trial in which the owner of the animal testified and a son of appellant's whose testimony will hereafter be noted also testified. We have not undertaken to give a detailed statement of the facts which are quite lengthy and in a state of irreconcilable conflict, but this statement will be sufficient to illustrate the questions discussed.

1. When the case was called for trial, Hon. Jo A. P. Dickson, one of our district judges, appeared and assumed to act and did act as district judge in the trial of the case. Thereupon appellant filed what is called a "plea in limine," to the effect that Hon. A. H. Carrigan was the legal and duly elected district judge of the Thirtieth judicial district, of which Archer county is a part; that while he was absent he was not in any manner disqualified from hearing, trying, and determining said cause, and that of his own volition he had applied to Judge Dickson, district judge of the Fiftieth district, to try the case. It was claimed that Judge Dickson was not qualified to try the case, was not present by reason of any appointment or selection of any kind, and had no authority or right to hear and determine the cause. We think this plea was unavailing. Under the Constitution of this state (article 5, § 11), district judges are authorized to exchange. The Constitution says they may exchange, and that they shall do so when required by law. Whether at the time Judge Carrigan was holding court for Judge Dickson or for some one else is not made apparent. We think it may often happen that a district judge, who has the care of a family and sometimes cares of business, is authorized, when in his judgment fairly exercised it is necessary for his own health or to care for the health of his family, or to look after important business matters, to temporarily absent himself from his post of duty and by exchange, or by calling on the incumbent of an adjoining or adjacent district, provide the means for the continued holding of the court, and that no litigant in such case has a right to retire such exchanging judge from the bench. This case is wholly unlike that of *Oates v. State*, 56 Tex. Cr. R. 571, 121 S. W. 370, cited by appellant. In that case we held that the Governor has no authority to appoint a district judge to hold court, and that, where the authority of such person attempting to act as judge was challenged, the conviction would be set aside.

2. A more serious question, however, arises in respect to the action of the court in overruling appellant's first application for a continuance. This continuance was sought on account of the absence of John King, who was alleged to reside in Clay county, and George Taylor, who was alleged to reside in or near Arlington, in Tarrant county, or near Ft. Worth, in the same county. We think

there is no merit at all, so far as the application rests on the absent testimony of John King. The testimony showed practically without controversy that no such person as King had lived in the section where the parties resided for many years, and so conclusively established this fact that it is not a matter of serious dispute. The matter in respect to the absence of George Taylor is somewhat different. The application for continuance states that appellant expected to prove by said witness Taylor that: "On or about the 29th day of November, 1909, while the defendant was in conversation with J. A. Pollan near Price's cross-roads, in Ellis county, Tex., the witness Geo. Taylor was present and heard the defendant purchase from the prosecuting witness J. A. Pollan one certain brown heifer about 1½ years branded with — on the hip, the same being the animal with which he is now charged with theft, and that he saw the defendant Geo. R. Johnson write a check and hand it to the said J. A. Pollan in payment for said animal." In the application for continuance it is averred that in this cause request was made to the clerk for subpoenas as shown by his application attached to his application for continuance, which is marked "Exhibit A." An inspection of this application for subpoenas for witnesses does not show that the witness Taylor is among them. The subpoena alleged to have been issued for Taylor had been returned, and was not before the court or the subject of inspection. In the absence of any reference to this application for witnesses, it might be assumed that the subpoena had duly issued as stated, but, where in the application referred to as evidence that the subpoena had been issued the name of the witness does not appear, we do not think the court would be concluded by a mere allegation that a subpoena had been issued where the record negated the fact that same had been applied for. Again, it may be doubtful under the facts whether such a witness lived in that section, or was in that immediate section at the time alleged. Practically all the witnesses for the state say that there had been a man named George Taylor in that country, but that he had moved away some years before the date of the alleged theft. A witness named Stewart speaks of seeing Taylor some time in the fall. He is not at all definite when he saw him, but finally thinks it may have been in October. Appellant in his testimony says that Taylor rode by while the transaction or the purchase was going on. He says that Taylor had left the country something like two or three years ago, and that he understood him to say he had moved to Arlington, but would not be positive about that. It is wholly unlikely that Taylor would have testified to the matters, at least in any detail, which it is stated in the application he would have testified to. Touching this matter, appellant says: "I know a fellow named

George Taylor. He passed by there at the time I was writing this check. I just spoke, 'Howdy George,' and he rode on. We were standing there talking. I was standing with my foot on the wheel when he went by. I was talking to Pollan and trying to write the check. He did not stop with me." Mrs. Johnson gives the following account of Taylor's presence at the time the trade was made: "There was a gentleman passed along there while they were having that conversation. George Taylor passed along there. I knew Mr. George Taylor's face. I do not know where he lived. He had lived down in that community before that time. He had lived close to Tellico. It was about four miles from Price's cross-roads to Tellico. George Taylor was coming from Ennis and going towards Tellico. He was traveling horseback. He did not stop and talk with us. He merely passed along there. I could not tell you where Mr. Taylor was at the time Mr. Johnson was writing this check." A careful reading of this entire record has convinced us that it may well be doubted whether Taylor was in that country at the time of the alleged occurrence of these events, and that it is fairly certain that if he was in the country that it is wholly unlikely that his testimony would have gone further than to show his mere presence when appellant and his wife met Pollan. In view of the entire record, we are not prepared to say that there was any abuse of the discretion of the trial court in refusing this application for continuance. Of course, if it were clear that the application were insufficient, the action of the court could be sustained on that ground without the consideration of the question as to how far we would defer to the action of the trial court, and as to whether there had been an abuse of the discretion which the law commits to him. It is in doubtful cases, of course, that his discretion arises, and, before we would be authorized to reverse a judgment of conviction in respect to any matter committed to the discretion of the trial court, it should be fairly clear that this discretion had been abused. In view of all the facts and in view of the showing made by the district attorney as to the testimony given by appellant's son in the examining trial, it seems to us that under the circumstances it would be unwarranted on our part to substitute our discretion in a matter of this sort for that of a trial judge on the ground and more conversant with the facts than we can possibly be.

3. Among other grounds of the motion for a new trial urged by appellant was the newly discovered testimony of F. M. Power and Lon Morris, who reside in Archer county. By these witnesses it was expected to be shown that at the request of the district attorney trying the case they had examined the check mentioned above with the naked eye, and with the same glass that the jury examined said check with while they were delib-

erating on the verdict in the case, and after said examination that it was their opinion, based on experience and the examination, that the check was in the same condition when paid as it was when they examined it in so far as the name J. A. Pollan, written thereon, was written on the face of the check before the stamp of the Ennis National Bank was placed on said check, marking the same paid. This ground of the motion is met by the answer of the district attorney to the effect that these witnesses were present under subpoena in the courtroom on the trial, and could have been used by appellant if he had so desired; that they were called to the courthouse at the instance of the state's counsel, and that they were called on to examine the check offered in evidence; that each of them told the district attorney that they could not give an expert opinion upon the writing of said check; that such opinion as they could give would not shed any light upon the question as to whether said check had been tampered with or not; that for this reason they were not put upon the stand, but, on the contrary, with the consent of the defendant and his counsel, given in open court, submitted the check to the jury to be examined by them with a magnifying glass, and they were allowed with the consent of each party to take said check with them to the jury room and examine it at their pleasure.

It was also alleged that the testimony of one Phelps Terry, cashier of a bank at Ennis, was newly discovered, and was important to show the time of the payment of the check in question, the genuineness of appellant's signature, and the custom of the bank in respect to paying checks payable to bearer, and other facts of similar character. To our minds the date of the payment of this check and matters of that sort is not important. That the check was signed by appellant seems not to have been doubted. That it was paid on the 31st day of December, 1909, through the regular channel seems to have been unquestioned. The inquiry was, Was the check given to the owner of the cattle? The testimony of all the state's witnesses strongly negatives this fact. In the first place, it was shown that before the alleged purchase by appellant he had been offered \$20 for the animal and had declined to sell it. In the next place, it was shown by this owner as well as his brother and Castle that appellant in substance denied having taken the animal to Archer county, but, on the contrary, stated that he had cut her out of the herd, and made no claim of ownership or purchase. In the next place the statement of himself and wife with such circumstantial detail that the purchase had been made and paid for in cash was strikingly at variance with their later claim that she had been paid for with a check. Again, attached to the district attorney's contest motion is part of the sworn testimony of George R. Johnson, Jr., son of appellant and about 17 years

of age, and one of the persons who got up these cattle and helped drive them to Ennis, to the effect, in substance, that the animal in question which was identified by description and brand had got into the pasture in Ellis county, and that he cut her out of the bunch several times while going to Ennis, and; further, that this heifer was the same one brought in the car from Ellis county. He did not know whose heifer she was, but says: "I knew she was not ours." He further states: "I never notified any one that we had a stray heifer in our pasture."

4. We cannot accede to the suggestion made by the learned counsel that the evidence is insufficient to sustain the conviction. On the contrary, it seems to us there is ample evidence, if believed, to sustain same. Of course, it may be that an injustice has been done appellant. The jury, however, who have heard the evidence, and the learned trial court who had the witnesses before him, have on full investigation of all the facts found adversely to him. We ought not to interfere unless it was clear that there was some abuse of discretion committed by the trial court.

Finding no error in the record, it is ordered that the judgment of conviction be, and the same is hereby, in all things affirmed.

MCCORD, J., absent.

On Motion for Rehearing.

PRENDERGAST, J. The appellant's attorneys have filed a motion for rehearing herein, setting up nothing new, in effect, from what was considered and fully passed upon by this court in the original opinion herein. In addition to an earnest and able oral argument and presentation of the motion for rehearing, he has filed a written brief and argument insisting earnestly that the court reverse and remand this case.

To his motion for rehearing he has attached some original papers which we cannot consider. They do not go to the question of the jurisdiction of this court. Neither do they come within the spirit or letter of what was said by this court as to such papers in the case of *Spear v. State*, 26 Tex. App. 173, 9 S. W. 358.

We have carefully read this whole record, and have, in addition thereto, reread and considered such portions of it as bear upon the action of the court, and the previous opinion herein, on the question of the overruling of appellant's motion for a first continuance. We have reached the conclusion that we would not be justified in reversing and remanding this cause. We can see no necessity for a further discussion on the subject, as the original opinion herein rendered fully disposes of the whole matter to our satisfaction.

The motion for rehearing is therefore overruled.

FOREMAN v. STATE.

(Court of Criminal Appeals of Texas. Jan. 25, 1911.)

1. WITNESSES (§ 379*)—CRIMINAL LAW (§ 415*)—CONTRADICTION—IMPEACHMENT.

Where, in a prosecution for rape on a female under 15, defendant pleaded limitations, and there was a direct issue as to the time when he had his last act of intercourse with prosecutrix, she testifying that she had not had intercourse with other men than her husband and defendant, evidence that she had made statements to others that she had had intercourse with other men mentioned, at the time contended for by defendant, was admissible to impeach her and also as bearing on the question of limitations.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 1209, 1220-1222; Dec. Dig. § 379; * Criminal Law, Dec. Dig. § 415.*]

2. WITNESSES (§ 330*)—CROSS-EXAMINATION—SCOPE.

Where, in a prosecution for rape on a female under 15, defendant claimed that the prosecution was barred by limitations, and that he was not in the country where he could have had intercourse with her at the time claimed by the state, he was entitled to cross-examine prosecutrix directly as to the time of his last act of intercourse with her, calling attention to the circumstances by which he fixed the time.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 1106-1108; Dec. Dig. § 330.*]

3. RAPE (§ 4*)—DEFENSES—INTERCOURSE WITH OTHERS.

A person having intercourse with a girl under 15 years of age cannot justify himself because she may have had intercourse with other men.

[Ed. Note.—For other cases, see Rape, Cent. Dig. § 4; Dec. Dig. § 4.*]

Appeal from District Court, Cherokee County; James I. Perkins, Judge.

Fare Foreman was convicted of rape, and he appeals. Reversed and remanded.

Donley & Guinn, for appellant. John A. Mobley, Asst. Atty. Gen., for the State.

DAVIDSON, P. J. Appellant was convicted of rape upon a girl under 15 years of age; his punishment being assessed at 5 years' confinement in the penitentiary.

It is a conceded fact that appellant had intercourse with the girl. It is a conceded fact that she gave birth to a child on the 30th of December, 1907. The girl testified that appellant engaged in two acts of intercourse with her, one in 1905, and the other subsequently. The indictment was returned against appellant in the latter part of January, 1908. The girl also testified that the last act of intercourse was seven or eight months prior to the birth of her child; that Ben or Will Williams also had intercourse with her after the last act which she testified about occurring between herself and appellant; and that Williams was the father of her child, and not appellant. Appellant testified that he had two acts of intercourse with the girl, one in 1905 and the other in November, 1906, more than 12 months prior to the return of the in-

dictment. The question at issue and fought out in the court below was not the innocence of the defendant, or to show he had not had intercourse with the prosecutrix, but that more than 12 months had elapsed at the time of the return of the indictment, and that the cause of action was therefore barred by the statute of limitation. This, we judge from the record and contentions of the parties, was the crucial and main point in the case. If appellant's testimony is true, the action was barred. If the prosecutrix's testimony is true, it was not barred. The child is supposed to have come in the ordinary period of gestation. At least there are no facts showing that it was an immature child; the evidence being that the child was born on the 30th of December, 1907, and was still living at the time of the trial, and this occurred on June 30, 1910. Appellant offered quite a lot of testimony to attack the evidence of the prosecutrix: First, to show that her testimony was false as to her statement that any act of intercourse occurred between them during the year 1907, and, among other things, to support this view of the case, he introduced evidence to show that he was not in the country at the time, and placed in such position that he could not have had intercourse with her as she testified. Second, to show that her testimony was false in regard to her statement that her husband was the father of the child, she having testified that he had had intercourse with her some time after appellant, during the year 1907, and that that was the only time that he had had intercourse with her, and that this act came so close to the birth of the child that it was a physical impossibility that he could have been the father of the child, and that her testimony was false in this regard. He then offered testimony to show that other parties had had intercourse with her in the year 1907, in the early part of it, coming down to the month of April. This seems to have been offered both as original and impeaching testimony. If her testimony is true that her husband had intercourse with her after she says appellant did, and between the latter act of appellant, and birth of her child, as she testified, her husband could not have been the father of her child. If the other parties mentioned in the evidence had intercourse with the prosecutrix in the early part of 1907, as offered by appellant, this would tend to show that one of them was the father of the child. This became an important fact because around these questions and these matters hung the question of limitation. They were strongly in aid of appellant's alibi and strongly contradictory of the testimony of the prosecutrix.

The question of limitation being denied by the state's evidence and asserted by that of the appellant, it became a serious question

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

on the trial as to whether this indictment could be maintained under that plea of limitation. We are of opinion that this testimony was admissible. See *Bader v. State*, 57 Tex. Cr. R. 293, 122 S. W. 555; *Rice v. State*, 37 Tex. Cr. R. 36, 38 S. W. 801; *Knowles v. State*, 44 Tex. Cr. R. 322, 72 S. W. 398; *Skidmore v. State*, 57 Tex. Cr. R. 497, 123 S. W. 1129, 26 L. R. A. (N. S.) 466; *Pridemore v. State*, 129 S. W. 1112. The cases of *Bader*, *Rice*, and *Knowles*, supra, were rape cases, and the girl in each instance was under the age of 15 years at the time of the alleged rape. The prosecutrix also testified that she had not had intercourse with other men than her husband, Williams, and appellant, and it may be stated in this connection, also, that he proposed to prove her statements to others that she had had intercourse with the other men mentioned at the time contended for by the appellant. In view of the fact that it was a direct issue as to the time when appellant had his last act of intercourse with the prosecutrix, we think this testimony should have gone to the jury; it bearing upon the truthfulness of the prosecutrix and also the relation to the question of limitation.

There is another question arising out of the rejection of testimony by the court. The appellant proposed to cross-examine the witness directly with reference to the time that she says appellant had the last act of intercourse, by calling attention to the circumstances by which he fixed the time, and also to cross-examine her in relation to the time of the last, menstrual discharge in this connection. In other words, they complain that the court did not permit them to go fully into the cross-examination of the girl in regard to these matters. The court's ruling indicates that he regarded the intercourse with others as being wholly immaterial upon the general proposition that it could not be pleaded in justification of his intercourse with the girl. This would be a correct position if that was the question involved. We think the authorities are clear that the party having intercourse with a girl under 15 years of age could not justify himself for his act because she may have had intercourse with other men. That question is not here involved. The question was one of limitation, and these facts were sought, first, to show limitation, and, second, impeachment. It may be also stated that it is not always the case that such evidence can be introduced for impeachment; but we are not entering into any discussion of that question now and here, but, under the circumstances of this case, we are of opinion that this was important testimony to the defendant in regard to the two questions involved, and the exclusion of the testimony was of a material character. It is evident that under her tes-

timony her husband could not have been the father of her child, and she could not state the time of the intercourse, or did not state the time of the intercourse, with the appellant any more specifically than that it was seven or eight months prior to the time she gave birth to the child. If appellant was out of the country and did not have intercourse with her, of course, he could not have been convicted under this indictment, and it was competent to show that other men had intercourse with her in order to show that her testimony in regard to her alleged intercourse with the man who afterward became her husband was untrue, and also to show that one of the other parties who had intercourse with her at the proper time, may have been the father of her child, as well as to disprove her evidence in regard to the last act of intercourse with appellant.

These questions, we think, bore directly upon the issues suggested by appellant for reversal, and because of their rejection by the court the judgment is reversed, and the cause is remanded.

BUTLER v. STATE.

(Court of Criminal Appeals of Texas. Jan. 25, 1911. Rehearing Denied Feb. 15, 1911.)

1. CRIMINAL LAW (§ 404*)—EVIDENCE—BULLETS.

A bullet was sufficiently identified to make it admissible in evidence against accused, where the constable producing it testified that he obtained it from the undertaker and the undertaker identified it as one which he removed from decedent's body and delivered to the constable.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 891-893; Dec. Dig. § 404.*]

2. CRIMINAL LAW (§ 1001*)—BILL OF EXCEPTIONS—SUFFICIENCY.

A bill of exceptions to admission in evidence of a bullet removed from decedent's body insufficiently raises an objection that it did not appear that accused used a pistol shooting that kind of bullets, where the bill does not show that the evidence did not show he had such a pistol or was not the only person who shot.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 2828; Dec. Dig. § 1001.*]

3. HOMICIDE (§ 30*)—RESPONSIBILITY—AIDING OFFENSE.

One is responsible for a homicide whether he fired the fatal shot or not, if he was present aiding and assisting.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 48-51; Dec. Dig. § 30.*]

4. HOMICIDE (§ 171*)—EVIDENCE.

The state could show that bullet shells appearing to have been recently exploded and fresh bullet marks on a tree were found the next morning at the scene of the homicide.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 351-353; Dec. Dig. § 171.*]

5. CRIMINAL LAW (§ 1170½*)—HARMLESS ERROR—ADMISSION OF EVIDENCE.

Any error in permitting the state in cross-examining witnesses to good reputation to ask whether they had heard of certain misconduct

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

by accused was harmless, where they answered that they had not.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 3130; Dec. Dig. § 1170½.*]

6. CRIMINAL LAW (§ 1036*)—HARMLESS ERROR—ADMISSION OF EVIDENCE.

Accused cannot complain because the state was permitted in cross-examining accused's witnesses to his good reputation to ask whether they had heard of certain misconduct by him, where there was no objection to evidence of such misconduct.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2639-2641; Dec. Dig. § 1036.*]

7. WITNESSES (§ 392*)—CONTRADICTION.

A statement signed by accused's witness was admissible to contradict her, though she made it in jail, she not being accused.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 1249-1251; Dec. Dig. § 392.*]

8. HOMICIDE (§ 253*)—MURDER—EVIDENCE—SUFFICIENCY.

Evidence held to sustain a conviction of murder in the first degree.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 523-532; Dec. Dig. § 253.*]

9. HOMICIDE (§ 22*)—MURDER IN FIRST DEGREE—MOTIVE UNNECESSARY.

Motive is not essential to murder in the first degree, if it is committed with malice aforethought.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 35-38; Dec. Dig. § 22.*]

Appeal from District Court, Grayson County; J. M. Pearson, Judge.

Clifton Butler was convicted of murder, and he appeals. Affirmed.

H. D. Cumby, for appellant. John A. Mobley, Asst. Atty. Gen., for the State.

DAVIDSON, P. J. This conviction was for murder; the punishment being assessed at life imprisonment in the penitentiary.

1. A bill of exception recites that the witness Hughes testified that he had in his possession a bullet which he had procured from W. H. Halton, an undertaker of Denison; that the bullet had been in his possession since it was turned over by Mr. Halton, and was in the same condition as when delivered to him by Halton. Halton testified that he removed from the body of the deceased a bullet which he turned over to Hughes, the constable, and that the bullet exhibited to him is the same bullet. The bill further recites that, after said bullet had been thus identified and its custody accounted for in the manner above detailed, the state offered the same in evidence before the jury, and it was introduced for the inspection and consideration of the jury. The objection urged to this was that it had not been shown by the testimony that defendant owned or had in his possession a pistol which shot the character of bullet offered, and it had not been shown that since the day of the homicide the bullet had been in legal and proper custody, and had not been shown that said bullet was the one removed from the body of deceased, and because said bullet would

be irrelevant and immaterial, and its introduction in evidence would mislead the jury and prejudice the rights of defendant, and create in the minds of the jury the impression that the defendant shot into the body of the deceased the bullet so offered, when it was not sufficiently shown by the testimony that the defendant had in his possession or owned a pistol which shot the character of bullet introduced in evidence. These objections are not stated as facts or verified by the court as facts, but are simply grounds of objection urged by defendant. We are of opinion that, taking the testimony as stated in the bill, it is sufficiently shown that the bullet was the bullet that came from the body of deceased, and therefore admissible as evidence. The ground of objection that it was not shown that appellant had such a pistol is not stated as a fact, and on this phase of the bill the evidence may have shown conclusively that appellant did own such a pistol, and, further, the evidence may have shown that appellant did the killing, and was the only party who did any firing, and if we might speculate, if other parties were involved in the difficulty, yet if appellant was present, aiding and assisting in it, he would be responsible for the homicide whether he fired that particular shot or not. We do not think there was any error in these contentions, as the bill of exceptions presents the matter.

2. Another bill recites that the witness Hughes testified that on the morning after the shooting of Wesley Higdon, and near the scene of the shooting, he picked up from the ground seven empty hulls of the kind used in a 32-automatic pistol, and had cut from a bois d'arc tree near the scene of the shooting two steel bullets of the kind shot from 32 shells used in an automatic pistol; that since the shells and hulls came into his possession in the manner above detailed he had retained them in his custody and brought them to court. This testimony was offered to the jury and permitted to go before them as evidence. Appellant objected to this testimony and inspection of the shells and bullets by the jury, because same would be irrelevant and immaterial to any issue in the case, would be in the nature of hearsay and prejudicial to the rights of defendant, and because it had not been sufficiently shown by the testimony when said bullets were shot into the tree, whether before or after the alleged killing of the deceased, and further objection was urged that it had not been shown by the evidence that said shells were ejected from the pistol owned by the defendant, or thrown upon the ground by some other person. The court qualified the bill as follows: "The witness Hughes testified that the bullet marks on the tree had the appearance of being fresh; that the hulls had the appearance of being recently exploded; that the

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

bullets were such as would fit the shells. C. L. Stubblefield testified that he was present just before the shooting, and saw two parties lying near a hedge extending westward from this tree; that said parties were near said hedge and about eight feet west of said tree, and that said tree was about five feet from where deceased was standing and northwest of the deceased at the time of the shooting." The objections of appellant are not well taken. It seems from the facts stated in the bill that these shells were found at the scene of the homicide next morning, and that the bullet marks in the tree were fresh, and under the statement of the judge in qualifying the bill appellant and another party were placed at the scene of the homicide, which we think sufficiently connects up the matters introduced and to which exceptions were reserved, and they were properly admissible. They were facts evidently connected with the homicide, and, as circumstances, were introducible before the jury for what they were worth.

3. Another bill shows that several witnesses testified that they had known defendant for a period of years, some of them that they had known him two or three years, others that they had known him seven or eight years, that they were acquainted with his general reputation in the community in which he resided as being a peaceable law-abiding citizen, and that such reputation was good. On cross-examination of these witnesses, the county attorney asked: "Q. From this talk you have heard, you concluded that he has a good general reputation. You had not heard at that time anything about his living down there with a little sporting woman named Ida Edwards at the house where Fluffy Ruffles live, and where another woman called 'Dirty Legs'?" The witness answered in the negative. The county attorney further asked: "Q. You had not heard of his taking an automatic pistol in his hand, and chasing up Myrick avenue and following a party of boys going to prayer meeting, and drawing an automatic pistol from his pocket, or having it in his hand, and stating to those boys that some one had thrown a rock or something into the window at the Rich house and struck him, and asking them if they did it, and saying, 'By God he would find the son of a bitch who did it, and kill him before morning'?" The witness answered in the negative. He again asked: "Q. You never heard of his being a pistol 'toter,' and going around threatening people's lives for interrupting him down at the house of his woman?" The witness again responded in the negative. He again asked: "Q. If you had heard of his doing that way, you would not say he had a good reputation for being a peaceable, law-abiding citizen?" to which the witness responded in the negative. Objection was urged to all of this because hearsay, irrelevant, immaterial, and prejudicial to the rights of defendant; and, further, that there

was no proof in the case which warranted the asking of such questions, the questions themselves stating matter which had not been proven in the case. The court qualified this by stating that the witness Ida Edwards testified that she had been once an inmate of a home for fallen women at Pilot Point; that prior to the trial she was in a similar place at Dallas; that she admitted to the sheriff that she made her living by prostitution while she lived with Mrs. Rich; that she and Lela Ramsey were the only girls there, and that Lela and Allie Mingo, a man, occupied the same room at Mrs. Rich's; that she and the defendant were "friends," and that he did not stay there at night, but came there often; that she did not tell him about talking to another man. Hollis testified that he, John Apple, Oscar Heath, and Eugene Heath passed by the Rich house three nights before the shooting on their way to prayer meeting, and that, as they passed north along Myrick avenue, they heard some falling glass; that after they had gone four or five blocks two parties came up and asked them if they threw into the window at Mrs. Rich's and hit Butler; that one of them, the larger one, had an automatic pistol and exhibited it; that they told him they did not throw into the house, and that the party said that by God he would find the fellow who did it before morning and shoot him. Heath testified he was with Hollis at the time, and that the party who had the pistol and made the statement was the defendant. Lee Hollis also testified in this connection that he did not know the defendant, but Heath said it was "Butler." Being cross-examined, Hollis said at another time it was Arch Butler. On redirect he testified he was not sure whether it was Cliff or Arch Butler. This is the qualification of the judge. In the first place, appellant is not in any condition to complain, we think, of the answers of the witnesses because they were in the negative. They each stated in response to the questions that he had not heard of these matters. It was but the failure on the part of the witnesses to give testimony that was adverse to appellant. In other words, the county attorney was seeking to show by these witnesses that these matters on the part of appellant had occurred, and he was weakening the effect of their testimony establishing the good reputation, but failed to do so. From this standpoint we are of opinion that there was no injury, and there was no error shown in the bill; but, in the next place, taken in connection with the qualification of the judge, it is shown there was a basis for the questions asked by the county attorney. As before stated, there was no damaging testimony elicited, and, in fact, nothing but a denial of the knowledge of those facts. The county attorney, we think, was justified in asking the questions in view of some of the testimony which is cited in the qualification of the judge, but there is no objection urged

in this bill, or in the record to the introduction of the testimony of Ida Edwards and Heath and Hollis. As the bill presents this matter, there is nothing of which appellant can complain.

4. Another bill recites: That while Ida Edwards was on the witness stand the county attorney introduced in evidence the following portion of a statement by her: "I know Allie Mingo and Cliff Butler. They were at our house long about 6 o'clock yesterday afternoon. Allie Mingo and Cliff Butler were in the front room, I was in the room back of the front room. The room I was in adjoined the front room where they were. There is a door between these two rooms. It (the door) was open. I heard them talking. One of them said: 'We will lay for him to-night, and shoot him.' They said he was the one who had been rocking the house." Objection was urged to this on the ground that it was immaterial, irrelevant, and a statement made by the witness while in jail, and in the custody of the law, and the statement taken for the purpose of contradicting the witness, and further, that the witness was introduced at the preliminary trial of this defendant at Denison, Tex., by the state, and thereafter while in the county jail as a witness to testify against this defendant made said statement, and, further, that the state did not offer the entire statement of the witness and a portion of it would not be admissible. It seems that this witness was placed on the stand by defendant, and this was upon the cross-examination. There is a qualification by the judge to this in which it is stated that on cross-examination the witness was asked if the defendant was not present with Mrs. Rich and Allie Mingo at the time Mrs. Rich and Mingo talked about the killing of the party referred to, and she said he was not. She was asked by state's counsel if she did not on the day after the shooting sign a written statement at the jail, containing, among other things, the statement complained of in the bill and she denied it. The county attorney offered that portion of the statement set out in the bill. The witness had admitted her signature to the statement, and the county attorney testified that it is the identical statement made by the witness and correctly written down by him at the time and signed by her, and that it had not been changed. The court in his charge limited this matter to impeachment. We think this testimony was admissible for the purpose of impeaching the witness Ida Edwards, and it was on a material question. She had denied that the deceased was present when he and the other witness made the remarks with reference to shooting the party, and this statement that she made was contradictory. It was elicited on the cross-examination. The witness was defendant's witness, and this was a legitimate manner for impeaching the witness by the state, and

the fact that she was in jail, we think, would not be any reason why she could not be impeached as a witness. There is nothing to indicate that she was charged with the crime, and, in fact, it was indicated that she was not. The court, as above stated, limited this to its proper office of impeachment, and we are of opinion that the bill does not show any error.

5. The remaining complaint is that the evidence is insufficient to support the conviction of murder in the first degree. We have carefully examined the facts in this record, and have reached the conclusion that upon this ground the appellant is not entitled to a reversal. The evidence discloses that the homicide occurred about dark; that appellant and Allie Mingo, an Indian boy about grown, were lying near a bois d'arc hedge. The deceased and his friend Stubblefield had alighted from an engine and crossed the street, and were standing not far distant from where appellant and Mingo were lying down. While standing there seven shots were fired from a pistol supposed to be of an automatic character. One of the balls entered the body of the deceased just inside of the top of the hip, passing into the body which produced the fatal result. There is no serious question that appellant and Mingo were together, and that one of them fired the shots. There was a slight intermission between the firing of the shots. Some of the shots were fired rapidly, then an intermission, and then the remainder of the shots were fired. There seems to have been time sufficiently elapsing between the firing of the first and second batches of shots for them to have changed hands with the pistol, but whether this was so or not the parties were together, and the killing was done without any necessity, reason, or cause for it so far as this record discloses. Two or three days prior to the homicide the evidence discloses, further, somebody had thrown rocks at the house where appellant kept his mistress and Mingo also had his mistress; that they became infuriated, and followed some young men up the street and inquired if they had thrown the rocks. This they denied, and appellant remarked that he would ascertain who did it and kill the damn son of a bitch. It appears from the evidence that he was on the lookout for a party whom he thought had thrown the rocks, and it is shown also that the house had rocks thrown at it on more than one occasion. Appellant's contention that the case is not one of murder in the first degree seems predicated upon the fact that no motive was shown. Motive is not always necessary. Where the facts of the killing are shown, and the circumstances indicate that it was done with malice aforethought, and the circumstances raised it to the degree of murder in the first degree, it is not necessary, to sustain the conviction, that a motive be shown. If appellant killed this boy, believ-

ing he was the person who rocked the house, then the evidence is ample as to motive. But, in any event, appellant had seen Stubblefield and the deceased get off the engine just a few moments, or a very short time before the homicide, and had turned away and left them, and had gone to the place where they were lying down behind the hedge when Stubblefield and deceased came along and the killing occurred. Without going into a detailed statement further than the above, we are of opinion that the jury were justified in reaching the conclusion arrived at by their verdict.

Finding no reversible error in the record, the judgment is affirmed.

RAGSDALE et al. v. STATE.

(Court of Criminal Appeals of Texas. Jan. 18, 1911. Rehearing Denied Feb. 15, 1911.)

1. INFANTS (§ 68*)—CRIMES—PRIVILEGES AS TO TRIAL—DISMISSAL—JUVENILE DEFENDANTS.

Under Code Cr. Proc. 1895, art. 1145, as amended by act approved March 17, 1909 (Laws 1909, c. 54), providing that the judge of the district court may dismiss a prosecution or transfer a case to the juvenile docket, upon a showing that defendant is under 16 years of age, or, in his discretion, proceed to try the cause, the district court is not bound to dismiss or transfer upon such a showing, but may order the case tried before it.

[Ed. Note.—For other cases, see Infants, Cent. Dig. § 174; Dec. Dig. § 68.*]

2. CRIMINAL LAW (§ 1166½*)—APPEAL—HARMLESS ERROR.

Any error in trying a criminal case before the district court as an ordinary criminal case, instead of transferring it to the juvenile docket, on the ground that defendant was under 16 years of age, was not reversible where it was not shown that accused was injured thereby; the procedure being the same in either court.

[Ed. Note.—For other cases, see Criminal Law, Dec. Dig. § 1166½.*]

3. INFANTS (§ 68*)—INSTRUCTIONS.

It was not reversible error to charge, in a prosecution for burglary in the district court of an accused under 16 years of age, that the defendant in this case, "as in all criminal cases," is presumed to be innocent until his guilt is established by evidence beyond a reasonable doubt.

[Ed. Note.—For other cases, see Infants, Dec. Dig. § 68.*]

4. BURGLARY (§ 46*)—INSTRUCTIONS—SUFFICIENCY—DEFINITION OF THEFT—NECESSITY.

An instruction, in a prosecution for burglary of a store, stated that if the jury believed that accused, at the time and place stated, by force or breaking at night, or by breaking in the daytime, entered a house occupied by another with intent fraudulently to take corporeal personal property therein and belonging to such person, from his possession, without his consent, with intent to deprive him of the value thereof, and appropriate it to accused's use and benefit, and that accused at the time had discretion sufficient to understand the wrongfulness of his act, they should find him guilty as charged, but if the jury did not find these facts to be established they should acquit. *Held*, that the charge given required the jury to find all of the

elements of theft in order to convict, so that the court was not required to technically define theft in a separate charge.

[Ed. Note.—For other cases, see Burglary, Cent. Dig. §§ 111-120; Dec. Dig. § 46.*]

5. CRIMINAL LAW (§ 793*)—INSTRUCTIONS—FORM—CODEFENDANTS.

In a prosecution of two defendants for burglary, the court charged what was essential for conviction, and that if the jury believed from the evidence beyond a reasonable doubt they should find defendants guilty as charged, but should acquit if they did not find each of such facts to be established, and if they so found such facts as against one defendant, but not as against the other, they should convict the former and acquit the latter, and if they found defendants, or either of them, guilty, they should assess their or his punishment at confinement for not less than 2 nor more than 12 years, and, if they convicted both, they might assess the same or a different punishment as to each. *Held*, that the charge was sufficient to enable the jury to properly formulate their verdict if they should convict either, neither, or both of the defendants.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1939; Dec. Dig. § 793.*]

6. CRIMINAL LAW (§ 804*)—INSTRUCTIONS—NECESSITY OF WRITING.

Since under Code Cr. Proc. 1895, art. 753, providing that the jury's attention shall be called to an informal verdict brought in, and, with their consent, it may, under the court's direction, be reduced to proper form, the court could have orally called the jury's attention to the informality of a verdict brought in, and instructed them orally as to the correct form, or had it changed with their consent, it was not reversible error to orally instruct as to the form of their verdict in the first instance, though it may have been better to have instructed thereon in writing.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1948; Dec. Dig. § 804.*]

7. CRIMINAL LAW (§ 796*)—INSTRUCTIONS—PLACE OF PUNISHMENT.

Since Code Cr. Proc. 1895, art. 1145, as amended by act approved March 17, 1909 (Laws 1909, c. 54), requires the district judge, and not the jury, to find that an accused is under 16 years of age, so as to be punished as a juvenile, and also requires him to fix the place of imprisonment, upon conviction, the court was not required to instruct, in a prosecution of two defendants under 16 years of age, that the verdict should fix the place of confinement, but properly instructed that, if the verdict of conviction imposed a sentence of confinement for 5 years or less, the judgment of the court would be for confinement in the state institution for the training of juveniles, but would be for confinement in the penitentiary if the verdict was for more than 5 years' confinement.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1934; Dec. Dig. § 796.*]

8. INFANTS (§ 66*)—OFFENSES—CAPACITY.

One cannot be convicted of an offense committed while he was between the ages of 9 and 13 years unless he had sufficient discretion to understand the nature and illegality of the act; it not being sufficient that he knew generally the difference between good and evil or had the intelligence of ordinary boys of his age.

[Ed. Note.—For other cases, see Infants, Cent. Dig. § 172; Dec. Dig. § 66.*]

9. INFANTS (§ 66*)—CAPACITY TO COMMIT CRIME—EVIDENCE—BURDEN OF PROOF.

Where it appears that accused was between the ages of 9 and 13 years when the offense was committed, the burden is upon the

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

state to show that he had sufficient discretion to understand the nature and the illegality of the act.

[Ed. Note.—For other cases, see *Infants*, Cent. Dig. § 172; Dec. Dig. § 66.*]

10. INFANTS (§ 66*)—CAPACITY TO COMMIT CRIME—EVIDENCE—CIRCUMSTANTIAL EVIDENCE.

Proof that an accused, who was between the ages of 9 and 13 years when the offense was committed, had sufficient discretion to understand the nature and illegality of his act, need not be made by direct and positive evidence, but may be shown by circumstances.

[Ed. Note.—For other cases, see *Infants*, Cent. Dig. § 172; Dec. Dig. § 66.*]

11. INFANTS (§ 66*)—CRIMINAL CAPACITY—EVIDENCE—SUFFICIENCY.

Evidence, in a prosecution for burglary of one under the age of 16 years, held to support a finding that defendant had sufficient discretion to understand the nature and illegality of the act when the offense was committed.

[Ed. Note.—For other cases, see *Infants*, Cent. Dig. § 172; Dec. Dig. § 66.*]

12. BURGLARY (§ 41*)—PROSECUTION—SUFFICIENCY OF EVIDENCE—INTENT.

Evidence, in a prosecution for burglary, held to sustain a finding that defendant entered the building for the purpose of committing theft.

[Ed. Note.—For other cases, see *Burglary*, Cent. Dig. §§ 94-103; Dec. Dig. § 41.*]

Appeal from District Court, Cherokee County; James I. Perkins, Judge.

Sidney Ragsdale and another were convicted of burglary, and they appeal. Affirmed.

R. O. Watkins and John C. Box, for appellants. John A. Mobley, Asst. Atty. Gen., for the State.

PRENDERGAST, J. The appellants, two negro boys, were jointly indicted for and convicted of burglary and sentenced to confinement for three years in the state institute for the training of juveniles. The indictment did not allege their ages.

Before their trial the father of each filed a proper sworn statement in accordance with article 1145, Code Cr. Proc. 1895, as amended by Acts 1909, p. 100, approved March 17, 1909, that they were respectively under 16 years of age when they were alleged to have committed the offense, and at the same time, their attorneys filed a written motion asking the court to dismiss the case and order them tried as provided by the law for the trial of juveniles and delinquent children. The district judge, himself, heard the evidence under these statements, and motion, and held that they were both under 16 years of age. The evidence clearly established that they were both between the ages of 12 and 13 years. The judge refused to dismiss the case and try them as in the juvenile court, but tried them as adult defendants are tried. The first assignment of error is to the action of the judge in refusing to dismiss the case and order it tried as provided for the trial of delinquent children or juveniles.

While said article 1145, Code Cr. Proc. 1895, as amended by Acts 1909, p. 100, under which this proceeding was had, authorized the judge to "dismiss" or transfer the case to the juvenile record or docket in case he found the defendants were under 16 years of age, it did not require him to do so, but expressly states: "Or the judge of the district court may, in his discretion, proceed to try said cause as provided by law." Besides this, it is not required by law that any difference shall be had in the trial on the juvenile docket and that of the regular docket. Neither is it shown that any injury resulted in this respect to the appellants by the trial as had. Hence the lower court did not err as complained.

There is no reversible error in the charge of the judge in using the words "as in all criminal cases," where he charged "the defendants in this, as in all criminal cases, are presumed to be innocent until their guilt is established by evidence beyond a reasonable doubt," as complained of by appellants' next assignment.

The judge did not, in a separate paragraph, technically define theft, but did clearly require the jury to believe from the evidence beyond a reasonable doubt every element and fact which is necessary to make one guilty of theft. The court's charge on that subject is as follows: "Now, if you believe from the evidence beyond a reasonable doubt that the defendants did, in Cherokee county, Tex., on or about the 18th day of August, 1909, by force or breaking at night, or by breaking in daytime, enter a house occupied by H. P. Tilley, with the intent fraudulently to take corporeal personal property situated in said house and belonging to said Tilley, from his (Tilley's) possession, without his consent, with intent to deprive the owner of the value of the same, and to appropriate it to the use or benefit of themselves, the defendants, and that defendants, at the time of the commission of such act, had discretion sufficient to understand the nature and illegality of such act, then you will find the defendants guilty as charged in the indictment. Otherwise, if you do not find each and all said facts to be so established, you will acquit the defendants." There was no error in the court not defining theft in a separate paragraph or technical definition thereof. All the elements of theft, as said before, were required to be found by the jury before the defendants could be convicted.

By their fourth assignment the appellants complain that the court, by the written charge given, did not give the jury the respective forms of their verdict in case they found the defendants guilty, or not guilty, or one guilty and the other not guilty, etc.; and by their eighth assignment they complain that the court gave an oral charge in addition to

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

the written charge informing the jury of the several forms of verdict they were to render in certain contingencies. We will discuss these assignments together. We deem it unnecessary to quote the full charge of the court. Suffice it to say that to us the charge appears to distinctly set forth all of the law applicable to the case. After giving in substance all of the law applicable to the case and then applying it to the defendants in the particular case, he tells the jury what is essential for them to believe from the evidence beyond a reasonable doubt, and, if they believe all that, "then you will find the defendants guilty as charged in the indictment. Otherwise, if you do not find each and all of said facts to be so established, you will acquit the defendants, and, if you so find said facts as against one defendant but not as to the other, then you will convict the former and acquit the latter. If you find the defendants or either of them guilty, you will assess their or his punishment at confinement for not less than 2 nor more than 12 years; if you convict both, you may assess the same or a different punishment as to each." From this charge we believe any ordinary jury could clearly formulate the proper form of verdict in accordance with their findings. However, the record shows that, after the court had read its written charge in full to the jury, he stated that he would give verbal instructions as to the form of their verdict and immediately then orally instructed as follows: "If you find the defendants or either of them not guilty, let the form of your verdict be, 'We, the jury, find the defendants (or defendant) not guilty,' naming the one or both found not guilty. If you find both of the defendants guilty and assess the same punishment against both, the form of your verdict will be, 'We, the jury, find the defendants Sidney Ragsdale and Cleophis Arnwine each guilty as charged and assess the punishment of each at confinement for ——— years,' filling the blank with the term you assess. If you find both the defendants guilty and assess a different punishment against each, let your verdict state that you find the defendants, naming them, guilty, and let it also state the number of years' confinement which you assess as punishment against each. If you find one of the defendants guilty and the other not guilty, your verdict should state which one is found not guilty and which is found guilty, and the number of years' confinement which you assess as punishment against the one found guilty." The defendants and their attorneys were present when all this occurred. No express assent was given to what the judge orally stated to the jury as to the respective forms of their verdict, nor did the defendants or their attorneys at the time make any objection thereto. Nor did they make any complaint until they first filed their motion for new trial, two days after the defendants

were convicted, when they set up an objection to this action of the court by their motion for new trial. No complaint is anywhere made in the record by the appellants or their attorneys that these various forms of verdict given to the jury orally by the judge were in any way incorrect, or that there was any mistake or error thereabouts.

While it would have been, perhaps, better for the court to have given the forms of verdict in writing instead of orally, we conclude the appellants were in no way injured by this oral instruction. We think it clear, too, that, if the jury had gone out without this oral instruction as to the forms of their verdict, and had returned into the court a verdict which was informal, article 753, Code Cr. Proc. 1895, clearly authorized the court to then orally call their attention to the informal verdict and then have given them orally the correct form, or had it changed then and there with their consent. Hence we conclude there was no reversible error shown by either of said assignments.

The fifth assignment complains that the court erred in failing to instruct the jury to say by their verdict where the defendants should be confined. The sixth assignment is to the same effect in a different form, and the seventh, in substance, raises the same question differently. We will discuss these assignments together.

Article 1145, Code Cr. Proc., as amended by Acts 1909, above referred to, is as follows: "Art. 1145. When an indictment is returned by the grand jury of any county charging any male juvenile under the age of sixteen years with a felony, the parent, guardian, attorney or next friend of said juvenile or said juvenile himself may file a sworn statement in court setting forth the age of such juvenile at any time before announcement of ready for trial is made in the case. When such statement is filed, the judge of said court shall hear evidence on the question of the age of the defendant, and if he be satisfied from the evidence that said juvenile is less than sixteen years of age, said judge shall have authority to order such prosecution dismissed and to order such juvenile turned over to the juvenile court of said county, if there be any such court in said county, in which cases arising under the juvenile court laws are tried, through agreement of the judges of the district and county courts of said county, to be tried in said juvenile court in the manner prescribed by law for the trial of such juveniles in such cases, or the judge of the district court may, in his discretion, proceed to try said cause as provided by law. If said juvenile be convicted and the verdict of conviction is for confinement for five years or less, the judgment and sentence of the court shall be that the defendant be confined in the state institution for the training of juveniles instead of the penitentiary for the term of his sentence, and that such defendant be conveyed

to the state institution for the training of juveniles, by the sheriff or any peace officer designated by the court, and there confined for the period of his sentence, provided that such conviction and serving of sentence shall not deprive such defendant of any of his rights of citizenship when he shall become of legal age. If the verdict of the jury be for confinement for a longer period than five years, the defendant shall be confined in the penitentiary as now provided by law for persons convicted of a felony. Provided, that the age of the defendant shall not be admitted by the attorney representing the state, but shall be proved to the satisfaction of the court by full and sufficient evidence that the defendant is less than sixteen years of age, before the judgment of commitment to said institution shall be entered. The officer conveying any defendant to said institution shall be paid by the county in which said conviction is rendered the actual traveling expenses of said officer and defendant and five dollars additional; provided, further, that nothing in this act shall be held to affect, modify or vitiate any judgment heretofore entered, confining any defendant to the house of correction and reformatory, but the unexpired portion of any such judgment shall be fulfilled by the confinement of any such defendant in the state institution for the training of juveniles."

This article is materially different in many respects from the same article as enacted in 1889. Some of these changes are that the jury, by this amendment, is not required, as it was by the old act, to find the age of the defendants or that they were under 16 years of age. The judge himself is to find that. Neither is the jury authorized or required, as by the old act, to fix the place of the imprisonment of the defendants. This is also left to the judge, but the jury were correctly and clearly informed by the judge of the court, which was proper, as follows: "If your verdict is for conviction and is for confinement for five years or less, the judgment and sentence of the court will be that the defendants be confined in the state institution for the training of juveniles, instead of the penitentiary, for the term of his sentence; if your verdict is for more than five years, then the judgment and sentence will be confinement in the penitentiary for the term assessed by you."

Under the said article before it was amended in 1909, the appellants' assignments of error we are now discussing would probably have been well taken. These defendants, however, committed the offense after this article was enacted and were tried and convicted in accordance therewith. So that none of these assignments are well taken.

The ninth assignment questions the sufficiency of the evidence to support the verdict and judgment on the ground that the evidence fails to show that the defendants or either of them had sufficient discretion to

enable them to understand the nature and illegality of the acts constituting the offense charged. And their last assignment claims that the evidence was insufficient to show that the defendants went into the building mentioned for the purpose of committing the offense of theft.

The evidence clearly shows that the witness Tilley, whose storehouse was broken into, had been missing money from his cash drawer and suspected a former employé; that he and the city marshal laid plans to catch whoever this was; that after night and about good dark, the house having been locked up, Tilley secreted himself in the house and the city marshal at some place outside; that the defendants opened the closed fastened door by using some sharp instrument to push back the bar fastening it. This took them about a half hour. As soon as they opened the door, they came into the house, passing rapidly by where Tilley was secreted, going toward his cash drawer. Before they reached it, he halloed, when the appellants squatted down under the counter; one of them halloed. He then struck a light and found that the parties who had opened his door and were making toward his cash drawer were the defendants. Soon afterward, the city marshal came in and found Tilley holding the defendants. There was no other evidence explanatory of why these defendants broke into this house, nor why they were making their way rapidly toward Tilley's cash drawer. All of the circumstances detailed by the testimony, on the contrary, indicates that their purpose and object in breaking into this house was to steal and none other.

The testimony of Wheeler Ragsdale, the father of the Ragsdale defendant and kinsman of the other defendant, testified that each of the defendants were 12 years old in July, 1909. This offense was committed on or about August 13, 1909. He further testified that the defendants had been going to school off and on since they were within scholastic age, 8 years old; that each of them could read, write, and figure a little in arithmetic; that both had attended Sunday school and church; that he had always instructed his son to do right, and, from the surroundings he has had, says that he would know right from wrong; that the other boy was old enough to know right from wrong. The city marshal also testified that both boys could write; that he had seen them sign their bonds in this case; that the boy Sidney had hung around a barber shop and about town a good deal, the other defendant not so much; that the Ragsdale boy had worked also about a soda water business; that both of them had average intelligence for boys of their age.

The court also on this point correctly instructed the jury as follows: "No person shall, in any case, be convicted of any offense committed when he was between the ages of

9 and 13 years, unless it shall appear by proof that he had discretion sufficient to understand the nature and illegality of the act constituting the offense. When it has been shown that defendants were between 9 and 13 years of age, at the time of the alleged offense, then the burden of proof is upon the state to establish by proof the discretion above referred to, and it is not sufficient for this purpose that the minor defendant knew the difference between good and evil, in general, or that he had the intelligence of ordinary boys of this age, but it is required that the jury must be satisfied by the evidence beyond a reasonable doubt that the defendant had discretion sufficient to understand the nature and illegality of the particular act constituting the offense. But it is not required that this discretion shall be proved by direct and positive evidence; it, like any other fact, may be proven by circumstances." Then by the charge the jury is required to believe all of this beyond a reasonable doubt before they could convict. In the last paragraph the judge gave this charge: "If you find defendants committed the act charged, but have a reasonable doubt as to whether they had discretion sufficient to understand the nature and illegality of such act, you will acquit the defendants, or such one, if not both, as to whom you have such doubt."

The evidence was amply sufficient on the two grounds above complained of. The defendants were present at the trial. The court and jury saw them and could, with the evidence introduced, form a much better opinion than can this court. The jury found them guilty, the judge approved the verdict, overruled the motion for new trial, and in our opinion the evidence amply sustains the verdict and judgment.

It will be ordered that the case in all things be affirmed.

CRAVEN LUMBER CO. v. ALLEN et al.
(Court of Civil Appeals of Texas. Jan. 26, 1911.)

TRESPASS (§ 46*)—ACTION BY VENDOR—EVIDENCE.

In an action to foreclose a vendor's lien and to recover damages against a third person for a trespass impairing the security of the lien, evidence held insufficient to support the verdict against the third person.

[Ed. Note.—For other cases, see *Trespass*, Cent. Dig. §§ 123-127; Dec. Dig. § 46.*]

Appeal from District Court, Panola County; W. C. Buford, Judge.

Action by Bettie Chadwick and others who were substituted for her as plaintiffs on her death against S. M. Houston, M. J. Booth, and the Craven Lumber Company. From a judgment for plaintiffs against the last-named defendant, it appeals. Reversed and remanded.

Bennett Hill and Albert W. Webb, for appellant. H. N. Nelson, for appellees.

HODGES, J. On January 9, 1907, Mrs. Bettie Chadwick, joined by her husband, Daniel Chadwick, filed suit in the district court of Panola county asking for judgment against S. M. Houston for the balance due on certain promissory notes given as the purchase money for a tract of land described in the petition, and upon which the plaintiff claimed a vendor's lien. Recovery was also sought in the same action against M. J. Booth and the appellant, the Craven Lumber Company, for the value of 300,000 feet of timber, which it is alleged they cut and carried away from the premises upon which the above-mentioned lien existed. During the pendency of the suit Mrs. Chadwick died, and it was prosecuted by those who succeeded to her rights. Separate answers were filed by Booth and the Craven Lumber Company. The latter demurred generally and specially to the amended original petition, specially denied the charge of conversion, and made other defenses not necessary here to notice.

It seems that the case had been continued at several previous terms of the court. At the time it was tried and the judgment rendered from which this appeal is prosecuted, the attorney for appellant, the Craven Lumber Company, was absent, his demurrers were not called to the attention of the court, and no testimony was offered in behalf of that defendant. The case appears to have been reached and called for trial in regular order, and the absence of appellant's attorney is explained by his ignorance of the fact that the case had been set for a particular day. The court heard evidence offered by the plaintiffs, and instructed the jury upon the issues presented. A verdict was returned in favor of the plaintiffs against all the defendants. That against the appellant was for \$300 for the conversion of timber. The Craven Lumber Company alone has appealed.

The only assignment of error which we deem it necessary to consider is that which questions the sufficiency of the evidence to sustain the verdict. Appellant's liability depends upon whether it was responsible for damaging the security held by the appellees for the payment of the vendor's lien notes before referred to. The evidence relied upon to show this consisted of the testimony of witnesses who stated that 300,000 feet of timber had been cut from the land by Houston, the original vendee, presumably while he owned it, and that this had been sawed into lumber and some of it delivered to the appellant. How much appellant received is not shown. Nor was it proved by testimony which we regard as satisfactory that any of the lumber ever went into the possession

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

of the appellant. However, we do not wish to be understood as here holding that, even if it be shown that some or all of the lumber had been sold to appellant, it would for that reason alone be liable for a conversion. That question will remain open till presented upon a more complete record.

As it is, we do not think the evidence is sufficient to sustain a verdict rendered against the appellant, and the judgment will be reversed and the cause remanded.

GALVESTON TRIBUNE v. GUISTI et al.†
(Court of Civil Appeals of Texas. Jan. 12, 1911. Rehearing Denied Feb. 2, 1911.)

1. LIBEL AND SLANDER (§ 15*)—WORDS ACTIONABLE.

Unless the natural and reasonable conclusion to be drawn from an alleged libelous publication considered in connection with the circumstances alleged is that it was intended thereby to make a charge against or a statement concerning the person mentioned therein which would tend to injure his reputation and expose him to public hatred, contempt, ridicule, or financial injury, the publication is not libelous under Laws 1901, c. 26, defining libel, though the person mentioned may have suffered injury by reason thereof.

[Ed. Note.—For other cases, see Libel and Slander, Cent. Dig. §§ 1-9; Dec. Dig. § 15.*]

2. LIBEL AND SLANDER (§ 15*)—WORDS ACTIONABLE.

A newspaper article reciting that a barroom in a corner grocery near a medical school was in operation, that a young woman, the daughter of the proprietor and his assistant in the grocery business, was found behind the bar, and had stated that sales had been made to students, in violation of law, but that the sales were made without knowing that the buyers were students, and stating that the place had been complained of, and that it was understood that students inclined to patronize such places were attracted there for some reason, did not justify the inference that it was intended to impute unchastity to the daughter, nor could the publisher have reasonably anticipated that it would have caused the daughter to lose the respect of her acquaintances, nor have tended to injure her reputation and expose her to public hatred, ridicule, or contempt or financial injury, and hence was not libelous.

[Ed. Note.—For other cases, see Libel and Slander, Cent. Dig. §§ 1-9; Dec. Dig. § 15.*]

3. LIBEL AND SLANDER (§ 97*)—ACTIONS—QUESTIONS FOR COURT—INNUENDOES.

The question whether an innuendo charged in the petition in an action for libel is a reasonable inference from the statement complained of, and the facts alleged in connection therewith, is a question for the court, and unless such question can be decided affirmatively, a general demurrer to the petition must be sustained.

[Ed. Note.—For other cases, see Libel and Slander, Cent. Dig. §§ 234-236; Dec. Dig. § 97.*]

4. LIBEL AND SLANDER (§ 125*)—GENERAL VERDICT—SPECIAL DAMAGES.

In an action for libel, where the court charged that if the jury found for plaintiff on a certain claim, they could award her general damages, but if they found for plaintiff on the claim that the publication charged her with want of chastity, they might award her special

damages, and suggested forms of verdict in case both general and special damages should be found, and in case only general damages should be found, and the jury used the form of verdict granting plaintiff only general damages, the verdict was, in effect, a finding against plaintiff on the claim that the publication charged her with unchastity, and, where not complained of, was conclusive against the right to recover upon such claim.

[Ed. Note.—For other cases, see Libel and Slander, Cent. Dig. § 374; Dec. Dig. § 125.*]

5. APPEAL AND ERROR (§ 1175*)—DISPOSITION OF CAUSE—REVERSAL—RENDERING FINAL JUDGMENT.

Ordinarily, when the judgment of a trial court overruling a general demurrer to a petition is reversed, the appellate court should not render a judgment for appellant, but such rule does not apply where it appears that it is not possible to so amend as to state a cause of action.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4573-4587; Dec. Dig. § 1175.*]

Appeal from District Court, Galveston County; Clay S. Briggs, Judge.

Action by Pietrina Guisti and others against the Galveston Tribune. Judgment for plaintiffs, and defendant appeals. Reversed and rendered.

Wm. B. Lockhart, for appellant. Marsene Johnson, Geo. G. Clough, Aubrey Fuller, and Elmo Johnson, for appellees.

PLEASANTS, C. J. This is a suit to recover damages for libel, brought by the appellee Pietrina Guisti against the Galveston Tribune, a corporation, engaged in the business of publishing a newspaper in the city of Galveston, known as the Galveston Tribune. Before the trial in the court below the plaintiff intermarried with Amerigo Collucci. The amended petition upon which the cause was tried, and in which the husband joined pro forma, alleged that the defendant on or about the 14th day of December, 1908, through its newspaper, the Galveston Tribune, a daily paper having a large circulation in Galveston county and throughout the state of Texas, falsely, maliciously, recklessly, and wantonly printed, published, and circulated a malicious, slanderous libel of and concerning plaintiff, Pietrina Collucci, who was on said date an unmarried woman over the age of 21 years and resided with her father, T. Guisti, in the city of Galveston. The publication alleged to be libelous and the allegations of the petition upon which plaintiffs seek recovery are as follows:

"No More Liquor Sold to Students.

"As stated in the Tribune Friday evening, one of the first licenses issued by the city since August 1st for the conducting of a corner grocery saloon within the residence section prohibited by the districting ordinance was to T. Guisti, to sell liquor at 902 Mechanic street. One of the main objections

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

† Writ of error granted by Supreme Court.

to this saloon previous to the passing of the ordinance was its close proximity to the State Medical College, and the allegation that the proprietor of the place violated the provisions of the Baskin-McGregor law and the conditions of his bond by selling liquor to students. With the reopening of the barroom, the complaints to the dean of the college have been again renewed, and a personal investigation of the place by a representative of this paper this morning revealed the following facts: The place is open as usual for business, and, when the reporter called, liquor was being sold over the bar, together with lunch, in fact at the time a man was standing at the bar drinking a bottle of porter and eating a sandwich. The proprietor of the place was not present, but a young woman behind the bar, in answer to the question as to whether or not students were patrons of the place, stated in an excited way that 'She was going to tell Dr. Carter to put bells around the necks of the students, so they could tell who they were. When we ask young men if they are students, they get mad and tell us that it is none of our business. We can't tell, and we are here to do business.' Asked if there had been any sales to students since the place reopened, she admitted that there had been, and that it took place on Saturday morning. "Two young men came in and asked for some wine. They told me they were not students, and I sold them what they wanted; then after they had drank it, they said they were students and laughed." On the door leading from Ninth street into the barroom annex, on the wall facing the door and behind the bar, are signs printed by hand on white cardboard, with the following wording: 'No Liquor of any Kind Sold Here to Students.' The young woman pointed to these signs and stated that they were put there on Saturday evening for the students to read themselves when they came in. Asked if she was not familiar with the provisions of the law regulating such sales, and that dealers are supposed to know whether customers are students or not, she answered 'That she did not know for sure,' but that 'they did not want to sell to students.' Bond has such provision. It is set forth in all liquor dealers' bonds, among other things, that the bond is conditional that the principal, agent, or employé will not sell or permit to be sold or given away any spirituous, vinous or malt liquors, or medicated bitters to a student of any institution of learning. It is also stated by legal authorities that ignorance of this law or of the fact that the dealer or employé cannot tell who a student is does not in any manner excuse; they are supposed to know their customers, and in case of doubt to take the safe course and refuse to sell. The place named above has been complained of, and it is understood from neighbors that the

students inclined to patronize such places are attracted there for some reason. On two of the opposite corners are located corner groceries which formerly had bar annexes, but neither of them have as yet renewed their licenses. A woman in charge of one of the places stated this morning that she did not intend to take out a license, as she realized that the time was short when the place would be allowed to exist, and she was satisfied to continue her other business without beer."

The plaintiff further alleged that the "young woman" referred to by defendant in the article above quoted, meant and was by defendant intended to mean the plaintiff, Pietrina Collucci (née Guisti); and that said article is wholly false and untrue, and is scandalous, libelous and defamatory.

"Plaintiffs further alleged that said false, slanderous, libelous statement published and circulated by defendant, as aforesaid, on said December 14, 1908, was read by a great number of citizens of Galveston county, Texas, and was read by numbers of citizens of the state of Texas residing in other counties in said state, to the shame, humiliation, and distress of mind and injury to the reputation of the plaintiff, Pietrina Collucci (née Guisti) and to her great damage, general and special, as hereinafter fully set out.

"Plaintiff further alleged that by the following words used in said publication, to wit, 'The proprietor of the place was not present, but a young woman behind the bar, in answer to the question as to whether or not students were patrons of the place, stated in an excited way that "she was going to tell Dr. Carter to put bells around the necks of the students, so they could tell who they were." "When we ask young men if they are students, they get mad and tell us that it is none of our business. We can't tell, and we are here for business." Asked if there had been any sales to students since the place reopened, she admitted that there had been and that it took place on Saturday morning. "Two young men came in and asked for some wine. They told me they were not students, and I sold them what they wanted; then after they had drank it they said they were students and laughed." Defendant meant and intended to mean and publish that the plaintiff, Pietrina Collucci (née Guisti), was behind the bar, meaning the barroom; and that defendant meant and intended to mean and publish that said plaintiff was offering for sale and selling and had sold intoxicating liquor in a barroom to students of an institution of learning in violation of law.

"Plaintiff further alleged that the published statement of defendant that she, the said Pietrina Collucci (née Guisti), was a barmaid, serving and selling intoxicating liquors in a common barroom, caused her to lose the respect and esteem of her neigh-

bors and acquaintances in the community in which she lived, and that the published statement of defendant, that she, said plaintiff, Pietrina Collucci (née Guisti) was aiding and abetting and conniving at violations of the law regulating the sale of intoxicating liquors in the state of Texas, impeached her integrity, and caused an ill opinion of her in the community in which she lives, and caused her to sustain damages by reason of the injury to her reputation as a woman of integrity, good conduct and good demeanor in the community in which she lives, and caused her to suffer much mental anguish and humiliation.

"And said plaintiff, Pietrina Collucci (née Guisti), further alleges that by the use of the following false, slanderous, and libelous words in said published statement, to wit, 'The place named above has been complained of, and it is understood from neighbors that the students inclined to patronize such places are attracted there for some reason,' defendant meant, as an addition to the other matters hereinbefore quoted, that this plaintiff was used by her father as a barmaid in said barroom for the purpose of attracting medical students and other persons there for patronage; and meant and was intended to mean by the defendant that this plaintiff was a person of loose morals, and a person addicted to lascivious conduct, and that she, this plaintiff, was an attraction placed in said barroom by her father to entice and attract said medical students and other persons into said barroom, and that said published words last above quoted meant, and were by defendant intended to mean, that this plaintiff was an unchaste woman.

"And this plaintiff, Pietrina Collucci (née Guisti), alleges that by reason of said last-quoted false, slanderous, and libelous words of and concerning her, with the imputations and insinuations of defendant as aforesaid, caused her to sustain special injury and damages to her reputation as a woman of good morals, good conduct, good propriety and virtue, and caused her to suffer much mental pain, agony, distress of mind and humiliation, and degraded her in the community in which she lives.

"And plaintiffs further allege that the whole of said libelous article tended to injure the reputation of the said young lady plaintiff, and thereby exposed her to public hatred, contempt, ridicule, and disgrace in the community in which she lives.

"And plaintiffs further allege that the whole of said false, scandalous, and libelous article published and circulated by defendant, on the date aforesaid, did bring odium upon the plaintiff, Pietrina Collucci (née Guisti); and did induce an ill opinion of her in and about the community in which she resides.

"And plaintiffs further allege that at the time of said libelous publication by defend-

ant, the plaintiff, whose name at that time was Pietrina Guisti, was a lady over the age of 21 years, and that she resided at the home of her father, T. Guisti, and assisted him in his grocery store, but not in the room in which malt liquors were by her father legally sold; and that said plaintiff, Pietrina, was the only young woman living or employed in the dwelling and store of her said father, all of which defendant and the neighbors and acquaintances of said plaintiff then and there well knew, and the defendant intended to and did identify and refer to her as the young woman libelously referred to in said publication.

"Wherefore plaintiffs allege that defendant by reason of the publication and circulation of said false, scandalous, libelous, slanderous, and defamatory statement and statements of and concerning said Pietrina Collucci (née Guisti), did cause her to sustain great damage by causing her to suffer great mental pain and anguish, and shame, humiliation, and disgrace, and did cause her to sustain special damages and injury to her fair name, good reputation, and integrity, to her total damage twenty thousand dollars. Wherefore plaintiffs pray as in their original petition filed heretofore that defendant be cited to appear and answer this petition; and that on final trial hereof, plaintiff, Pietrina Collucci, have judgment against defendant for her said damages in said total sum of twenty thousand (\$20,000) dollars, for general relief, with costs of suit."

Defendant's answer contains a general demurrer and general denial, and also special exceptions and pleas, the nature of which it is unnecessary to state. The trial in the court below with a jury resulted in a verdict and judgment in favor of plaintiffs for the sum of \$5,000.

Appellant's first assignment of error complains of the judgment of the trial court overruling the general demurrer to the petition. The proposition advanced under this assignment is, in substance, that the words used in the publication complained of are not libelous per se, and the facts alleged, considered in connection with the language of the publication, are not sufficient to justify or support the innuendoes charged in the petition. An act of the Legislature of this state passed in 1901 (Acts 1901, p. 30) defines a libel as follows: "A libel is a defamation expressed in printing or writing, or by sign or pictures, or drawings, tending to blacken the memory of the dead, or tending to injure the reputation of one who is alive, and thereby expose him to public hatred, contempt or ridicule, or financial injury, or to impeach the honesty, integrity or virtue or reputation of any one, and thereby expose such person to public hatred, ridicule, or financial injury."

This statute does not enlarge the common-law definition of libel as previously understood and declared by our courts, and mani-

festly its purpose was only to fix certainly and clearly by statute a definition which might not be changed or modified by the courts to meet the supposed justice of a particular case. Unless the language of the publication upon which the libel is predicated, taken in connection with the facts and circumstances alleged by the complainant, are reasonably calculated to produce the results stated in the statute, viz., "to blacken the memory of the dead," or "to injure the reputation of one who is alive, and thereby expose him to public hatred, contempt, or ridicule or financial injury, or to impeach the honesty, integrity, or virtue or reputation of any one, and thereby expose such person to public hatred, ridicule or financial injury," no libel is shown. Tested by this statute, we cannot see anything in the language of the publication considered in itself, or when taken in connection with the facts or circumstances alleged in the petition, which could reasonably cause any injury to Mrs. Collucci. If this is true, the fact that she did suffer injury as claimed by her by reason of said publication would not make the appellant liable therefor. The principle that one shall only be held accountable for such natural and probable consequences of his acts or omissions as he might reasonably have anticipated is sound in law and in morals, and is firmly fixed in the decisions of the courts of this state. This principle has been uniformly recognized and applied in determining the question of whether a publication complained of as libelous will support such charge.

In the case of *Belo & Co. v. Smith*, 91 Tex. 225, 42 S. W. 850, it is held that in determining this question the whole publication must be considered, and the question is what effect the publication would have upon the mind of the ordinary reader. This is but another way of saying that unless the natural and reasonable conclusion to be drawn from the language of the publication, considered in connection with the facts and circumstances alleged in the petition, is that it was intended thereby to make a charge against, or a statement concerning, the person mentioned therein, which would tend to injure his reputation and expose him to public contempt, hatred, ridicule or financial injury, the publication is not libelous.

The petition alleges that the complainant "resided at the home of her father, T. Guisti, and assisted him in his grocery store, but not in the room in which malt liquors were by her father legally sold, and that said plaintiff, Pietrina, was the only young woman living or employed in the dwelling or store of her father." The corner grocery with the barroom annex in which malt liquors were sold was legally conducted by plaintiff's father, and she lived with him at that place, and was his assistant in carrying on the grocery business. Under these circumstances it could not have been rea-

sonably anticipated by the defendant that the publication of a statement that the plaintiff sold beer in her father's annex to his grocery business where he was lawfully engaged in the business of selling malt liquor "would cause plaintiff to lose the respect and esteem of her neighbors and acquaintances in the community in which she lived" or would tend to injure her reputation and thereby expose her "to public hatred, contempt, or ridicule or financial injury." The statement that she had admitted making a sale to students of the University does not charge her with a crime, and when the publication further shows that she did this innocently, without knowing that she was selling to students, and that she did not intend or desire to sell to students, but was imposed on in the matter, such publication does not support the innuendo that the complainant was thereby charged with "aiding and abetting and conniving at violation of the law regulating the sale of intoxicating liquor." No ordinary reader would place such construction upon the publication, but on the contrary the publication as a whole shows that she and her father intended and were trying to conduct the business in accordance with the requirements of his liquor dealer's bond.

No facts are alleged which would justify the innuendo charged in the petition that by the statement in the publication, "The place named above has been complained of, and it is understood from neighbors that students inclined to patronize such places are attracted there for some reason," defendant intended to reflect upon the virtue and chastity of the complainant. Such an inference from this language is wholly unreasonable. It is inconceivable that a young woman whose reputation for virtue and chastity is above reproach as plaintiff's must be presumed to be, could have that reputation injured by the statement above quoted used in the connection in which it appears in the publication. It is perfectly apparent from the publication that the complaint against the house mentioned in the statement was that students of the University obtained liquor there, and the most reasonable and natural inference from the remainder of the statement is that students who were inclined to patronize places where liquor was served were attracted to this place either because they could more easily obtain liquor there, or were treated with more consideration and given more attention and better service than at other places of this kind. To impute to this statement a meaning so at variance with the ordinary meaning of the words used when there is nothing in the circumstances and facts shown in the petition which tends in the least to indicate that the statement was intended to charge the plaintiff with a want of chastity or to intimate any doubt of her virtue is a wrong to both plaintiff and defendant. No greater

outrage can be perpetrated upon a virtuous woman than an imputation of her chastity, and defendant should not be held guilty of this outrage when the statement made by it, considered in the connection with the facts and circumstances under which it was made, cannot be reasonably construed as a reflection upon plaintiff's chastity. The question is not what construction the witnesses in the case may put upon the statement, but what is its reasonable and natural meaning in view of the facts and circumstances under which it was made as alleged in the petition.

The statement may be ambiguous in the sense that the attraction referred to is not pointed out, but this ambiguity will not support an innuendo that is not a reasonable and natural inference from the words used, considered in connection with the facts shown. Suppose the innuendo charged in this case was that gambling was carried on at plaintiff's place of business, and no facts or circumstances were alleged which would make it reasonably probable that the statement would be so understood by the ordinary reader. Can there be any doubt that in such case the statement should be held insufficient to support the innuendo? We think it just as clear that this statement does not support the innuendo that plaintiff was unchaste. The fact that the publication complained of will justify two or more reasonable inferences does not authorize an unnatural and unreasonable inference to be drawn therefrom. The question of whether the innuendo charged in the petition is a reasonable inference from the statement complained of and the facts alleged in connection therewith is a question for the court, and unless this question can be decided affirmatively a general demurrer to the petition should be sustained. *Harris v. Santa Townsite Co.*, 125 S. W. 77; 13 Enc. Pl. & Pr. 54; 25 Cyc. 545, and cases there cited. The power of newspapers in advancing and conserving the moral and material welfare of the communities in which they are published and circulated is great, and so is their power to cause irreparable injury to the individual citizen by the intentional or careless publication of false statements affecting his personal character or private business. They should be held to strict responsibility for injury caused by false publications appearing in their columns, but are not liable for damages caused by an unwarranted and unreasonable construction of language used by them when there is nothing in facts shown to justify the conclusion that such construction was intended by the writer or would be given the language used by the ordinary reader. It follows from what we have said that the trial court should have sustained the general demurrer.

The trial court instructed the jury in substance that if they found for the plaintiff on the claim that the publication charged plaintiff, Pietrina Collucci, with being a common barmaid, and with aiding, abetting, and conspiring at violations of the law regulating the sale of liquor they should award plaintiffs general damages, but if they found for plaintiffs on the claim that the publication charged said plaintiff with a want of chastity they might award plaintiff special damages; and further instructed them:

"(12) If you should find for the plaintiff, the form of your verdict, should you find for both general and special damages, may be substantially as follows: 'We, the jury, find for the plaintiff in the sum of \$—— as general damages, and \$—— as special damages.'

"If you should find for the plaintiff general damages only, the form of your verdict may be substantially as follows: 'We, the jury, find for the plaintiff in the sum of \$—— as general damages.'

"If you find for the plaintiff for special damages only, the form of your verdict may be substantially as follows: 'We, the jury, find for the plaintiff for \$—— as special damages.' Filling in the blank space in each instance with such sum, if any, which you may believe plaintiff entitled to recover, if anything."

The verdict returned by the jury is as follows: "We, the jury, find for the plaintiffs in the sum of \$5,000.00 as general damages."

The effect of this verdict under the charge given by the court is a finding against plaintiffs on the claim that the publication charged Mrs. Collucci with unchastity. This finding is not complained of by appellees, and is conclusive against their right to recover upon this claim. Ordinarily, when the judgment of a trial court overruling a general demurrer to a petition is reversed, the appellate court should not render a judgment in favor of the appellant because the plaintiff in such case by an erroneous ruling of the trial court ought not to be deprived of his right to amend his petition. The rule, however, should not be followed when it appears, as in this case, that it is not possible to so amend as to state a cause of action.

We do not think a charge of libel can be predicated upon the publication complained of in view of the undisputed facts pleaded and proven by the plaintiff in regard to the first innuendo charged in the petition and the verdict of the jury upon the second.

We are of the opinion that the judgment of the court below should be reversed and judgment here rendered for the appellant, and it is so ordered.

Reversed and rendered.

CONROY et al. v. SHARMAN et al.†

(Court of Civil Appeals of Texas. Jan. 5, 1911. Rehearing Denied Feb. 2, 1911.)

1. EVIDENCE (§ 273*)—DECLARATIONS—BY PERSONS IN POSSESSION AS TO OWNERSHIP.

In trespass to try title, in which plaintiff claimed under a deed from her grandfather, and defendant claimed under a deed from the latter's wife, defendant's mother, the evidence showed that the land of which that claimed was a part was conveyed to defendant's mother in 1874, the deed not showing on its face that it was conveyed as separate property. A son of the mother testified that he lived near her for a number of years, during which time she claimed exclusive ownership of the land, and had told him that she owned a negro, which her husband traded for the land, and had the land deeded to her to compensate her for the negro. Another witness testified that some time in the 70's he had a conversation with the oldest child of defendant's mother, who is now dead, and that such son said that the land was his mother's, but did not say why. The statement by defendant's mother as to her ownership was not disputed at the time, and she openly asserted ownership, and sold part of the land during her lifetime, without any subsequent claim by any of the children. The transactions testified to by such witnesses occurred more than 50 years before suit was brought, and the parties thereto had long been dead. *Held*, that the testimony as to the declarations of defendant's mother as to her ownership of the land, and how she became the owner, was properly admitted, and was not objectionable as hearsay, and because made without the presence of plaintiffs or their privies in title; it being impossible to secure better evidence on the question in view of the long lapse of time.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 1108-1120; Dec. Dig. § 273.*]

2. APPEAL AND ERROR (§ 1050*)—HARMLESS ERROR—ADMISSION OF EVIDENCE—FACTS OTHERWISE PROVEN.

Any error in admitting evidence is not reversible where similar evidence of the same fact was admitted without objection.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4153-4160; Dec. Dig. § 1050.*]

3. HUSBAND AND WIFE (§ 133*)—SEPARATE ESTATE—SUFFICIENCY OF EVIDENCE.

Evidence in trespass to try title in which defendant claimed under a deed from his mother, *held* to show that his mother owned the property as her separate estate.

[Ed. Note.—For other cases, see Husband and Wife, Cent. Dig. §§ 487-494; Dec. Dig. § 133.*]

4. APPEAL AND ERROR (§ 1028*)—HARMLESS ERROR—AFFECTING PARTY NOT ENTITLED TO SUCCEED.

Where, under the undisputed evidence, the jury could have rendered a verdict only for defendant, any error committed at trial was harmless to plaintiff.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4034; Dec. Dig. § 1028.*]

Error from District Court, Harris County; Charles E. Ashe, Judge.

Action by Henry Conroy and others against Joseph R. Sharman and others. Judgment for defendants, and plaintiffs bring error. Affirmed.

S. H. Brashear, J. W. Lockett, and J. A. Camp, for plaintiffs in error. E. I. Kendrick, Hutcheson & Hutcheson, Ira P. Jones, A. R. & W. P. Hamblen, J. E. Walton, and Guy Graham, for defendants in error.

PLEASANTS, O. J. This is an action of trespass to try title brought by plaintiffs in error against defendants in error to recover title and possession of an undivided one-half interest in two tracts of land of 76½ acres each, parts of a tract of 354 acres situated in Harris county. The plaintiffs claim by inheritance under Jesse R. Sharman and the defendants claim by purchase under Harriet Caroline Sharman.

The land was conveyed to Harriet Caroline Sharman by R. D. Westcott on August 12, 1854. At the time this conveyance was made Harriet Caroline Sharman was the wife of Jesse S. Sharman. The deed does not in apt words convey the land to the wife as her separate property to be held for her sole use and benefit, nor does it recite that the consideration for the conveyance was her separate property or funds. Jesse S. Sharman died in 1867, and Harriet Caroline Sharman in 1885. The plaintiffs are children of two of the daughters of said Jesse S. Sharman, and Harriet Caroline Sharman. The defendant Joseph R. Sharman claims under deed from his mother, the said Harriet Caroline Sharman, executed in 1881, and the other defendants, who are numerous and need not be named, under deeds from Joseph R. Sharman. In addition to pleas of not guilty, all of the defendants, save two who filed disclaimers, pleaded the limitations of 3, 5, and 10 years. The cause was tried with a jury, and a verdict and judgment were rendered in favor of defendants. The jury were instructed to return a verdict in favor of some of the defendants on their pleas of limitation, and as to the other defendants the cause was submitted upon special issues. In response to questions propounded to them by the charge the jury found that the consideration given for the conveyance from Westcott to Mrs. Sharman was her separate property, and that the deed was made to Mrs. Sharman at the request of her husband, and with the intention on his part to have the land conveyed to her as her separate property.

Upon these issues the record discloses the following facts: Jesse Sharman, who died in 1867, left nine surviving children, and these children, with one or two exceptions, lived on or near the property in question until after the death of Mrs. Sharman in 1885, and none of them ever questioned the claim of their mother to the sole ownership of the land in controversy which she continuously asserted until she sold it to defendant Joseph R. Sharman in 1881. All of the children living at the time this suit

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

† Writ of error denied by Supreme Court.

was brought in October, 1907, refused to join therein, and the plaintiffs in the suit are the children of Nancy Sharman, who first married Conroy and then Davis, and Eliza Sharman, who married Stephanes, both of whom were daughters of Jesse and Harriet Sharman. Mrs. Stephanes died in 1872 and Mrs. Davis in 1895, and neither of them is shown to have ever asserted any claim to the land. During Mrs. Sharman's lifetime she openly and notoriously asserted exclusive ownership of the land, and this claim, so far as the record shows, was recognized and acquiesced in by all of the nine children of herself and Jesse Sharman.

Jesse Sharman, the oldest living son of Jesse S. and Harriet Caroline Sharman, who was a witness for plaintiffs, testified that he was born in Harris county in 1850, and lived with his father and mother on the old Sharman place until about a year after the death of his father, which occurred in 1867, and from that time on until her death in 1885 he lived within one and one-half miles of his mother. During all of this time his mother claimed exclusive ownership of the land in controversy. His mother told him that she owned a negro woman which his father sold, and to compensate her therefor gave her a negro man, and he afterwards gave the negro man for the land, "and, to make her even for the negro he had sold, had the land deeded to her."

Gid Westcott, who married one of the daughters of Jesse S. and Harriet Caroline Sharman, testified that some time in the 70's when another of Mrs. Sharman's sons-in-law, a Mr. Talley, talked about bringing a suit for an interest in the land he (witness) had a conversation in regard to the land with Tom Sharman, who was the oldest child of Mr. and Mrs. Sharman and who is now dead. This testimony is as follows: "I have talked with Tom Sharman about this matter. At the time when this matter came up about suing the mother, in the 70's, Tom Sharman had a conversation with me about it. I do not know when Tom Sharman was born; he was an older man than I was; he was not living with his mother at the time; he was married then. Before he married he did live with his mother and father, and was living with them at the time this slave transaction occurred. At the time of this slave transaction he was over 14 years old, and lived with his father and mother until he married in the 60's. He lived with his father until he died, and lived with his mother until he married. Tom Sharman said it was his mother's property." On cross-examination by the plaintiffs, Gid Westcott further testified: "It was T. J. Sharman that said the property was his mother's. He did not say why it was; he didn't say who paid for it; he said that was his mother's property. I don't know whether it was his idea or whether he knew it positively. He said it was his mother's property, and

that he was opposed at Mr. Talley (referring to the projected suit), and got vexed at it."

S. T. Sykes testified as follows: "I had a conversation with Tom Sharman when I was buying from the old lady. At the time I talked with him, before I bought from the old lady, as to what he said about his having a claim to the land. He didn't have any, and he said it was his mother's property. I did know Mrs. Conroy (referring to the deceased mother of the plaintiffs) in her lifetime, and I talked in regard to me, Tom and her, and she said her mother bought it, but her father was as much interested as she was, and she said her mother's money paid for it. She told me her mother's money paid for it."

H. C. Sapp testified: "That the oldest son of Mrs. Sharman, Tom Sharman, sold him a piece of land that he had gotten from his mother, and that said Tom Sharman told him that the title of this land was vested in his mother; that she had a perfect right to sell it to whom she pleased, and he said it was her individual property. He lived with his father and mother during his life up to his death."

Joe Sharman testified: "Mrs. Conroy's husband died either just before or just after my father died. She is the mother of the Conroy plaintiffs, and she died March 31, 1895. Mrs. Stephanes died March 27, 1872. She is the mother of the other set of plaintiffs in the suit."

Prior to her sale of the two tracts of 76½ acres each to her son, Joseph R. Sharman, Mrs. Sharman had sold to various parties other portions of the 354-acre tract. These conveyances were made with the knowledge of her children, and her right to make these sales does not appear to have been questioned by any of them, and the title of the purchasers from her and from Joseph R. Sharman appears to have been recognized by all of the heirs of Jesse S. Sharman, at least to the extent that no objection is shown to have been made by any of them to the possession of said purchasers, and no effort to recover any part of the land until this suit was brought.

In addition to the portions of their testimony before set out, the witnesses Sykes, Sapp, Westcott, and Joseph Sharman each testified to statements made by Mrs. Sharman in regard to the consideration paid for the land, and the execution of the deed to her, which were in substance the same as the statements testified to by the witness Jesse Sharman before set out. This testimony of the witnesses Sykes, Sapp, Westcott, and Joseph Sharman was objected to by the defendants on the ground that said statements and declarations of Mrs. Sharman were "self-serving, hearsay, and immaterial," were made privately and were not notorious; and "that none of the plaintiffs or their ancestors, or these in privity with them, were present, or given a chance to deny the state-

ment, and such statement was never repeated to them, or in their presence, and the statements called for were long after the acquisition of the property which is presumed to be community property, and long after the death of Mrs. Sharman's husband." These objections were overruled by the court, and this ruling is complained of under the first, second, third, and fourth assignments of error.

We do not think the court erred in this ruling. The testimony was not offered nor admitted as evidence in itself of the title of Mrs. Sharman, but to show the circumstances of her claim and its character, and we think when taken in connection with the other circumstances shown by the evidence, such as the long continuance of her claim, her open assertion and exercise of acts of exclusive ownership, evidenced by repeated sales of portions of the land, and the non-claim of the heirs of Jesse Sharman who knew of these sales and assertions of sole ownership by her, these statements could be properly considered by the jury in determining the question of whether the land was in fact deeded to her with the consent of the husband and with the intention to make it her separate property. The parties to the transaction, which occurred more than 50 years before this suit was brought, are long since dead, and the statements of Mrs. Sharman as to the character of her claim and the facts upon which it was based, repeatedly made when she was in possession of the land, do not appear to have been questioned by those whose interest would have prompted their denial if the statements were not true, and who knew of said statements, and were then probably in a position to show their falsity, if they were false, are circumstances which are logically relevant and important in determining the question of whether the property was intended to be conveyed to Mrs. Sharman as her separate property, and should not, after this lapse of time when better evidence cannot be procured, be rejected as hearsay and self-serving. *Brewer v. Cochran*, 45 Tex. Civ. App. 179, 99 S. W. 1033; *Frugia v. Trueheart*, 48 Tex. Civ. App. 513, 106 S. W. 741.

If this conclusion is not sound the assignments cannot be sustained, because other undisputed evidence to the same effect as that complained of by the assignments was admitted without objection. The testimony of Jesse Sharman, before set out, which was admitted without objection, contains in detail the same statements of Mrs. Sharman as to her claim to the land, and the facts upon which it was based as the evidence objected to under these assignments. Having permitted the testimony of Jesse Sharman to go to the jury without objection, plaintiffs will not be heard to complain that other testimony, showing the same facts, was admitted over

their objection. *Hammon v. Decker*, 46 Tex. Civ. App. 232, 102 S. W. 454; *Rice v. Dewberry*, 93 S. W. 735.

If, however, all of the testimony complained of under these assignments should be excluded, upon the other undisputed evidence which we have before set out no other verdict than one in favor of defendants upon the issue of title in Mrs. Sharman could have been properly rendered.

The undisputed testimony of plaintiffs' witness Jesse Sharman, to the effect that his mother told him that his father had the deed made to her for the purpose of making the land her separate property, and that he did this to compensate her for a negro woman which she had received from her father and her husband had sold, was admitted without objection, and would, standing alone, have authorized a verdict in favor of defendants. *Hardin v. Jones*, 29 Tex. Civ. App. 350, 68 S. W. 836. The testimony of this witness, taken in connection with other undisputed evidence admitted without objection, and showing the continuous claim and assertion of ownership by Mrs. Sharman and the long acquiescence in such claim by all of the heirs of Jesse Sharman, and its affirmative recognition by some of them, including the mother of most of the plaintiffs, leads to the irresistible belief that the property belonged to Mrs. Sharman in her separate right, and no other reasonable conclusion could have been reached by the jury.

This view of the force of the undisputed evidence renders a discussion of the remaining assignments of error presented in plaintiffs' brief unnecessary. If any error is shown by any of said assignments, in view of the undisputed evidence before set out, such error was harmless, and all of the assignments are therefore overruled, and the judgment of the court below affirmed.

Affirmed.

HOUSTON & T. C. R. CO. v. ELLIS.[†]
(Court of Civil Appeals of Texas. Jan. 10, 1911. On Motion for Rehearing, Feb. 2, 1911.)

1. EVIDENCE (§ 473*)—OPINION EVIDENCE—DIRECTION OF FIRE.

Where, on an issue as to whether plaintiff's barn was destroyed by fire from defendant's railway, a witness who had examined the burned area testified that he traced the burned area where the fire had traveled over the grass, and another witness testified that the way the fire had burned could be told by examining the way the straw and weeds fell, they could testify to their conclusions that from their examinations of the fire it burned with the wind from defendant's fireguards in the direction of plaintiff's barn.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 2220-2233; Dec. Dig. § 473.*]

2. TRIAL (§ 191*)—FIRES—SPARKS—INSTRUCTIONS—PRIMA FACIE CASE.

The court charged that, if the sparks from defendant's engine set fire to the grass and

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† Writ of error denied by Supreme Court.

communicated to plaintiff's barn, such fact constituted a prima facie case of negligence on defendant's part, and, in the absence of sufficient rebutting evidence, entitled plaintiff to recover, but if the engine from which the sparks escaped was equipped with the most approved spark arrester in use, and the employees used ordinary care in operating it, the prima facie case was rebutted, and the jury should find for defendant, but, if they believed that defendant failed to equip its engine with the most approved spark arrester in use, or the employees failed to use ordinary care, the prima facie case made out by proof of sparks escaping and causing the fire was not rebutted, and they should find for plaintiff. *Held*, that such instruction was not objectionable as assuming that the fire was set out by sparks from the engine.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 420-431; Dec. Dig. § 191.*]

3. RAILROADS (§ 485*)—FIRES—SPARK ARRESTERS—INSTRUCTION.

There being no evidence as to any spark arresters in use except the kind defendant was using on the engine in question, and there being no issue of negligence in failing to provide a spark arrester of a different model, the instruction was not erroneous as requiring defendant to equip its engine with the "most approved" spark arrester in use, instead of exercising ordinary care to do so, since under the proof a charge that defendant was required only to use ordinary care in that particular would have been a mere abstraction.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 1747-1756; Dec. Dig. § 485.*]

4. TRIAL (§ 296*)—APPEAL AND ERROR (§ 1033*)—INSTRUCTION—INCONSISTENT CHARGES.

Where an instruction states an incorrect measure of duty more onerous than that authorized by the objecting party, the error is not relieved by another instruction stating the correct measure of duty unless by a special reference to the erroneous portion of the charge, such portion is withdrawn, but if the correct rule is stated, and a rule more favorable to the objecting party is afterwards given, at the objector's request, he cannot thereafter complain of the inconsistency.

[Ed. Note.—For other cases, see Trial, Dec. Dig. § 296;* Appeal and Error, Cent. Dig. §§ 4052-4062; Dec. Dig. § 1033.*]

5. APPEAL AND ERROR (§ 1002*)—VERDICT—REVIEW.

Where there was evidence sufficient to take the case to the jury, a verdict for plaintiff on conflicting evidence will not be reversed.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3935-3937; Dec. Dig. § 1002.*]

On Rehearing.

6. APPEAL AND ERROR (§ 994*)—VERDICT—REVIEW.

The Court of Appeals will not set aside a verdict where the solution of the question depends on the credibility of witnesses, unless the testimony necessary to support the verdict is shown by the undisputed physical facts, or by contradictions or inconsistencies to be clearly false.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3901-3906; Dec. Dig. § 994.*]

Appeal from District Court, Waller County; Wells Thompson, Judge.

Action by W. E. Ellis against the Houston & Texas Central Railroad Company. Judg-

ment for plaintiff, and defendant appeals. Affirmed.

Baker, Botts, Parker & Garwood and W. B. Garrett, for appellant. R. E. Hannay and Meek & Highsmith, for appellee.

REESE, J. This is an appeal from a judgment of the district court in favor of appellee against appellant for \$2,100, being the value of a certain building and contents, and standing grass, the property of appellee, destroyed by fire on the night of February 9, 1909. It is alleged that the fire was set out by sparks thrown out by a locomotive of appellant being operated on its road. There were the usual allegations by the plaintiff of defective spark arrester and negligent operation of the engine. Defendant pleaded general denial, and specially alleged that the engine was equipped with the best approved fire arresting appliance in general use, and the same was in good condition, and the engine properly operated.

We make the following conclusions of fact as supported by the evidence: On the night of February 9, 1909, a barn belonging to appellee, with the contents thereof, as set out in the petition, was entirely destroyed by fire, also certain standing grass in the pasture, also the property of appellee. The barn in question was located in the inclosed pasture of appellee, about 300 yards south from appellant's track. The pasture joined appellant's right of way. The evidence is sufficient to authorize the finding of the jury that the property destroyed was worth \$2,100, the amount of the verdict. These conclusions are not disputed by appellant. While the evidence on the issues of negligence on the part of appellant in any of the particulars set out in the petition, and the communication of the fire by the engine are contested, the evidence is sufficient to support the verdict on both issues, and in deference to the verdict we find that the fire was caused by sparks from the engine communicated to the dry grass in appellee's pasture and thence to the barn, and that appellant was negligent in some one or more of the particulars set out in the petition, which negligence was the proximate cause of the fire. The issue as to whether the fire was caused by sparks from the engine was sharply contested, and upon this issue there was irreconcilable conflict in the testimony. It is not necessary to set it out here. If appellee's witnesses told the truth, the conclusion is irresistible that the fire was caused by sparks from the engine. If appellant's witnesses told the truth, the barn was on fire before the engine got to the pasture, and it was impossible for the fire to have been caused as alleged. Upon this issue appellee offered to read from the deposition of G. W. Crowder, taken by himself, the eighth direct interrogatory and the answer thereto, as fol-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

lows: "Int. 8. If you stated that you observed that a portion of plaintiff's pasture had been burned, please state whether or not you made an investigation to ascertain whether said fire began in or near said pasture, and in which direction it traveled or burned after it had been set out, and please state what your investigation disclosed, and please give your reason for knowing the way the fire traveled. Locate, as near as you can, how far the fire began from the defendant's rail, and whether or not said fire began on the right of way or inside the plaintiff's pasture? [From my investigation my conclusion was the fire started from the fireguards and burned in the direction of Mr. Ellis' barn], from the fireguards or right of way of the H. & T. C. R. R. Co. on through Mr. Ellis' pasture to the barn situated there. From my recollection now, I would say that the barn is situated in a southeast direction from the place where the fire originated near the right of way or fireguards of the H. & T. C. R. R. Co. My reason for knowing the way the fire traveled from tracing the burned streak or area where the fire had traveled over the grass of the pasture, and from the direction of the wind on the night of the fire, the wind being from the north. The fire began, as near as I can now recall, about 100 feet more or less from the defendant's rail on its right of way. The fire originated inside of the plaintiff's pasture." Appellant objected to the interrogatory and answer on the ground that the interrogatory called for the opinion and conclusion of the witness, and that the answer was the conclusions of the witness upon a question not a proper subject for expert testimony, and that the witness had not qualified himself to give his conclusion. In connection with its objection appellant offered the answer of said witness to cross-interrogatory No. 8, as follows: "My testimony, as stated in answer to direct interrogatory No. 8, is the conclusion I arrived at after making an investigation of the conditions as I found them on the ground the morning after the fire." The court sustained the objection to that portion of the answer inclosed in brackets, as follows: "From my investigation, my conclusion was the fire started from the fireguards and burned in the direction of Mr. Ellis' barn"—and overruled the objection as to the remainder. Appellant duly excepted, and complains of the ruling in the first assignment of error.

The appellant moved the court to strike out the testimony of E. Roberts, witness for appellee, as follows: "I live about 500 yards from plaintiff's barn. I saw the fire the night it burned. I expect it must have been 12 o'clock that night. Did not go over to the pasture that night; did the next morning. I have seen prairie fires burning. I can tell by looking at a burn the way the fire had burned. I went over next morning and looked at the burn. My purpose in go-

ing was to see whether it got in my pasture. I walked along next to my gate and looked at it. The wind was from the north that night. If a fire is back against the wind, the straw and weeds will fall with the wind and fall to the ground, and don't burn them. If it is all burning the same direction, of course, the wind will carry the fire, and it will fall ahead and burn. I knew the condition of the grass before the fire. Next morning it showed that the weeds and grass fell south. The lower part of them was singed off and burnt. The next morning it was burned between the railroad and the barn. From the guards until it reached the barn. Yes; the next morning there was something to indicate where the barn caught. There was a place six or eight feet wide burned right up to the corner of the barn. It caught from on the corner, the northwest corner." The motion was predicated upon witness' answer to a cross-interrogatory as follows: "That was just my conclusion from what I saw. I stated it as my conclusion." This ruling is made the basis of the second assignment of error. The undisputed testimony showed that at the time the engine passed the pasture, which, with the barn, lay south of the railroad, there was a strong wind blowing from the north. It is also undisputed that the grass in the pasture was burned between the railroad and the barn. The testimony of Roberts shows, and it is not disputed, that in such cases there would be left on the ground certain signs to indicate whether such a fire burned with the wind or against it. One of these signs was described by the witness. As the grass was 18 inches to 2 feet high, this is very reasonable. Roberts testified that the signs indicating that the fire burned with the wind, and not against it, were present on the ground. These were facts, and not conclusions. His conclusion that the fire burned with the wind followed irresistibly, and added really nothing to the force of his testimony as to the facts. We think, further, that it was permissible for him to state his conclusions in connection with the facts on which it was based in such a case as is here presented.

As to the testimony of the witness Crowder, he does not state the facts upon which he bases his conclusions so fully, but it does appear that in case of a fire such as this, burning through high grass under the impulsion of a strong wind, there will be left on the ground certain signs indicating the direction the fire traveled, whether with or against the wind. Roberts having testified as to some of them, and that they existed on the ground and induced his conclusion, it is a fair inference that these indications operated, in whole or in part, to induce Crowder's conclusions. It might be impossible to put the jury entirely in possession of the general appearance of things on the ground and all of the probably minute circumstances

from which a witness would conclude that the fire burned with the wind, and in such case we are inclined to think it would not be improper to allow the jury to have the benefit of the conclusion arrived at by the witness. If such conclusions were the result of insufficient data to support them, or otherwise weak or unreliable, that might be shown by cross-examination, whereby the witness might be required to state fully the grounds of his conclusions. A very learned and scientific discussion of the admissibility of the conclusions of witnesses, or, as it is called, "opinion evidence," is found in Professor Wigmore's great work on Evidence. 3 Wigmore, Evidence, § 1919, bottom of page 2552 et seq. From section 1928 we quote: "But if we are dealing with the other sort of witness—the one not claiming greater skill, but simply drawing inferences from his own observations which any one in his place could draw—the answer may be different. The answer here virtually depends on our attitude, whether of favor or disfavor, toward the principle involved. If we believe that the drawing of inferences by an observer of the data is a hateful, dangerous, and reprehensible thing, if we prefer to put obstacles of technical and not real force in the way of the most common sort of testimony, if we believe that this modern and minor rule about opinion is a fundamental canon in the investigation of truth, if we are opposed to Baron Parke's wish to employ 'a compendious mode of ascertaining the result of the actual observation of the witness,' then, of course, we shall look upon every witness as a possible 'usurper' of the jury's functions. We shall watch each phase of his testimony anxiously, and stop his mouth as soon as he approaches the insidious heresy of an 'opinion' or inference. On the other hand, if we believe that the rule in question, as applied to the unskilled witness who has personally observed the data, is a mere minor rule of convenience not in any way concerned with the value of the testimony, if we hold that it is inconsistent to aim in theory at convenience and simplicity by a rule which in thorough application causes ten times the inconvenience and complication which in theory it was to avoid, if we prefer to make the rules of evidence our tools rather than to become ourselves their helpless slaves, then we shall conclude to adopt the first form of the test as above; that is, that we shall allow the witness to state freely all the results which he is qualified to reach, and only now and then, when he comes to matters as to which it is instantly clear that the jurors are or can be as fully equipped with the data, we shall exclude his inferences." The text is enriched by liberal quotations from decided cases from which a few are selected. "Gibson, J., in *Cornell v. Green*, 10 Serg. & R. (Pa.) 16: 'I take it that whenever the facts from which a witness received an impression are too evanescent in their nature to

be recollected, or are too complicated to be separated and distinctly narrated, his impressions from these facts become evidence.'

* * * Johnson, J., in *Clark v. Baird*, 9 N. Y. 185: 'Evidence of opinion is also recognized as proper, on the same ground of necessity, in cases where language is not adapted to convey those circumstances on which the judgment must be formed.' * * * Campbell, J., in *Evans v. People*, 12 Mich. 35: 'Many cases exist in which it is impossible by any description, however graphic, to explain things so as to enable any one but the witness himself to see or comprehend them as they would have been seen or comprehended could the jury have occupied his position of observation.' * * * Endicott, J., in *Commonwealth v. Sturdivant*, 117 Mass. 122 [19 Am. Rep. 401]: '(The condition is that) the subject-matter to which the testimony relates cannot be reproduced or described to the jury precisely as it appeared to the witness at the time.' * * * Peck, J., in *Bates v. Sharon*, 45 Vt. 481: '(Opinion is admitted) where the facts are of such a character as to be incapable of being presented with their proper force to any one but the observer himself, so as to enable the triers to draw a correct or intelligent conclusion from them without the aid of the judgment or opinion of the witness who has had the benefit of personal observation.' The text proceeds: "It is in the application of this test that the opinion rule really breaks down as an aid in the investigation of truth. In the vast majority of rulings of exclusion, the data observed by the witness could not in any liberal and accurate view be really reproduced to the jury by the witness' words and gestures. The error of the judges consists in giving too much credit to the possibility of such reproduction. What is chiefly wrong is by no means the test itself, but the illiberal and quibbling application of it." There can be no question that such evidence is logically relevant, and would be regarded as of value by any one seeking to discover the absolute truth of the matter. The objection that by its admission the witness usurps the functions of the jury is unsound. We think the court did not err in admitting the testimony, and the assignments of error are overruled.

The court charged the jury as follows: "If the jury believes from the evidence that sparks of fire escaped from defendant's engine on the 9th of February, 1909, as it was passing along the defendant's road, near the plaintiff's pasture, and set fire to the grass growing therein, and that said fire was communicated to the plaintiff's barn, and which destroyed said barn, and all of its contents, as alleged by plaintiff, and all of the other property described, then such facts constitute a prima facie case of negligence on the part of the defendant, and, in the absence of rebutting evidence sufficient to overcome such prima facie case of negligence, will render

the defendant liable for the injuries occasioned thereby, and you should find a verdict for the plaintiff. If from the evidence the jury should believe that sparks of fire escaped from the defendant's engine, and set the fire which caused the plaintiff damage, but if, from the evidence you believe that the engine from which the sparks escaped was equipped with the most improved spark arrester in use, and that the agents and employees of the defendant in charge of said engine used ordinary care in operating said engine to prevent the escape of sparks, then the jury are charged that the prima facie case made out by proof of the escape of sparks and fire resulting therefrom is rebutted, and, if the jury so believes, they will find for the defendant. But, if from all the evidence they believe that the defendant failed to equip its engine, from which the sparks escaped that caused the fire, with the most approved spark arrester in use, or that the agents and employees of the defendant engaged in operating said engine failed to use ordinary care to prevent the escape of sparks, then the jury is charged that the prima facie case made out by proof of sparks escaping and causing the fire has not been rebutted, and they should find for the plaintiff as charged above." By the third assignment of error it is objected to this charge that it assumes that the fire was set out by sparks from the engine. The objection is without merit. The entire charge must be read together, from which it is clear that this issue was submitted to the jury, and they could not have understood otherwise. The issue was also directly and emphatically submitted in a charge requested by appellant. The further objection is made to this charge that it required appellant, in order to rebut the prima facie case made by the appellee, to show that the engine was equipped with the most approved spark arrester in use, whereas under the settled rule in this state the defendant was only required to show that it had exercised ordinary care to do so. Appellant is correct as to the rule in this state in the particular referred to, and it would be proper to so charge the jury where the facts presented the issue of ordinary care. The question is very fully discussed by the Supreme Court in the case of *M., K. & T. Ry. Co. v. Carter*, 95 Tex. 461, 88 S. W. 159, which is the latest expression of that court upon the question so far as we have been able to find. In that case the court charged that "it was the duty of appellant to equip its engine with the best spark arrester in use, and a failure to do so would render it liable for the consequences if the fire was shown to be due to such failure on its part." In answer to a certified question as to whether this charge was error under the evidence as stated, the Supreme Court answered that the trial court committed error "under the facts of this case" in failing to instruct the jury that it was the duty of the railway company to use ordinary

care to provide its engine with the best approved device for the prevention of the escape of sparks. The court then proceeds to state the grounds of such ruling as follows: "The testimony in this case tended to prove that each of two different kinds of spark arresters was used by railroad companies and each was considered by experienced railroad men as better than the other, which produced a condition in which it was necessary for the railroad company to make a choice between the two. Under this state of facts, it was the duty of the railroad company to exercise ordinary care—that is, such care as a man of ordinary prudence would exercise under like circumstances to select and use the better of the two—but, having used such care as the law requires, it cannot be held that a failure of judgment honestly exercised in an attempt to discharge the duty should render the company liable. *Turnpike Co. v. Railway*, 54 Pa. 350 [93 Am. Dec. 708]; *Jackson v. Railway*, 31 Iowa, 178 [7 Am. Rep. 120]; *Hoye v. Railway*, 46 Minn. 269 [48 N. W. 1117]; *Railway v. Corn*, 71 Ill. 496; *M. B. Sash and D. Co. v. Railway*, 91 Wis. 463 [65 N. W. 176]." In the case of *Turnpike Co. v. Railway*, above cited, from which the court quotes, the facts were of a similar nature. There was a question raised by the evidence as to which of the several spark arresters was the best, and as to whether the railroad company had exercised ordinary care in its selection from among these of the spark arresters with which its engine was equipped. The Supreme Court in the *Carter Case* says: "In passing upon this question, courts have usually expressed the rule without the qualification, because the facts in the case did not demand it. The standard established is that the railroad company must select the best devices in use for the purpose of arresting sparks and preventing the escape of fire from the locomotive, and it is said that a man of ordinary prudence will do so. *Jackson v. Railway*, 31 Iowa, 178 [7 Am. Rep. 120]. But this does not prescribe the form of the charge to be given, which must conform to the facts of each case."

In the present case there was no evidence as to any spark arrester in use except the one which, according to the testimony of the only witness testifying upon the point, was in use by appellant on the engine in question. There was nothing in the evidence that presented the issue of ordinary care *vel non* in this particular, or that could have assisted the jury in any way to determine such issue. The evidence was that the engine was equipped with a certain kind of spark arrester, and that this was the best known, and that was all. A charge that appellant was required to use ordinary care in this particular would have been a pure abstraction. We conclude that the objection to the charge referred to should not be sustained.

At the request of appellant, the court

charged the jury that in providing the engine with spark arresters and keeping the same in repair and in operating the same appellant was required to use ordinary care, and, if it had done so, appellee could not recover, even if the fire was started by sparks from the engine, and it is further objected to the charge of the court referred to that the rule there laid down was inconsistent with that stated in the requested charge, and the two together were calculated to mislead the jury, citing *Baker v. Ashe*, 80 Tex. 357, 18 S. W. 36; *Gonzales v. Adoue*, 94 Tex. 120, 58 S. W. 951, and other cases. If the charge of the court stated an incorrect measure of duty and more onerous than authorized on the part of appellant, the error would not have been relieved by stating the correct measure in the same charge or in a requested charge given, unless by special reference to the erroneous portion of the charge the same was withdrawn. This is the rule to be deduced from the cases cited, and other cases on the point, but where, as in this case, the correct rule is stated in the court's charge and a rule more favorable to appellant is stated in a charge given at his request, he cannot complain of the inconsistency. If the jury adopted the correct rule laid down in the court's charge as the basis of the verdict, there is no error. If, on the contrary, they apply the more favorable rule requested by appellant, he cannot complain. It is to be noted that in another charge requested by appellant and given by the court the same rule as to the measure of appellant's duty is stated as that made the basis of the principal objection in the court's general charge. The third assignment of error with the several propositions thereunder is overruled.

By the remaining assignments of error and the propositions thereunder appellant complains of the verdict on the grounds that the overwhelming weight and preponderance of the evidence shows that the fire which consumed appellee's property was not caused by sparks from the engine, and that the undisputed evidence showed that the engine was equipped with the most approved spark arrester in use, was in good repair, and carefully operated. As we have stated in our findings of fact, the evidence as to the origin of the fire was sharply conflicting. The testimony of appellee's witnesses, several in number, was amply sufficient to show that the fire originated from sparks from the engine. The testimony of the trainmen was directly to the contrary. We cannot say that the verdict was unauthorized, or is against the preponderance of the evidence. Certainly it does not present such a case as would authorize us to set it aside. It is true that the only witnesses testifying directly upon the point, employés of appellant, testified that the spark arrester upon the engine was the best in use, that it was in good repair, and that the engine was carefully handled,

but this was not sufficient to take the case from the jury. Appellee offered the only evidence in his power of negligence in such particulars; that is, that the fire was caused by the escape of sparks from the engine. From the necessities of the case the rule has been adopted that this makes a *prima facie* case of negligence. The credibility of the witnesses whose testimony was relied on to rebut this was for the jury. There was evidence introduced showing that this engine on that night was emitting sparks in an unusual manner, and that thereby fire was started in several places in the neighborhood of the fire. The evidence was sufficient to take the case to the jury and to authorize their finding. *Ross v. Railway Co.*, 47 Tex. Civ. App. 24, 103 S. W. 708, and cases cited.

We find no error in the record requiring a reversal, and the judgment is affirmed.

Affirmed.

On Motion for Rehearing.

In a motion for rehearing, our attention is called to a statement in the opinion that the pasture of appellee joined the right of way of the railroad. The evidence shows, and we find, that in fact a public road 60 feet wide ran between the right of way fence and the pasture fence. Whether this right of way fence is on the line of the right of way does not appear. At any rate, we make the requested correction in our findings. We do not regard this as material, as it does not affect the testimony of appellee's witnesses, which the jury found to be true, that the fire caught inside the pasture from sparks from the engine.

In the motion for rehearing appellant insists with great earnestness and very evident sincerity that we have erred in adopting the conclusions of the jury that the fire was started by sparks from the engine. We do not understand that it is contended that the testimony of appellee's witnesses is not sufficient to support this conclusion, but that the testimony of appellant's witnesses is clear and positive to the contrary, as is shown in the opinion, and that the testimony of appellee's witnesses is shown, not only by this testimony of appellant's witnesses, but by inconsistencies and contradictions in their own statements, to be false. We have again examined all the testimony with great care, and must adhere to our original conclusion. This appears to us to be a case where the jury had to judge whether they would believe the one or the other set of witnesses; in other words, a case involving the credibility of the witnesses, and the weight to be attached to their testimony. While this court has not and will not shirk the responsibility of setting aside a verdict of a jury, where the evidence so preponderates against it as to show it to be clearly wrong, no appellate court under our system of procedure can properly do this where the solution of

the question depends upon the credibility of the witnesses, unless perhaps in a case where the testimony of witnesses necessary to support the verdict is shown by the undisputed physical facts, or by contradictions or inconsistencies in such testimony to be clearly false. To do so would be simply to invade the province of the jury in a matter specially committed to them by the plain terms of the law. This matter is, we think, wisely committed to the jury, subject, of course, to the control of the trial court in the first instance, and in a proper case of the appellate tribunal. This case does not arise where some of the witnesses are clearly shown to have testified falsely, where such false testimony is not essential to support the verdict. If in eliminating all such testimony thus discredited, there is left enough evidence to support the verdict this case does not arise.

It is not improper that we should say that, upon investigation of the authorities upon the question of the admissibility of the testimony of the witnesses Crowder and Roberts, we were in very great doubt as to its admissibility. We concluded to follow the more modern rule, which we believe to be more in accordance with reason and common sense, and to approve the ruling of the trial court. As to our conclusion with regard to the charge so much criticized by counsel for appellant, we are content to adhere to our original conclusion, resting upon what we consider the holding in the Carter Case cited in the opinion.

These questions have been pressed upon us with great vigor and earnestness in the motion for rehearing, which is not only excusable, but commendable, in view of what counsel evidently considers many and vital errors in our conclusions. If injustice has been done appellant by the verdict in this case, which is, of course, possible, it is not such as an appellate court can correct without going entirely beyond its proper function.

The motion for a new trial is overruled.

CHEEK v. BOYD et al.

(Court of Civil Appeals of Texas. Jan. 31, 1911.)

1. TRIAL (§ 260*)—INSTRUCTIONS—REQUEST.

Requested instructions which are covered by the charge as given are properly refused.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 651; Dec. Dig. § 260.*]

2. FRAUDS, STATUTE OF (§ 160*)—INSTRUCTION—EVIDENCE.

Where, in an action to recover for medical services alleged to have been rendered for another at defendant's request, the evidence tended strongly to prove that defendant's promise was an original and not a collateral one, a requested instruction that under the statute of frauds plaintiff could not recover unless defendant's

promise was in writing, but which contained no reference to the evidence showing an original promise, was properly refused.

[Ed. Note.—For other cases, see Frauds, Statute of, Cent. Dig. § 379; Dec. Dig. § 160.*]

3. PHYSICIANS AND SURGEONS (§ 24*)—ACTION FOR SERVICES—QUESTION FOR JURY.

In an action by a physician to recover for services rendered to another at the request of defendant, evidence held sufficient to present a question to the jury as to whether defendant contracted to pay for the services rendered.

[Ed. Note.—For other cases, see Physicians and Surgeons, Dec. Dig. § 24.*]

4. TRIAL (§ 252*)—INSTRUCTION—CONFORMITY TO EVIDENCE.

An instruction presenting a theory not supported by the evidence is properly refused.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 596; Dec. Dig. § 252.*]

Appeal from Harris County Court; A. E. Amerman, Judge.

Action by J. G. Boyd and others against J. R. Cheek. From a judgment for plaintiffs, defendant appeals. Affirmed.

John Charles Harris and Harris & Harris, for appellant. R. W. Franklin, for appellees.

McMEANS, J. J. G. Boyd, a physician and surgeon, sued J. R. Cheek and the firm of Hamil & Stewart, defendants, to recover the principal sum of \$795 for medical services rendered to one Samuel Cisco upon the request of defendants, and for his board, etc., during the time Cisco was an inmate of plaintiff's sanitarium. The defendant, in addition to denying generally the right of plaintiff to recover against him, specially pleaded that the debt was one owing by Cisco to plaintiff, and that the promise or agreement of defendant to pay it as alleged in plaintiff's petition was not in writing, nor was there any memorandum thereof in writing signed by him or by any person thereunto by him lawfully authorized to sign the same, and that such promise, if any was made, was in contravention of the statute of frauds. Defendants Hamil & Stewart also answered, but as a verdict was instructed in their favor, as to which no complaint is made, the character of the defense set up by them becomes immaterial. A trial before a jury resulted in a verdict and judgment for plaintiff against defendant Cheek for \$795, being the amount sued for, with 6 per cent. interest per annum from January 1, 1908, from which the defendant Cheek has appealed.

The issue raised by the pleadings of defendant above referred to was submitted to the jury by the second paragraph of the court's charge, as follows: "If you believe from the evidence that J. R. Cheek, acting through an agent or agents thereunto duly authorized to act for him, placed one Cisco in the sanitarium of the plaintiff, with instructions to treat said Cisco, then J. R.

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

Cheek would be liable for the reasonable value of the professional services, as well as for the reasonable value of the expenses of treatment of said Cisco by plaintiff. You are charged that under the law a man cannot be charged with the debt of another, unless the agreement to pay the debt of another is evidenced by an instrument or memorandum in writing signed by the party so sought to be charged or by some person by him thereunto authorized. If you believe from the evidence that the debt sued for was the debt of Cisco, or of Hamil & Stewart, or that credit was extended to Cisco or to Hamil & Stewart, and that J. R. Cheek agreed to guarantee the payment of the bill or agreed to see that the bill was paid, then you are charged that there was no agreement in writing on the part of J. R. Cheek, and you will return a verdict for the defendant J. R. Cheek." Appellant makes no objection to the form of this charge.

By his first assignment of error appellant complains of the refusal of the court to give the following special charge requested by him, viz.: "You are instructed that the statutes of Texas provide that no action or lawsuit shall be brought in any of the courts of Texas in any of the following cases, unless the promise or agreement on which such action shall be brought, or some memorandum thereof, shall be in writing and signed by the party to be charged therewith, or by some person by him thereunto lawfully authorized, to wit: To charge any person upon a promise to answer for the debt, default, or miscarriage of another. Therefore, if you believe from the evidence that the plaintiff Dr. J. G. Boyd is attempting to charge the defendant, J. R. Cheek, upon a promise to answer for the debt of Samuel Cisco, or of the defendants Hamil & Stewart, and if you believe from the evidence that there is no promise or agreement, or memorandum thereof, in writing, signed by the said defendant, J. H. Cheek, or signed in writing by some person by said Cheek thereunto lawfully authorized, then you are instructed to find your verdict for defendant, J. R. Cheek." This charge correctly stated the law upon the issue raised by the pleadings and evidence. But we think there was no error in the refusal of the court to give it, for the reason that the issue had been sufficiently submitted to the jury in the portion of the court's general charge which is copied above. The assignment is overruled.

By his second assignment of error appellant complains of the action of the court in refusing to give his second special charge, which is as follows: "You are instructed that J. R. Cheek cannot be held for the debt of Samuel Cisco, or of Hamil & Stewart, unless the promise or agreement, or some memorandum thereof, shall be in writing and signed by said Cheek, or in writing and signed by some person by said Cheek thereunto lawfully authorized. And, if no such prom-

ise in writing signed as aforesaid has been introduced in evidence, you are instructed to find your verdict in favor of defendant, Cheek." The substance of this charge was embodied in the court's charge, hence it was not error to refuse it. There was evidence, which will be hereinafter more fully set out, that tended strongly to prove that Cisco's admission to the sanitarium, the medical attention given him, and the expenses incurred in his treatment were upon the orders and at the instance of the defendant Cheek and upon the faith of his credit. This being true, it would have been improper to give the charge in question, had it not been covered in the general charge, because it ignored such element of defendant's liability. The assignment is overruled.

The third assignment is predicated upon the refusal of the court to give defendant's special charge No. 8, which reads as follows: "If you believe from the evidence that defendant, J. R. Cheek, never did promise to pay plaintiff for the care of Samuel Cisco, then you will find your verdict in favor of defendant, J. R. Cheek." There is no error in refusing to give this charge, for the reason that it was fully covered by and embraced in the court's general charge.

Appellant's fourth special charge is as follows: "You are instructed that there has been no legal evidence introduced before you showing any liability on the part of defendant, J. R. Cheek, and you will therefore find your verdict in favor of said Cheek." The refusal of the court to give this charge is made the basis of the fourth assignment of error. The facts giving rise to the controversy are briefly as follows: Defendant was an operator in the Humble oil field. Hamil & Stewart were independent contractors engaged in drilling an oil well in said field for defendant, and Cisco was employed by them. While so employed Cisco fell from a derrick, and was severely injured. He was sent to Houston and placed in Dr. Boyd's Sanitarium, where he received medical attention, and other expenses were incurred in his behalf, amounting to the sum of the judgment. Upon the question of defendant's liability the following testimony was introduced:

D. R. Beatty testified: "One evening about 4 o'clock I saw a man fall out of the derrick where Hamil & Stewart were drilling, and I went to the man and did not know him. He was a stranger to me; but I knew that they were drilling a well under contract with Mr. Cheek; and I went to Mr. Cheek and told him some man had fallen out of Hamil & Stewart's rig, and had gotten hurt, and he came and found the man pretty badly hurt; and he (Cheek) asked me what he had better do with him, and I said, 'Send him to Houston at once.' And he asked where; and I said to Dr. Boyd's Private Sanitarium at 811 Main street. I know I called up Dr. Boyd and asked if he would not send the ambulance to meet the 6 o'clock train, and

he said he would have the ambulance there, and before going in I asked Cheek what I should say to Dr. Boyd when I got there, and he told me that this was not his man and was not working in his employ, but was working for Hamill & Stewart, but that he would see that the bill was paid if he (Boyd) took care of him. Coming in, I did not see Dr. Boyd. He was at the depot; but I saw his head nurse, and told the nurse just what Cheek said, that he did not want the man charged to him because he is not his man. I said, 'I would rather you did not charge it to his personal account. I had rather you charge it to my personal account than charge it to him.' That he was not his man. Next morning I met Dr. Boyd, and, as well as I can recall, I repeated the same thing to Dr. Boyd."

Plaintiff Boyd testified: "During the afternoon of March 13th, I was called over the long-distance telephone from Humble to talk to a man by the name of Feisthamil, who called me over the phone. I got Cisco that afternoon. Hamill brought him to my place with a doctor, but I have forgotten the doctor's name. Cisco was brought there in an ambulance and left there. I did not have a conversation with Mr. Hamill that day; but I did with Feisthamil. I did not have any conversation with Mr. Cheek, the defendant, in regard to this matter until quite a while later. I had a conversation with Mr. Cheek over the phone just before or just after Cisco left; and later he saw me in my office in Houston. Feisthamil brought Mr. Cheek to my office. At least, they came there together. There had been a failure to get anything out of the case in the way of payment from any one. There was a dispute as to who should pay that fee, so I went to Feisthamil and told him what the dispute was, so, according to his agreement with me, he brought Cheek to my office. The matter was talked over, and Cheek stated that he had ordered that man sent there, and agreed to be responsible for his bill and would pay it, and the only thing he wanted was for me to give him time; so that he could get some notes or some agreement from Hamill & Stewart, so that he could get back that money, and he asked for two or three weeks' extension. I took Cisco simply through the credit of Cheek, stated at that time by Feisthamil. I did not take him on the credit of Cisco. The amount was never charged to Cisco; but it was charged to J. R. Cheek." He further testified: "Feisthamil called us, and said an employé of Hamill had been injured that afternoon, and he wanted to send him over to my sanitarium, and that J. R. Cheek said he would be responsible for the bill. I took Cisco through the credit of Cheek, stated at that time by Feisthamil. My recollection is that Cheek said he had authorized it. Cheek said he

would pay it (the bill) himself; that he considered himself personally liable."

There was testimony which would probably have justified a verdict for defendant, but we have set out only such as was most favorable to plaintiff, and that is sufficient, we think, to demonstrate that the special charge set out in the assignment should not have been given. The assignment cannot be sustained.

There was no error in refusing to give defendant's special charge No. 6, which instructed that there was no evidence of any consideration to defendant for any promise on his part subsequently to Cisco's entrance to the sanitarium, because there was no evidence of such promise subsequently made, but, if any such was made, the same was coupled with the admission by defendant of his original liability incurred at the time of Cisco's entrance. Even if not subject to this objection, we think the charge was correctly refused because sufficiently given by the court in the general charge.

We find no reversible errors in the record, and the judgment of the court is affirmed.

Affirmed.

WOODMEN OF THE WORLD v. DODD et al.

(Court of Civil Appeals of Texas. Feb. 2, 1911.
Rehearing Denied Feb. 16, 1911.)

1. INSURANCE (§ 748*)—BENEFIT CERTIFICATES —FORFEITURE—"CONVICTION OF A FELONY" —"CONVICT."

Where a benefit certificate provided for forfeiture if a member was convicted of a felony, the policy was not forfeited where insured died pending a motion for rehearing on appeal from a conviction of manslaughter, under Code Cr. Proc. art. 884, providing that the judgment of conviction if suspended does not become final while an appeal remains undetermined, and Penal Code, art. 27, declaring that an accused person is a convict only after final condemnation by the court of last resort to which it may have been thought proper to appeal.

[Ed. Note.—For other cases, see Insurance, Dec. Dig. § 748.*]

For other definitions, see Words and Phrases, vol. 2, pp. 1584-1591; vol. 8, p. 7619.]

2. INSURANCE (§ 787*)—FORFEITURE—DEATH WHILE VIOLATING THE CRIMINAL LAWS OF THE STATE.

Where insured while insane and resisting arrest was killed by the sheriff, his insurance was not forfeited under a provision for forfeiture in case insured met his death while violating the criminal laws of the state.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 1957; Dec. Dig. § 787.*]

Appeal from District Court, Marion County; R. D. Hart, Special Judge.

Action by Mrs. Eddie Proctor Dodd and others against the Woodmen of the World. Judgment for plaintiffs, and defendant appeals. **Affirmed.**

The suit is by the beneficiary on a policy of life insurance issued by appellant, a fra-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

ternal benevolent association, to C. H. Proctor. The appellant claimed that the policy, according to its terms, was avoided because the insured had been convicted of a felony, and because the insured when he met his death was violating the criminal laws by resisting and assaulting the officer who came to arrest him. Appellees' replication to the plea of avoidance was that the judgment of conviction for manslaughter in the district court was pending on appeal to the Court of Criminal Appeals, and was not finally disposed of at the time of the death, and that as to the second ground of avoidance he was insane and irresponsible in law for his acts and conduct. The policy provides that it shall be null and void, and all rights shall be absolutely forfeited without notice, "if the member holding this certificate shall be convicted of a felony, or should die from an act or acts in consequence of the violation or attempted violation of the laws of the state." The facts are that the insured was indicted for murder. On the first trial the jury disagreed, and the second trial resulted in a conviction for manslaughter. The case was appealed to the Court of Criminal Appeals, and on June 24, 1908, the judgment of the trial court was affirmed. A motion for rehearing was made and filed, and was pending at the death of the insured on October 2, 1908. On proper motion of suggestion of his death the Court of Criminal Appeals on October 14, 1908, entered an order dismissing the motion for rehearing on account of the death of appellant. Pending the appeal the insured was granted bail; and after the affirmance of the judgment, and before there was any ruling on the motion for rehearing, some of his bondsmen filed an application with the clerk of the district court to be further relieved as sureties on the bond. This application, it is admitted, required the clerk to issue a warrant for the arrest of Proctor, which warrant was placed in the hands of the sheriff of the county for execution. It appears from the evidence that, when the sheriff undertook to execute the warrant, the acts and conduct of the insured towards him became so violent and dangerous as to require the sheriff in his own necessary self-defense to shoot and kill the insured. The appellees offered evidence going to show that the insured was insane and legally irresponsible for his acts and conduct toward the sheriff. The trial was to a jury, and verdict for appellees.

F. H. Prendergast and E. E. Brougher, for appellant. T. D. Rowell, for appellees.

LEVY, J. (after stating the facts as above). Appellant for error contends that the court should have directed a verdict in its favor because the agreed facts show that the insured had been convicted of a felony prior to his death, and this conviction avoided the

policy sued on. According to the terms of the policy, all rights and benefits thereunder ceased when the insured member "shall be convicted of a felony." Clearly these words of the policy were used, we think, to denote the final result of the prosecution in a court of competent jurisdiction. He must have been finally adjudged guilty. The words import all that the statute of the state in which the trial is had requires before holding the insured to the status of a convict. If the words were to be so construed as to signify merely the finding of the jury that the insured was guilty, then a forfeiture of the policy would be worked then and there on the verdict of the jury, although the trial court on motion for new trial or the appellate court on appeal should set aside the verdict on legal grounds. The accomplishment of such a result to the rights of a member could not reasonably have been intended by a benevolent association. Evidently the purpose of inserting the condition in the policy was to protect the order against and withdraw benefits from any member who subsequently by his violation of the felony laws was finally declared by due process of law a felon. So interpreting the meaning of the language of the policy, it could not be said, we think, that the insured at the time of his death had under the laws of this state the legal status of a convict. Article 884, Code Cr. Proc. 1895, provides that the judgment of conviction is suspended, and does not become final while the appeal remains undetermined. Article 27, Pen. Code 1895, provides that an accused person is "a convict" only after final condemnation by the highest court of resort which by law has jurisdiction, and to which he may have thought proper to appeal. See *Jones v. State*, 32 Tex. Cr. R. 135, 22 S. W. 404; *Brannan v. State*, 44 Tex. Cr. R. 399, 72 S. W. 184. The motion for rehearing pending in the Court of Criminal Appeals operated to suspend the judgment of conviction, and, as long as it was pending and undisposed of, there was no final judgment of conviction against the accused. It was admitted that the insured died before the motion for rehearing was finally acted on, and therefore the policy was not avoided on the ground of a conviction of a felony, as contemplated by the policy sued on.

The appellant next for error contends that the evidence is insufficient to establish the fact that Proctor was insane at the time he resisted the officer and was killed. If Proctor were insane, then he was legally irresponsible for his acts and conduct, and the policy would not be avoided. The facts in evidence were amply sufficient, we think, to raise and to require the court to pass the issue to the jury, and their finding is warranted by the testimony. And we do not feel authorized to disturb the finding merely because there are contradictory facts.

It would serve no useful purpose to set out the facts.

The judgment was ordered affirmed.

SMITH v. HESSEY.[†]

(Court of Civil Appeals of Texas. Jan. 4, 1911.
Rehearing Denied Feb. 8, 1911.)

1. APPEAL AND ERROR (§ 237*)—QUESTIONS REVIEWABLE—ASSIGNMENTS OF ERROR.

A party against whom a special verdict is rendered must, if he deems the evidence insufficient to sustain it, move to set aside the verdict, and, if on appeal he complains of the verdict, he must do so under an assignment of error addressed to the action of the court in refusing to set it aside.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1386-1388; Dec. Dig. § 237.* Trial, Cent. Dig. §§ 875-878.]

2. APPEAL AND ERROR (§ 750*)—QUESTIONS REVIEWABLE.

An assignment of error to the action of the court in rendering judgment on a special verdict merely raises the question whether the court entered judgment in conformity with the verdict.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3074-3083; Dec. Dig. § 750.*]

3. APPEAL AND ERROR (§ 1033*)—QUESTIONS REVIEWABLE—PARTY ENTITLED TO COMPLAIN.

A party on appeal from a judgment on a special verdict on the ground that the judgment does not conform to the verdict may not complain of an error in the judgment operating to the disadvantage of the adverse party who does not complain.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4060-4062; Dec. Dig. § 1033.*]

4. APPEAL AND ERROR (§§ 1002, 1001*)—SPECIAL VERDICT—CONCLUSIVENESS.

A special verdict rendered on conflicting evidence and supported by evidence will not be disturbed on appeal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3925-3934; Dec. Dig. §§ 1002, 1001.*]

5. INSURANCE (§ 593*)—FIRE INSURANCE—CONTRACTS—CONSTRUCTION.

A life policy was made payable to insured's estate. Insured assigned the policy to his copartner to the extent of such an interest as the copartner might have when the policy became a claim. Insurer before issuing the policy notified insured and his copartner that it did not issue policies based on the insurable interest of a partner in the life of his copartner. *Held*, that the interest of the copartner in the policy on the death of insured was the amount which insured then owed him.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 1481; Dec. Dig. § 593.*]

Appeal from District Court, Travis County; Geo. Calhoun, Judge.

Action by Mrs. Tennie A. Hessey against F. H. Smith. From a judgment for plaintiff, defendant appeals. Affirmed.

Dickens & Dickens and Warren W. Moore, for appellant. Allen & Hart, Jas. H. Hart, and D. H. Doom, for appellee.

JENKINS, J. This suit was instituted by appellee as survivor of the community estate of N. H. Hessey, deceased, and herself, to recover of appellant the interest of said community estate in a partnership business carried on by said N. H. Hessey and appellant, Smith which interest she alleged to be of the value of \$2,509.41, and also the sum of \$2,500, which it was alleged had been collected by appellant on an insurance policy on the life of said Hessey. Appellee recovered nothing as to the copartnership effects, but judgment was rendered in her behalf for \$1,958.41, balance due her on said insurance policy.

At the request of the appellant, the case was submitted to the jury on special issues, to all of which they returned findings. As shown by a memorandum made by the court and copied in the record herein, the court arrived at the amount of the judgment rendered on said special findings in the following manner:

Assets.	
Stock of mdse.....	\$15,853 64
Loans	5,068 69
Book accounts	2,392 78
Cash	127 85
Furniture and fixtures.....	1,662 90
N. H. Hessey.....	4,948 45
F. H. Smith.....	944 16
Liabilities.	
Outstanding debts.....	\$14,284 56
Capital furnished by Smith.....	7,200 77
Discount on book accounts.....	199 39
Taxes	500 00
Profit	8,813 72
	<hr/>
	\$30,998 44 \$30,998 44
One-half of net profit of \$8,813.72 is.....	\$4,406 86
Hessey has drawn.....	4,948 45
Hessey overdraft	541 45
Allow him Cr. for insurance.....	2,500 00
	<hr/>
Due by Smith.....	\$1,958 41

It does not appear from appellant's brief that he made any motion to set aside the findings of the jury, and for a new trial, and, if he did so, he has not assigned error on the action of the court thereon. All of the assignments of error are to the action of the court in rendering judgment for the amount of \$1,958.41, except one, which is as to the refusal of the court to submit a special issue requested by appellant.

In the case of *Scott v. Bank*, 66 S. W. 485, this court, speaking through its present Chief Justice, said: "It seems quite clear that, when a special verdict has been returned which entitles one of the litigants to a judgment, there are but two alternatives for the trial court. One is to set aside the verdict and grant a new trial, and the other is to render judgment upon and in conformity with the verdict. If the verdict is not supported by the testimony, what is the remedy of the party dissatisfied with it? * * * Can such dissatisfied party remain inactive, and on appeal complain of the verdict or the

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

†Writ of error denied by Supreme Court.

failure of the court to set it aside of its own motion? Clearly not, because it is not the duty of any court to set aside a verdict unless requested so to do. * * * The law charges the party against whom the jury finds the facts with the knowledge of the fact that the verdict is contrary to his success, and that, unless he secures its removal, it will be followed by a judgment against him, regardless of what the evidence may be. This being the case, he must not only ask the trial court to set the verdict aside, but, if on appeal he seeks to complain on account of the verdict, he must do so under an assignment of error addressed to the action of the court in refusing to set it aside and grant a new trial."

As above stated, there is no such assignment in this case. The only matters which we are required to consider under appellant's assignments in reference to alleged errors of the court in entering judgment on said special findings of the jury are as to whether or not the court has entered judgment in conformity with said findings, or, as we think, has the court failed so to do to the injury of appellant? Taking the special findings of the jury as we construe them, the calculation of the court in arriving at the amount of the verdict in favor of the appellee is correct, except the court has allowed 5 per cent. for collecting all of the book accounts, which amounts to \$109.39. The special finding is that only 60 per cent. of said accounts are collectible, and they are charged to appellant on that basis, whereas the calculation used by the court shows that he allowed appellant a discount of 5 per cent. for collecting the entire face value of said accounts. This would make a difference of \$79.76 in favor of appellant, of which no complaint is made in the assignments of error. However, appellant construes the findings of the jury as fixing the inventory value of loans at \$5,068.89, and their market value at 25 per cent. above this amount. If this be true, the court has erred in its judgment on said item to the amount of \$1,267.17 in favor of appellant. Appellee does not complain of this action of the court. Can appellant be heard to do so? We think not. In order for an appellant in any case to require of this court a reversal of a judgment, he must show that an error has been committed which, at least probably, resulted in his injury. If any error was committed by the court in this matter, it not only did not probably result in an injury to him, but assuredly resulted to his benefit. Notwithstanding the fact that the verdict of the jury is not complained of by any assignment of error, which would require us to examine as to the correctness of the same, we have carefully examined the statement of facts in connection with the special findings of the jury; and, while there is evidence on the part of the appellant from which the

jury might well have found differently, still there is evidence sufficient to support the findings of the jury. Such being the case, this court will not set such verdict aside, nor will we disturb the judgment on the ground assigned, viz., that the evidence is insufficient to sustain the verdict of the jury.

Appellant assigns error upon the refusal of the court to submit to the jury the following special issue: "State whether or not the said Hessey and said Smith intended the policy of insurance taken out in the Southwestern Life Insurance Company, and assigned by each to the other, upon their respective deaths to be paid to the survivor, without regard to whether the one that died was indebted to him or not." We think the court did not err in refusing to submit this issue, for the reason it was not raised by any legal evidence in the case. The evidence shows that the policy on the life of Hessey, which was collected by Smith, was applied for as a copartnership life insurance policy; that is, that Hessey applied for said policy to be paid to appellant, stating the insurable interest of appellant in the life of Hessey to be that of a partner. We are not called upon in this case to decide whether or not the fact of copartnership gives an insurable interest in the life of another, for the reason that the Southwestern Life Insurance Company notified the parties (the appellant having applied for a like policy in favor of Hessey) that it did not issue policies of that character. The Hessey policy was issued payable to his estate, and a written assignment thereof was made to appellant "to the extent of such interest as said assignee may have when said policy becomes a claim." The only interest that appellant had in said policy when the same "became a claim"—that is, upon the death of Hessey—was the amount, if any, Hessey then owed appellant, which, as adjudged by the court in accordance with findings of the jury, was \$541.45. This amount the court allowed appellant to retain, and rendered judgment for appellee for the difference between the face of the policy (\$2,500) and this indebtedness \$541.45, which amounts to \$1,958.41. This was all that appellant was entitled to under said assignment of said policy. *Lewy v. Gilliard et al.*, 76 Tex. 400, 13 S. W. 304; *Goldbaum v. Leon & H. Blum*, 79 Tex. 638, 15 S. W. 564; *Andrews v. Ins. Co.*, 92 Tex. 584, 50 S. W. 572.

Finding no error in the record, the judgment herein is affirmed.

COUTURIE v. CRESPI.†

(Court of Civil Appeals of Texas. Jan. 18, 1911. Rehearing Denied Feb. 15, 1911.)

1. BANKRUPTCY (§ 303*)—PREFERENCE—EVIDENCE.

In an action by a trustee in bankruptcy to recover a payment made by the bankrupt with-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes 134 S.W.—17 †Writ of error denied by Supreme Court.

in four months of bankruptcy, evidence held sufficient to support a finding that defendant had no knowledge of the insolvency of the bankrupt at the time the payment was made.

[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. § 303.*]

2. APPEAL AND ERROR (§ 742*)—ASSIGNMENTS OF ERROR—INSUFFICIENT STATEMENTS.

Assignments of error not followed with such propositions and statements as will enable the Supreme Court to pass on the assignments without referring to the transcript may be ignored.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3000; Dec. Dig. § 742.*]

3. APPEAL AND ERROR (§ 692*)—RECORD—MATTERS PRESENTED—RULINGS ON EVIDENCE.

Rulings excluding questions to a witness will not be reviewed where the bill of exceptions fails to show what answers would have been given.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2905-2909; Dec. Dig. § 692.*]

Appeal from District Court, McLennan County; Marshall Surratt, Judge.

Action by Felix Couturie, trustee in bankruptcy, against Pio Crespi. From a judgment for defendant, plaintiff appeals. Affirmed.

See, also, 131 S. W. 403.

Saunder, Dufour & Dufour and Jno. W. Davis, for appellant. Prendergast & Williamson, for appellee.

KEY, C. J. Both parties have made statements of the nature and result of this suit, but the one contained in appellee's brief is more succinct and is substantially correct. It is as follows:

"Felix Couturie, the trustee of Gussoni & Co., who were adjudged bankrupts on April 14, 1908, filed this suit against Pio Crespi, who had been an employé of Gussoni & Co. for about three years prior to their bankruptcy.

"The suit was first a suit for debt to recover the sum of \$8,335.71, alleged to have been the indebtedness of Crespi to Gussoni & Co. at the time of their bankruptcy, which indebtedness grew out on account of Crespi having overdrawn his account for that amount. The second ground or theory of Couturie's Case was that Crespi being a creditor of Gussoni & Co. had received a preference which was recoverable under and by virtue of the bankruptcy act by reason of having drawn within four months next preceding the filing of said petition in bankruptcy \$2,700, which he drew and was charged to his own account on February 21, 1908, and to recover, also, the following sums of money, which were alleged to have been drawn out of the funds of Gussoni & Co., and appropriated to his own use: February 21, 1908, \$10; February 21, 1908, \$150; February 19, 1908, \$350; February 21, 1908, \$350;

February 28, 1908, \$130.51; February 18, 1908, \$100; February 15, 1908, \$100; February 5, 1908, \$75.

"The defendant Crespi answered by general demurrer, special demurrers, general denial and by special answer, wherein he pleaded that he had been employed by Gussoni & Co. in the city of Savannah for the cotton season of 1905-06, 1906-07, and 1907-08; that by the terms of his employment he was to receive a salary of 4 per cent. of the profits of said business per annum, but, in the event the profits should not reach the sum of \$4,000 per annum, that he was guaranteed a minimum of \$4,000 per annum for his services; that in addition to such salary he was to receive the sum of \$150 per month to cover his expenses on account of the conduct of such business, which sum was to constitute no part of his salary but was to be charged as a part of the expense of Gussoni & Co.; that in conformity with his said contract of employment he had drawn out the sums of money charged by plaintiff in the exhibit attached to plaintiff's second amended petition, but that in the keeping of the books at Savannah his account was balanced from time to time by charging up such balances to New Orleans, and that no credits had been given him for the amount that he was entitled to on the books of Gussoni & Co. at Savannah, and that such credits should have been credited on the books of Gussoni & Co. at their head office in New Orleans, which had not been done. That in truth and in fact he was not indebted to said firm in any sum whatsoever or to Couturie as trustee for such firm.

"(2) That he had no notice or knowledge of the insolvency of the firm of Gussoni & Co. at the time he drew out said \$2,700 or any other sum which was received by him individually; that as to the sums which he paid to the creditors of Gussoni & Co. which were attempted to be charged to him, such sums were not paid out with the view of appropriating the same to his own use and benefit, and same were not so appropriated, but such funds as were paid out were paid out in due course of business, without any knowledge of insolvency or intent of a preference.

"(3) That, as to the funds which were in his hands, he had the right to retain such funds, or so much thereof as were sufficient to pay any and all indebtedness due by Gussoni & Co. to him, and offset same against the indebtedness of said firm to him; that such offsetting or retention of said funds under and by virtue of the bankruptcy act was permissible, and same did not constitute a preference within the acts of Congress relating to bankruptcy.

"The appellant filed a supplemental petition, joining issues. The trial was had before the court who rendered a judgment in

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

favor of the appellee, from which judgment this appeal is had."

The trial judge filed no conclusions of fact and law, but the judgment rendered implies findings in favor of the defendant, first, as to the terms of the contract fixing his compensation; and, second, that he had no knowledge or notice of the insolvency of Gussoni & Co. at the time he drew out the sums of money sought to be recovered by the plaintiff; or, third, that the funds referred to were in his hands, and he had the right to retain same as an offset against the indebtedness of Gussoni & Co. to him. The defendant submitted testimony amply sustaining the first two findings, which renders it unnecessary to decide as to the third. However, there was some testimony tending to sustain the latter defense. The contentions urged by counsel for appellee upon the subject of preferences under the bankruptcy statute seem to be sustained by the following authorities: *Grant v. Bank*, 97 U. S. 80, 24 L. Ed. 971; *Barbour v. Priest*, 108 U. S. 293, 26 L. Ed. 478; *Stuckey v. Bank*, 108 U. S. 74, 2 Sup. Ct. 219, 27 L. Ed. 640; *Tumlin v. Bryan*, 165 Fed. 168, 91 C. C. A. 200, 21 L. R. A. (N. S.) 960.

In *Grant v. Bank*, supra, the court says: "Some confusion exists in the cases as to the meaning of the phrase 'having reasonable cause to believe such a person is insolvent.' Dicta are not wanting which assume that it has the same meaning as if it had read, 'having reasonable cause to suspect such a person is insolvent.' But the two phrases are distinct in meaning and effect. It is not enough that a creditor has some cause to suspect the insolvency of his debtor; but he must have such a knowledge of facts as to induce a reasonable belief of his debtor's insolvency, in order to invalidate a security taken for his debt. To make mere suspicion a ground of nullity in such a case would render the business transactions of the community altogether too insecure. It was never the intention of the framers of the act to establish any such rule. A man may have many grounds of suspicion that his debtor is in failing circumstances, and yet have no cause for a well-grounded belief of the fact. He may be unwilling to trust him further, he may feel anxious about his claim and have a strong desire to secure it, and yet such belief as the act requires may be wanting. Obtaining additional security, or receiving payment of a debt, under such circumstances, is not prohibited by law. Receiving payment is put in the same category, in the section re-

ferred to, as receiving security. Hundreds of men constantly continue to make payments up to the very eve of their failure, which it would be very unjust and disastrous to set aside. And yet this could be done in a large proportion of cases if mere grounds of suspicion of their solvency were sufficient for the purpose."

In the case at bar it was shown that Crespi, the defendant, had heard rumors concerning Gussoni & Co.; that he sent a telegram to their headquarters at New Orleans so informing them, and received the following reply: "Rumors of failure absurd. We have trouble caused by a concern here. Tomorrow everything will be settled." There was other testimony tending to show that the defendant believed, and had reason to believe, that the firm was solvent, and that one member of the firm was a man of very large means. The testimony referred to justified the court in finding that the defendant had no knowledge or notice that Gussoni & Co., and the individuals composing that firm, were insolvent at the time that he withdrew the several sums of money in controversy, and applied them as set out in his answer. And not having such notice, and the sums referred to having been used in payment of his own salary and of other legitimate debts and expenses of the firm, the plaintiff, as trustee in bankruptcy, was not entitled to recover the same.

Besides the questions already referred to, appellant's brief contains several assignments relating to the action of the trial court in rulings made upon the admissibility of testimony. Some of the assignments referred to are not followed up in appellant's brief with such propositions and statements as will enable this court to pass upon the assignments without referring to the transcript; and, for that reason they might be ignored. *Kostoryz v. Leary*, 130 S. W. 456, and cases there cited. However, the assignments referred to have been considered in connection with the record, and no reversible error has been found. As to some of the rulings referred to, where the court sustained exceptions to certain questions, the bills of exception fail to show what answers would have been given to the questions; and, for that reason, if for no other, those assignments would have to be overruled.

Upon the whole case, and after considering all the assignments, our conclusion is that the judgment should be affirmed, and it is so ordered.

Affirmed.

FREEMAN v. COURTNEY.[†]

(Court of Civil Appeals of Texas. Jan. 18, 1911. Rehearing Denied Feb. 15, 1911.)

DAMAGES (§ 210*)—PERSONAL INJURIES—INSTRUCTIONS.

An instruction in an action for negligent injuries that, if the jury "find for plaintiff and believe from the evidence that he sustained any of the injuries alleged in his petition, then you will award him such damages as you believe from the evidence will fairly compensate him for such injuries, if any, as are alleged in his petition, and which you find are sustained by the evidence," is unobjectionable.

[Ed. Note.—For other cases, see *Damages*, Cent. Dig. §§ 537, 538; Dec. Dig. § 210.*]

Appeal from District Court, Bexar County; Arthur W. Seeligson, Judge.

Action by F. G. Courtney against T. J. Freeman, receiver of the International & Great Northern Railway Company. From a judgment for plaintiff, defendant appeals. Affirmed.

King & Morris and Hicks & Hicks, for appellant. H. C. Carter and Perry J. Lewis, for appellee.

NEILL, J. This suit was brought by F. G. Courtney against T. J. Freeman in his capacity as receiver of the International & Great Northern Railroad Company to recover \$40,000 damages for personal injuries alleged to have been inflicted by the negligence of the defendant while plaintiff was in the latter's service as a brakeman and in the discharge of the duties of his employment.

The plaintiff's allegations were substantially: That on March 30, 1908, while plaintiff was in the employ of defendant as a brakeman on a train being operated between Laredo and San Antonio, when the train reached a point about six or seven miles from San Antonio, by reason of defendant's negligence, plaintiff was thrown from one of the cars of the train and seriously and permanently injured. That in said train there were stock cars which had trapdoors in the roofs thereof. That it was the duty of defendant to keep such doors securely fixed and fastened so as to avoid injuring his employés, whose duty it was to go over such cars in the discharge of the duty of their employment. That while plaintiff was going over the top of said cars, as was necessary for him to do in discharging his duty, the train gave a sudden lurch which caused him to step from the running board, which runs over the top of the car he was on, upon the trapdoor which was thereby displaced or gave way, and caused him to be thrown from the car a distance of some 20 feet. That defendant had negligently failed to have the trapdoor which constituted a part of the roof of the car and liable to be stepped upon by his employés securely fastened, and also negligently permit-

ted the trapdoor to be insecurely and defectively fastened and in a defective state and in such condition as to give way or become displaced when plaintiff stepped upon it, and that, by reason of its defective condition, plaintiff was thrown from the car. That it was at night and dark, and plaintiff did not know of the defective condition of the trapdoor until it was too late to save himself, and that such negligence of defendant directly caused his injuries without his fault. That by reason of being thrown from the car plaintiff was terribly shocked, bruised, and mangled. That his left leg, hip, side, arm, shoulder, and head were severely skinned and bruised, and a severe injury inflicted to his back and spine. That, by reason of said injuries, plaintiff's hearing has become greatly impaired, the use of his left shoulder impaired, the sensation and use of his left leg impaired, and the functions of his kidneys and bladder have become impaired by reason of injuries to such an extent as to cause him great pain and to necessitate frequent and painful urinations. That he suffers great pain throughout his entire body, limbs, and head, and that said injuries and the severe shock he received have seriously affected his heart and weakened that organ, and his nervous system is so shocked and impaired as to prevent him from proper rest day or night. That all of said injuries are permanent and have caused him to suffer great mental and physical pain, and will constantly hereafter cause him to suffer such pain, etc. The defendant answered by a general denial and a plea of contributory negligence. The trial of the case resulted in a verdict and judgment in favor of plaintiff for the sum of \$11,500.

The evidence clearly establishes the negligence of the defendant alleged in plaintiff's petition and his injuries as its consequent and proximate result, but fails to show any negligence on his part contributing thereto. Indeed, it is not contended by the defendant that such negligence on his part was not proved or that any contributory negligence on the part of plaintiff was proved. As to the matters of fact, the only contention of defendant is that the verdict is excessive, and that a new trial should have been granted on that account. We have fully considered the evidence bearing upon the nature and extent of plaintiff's injuries, mental and physical sufferings he has endured and may continue to endure by reason of them, and from such consideration have been unable to reach the conclusion contended for by the defendant. We therefore sustain the verdict as to the amount of damages assessed. This disposes of the second, third, and fourth assignments of error.

The first, and only remaining assignment, complains of this paragraph: "If you find for the plaintiff and believe from the evi-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes
[†]Writ of error denied by Supreme Court.

dence that he sustained any of the injuries alleged in his petition, then you will award him such damages as you believe from the evidence will fairly compensate him for such injuries, if any, as are alleged in his petition, and which you find are sustained by the evidence" of the court's charge. We can perceive no error in it.

The judgment is affirmed.

GALVESTON, H. & S. A. RY. CO. v. QUILHOT.

(Court of Civil Appeals of Texas. Jan. 18, 1911. Rehearing Denied Feb. 15, 1911.)

1. CARRIERS (§ 110*)—FREIGHT—NOTICE—CHARACTER OF GOODS.

If the packages in which freight is presented to the carrier, or the marks thereon, mislead it to believe that the freight is ordinary freight instead of goods of exceptional value, and the shipper does not notify the carrier of the character of the goods, the carrier is not liable for their exceptional value if lost.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. § 498; Dec. Dig. § 110.*]

2. CARRIERS (§ 134*)—FREIGHT—ACTIONS—SUFFICIENCY OF EVIDENCE—CHARACTER OF GOODS—CARRIER'S KNOWLEDGE.

In an action for loss of silverware and china en route which were shipped, packed in a box and barrel, evidence held to sustain a finding that the railroad company's agent was not misled as to the character or value of the goods by any statement of the shipper, or by the nature of the packages or the markings thereon.

[Ed. Note.—For other cases, see Carriers, Dec. Dig. § 134.*]

3. CARRIERS (§ 110*)—FREIGHT—NOTICE OF CONTENTS—NECESSITY.

The shipment of silverware and expensive china in a box and barrel is not so unusual nor is their value so extraordinary as to require the shipper as a matter of law to give notice to the carrier of their nature and value in absence of a request for such information, in order to recover for their loss en route.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. § 498; Dec. Dig. § 110.*]

Appeal from Guadalupe County Court; H. M. Wurzbach, Judge.

Action by W. Quilhot against the Galveston, Harrisburg & San Antonio Railway Company. From a judgment for plaintiff, defendant appeals. Affirmed.

Baker, Botts, Parker & Garwood, Dibréll & Mosheim, and J. S. McEachin, for appellant. Seidemann & Short, for appellee.

JAMES, C. J. The case was previously before us on appeal. 123 S. W. 200. In two respects the statement of facts is said to be different from what it was in that case.

Appellant shows that the station agent, Griffin, testified at the late trial that he prepared the bill of lading, and that he got his information as to the contents of the box and barrel either from the agent of appellee, who delivered same for shipment, or from the marks on the packages, and that

this testimony was not in the former record.

Also, that another fact was shown which was not in the former record, to wit, the testimony of Mrs. Abbott, who stated that she made inquiry as to the cost of the shipment, and ascertained that to send it by express was much higher than by freight, and after ascertaining this she delivered the goods to Krezdorn, a jeweler, with instructions to ship same as if it were his own property, and that in this connection the fact that the silverware was placed by the jeweler in a box in which he had previously received clocks, and which was marked "Clocks," and that the hand-painted china and other exceptionally valuable articles of like class were placed in a barrel upon which was marked "Glass," which, according to the testimony, meant common glass, was significant of an endeavor on the part of appellee's agent to ship such valuable articles as ordinary glass and clocks.

The result of the trial was a judgment for plaintiff rendered by the court, sitting without a jury. The only matter contended for is that the judgment should have been for defendant on the evidence. We find the substance of the testimony, in so far as it is in support of the judgment, to be as follows:

Mrs. Abbott desired to ship a lot of silverware and expensive china, which were wedding gifts, to her daughter, Mrs. Quilhot. She was informed that it would be less expensive to send same by freight than by express, and delivered them to Mr. Krezdorn, a jeweler, to ship for her. Krezdorn packed them in a box and barrel, which he had on hand, the former bearing the mark "Clocks" and the latter "Glass," nailed them up, and addressed same to Mr. William Quilhot, Amsterdam, N. Y., and sent same by the street railway company to the depot, the person by whom he sent them being Willis Sheffield, and to the best of Krezdorn's recollection he gave Sheffield no other instructions than to get the bill of lading and bring it back. Sheffield delivered same and brought back the bill of lading which showed "list of articles: one box Glass, one bbl. clocks"; "contents and value unknown." The shipment was never delivered, but was lost. In the bill of lading was a provision that correct weight and classification are to be ascertained and collected at destination, and that the same was given subject to correction as to rate, weight, and classification, so as to conform to the commission rules. Krezdorn testified that he had received such goods sent to him by freight.

The evidence does not clearly show a case of intentional deceit on the part of Mrs. Abbott or her agent, Krezdorn. But, according to the authorities, this would make no difference in the result, if the packages were presented to the carrier in such form, by marks or otherwise, as to be calculated to lead, and

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

do lead, the carrier to receive them as ordinary freight, instead of articles of exceptional value, requiring a higher rate and greater care. If, under such circumstances, the carrier acts upon the appearance of the packages, calculated to mislead it, the law is well settled that it is not liable for the loss of the packages. The testimony in this record is not such as to show conclusively that defendant's agent was in fact influenced by the marks on the packages in accepting the same and giving the bill of lading. The bill of lading he issued described the contents as unknown. If he actually understood that the contents consisted of clocks and ordinary glassware, he would naturally not have referred to same as unknown. The box and barrel had previously been used and had the marks "Glass" and "Clocks" already upon them. It may have been evident from their appearance that these marks had not been placed there to designate the contents of these packages, and that this is why he stated the contents as unknown.

The case is not materially different upon the facts from what it was when here before. In the former opinion we stated: "There was no evidence of anything done by the shipper of the property to deceive appellant as to the contents of the box and barrel tendered to it for shipment. The marks upon them were put there to indicate their former contents, and the agent did not testify that he was misled by them; and it would seem from his testimony that he paid very little attention to the shipment anyway. It was stated in the bill of lading that the contents of the box and barrel were unknown as well as their value. There was no evidence whatever tending to show that appellant was led to believe that the property was of less value than that claimed for it."

The agent, Griffin, on this trial testified that he got his information as to the contents of the shipment either from the person who delivered the shipment or from the marks on the barrel and box. The testimony of Sheffield tends to the contrary so far as he was concerned. The recital in the bill of lading, "contents unknown," tends to negative, if it does not entirely negative, the fact that he acquired information of the contents from any source.

It was competent for the trial judge in considering the testimony to arrive at the conclusion that no intention to deceive existed for any purpose on the part of the shipper or her agent, Krezdorn; that defendant's agent was not in fact misled by anything that was represented by the shipper or her agent, nor by the condition, or markings upon the packages, into accepting the same for transportation, and fixing the charges.

The case as it exists in this record is not materially different from what it would have been had the aforesaid marks not been on the packages, it appearing that the agent did

not act upon such markings, and was not deceived thereby. Suppose the box and barrel had no marks, and was accepted, as it was in this instance, without question and evidently without any special attention given the matter of their contents and value, were the contents of such a nature as made it the duty of the shipper to give the carrier notice of the same? This, it seems, would be true if money was being shipped in a trunk or package which would not of itself be calculated to convey notice of the fact. *Hutchinson on Carriers* (3d Ed.) §§ 331, 332. It is probable that the rule will apply as well to rare or costly articles of exceptional value shipped in such manner. A well-considered case on the subject is *Chesapeake & O. Ry. Co. v. Hall* by the Supreme Court of Kentucky, 136 Ky. 389, 124 S. W. 375, which sums up the shipper's duty to notify in this language: "We do not mean to hold that it is the duty of the shipper in every case to inform the agent, unless inquiry is made as to the contents and value of the article shipped. This is only necessary when the contents are altogether different from what one would assume, were contained in such a package, as where money, or valuable jewelry is put in a trunk or box. If the package presented for shipment contains the kind of goods that are generally or usually sent in such packages, or that a person of ordinary prudence might assume would be shipped in them, the carrier will be liable for the value of the contents no matter what they are, unless false or misleading statements as to the contents are made by the shipper, either voluntarily, or in response to inquiries, or he fraudulently or intentionally conceals the true value or character of the goods for the purpose of obtaining a lower rate."

It is manifest that a person of ordinary judgment and experience, would naturally assume that any kind of crockery or even silverware that is now in almost universal use, and which have become common articles of commerce, would be received for shipment as freight in the ordinary way. Krezdorn testified that he had received such goods shipped as freight. Their value is not so exceptional and extraordinary as to suggest any different view, so as to require the shipper, as a matter of law, to give notice to the carrier of their nature and value, unless the information is asked of him.

The judgment is affirmed.

TEXAS & P. RY. CO. v. GULLETT et al.
(Court of Civil Appeals of Texas. Jan. 14, 1911. Rehearing Denied Feb. 11, 1911.)

1. RAILROADS (§ 390*)—INJURY TO PEDESTRIAN—CONTRIBUTORY NEGLIGENCE—DISCOVERED PERIL.

That a pedestrian was guilty of contributory negligence in being on a railway track, does not prevent recovery for his death if the

employés on the train which struck him discovered his peril in time to have stopped the train before striking him by using the means at hand.

[Ed. Note.—For other cases, see *Railroads*, Cent. Dig. §§ 1324, 1325; Dec. Dig. § 390.*]

2. RAILROADS (§ 376*)—INJURY TO PEDESTRIAN—DISCOVERY OF PERIL—DUTY OF EMPLOYÉS.

Train employés, discovering the peril of one on the track, must use every means at hand, consistent with the safety of the train, to avoid striking him; use of ordinary care being insufficient.

[Ed. Note.—For other cases, see *Railroads*, Cent. Dig. §§ 1275–1279; Dec. Dig. § 376.*]

3. DEATH (§ 104*)—DAMAGES—INSTRUCTIONS.

An instruction that in determining the damages caused by negligent death, the jury could consider the support of the widow and her minor children, and the children's ages, was erroneous, being unlimited as to time.

[Ed. Note.—For other cases, see *Death*, Dec. Dig. § 104.*]

4. TRIAL (§ 194*)—INSTRUCTIONS—WEIGHT OF EVIDENCE.

An instruction to ascertain the amount of damages for negligent death in dollars and cents, and make that good, was erroneous as upon the weight of the evidence.

[Ed. Note.—For other cases, see *Trial*, Cent. Dig. §§ 439–466; Dec. Dig. § 194.*]

5. DEATH (§ 104*)—DAMAGES—UNSUPPORTED INSTRUCTIONS.

An instruction permitting the jury to determine the value of decedent's services in superintending and educating his children, was erroneous, in the absence of evidence of such services.

[Ed. Note.—For other cases, see *Death*, Dec. Dig. § 104.*]

6. DEATH (§ 104*)—DAMAGES—UNSUPPORTED INSTRUCTIONS.

An instruction in an action for negligent death permitting consideration of decedent's health, energy, etc., was erroneous, in the absence of supporting evidence.

[Ed. Note.—For other cases, see *Death*, Dec. Dig. § 104.*]

Appeal from District Court, Van Zandt County; T. R. Yantis, Special Judge.

Action by Mrs. Nellie Gullett and others against the Texas & Pacific Railway Company. Judgment for plaintiffs, and defendant appeals. Reversed and remanded.

W. L. Hall, M. G. Sanders, and J. A. Germany, for appellant. Chas. H. Reese, Jno. W. Davidson, and W. A. Davidson, for appellees.

BOOKHOUT, J. This is a suit by Mrs. Nellie Gullett, for herself and as next friend for her minor children, Hallie, Katie, Bessie, and Vergie Gullett, to recover damages for the alleged negligent killing of her husband and the father of her children. She alleges that J. B. Gullett went upon defendant's track on May 1, 1907, at a point where it had been used by the public as a pathway for travel by pedestrians such a length of time as to make him a licensee, and was there run over and killed by one of the defendant's trains; that the engineer operat-

ing the engine of the train had been for more than 10 years an employé of defendant, and knew this particular place was so used by the public; that the train was run at a dangerous rate of speed; that the engineer failed to sound the whistle and ring the bell for Houston street crossing, which was west of where deceased was, and failed to give any kind of warning of the approach of the train, although they knew that they were approaching street crossings in the town of Grand Saline; that the engineer did discover the said J. B. Gullett and his peril in time to have avoided striking him, but that the engineer and employés in charge of the train failed to exercise any care in that behalf. The petition further sets out the damage alleged to have been sustained by reason of the loss of the said J. B. Gullett by the plaintiffs, and prays for a judgment of \$1,999. The defendant answered by a general denial, and specially denied that its roadbed and right of way was habitually used by the public as a highway for pedestrians; that deceased was using it as such, but that he was lying down upon it in the nighttime. Further answering, it alleged that deceased was a trespasser, and that he was guilty of contributory negligence in being upon the track at the time and place where he was killed; that he was negligent in remaining on the track in front of a moving train; that he was not at a crossing, but that he went upon the track in a drunken condition at a place and time that the engineer would not reasonably anticipate his presence, and there laid down so as to partially conceal himself where the roadbed was dark, being covered with cinders, and he himself wearing dark clothes made it nearly impossible for the employés in charge of said train to discover his presence. The case was tried before a jury and resulted in a verdict and judgment for plaintiffs for the gross sum of \$1,999. Defendant's motion for new trial having been overruled, it perfected an appeal.

The evidence was sufficient to raise the issue that the agents and servants of appellant in charge of and operating its train that struck and killed J. B. Gullett saw him upon the railroad track and discovered his peril in time, with the use of the means at their command, to have stopped the train before striking him. There was, therefore, no error in refusing appellant's charge instructing a verdict in its favor. The fact, if it was a fact, that Gullett was guilty of contributory negligence in being upon the railway track would not prevent a recovery by appellees under the law of discovered peril. *Railway v. Staggs*, 90 Tex. 461, 39 S. W. 295. It is, therefore, unnecessary to discuss the assignments presenting the contention that the court erred in refusing certain requested charges on contributory negligence.

Error is assigned to the court's action in refusing appellant's requested charge reading as follows: "You are further instructed that if you find from the evidence that J. B. Gullett was standing upon the track at the time he was struck, and that the engineer on said train saw the said J. B. Gullett standing thereon, then, in that event, the engineer on said train had the right to presume that the said J. B. Gullett would get off the track in time to avoid being struck by said engine, and you will find for the defendant, unless you further find that the said engineer discovered that the said J. B. Gullett could not or would not get off the track in time to prevent being struck, and that the engineer could have stopped his train by the use of ordinary care to use all the means at his command consistent with safety of the train before striking him." This charge is not correct. If the agents and employes operating the train saw Gullett on the track and discovered his peril, they owed him the duty of using every means within their power, consistent with the safety of the train, to avoid running him down. *Railway v. Breadow*, 90 Tex. 26, 38 S. W. 410. The use of ordinary care to make use of such means as stated in the charge is not the correct rule.

The jury were instructed that "if they believe from the evidence that they (plaintiffs) have sustained any injury for which defendant is liable, as explained in these instructions, then the jury has the right to take into consideration the support of plaintiff and her minor children and the instruction and physical, moral, and intellectual training, as well as the ages of said minor children, so far as these matters have been proven in determining the amount of damages in this case." This charge is assigned as error, and the assignment must be sustained. The plaintiffs were entitled to recover compensation for the pecuniary loss sustained by them in the death of J. B. Gullett. To instruct the jury that in determining the damage they could take into consideration the support of plaintiff and her minor children, as well as the ages of said children, without qualification, was error. This charge left the jury without any limit as to the time they should consider such support. There was no evidence of the cost of such support. *Railway v. Worthy*, 87 Tex. 465, 29 S. W. 376.

Again, the jury were instructed that, "You must ascertain from the evidence the pecuniary loss sustained in dollars and cents as nearly as you can approximate thereto and make that good." This charge is assigned as error, and we think this assignment should be sustained. An instruction to ascertain the amount of the damages sustained by plaintiffs in dollars and cents, and make that good, is upon the weight of evi-

dence. There is nothing in the other parts of the charge modifying this language.

Error is assigned to that portion of the charge reading as follows: "The jury must found their estimate of the amount of such loss, if any, upon such facts in proof as tend to show the extent of the pecuniary loss sustained, taking into consideration the age, business capacity, experience and habits, health, energy, and perseverance during what would have probably been his lifetime, if he had not been killed, so far as these matters have been shown by the testimony, and also having regard to the value of services in the superintendence, attention to the care of his family, and in the education of his children, of which they have been deprived by the death of J. B. Gullett." The evidence falls to show what services if any, were rendered by J. B. Gullett during his lifetime in the superintendence of his family and the education of his children. The charge leaves it to the jury to determine the value of these services, when there is no evidence that any such services were rendered by him. This was error.

It was also improper to instruct the jury to take into consideration the habits, health, energy, and perseverance, during what would have been the lifetime of the deceased when there was no evidence upon those matters.

For the errors pointed out in the charge the judgment is reversed and the cause remanded.

ST. LOUIS SOUTHWESTERN RY. CO. OF TEXAS v. EDWARDS.†

(Court of Civil Appeals of Texas. Jan. 7, 1911.
Rehearing Denied Feb. 11, 1911.)

1. RAILROADS (§ 305*)—OPERATION OF TRAINS —CARE REQUIRED.

Where trainmen discover at a private crossing persons leading stock which is becoming frightened at the train, they must refrain from sounding the whistle when it is discovered that it will probably cause injury, unless it is necessary to preserve the train or prevent damage to some person.

[Ed. Note.—For other cases, see *Railroads*, Cent. Dig. §§ 968-971; Dec. Dig. § 305.*]

2. RAILROADS (§ 350*)—OPERATION OF TRAINS —CARE REQUIRED.

Whether trainmen discovered the peril of a person leading an animal through the gate of a private farm crossing in time to refrain from sounding the whistle and frightening the animal, causing injury to the person, *held*, under the evidence, for the jury.

[Ed. Note.—For other cases, see *Railroads*, Cent. Dig. § 1155; Dec. Dig. § 350.*]

Appeal from District Court, Hunt County; R. L. Porter, Judge.

Action by George Edwards against the St. Louis Southwestern Railway Company of Texas. From a judgment for plaintiff, defendant appeals. Reversed and remanded.

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

† Writ of error granted by Supreme Court.

E. B. Perkins and Templeton, Craddock, Crosby & Dinsmore, for appellant. Evans & Carpenter, for appellee.

RAINEY, C. J. This suit was brought by George Edwards against the railway company to recover damages for personal injuries to his wife, alleged to have been sustained by her by reason of being jumped against and knocked down by a cow she was leading becoming frightened at the blowing of the whistle of a passing train of the defendant at a private crossing over defendant's track, inside the inclosure of a farm on which plaintiff lived. Defendant pleaded the general issue, and specially that the train was properly operated and in the usual manner; that plaintiff's wife knew that the train was coming before she reached the gate, that leads to the crossing, and after going through said gate had ample time to have reached a place of safety; that she knew how trains were usually operated at said place; and that she assumed the risk and was guilty of contributory negligence. A trial resulted in a verdict and judgment for plaintiff, from which the railway company appeals.

The court gave the following charge, viz.: "Now, if you believe from the preponderance of the evidence that the place where it was the duty of the railway company to sound its road crossing signal was west of said crossing more than 100 yards when trains were traveling in a western direction on said road, and if you find that while plaintiff's wife was standing on the inside of the right of way holding a cow, with a rope, waiting for the train to pass, the agents and servants of the defendant in charge of and operating a freight train sounded the whistle when the engine was on said private crossing, and if you find that said cow took fright at the sound of said whistle and jumped against plaintiff's wife, and she was thereby injured in any or all the ways and parts of her body as alleged and set forth in the original petition and in the trial amendment; and if you further find that the use of said crossing by persons on said farm had existed so long and with such frequency, if it did, that the agents and servants in charge of and operating the defendant's freight trains and the one in question, knew that persons might reasonably be expected to be on or about said crossing, intending to use the same in crossing, at any time during the day; and if you further find that the agents and servants in charge of said train, in sounding said whistle on said crossing, if they did, were guilty of 'negligence' under the circumstances as that term is defined in the first paragraph of this charge, and that such negligence, if any, was the proximate cause of plaintiff's wife's injuries, if any—then you will find for the plaintiff." This charge is assigned as error, and among the objections thereto appellant urges the

following: "The said charge is erroneous in that the same directs a verdict for the plaintiff without reference to whether the operatives of the engine knew of the presence of plaintiff's wife near the crossing in a perilous situation and without reference to whether in the exercise of ordinary care they would have been keeping a lookout for persons situated as she was and would have discovered her in time to have avoided the accident and when the operatives were under no duty to keep a lookout for a person situated as she was."

Plaintiff's wife testified, in effect, that said crossing had been used frequently and for a long time by persons on the farm; that persons might reasonably be expected to be on or about the crossing, intending to use it; that the track was fenced, with gates on either side, and the right of way was about 100 feet wide; that she was leading a cow intending to cross the track to give her water; that when she approached the gate she heard a train, but paid no attention to it. She led the cow through the gate, and just as she reached the inside thereof the train passed and sounded the whistle at the crossing, which frightened the cow, causing her to jump against plaintiff's wife, injuring her.

The court's charge is subject to the criticism of appellant, in that it authorizes a recovery if the jury believed from the evidence that such crossing had been used by persons on the farm with such frequency and for such a length of time as that defendant knew persons might reasonably be expected to be on or about the crossing. In other words, the import of the charge is that defendant owed the plaintiff's wife the duty to use care in keeping a lookout at said point to discover her situation, and to avoid frightening her cow and preventing injury. This is not a correct principle of law. While, under such circumstances, it was the duty of the servants of the railway company to keep a lookout for persons intending to use the crossing to prevent a collision with them, they owed no such duty to keep a lookout to avoid the frightening of stock. Their duty was to run their trains at such place without making unusual noises. If they discover persons driving teams or leading stock, and they discover the stock is becoming frightened at the train, they must refrain as much as possible from making any noise that is calculated to frighten the stock. The sounding of the whistle of an engine is required by law on certain occasions, yet this should be refrained from to prevent the frightening of stock, when it is discovered that stock will become frightened and probably do injury, unless the sounding is necessary for the preservation of the train or to prevent injury to some person.

The rule applicable to keeping a lookout in such a case as this is laid down in *Railway Co. v. Boesch* (Sup.) 126 S. W. 8, and in

Hargis v. Railway Co., 75 Tex. 19, 12 S. W. 953. In the *Boesch Case*, where a team was frightened by a train at a street crossing in a town, it is said: "It is the right of the servants of a railroad company to move their trains with usual and necessary noises, without keeping a lookout for frightened teams along the track. It was so held in the case of *Hargis v. Railway Co.*, 75 Tex. 19, 12 S. W. 953. But where they undertake to make an unusual and unnecessary noise at a crossing of a public road, or street, they should exercise circumspection, and see that there are no teams in position to be frightened by such unusual sounds."

Whether or not the operatives of the train saw the situation of plaintiff's wife in time to refrain from sounding the whistle, or discovered her peril in time so to do, was a question for the jury. The evidence fails to show that her situation was discovered by the engineer; but there was evidence that the fireman saw her, but whether in time to inform the engineer to prevent the sounding of the whistle was a question for the jury's determination. *Railway Co. v. Boesch*, supra.

Several special charges requested by the appellant were refused by the court. From what we have said, we deem it unnecessary to discuss them, as on another trial the court will be governed by this decision, and such charges given or omitted as may be required by the evidence given on the trial.

For the error in the charge, as indicated, the judgment is reversed, and the cause remanded.

MECCA FIRE INS. CO. v. COGHLAN.
(Court of Civil Appeals of Texas. Jan. 18, 1911. Rehearing Denied Feb. 9, 1911.)

INSURANCE (§ 323*)—FIRE INSURANCE—VACANCY OF PROPERTY—CONSTRUCTION OF POLICY.

Where one insurance policy upon several buildings, which practically constitutes one risk, provided that it shall be void as to every part if a building therein described is vacant for more than 10 days, that provision goes to the entire contract, and if one building is vacant longer than 10 days, the whole insurance lapses even though the amount of insurance on each building is specified.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 764; Dec. Dig. § 323.*]

Appeal from District Court, Harris County; Norman G. Kittrell, Judge.

Action by W. C. Coghlan against the Mecca Fire Insurance Company. From a judgment for plaintiff, defendant appeals. Reversed, and judgment rendered for defendant.

W. L. Eason, for appellant. John G. Tod, for appellee.

McMEANS, J. In consideration of \$25 paid by W. C. Coghlan to the Mecca Fire In-

surance Company the latter issued to him a policy of fire insurance insuring him against loss by fire in the sum of \$1,000, as follows: "\$400.00 on the two-story frame shingled roof building while occupied by tenants as courtroom on first floor and living rooms on second floor on corner of Broadway and State Sts., Harrisburg, Texas. \$200.00 on his one frame addition to the above building thereto attached which was used for grain and feed when building was used for merchandising. \$400.00 on the two-story frame shingled roof building, including foundations, gas and water pipes, bath tubs and water-closets and connections, and stationary heating apparatus therein occupied as a dwelling, situated on corner of Broadway & State Sts., in the town of Harrisburg, Texas, Harris County." The property described in the policy having been destroyed by fire, Coghlan brought this suit against the insurance company to recover the full amount for which it was insured.

The undisputed testimony showed that one of the buildings described as a two-story frame shingled building was a residence house and that it had become vacant before the fire and so remained for more than 10 days. It was further shown, without contradiction, that the other two-story building described as a storehouse had also become vacant before the fire and remained so for more than 10 days. The building described as an "addition to the above building thereto attached" was shown to have been continuously occupied by tenants of the insured from the date of the issuance of the policy until the time of the fire. There was proof that the two buildings last referred to were so attached as to be regarded as one building. The case was tried before a jury. After the testimony was heard the court instructed the jury to return a verdict for plaintiff for \$600, being the amount for which the addition and the building to which it was attached were insured, and denied a recovery for the amount for which the residence was insured. The jury having returned a verdict in accordance with the instruction of the court, a judgment thereon was duly entered for plaintiff, from which the defendant, after its motion for new trial had been overruled, appealed.

Appellant's first assignment complains that the court erred in overruling its motion for new trial on the grounds stated in paragraph 1 thereof, which are "that the verdict and judgment are contrary to the law and the evidence because the uncontradicted evidence showed that the policy sued on is divided into three items, and that each item covers a separate building, and that the 'residence' and the 'storehouse' covered by the policy were vacant and unoccupied at the time of the fire, and that each of said buildings had

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

been vacant and unoccupied for more than ten days next preceding the fire, and the policy provides that same shall be void in the event a building described in the policy be or become vacant or unoccupied and so remain for ten days; and that said buildings were contiguous to each other and so situated as to constitute one risk."

The third assignment complains of the refusal of the court to give defendant's special charge No. 4 instructing the jury to return a verdict in its favor.

Appellant contends that the policy became void in toto when one of the buildings described therein became vacant and unoccupied and so remained for 10 days prior to its destruction by fire. On the other hand, the appellee maintains that the vacancy of a part only of the property insured does not avoid the insurance under the vacancy clause, and that when an insurance policy covers two or more buildings, there is no breach of the condition against the vacancy unless all the buildings are vacant; and he cites several cases in support of his contentions. The court evidently held the view that vacancy of one of the buildings avoided the policy only in so far as that particular building was concerned, leaving the policy in full force as to the others.

The testimony is conclusive that the residence was a separate building, and was not attached to the storehouse, or the addition thereto, in such a way as to make them one building. The parties by their contract recognized the existence of each of the three structures insured as separate structures, and not as one building, but while separate, the evidence leaves no doubt that the three were so situated with reference to each other as to constitute one risk. The contract provides that "this policy shall be entirely void in toto as to every part and parcel, subject and divisions thereof * * * if a building herein described * * * be or become vacant or unoccupied and so remain for ten days." We think that the ruling of our Supreme Court in *Bills v. Insurance Company*, 87 Tex. 547, 29 S. W. 1063, 29 L. R. A. 706, 47 Am. St. Rep. 121, is decisive of the question under discussion. We quote: "The terms being that the policy shall be *entirely* void upon a certain state of case, it cannot become void in part in that event. A contract cannot be entirely void and at the same time be partially valid. *Entirely void* means void in toto, in all its parts, and as to all rights claimed under it. We agree with counsel for defendant that the contract is entire, and that if the facts bring the case within the language of the clause expressing the condition of the forfeiture it is void as to all the property embraced."

The expression "entirely void," as used above, is also used in the policy sued on in

the present case. But this policy goes further, and, in addition to providing that it shall be entirely void in the case stated, adds, "in toto, as to every part and parcel, subject and division thereof," if a building therein described become and remain vacant and unoccupied for 10 days. Here the subject of insurance was buildings, and the parties recognized by their contract the insured property consisted of three buildings, and it was clearly provided in the contract that if a building (that is, one building—any one of the three) should remain vacant and unoccupied for 10 days the policy should be entirely void, in toto, as to every part and parcel, subject and division. As said by Judge Brown in the case referred to: "It is unnecessary to enter into a discussion of the rules which govern in determining whether a policy of insurance upon different articles separately valued is to be held entire or not. * * * The language in this policy, however, is so definite upon the subject that there is no room for construction." We think that the facts bring the case within the language of the clause expressing the condition of the forfeiture, and that the policy became void in toto when one of the buildings became vacant and so remained for 10 days, and that the court should have instructed a verdict for defendant as requested by the special charge.

In view of the above holding it becomes unnecessary to consider in detail the several cross-assignments of error presented by appellee in which he complains of the action of the trial court in denying to him a recovery of the amount for which the residence was insured, but it is sufficient to say that the cross-assignments present no reversible error and are overruled. The judgment of the court below is reversed and judgment here rendered for appellant.

Reversed and rendered.

HILL COUNTY v. SAULS.†

(Court of Civil Appeals of Texas. Jan. 14, 1911. Rehearing Denied Feb. 4, 1911.)

1. COUNTIES (§ 74*)—TREASURERS—COMPENSATION.

Under Const. art. 16, § 44, giving county treasurers such compensation as may be provided by law, and under Rev. St. 1895, art. 2467, providing that they shall receive commissions not exceeding a stated percentage to be fixed by the commissioners' court, the amount of commission is discretionary with that court; but it cannot validly provide that he shall receive no commission, and, on such order being made, the treasurer is entitled to the commission fixed by a previous order.

[Ed. Note.—For other cases, see Counties, Dec. Dig. § 74.*]

2. COUNTIES (§ 74*)—TREASURERS—COMPENSATION.

Under Rev. St. 1895, art. 2467, providing that county treasurers shall receive commissions

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

† Writ of error denied by Supreme Court.

on moneys received and disbursed not exceeding a certain percentage to be fixed by the commissioners' court, the treasurer who served more than one year was entitled to commissions as money was received and paid out, and not a proportionate amount of the commissions for the time he served.

[Ed. Note.—For other cases, see Counties, Dec. Dig. § 74.*]

3. COUNTIES (§ 74*)—TREASURERS—COMPENSATION.

Under Rev. St. 1895, art. 2467, providing that county treasurers shall receive commissions not exceeding $2\frac{1}{2}$ per cent. on receipts and disbursements, to be fixed by the commissioners' court, courts cannot interfere with an order fixing the commission at $1\frac{1}{2}$ mills on the dollar.

[Ed. Note.—For other cases, see Counties, Dec. Dig. § 74.*]

Appeal from District Court, Hill County; W. C. Wear, Judge.

Action by Delle Sauls against Hill County. Judgment for plaintiff, and defendant appeals; plaintiff assigning cross-error. Affirmed.

Frazier & Shurtleff, for appellant. F. P. Works, W. C. Morrow, and William C. Morrow, for appellee.

RAINEY, C. J. This suit was brought by appellee to recover of Hill county, appellant, certain fees of office claimed to be due him as county treasurer of said county. Appellant answered by general denial, and specially answered, in effect, that all sums due him as such treasurer have been paid him; that the compensation to which he was entitled as treasurer had been fixed by the commissioners' court prior to his election and induction into office, and he was not led to believe he would receive any greater amount for his services; that he accepted the amount so paid him in full settlement of the services so rendered, and he is estopped from claiming further compensation. A trial resulted in a judgment in favor of appellee for \$838.68 with interest, and appellant appeals.

There is no controversy as to the facts, which consist of agreements of counsel and orders of the commissioners' court, as follows: "It is agreed that the plaintiff was elected county treasurer at the November election, 1908, and qualified the 1st of December, 1908; that the funds received by him between December 1, 1908, and March 13, 1909, exclusive of what he received from his predecessor and exclusive of school fund, amounts to \$77,988.76; that the total compensation on that at 1 per cent. would be \$986.45; and that he has received during that period \$140.87."

The commissioners' court of Hill county passed the following orders:

"It is the sense of the commissioners' court that on December 1, 1908, and after the present term of the county treasurer, Mr. Albert L. Welch, has expired, the commissions received by the county treasurer be limited to that to which he is entitled by

law for receiving and disbursing the school funds, and that he receive no commissions on other county funds received and disbursed by said officer, and it is so ordered this January 16, 1908.

"On this, the 16th day of February, 1906, the court took up the matter of fixing the commissions to be paid and allowed the county treasurer for his services for receiving and paying out the funds of Hill county as such treasurer. And the court, after considering the same, all members being present and acting, made the following order: It is ordered by the court that the commission hereafter to be allowed and paid to the county treasurer for his services as such shall be for receiving the funds on which a commission is legally chargeable, the rate of 1 per cent. And on all funds paid out on which a commission is legally chargeable the rate of 1 per cent.

"On this 13th day of March, 1909, the matter of the commissions to be allowed the county treasurer came on to be considered by the court, and the matter of determining what should be done with the order of this court made and entered on January 16, 1908, and entered in this volume on page 206, and the court, having fully considered the matters involved here, enters this order: It is hereby ordered that the order of this court entered on January 16, 1908, be, and the same is hereby, rescinded, and that the county treasurer be, and he is hereby, allowed $1\frac{1}{2}$ mills on receipts and $1\frac{1}{2}$ mills on disbursements, and that this order take the place of the order entered as above stated on page 206 of this volume. The purpose of this order is to do away with the former order of this court, and to fix a commission of $1\frac{1}{2}$ mills for receipts and $1\frac{1}{2}$ mills for disbursements by the county treasurer, from and after December 1, 1908. Done in open court, all members thereof being present and acting. March 13, 1909.

"It is agreed that the $1\frac{1}{2}$ mills referred to in the above order meant $1\frac{1}{2}$ mills on the dollar. It is further agreed that the plaintiff at the time he qualified as county treasurer, and at the time he performed the services, knew of the existence of the order of January 16, 1908, and that he knew that it was the purpose of that order to reduce the salary; that that order meant just what it said, that he was not to have any salary or compensation for the work, further than that provided in said order."

The first question to be considered is: Was the action of the commissioners' court of Hill county on January 16, 1906, limiting the commissions of the treasurer to what he was allowed by law for receiving and disbursing the school funds and denying him commissions as to all other funds, void and of no effect?

The law relating to the compensation of

the county treasurer in force at the time said action was taken by said commissioners' court was as follows: Const. Tex. art. 16, § 44, directs: "The Legislature shall prescribe the duties and provide for the election by the qualified voters of each county in this state, of a county treasurer and county surveyor, who shall have an office at the county site and hold their office for two years, and until their successors are qualified; and shall have such compensation as may be provided by law." Article 2467, Sayles' Ann. Civ. St. 1897, provides: "The county treasurer shall receive commissions on the moneys received and paid out by him, said commissions to be fixed by order of the commissioners' court as follows: For receiving all moneys, other than school funds for the county, not exceeding two and one-half per cent., and not exceeding two and one-half per cent. for paying out the same; provided, however, he shall receive no commission for receiving money from his predecessor nor for paying over money to his successor in office." Article 2468, Sayles' Ann. Civ. St. 1897, provides: "The treasurers of the several counties shall be treasurers of the available free school fund, and also of the permanent county school fund for their respective counties. The treasurers of the several counties shall be allowed for receiving and disbursing the school funds one-half of one per cent. for receiving, and one-half of one per cent. for disbursing, said commission to be paid out of the available school fund of the county; provided, no commission shall be paid for receiving the balance transmitted to him by his predecessor, or for turning over the balance in his hands to his successor; and provided further, that he shall receive no commission on money transferred." Acts 31st Leg. p. 22, § 154a, provides: "That no commission shall hereafter be paid for receiving and disbursing the school fund."

The Constitution created the office of county treasurer and provides that he "shall have such compensation as may be provided by law." This evidently contemplates that the Legislature should enact some provision which would entitle the county treasurer to some compensation. In obedience to this, the Legislature did enact article 2467, Rev. St. 1895, which provides that the treasurer shall receive commissions on all moneys received and disbursed, other than school funds for the county, not exceeding 2½ per cent. for receiving and not exceeding 2½ per cent. for paying out the same, except such as received from his predecessor, and that turned over to his successor. While this law left it discretionary with the commissioners' court to fix the compensation, not to exceed the 2½ per cent., as stated, yet by its terms it is evident that the commissioners' court was to fix some remuneration for services rendered, and the action denying any compensation whatever was contrary to the spirit, if not the letter, of said law. We there-

fore are of the opinion that said action of the commissioners' court in failing to allow compensation was void and of no effect, and that the order theretofore existing allowing commissions of 1 per cent. on all moneys received and on all moneys paid out remained in full force until March 13, 1909, when said court fixed the compensation at 1½ mills on the dollar.

Appellant complains that the judgment is excessive, in that a greater sum was allowed appellee than he was entitled to, and contends that the commissions for the time which appellee held the office prior to March 13, 1909, should have been the proportion of \$2,000 as that time bears to the whole year. The case of *Davenport v. Eastland Co.*, 94 Tex. 277, 60 S. W. 243, is cited in support of appellant's contention. In that case the county treasurer had qualified on November 1, 1896, and served until his successor qualified on November 19, 1898, something over two years. Between November 1, 1898, and November 19, 1898, he collected and paid out considerable money, and the question was whether he was entitled to full commissions on the moneys received and paid out, or only such proportion of \$2,000 as the time he served over two years bears to the whole year. Had he been allowed to retain the full commissions on the amount collected and paid out, injustice would have been done his successor, as appellant would have gotten a greater proportion of the \$2,000 than he was entitled to. But such is not this case. Here, the treasurer served for more than 12 months, and he was entitled to commissions on the money as it was received and paid out, and the sum he received for commissions, not exceeding \$2,000 for that year, the county is in no attitude to complain.

Appellee presents a cross-assignment of error to the action of the court in sustaining an exception to his plea seeking to recover commissions in excess of 1½ mills on the dollar for services rendered after March 13, 1909. Plaintiff pleads that he was entitled to commissions at the rate of 1½ per cent. on the moneys collected, contending that the order of March 13, 1909, was void in that the commissions allowed were unreasonable, being insufficient compensation for the services rendered.

The law vested in the commissioners' court the power to fix the commissions of county treasurer; the only limitation being that it should not exceed 2½ per cent. on the dollar for receiving and paying out money. Having fixed the maximum rate, it seems, had the lawmakers intended the commissioners' courts should not fix a lower rate, they would have so said. As the amount fixed was within the discretion given by law, it is not within the power of the courts to interfere. Besides, appellee was aware of the court's action, and, if the compensation was too small, he was not compelled to perform the services, and, having done

so, he cannot complain. It may be that the compensation fixed was too small and an injustice done appellee, but, on the other hand, the compensation may have been sufficient under the then existing conditions; at any rate, the commissioners' court has exercised the discretion granted by law, and this court is powerless to interfere. *Riggins v. Richards*, 79 S. W. 84; *Sanderson v. Pike Co.*, 195 Mo. 598, 93 S. W. 942.

The judgment is affirmed.

LOTT v. COUSINS et al.

(Court of Civil Appeals of Texas. Feb. 2, 1911.)
VENDOR AND PURCHASER (§ 263*)—LIEN
NOTES—ASSUMPTION.

One who, upon purchasing land, assumed the payment of vendor's lien notes executed by his grantor, was bound to make payment thereof to the holder at maturity, and was not merely liable for their payment to his grantor.

[Ed. Note.—For other cases, see *Vendor and Purchaser*, Cent. Dig. §§ 700-712; Dec. Dig. § 265.*]

Error from District Court, Smith County; R. W. Simpson, Judge.

Action by W. H. Cousins against John A. Lott and others. Judgment for plaintiff against certain defendants, and defendant Lott brings error. Affirmed.

Price & Beaird, for plaintiff in error. Hanson & Butler, for defendant in error Cousins.

HODGES, J. The judgment from which this writ of error is prosecuted was rendered in a suit instituted in the district court of Smith county by the defendants in error against Joe and John Verrell, John A. Lott, the plaintiff in error, and T. N. Jones, on two promissory notes for the sum of \$116.65 each. The notes were given as the purchase price of a tract of land, upon which the foreclosure of a lien was also sought and obtained. Service of citation was had upon the Verrells and the plaintiff in error, but none upon Jones. The plaintiff in the suit dismissed as to Jones, and took a personal judgment by default against the other parties, and also secured a decree foreclosing his vendor's lien upon the land. The plaintiff in error, Lott, is the only one who complains of that judgment.

In the one assignment of error presented in his brief it is claimed that the petition was insufficient to authorize a personal judgment against him. The petition contains, after the usual averments necessary in suits on promissory notes seeking the foreclosure of a lien, the following: "Plaintiff would further allege and show that the defendant John A. Lott purchased the said land from the said John and Joe Verrell since said notes were executed, and assumed the payment of said two notes, and has since said time sold said land to defendant T. N. Jones,"

etc. The recitation in the judgment shows that the court heard testimony upon the issue as to whether or not Lott had assumed the payment of the notes. It is insisted that in assuming such payment, Lott became liable, if at all, only to the Verrells. The effect of Lott's assumption was to undertake the payment of the notes according to their tenor and effect, and that necessarily carried with it the obligation of making such payment to the owner and holder of the notes at the time of their maturity. *Hoeldtke v. Horstman*, 128 S. W. 642, and cases there cited.

The judgment of the district court is affirmed.

MICHALEK v. CERNOCK.

(Court of Civil Appeals of Texas. Jan. 28, 1911.)

1. APPEAL AND ERROR (§ 172*)—OBJECTIONS NOT RAISED BELOW.

A landlord cannot justify distress by showing on appeal a valid ground for the writ under *Sayles' Ann. Civ. St.* 1897, art. 3240 not relied on in the affidavit for the writ; the ground relied on below having been found not to exist.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 1070-1078; Dec. Dig. § 172.*]

2. LANDLORD AND TENANT (§ 274*)—WRONGFUL DISTRESS—DAMAGES—EVIDENCE—SUFFICIENCY.

Evidence held insufficient to sustain an award of \$350 actual, and \$250 exemplary, damages, for wrongful distress against a farm tenant.

[Ed. Note.—For other cases, see *Landlord and Tenant*, Dec. Dig. § 274.*]

Appeal from Grayson County Court; J. Q. Adamson, Judge.

Action by August Michalek against Frank J. Cernock. Judgment for defendant, and plaintiff appeals. Reversed and remanded.

Orus O. Ross and W. L. Hay, for appellant. J. W. Fisher, for appellee.

BOOKHOUT, J. The inception of this suit is a distress warrant issued out of the justice's court of precinct No. 3 of Grayson county, on September 13, 1909. It was claimed that certain advances in the sum of \$332.46 were made by August Michalek to Frank Cernock, his tenant, to enable him to make a crop, which amount was due. The writ was levied on certain corn and cotton. It was made returnable to the county court of Grayson county. In the county court plaintiff filed his first amended original petition specifically setting out two notes, which he alleged evidenced the advances, neither of which was due when the distress warrant issued. The said amendment further alleged that "on or about the 10th day of September, 1909, said defendant, Frank J. Cernock, without the knowledge or consent of plaintiff,

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

and while the rents and advancements above mentioned were unpaid, removed and permitted to be removed from said premises three bales of cotton, and that said defendant sold said cotton and appropriated the proceeds thereof to his own use and benefit, and failed and refused to pay the plaintiff his portion of the rent therefrom and that defendant was about to remove on said date from said premises other property without the consent of plaintiff, and without paying plaintiff his rent or paying the advancements above mentioned." The defendant filed an amended answer, denying that plaintiff furnished him with any advances with which to make his crop and reconvened for damages, actual and exemplary, for the alleged wrongful and illegal suing out and levy of the distress warrant. A trial resulted in a verdict as follows: "We, the jury, find for plaintiff in the sum of \$235.85 for rents. We do not find for \$78.65 for supplies. We find in favor of defendant the sum of \$350, actual damages, and \$250 exemplary damages, and \$22 for work." Upon this verdict judgment was rendered for defendant in the sum of \$398.15, and for all costs, and his motion for a new trial being overruled plaintiff perfected an appeal.

It is assigned that the court erred in the seventh paragraph of his charge in submitting to the jury the issue as to whether or not the distress warrant was sued out without probable cause. It is insisted that the evidence showing that the tenant without payment of his rent and before the distress warrant was sued out had sold three bales of cotton raised on the rented premises, that this constituted probable cause as a matter of law. The uncontradicted evidence showed that the tenant had sold at different dates three bales of the cotton raised by him on the rented premises at the time the distress warrant issued and had the affidavit alleged this fact as the basis for suing out the writ the contention would be sound. But these facts are not alleged in the affidavit or made the ground of the issuance of the writ. The ground set out in the affidavit as the basis for the issuance of the writ is that the advances are due, when the affidavit on its face shows that this was not true. The statute sets out three grounds upon which the writ may issue, one being that when the advances made the tenant are due. *Sayles' Ann. Civ. St. 1897, art. 8240.*

The affidavit for the writ having specified a valid ground for the issuance of the writ, and upon trial it being shown that such ground did not in fact exist, the appellant cannot, on appeal, be heard to say that a valid ground for suing out the writ did exist at the time of its issuance, and this constituted probable cause for the writ, when such ground was not made the basis for its issuance. Such, in effect, is the holding of

this court in *Jackson v. Corley*, 30 Tex. Civ. App. 417, 70 S. W. 571. See, also, *Weir v. Brooks*, 17 Tex. 640; *McKee v. Sims*, 92 Tex. 51, 45 S. W. 564; *Stiff v. Fisher*, 85 Tex. 556, 22 S. W. 577.

Again, it is contended that the verdict is excessive in finding \$350 actual damages in favor of Cernock, the tenant. This contention must be sustained. The testimony in regard to the damages to the corn was to the effect that the corn would make from 12 to 15 bushels per acre and that there was about 40 acres planted in corn. The market price of same was 60 cents per bushel; that the greatest amount of corn would not have been over 600 bushels, of which amount the plaintiff was entitled to one-third as rents, leaving 400 bushels belonging to defendant. The proof further showed that the corn was on hand and the only damage which it might have sustained was by reason of the fact of some of it falling down and the damage on account thereof, if the total amount of the corn had been destroyed, as alleged by the plaintiff, would not have exceeded \$240, and the total amount of damages to the cotton, had all of it been destroyed, as alleged by plaintiff, would not have exceeded \$120, aggregating \$360, and under no phase of the case, according to the pleadings and testimony can a judgment for \$350 as actual damages be sustained.

It is assigned that "the verdict for exemplary damages is excessive, is without sufficient testimony to support it, and shows that the jury in rendering it was not actuated by the facts in the case or the testimony or by the law, but was actuated by passion and prejudice." This assignment is sustained. The evidence was insufficient to support a verdict for exemplary damages in the sum of \$250.

For the errors pointed out, the judgment is reversed and the cause remanded.

MISSOURI, K. & T. RY. CO. OF TEXAS v. HAYNES.

(Court of Civil Appeals of Texas. Jan. 28, 1911.)

CONSTITUTIONAL LAW (§ 46*)—DETERMINATION OF QUESTIONS—IMMATERIAL QUESTIONS.

Where a statutory penalty included in a judgment is remitted, the question of the constitutionality of the statute will not be considered on appeal.

[Ed. Note.—For other cases, see *Constitutional Law*, Cent. Dig. § 43; Dec. Dig. § 46.*]

Appeal from Rockwall County Court; H. M. Wade, Judge.

Action by Viola Haynes against the Missouri, Kansas & Texas Railway Company of Texas. From a judgment for plaintiff, defendant appeals. Reformed and affirmed.

T. B. Ridgell, for appellant. W. B. Wade, for appellee.

RAINEY, C. J. This is a suit by Viola Haynes against the railway company to recover the value of two mules killed and one set of harness destroyed by reason of appellant's train colliding with said mules at a crossing over said railway track; also to recover the statutory penalty of \$20 attorney's fee. A trial resulted in favor of plaintiff for \$360, amount of claim, and the \$20 attorney's fee.

The appellant assigns error to the action of the court in allowing the penalty of \$20 attorney's fee, on the ground that the act providing the fee is unconstitutional. It is unnecessary for us to pass upon this contention, as appellee has filed in this court a remittitur of said fee.

No statement of facts accompanies the record, and the other assignments of error relate to the action of the court on matters which cannot be considered in the absence of a statement of facts, and the judgment will be reformed and affirmed for \$360; cost of appeal to be taxed against appellee.

POWDRILL v. POWDRILL.

(Court of Civil Appeals of Texas. Feb. 3, 1911.)

1. APPEAL AND ERROR (§ 100*)—INJUNCTION—REFUSAL TO DISSOLVE—MODIFICATION.

Acts 1909, c. 34, § 2, authorizing an appeal from an order granting or refusing a temporary injunction, or granting a motion to dissolve the same, does not authorize an appeal from an order modifying a temporary injunction, and denying a motion to dissolve the same as modified.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 670-680; Dec. Dig. § 100.*]

2. APPEAL AND ERROR (§ 1*)—RIGHT OF APPEAL—STATUTORY AUTHORITY.

The right of appeal does not exist unless conferred by statute.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1-4; Dec. Dig. § 1.*]

3. APPEAL AND ERROR (§ 627*)—JURISDICTION—FILING RECORD—TIME.

Under Acts 1909, c. 34, § 2, authorizing an appeal from an order granting or refusing a temporary injunction, or granting a motion to dissolve the injunction, and requiring the record to be filed in the appellate court within 15 days after record of the order appealed from, the court can acquire no jurisdiction where the record is not filed in the appellate court within the time specified.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2744-2749; Dec. Dig. § 627.*]

Appeal from District Court, Shelby County; James I. Perkins, Judge.

Action by Dillah A. Powdrill against J. O. Powdrill. From an order refusing to dissolve a temporary injunction, and modifying and continuing the same in force, defendant appeals. Dismissed.

PLEASANTS, C. J. This appeal is from an order of the district court of Shelby county made in term time overruling a motion

presented by appellant to dissolve a temporary injunction theretofore granted in this cause on application of appellee, and modifying and continuing in force said temporary injunction. The term of the court at which the order was made began on February 7, 1910, and ended on March 12, 1910. The suit, which is one for divorce, was brought by appellee to the August term, 1910, of said court; her original petition having been filed on February 15, 1910. The petition asked for a temporary injunction restraining appellant from disposing of the community property, and from interfering with plaintiff's custody and control of their children pending the final hearing of the suit. Such injunction was granted by the court on the day the petition was filed, and a writ issued and served upon appellant. Thereafter appellant filed a motion to dissolve the temporary injunction, which was heard and overruled by the court on March 7, 1910. The order overruling the motion to dissolve modified the temporary injunction to some extent, and directed that, as so modified, said injunction continue in force until a final hearing of the case. Appellant gave due notice of appeal from this order, and on March 28, 1910, filed a transcript of the proceedings in this court.

Appellee has moved to dismiss the appeal on the ground that no appeal is given by the statute from an interlocutory order overruling a motion to dissolve a temporary injunction, and therefore this court is without jurisdiction to hear and determine such appeal. The motion must be sustained. The act of 1909 (Acts 1909, p. 355, c. 34, § 2), giving the right of appeal from an order granting or refusing a temporary injunction, or granting a motion to dissolve such an injunction, does not give the right to appeal from an order overruling a motion to dissolve. While the wisdom of this discrimination, which in many cases deprives a defendant against whom a writ of injunction has been granted without notice of an opportunity to show the trial court that such injunction was erroneously granted, may well be doubted, it is a matter exclusively within the discretion of the Legislature. Appellate courts can only exercise such jurisdiction as is conferred upon them by law, and, unless the right of appeal is given in the particular case by statute, we have no jurisdiction to hear such appeal.

Under the statute above cited in all appeals provided for thereby the transcript of the proceedings must be filed in the appellate court within 15 days after the record of the order appealed from. This provision has been declared by the Supreme Court to be jurisdictional, and, unless the record is filed in the appellate court within the time prescribed by the statute, such court acquires no jurisdiction to entertain the ap-

peal. *Baumberger v. Allen*, 101 Tex. 352, 107 S. W. 526. Under this rule, even if the order modifying and continuing the injunction in force could be regarded as one from which an appeal would lie under the statute, the record not having been filed in this court within 15 days after the order was entered of record, we would not have acquired jurisdiction to hear such appeal. The order, however, cannot be regarded as a regranting of a temporary injunction so as to give a right of appeal therefrom.

The motion is sustained, and the appeal dismissed.

MORSE et al. v. TACKABERRY et al.
(Court of Civil Appeals of Texas. Jan. 5, 1911.
Rehearing Denied Feb. 2, 1911.)

1. COURTS (§ 363*)—ACTION AGAINST RECEIVERS—LEAVE OF COURT—STATE STATUTES.

Sayles' Ann. Civ. St. 1897, art. 1483, authorizing suit against receivers without leave of court, only affects receiverships pending in the state court, and does not affect the common-law rule to the contrary applying to receivers appointed by a federal court.

[Ed. Note.—For other cases, see *Courts, Cent. Dig. §§ 939-949*; *Dec. Dig. § 363.**]

2. RECEIVERS (§ 174*)—FEDERAL COURT RECEIVERS—ACTIONS AGAINST—AUTHORITY—CONGRESSIONAL STATUTES.

Act Cong. Aug. 13, 1888, c. 866, § 3, 25 Stat. 436 (U. S. Comp. St. 1901, p. 582), providing that every receiver appointed by a federal court may be sued as to any act or transaction connected with the property in his charge without previous leave of court, only permits suits against federal court receivers without leave of court where the cause of action is based on some act or omission connected with the carrying on the business pertaining to the receivership and does not apply to suits in the state court against a federal court receiver, primarily to recover land, to remove a cloud on title, and incidentally to recover for the removal of timber therefrom by the receiver and his employes.

[Ed. Note.—For other cases, see *Receivers, Cent. Dig. §§ 333-343*; *Dec. Dig. § 174.**]

3. JOINT TENANCY (§ 14*)—ACTIONS—JOINDER OF PARTIES.

Where plaintiffs sue as joint tenants for the recovery of their undivided interests in the land described, the fact that they allege the amount in acreage of the undivided interest owned by each of them does not affect their joint ownership nor their right to join in a suit to recover the entire undivided interest in the land owned by them as such joint tenants.

[Ed. Note.—For other cases, see *Joint Tenancy, Cent. Dig. § 19*; *Dec. Dig. § 14.**]

4. ACTION (§ 38*)—JOINDER OF CAUSES.

Where plaintiffs as joint tenants sue to recover certain land, and allege facts entitling them to repudiate their sale thereof and to have canceled the several deeds executed by them, there is not a misjoinder of causes, though the main purpose of suit is the recovery of the land.

[Ed. Note.—For other cases, see *Action, Cent. Dig. § 549*; *Dec. Dig. § 38.**]

Appeal from District Court, Liberty County; L. B. Hightower, Judge.

Action by Nixon Morse and others against

J. V. Tackaberry and others to recover certain land. From a decree dismissing the action, complainants appeal. Reversed and remanded in part.

V. A. Collins and J. B. Warren, for appellants. Andrews, Ball & Streetman, for appellees Kirby Lumber Co. and receivers. Stevens & Pickett, for other appellees.

PLEASANTS, C. J. Appellants, Nixon Morse, Claude Tompkins, and Susan James, joined by her husband, Lee James, brought this suit against appellees, J. V. Tackaberry, S. Gallias, the Kirby Lumber Company, and J. S. Rice and Cecil Lyons, receivers of said Lumber Company. The original petition alleged, in substance, that the plaintiffs, as heirs of A. N. B. Tompkins, deceased, were the owners of certain undivided interests in a tract of 673 acres of land, a part of the Valentine E. Disboe one-third league survey in Liberty county; that on the 26th day of July, 1900, the 18th day of July, 1900, the 25th day of July, 1900, and the 10th day of December, 1900, respectively, the plaintiffs Nixon Morse, Claude Tompkins, and Susan James, who was then Susan Tompkins, severally executed their respective deeds by which each of said plaintiffs conveyed to the defendant Tackaberry her undivided interest in said land; that at the date of the execution of each of said deeds the plaintiff grantor therein was unmarried, and under the age of 21 years, and that the consideration for each of said conveyances was inadequate. Plaintiffs, their disabilities of minority being removed, tendered into court the several amounts received by them as consideration for the execution of said deeds, and asked that defendants be required to accept same, and that each of the plaintiffs be permitted to repudiate her said deed, and that the same be canceled in so far as it affects plaintiff's interest in said land. It is then alleged that under conveyance from the defendant Tackaberry the defendants Gallias and the Kirby Lumber Company are asserting claims to the land and the timber thereon, "and that said deeds being now of record are a cloud on plaintiffs' title." The prayer of the petition is as follows: "Wherefore, premises considered, plaintiffs pray the court that defendants be cited in terms of law to answer this petition, and that upon final hearing hereof plaintiffs have judgment canceling and rendering forever null and void, in so far as same affect and seek to convey the interest of these plaintiffs in the land above described, the said deeds above set forth, and have judgment removing the cloud from plaintiffs' title caused thereby as to their interest in said land. Plaintiffs also pray that they have and recover of the defendants S. Gallias and the Kirby Lumber Company, and its receivers, as receivers, their interest

as above set forth in the above-described 673 acres of land; and for all other and further relief, general and special, legal and equitable, to which they may be entitled under the facts; for costs of suit in this behalf expended, and thus they will ever pray."

This petition was filed on November 25, 1905. On February 15, 1906, defendants Kirby Lumber Company and J. S. Rice and Cecil Lyons, receivers, filed plea in abatement setting up the pendency of the receivership for said Lumber Company in the United States Circuit Court for the Southern District of Texas, and the failure of the plaintiffs to obtain permission of said court to bring this suit in the district court of Liberty county against said company and its receivers, and prayed that the suit be dismissed as against said defendants. This plea was heard and sustained by the court on the day on which it was filed, and plaintiffs' suit against said defendants was dismissed. On January 27, 1907, defendants Tackaberry and Gallias filed an answer containing a general denial and a special plea by the defendant Gallias in which he asserts title to the whole of the Disboe one-third league survey, and asks for recovery of same against the plaintiffs and one P. Bailey, who he asks be made a party defendant. He also pleaded that Arch McDonald had conveyed said land to him by general warranty deed, and asks that said McDonald be made a party defendant, and in event plaintiffs recover any portion of said land that he have judgment against said McDonald on his covenants of warranty.

On September 18, 1908, plaintiffs filed an amended petition against all of the original defendants, containing the general allegations of the original petition, and in addition thereto the following: "And plaintiffs further show unto the court that since the filing of the original petition herein, to wit, on January 1, 1907, and subsequent thereto, the defendant the Kirby Lumber Company has entered upon said land and cut and removed therefrom 700,000 feet of merchantable pine timber of the reasonable market value of \$5 per thousand feet, and manufactured it into lumber of the reasonable value of \$15 per M, and have sold and removed the said lumber beyond the reach of these plaintiffs, making a total value of the timber of \$3,500 and a total value of the lumber of \$10,500; and have cut and removed from said land 2,500 ties, the timber of which is of the reasonable market value of 5¢ per tie, and of the reasonable market value of 25 cents per tie after being manufactured, making a total of \$125 for the tie timber in the ties, and total of \$625 for the ties as manufactured, or a grand total of \$3,625 for all the timber, and \$11,125 for all the manufactured product." In addition to the relief asked in the original petition, the amended petition contains a prayer for recovery against the defendants Kirby Lumber Com-

pany and its receivers of the sum of \$11,125, the value of the timber alleged to have been taken from plaintiffs' land. At the next term of court in February, 1909, the defendants Rice and Lyons again answered by plea in abatement setting up the pendency of the receivership and the failure of the plaintiffs to obtain of the court in which said receivership was pending permission to bring this suit. At the succeeding term of the court in August, 1909, the defendants Tackaberry and Gallias filed an amended answer in which they excepted to plaintiffs' petition on the ground of misjoinder of causes of action and of parties plaintiff. Upon a hearing in the court below on August 30, 1909, the plea in abatement of the defendants Rice and Lyons, and the exception to the petition on the ground of misjoinder presented by the defendants Tackaberry and Gallias, were sustained, and plaintiffs declining to amend, their suit was dismissed.

The first assignment of error complains of the ruling of the trial court sustaining the plea in abatement filed by the receivers Rice and Lyons. At common law no suit could be maintained against a receiver unless brought by leave of the court in which the receivership was pending, and this rule, when not modified by statute, is sustained by the great weight of authority. Property in the hands of a receiver being in the custody and under the control of the court that appoints the receiver, its proper administration and management requires that the jurisdiction of such court in respect thereto shall not be interfered with by any other tribunal of equal or co-ordinate jurisdiction, and in the absence of statutory authority a court other than the one in which the receivership is pending should not entertain a suit against a receiver unless the suit is brought by leave of the court that appoints the receiver. The act of the Legislature of 1887 (Sayles' Ann. Civ. St. 1897, art. 1483), which abrogates this rule, only affects receiverships pending in the courts of this state, and can have no application to receivers appointed by a United States court. An act of Congress passed in 1888 (Act Aug. 13, 1888, c. 866, § 3, 25 Stat. 436 [U. S. Comp. St. 1901, p. 582]) provides: "That every receiver or manager of any property appointed by any court of the United States may be sued in respect of any act or transaction of his in carrying on the business connected with such property without the previous leave of the court in which said receiver or manager was appointed." This statute as construed by the courts only modifies the rule prohibiting suits against receivers without leave of the court in which the receivership is pending to the extent of permitting such suits in cases in which the cause of action alleged is based upon some act or omission of the receiver, his predecessor, agent or employé in carrying on the business pertaining to the discharge of his duties as receiver.

The cause of action alleged in this suit is primarily one for the recovery of land and to remove cloud from title, and is not within the purview of the act of Congress above quoted. The amended petition does allege that the Kirby Lumber Company cut and removed timber from plaintiffs' land and seeks to recover against said company and the receivers as damages the value of said timber, but the right to recover such damages is merely incidental to the right to recover title to the land, and if we give the broadest intendment to the allegations of the petition and concede that they in effect charge that the company, acting by and through the receivers, cut and removed the timber, the essential character of the cause of action is not changed. The damages sought to be recovered are merely incidental to the alleged right to recover the land and are wholly dependent thereon. The following authorities support the ruling of the trial court in sustaining the receivers' plea in abatement: *Railway Co. v. Pennefather & Co.*, 126 S. W. 951; *Bennett v. Railway Co.*, 17 Wash. 534, 50 Pac. 496; *Smith v. Railway Co.*, 151 Mo. 391, 52 S. W. 378, 48 L. R. A. 368; *McNulta v. Lochridge*, 141 U. S. 327, 12 Sup. Ct. 11, 35 L. Ed. 796; *Ry. Co. v. Cox*, 145 U. S. 593, 12 Sup. Ct. 905, 36 L. Ed. 829; *Kerr on Receivers* (2d Ed.) p. 196 et seq.

The second assignment complains of the ruling of the trial court sustaining the exception of defendants Tackaberry and Gallias to plaintiffs' petition on the ground of misjoinder of causes of action and of parties plaintiff. We think this assignment should be sustained. As before said, plaintiffs' cause of action is primarily for the recovery of their undivided interests in the land described in the petition. They sue as joint tenants claiming under the same title and the fact that they allege the amount in acreage of the undivided interest owned by each does not affect their joint ownership, nor their right to join in a suit to recover the entire undivided interest in the land owned by them as such joint tenants. In support of their right to recover the land they allege facts which entitle them to repudiate their sale and to have cancellation of the several deeds executed by them to the defendant Tackaberry and pray for such relief; but the main purpose of the suit is the recovery of the land. The right to sue to have the several deeds to Tackaberry canceled being ancillary to plaintiffs' right to sue jointly for the land, the causes of action could be properly joined. *Silberberg v. Pearson*, 75 Tex. 288, 12 S. W. 850; *Bullock v. Sprowls*, 93 Tex. 188, 54 S. W. 661, 47 L. R. A. 326, 77 Am. St. Rep. 849; *Wade v. Love*, 69 Tex. 523, 7 S. W. 225.

It follows from the conclusions above stated that the judgment of the trial court sus-

taining the plea in abatement of the receivers and dismissing the cause as to them and the Kirby Lumber Company should be affirmed and the judgment sustaining the exception of the defendants Tackaberry and Gallias should be reversed and the cause remanded as to said defendants, and it has been so ordered.

Affirmed in part.

Reversed and remanded in part.

HOUSTON EAST & WEST TEXAS RY. CO. v. INMAN, AKERS & INMAN.

(Court of Civil Appeals of Texas. Jan. 12, 1911. Rehearing Denied Feb. 2, 1911.)

1. CARRIERS (§ 180*)—LOSS OF GOODS—CONNECTING CARRIERS—BILL OF LADING—LIMITATIONS TO CARRIER'S OWN LINE—HEPBURN COMMERCE ACT—"STATE."

Act Cong. June 29, 1906, c. 3591, § 7, 34 Stat. 695 (U. S. Comp. St. Supp. 1909, p. 1168), amending Hepburn Commerce Act Feb. 4, 1887, c. 104, § 20, 24 Stat. 386 (U. S. Comp. St. 1901, p. 3169), provides that any common carrier receiving property for transportation from a point in one state to a point in another state shall issue a receipt or bill of lading therefor, and shall be liable to the lawful holder thereof for any loss, damage, or injury to such property, caused by it or by any connecting carrier, to which the property may be delivered, or over whose line or lines the property may pass, and that no contract, rule, receipt, or regulation shall exempt any such carrier from the liability so imposed. *Held*, that the word "state" was used in such provision in its limited sense to represent and include only the states of the federal Union, and that such section had no application to a shipment of cotton from a point in Texas to a foreign country.

[Ed. Note.—For other cases, see *Carriers*, Dec. Dig. § 180.*]

For other definitions, see *Words and Phrases*, vol. 7, pp. 6628-6633, 6640; vol. 8, p. 7804.]

2. CARRIERS (§ 180*)—LIMITED LIABILITY—STATE STATUTES—APPLICATION.

A state statute restricting the right of a common carrier to limit its liability has no application to a shipment from a point within the state to a foreign country.

[Ed. Note.—For other cases, see *Carriers*, Dec. Dig. § 180.*]

3. CARRIERS (§ 180*)—ACTING CARRIERS—LIMITED LIABILITY—FOREIGN SHIPMENT.

Where an initial carrier accepted a shipment of cotton for transportation from a point in Texas to Bremen, Germany, it was entitled to limit its liability to loss or damage occurring on its own line.

[Ed. Note.—For other cases, see *Carriers*, Dec. Dig. § 180.*]

4. TRIAL (§ 89*)—RECEPTION OF EVIDENCE—HEARSAY—MOTION TO STRIKE.

Where testimony given by a witness on direct examination was shown to be hearsay on cross-examination, it was subject to a motion to strike.

[Ed. Note.—For other cases, see *Trial*, Cent. Dig. §§ 228-234; Dec. Dig. § 89.*]

Appeal from District Court, Harris County; W. P. Hamblen, Judge.

Action by Inman, Akers & Inman against the Houston East & West Texas Railway

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

Company. Judgment for plaintiffs, and defendant appeals. Reversed and remanded.

Baker, Botts, Parker & Garwood, Lane, Wolters & Storey, and Wm. A. Vinson, for appellant. Hunt, Myer & Townes, for appellees.

PLEASANTS, C. J. This suit was brought by appellees against appellant to recover the value of 42 bales of cotton, a part of a shipment of 100 bales, alleged to have been delivered to appellant at Nacogdoches, Tex., for shipment to Bremen, Germany, and to have been lost or converted by appellant. The petition alleges that "the said defendant, Houston East & West Texas Railway Company, received from Herman Loeb 100 bales of cotton marked and numbered 'F. T. W.,' and agreed that it and its connections would transport the same from the town of Nacogdoches, Tex., the point of receipt, to the port of Galveston, Tex., and there deliver, lighter, ferry, or cart, at owner's risk, to the Elder Dempster Line, or some other steamship or steamship company, to be there transported to the port of Bremen, Germany, and to be there delivered to order or assigns, notify Inman, Akers & Inman." It was further alleged that the bill of lading, in due course of business, for a valuable consideration, was indorsed and delivered by Herman Loeb to the plaintiffs, and that defendant failed to deliver 42 bales of said cotton to the Elder Dempster Line, or any other steamship or steamship company at Galveston, but converted the same to its own use, the value thereof being placed at \$2,430.98. By its answer appellant admitted the receipt from Herman Loeb at Nacogdoches, Tex., of 100 bales of cotton, marked "F. T. W.," for transportation over its line, and that of connecting carriers, to the port of Bremen, Germany; but alleged that it had no line of railroad to Galveston, Tex., its southern terminal being at Houston; that it seasonably delivered to the Direct Navigation Company, a connecting carrier at Houston, Tex., the identical cotton which had been delivered to it by Herman Loeb at Nacogdoches; and further alleged that, as shown by the bill of lading, the shipment was a foreign shipment, and that the bill of lading contained the following stipulation: "In consideration of the rate of freight herein named, it is hereby stipulated that the service to be performed hereunder shall be subject to the conditions, whether printed or written, herein contained, and said conditions are hereby agreed to by the shipper, and by him accepted for himself and his assigns as just and reasonable. * * * It is agreed: (3) No carrier shall be liable for loss or damage not occurring on its own road, or its portion of the through route, nor after said property is ready for delivery to the next carrier, or to the consignee. * * * And finally, in accepting this bill of lading,

the shipper, owner, and consignee of the goods, and the holder of the bill of lading, agree to be bound by all of its stipulations, exceptions, and conditions, whether written or printed, as fully as if they were all signed by such shipper, owner, consignee, or holder." Appellant alleged that the foregoing stipulation was valid and binding upon the plaintiffs, and that it, having delivered said cotton to its connecting carrier at Houston, Tex., was not liable to the plaintiffs for any negligence or default of any connecting carrier. The trial in the court below was with a jury. After the evidence was in the trial judge instructed the jury to return a verdict in favor of the plaintiffs for the value of the cotton. In obedience to this instruction a verdict was rendered in favor of plaintiffs for the sum of \$2,453.33, and judgment was rendered accordingly.

The evidence shows that the defendant received the cotton for shipment, and issued the bill of lading as alleged in the petition. This bill of lading contained the clause restricting appellant's liability to loss or damage occurring on its own line, as set out in defendant's answer. There was evidence showing that 98 bales of the cotton was promptly and safely carried by appellant to Houston, Tex., the terminus of its line of railroad, and was there delivered to its connecting carrier, the Direct Navigation Company. Upon this state of the evidence the trial court erred in instructing the jury to return a verdict in favor of the plaintiffs.

This instruction was based upon the conclusion of the learned trial judge that the act of Congress of June 29, 1906, c. 3591, § 7, 34 Stat. 595 (U. S. Comp. St. Supp. 1909, p. 1166), known as the Carmack amendment to Hepburn Commerce Act Feb. 4, 1887, c. 104, § 20, 24 Stat. 386 (Comp. St. 1901, p. 3169), was applicable to the facts of this case. That amendment is as follows: "That any common carrier, railroad or transportation company receiving property for transportation from a point in one state to a point in another state shall issue a receipt or bill of lading therefor, and shall be liable to the lawful holder thereof for any loss, damage or injury to such property caused by it or by any common carrier, railroad or transportation company to which such property may be delivered, or over whose line or lines such property may pass, and no contract, receipt, rule or regulation shall exempt such common carrier, railroad or transportation company from the liability hereby imposed: Provided, that nothing in this section shall deprive any holder of such receipt or bill of lading of any remedy or right of action which he has under existing law." This language is clear and unambiguous, and the prohibition against the right of a connecting carrier to limit its liability to loss or damage occurring on its own line is only applicable when the shipment is from "a point in one state to a point in another state." The use of this

language excludes the idea that Congress intended to prohibit such contracts when the shipment was to a foreign country.

The word "state," as used in the Constitution of the United States, has been uniformly construed to mean a constituent member or part of the federal Union having an independent local governmental organization, but as used in the statutes and treaties of the United States it has been construed to include territories of the United States, and also foreign countries or states when such construction is required by the context of the act or instrument, and is necessary to effectuate its evident purpose. *Hepburn v. Elzey*, 6 U. S. 445, 2 L. Ed. 332; *Downes v. Bidwell*, 182 U. S. 244, 21 Sup. Ct. 770, 45 L. Ed. 1088; *Talbot v. Silver Bow*, 139 U. S. 438, 11 Sup. Ct. 594, 35 L. Ed. 210; *De Geofrey v. Riggs*, 133 U. S. 258, 10 Sup. Ct. 295, 33 L. Ed. 642; *Eldman v. Martinez*, 184 U. S. 578, 22 Sup. Ct. 515, 46 L. Ed. 697; *Terry v. Olcott*, 4 Conn. 442; *Insurance Co. v. Insurance Commissioners*, 64 Mich. 614, 31 N. W. 542.

We think it is clear from an examination of the entire act that the word "state," as used in the amendment in question, was used in its limited constitutional sense, and was intended to mean a state of the federal Union. Other portions of the act are expressly made applicable to shipments from "any state or territory or the District of Columbia to any other state, territory or District of Columbia, or to any foreign country," showing that Congress did not understand or intend that the word "state," as used in the amendment, should include a foreign state or country, as well as a state of the Union.

A valid reason for the failure of the amendment to include foreign shipments within its provisions is not far to seek. The rule which forbids a common carrier to contract against liability for loss or damage caused by its connecting carrier for which it is in no way responsible is an arbitrary one, and can only be upheld upon the grounds of public necessity, and it is entirely reasonable to conclude that Congress did not deem it wise to extend this rule so as to make the domestic carrier liable for loss occasioned by the negligence of a foreign steamship company or other foreign carrier, because the right of the domestic carrier to be reimbursed for any amount paid by it by reason of the default of a connecting carrier would be much more difficult of enforcement against a foreign carrier than it would if the shipment was merely interstate.

The shipment in question being one to a foreign country neither the act of Congress above quoted, nor the statute of this state restricting the right of the carrier to limit its liability, has any application, and, under the well-settled rule of decision in this state, the limitation contained in the bill of lading

is a valid and binding contract, and appellant was entitled to a verdict if it had in fact delivered the cotton to its connecting carrier, the Direct Navigation Company. *Ry. Co. v. Sherwood*, 84 Tex. 125, 19 S. W. 455, 17 L. R. A. 643; *Navigation Co. v. Ins. Co.*, 89 Tex. 1, 32 S. W. 889, 30 L. R. A. 713, 59 Am. St. Rep. 17; *Ry. Co. v. Crossman*, 33 S. W. 290.

On the trial of the cause in the lower court Chesley B. Howard, a member of plaintiff's firm, testified by deposition. In answer to a direct interrogatory this witness stated: "Neither my firm, nor any one for my firm, has received the said 42 bales, nor any part thereof." On cross-examination he testified: "I did not personally buy said cotton. My firm bought hundreds of thousands of bales during that cotton season. I am a member of the firm, and thousands of details are left to competent subordinates. My information that we bought the cotton is from the record on our books showing the purchases, the bill of lading showing shipment of same which I personally saw, and the payment of Mr. Loeb's drafts against the cotton and delivery of part of the cotton at Bremen. I was not at Nacogdoches when the cotton was shipped. In stating that my firm received at Bremen only 58 bales of the cotton marked 'F. T. W.' under bill of lading No. 24, I am doing so on information furnished me by my employes. I was not at Nacogdoches when the cotton was shipped, nor in Galveston when it reached there, nor at the wharf in Bremen, Germany, when the ship was unloaded. I was not in Nacogdoches, nor in Galveston, Texas, when the cotton in question moved. I did not see a single bale of the shipment of cotton in question, and probably do not see a thousand bales out of each one hundred thousand which my firm buys and sells."

Defendant objected to the admission in evidence of the statement of the witness that neither his firm nor any one for it had received the cotton in question on the ground that as shown by the testimony of said witness on cross-examination, such statement was hearsay. It having been clearly shown by the statements of the witness on cross-examination that the testimony objected to was hearsay, it was not admissible when objected to on that ground by the defendant.

The case having been tried on the theory that the limitation in the bill of lading relied on by the defendant was invalid, we cannot presume that the evidence upon the issue of whether the cotton was all delivered to the Direct Navigation Company was fully developed, and therefore cannot properly render a judgment for the defendant.

Because of the errors before pointed out the judgment of the court below is reversed and the cause remanded.

Reversed and remanded.

SIMMS v. REISNER et al.

(Court of Civil Appeals of Texas. Jan. 27, 1911.)

1. MINES AND MINERALS (§ 52*)—GAS LEASE—INJUNCTION—EVIDENCE.

Evidence held insufficient to authorize a temporary injunction restraining defendant from boring for oil on certain property on which he held an oil lease, either on the theory that defendant had abandoned the lease, or that he was so unskilled in drilling such wells that he would be liable to bring in a well of salt water which would be destructive of all the wells in the neighborhood.

[Ed. Note.—For other cases, see Mines and Minerals, Dec. Dig. § 52.*]

2. INJUNCTION (§ 132*)—SCOPE OF REMEDY—POSSESSION OF PROPERTY.

It is not the function of a preliminary injunction to transfer the possession of land from one person to another pending an adjudication of title, unless the possession has been forcibly or fraudulently obtained by defendant and the equities require that the possession thus wrongfully invaded be restored, and the original status preserved pending the decision of the issue of title.

[Ed. Note.—For other cases, see Injunction, Cent. Dig. § 302; Dec. Dig. § 132.*]

Appeal from District Court, Harris County; W. P. Hamblen, Judge.

Suit by B. A. Reisner and others against E. F. Simms. From an order granting a temporary injunction, defendant appeals. Reversed.

P. H. Briant and R. U. Culberson, for appellant. Dannenbaun & Taub, for appellees.

PLEASANTS, C. J. This appeal is from an order of the district court for the Fifty-Fifth judicial district granting a temporary injunction in a suit in said court brought by appellees against the appellant.

The following concise and accurate statement of the substance of the pleadings and the issues presented thereby, and of the proceedings had in the lower court, and the result thereof, is copied from appellant's brief:

"In substance it was alleged in the petition that the appellees were the lessees in a certain oil and gas lease on a tract of land located in the Humble oil field in Harris county, Texas, and that the appellant had wrongfully entered on the land covered by said lease, had ejected appellees therefrom, and was, at the time of the filing of the petition, engaged in boring an oil well on said land.

"It was admitted in the petition that the appellant had, on or about the 3d day of March, 1905, entered into a contract with one W. E. Armstrong, who was then the owner of the land, by which contract the right was given appellant to bore for oil on the land in controversy. It was alleged, however, that about June, 1906, appellant abandoned said land because the production of oil thereon had become unprofitable, and

had delivered possession thereof to the owner, W. E. Armstrong.

"It was also alleged in the petition that appellees were the owners of a producing oil well on certain lands adjoining the tract in controversy, and that, if appellant was permitted to continue his operations on the Armstrong lease, there was danger that salt water would be brought into the field and destroy the producing well.

"The prayer was for an injunction restraining appellant from continuing to bore for oil on the land in controversy, for a writ of possession, and for a cancellation of the lease from Armstrong to appellant.

"A restraining order was issued on the 23d of November, 1910, and the cause set down for hearing on the 26th of November, 1910.

"At the time directed by the order of the judge, the appellant presented his answer, under oath, to the petition. In this answer the appellant claimed that he had in all respects complied with the terms of his lease with Armstrong, had paid the money consideration called for therein, had put down more wells than required by his agreement, and had produced on this lease a quantity of oil amounting in the aggregate to more than 600,000 or 700,000 barrels. He denied that he had ever terminated said lease, or delivered possession of the land covered thereby to Armstrong, or to Stockdick, the subsequent owner, but claimed that he had always asserted his rights under his lease to bore for oil on the land.

"Appellant alleged that, though the wells had ceased temporarily to be productive, 'it was his belief and expectation that in course of time more oil would drain into the basin beneath said lands from contiguous territory, and that when such condition presented itself it had always been his intention to bore again for oil upon the land embraced in said lease.'

"He alleged that the time having arrived when, in his judgment, there was sufficient accumulation of oil to justify operations he began putting down a well on the Armstrong lease, and was so engaged when stopped by the restraining order issued in this cause.

"He alleged that since the wells on the Armstrong lease had watered out, there had been no oil of consequence produced on lands adjacent or near to said Armstrong land, and that at all times he had held himself ready to protect said lands from drainage from outside wells, should any be dug.

"He denied that he was inexperienced in boring for oil on the land in controversy, or that there was any danger from his operations that salt water would be brought into the field.

"The cause having been heard on the petition, answer, and supporting affidavits, the court, on November 26, 1910, ordered the

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

restraining order to continue in full force and effect.

"The exhibits attached to the pleadings, and the affidavits produced on the hearing in the court below, establish the following facts:

"On March 3, 1905, W. E. Armstrong, who was then the owner of the property upon which appellant claims the right to bore the well, the boring of which was enjoined by the court below, made and entered into the following lease contract with appellant:

"The State of Texas, Harris County: W. E. Armstrong, lessor, in consideration of the sum of twelve hundred and fifty (\$1,250.00) dollars in hand paid by E. F. Simms, lessee, receipt of which is hereby acknowledged, and of the further undertakings of said lessee hereinafter specified, does hereby let and lease unto said lessee, his heirs and assigns, lot number twenty (20) in block number one (1), and lot number twenty (20) in block number two (2) of the Cherry subdivision of the James Strange survey in Harris county, Texas, the terms of this lease beginning with this date and becoming permanent when the undertakings of the lessee hereinafter specified are performed. In consideration of the foregoing, the said lessee hereby agrees and binds himself to bore and develop two (2) wells upon the above-described land under the following conditions, viz.: He shall within thirty (30) days from this date begin boring of the first well on said land and complete the same as soon thereafter as may be possible with reasonable diligence and dispatch, and if said well shall produce oil in flowing quantities, then the said lessee agrees and obligates himself within 30 days after said oil is first brought to the surface, to begin the boring of another well on said tract and to complete the same as soon thereafter as may be done with reasonable diligence and dispatch. The lessee reserves the right to use all fuel, oil, and gas developed from either of said wells that may be necessary in operating and developing the same, and of the remainder of such oil and gas agrees and obligates himself to deliver to the lessor or his order, free of charge in any pipe line that may be convenient or accessible to said well one-fourth ($\frac{1}{4}$) of such production of a flowing well and one-eighth ($\frac{1}{8}$) of such production of a pumping well. The lessee may bore other wells and produce oil therefrom upon the same terms and conditions at his option. Should any mineral and gas be discovered and produced on said land, then the parties hereto shall have the same proportionate interest in such production as in the oil and gas hereinbefore mentioned; lessee may terminate this lease when production becomes unprofitable and remove all improvements erected by him.

"Witness our hands in duplicate, at Houston, Texas, March 3, 1905. W. E. Armstrong, E. F. Simms."

"Appellant paid the cash consideration

mentioned in this lease and immediately took possession of the property, bored several wells thereon, and fully complied with all of the terms and conditions of the lease contract. The wells bored by him were large producers and he successfully operated them until the latter part of 1905, at which time an invasion of water into this portion of the Humble oil field rendered the wells there unproductive and all further operation and development ceased. Appellant moved his improvements and machinery from the property in controversy and took the casing from one of the wells, but left the property in charge of Mr. H. A. McAnallen and requested him to take possession of it and prevent encroachment thereon. McAnallen was in charge of the property continuously, and no one else had possession of it until appellant returned thereto and began boring the well which he was enjoined from boring by the order of the court from which this appeal is prosecuted."

When the wells in this portion of the field became ruined by water, as before stated, it was anticipated that a sufficient quantity of oil from other portions of the field would probably find its way to this property to make its development again profitable. Shortly before appellant began boring the well in question appellees had brought in a productive well on an adjoining lot near the line of the lot in controversy, and appellant at once began to bore the well in question to protect his lease and prevent the oil under the property from being drained into and brought up through appellees' well. On April 25, 1907, W. E. Armstrong conveyed the property covered by appellant's lease to A. Stockdick for a consideration of \$50, by deed of general warranty. On May 27, 1910, Stockdick leased the property to appellees for the purpose of development as an oil field, and appellees are claiming in this suit that under this lease they are entitled to the possession of the property. Before his sale to appellees Stockdick recognized appellant's right to further develop the property under his lease and tried to purchase same, but they could not agree upon the price. There is no evidence that appellant ever declared that he had canceled the lease or abandoned his rights thereunder, and neither the lease contract nor the possession of the property was ever delivered to Armstrong, or his vendees.

Ed. McCarvell, one of the plaintiffs, swore that "there was great danger that the defendant, because of his lack of knowledge of said field, will bring in a well producing salt water, and thereby injure or destroy the well now operated by the plaintiffs on lot 21, as well as destroy lot 20 and adjoining lot 19 as producing oil land." There is other testimony to the effect that the bringing in of a salt water well in any portion of an oil field is likely to greatly injure all of the wells in the field. McCarvell does not give any facts tending to show his knowledge of appel-

lant's skill as an oil operator or of appellant's familiarity and acquaintance with the conditions of this oil field. On the contrary, the undisputed evidence of several witnesses shows that appellant has been a successful operator in this field, had bored and operated a number of wells on this and adjoining lots, and there is no evidence that he ever brought in a salt water well. The undisputed evidence further shows that the drillers employed by appellant to drill the well in question "are competent men in their line of work, and have had much experience in drilling oil wells in the Humble oil field." Upon this showing we do not think the trial judge was authorized to grant the injunction. The opinion of the plaintiff McCarvell, that there was danger that appellant, because of lack of experience, might bring in a salt water well, is not only unsupported by any fact in evidence, but is against the undisputed testimony before set out showing that both appellant and the drillers employed by him were thoroughly competent and fully acquainted with all of the conditions existing in this oil field.

We cannot believe that the court upon this evidence found that there was such danger to the field and to appellees' wells from appellant's lack of knowledge of the field and his incompetency as an oil operator as would justify an order preventing him from operating in said field, and appellees do not so contend in their brief. If such was the finding, it cannot be sustained.

The question of whether appellant had surrendered or forfeited his lease, if that question is raised by the evidence, is not one which can be properly decided on the application for a temporary injunction. Appellant was in possession of the land, claiming under his lease. He did not acquire this possession by force or fraud, and, so far as the evidence shows, appellees were never in actual possession of the property. An injunction is not a remedy which can be used for the purpose of recovering title or right of possession of property, and it is not the function of a preliminary injunction to transfer the possession of land from one person to another pending an adjudication of the title, except in cases in which the possession has been forcibly or fraudulently obtained by the defendant and the equities are such as to require that the possession thus wrongfully invaded be restored, and the original status of the property be preserved pending the decision of the issue of title. *Jeff Chaison Town-Site Co. v. McFaddin, Wiess & Kyle Land Co.*, 121 S. W. 716.

The trial court did not order the possession of the land delivered to appellees, but he enjoined the appellant from using it for the purpose for which it was leased, and thereby rendered his possession worthless. This should not be done unless the use of the

property by the appellant would cause injury to appellees against which they could only be adequately protected by an injunction, and this, as we have before said, is not shown by the evidence.

If appellees have a probable right to the possession of the property for the purpose of producing oil therefrom they might in a proper proceeding have the oil taken therefrom by appellant impounded pending the adjudication of their right in same, but the facts presented by this record do not, in our opinion, justify an injunction restraining appellant from boring for oil upon said property.

It follows that the order of the court granting said injunction should be set aside, and it has been so ordered.

MISSOURI, K. & T. RY. CO. OF TEXAS v. TOLBERT.

(Court of Civil Appeals of Texas. Jan. 7, 1911.
Rehearing Denied Feb. 11, 1911.)

1. AGRICULTURE (§ 8*)—JOHNSON GRASS—PENALTIES.

One suing a railroad company for penalties and damages under the statute making it unlawful for a railroad company to permit Johnson grass to mature on its right of way need not allege or prove negligence, and the allegation of negligence may be treated as surplusage.

[Ed. Note.—For other cases, see Agriculture, Dec. Dig. § 8*.]

2. WATERS AND WATER COURSES (§ 119*)—SURFACE WATER—DRAINAGE—RAILROADS.

One seeking to recover under the common law and the statutes governing the construction of railroads with reference to the natural drainage of land must allege and prove negligence in diverting the water from its natural course, and along its right of way, and emptying it on the land of another, causing damage by the water carrying with it Johnson grass seed and roots.

[Ed. Note.—For other cases, see Waters and Water Courses, Cent. Dig. §§ 131-134; Dec. Dig. § 119*.]

3. TRIAL (§ 191*)—INSTRUCTIONS—ASSUMPTION OF FACTS.

In an action against a railroad company for penalties and damages under the statute making it unlawful for a railroad company to permit Johnson grass to mature on its right of way, the court may, in its charge, assume that the act of the company in permitting the grass to mature was negligent.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 420-431; Dec. Dig. § 191*.]

4. AGRICULTURE (§ 8*)—JOHNSON GRASS—PENALTIES.

Under the statute making it unlawful for a railroad company to permit Johnson grass to mature on its right of way, a company is liable for the penalty each time Johnson grass is permitted to mature on its right of way.

[Ed. Note.—For other cases, see Agriculture, Dec. Dig. § 8*.]

5. AGRICULTURE (§ 8*)—JOHNSON GRASS—PENALTIES—CONTRIBUTORY NEGLIGENCE.

An action against a railroad company for permitting Johnson grass to mature on its right of way in violation of the statute may be defeated by the company proving that plaintiff

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes.

had permitted the grass to mature on his land during the time complained of.

[Ed. Note.—For other cases, see Agriculture, Dec. Dig. § 8*]

6. AGRICULTURE (§ 8*) — SURFACE WATER — DRAINAGE—CONTRIBUTORY NEGLIGENCE.

Where a cause of action against a railroad company for injuries to land from the growth and spread of Johnson grass is based on the negligence of defendant in respect to the drainage of surface water by which the seed of such grass was carried to plaintiff's land, that plaintiff permitted Johnson grass to grow on his land would not defeat recovery, though such act would have prevented recovery of the statutory penalty.

[Ed. Note.—For other cases, see Agriculture, Dec. Dig. § 8*]

7. AGRICULTURE (§ 8*) — SURFACE WATERS — DRAINAGE—RAILROADS—DAMAGES.

Where land has been damaged by the spread of Johnson grass thereon in consequence of the act of a railroad company in diverting surface water from its natural course so as to flow along its right of way and onto plaintiff's land so as to carry the grass seed and roots to the land, the owner may recover the difference in the value of the land with the grass as situated thereon and the value of the land without the grass.

[Ed. Note.—For other cases, see Agriculture, Dec. Dig. § 8*]

Appeal from Hunt County Court; J. W. Manning, Judge.

Action by R. L. Tolbert against the Missouri, Kansas & Texas Railway Company of Texas. From a judgment for plaintiff, defendant appeals. Affirmed.

Coke, Miller & Coke and Templeton, Craddock, Crosby & Dinsmore, for appellant. R. D. Thompson and C. E. Mead, for appellee.

BOOKHOUT, J. Appellee as plaintiff brought this suit in the county court of Hunt county by his original petition, filed on August 12, 1909, and thereafter on November 10, 1909, he filed his first amended petition upon which the case was tried.

It is alleged that plaintiff is the owner of about 15 acres of land lying southwest from Greenville, in Hunt county, Tex., through which appellant's railroad runs, entering the said tract at its northeast corner and passing through the same to the southwest corner; that appellant's right of way is 100 feet wide; that, on appellee's premises, the appellant's track is in part built on a dump and in part is built through a cut. It is alleged that appellee's land slopes from east to west, and that the natural drainage is in that direction; that appellant constructed a ditch on the south or east side of its track and on its right of way, which led to a culvert or bridge under appellant's railroad and contiguous to appellee's premises. It is alleged that appellant permitted Johnson grass to mature and go to seed on its right of way three several times in the year 1908 and three several times in the year 1909. And it

is alleged that Johnson grass seeds and the roots of Johnson grass were negligently communicated from appellant's right of way to appellee's lands, whereby Johnson grass was set and caused to grow on appellee's lands, to appellee's damage in the sum of \$450. Appellee also claims three statutory penalties for the year 1908 and three statutory penalties for the year 1909. The petition charged negligence on the part of appellant with respect to the drainage in the following language: "That from the time said Johnson grass appeared upon said right of way, and especially since the same made its appearance upon plaintiff's land, he has exercised all possible care and effort to prevent the same from infecting his said land, and since that time has not permitted any of said Johnson grass to mature or go to seed upon his land, but by reason of the negligence of the defendant in allowing said grass to mature and go to seed upon its said right of way, and by reason of its said negligence in diverting the natural flow of the water as above explained, causing the same to flow along its said right of way as aforesaid, and causing it to pass through said culvert out upon plaintiff's said land, washing and scattering said Johnson grass and roots in and upon plaintiff's said land, the same has become permanently set and infected with said grass, and that it will continually grow and spread until plaintiff's land will be wholly taken and occupied by said Johnson grass." Appellant answered by general demurrer, special exceptions, and general denial, and by special pleas as follows: (1) That, if appellant had diverted the surface water from its natural course, it had concentrated the surface water upon its right of way and drained it from its right of way off appellee's land, thereby benefitting the land. (2) That appellant's railroad was constructed and its ditches, culverts, and bridges located and constructed on the lands in question many years before appellee became the owner thereof, and that, if there was any injury to the lands by reason of the construction of the railway and its ditches and culverts, said injuries had been inflicted before appellee purchased the land, and that appellee took the land with the incumbrances. (3) That, if any Johnson grass was set from appellant's right of way upon appellee's land, it was set only in a natural branch or drain which runs across appellee's land and under appellant's railroad, and that the land upon which it was set was practically worthless by reason of the said branch or drain; that, if Johnson grass was otherwise upon appellee's land, appellee and his tenants had caused it to be so set by ploughing and dragging the roots of Johnson grass from said branch to other parts of the land, and that appellee was therein guilty of negligence. Appellant

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

also pleaded the statute of limitations of two years in bar of appellee's cause of action. Appellant's demurrer and exceptions were overruled by the court, and the cause was tried before the county judge, with the aid of a jury, at the November term, 1909, of the court, and the trial resulted in a verdict and judgment for appellee for penalties in the sum of \$50 and for damages in the sum of \$150; the judgment aggregating the sum of \$200. Appellant's motion for new trial having been overruled, it perfected an appeal to this court.

Error is assigned to that clause of the court's charge reading as follows: "It shall hereafter be unlawful for any railroad or corporation doing business in this state to permit any Johnson grass to mature or go to seed upon any right of way owned, leased, or controlled by such railroad or railway company or corporation in this state. If it shall appear upon the suit of any person owning, leasing, or controlling land contiguous to the right of way of any such railroad, or railway corporation or company, that said railroad or railway company or corporation has permitted any Johnson grass to mature or go to seed upon their right of way, such person so suing shall recover from such railroad or railway company or corporation the sum of \$25 and any such additional sum as he may have been damaged by reason of such railroad or railway company or corporation permitting Johnson grass to mature or go to seed upon their right of way, provided the owner of land or any person controlling land contiguous to the right of way of any such railroad or railway company who permits any Johnson grass to mature or go to seed upon said land shall have no right to recover from such railroad or railway company." It is contended that this clause of the charge conflicts with a subsequent paragraph reading as follows: "If you believe from the evidence that the defendant has permitted Johnson grass to grow upon its right of way through and contiguous to plaintiff's said land, and you further believe that the defendant has permitted said grass to go to seed upon its right of way, and if you believe from the evidence that the roadbed and embankment along defendant's said railroad through plaintiff's said land and the culvert under its said road so constructed as to negligently concentrate the flow of the water along its said right of way and out through the said culvert upon plaintiff's land, thereby negligently permitting the said water flowing along said right of way to wash and carry said Johnson grass seed and roots out and upon the plaintiff's said land, or if you believe that the defendant has negligently permitted said grass, seed, or roots to be washed or carried over and upon plaintiff's said land, they have lodged, sprouted, and taken root thereon, germinating, spreading, and thereby causing said seeds and roots to infest said land causing a growth of said John-

son grass upon the plaintiff's said land, thereby damaging the same, and if you further believe that the plaintiff has exercised ordinary care to prevent said grass from being so spread upon his land, and to prevent the seeds or roots of said grass from being blown, washed, or carried upon his said land, and to prevent injury that might result therefrom, you will find for the plaintiff." This assignment is not sustained. The appellee based his cause of action on two distinct grounds: First. He alleged a case entitling him to recover penalties and damages under the statute commonly known as the "Johnson Grass Statute." Second. He alleged a cause of action entitling him to recover under the common law and statutes governing the construction of railroads with reference to the natural drainage of the land, irrespective of the Johnson grass statute. Under the first count, it was not necessary to allege or prove negligence on the part of appellant, in the second count it was necessary to allege and prove both, and the apparent conflict in the court's charge resulted from a presentation of the law to the facts under the issue raised by each of said counts.

Error is also assigned to a paragraph of the charge reading as follows: "Therefore, if you believe from the evidence that the defendant permitted Johnson grass to mature or go to seed upon any portion of its right of way contiguous to plaintiff's land, as alleged and described in his petition, during the years 1908 and 1909, or during any portion of said years, and if you further believe from the evidence that the plaintiff has not permitted Johnson grass to mature or go to seed upon his said land during the years 1908 and 1909, or either of said years, then the plaintiff would be entitled to recover of the defendant the sum of \$25 as a penalty for each and every time said defendant had so permitted said Johnson grass to mature or go to seed upon its said right of way contiguous to plaintiff's said land during the year 1908 and during the year 1909, before November 10, 1909, such recovery in the aggregate not to exceed the sum of \$150. And if you further believe that during said years the seeds or roots of said Johnson grass have been blown, washed, or carried from defendant's said right of way onto and upon plaintiff's said land as alleged, thereby causing said seed or roots to sprout and grow upon plaintiff's said lands, and you further believe that by reason thereof plaintiff's land has been damaged, then the plaintiff would be entitled to recover such additional sum as will fairly compensate him for any damages thereby sustained to his said land."

It is contended that said charge is erroneous, in that it assumes, if appellant permitted Johnson grass to mature and go to seed upon its right of way, it negligently did so; and that it is further erroneous in that under the same more than one recovery of a

penalty for each of the years 1908 and 1909 was authorized, whereas, under the statute of this state fixing such penalty, no more than one of such penalties in any one year could be recovered. We do not concur in either of these contentions. The statute makes it unlawful for a railway company to permit Johnson grass to mature and go to seed upon its right of way, and it was not error for the trial court to assume that its act in this respect is negligent. *Railway Co. v. Terhune*, 94 S. W. 381; *Railway Co. v. Gentry*, 43 Tex. Civ. App. 299, 95 S. W. 74.

Nor did the trial court err in its charge in authorizing a recovery of more than one penalty for each of the years 1908 and 1909. There was evidence sufficient to warrant the jury in finding that Johnson grass did mature and go to seed more than once during each of those years on appellant's right of way. In the case of *Railway Co. v. Voss*, 49 Tex. Civ. App. 566, 109 S. W. 984, the Court of Civil Appeals for the Third District held that under this statute one owning land contiguous to the railway right of way was entitled to recover the penalty stipulated in the statute each time Johnson grass was permitted to mature and go to seed upon its right of way. The court sustained a finding for more than one penalty during the year that this statute was violated. We concur in that holding.

Again, it is contended that said charge is upon the weight of the evidence, in that if the defendant permitted Johnson grass to mature and go to seed on the right of way, and if the seed or roots thereof washed on to plaintiff's contiguous land, and damaged the same, plaintiff was entitled to recover, and the charge assumes that, if the seeds or roots of the grass washed down upon the land, the defendant was negligent with respect to such washing. This contention is not tenable. As stated, the petition set up two grounds of recovery. Appellee first pleaded a case under the Johnson grass act. He made the necessary allegations for that kind of case, calling for penalties and damages to the land. It was not necessary to plead negligence, and, while it is incidentally pleaded, it may be treated as surplusage. This cause of action could have been defeated by proof on the part of appellant that appellee had permitted Johnson grass to mature and go to seed during the time complained of.

In another count of the petition appellee alleged a case good at common law. Under that count, he alleged and proved a case of negligence against appellant in diverting the water from its natural course, and along its right of way, and emptying it on another part of appellee's land, carrying with it grass seed and roots. Under this count it was necessary to show negligence, but if that was done, and an injury resulted, appellee could

not be defeated, even had the proof shown that he had permitted Johnson grass to mature and go to seed on his own land. Under the first count the law imputes negligence on account of the Johnson grass maturing and going to seed on the right of way. Under the second count the negligence must consist, not in permitting the grass to grow or go to seed on the right of way, but in negligently permitting it to be carried onto the land of another. The court submitted both issues under appropriate instructions, and in so doing we do not think committed any error.

These remarks also dispose of the fourth assignment adversely to appellant, and the same is overruled.

The fifth assignment is as follows: "The court erred in the following paragraph of its charge to the jury on the measure of damages, to wit: 'Should you find from the evidence that the plaintiff's land has been damaged by the spread of Johnson grass thereon, and that the defendant is liable for the same, you will allow plaintiff such sum therefor as will represent the difference, if any, in the value of the said land with the said grass as situated thereon as shown by the evidence, and the value of the said land without the said Johnson grass upon the same'—because the measure of damages to the plaintiff's premises therein submitted is not the legal measure of damages to the plaintiff's land." This charge announced the correct measure of damages, and the assignment is overruled.

Finding no reversible error in the record, the judgment is affirmed.

CONSUMERS' LIGNITE CO. v. CAMERON.†
(Court of Civil Appeals of Texas. Jan. 14, 1911. Rehearing Denied Feb. 11, 1911.)

1. TRIAL (§ 194*)—INSTRUCTIONS—WEIGHT OF EVIDENCE.

In an action for injury to a miner, a requested instruction that the servant assumed the risks of which he had actual knowledge and of such hazards as he would have learned by ordinary inspection, and cannot shut his eyes to dangers obvious to an ordinary man, or to an experienced man, if he is experienced, was properly refused because the rule as to assuming risks is the same whether the servant is an ordinary or an experienced man, and the stress laid in the requested charge on the difference between such men made it a charge on the weight of evidence.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 466; Dec. Dig. § 194.*]

2. TRIAL (§ 253*)—INSTRUCTIONS—IGNORING EVIDENCE.

In an action by a miner for injury caused by a car jumping the track, it was not error to refuse an instruction requested by defendant that the mere fact that the car left the main track and went into the switch track does not raise any presumption of negligence on the part of the defendant, where there was sufficient testimony to show that the car that caus-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

† Writ of error denied by Supreme Court.

ed the injury jumped the track by reason of a defective switch.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 613-623; Dec. Dig. § 253.*]

3. MASTER AND SERVANT (§ 296*)—INJURY TO SERVANT—MINERS—INSTRUCTIONS TO JURY.

In an action by a miner for injuries caused by a car jumping the track, a charge on behalf of the plaintiff that although defendant had a rule requiring employes to stand back when a trip of cars was passing on the main line, yet, if the plaintiff did not know the rule, he would not be bound thereby, and would not be precluded from recovery by negligence of the defendant, if any, in the particulars "charged in the petition," unless an ordinarily prudent man, under such circumstances, would have stood back, was not in conflict with the court's main charge, wherein the jury were told not to consider two grounds of negligence, charged in the petition, for lack of evidence to support them, as the charge under consideration did not relate to either of the matters excluded by the court's main charge.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 1180-1194; Dec. Dig. § 296.*]

4. MASTER AND SERVANT (§ 201*)—INJURY TO SERVANT—FELLOW SERVANTS.

Where the negligence of the master concurs with the negligence of a servant, the master is liable.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 515-534; Dec. Dig. § 201.*]

5. TRIAL (§ 260*)—INJURY TO SERVANT—MINERS—INSTRUCTIONS TO JURY.

In an action by a miner for injuries caused by a car jumping the track, it was not error to refuse an instruction for defendant that a servant who is experienced and has the capacity and opportunity to appreciate the dangers, and who without protest voluntarily remains in the service of the employer and attempts to work at the place furnished, or to use the appliances furnished to do such work, assumes the risk, where the court in his main charge told the jury that if they found that the cars frequently left the main track and ran in upon the switches, and the plaintiff knew of such frequent occurrences or ought to have known of them, he assumed the risk, as the charge given was more favorable to the defendant in that it did not require that plaintiff should appreciate the dangers in order to assume the risk.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 651-659; Dec. Dig. § 260.*]

6. TRIAL (§ 260*)—INSTRUCTIONS—INSTRUCTIONS ELSEWHERE GIVEN.

In an action for injuries to a servant, it was not error to refuse requested instructions where the point was sufficiently covered in the main charge of the court.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 651-659; Dec. Dig. § 260.*]

Appeal from District Court, Wood County; R. W. Simpson, Judge.

Action by Malcolm Cameron against the Consumers' Lignite Company. From a judgment for plaintiff, defendant appeals. Affirmed.

Walter F. Seay and Harris, Suiter & Britton, for appellant. Jones & Jones, for appellee.

RAINEY, C. J. This action was brought by the appellee to recover of appellant dam-

ages for personal injuries sustained by him while in appellant's employ as a miner. Appellant answered by general denial, assumed risk and contributory negligence, and that appellee's injury was caused by the negligence of fellow servants. A trial resulted in a verdict and judgment for appellee for \$1,000, and appellant appeals.

Appellee was at work in a room in a mine, and was injured by reason of a car running off the track at a defectively constructed switch which caused another car to strike appellee and injure him. At the time appellee was working by the order of his foreman in a room in the mine. A main line of track runs down a hallway of the mine and from said main line switches lead off of said main line into rooms on either side, where the miners work. Small cars are operated on these tracks to convey coal from these rooms as it is dug. These cars are pulled by mules. The track where the car jumped the main track was negligently constructed, of which appellant had notice. Appellee had been working as a miner for appellant about 2½ years, and, while an experienced miner, he had worked but little on the tracks. He knew that the general construction of the track was bad, but did not know of this defective switch, which had not been put in very long. It was dark in the mine, the miners having to wear on their heads lights with which to see how to work; the light worn by the trackmen being larger than that used by the coal diggers. Appellee had never inspected the track and learned of its defective construction after he was injured.

Appellant complains of the action of the court in refusing to give the following requested charge, viz.: "The servant assumes the risk of the danger of which he has actual knowledge, and of such hazards as he would have learned by the exercise of that ordinary circumspection which a prudent man would have used in the particular employment. He is under no obligation to look out for master's negligence, but he cannot shut his eyes to dangers that are obvious to an ordinary man, or to an experienced man, if he be experienced." The proposition submitted is: "Where the evidence shows that the injured employe is an experienced man in the business in which he is engaged at the time of the injury, the defendant is entitled to a charge that the servant assumes, not only such risks that are obvious to an ordinary man, but that are obvious to an experienced man." The issue of assumed risk was presented to the jury by the court in the main charge.

The evidence does not show that appellee was especially experienced in the construction of tracks. He was an experienced coal digger. He had never been a trackman, and never did any track work, except "mere-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes.

ly as a helper." Never knew of a car taking the switch as the one which hurt him, prior to the accident. Did not know of the defective switch and could not tell the switches were in bad condition by walking over them. The court's charge was sufficiently full upon the question of assumed risk. Besides, the rule of law as to assumed risk is the same as to an ordinary man and an experienced man. If he knows the danger or must or would have learned of it by the exercise of that ordinary circumspection which an ordinarily prudent person would use in the particular employment, then he assumes the risk. Of course, an experienced man knows, or has a better opportunity of knowing, the dangers in the particular employment than an ordinary man, but both are chargeable with what they know or ought to know, and for the court to lay stress in his charge as to any difference between the two as a matter of law, would, in our opinion, be upon the weight of evidence.

The second assignment is: "The court erred in refusing defendant's instruction No. 25, which is as follows: 'You are instructed that the mere fact that the car left the main track and went into the switch track does not raise any presumption of negligence on the part of the defendant.'" The evidence did not call for this charge, there being sufficient testimony to show that the car that caused the injury jumped the track by reason of a defective construction of the switch.

The third assignment is: "The court erred in giving special instruction No. 1, requested by the plaintiff, which said special instruction is as follows: 'Although you may find that the defendant has promulgated a rule requiring employes to stand back out of danger when a trip of cars was passing on the main line, yet if you find that plaintiff did not know of said rule, he would not be bound thereby, and if he failed to stand back when a trip of cars was passing on the main line he would not be precluded from recovering for an injury sustained by him by reason of the negligence, if any, of defendant in the particulars charged in his petition, unless you find that an ordinarily prudent person would under the same or similar circumstances have stood back out of danger when a trip of cars was passing on the main line.'" It is contended that this charge conflicts with the court's main charge, wherein the jury were told not to consider two grounds of negligence alleged in the petition for the reason that there was no evidence to support them. The special charge under consideration did not relate to either of the matters excluded by the court's main charge, and we are unable to see wherein the conflict exists, or if so, how it could have, in any way, affected the result.

The fourth, fifth, sixth, seventh, and eighth assignments of error relate to the refusal of the court to charge on the law of

fellow servants. The evidence falls to raise the issue of injury caused by the negligence of fellow servants. But if it be shown that the servants were negligent, the fact remains that the proximate cause of the injury was the car jumping the switch, which was occasioned by the negligence of appellant in permitting the existence of a defectively constructed switch. Where the negligence of the master concurs with the negligence of the servant, we think the well-settled law is that the master is liable for the consequences resulting from such negligence. *Railway Co. v. Jackson*, 93 Tex. 262, 54 S. W. 1023; *Railway Co. v. Bonatz*, 48 S. W. 767; *Suderman v. Woodruff*, 47 Tex. Civ. App. 229, 105 S. W. 217.

The court refused a charge requested by appellant, that involved the following principle: "A servant who is experienced, has the capacity and opportunity to appreciate the dangers, and who without protest voluntarily remains in the service of the employer and attempts to work at the place furnished, or to use the appliances furnished to do such work, assumes the risk of injury and cannot recover for an injury resulting therefrom." This forms the basis for the ninth assignment of error. The principle embraced in said assignment was submitted by the court in the main charge as follows: "If you shall find that cars frequently left the main track and ran in upon the switches in defendant's mine, then if plaintiff knew of such frequent occurrences, if any, or would have necessarily learned of same in the ordinary discharge of his own duty, then he assumed the risk of being thus injured, and if you find the manner in which the car in question left the main track, if it did, was one of frequent occurrence, and the likelihood of it doing so, if it did, was known or must necessarily have been known to plaintiff in the ordinary discharge of his duties, then he assumed the risk of being thus injured, and he cannot recover." The court's charge was more favorable to the appellant than the one requested, as it did not require that appellee should appreciate the dangers in order to assume the risk.

The tenth assignment of error complains of the refusal of the court to instruct the jury to the effect that plaintiff could not recover for the rupture prior to the accident, but could only look to the increased injury by reason of the aggravation of the same. This point was sufficiently covered by the main charge of the court and there was no error in refusing the requested charge.

The eleventh, twelfth, thirteenth, and fourteenth assignments of error bear upon the same question; that is, that appellee was not working at the place assigned him. This issue was raised by the evidence, but we think the court in its general charge fairly presented the same, and appellant was not injured by the refusal to give such special instructions.

The fifteenth assignment of error is: "The court erred in its charge to the jury in paragraph 8 of said charge: 'If you find that said plaintiff had been instructed to work at another place in the mine, and that he, without knowledge or consent of the defendant or his agents having charge and control of the mine, went to work at the place where he claims to have been injured, then he assumed the risk of being injured by some defective condition, if any, of the track and switch, and cannot recover, but if the plaintiff was given the privilege of working at either of two places, and he was working at one of these places when he claims to have been injured; or if he was instructed to work at another place, yet if the agent of the defendant in charge of defendant's mine knew plaintiff was at work where he claims to have been injured, then he did not assume such risk, unless the defect, if any, was open and patent and was known to the plaintiff or must necessarily have been known had he used that circumspection which an ordinarily prudent person would have exercised in the same employment.'" The effect of the objection to this charge is that if appellee was working at a place different from where he was instructed to work, there is no evidence showing that knowledge thereof was brought home to any one standing in the place of the master. We do not concur in this contention, but think the evidence was such as to raise the issue of such knowledge and authorized the instruction given.

Appellant claims that the judgment is not supported by the evidence. We are of the opinion that the evidence fully warranted the judgment rendered.

Other assignments of error not here discussed are presented, but none warrant a reversal, and the judgment is affirmed.

Affirmed.

CLARK v. ASBURY.

(Court of Civil Appeals of Texas. Jan. 25, 1911.)

1. BROKERS (§ 49*)—SUIT FOR COMPENSATION—RIGHT TO RECOVER.

A broker suing on an express contract for his services cannot recover without showing compliance with the contract or that he was prevented from executing it by his principal.

[Ed. Note.—For other cases, see Brokers, Cent. Dig. §§ 70-72; Dec. Dig. § 49.*]

2. BROKERS (§ 57*)—COMPENSATION—RIGHT TO. Under a contract for a broker's commission, for procuring a purchaser for land at \$2,250, one-third cash, he does not earn his commission by producing a purchaser willing to buy for \$1,000 cash, the remainder in notes; if reimbursed for \$48 lost in discounting notes to procure the cash, though the vendor agreed to the terms and the broker offered to bear one-half of the discount.

[Ed. Note.—For other cases, see Brokers, Cent. Dig. §§ 66-72; Dec. Dig. § 57.*]

3. BROKERS (§ 56*)—RIGHTS OF PRINCIPAL.

Giving exclusive agency does not, of itself, preclude the principal from making a sale.

[Ed. Note.—For other cases, see Brokers, Cent. Dig. §§ 85-89; Dec. Dig. § 56.*]

4. BROKERS (§ 79*)—RIGHT TO COMMISSION—SALES MADE BY PRINCIPAL.

If a broker is entitled to recover any compensation on a sale made by his principal on terms differing from those set forth in his contract, he must sue upon a quantum meruit and not on the contract.

[Ed. Note.—For other cases, see Brokers, Dec. Dig. § 79.*]

5. VENDOR AND PURCHASER (§ 133*)—"GOOD DEED."

A vendor's obligation to furnish a "good deed" does not require one which can be shown to convey a title good by an abstract thereof, but one conveying a good title, including title acquired by adverse possession (citing 4 Words and Phrases, p. 3108).

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. §§ 234-237; Dec. Dig. § 133.*]

6. ADVERSE POSSESSION (§ 106*)—STRENGTH OF TITLE.

Under the statute making title by adverse possession "full title precluding all claims," the holder has as full ownership as can be held under any other character of title.

[Ed. Note.—For other cases, see Adverse Possession, Cent. Dig. §§ 604-623; Dec. Dig. § 106.*]

7. VENDOR AND PURCHASER (§ 133*)—"SATISFACTORY DEED."

A vendor's obligation to furnish a "satisfactory deed" does not require him to comply with the purchaser's whims respecting title, but the fact that title tendered might seriously interfere with selling the land or borrowing money thereon, might reasonably render such deed unsatisfactory.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. §§ 234-237; Dec. Dig. § 133.*]

For other definitions, see Words and Phrases, vol. 7, pp. 6334-6337.]

8. SPECIFIC PERFORMANCE (§ 4*)—CONTRACT TO CONVEY.

The parties to a contract to convey having deposited mutual forfeits, the vendor could not maintain specific performance; his only remedy being suit for damages for breach of the contract as limited by the damages stipulated.

[Ed. Note.—For other cases, see Specific Performance, Cent. Dig. § 4; Dec. Dig. § 4.*]

Appeal from Falls County Court; W. E. Hunnicutt, Judge.

Action by D. C. Clark against Shon Asbury. From a judgment for defendant, plaintiff appeals. Affirmed.

Z. I. Harlan, for appellant. Tom Connally, for appellee.

JENKINS, J. Appellant brought this suit upon the following written contract: "Rosebud, Texas, 9-7-07. Mr. D. C. Clark, Rosebud, Texas—Dear Sir: I hereby give you the exclusive right to sell my tract of land described on the opposite side of this sheet, and for your services in finding me a buyer, ready and willing to buy under the terms agreed upon between us, I agree to pay you a cash commission of \$1 per acre. In the

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

event of a sale I agree to make a good and satisfactory deed. Yours truly, Shon Asbury." By reference to the opposite side of the sheet referred to in this contract, it appears that the land listed was 150 acres, to be sold at \$15 per acre, one-third cash.

The case was tried in the justice's court and appealed to the county court, and upon trial before a jury in the county court, the trial judge instructed a verdict for the defendant. Appellant contends that this action of the court was error, for the reason that he had complied with his part of the contract, and that appellee was unable to comply with the contract in that, by reason of a defect in his title, he was unable to make a good and satisfactory deed. Appellee denies that appellant complied with the contract, in that he never produced a purchaser who was able and willing to buy upon the terms set out in said contract; and also alleges that he tendered a good and satisfactory deed to the proposed purchaser, who refused to accept the same.

The facts show that appellant secured a purchaser who examined the land and expressed himself satisfied therewith, but stated that he did not wish to purchase paying only one-third cash, but would take the land at \$1,000 cash, balance on terms stated in the contract thereafter entered into, conditioned, however, that appellee would stand the discount of \$48 on notes held by him, which it was necessary to pay in order to get the cash upon same. It also appears that this transaction was in the fall of 1907, when "the lid was on," and the bank discounting said notes would not pay cash, but would give New York exchange. The appellant submitted this proposition to the appellee, who refused to stand the discount, but agreed with appellant that he would stand one-half of the same. Thereafter he entered into a written contract of sale, with the knowledge and consent of appellant, wherein he agreed to convey said land to the proposed purchaser for the sum of \$1,000 cash, balance in five equal annual installments at 8 per cent. interest, and agreed to make a good deed to said land; and further agreed that he would furnish an abstract of title as soon as he could have the same made. Thereafter the abstract was furnished and showed that this land had formerly belonged to W. S. Maxwell, who died leaving surviving him a wife and nine children; that the wife and seven of said children conveyed their interest in the land to a remote grantor of appellee, but that one of said children conveyed his interest to his brother G. W. Maxwell, and that G. W. Maxwell had never deeded his interest to any one. Upon this showing it appeared that G. W. Maxwell was the owner of two-ninths of a one-half interest, or a one-ninth of the entire tract, the same having been the community property of W. S. Maxwell and wife. The proposed purchaser refused to take the land unless a deed was ob-

tained from said G. W. Maxwell. It appeared from the undisputed evidence on the trial of this case that said G. W. Maxwell was a resident of Eastland county, Tex., and had been for many years, and that he had been more than 21 years of age for the last 14 years. It further appeared that appellee held the land under a deed conveying the entire tract to him by metes and bounds, and that he had resided upon the land as his homestead for the last 14 years, claiming the same as his own, using and cultivating the same under said deed duly registered for all said time, and paying all taxes thereon.

The appellant sued upon a written contract, and must recover, if at all, upon the terms thereof. Had this been a suit upon quantum meruit it would have presented an entirely different aspect. The terms of said contract required that the land should be sold for one-third cash. The proposed purchaser was not willing to buy on these terms, but was willing to buy if he was allowed to pay \$1,000 in cash, with this further proviso, that the seller should stand the loss of \$48 discount on notes held by him, in order to obtain said cash. That appellee agreed to these terms does not make it a sale upon the terms as set out in the contract. It cannot be said that the proposition to pay \$1,000 cash and execute notes for the balance, instead of one-third cash, is an immaterial difference; and, certainly, it cannot be said that the reduction in the price of \$48 which would be occasioned by the seller standing the discount, is immaterial, even though the agent proposed, to stand one-half of this discount. In *O'Brien v. Gilliland*, 4 Tex. Civ. App. 40, 23 S. W. 244, where the contract with the broker was to sell for cash, and he produced a purchaser who was willing to buy the land and pay one-half cash and execute vendor's lien notes for the remainder, and the broker had arranged to sell these notes for cash, it was held that this was not a sale in compliance with his contract to sell for cash.

In *Thornton v. Stevenson*, 31 S. W. 233, it was held that where a broker was to sell property at a certain price and discussed the sale with a party who afterwards purchased from the owner at a different price, he could not recover his commissions in a suit on his contract. In a suit for commissions on a contract, the recovery must be confined to the contract itself. *Eldson v. Saxon*, 30 S. W. 958, 959. These are sound propositions of law, and a broker who sues upon a contract, and not upon quantum meruit, cannot recover unless he shows compliance with the contract, or unless he was prevented from carrying out the same by the seller. *Owen v. Kuhn, Loeb & Co.*, 72 S. W. 432. Giving an agent an exclusive agency does not, of itself, preclude the owner from making a sale. *J. I. Case Threshing Machine Co. v. Wright Hardware Co.*, 130 S. W. 729; *Dole v. Sherwood*, 41 Minn. 535, 43 N. W. 569, 5

L. R. A. 720, 16 Am. St. Rep. 731. And if the owner make a sale upon other and different terms from those set forth in his contract with the agent, it cannot be said that the agent has made a sale in compliance with the terms of said contract; and if in such case he is entitled to any compensation, it must be upon quantum meruit, and not upon contract.

It will be seen by reference to the contract above set out, that appellee agreed to make a "good and satisfactory deed." Appellant insists that by the expression "good deed," is meant one which can be shown to be good by an abstract thereof. To this proposition we do not assent. Had the agreement been made to furnish a good deed as shown by the abstract, appellant's contention would have been sound. We understand by the term "a good deed," not one which is good merely in form, but one which conveys a good title. Words and Phrases, 3108. But under the decisions of this state it must be held that a title by limitation is a good title. A party holding such title has "as full ownership in land as can be held under any other character of title." *MacGregor v. Thompson*, 7 Tex. Civ. App. 32, 26 S. W. 649; *Improvement Co. v. Shelby*, 17 Tex. Civ. App. 685, 41 S. W. 542. The statute declares such party shall be held to have "full title precluding all claims." Rev. St. 1895, art. 3347. See, also, on this subject, *Morgan v. White*, 50 Tex. Civ. App. 318, 110 S. W. 494; *Branch v. Baker*, 70 Tex. 190, 7 S. W. 809; *Burton v. Carrol*, 96 Tex. 325, 72 S. W. 581; *Moody v. Holcomb*, 26 Tex. 719.

Under the evidence in this case there can be no question but that the deed tendered by appellee and his wife conveyed a good title to the land; but it will be observed that the contract was not only to furnish a good deed, which we hold to mean a good title, but also a satisfactory one. It might well be questioned whether a deed conveying a good title by limitation can be held to be a satisfactory deed. Such title may be good in law, but may not be merchantable by reason of the fact that the evidence rests in parol, and is not made a matter of record, for which reason it might not be satisfactory to a purchaser. We do not think that under the term "satisfactory" it would be necessary to comply with any unreasonable whims of the proposed purchaser with reference to the title; but the fact that the title tendered him might seriously interfere with his selling the land or borrowing money thereon, might reasonably render such a deed unsatisfactory. *Singerly v. Thayer*, 108 Pa. 291, 2 Atl. 230, 56 Am. Rep. 207; *Berthold v. Electric Co.*, 165 Mo. 280, 65 S. W. 792. However, under the facts of this case, and in view of our holding that the appellant had not complied with the contract in obtaining a purchaser who was ready and willing to purchase in accord-

ance with the terms of said contract had the title been satisfactory, we are not called upon to decide this question.

There is one other matter which, though not necessary to the disposition of this case, perhaps ought to be passed upon, inasmuch as the same is raised by appellant's brief; and that is, that if appellee is correct in his contention that he tendered a deed in compliance with the terms of his written contract with appellant, he ought to have brought suit to enforce his contract with the purchaser. The answer to this is that he had no contract with the purchaser upon which he could enforce specific performance. Under said contract appellee and the purchaser each deposited with the bank \$300 as a forfeit to be paid by the party failing to comply with the contract. Appellee's only remedy would have been suit for damages for breach of the contract, and in such suit it would have appeared that his damages were liquidated, and the extent of his recovery would have been the \$300 forfeit money. It further appears from the evidence that appellee and the proposed purchaser subsequently compromised as to the forfeit money by appellee's paying \$50.50, and was permitted to withdraw the remainder of the \$300.

For the reasons given we think the court did not err in peremptorily instructing the jury to return a verdict for appellee, defendant in the court below, and, so holding, we affirm the judgment in this case.

Affirmed.

GEHRING et al. v. GALVESTON ELECTRIC CO.

(Court of Civil Appeals of Texas. Jan. 17, 1911. On Motion for Rehearing, Feb. 9, 1911.)

1. STREET RAILROADS (§ 118*)—INJURIES TO TRAVELERS—DISCOVERED PERIL.

Decedent was run down by a street car approaching him from the rear as he was walking either on the track or between the two tracks of defendant street car company. There was evidence that, while the car was at least a block and a half distant, decedent's proximity to the track was such as to excite in the minds of witnesses an apprehension that he would be struck, and that it was apparent that he did not hear the gong. The car did not slacken speed, but ran at least two cars lengths after striking him. Held, that an instruction on discovered peril relieving defendant from liability unless the operatives of the car realized that decedent could not or would not save himself, but would "certainly" be injured unless they could prevent it, was erroneous, since, if it was apparent to the motorman that decedent was unconscious of danger, he was bound to take steps to prevent any injury.

[Ed. Note.—For other cases, see Street Railroads, Cent. Dig. §§ 253-269; Dec. Dig. § 118.*]

2. NEGLIGENCE (§ 83*)—DISCOVERED PERIL—REQUISITES.

It is sufficient to justify a recovery for negligence on the ground of discovered peril if

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

the peril is discovered in such time that, by the proper use of the agencies at hand by defendant or its employes, the injury may be avoided.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. § 115; Dec. Dig. § 83.*]

Appeal from District Court, Galveston County; Robt. G. Street, Judge.

Action by Augusta Gehring and others against the Galveston Electric Company. Judgment for defendant, and plaintiffs appeal. Reversed and remanded.

Hogg, Gill & Jones and James B. & Charles J. Stubbs, for appellants. Terry, Cavin & Mills, for appellee.

McMEANS, J. The appellants Augusta Gehring and her daughter, Elsie Gehring, brought this suit against the Galveston Electric Company, a corporation, operating a street railway in the city of Galveston, to recover damages for the death of C. C. Gehring, the husband of Augusta, and the father of Elsie; it being alleged that his death was due to the negligence of the operatives of a street car of appellee, as a result of which the car collided with C. C. Gehring and killed him. The grounds of negligence averred, first, a failure to keep a reasonable lookout and sound warnings on the approach of the car; and, second, that the motorman discovered deceased and his peril in ample time to have stopped the car, or so reduced its speed, by the use of the means at hand, as to have prevented the injury. The defenses urged were, in substance, a general denial and contributory negligence. There was a verdict and judgment for defendant, and from an order overruling a motion for new trial the plaintiffs have appealed.

It appears to be conceded that the accident happened on Market street, which runs east and west, at a point between the intersections of this street and Thirty-Second and Thirty-Third streets, which run north and south, and that there were two street car tracks, in Market street, the north one being used exclusively by west-bound cars and the south one by east-bound cars, and that the car that collided with deceased was a west-bound car.

The evidence in the record tending to raise the issue of discovered peril is substantially as follows:

F. Hamilton testified: "While the car was standing there (at the fire engine house at the corner of Twenty-Ninth and Market, more than two blocks from the place where the accident happened), I was sitting on the left-hand side of the car, about three windows from the front end, and was looking out of the window, and saw the old gentleman (deceased) walking in the direction the car was going on Market street about a block and a half from the car, down between the curbing and the first car track.

Soon after the car started, he stepped over between the two car tracks, and continued to walk as before. The car was started at full speed in order to make up the time they had lost in the firehouse, and when the car passed Thirty-First street, without making any check in speed, or giving any warning of any kind, I saw it was going to strike the old man who was walking between the tracks, and, when it was 25 or 30 feet from him, I hollowed at him, but it was too late for him to get out of the way. The car was going so very fast, and in an instant the car struck him and knocked him over on the left-hand side of the track, being the same side I was sitting on in the car. When the car struck the man, it was about a quarter of a block between Thirty-Second and Thirty-Third streets. After he (deceased) had walked about a quarter of the way between Thirty-First and Thirty-Second streets, he stepped over between the two car tracks, and continued walking that way until the car struck him. He was walking right in between the two car tracks, and the space between the tracks is about four feet. The car was still standing at the firehouse when I first saw the man, and, when the car started, he was still walking between the sidewalk and the first track, and, after the car had gone a short distance, he stepped over between the two car tracks, and, as I have stated, continued to walk westward until the car struck him. He was about a block and a half from the car when I first saw him, and he was in plain view all the time until the car struck him and passed him. He did not turn his head, or do anything to indicate that he was conscious of the approach of the car. No attempt was made by either the motorman or the conductor to stop the car or check the speed until after the accident. From the time the car started from the firehouse, it went at full speed, and it did not slow up or check its speed until after the accident, and there was no effort made to stop the car or check its speed until after the accident. He (deceased) was about a block from the car when he stepped over between the two tracks."

William Gauslin testified: "I was present when the car hit Charles C. Gehring which caused his death. I was present when the accident took place. I was sitting in a street car when said accident happened. I saw Charles C. Gehring just prior to, and got to him immediately after, the accident. The car lost several minutes there (at the firehouse), and on starting it continued west at an unusual speed, and on Market, near Thirty-Third street, it hit an old gentleman whom I did not recognize until the car was stopped and I got to him. Before the car was stopped, I stood up and asked the conductor if he was not going to stop the car,

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes 134 S.W.—19

telling him that he had struck an old man and had seriously injured him. The car went about 150 feet after it struck Gehring. I got up and told the conductor to stop the car; that he had struck an old gentleman. He did so, and I got out of the street car and went to the old gentleman. I told the conductor to stop the car that he had hit an old gentleman. He immediately stopped the car when I told him. It never stopped from the time it left Thirtieth and Market street until it hit the old gentleman. It kept the same speed all the way, which was very fast. Immediately before the accident, the deceased was walking west. He was walking west with his back towards the car. I did not see the deceased immediately when the car struck him. I saw him afterwards."

The witness, A. Bellar, testified: "I saw the man who was injured just before the accident occurred. The motorman was sounding his gong, and that attracted my attention to the man who was injured, who I learned after was Charles C. Gehring. When I first saw him, he was about 25 or 30 feet from the car. When the car was about 10 feet from him, he suddenly turned sideways, and just as the car was passing him he was against its side. I judge he struck the car just south of the iron gate." He further testified: "I did not at any time see that he was in danger of being injured before he was actually injured. He was in no danger at all, and could not have been hurt had he not turned into the side of the car."

The witness Altenberger testified that the deceased when he first saw him was walking in the path between the two car tracks, going west and the car coming up behind him, and was within 10 feet of him; that the deceased must have turned half around, when the car struck him on the right shoulder and knocked him down; that after he fell the car ran about two car lengths, he judged, from where it struck him; that he did not think the motorman put his hand on the brake until the conductor signaled him to stop.

It appears that the motorman sounded the gong for some distance before the collision—the motorman says he sounded it continuously—but that deceased gave no evidence that he heard it, or that he was conscious of the car's approach. It was shown that the width of a street car track is a little over five feet, and that the width of the space between the two tracks where the accident occurred was four feet, two inches; that the car in question was eight feet wide, and overhung the track about eighteen inches. There was much testimony which would have justified a fact conclusion that the deceased was walking between the rails of the south track until just before the car reached him, when he suddenly turned and walked diagonally toward the north track, and reached it just in time to be struck by

the car, and this happened so quickly as to not give time to the motorman by the proper and diligent use of the means at his command to stop the car or otherwise prevent the collision.

On this state of the evidence the court charged the jury on the issue of discovered peril as follows: "Discovered peril would have existed in this case under the following conditions, and none other: If the deceased was seen by the operatives of the car, or either of them, to be in imminent peril of collision with the car, and it was realized by the operatives, or either of them, that he would not, or could not, save himself, but would certainly be injured unless they could prevent it, then a case of discovered peril had arisen, and it was the duty of the operatives of the car to do all that was practicable to avoid the injury, and for their failure to do so, if thereby the injury could have been avoided, the defendant would be liable, notwithstanding the deceased may have been guilty of contributory negligence." The correctness of this charge as applied to the evidence is assailed by appellants' first assignment of error. Upon this issue the appellants requested the court to give the following special charge: "If you find that the deceased was walking between the tracks of the company ahead of the car in question, and was walking so near the track as to be in danger of injury from the approaching car, or that he was walking in such close proximity to the track on which the car was moving as to be in danger of injury from the car by reason of any slight change in his course which would throw him in the course of the car, and the motorman in charge thereof saw such danger, if any, and saw that deceased was unconscious of the near approach of the car, if he was, and saw this in time to have averted the threatened injury, if any, by the use of the means at hand, consistent with the safety of the car, and failed to do so, and by reason of such failure the car struck deceased and injured him so that he died therefrom, you will find for the plaintiffs, even though you may believe that the deceased was guilty of contributory negligence in failing to learn of the approach of the car and in failing to put himself in a place of safety." The refusal to give this charge is made the basis of appellants' fourth assignment of error.

By their first proposition under the first assignment appellants contend, in effect, that when the operatives of the street car discovered the deceased walking either in the actual course of the car, or so near the track upon which the car was proceeding as to render it reasonably probable that he would be struck by the car, unless it was stopped or his attention attracted, it became the duty of the motorman to use every means at hand consistent with the safety of the car to prevent the threatened collision;

and that it was not necessary, in order to call this duty into action, that it should be obvious to the motorman that the party in peril would certainly and inevitably be injured unless the duty was performed.

They assert by their second proposition that "it is error to charge the jury, upon the issue of discovered peril, that said issue cannot be found in favor of the plaintiffs unless it appeared from the evidence that the operatives of the car saw the deceased in imminent peril of collision with the car, and that it was realized by the operatives of the car that deceased would not or could not save himself, but would certainly be injured unless the operatives of the car could prevent it." If the testimony had shown that deceased was upon the track in the actual course of the car, and that, therefore, he would inevitably be injured unless the car was stopped, the charge of the court would have been correct as applied to that state of facts, at least it could not have operated to the prejudice of appellants. But that is not the case as made by the witnesses whose testimony is above quoted. No witness testified that the deceased was at any time in the actual course of the car. Those who testified as to his danger testified that it arose from his close proximity to the track. This is specially true as to the testimony of the witness Hamilton. He says he observed deceased while the car was a block distant from him and he was then walking between the two tracks, and continued to walk between the tracks until he was struck by the car. He was still between the two tracks and 25 or 30 feet in advance of the car when Bellar first saw him, and about 10 feet when Altenberger first saw him. The tracks are four feet and two inches apart, and the car extended eighteen inches over the rails, so that two cars, passing upon the tracks, would be only about one foot apart. A person of ordinary size, walking midway between the two tracks, would almost certainly be struck by a car passing on one of them, and this is true as to a person standing, even should the body be held rigidly erect and still. Neither Hamilton nor any other witness stated that deceased was walking nearer one track than the other, nor, indeed, that he was equidistant from both, but Hamilton says that, when he saw him walking between the tracks, he saw the car was going to strike him. The motorman says he sounded the gong continuously from the time he first saw the deceased until the car struck him. This witness places the deceased on the south track until just before the car reached him, at which time he says the deceased suddenly turned and walked to the track upon which the car was proceeding, and was struck before the motorman had time to stop or greatly lessen the speed of the car. It must have been apparent to the motorman that the sound of the gong had not attracted deceased's attention, and, if Hamilton spoke the truth, that deceased was

wholly unconscious of the car's approach. In the light of these facts, and especially of the testimony of Hamilton, Bellar, and Altenberger, could the motorman speculate on whether the car would in fact strike the deceased or miss striking him by the narrow margin of a few inches? When, if Hamilton testified truly, the proximity of deceased to the track was such as to excite in his mind an apprehension that the deceased would surely be struck if he continued walking as he was, and when it was apparent that he did not hear the ringing of the gong, could the motorman delay action until such time as he realized that the deceased would certainly be injured unless he prevented it? We think not. To hold that the motorman could proceed as long as it might appear to him that he could miss by a few inches a man apparently unconscious of danger, provided the man kept his exact course, and that he was not called upon to act until he realized that the person so exposed would certainly be injured unless the use was made with the means at hand to prevent it, would be to permit the motorman in a large measure to speculate upon human life and limb, and would tend to the annulment of the humane theory upon which the doctrine of discovered peril is rested. *Railway v. Finn*, 107 S. W. 94; *Id.*, 101 Tex. 511, 109 S. W. 918; *Sanchez v. Railway*, 88 Tex. 118, 30 S. W. 431; *Brown v. Griffin*, 71 Tex. 654, 9 S. W. 546; *Railway v. Ploeger*, 93 S. W. 226; *Id.* (Sup.) 93 S. W. 722; *Railway v. Munn*, 46 Tex. Civ. App. 276, 102 S. W. 442; *Railway v. Jacobson*, 28 Tex. Civ. App. 150, 68 S. W. 1111; *Railway v. Hanna*, 34 Tex. Civ. App. 608, 79 S. W. 639. It is the knowledge by the operatives of the danger of injury, and not the certainty of injury, that calls forth the action. It is sufficient if the peril be discovered in such time that by the proper use of the agencies at hand the injury can be avoided. *McDonald v. Railway*, 80 Tex. 14, 22 S. W. 939, 40 Am. St. Rep. 803; *Railway v. Lively*, 14 Tex. Civ. App. 554, 38 S. W. 372; *Railway v. Haltom*, 95 Tex. 115, 65 S. W. 625; 29 Cyc. 631.

We think the court should not have given the charge complained of, but should have charged the jury in substantially the language of the requested charge. The assignments raising the points are sustained.

We have examined the other assignments presented in appellant's brief, and think that there are no reversible errors pointed out in any of them. For the errors indicated, the judgment of the court below is reversed and the cause remanded.

Reversed and remanded.

On Motion for Rehearing.

We have carefully considered appellee's motion for rehearing, and are of the opinion that it should be overruled, and it has been so ordered.

In the opinion heretofore filed in this case

we say: "If the testimony had shown that deceased was upon the track in the actual course of the car, and that therefore he would inevitably be injured unless the car was stopped, the charge of the court would have been correct as applied to that state of facts, at least it could not have operated to the prejudice of appellants." This much of the opinion we now withdraw. We do this because the language quoted, standing alone, is not strictly accurate and is probably misleading. It would not in any instance appear that a person, even walking between the rails of a track, ahead of a moving car, would certainly and inevitably be injured, if the car was not stopped, if it also appeared that he was in control of his powers of locomotion. Such certainty of injury could only become obvious where it was apparent that the person so exposed could not leave the track, as, for instance, that he was down and helpless, either between the rails or so near the track as to be in the actual course of the car. One having his power of locomotion has always the chance of saving himself at the last instant, and it will not do to say that a motorman in charge of a moving car, seeing a person walking in the course of the car, with his back to it, apparently oblivious of its approach, may speculate upon the possibility that the person will hear the noise of the car or the gong and save himself at the last instant. As stated in the main opinion, it is the knowledge of the danger, and not the certainty of the injury, that calls forth the action of the operatives to use all the means at hand, consistent with the safety of the car, to stop.

Overruled.

BUCHANAN v. A. B. SPENCER LUMBER CO. et al.

(Court of Civil Appeals of Texas. Jan. 25, 1911. On Motion for Rehearing, Feb. 15, 1911.)

1. GARNISHMENT (§ 201*)—PRIORITY.

The board of trustees of a school district filed an answer as garnishee, admitting an indebtedness to defendant for material, furnished under written contract, used in erection of a school building. Petitioner filed an intervention on the ground that the original defendant had given him promissory notes secured by its contract with the garnishee, which notes were still unpaid. *Held*, that petitioner had a prior right to the money, as the transaction alleged by him was in effect an assignment of whatever was due or might become due under the contract to the extent of the amount due on the notes.

[Ed. Note.—For other cases, see Garnishment, Cent. Dig. § 394; Dec. Dig. § 201.*]

2. GARNISHMENT (§ 1*)—NATURE—PROCEEDING IN REM.

Garnishment is in its nature a proceeding in rem, and the garnishee is the receiver of the court to hold the res until it is determined who is entitled to it.

[Ed. Note.—For other cases, see Garnishment, Cent. Dig. § 1; Dec. Dig. § 1.*]

3. GARNISHMENT (§ 1*)—COMPLIANCE WITH STATUTE—NECESSITY.

The only authority for garnishment proceeding is statutory, and the plaintiff must follow the statute strictly, as the garnishee cannot safely waive compliance with any of its substantial requirements, or submit to an unauthorized garnishment.

[Ed. Note.—For other cases, see Garnishment, Cent. Dig. § 1; Dec. Dig. § 1.*]

4. GARNISHMENT (§ 17*)—INTERVENTION.

As school districts are not subject to a garnishment, the holder of an assignment of a contract with the school board as security for a note cannot be deprived of such security by garnishment proceedings by other creditors of the assignor, and it makes no difference whether the garnishee knew of such assignment when the writ of garnishment was served or not.

[Ed. Note.—For other cases, see Garnishment, Cent. Dig. §§ 32-34; Dec. Dig. § 17.*]

5. GARNISHMENT (§ 20*)—WAIVER—EXEMPTIONS.

One to whom a fund exempt from garnishment is due can waive the exemption; but, unless he does so, his debtor cannot.

[Ed. Note.—For other cases, see Garnishment, Cent. Dig. § 40; Dec. Dig. § 20.*]

Appeal from Uvalde County Court; T. M. Millam, Judge.

Action by the A. B. Spencer Lumber Company and others against the Read Land & Lumber Company, in which the Board of Trustees of School District No. 1 of Zavala County was garnished, and in which William Buchanan filed an intervening petition claiming the fund. From an order striking out the intervening petition, petitioner appeals. Reversed and remanded.

Love & Williams, for appellant. Martin, Old & Martin, for appellees.

NEILL, J. On October 30, 1909, A. B. Spencer Lumber Company, a corporation, having sued the Read Land & Lumber Company, another corporation, for an indebtedness of \$747.90, sued out a writ of garnishment against the board of trustees of school district No. 1 of Zavala county, Tex., alleging that it had in its hands as trustees effects belonging to said defendant. After the writ was served upon said board of trustees, it appeared with the county judge of Zavala county in the county court of Uvalde county, wherein the original suit was pending, and, without waiving any of the legal rights, privileges, or exemptions of a school district, answered that it was indebted to said Read Land & Lumber Company in the sum of \$300 for certain material furnished it by said defendant under a written contract, which material was used in the erection of a school-house in and for said district. Afterwards, on November 30, 1909, William Buchanan filed in the case a petition for leave to intervene, in which he alleged, in substance: That on June 11, 1909, the Read Land & Lumber Company executed and delivered him its three certain promissory notes for the sum of \$252.40 each, payable, respective-

ly, 30, 60, and 90 days after date; and that for the purpose of securing their payment said company delivered to him its contract with said board of school trustees of common school district No. 1 of Zavala county, Tex., together with its several bills for material furnished to that date to be held as collateral security for the payment of said notes. That the notes above referred to are unpaid, and the contract signed by said board of school trustees and bills for material furnished it under said contract are still in the possession of the intervener and give him a prior right to any money that may be due said Read Land & Lumber Company by said school district on said contract. Having, presumably, obtained leave to intervene, he, on the same day, filed in the cause what is styled "Plea of Intervention," which contains a general demurrer to plaintiff's original petition, the application for the writ of garnishment, and the defendant's answer to the writ. It also specially excepts to the answer of the board of school trustees, upon the ground that it shows upon its face that no judgment can legally be taken against said board, in that it is shown by the answer that the funds of said school district are held by it in trust for a public use, and it does not appear that the building, for which the indebtedness was incurred for material, has been completed. It then reiterates the allegations contained in his petition for leave to intervene in the case, alleging, however, in addition, that soon after the transfer of said contract of the Read Land & Lumber Company with said board of trustees, which, with the bills for material furnished thereunder, was delivered as security, its attorney notified the garnishee of such fact and requested it to pay him whatever money it was due thereon. But his plea contains no prayer for any relief whatever, either as against the plaintiff, defendant, or garnishee. On February 22, 1910, the plaintiff filed a motion to strike out intervener's claim and petition of intervention, and, at the same time, also filed its first supplemental petition. The motion to strike out is predicated upon the grounds: (1) That intervener's claim against the Read Land & Lumber Company is distinct and separate from that upon which plaintiff's cause of action against said company is predicated; (2) that the claim of intervener appears to be unsecured, no lien of any character being shown to exist on the fund due by the garnishee to said defendant; and (3) that, there being no privity of contract between intervener and plaintiff or the garnishee, no right of intervention on the part of the former exists. The supplemental petition contains exceptions to the petition of intervention, which are, substantially, the same as those embodied in said motion. The court, upon hearing the motion to strike out the intervener's petition of intervention, sustained the same, and then, upon trying the cause, as between the plaintiff and the gar-

nishee, rendered judgment in favor of the former and against the intervener for all costs incurred by him. He has appealed from the judgment.

The only assignment we need notice is that which complains of the court's sustaining the motion to strike out intervener's pleadings of intervention. This action of the court does not extend to the sufficiency of his pleadings, but is to the effect that he had no right to intervene at all. If the exceptions contained in plaintiff's supplemental petition had been presented and sustained, intervener might have, by amending them, cured their defects, if there were any. But the blow dealt him was a solar plexus, a clear knock-out before he could enter the fight for what he claimed he was entitled to. Therefore we need consider his pleadings only for the purpose of determining his right to intervene, for, if they disclose such right, as an intervener he was entitled to an opportunity to have his claim adjudicated though his petition or plea of intervention may have been open to some of the exceptions interposed thereto by the plaintiff. If, as is stated in his petition for leave to intervene, which was reiterated in his plea of intervention, defendant, the Read Land & Lumber Company, delivered to his attorney and agent its contract with the board of trustees of school district No. 1 of Zavala county, with the bills for material furnished under it, for the purpose of securing him in the payment of the promissory notes mentioned, then there was, in effect, an assignment to him of whatever was due or might become due the Read Land & Lumber Company by the board of said school district under such contract, to the extent of the amount due intervener on the notes, for the purpose of securing their payment. And whatever right the said company had to the money due or to become due on said contract, to the extent of its indebtedness to the intervener on said notes, passed to him by virtue of such assignment. It is apparent from the answer of garnishee that the sum of money it had on hand was due on said contract. This sum of money was the subject of controversy between the plaintiff and the intervener; the issue being which, as between themselves, had the superior right to the fund, the plaintiff by virtue of the garnishment proceedings, or the intervener by virtue of his assignment?

"Garnishment" is a proceeding by which the debtor is compelled to pay another than his creditor, and the right of the creditor is, against his will, transferred to another. It is in its nature a proceeding in rem, and the garnishee is the receiver of the court to hold the res until it is determined who is entitled to it. The only authority for such a proceeding is statutory, and the plaintiff must follow the statute strictly, and the garnishee cannot safely waive compliance with any of its substantial requirements, or submit to a judgment in an unauthorized garnishment.

Rood on Garnishment, §§ 5, 6. The garnishee can occupy no better position than if sued by the defendant. The one stands in the other's shoes.

In view of the matters alleged and the law applicable to them, we have no doubt as to the right of appellant to intervene in the case and show his right to the money in the hands of the garnishee, just as he could have done had the Read Land & Lumber Company instituted suit against the board of trustees (the garnishee) for the money due on the contract which was assigned him by said company as security for the debt it owed him.

The court erred in sustaining plaintiff's motion to strike out appellant's petition or plea of intervention, for which error the judgment is reversed, and the cause remanded.

On Motion for Rehearing.

In the motion for rehearing it is contended by appellees that: "The Court of Civil Appeals has erred in its holding that the allegation of the appellant, William Buchanan, stating that as the defendant, the Read Land & Lumber Company, 'had delivered to Buchanan's attorney and agent the contract the said Read Land & Lumber Company had with the board of trustees of school district No. 1 of Zavala county, together with the bills for material furnished under it for the purpose of securing said Buchanan in the payment of the promissory notes mentioned,' was a sufficient allegation to authorize said Buchanan to intervene, and that such allegation was in effect an assignment to said Buchanan of whatever was due, or might become due, the Read Land & Lumber Company by the board of said school district under such contract, to the extent of the amount due intervenor on the notes for the purpose of securing their payment. And that whatever right the said company had to the money due or to become due on said contract, to the extent of its indebtedness to the intervenor on said notes, passed to said Buchanan by virtue of such assignment."

Let it be conceded that the assignment of the Read Land & Lumber Company to Buchanan was only made as collateral security to secure the latter in the payment of the debt owed him by the former, still it was nevertheless an assignment for this purpose, and, unless such indebtedness has been paid, Buchanan, as against appellants, is entitled to such security and to have the money in the hands of the garnishee shown by its answer to be due on such contract appropriated to the payment of his debt. And as school districts, school boards, and the like are not subject to garnishment (*Herring-Hall-Marvin Co. v. Bexar County*, 16 Tex. Civ. App. 673, 40 S. W. 145; *City of Sherman v. Shobe*, 94 Tex. 127, 58 S. W. 949, 86 Am. St. Rep. 825; *Herring-Hall-Marvin Co. v. Kroeger*, 23 Tex.

Civ. App. 672, 57 S. W. 980; *School Dist. No. 4 of Marathon v. Gage*, 30 Mich. 484, 33 Am. Rep. 421; *Hightower v. Slaton*, 54 Ga. 108, 21 Am. Rep. 273; *Chamberlain v. Watters*, 10 Utah, 298, 37 Pac. 566; *Skelly v. Westminster School Dist.*, 103 Cal. 652, 37 Pac. 643; *Kein v. School Dist.*, 42 Mo. App. 460; *Millison v. Fisk*, 43 Ill. 112; *Bivens v. Harper*, 59 Ill. 21; *Clark v. Mobile School Com'rs*, 36 Ala. 621; *Board of Education of City and County of San Francisco v. Blake* [Cal.] 38 Pac. 536; *Dollman v. Moore*, 70 Miss. 267, 12 South. 23, 19 L. R. A. 222; *Bulkley v. Eckert*, 3 Pa. 368, 45 Am. Dec. 650; *Born v. Williams*, 81 Ga. 796, 7 S. E. 868; *Bank of Southwestern Georgia v. Mayor, etc.*, of Americus, 92 Ga. 361, 17 S. E. 287; *Buchanan*, as the assignee of such fund, cannot, against his consent, be deprived of such security; and it can make no difference whether the garnishee knew of such assignment when the writ of garnishment was served or not. One to whom a fund exempt from garnishment is due can waive the exemption; but, unless he does so, his debtor cannot. *City of Sherman v. Shobe*, supra; *Gilbert Book Co. v. Pye*, 43 Tex. Civ. App. 183, 95 S. W. 10.

Therefore we overrule the motion, and direct the court below in trying the case to determine: (1) Whether the alleged assignment was made to Buchanan, or, which is the same thing, to his attorney for him; and (2) whether the debt, which the assignment was made to secure, has been paid; and, then, if the first question should be answered in the affirmative, and the second in the negative, to enter judgment in favor of Buchanan, the intervenor, against the garnishee for all the money due the Read Land & Lumber Company on the assigned contract which it had on hand when the writ of garnishment was served, and against the A. B. Spencer Lumber Company, garnisher, for all costs incurred in this proceeding.

With such directions to the trial court, the motion is overruled.

RAMSEY & MONTGOMERY v. EMPIRE TIMBER & LUMBER CO.

(Court of Civil Appeals of Texas. Jan. 14, 1911. Rehearing Denied Feb. 9, 1911.)

1. PARTNERSHIP (§ 5*)—CREATION OF RELATION.

Where an existing partnership enters into an agreement with a corporation by which the parties are to purchase a stock of lumber to be paid for by the corporation and by the firm, and to be sold by the corporation, and the proceeds to be divided between the corporation and the firm, and the firm purchases a stock of lumber for joint account and pays therefor, of which the corporation has knowledge, and the corporation thereafter disposes of the stock on joint account, and receives and retains its share of the profits, the parties are partners in the transaction.

[Ed. Note.—For other cases, see *Partnership*, Cent. Dig. § 15; Dec. Dig. § 5.*]

2. PARTNERSHIP (§ 9*)—SHARING PROFITS AS COMPENSATION.

Where a partnership buys a stock of lumber for its own benefit, and then contracts with a corporation to sell the stock for it for a compensation or commission of one-third of the net profits, the parties are not partners.

[Ed. Note.—For other cases, see Partnership, Dec. Dig. § 9.*]

3. TRIAL (§ 250*)—INSTRUCTIONS—APPLICATION TO PLEADINGS AND ISSUES.

Under Rev. St. 1895, art. 1317, which provides that the court shall instruct the jury as to the law arising on the facts, the instructions must be confined to the issues made by the pleadings and evidence.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 584-596; Dec. Dig. § 250.*]

4. TRIAL (§ 253*)—INSTRUCTIONS—IGNORING ISSUES.

Where the evidence, in an action on a note, showed that plaintiff was to have one-third of the profits, if any, arising from a lumber transaction engaged in by the parties, but was conflicting as to whether such part was plaintiff's share of profits as such or compensation by way of commission, instructions, abstractly correct, that if plaintiff did not furnish any part of the purchase price, or was not under the contract to do so, nevertheless, if the agreement was that he was to make sales of the lumber and get one-third of the net profits, this was a partnership and rendered plaintiff liable for one-third of the losses, were properly refused.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 613-623; Dec. Dig. § 253.*]

Appeal from District Court, Jefferson County; L. B. Hightower, Jr., Judge.

Action by the Empire Timber & Lumber Company against Ramsey & Montgomery, with cross-action by defendants. Judgment for plaintiff, and defendants appeal. Affirmed.

W. D. Gordon and Oliver J. Todd, for appellants. Smith & Fleming and John Broughton, for appellee.

REESE, J. The Empire Timber & Lumber Company instituted this suit in the district court against Ramsey & Montgomery to recover the amount due upon a promissory note for \$750 executed by defendants to plaintiff. Defendants pleaded general demurrer and general denial, and specially set up the following facts: "That B. R. Moses, then acting for the benefit of himself and others who subsequently formed the plaintiff company, entered into an agreement with these defendants by the terms of which the said defendants were to purchase a certain stock of lumber known as the Grubbs stock, which stock was to be resold by and through said B. R. Moses, and the Empire Timber & Lumber Company, thereafter to be formed, for whose benefit the contract was entered into, and it was mutually agreed by said parties that they would contribute equally to the purchase price of said lumber and share equally the profits and losses resulting from the resale of said property, which resale was to be made by and through Moses and said Empire Timber & Lumber Company when

formed. That the aforesaid contract became the property of and was adopted by, and the terms and conditions thereof adopted and ratified by, the Empire Timber & Lumber Company, and said adoption and ratification was furthermore accepted by these defendants, and same became a binding obligation and agreement of said plaintiff for whose benefit said contract was made by these defendants."

It was further alleged that in pursuance of this agreement the stock of lumber was purchased by plaintiff and defendants, the entire purchase price being advanced by defendants, and "the Empire Timber & Lumber Company being carried by defendants as to its interest," defendants, being in need of funds, drew a draft on plaintiff for \$750, which was paid and credited by defendants upon the unpaid share of plaintiff in the purchase price of the lumber; that plaintiff afterwards requested defendants to execute a note for the amount, which they did, being the note sued on; "that the same might be carried by them for the convenience of the plaintiff." Defendants further alleged that there was no consideration for said note, that they were not indebted to plaintiff in any sum, but that, on the contrary, plaintiff was at that time, and is now, indebted to them in as large amount as its share of the losses upon said venture. Defendants further set out in detail the facts to show that in the purchase and sale of said lumber there were large losses which it is alleged should be borne by them and plaintiff in the proportion of one-third by each of defendants and one-third by plaintiff, plaintiff's share of said losses being alleged to be \$1,348.67, which they plead in reconvention, and for which they prayed judgment.

By supplemental petition plaintiff pleaded that it is a corporation and had no power under its charter to enter into the partnership alleged in the answer, and it is further denied generally and specially that it ever entered into the partnership agreement as alleged. A trial with a jury resulted in a verdict and judgment for plaintiff for the amount due upon the promissory note, and against defendants on their cross-action. Their motion for new trial having been overruled, defendants prosecute this appeal. The evidence was sufficient to support the verdict in both particulars and we therefore find that the appellants were indebted to the plaintiff in the amount found, being the amount due upon the note, and that there was no partnership, as alleged by them.

The court charged the jury as follows: "You are further instructed that if you shall believe from a preponderance of the evidence before you that on or about the time alleged in the answer of defendant, the said defendant partnership entered into an agree-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

ment or contract with the Empire Timber & Lumber Company, thereafter to be organized, or with the said B. R. Moses, acting for said plaintiff company, whereby it was contracted and agreed between them that the said plaintiff corporation and the said defendant partnership should purchase a certain stock of lumber described in the pleadings and evidence as the Grubbs stock of lumber, and you further believe from the evidence that such purchase was to be made by the said plaintiff corporation, or the said B. R. Moses, acting for said corporation, and the said defendant partnership, with the understanding that the same should be paid for by the said plaintiff corporation and by said partnership, with the view that said stock of lumber should be sold by said plaintiff corporation and the proceeds thereof should be divided between said plaintiff corporation and said defendant partnership, the said plaintiff corporation to share in one-third of the profits arising from said venture, and the defendant partnership to have two-thirds of the profits arising from said venture, and you further believe from the evidence that in accordance with such contract and agreement the defendant partnership did purchase said stock of lumber for the joint account and benefit of itself and said plaintiff corporation, and paid the purchase price of said stock of lumber either in cash or executed its notes or obligations therefor in a manner that was satisfactory to the receiver then having said stock of lumber for sale; and you shall further believe from the evidence that such purchase after being so made by the defendant partnership was made known to the plaintiff corporation; and you further believe from the evidence that thereafter the plaintiff corporation under the terms of its said contract with defendant partnership undertook to, and did, dispose of said stock of lumber for the joint account and benefit of itself and said defendant partnership, or did dispose of any portion of said stock of lumber under such contract or agreement with said defendant partnership, and received and retained its (said plaintiff corporation's) share of the profits arising out of the sale of said lumber according to the terms of its said agreement with defendant partnership, if any, then I instruct you that said plaintiff corporation and defendant partnership were, in contemplation of law, partners in the undertaking of the purchase and sale of said stock of lumber, and if you so find the facts to be, you will find that said corporation was a partner with said partnership."

By the first assignment of error this charge is assailed on the ground that it was affirmative error for the court to charge the jury that, in order to create a partnership, plaintiff must have agreed to contribute one-third of the original purchase price of the lumber. It is a sufficient answer to this assignment that the charge does not do this. The charge

embodies the proposition that the facts stated (following the allegations of the pleadings and the evidence of appellants) would constitute a partnership, and this is undoubtedly correct. In any view of the case this did not constitute affirmative error.

The court further charged the jury that if appellants bought the stock of lumber for its own benefit, and then entered into an agreement with appellee whereby it should handle and sell the stock for appellants for a compensation for so doing, of one-third of the net profits to accrue to appellants, over and above the purchase price of the lumber, the parties were not partners. This was a correct statement of the law upon the facts as presented by the testimony introduced by appellee, and presented correctly the law upon its side of the case. There is nothing in the opinion of the Supreme Court in the case of *Kelley Island Co. v. Masterson*, 100 Tex. 88, 93 S. W. 427, or *Cothran v. Marmaduke*, 60 Tex. 370, inconsistent with this, and the doctrine is supported by *Buzard v. Bank*, 67 Tex. 83, 2 S. W. 54, 60 Am. Rep. 7, *Stevens & Andrews v. Bank*, 62 Tex. 501, and many other cases. *Brown v. Watson*, 72 Tex. 216, 10 S. W. 395; *Railway Co. v. McFadden*, 91 Tex. 203, 42 S. W. 593; *Missouri Pac. Ry. Co. v. Johnson* (Sup.) 7 S. W. 840; *System Co. v. Exchange Bank*, 61 S. W. 509; *Fouke v. Brengle*, 51 S. W. 520; 30 Cyc. 372, 378.

Although the charge first above referred to did not, in any view of the law, present affirmative error, appellant sought by various requested charges to have presented to the jury the proposition that if appellee did not furnish any part of the purchase price, or was not, under the contract, to do so, nevertheless if the agreement was that he was to make sales of the lumber and get one-third of the net profits, this constituted a partnership and rendered appellee liable for one-third of the losses. These several charges were refused and this action of the court is made the ground of several assignments of error all of which may be considered together as presenting one general proposition. If it be conceded that these charges, or any of them, state correct propositions of law in the abstract, in so far as they depart from the propositions laid down for the guidance of the jury in the court's charge, they present a case not presented by either the pleadings or evidence. We have set out the substance and in part the language of appellants' pleadings as to the nature of the contract with appellee acting through its general manager, Moses. The contract pleaded was that the lumber was to be bought for the joint account of the parties, appellants to pay two-thirds of the purchase price and appellee one-third, and that appellee was to sell the lumber and take one-third of the profits. It was further alleged that appellants advanced all the purchase money, the Empire Timber & Lumber Company being

carried by defendants as to its interest." Appellants' testimony, if true, established this contract, and this is what they claimed to be the effect of the documentary evidence introduced, consisting of letters and telegrams of Moses. On the contrary, the evidence of Moses, testifying for appellee, if true, established that the appellee had nothing to do with the lumber except to sell the same for a commission, that it at first proposed to do so for a fixed commission of \$1 per thousand feet, but upon appellants' objecting, it agreed to sell the lumber for a commission of one-third of the net profits over and above the price paid by appellants for the lumber. There was nothing in the pleadings or evidence of either of the parties as to any agreement that appellants were to buy the lumber for joint account and pay all the purchase price themselves, and a charge as to the rights of the parties under this kind of a contract would, even if correct, have been a mere abstraction. The entire charge of the court, both that portion presenting appellants' contention and that presenting appellee's contention, was based upon the facts pleaded and supported by the evidence. This was all the court was required to do, and all that it could properly do. It is hardly necessary to cite authority in support of the proposition that the charge of the court must be confined to the issues made by the pleadings and evidence. It is provided by statute that the court shall instruct the jury "as to the law arising on the facts." Rev. St. 1895, art. 1317; *M., K. & T. Ry. Co. v. Carter Bros.*, 95 Tex. 483, 68 S. W. 159; *Giddings v. Baker*, 80 Tex. 314, 16 S. W. 33; *Boating Ass'n v. Steamship Co.*, 80 Tex. 378, 16 S. W. 112; *Nations v. Thomas*, 25 Tex. Supp. 223. The court says in *Giddings v. Baker*, supra: "The plaintiffs did not claim because of Baker's silence; they sought to recover because, as they alleged, he had spoken falsely. Whether the legal proposition involved in the instruction is correct or not we need not pause to inquire. It was not applicable to the facts of the case and should not have been given." In each of these requested charges the taking of one-third of the profits by appellee is spoken of as constituting a partnership. It is undeniable that under the contract appellee was to have one-third of the profits, but the essential distinction between the respective contentions of the parties is that appellee was to get, according to its contention, one-third of the profits as its compensation for selling the lumber, by way of commission, and not as its share of the profits in a business deal in which the parties were all interested. The charges requested, if otherwise correct, ignored this distinction and for that reason alone should not have been given.

Having submitted correctly the law applicable to the exact issues presented by the pleadings and evidence, it would not have been proper for the court to go further and

present propositions of law, even if abstractly correct, applicable to a state of facts neither pleaded nor proven. We are of the opinion that the court did not err in refusing any of the charges requested, and the several assignments of error presenting appellants' objections to such action, and the propositions thereunder, are severally overruled.

The court did not commit material error in submitting to the jury the issue of whether there were losses, as complained of in the third assignment. If, as appellants contend, the evidence was undisputed that there were losses, this charge could not have misled the jury. Moreover, if error, it was harmless in view of the finding that there was no partnership and hence the matter of losses immaterial. In view of the evidence it is inconceivable that the jury found that there was a partnership but no losses.

By their fifteenth assignment of error it is urged by appellants that the court erred in overruling their motion for a new trial, on the ground that the overwhelming weight of the evidence established the partnership as claimed by them. We have examined the evidence in the record very carefully and while it would have sustained a verdict for appellants on this issue, it does not so preponderate in favor of such finding as to authorize this court to disturb it. Much of the evidence relied upon by appellants—that is, the telegrams and the letters of Moses of September 7, 1907, and other letters—is consistent with appellee's claim. It had just been incorporated for the purpose of buying and selling lumber on commission, and was naturally anxious to get business. The Grubbs stock was rather a large order, and it was perfectly natural that appellee should have been anxious for appellants to buy it, so that it could get to handle it on commission. The larger the profits, the larger the commission. We do not say that this evidence is inconsistent with appellants' contention, but only that it is not, in one view which may reasonably be taken of it, inconsistent with appellee's contention as to the nature of the contract. Nor is it of controlling significance that appellee rendered to appellants statements in which they charged themselves with so much "profits." The principal evidence, however, is the testimony of appellants on the one hand and of Moses on the other, and according to Moses' testimony the only connection of the appellee with the transaction is that they were to sell the lumber for a commission of one-third of the profits. If that is true there was no partnership. The transaction by which appellants borrowed \$750 from appellee and gave their note therefor, when, according to their contention, appellee owed them this and much more as its share of the purchase price of the lumber, is so strongly corroborative of Moses' testimony as to the nature of the contract, that it is not surprising if much force

was attached to this circumstance by the jury, even in view of appellants' explanation of it.

Our conclusion is that the evidence is sufficient to support the verdict, and that there is no such preponderance, if in fact there is any, as would authorize us to set it aside.

We find no error in the record and the judgment is affirmed.

Affirmed.

LUMPKIN et al. v. STORY et al.†

(Court of Civil Appeals of Texas. Jan. 18, 1911. Rehearing Denied Feb. 15, 1911.)

1. LIMITATION OF ACTIONS (§ 170*)—VENDOR'S LIEN—BAR OF NOTES—RECOVERY OF PROPERTY.

Where limitations are pleaded against purchase-money notes secured by a vendor's lien, plaintiff may change the cause of action, rescind the contract of sale, and recover the land.

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. § 656; Dec. Dig. § 170.*]

2. ADVERSE POSSESSION (§ 62*)—SOURCE OF TITLE.

Where, in an action to recover land, plaintiffs claimed as heirs of a decedent, and defendants claimed under decedent as their vendor, retaining a vendor's lien for the unpaid price, without asserting title under any other source, both parties claimed under a common source of title, and the possession of defendants and their purchasers was not adverse as against the heirs until they repudiated the title under decedent.

[Ed. Note.—For other cases, see Adverse Possession, Cent. Dig. §§ 323-332; Dec. Dig. § 62.*]

Appeal from District Court, Bosque County; O. L. Lockett, Judge.

Consolidated actions by Millard Story and others against S. H. Lumpkin and others. From judgments for plaintiffs, defendants appeal. **Affirmed.**

See, also, 49 Tex. Civ. App. 332, 108 S. W. 455.

The nature and result of this suit is stated as follows in appellants' brief:

"This was originally two suits, brought by appellees, plaintiffs below, in the district court of Dallas county, Tex.; one against T. M. Moffett, as maker of notes, S. H. Lumpkin and Eli Walker, on the five vendor's lien notes executed by Moffett, and the other against A. A. Locklar, maker of notes, S. H. Lumpkin, and Zeb Morris, on the five vendor's lien notes executed by Locklar. Moffett, though served, never appeared or answered. Locklar was never served with citation. Lumpkin and his two tenants Walker and Morris, being the only parties in possession of the land, filed their original answer in each case setting up: (1) Plea of privilege to be sued in the county of their residence; (2) demurrer to the jurisdiction of the court; (3) that Walker and Morris were the tenants of the defendant S. H. Lumpkin; (4) general denial; (5) plea of statute of four years' lim-

itation as to said land, there being 410 acres in both tracts. On April 24, 1908, appellees, plaintiffs below, filed their second amended original petition in said district court of Dallas county, in the form of trespass to try title, leaving out all allegations as to the notes. The said Lumpkin and his tenants in said district court of Dallas county filed their amended answer, setting up substantially the same defense as in their original answer, with the addition of a plea of not guilty, and the plea of three, five, and ten years' limitation. On May 21, 1908, trial was had in said case of appellees, plaintiffs below, against Moffett et al., and resulted in a judgment overruling the plea of privilege and demurrer to the jurisdiction, and giving appellees three-fifths of the land. Lumpkin and Walker perfected their appeal, and the case was transferred to the Court of Civil Appeals at Austin, and, while the case was pending on appeal, the Thirtieth Legislature amended the venue statute by adding articles 1194a, 1194b, and 1194c, and the Court of Civil Appeals reversed said judgment with instructions to change the venue of said case to the district court of Bosque county. See Lumpkin et al. v. Story et al., 49 Tex. Civ. App. 332, 108 S. W. 455. In obedience to the ruling in said case, supra, both cases were transferred to the district court of Bosque county, and filed therein on September 7, 1908. On December 5, 1908, the defendant Lumpkin, in both cases, filed his second amended original answer in the district court of Bosque county pleading: (1) General demurrer; (2) general denial and plea of not guilty; (3) statute of three years' limitation; (4) statute of five years' limitation; (5) statute of ten years' limitation; (6) suggestion of good faith improvements. The defendants Walker and Morris each pleaded that they were yet tenants of the said Lumpkin and disclaimed title to the land. On December 5, 1908, the appellees, plaintiffs below, and the defendant Lumpkin and his tenants, Walker and Morris, filed an agreement to consolidate the two suits. On March 15, 1909, the two suits were, by order of the court, consolidated. On the trial of this consolidated case in the district court of Bosque county, appellees, plaintiffs below, only read as evidence of title the two deeds both dated November 21, 1892, from A. A. Story and J. W. Story (one) to T. M. Moffett for the 205 acres out of the T. R. Hawkins 918 $\frac{1}{2}$ -acre survey, alleged to be patented to him by patent No. 91, vol. 2, by metes and bounds. The other to A. A. Locklar for a like number of acres (205) out of the T. R. Hawkins survey, and described by metes and bounds, both tracts containing 410 acres, and is the same land described in the Lumpkin title papers, as being 210 acres and 200 acres by field notes, making in all the 410 acres in the consolidated case. The vendor's

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

†Writ of error denied by Supreme Court.

lien was retained in the deeds, and deeds of trust were also given to secure said ten vendor's lien notes of Moffett and Locklar.

"The appellees, plaintiffs below, are the heirs at law of A. A. Story and J. W. Story, deceased, and succeed to whatever title, if any, they had in the land in controversy. The record shows, and the facts are all uncontroverted, that appellant's (Lumpkin's) title is as follows: (1) State of Texas to T. R. Hawkins, patent No. 91, volume 2, dated July 21, 1846, for 918 $\frac{3}{4}$ acres of land out of which the 410 acres in controversy is a part. The court excluded this patent, but appellees' two deeds both claim that said land is out of the T. R. Hawkins 918 $\frac{3}{4}$ -acre survey patented to him July 21, 1846, by patent No. 91, volume 2, and appellees, plaintiffs below, in their petition allege that said land is out of the T. R. Hawkins 918 $\frac{3}{4}$ -acre survey patented to him July 21, 1846, by patent No. 91, volume 2, and even the judgment in this case says that said land is out of the T. R. Hawkins 918 $\frac{3}{4}$ -acre survey, patented to him July 21, 1846, by patent No. 91, volume 2. (2) It was admitted that James R. McMahon and Laura A. Davis and her husband, the plaintiffs in cause No. 1,996, were the sole heirs at law of T. R. Hawkins, deceased, who died in 1849. (3) By the judgment in cause No. 1,996 of James R. McMahon et al. v. G. W. Anderson et al., and the order of sale and writs of restitution issued thereunder and the sales to the said Lumpkin of said 410 acres of land in two tracts of 200 and 210 acres, the deed from J. R. McMahon of his interest in said judgment, all put the legal and equitable title to said lands in the appellant S. H. Lumpkin on January 5, 1897. (4) Deeds from S. H. Lumpkin to Belle Locklar, dated January 6, 1897, for the 210 acres, and to Mrs. L. E. Moffett of same date for the 200 acres and the reconveyance of said lands in consideration of the cancellation of the purchase-money notes made by the vendees, back to the appellant S. H. Lumpkin, the last deed being made by Mrs. Belle Locklar, joined, pro forma by her husband, A. A. Locklar, on April 5, 1900, and filed for record same day, put the fee-simple title to all of said 410 acres of land in the appellant S. H. Lumpkin. The further uncontroverted evidence is that appellant S. H. Lumpkin, defendant below, took possession of said 410 acres of land on January 5, 1897, and has by himself and his vendees been in continuous and uninterrupted adverse possession of the same under deeds duly registered and paying all taxes due thereon for each and every year, cultivating, using, and enjoying the same since said date; more than three years, more than five years, and more than ten years before the institution of this suit. This consolidated case was tried on April 1, 1909, and resulted in an instructed verdict for appellees, plaintiffs below, for three-fifths of said 410 acres of land, and appellant S. H. Lumpkin two-

fifths of said land, to which appellant excepted."

Appellees concede that appellants' statement is substantially correct, but submit in their brief what they term a "clearer statement of the issues involved," as follows:

"Appellees' ancestors, by deeds dated November 21, 1892, sold to T. M. Moffett 205 acres of land out of the T. R. Hawkins 918 $\frac{3}{4}$ -acre survey, situated in Bosque county, Tex., and to A. A. Locklar 205 acres out of the same survey. To secure the payment of the purchase money in the deed to Moffett, which unpaid purchase money consisted of nine certain promissory notes for the sum of \$100 each, a vendor's lien was expressly retained in the deed. This deed was filed for record in the office of the county clerk of Bosque county on the 10th of December, 1892, and duly recorded in volume 20, pp. 389 and 390, Deed Records of said county. At the same time a deed of trust on the land conveyed was executed by Moffett to M. J. Dart, as trustee, to secure the payment of said notes, the last five of which said notes were given the preference lien over the first four notes. In the deed from Story and wife to A. A. Locklar, nine notes were executed for the purchase money, and a vendor's lien expressly retained in the deed to secure the payment of the notes, the last five of which were made a preference lien over the first four. This deed was dated the 21st of November, 1892, filed for record on December 10, 1892, and recorded on December 26, 1892, in deed records of Bosque county. At the same time of the execution of the deed, A. A. Locklar, the vendee, executed a deed of trust on the land conveyed to M. J. Dart, as trustee, to secure the payment of the notes mentioned in the deed. This deed of trust was duly acknowledged and filed for record on December 10, 1892, and recorded on December 13, 1892, in the records of Bosque county. The deed of trust executed by T. M. Moffett to M. J. Dart was likewise duly acknowledged and was filed for record on December 10, 1892, and recorded on December 12, 1892, in the records of Bosque county. Subsequently, the heirs or alleged heirs of T. R. Hawkins brought suit in the district court of Bosque county against Moffett and Locklar together with other persons occupying the land, in trespass to try title for the recovery thereof. Appellees' ancestors, A. A. Story and J. W. Story, both of whom were then living, were not made parties to this suit. Neither was the J. B. Watkins Land & Mortgage Company, which at that time held the notes on which these suits were originally instituted, made a party to said suit. Appellees' ancestors and the Watkins Company both had private notice from the vendees Moffett and Locklar of the pendency of the suit. No appearance, however, was made in the suit by either of them.

"On February 17, 1896, the following decree was entered in said cause: 'James R. Mc-

Mahon et al. v. G. W. Anderson et al. (No. 1,996.) In the district court, Bosque county, Tex., January term, A. D. 1896. Now in the above entitled and numbered cause came the plaintiffs, James R. McMahon, Laura A. Davis, and her husband, S. C. Davis, by their attorneys, and the defendants G. W. Anderson, A. A. Locklar, T. M. Moffett, Mrs. E. A. Smith, a feme sole, J. F. Parks, T. J. Ray, and W. F. Ray, by their attorneys, and enter into the following agreement of settlement of the matters involved between them: First. The evidence taken in this case and now on file discloses that the plaintiffs are the heirs and issue thereof of Timothy R. Hawkins, deceased, to whom the land in controversy was patented, and discloses the fact that the statute of five and ten years' limitations apply to an equal undivided three-fifths of the land sued for, and as plead by defendants. And it is agreed that the said defendants have title to the several parcels of the said land claimed by them and described in their answer, respectively, to the extent of three-fifths thereof by reason of their pleas of limitations of five and ten years, and that the plaintiffs, James R. McMahon and Laura A. Davis, are entitled to the establishment and recovery of two-fifths undivided interest in the whole of the land sued for and described in their petition, equal to a like interest in each parcel claimed by each of the said defendants. It is agreed that said tract of land, exclusive of all improvements, and each separate parcel as claimed by all of the defendants, excluding all improvements, is worth \$2.50 per acre. And the plaintiffs herein agree that the court may decree title out of them and each of them, and vest in said defendants, to the whole of said land as claimed by said defendants, as shown by their answer, for \$1 per acre for the whole of such parcel, equal to \$2.50 per acre for two-fifths thereof, payable one-third on or before December 1, 1896, one-third on or before December 1, 1897, and one-third on or before December 1, 1898, with 10 per cent. interest thereon from date until paid. All interest due and payable December 1st of each year until the whole sum shall have been paid; and decreeing a vendor's lien and the foreclosure thereof for such sums, and provisions for order of sale in default of such payment. Which terms and agreements these defendants accept, and both parties now agree that such judgment may be entered and that defendants pay all costs of this suit. Eldon & Burns and Gilliter & Hale, Attys. for Plaintiffs. Robertson & Robertson, Attys. for Defendants.'

"Following such recital, the decree continued: 'And it further appearing to the court from the evidence, agreement, and statements of counsel before the court that the plaintiffs James R. McMahon and Laura A. Davis, the wife of S. C. Davis, are the heirs and issue thereof of Timothy R. Hawkins, deceased, to whom the land involved in this

suit was patented, and as such heirs are entitled to recover said land sued for, and it further appearing to the court that the defendants and each of them, and those under whom they and each of them severally claim, have title to an equal undivided three-fifths of the respective tracts claimed by each of the defendants as hereinafter described, which title the said defendants have acquired by statute of five and ten years' limitation, the said three-fifths undivided interest may have been inherited by plaintiffs from their grandmother and mother, Susan, who was the wife of Timothy R. Hawkins, deceased, the said Susan having died in 1886, when her said three-fifths interest descended to the mother of plaintiff James R. McMahon, who died in 1890, and to plaintiff Laura A. Davis. It is therefore ordered, adjudged, and decreed by the court that the plaintiff James R. McMahon and Laura A. Davis, wife of S. C. Davis, do have and recover of and from the defendants G. W. Anderson, A. A. Locklar, T. M. Moffett, Mrs. E. A. Smith, a feme sole, J. P. Parks, T. J. Ray, and W. F. Ray, an equal undivided two-fifths of, in, and to the several parcels of the land sued for, described by metes and bounds as follows: 167 $\frac{3}{4}$ acres more or less in possession of and claimed by G. W. Anderson, beginning,' etc., describing the tract. 'Also 210 acres more or less in the possession of and claimed by A. A. Locklar,' etc., giving field notes. 'Also 200 acres, more or less in possession of and claimed by the defendant T. M. Moffett,' etc., giving field notes. And so on with each of the defendants, concluding that part with: 'And it appearing to the court that the plaintiffs are the legal and equitable owners of two-fifths of all of said land and premises, and are entitled to possession of the same, and that their said interest is fixed and established, and for which the said plaintiffs may have their writ of possession. And it is further ordered, adjudged, and decreed by the court that the said defendants G. W. Anderson, A. A. Locklar, T. M. Moffett, Mrs. E. A. Smith, J. P. Parks, T. J. Ray, and W. F. Ray do have and recover of and from said plaintiffs James R. McMahon, Laura A. Davis, and her husband, S. C. Davis, and each of them, the remaining three-fifths equal undivided interest in the land sued for and described in the parcels occupied and claimed by each of the said defendants herein described, to the extent and to the land claimed and occupied by the defendants respectively, by reason of their pleas of five and ten years' limitation, which interest is fixed and established in the said defendants, and to the extent that the said defendants are quieted in their title and possession of the said several parcels of the land described herein as claimed and occupied by them respectively, which covers and includes the whole of the land sued for by the said plaintiff. And it further appearing to the court from the agreement of the par-

ties that the land sued for is worth \$2.50 per acre, excluding all improvements, and that the plaintiffs James R. McMahon and Laura A. Davis, wife of S. C. Davis, are willing to take the said sum to the extent of their said interest in the said land, payable one-third on or before December 1, 1896, and one-third payable on or before December 1, 1897, and one-third payable on or before December 1, 1898, with 10 per cent. interest per annum from this date until paid, all interest payable annually December 1st of each year, until the whole shall have been paid. And, in case said interest or either of said installments is not promptly paid when due, then all of said indebtedness shall immediately fall due, and the clerk is in that event ordered to issue writ or writs of order of sale against each party so failing for his or her entire tract of land, and that said defendants and each of them have accepted said proposal of plaintiffs, and that said offer and acceptance is fair and equitable and satisfactory to the parties. It is therefore further ordered and decreed by the court that all the right, title, and interest of the plaintiffs James R. McMahon, Laura A. Davis, and her husband S. C. Davis, of, in, and to the land sued for, be, and it is hereby, divested out of them and each of them and vested in the said defendants G. W. Anderson and A. A. Locklar, T. M. Moffett, and Mrs. E. A. Smith, J. P. Parks, T. F. Ray, and W. F. Ray and each of them to the said several parcels of the land sued for and occupied and claimed by the said defendants as herein described, subject to said debt at \$1 per acre and all interest on all of said land, and that the vendor's lien for the payment of said land at the rate of \$1 per acre, equal to two-fifths interest at \$2.50 per acre, is hereby fixed, established, and foreclosed against the said defendants to the amount and extent as follows:—naming the amount against each one, including 'A. A. Locklar, 210 acres as described in this decree for \$210; T. M. Moffett, 200 acres as described in this decree for \$200.'

"The decree then provides for the payment of the several sums and interest on the installments and at the dates as previously stated and directing, in the event of default by any one of the defendants, that order of sale issue for the sale of such part for the satisfaction of the judgment against him, and directing the sheriff to place the purchaser at such sale in possession. Adjudged costs against defendants. Appellant Lumpkin claims title to the land, the three-fifths involved in this appeal, through the sales made under the agreed foreclosure provided for in said decree. Subsequently appellees, who had acquired the vendor's superior title by inheritance and were the owners of the notes by transfer from the J. B. Watkins Land & Mortgage Company, brought suit on the respective notes against Moffett and Locklar, as stated in appellants' statement

of the case, and subsequent proceedings were had in the matter, as stated by appellants."

Lumpkin, Merrill & Lumpkin and G. P. Robertson, for appellants. K. R. Craig, for appellees.

KEY, C. J. (after stating the facts as above). In substance and generally speaking, appellants' brief urges but two grounds for reversal, which are: First, that the plaintiffs failed to show title to any of the land and failed to show common source of title; and, second, that appellant Lumpkin showed title by limitation. It is true that the plaintiffs did not show a chain of title from the government to themselves, but we are of opinion that they proved that they and the defendants were claiming title under a common source. They claimed title as the children and heirs of A. A. and J. W. Story, and they showed that the defendants were claiming under the Storys, because their vendors Moffett and Locklar held under deeds from the Storys; and the plaintiffs' title was superior to the title conveyed by the Storys to Moffett and Locklar by deeds retaining a vendor's lien for purchase money which had not been paid. When the defendants pleaded limitation against the purchase-money notes, the plaintiffs had the right to change their cause of action, rescind the contract of sale, and recover the land. *White v. Cole*, 87 Tex. 500, 29 S. W. 759. It is true that the decree rendered in the suit brought by the heirs of Timothy R. Hawkins, the original grantee of the land, against Moffett and Locklar and others, recites and establishes the fact that Moffett and Locklar had title to a three-fifths undivided interest in the respective tracts claimed by each by and under their pleas of five and ten years' limitation. But it was not made to appear that the titles thus held were not derived from the Storys and conveyed by the deeds from the latter. In fact, the decree referred to recites the fact "that the defendants and each of them, and those under whom they and each of them severally claim, have title to an equal undivided interest of three-fifths of the respective tracts claimed by each of the defendants," etc. Moffett and Locklar were two of the defendants therein referred to. They held under deeds from the Storys, and, in the absence of any testimony tending to show that they had bought from or were then holding under some other person, we think the decree referred to must be construed as reciting the fact that the title by limitation referred to was either acquired by the Storys before they sold to Moffett and Locklar, or was based upon the connected adverse holding of the Storys and Moffett and Locklar. Hence we conclude that it does not appear that Moffett and Locklar had or asserted title to any of the land derived from a source separate and distinct from their claim under the Storys; and, this being the case, we hold that it was shown that both

parties were claiming under a common source of title.

It is not necessary for us to determine whether or not the decree rendered in the former suit was binding upon the plaintiffs in this suit. They have seen proper to abide by that decree, and have recovered in this suit only the amount of land that was awarded to Moffett and Locklar by that decree. Nor is it material that appellant Lumpkin had acquired the interest of James R. McMahon and his attorneys in the decree referred to. He did not thereby acquire any interest in the three-fifths of the land that was awarded to Moffett and Locklar.

Having held that the proof shows that plaintiff and the defendant Lumpkin were claiming under common source of title, it follows that limitation was not available as a defense. Moffett and Locklar having accepted deeds from the Storys, their possession and that of Lumpkin, their vendee, was not adverse to the Storys and those succeeding to their rights, until Moffett and Locklar, or their vendees, repudiated the Story title, which, it seems, was not done until they pleaded limitation to the suit brought upon the purchase-money notes.

No error has been shown, and the judgment is affirmed.

TAYLOR et al. v. SHELTON.†

(Court of Civil Appeals of Texas. Dec. 15, 1910. On Rehearing, Jan. 19, 1911.)

1. USURY (§ 138*)—"USURIOUS INTEREST"—RECOVERY—AMOUNT.

The "usurious interest," which, under Rev. St. 1895, art. 3106, as amended by Acts 1907, c. 143, is recoverable by the person paying it from the person receiving or collecting it, to twice the amount so received or collected, means the whole amount of the interest received, and not the excess above what might lawfully have been received.

[Ed. Note.—For other cases, see Usury, Cent. Dig. § 424; Dec. Dig. § 138.*]

For other definitions, see Words and Phrases, vol. 8, p. 7245.]

2. USURY (§ 142*)—ACTION FOR PENALTIES—PRINCIPAL UNPAID.

Where usurious interest is charged and actually paid and received, and the payment is intentionally appropriated by the parties to the discharge of the usurious interest, the right to the penalty of twice the amount of interest paid, given by Rev. St. 1895, art. 3106, as amended by Acts 1907, c. 143, attaches at once, though the principal has not been paid.

[Ed. Note.—For other cases, see Usury, Cent. Dig. § 430; Dec. Dig. § 142.*]

3. EVIDENCE (§ 43*)—JUDICIAL NOTICE—JUDICIAL PROCEEDINGS—RECORDS.

The court cannot take judicial notice of the record in another case, and it cannot be considered without formal introduction in evidence.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 62-65; Dec. Dig. § 43.*]

4. USURY (§ 146*)—EFFECT OF USURY.

Under the statute the taint of usury forfeits any further interest, and thereafter leaves

the principal as what is actually owing to the creditor.

[Ed. Note.—For other cases, see Usury, Cent. Dig. § 437; Dec. Dig. § 146.*]

5. USURY (§ 100*)—USURY AS DEFENSE—APPLICATIONS OF PAYMENT OF USURY—APPLICATION FOR REDUCTION OF PRINCIPAL.

Where usury is pleaded as a defense, and the court is asked to credit the usurious sums on the principal, it may so apply them, but a party having a defense of usury may waive any credit on the principal and seek an abatement of further interest, in which case the court is not warranted in making applications on the principal.

[Ed. Note.—For other cases, see Usury, Dec. Dig. § 100.*]

6. USURY (§ 141*)—ACTIONS FOR PENALTIES—PERSONS LIABLE.

Defendant made a loan of \$5,500 to the plaintiffs taking their note secured by deed of trust of lands, and for one year and eight months collected interest at 12 per cent. per annum, amounting to \$1,100, and at maturity the land covered by the deed of trust was sold, and a credit of \$3,300 applied on the note which was then assigned without recourse. In a suit on the note by the assignee, the plaintiffs pleaded specially that the assignee ought not to recover interest, and did not ask a credit of usurious interest on the principal, but the assignee offered a credit on the principal debt of the amount of usurious interest and judgment was so entered. At about the same time the plaintiffs sued under Rev. St. 1895, art. 3106, as amended by Acts 1907, c. 143, to recover from the defendant double the usurious interest received by him. Held that, notwithstanding the judgment, the assignee's act in allowing the credit on the principal was a voluntary credit, of which the defendant who had no title to the note and who was not a party to the assignee's action thereon, could take no benefit, so that he was liable for the statutory penalty.

[Ed. Note.—For other cases, see Usury, Cent. Dig. § 427; Dec. Dig. § 141.*]

Appeal from District Court, Bowie County; P. A. Turner, Judge.

Action by Mary J. Taylor and others against Thomas F. Shelton. Judgment for defendant, and plaintiffs appeal. Reversed.

The suit is to recover double the amount of \$1,100 usurious interest paid on money loaned in the sum of \$5,500. Appellee answered by general denial and in bar of recovery that appellants had not paid, or caused to be paid, the principal of the debt. The trial was to the court, and judgment was rendered in favor of the defendant in the suit. The following are the findings of fact and conclusions of law made by the trial court:

"(1) I find that heretofore on or about the 11th day of April, 1907, the defendant, Thomas F. Shelton, loaned to the plaintiffs, Mary J. Taylor, J. W. Rea, and his wife, Mrs. Dora Rea, the sum of \$5,500, and to secure the payment of said loan the plaintiffs executed and delivered their joint promissory note, payable to the order of the said Thomas F. Shelton, on the 1st day of January, 1908; said note upon its face providing for the payment of interest after maturity at the rate of 10 per cent. per annum, and to se-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes
† Writ of error denied by Supreme Court.

cure the payment of the said note the plaintiffs made, executed, and delivered to J. L. Penix, as trustee, for the benefit of the said Thomas F. Shelton, the defendant, a deed of trust upon certain lands located in Bowie county, Tex., and in Ward county, Tex., such land being the property of the plaintiffs.

"(2) I find at the time said loan was made, to wit, on or about the 11th day of April, 1907, the plaintiffs paid to the said Thomas F. Shelton interest on said loan, in advance, at the rate of 12 per cent. per annum—that is to say, the sum of \$440—as interest upon said note until maturity, and I further find that when said note became due, to wit, on the 11th day of January, 1908, the said Thomas F. Shelton agreed to extend its payment for one year, in consideration that the plaintiffs should pay him interest thereon at the rate of 12 per cent. per annum for that year, which they did, paying him the sum of \$660, as interest. I find that the interest paid on the dates aforesaid upon said loan amounts in the aggregate to \$1,100, and was interest paid at the rate of 12 per cent. per annum, and was usurious under the laws of the state of Texas.

"(3) I further find that at the maturity of said note—that is to say, at the end of the period of extension thereon allowed, to wit, on the 11th day of January, 1909—the plaintiffs failed to pay the same, and that J. L. Penix, trustee named in said deed of trust, having refused to act, the said Thomas F. Shelton, as he was authorized to do by the terms of said deed of trust, duly and regularly appointed W. S. Thomas substitute trustee in place and instead of the said J. L. Penix, investing the said W. S. Thomas, as he was authorized to do by the terms of the deed of trust, with all the powers therein granted to the said J. L. Penix, and that thereafter, on the first Tuesday in June, 1909, the said W. S. Thomas, after having duly and legally advertised said lands for sale, sold the same at public vendue at the courthouse door in Boston, Bowie county, Tex., and at said sale the land in Bowie county brought \$2,000, and the land situated in Ward county, Tex., brought \$1,300, the same being purchased by the said Thomas F. Shelton, said land selling for the aggregate price of \$3,300, which was credited upon the note.

"(4) I further find that the plaintiffs have made no payment upon the note thus given by them other than the interest as above found, and the amount which was derived from the sale of the land securing the payment of the said note. I further find that after the sale of land under the deed of trust aforesaid, that Thomas F. Shelton transferred the said note of the plaintiffs to T. H. Leeves, and I further take judicial notice of the fact that at this term of this court there is pending and has been submitted to me for decision along with this cause and upon the same facts a suit in which T. H. Leeves is the plaintiff and Mary J. Taylor,

J. W. Rea, and Dora Rea are defendants, in which suit T. H. Leeves sues to recover the balance due upon the note aforesaid and in which suit the defendants have pleaded usury, and I further take judicial notice of the fact that in that suit all sums paid as interest as aforesaid by the plaintiffs herein, have by the plaintiff T. H. Leeves been allowed as a credit upon the said note, and I have rendered judgment in that suit at the request of the attorneys for T. H. Leeves, allowing the defendants therein, and plaintiffs here, credit upon the principal remaining due upon said note for the entire amount of the interest paid by them to the said Thomas F. Shelton upon said note, to wit, the sum of \$1,100."

"Conclusions of Law.

"Therefore I conclude, as a matter of law, inasmuch as the plaintiffs herein have not paid the principal of the note upon which they paid usurious interest, and that no judgment has been rendered against them upon the principal of said note for any sum except the remaining amount of principal of said note, after deducting therefrom the sum of \$1,100 paid thereon as interest and the entire proceeds of the sale of the lands pledged as security therefor, that they are not entitled to recover the penalty sued for in this action, and therefore render judgment in favor of the defendant, Thomas F. Shelton."

Chas. S. Todd and J. A. Hurley, for appellants. Hart, Mahaffey & Thomas, for appellee.

LEVY, J. (after stating the facts as above). The appellants, for error, contend that the court erred in denying them a recovery for double the amount of the usurious interest found to have been paid as usurious interest upon the ground that the right to the penalty could not legally attach and exist until the entire principal of the debt upon which they paid usurious interest was paid. As seen, the court concluded, as a matter of law, that the right to the penalty did not exist until the entire debt was paid, and denied the recovery for that reason. The court made the finding, "I find at the time said loan was made, to wit, on or about the 11th day of April, 1907, the plaintiffs paid to the said Thomas F. Shelton interest on said loan, in advance, at the rate of 12 per cent. per annum—that is to say, the sum of \$440—as interest upon said note until maturity; and I further find that when said note became due, to wit, on the 11th day of January, 1908, the said Thomas F. Shelton agreed to extend its payment for one year, in consideration that the plaintiffs should pay him interest thereon at the rate of 12 per cent. per annum for that year, which they did, paying him the sum of \$660 as interest. I find that the interest paid on the dates aforesaid upon said loan amounts

in the aggregate to \$1,100, and was interest paid at the rate of 12 per cent. per annum, and was usurious under the laws of the state of Texas." By reference to the record it fully appears that the finding of the court is founded on testimony that is without conflict. It must be taken, therefore, as proven conclusively in the case that appellee actually received, and appropriated, and intended to appropriate, each of the payments made in discharge of the usurious interest, and that appellants agreed and intended that the several payments so made should be applied and appropriated at the time of each payment to the discharge of the usurious interest charged and exacted by appellee. The "usurious interest" of the statute means the whole amount of the interest received, and not the excess above what might lawfully have been received. *Smith v. Chilton*, 90 Tex. 447, 39 S. W. 287; *Baum v. Daniels*, 118 S. W. 754. The facts being clear that usurious interest was charged and actually paid and received, and intentionally appropriated by the parties at the time of each payment in the discharge of the usurious interest, the right, we think, to the penalty attached, and was recoverable under the statute of this state, though the principal sum lent has not been paid. Article 3106, Rev. St. 1895, as amended by Acts 1907, p. 277; *Stout v. Bank*, 69 Tex. 384, 8 S. W. 808; *Rosetti v. Lozano*, 96 Tex. 57, 70 S. W. 204. The case of *Stout v. Bank*, supra, it is true, was to recover the penalty under the federal statute, but in *Smith v. Chilton*, supra, our Supreme Court remarked that the statute of this state in respect to the penalty was substantially the same as the federal act. And the rule laid down in the *Stout* Case was followed in the *Rosetti* Case, supra, when by cross-action the penalty was allowed as a debt. There the recovery was allowed as a debt before the principal debt was actually paid. In the case of *Building Co. v. Peightal*, 28 Tex. Civ. App. 575, 67 S. W. 524, it was decided that a recovery could not be had until the principal sum due was paid, and the case of *Association v. Biering*, 86 Tex. 476, 25 S. W. 622, 26 S. W. 39, was cited as authority. But in the *Rosetti* Case, supra, the Supreme Court said, speaking to the rule laid down in the *Stout* Case, supra, "nothing contrary to this was held in *Loan Association v. Biering*. The contract and transactions in that case took place before the act of 1892 giving the penalty in question was enacted, and consequently involved no such question as the one before us." But by the further findings of the court it appears that appellee, after the sale of the land under the deed of trust and after crediting the proceeds of the sale on the note, transferred the note to T. H. Leeves, and that Leeves brought suit on the note against appellants to recover the balance due upon the note, and that in that suit appellants interposed the plea of usury, and that

on that plea of usury Leeves offered to allow a credit on the principal debt of the amount of the usurious interest, and the court awarded judgment for Leeves for the balance after crediting the entire amount of the usurious interest paid on the principal of the debt sued for by Leeves. The effect of this proceeding upon the right of appellants to collect the penalty against appellee must be considered. In this connection it is stated that the court uses the words "judicial notice" in the findings, but by reference to the record it appears that there was evidence as to all the matters stated except "and upon the same facts." The court states as a fact that he had rendered judgment in that suit for Leeves, allowing a credit of the usurious interest on the balance due. This is taken as testimony and of a fact found by the court's using himself as a witness to the fact. As the proceedings in that suit are in the record by formal introduction in evidence and by proof we consider the facts, and we do not consider the part the court took judicial notice of. And we here make it plain that the court cannot take judicial notice of the record in another case, and it could not be considered without formal introduction in evidence. *The People v. De La Guerra*, 24 Cal. 73. Referring to the statement of facts it conclusively appears that appellee transferred the note to Leeves "without recourse on me." The note was at the time credited with the proceeds of the sale of the land, which was \$3,300. Thus title to the unpaid balance of the debt passed absolutely to Leeves without recourse on appellee. By the record it appears that Leeves brought suit for his debt thus acquired. And it also appears by the record that appellants sued appellee for the penalty in question. The two suits seem to have been filed about the same time, as their file numbers show. At any rate, the appellants' suit was filed on January 9, 1909, and their amended answer in the Leeves suit was filed on January 25, 1910. Appellants made answer to the Leeves suit on the balance of the debt, as follows: "And for special answer in this behalf the defendants say that the note sued on by the plaintiff herein was, and is, usurious for that Thomas F. Shelton, to whom the defendants executed and delivered the said note, and from whom the plaintiff T. H. Leeves acquired the same, long after maturity thereof, unlawfully and wrongfully charged and received from the defendants interest at the rate of 12 per cent. per annum for the loan of \$5,500, and charged, exacted, and received from the defendants the sum of \$1,100 as interest upon said note for a period of one year and eight months, to wit, from the 1st day of May, 1907, to the 1st day of January, 1909, being \$183.34 in excess of the highest rate of interest allowed to be charged and received under the laws of Texas; whereby the defendants say that the said T. F. Shelton, and the

plaintiff, his assignee of said note after maturity thereof, forfeited and lost all right to any interest on the same. Wherefore defendants say that plaintiff ought not to recover anything as interest on the note sued on." The answer, as seen, was simply a plea in bar of the right of Leeves to collect any interest; and the plea, if usury be established, could merely have the effect to limit a recovery by Leeves, who was a purchaser after maturity, to the balance of the principal of the debt due without any interest. The taint of usury forfeits any further interest under the statute, and leaves thereafter the principal of the debt as what is really due and owing the owner of the note. Appellants could not be required to pay more to Leeves than the principal sum owing him. *Spann v. Sterns*, 18 Tex. 556; *Moseley v. Smith*, 21 Tex. 441; *Sheffield v. Gordon*, 34 Tex. 531; *Gilder v. Hearne*, 79 Tex. 120, 14 S. W. 1081. The plea urged in that case, therefore, being solely that "plaintiff ought not to recover anything as interest on the note sued on," there could be presented no question of, or any basis for, allowing the recovery of the usurious interest paid and its application to payment of the principal of the debt as a set-off. There are cases where the pleadings asked that the usurious sums paid be credited on the principal and the court granted such relief, and applied the payments, though made as interest, to the principal sum. But in the absence of such pleading, as here, the court is not warranted in granting that particular relief. Here appellants were willing to allow judgment to Leeves for the balance of the note sued for, and made no objection thereto, and only asked the court that they be not required to pay any "interest on the note sued on." It is permitted by law for them to waive, if they so desire, any credit on the principal, and to rely on not paying any more interest on the debt. Construing the plea in that case, as we do, as seeking an abatement merely in the payment of any interest to Leeves, and no more the cases referred to as allowing credits to the principal for usurious interest paid, on pleadings seeking that relief, would have no application here. It appears, then, that appellants' cause of action against appellee for the penalty was complete before he transferred the note to Leeves, and that they had sued for the penalty before the trial of the Leeves suit. And

it appears that Leeves voluntarily allowed a credit in his suit on the debt sued for, to appellants, of the amount of the usurious interest previously paid by appellants to appellee. Could appellee take any benefit from the act of Leeves in allowing a credit on the principal of the note, as against the suit by appellants for the penalty in question? Appellee had parted with the title to the debt without recourse, and was not a party, nor a necessary or proper party, to the Leeves suit. While Leeves, being a purchaser after maturity, could not recover any interest on his debt as against the plea in the case, he would not be responsible for appellee's wrongful act in taking and appropriating usury. And it was proper in that case, as stated, to render judgment only for the principal due. We think the question must be answered that appellee could not be relieved of liability for the penalty by the subsequent voluntary act of Leeves in allowing the credit, which was a gratuity on Leeves' part, nor would the judgment in the Leeves suit be conclusive against a recovery by appellants of the penalty against appellee.

It being conclusively shown that appellants are entitled to recover the penalty sued for, the judgment, we think, must be reversed and here rendered for appellants with all costs, and it is accordingly so ordered.

On Rehearing.

The Acts of 1907, c. 143, amending article 3106, Rev. St. 1895, was approved April 18, 1907, and took effect 90 days after adjournment of the Legislature; therefore it was not in effect April 11, 1907, the time appellant paid the first item of usurious interest in question. Under the former article in force April 11, 1907, the right to recover the penalty, as distinguished from a recovery merely of usurious interest paid, was limited to usury under a written contract. The undisputed evidence shows that the first amount of \$440 interest in question was paid under an oral agreement between the parties, and hence that item should not here be allowed, and it was error to render judgment for that amount. To this extent the former opinion, and the judgment of this court are modified.

We adhere to the ruling in *Baum v. Daniels*, supra.

The motion, except in the respect above, is overruled.

LOUISVILLE & N. R. CO. v. BEASLEY & BEASLEY.

(Supreme Court of Tennessee. Feb. 1, 1911.)

JUDGMENT (§ 269*)—RES JUDICATA—ARREST OF JUDGMENT—EFFECT.

The proceeding in an action in which judgment for plaintiff is arrested for a defect of substance in the statement of the cause of action in the warrant is not a bar to another action; Shannon's Code, § 4446, providing, if the judgment for plaintiff is arrested, he may commence a new action, contemplating a case where the arrest is for matter of substance, because section 4585 abolishes motions in arrest of judgment for matters of form.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 500; Dec. Dig. § 269.*]

Certiorari to Circuit Court, Trousdale County; J. M. Gardenhire, Judge.

Action by Beasley & Beasley against the Louisville & Nashville Railroad Company. Judgment for plaintiffs was affirmed by the Court of Civil Appeals, and defendant petitions for certiorari. Refused.

Ed. T. Seay, for plaintiffs. J. E. Foust and Baskerville & Collier, for defendant.

NEIL, J. Plaintiffs below, Beasley & Beasley, brought an action against the railroad company in 1908 before a justice of the peace for injury inflicted upon certain cattle in course of shipment. There was a judgment before the justice for \$49.07, and an appeal prayed and prosecuted to the circuit court of Trousdale county. There the case was tried before the court and jury, and resulted in a verdict in favor of the plaintiffs. A motion in arrest of judgment was then made for a defect of substance in the statement of the cause of action in the warrant sued out before the justice of the peace (Railway Co. v. Flood, 122 Tenn. 58, 118 S. W. 384), and sustained, and the suit dismissed. In 1909 a second action was brought before a justice of the peace of the same county on the same cause of action, and a judgment rendered as before, and an appeal to the same circuit court. In that court the defendant interposed a plea of res adjudicata, based on the former proceeding. The plea was overruled, and it was then agreed by the parties that the plaintiff was entitled to a judgment on the merits of the controversy, unless the plea of res adjudicata could be lawfully held effective on the facts just presented. A judgment was then entered in favor of the plaintiffs, and an appeal prayed to the Court of Civil Appeals. In that court the action of the circuit judge was affirmed, and a petition for certiorari was then filed in this court, presenting the same question here.

We are of the opinion that the Court of Civil Appeals reached the correct conclusion. "After the arrest of judgment a new action may be brought, and the proceeding in the action wherein the judgment was arrested

cannot be pleaded either in bar or in abatement." Am. & Eng. Enc. of L. & Pr. vol. 5, p. 557. In addition to the foregoing, the point is covered by our statute, which reads: "If the action is commenced within the time limited, but the judgment or decree is rendered against the plaintiff upon any ground not concluding his right of action, or where the judgment or decree is rendered in favor of the plaintiff, and is arrested, or reversed on appeal, the plaintiff, or his representatives and privies, as the case may be, may, from time to time, commence a new action within one year after the reversal or arrest." Shannon's Code, § 4446.

Of course, this section was primarily intended to prevent the running of the statute of limitations in the cases mentioned, but it necessarily implies the existence of a cause of action otherwise valid. This section, moreover, contemplates a case wherein a motion in arrest of judgment was granted for matter of substance, because under section 4585 of the same Code motions in arrest of judgment for matters of form in civil suits are abolished.

It results that the petition for certiorari must be refused.

MITCHELL v. STATE.

(Supreme Court of Tennessee. Jan. 21, 1911.)

CRIMINAL LAW (§ 1208*)—PUNISHMENT—STATUTES—CONSTRUCTION.

Shannon's Code, § 7208, providing that no one convicted of a felony shall be imprisoned in the penitentiary less than 12 months, but the jury may, where the offense merits less, punish by imprisonment in the county jail for a less period, does not apply to cases covered by section 6471, providing that one convicted of an assault with intent to commit, or of an attempt to commit, any felony punishable by imprisonment in the penitentiary, shall be punished by imprisonment in the penitentiary, or in the county jail and by fine; for, if the two statutes applied to the same cases, there would be a conflict, in the first case imprisonment in the county jail being the minimum penalty, and in the latter the minimum being imprisonment in the county jail and fine.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3281-3295; Dec. Dig. § 1208.*]

Error to Circuit Court, Humphreys County; W. L. Cook, Judge.

Jim Mitchell was convicted of an assault with intent to commit murder in the second degree, and brings error. Affirmed.

H. O. Carter, for plaintiff in error. The Attorney General, for the State.

NEIL, J. In this case the plaintiff in error was convicted of an assault with intent to commit murder in the second degree, and was sentenced to 12 months' confinement in the county jail and to pay a fine of \$250. From this judgment he prayed and prosecuted an appeal to this court.

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

Error is assigned upon the following excerpt from the judge's charge, viz.:

"If you are satisfied from the proof that such an assault, as explained under the definition of an assault with intent to commit murder in the second degree, has been made, you shall find the defendant guilty of an assault with intent to commit murder in the second degree, and fix his punishment at confinement in the penitentiary not less than one nor more than five years, or by punishment in the county jail at not more than one year and by fine not exceeding \$500."

This charge was based on section 6471 of Shannon's Code, which reads as follows:

"If any person assault another with intent to commit, or otherwise attempt to commit, any felony or crime punishable by imprisonment in the penitentiary, where the punishment is not otherwise prescribed, he shall, on conviction, be punished by imprisonment in the penitentiary not exceeding five years, or by imprisonment in the county jail not more than one year and by fine not exceeding five hundred dollars, at the discretion of the jury."

It is insisted that the judge should have also instructed the jury according to section 7206, which reads as follows:

"In no case shall any person convicted of a felony be confined for a less period than twelve months in the penitentiary. Whenever in the opinion of the jury, in any case the offense merits a less punishment than twelve months in the penitentiary, the jury may punish by confinement in the county jail for any period of time short of twelve months."

That is to say, it is urged that the judge should have instructed the jury that if, in their opinion, the offense merited a less punishment than 12 months in the penitentiary, they should have punished plaintiff in error by confinement in the county jail for any period of time short of 12 months.

It is noted that the last clause of section 6471 provides that the lowest punishment for the crimes covered by that section is "imprisonment in the county jail not more than one year and by fine not exceeding five hundred dollars, at the discretion of the jury."

Plainly, section 7206 does not apply to a case covered by section 6471. Under the section last mentioned a jury may fix the imprisonment in the county jail at one year or any time less than that, but must add to it a fine for some amount; while under section 7206 they may fix a period for any time short of 12 months, but cannot add a fine. So it is perceived that, if section 7206 should be held to apply to cases covered by section 6471, it would be brought in conflict therewith. Construing the two sections as we have done, both are saved; their terms being directed to different subjects.

In the case of Bolton v. State it was held that section 7206 (or the statute embraced

therein) was passed for the purpose of giving to the jury the power of commuting the punishment in cases of petit larceny, and all other offenses where the punishment prescribed is as low as one year's imprisonment in the penitentiary, to imprisonment in the county jail for less than 12 months. 5 Cold. 650, 657.

In the case of Davis v. State it was held that the section in question applied only to cases where 12 months in the penitentiary was fixed as the minimum punishment. 6 Baxt. 429.

In the case of Morton v. State it was held that under section 6471 the defendant might be punished by imprisonment in the penitentiary for one year. It was held that this was a valid judgment, but that, if the party had been imprisoned in the county jail under the last clause of the act, it would have been the duty of the jury to impose a fine. The court said:

"To our minds, the true and obvious meaning of the statute is that the convict shall be punished either by imprisonment in the penitentiary, without more, or by imprisonment in the county jail and fine; and, whether the one mode or the other shall be adopted is left to the discretion of the jury. If they think the crime merits confinement in the penitentiary, they must impose a sufficient term of imprisonment, not exceeding five years, to embrace the whole scope of punishment and cover the whole case; or, if they deem other punishment more in consonance with the demands of justice in the particular case, they may fix a term of imprisonment in the county jail not more than one year, and add to that a fine not exceeding \$500." 91 Tenn. 437, 439-440, 19 S. W. 225, 226.

These cases fully illustrate the difference between sections 6471 and 7206.

We think there was no error in the action of the trial court, and the judgment is affirmed.

DARNELL v. STATE

(Supreme Court of Tennessee. Jan. 14, 1911.)

1. STATUTES (§ 124*)—SUBJECTS AND TITLES.

The conclusion of Acts 1905, c. 233, § 19, being an act to create a board of jury commissioners for counties of a certain population, that the provisions of the act shall apply to all grand and petit juries in circuit and criminal courts of the state, is to be construed as limited to counties of the prescribed population, and so not making a provision not allowed by the title of the act.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. §§ 184-186; Dec. Dig. § 124.*]

2. JURY (§ 53*)—INCOMPETENCY OF JURORS—PRIOR SERVICE.

While, under Acts 1905, c. 233, being an act in relation to juries of counties of a certain population, an emergency juror drawn under sections 7 and 8 is not incompetent because of service on a regular jury within two years next preceding the making of the list, a regular ju-

¹For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

ror, though drawn under the special provisions of section 13, and though section 4 allows his being put on the jury list, is, under section 5, in view of sections 11 and 12, incompetent, if he has so served in such time.

[Ed. Note.—For other cases, see Jury, Dec. Dig. § 53.*]

3. JURY (§ 39*)—QUALIFICATION OF JURORS—STATUTES.

Acts 1883, c. 198, entitled "An act to amend" Code 1858, § 3981, by section 1 providing that Code 1858, § 3981, shall be amended so as to read that the county court of each county shall, at a certain time, appoint the jurors to serve at the next succeeding court, provided that no person shall be summoned or serve on the venire who has served on a venire for a period of "two years" preceding, not only amended Code 1858, § 3981, providing that the county court shall at a certain time designate a certain number of men to serve as jurymen at the next court, but also amended section 3983, providing that no court shall appoint any person to serve as a juror more than one time in each period of "twelve months," and section 4010, declaring it ground for challenge to a juror that he has served for a term within "twelve months" next preceding, as all such sections must be construed in pari materia, and the effect of the amendment of the one was to work a corresponding change in the other sections.

[Ed. Note.—For other cases, see Jury, Dec. Dig. § 39.*]

4. CRIMINAL LAW (§ 1166½*)—APPEAL—REVERSIBLE ERROR—INCOMPETENT JUROR.

Reversible error is committed by one being forced, after exhausting his peremptory challenges, to take a juror, incompetent because of having served within two years prior thereto, over a specific objection on that ground.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3114-3125; Dec. Dig. § 1166½.*]

Error to Circuit Court, Franklin County; S. D. McReynolds, Judge.

Sam Darnell was convicted of murder, and brings error. Reversed, and remanded for new trial.

Lynch & Phillips, for plaintiff in error. Assistant Attorney General Faw, for the State.

NEIL, J. The plaintiff in error was indicted in the circuit court of Franklin county, at its December term, 1909, charged with the murder of one T. J. Harrison. He was convicted of murder in the first degree, and sentenced to be hanged. From this judgment he has appealed, and assigned errors.

In the view we take of the case it is necessary to mention only two of these assignments.

The first of these is that the act under which the jury was impaneled, commonly known as the "jury law of Franklin county" (Acts 1905, c. 233), is unconstitutional because the body of the act is broader than its title. The contention is based upon the following: The act is entitled "An act to create a board of jury commissioners for counties in this state having a population of not less than 20,292, and not more than 20,400 inhabitants according to the federal census

of 1900, or that may have that number of inhabitants by any subsequent federal census." After making various and sundry provisions to carry out the purposes indicated by the title, section 19 follows, near the close, in this language: "Be it further enacted, that the provisions of this act will apply to all grand and petit juries in circuit and criminal courts of this state." The same question was decided against plaintiff in error's contention in the case of *Allie Dameron v. State*, from Bedford county, at the December term, 1909. *Dameron's Case* involved the jury law of Bedford county (chapter 355 of the Acts of 1907), which was a substantial copy of the Franklin county jury law involved in the present case. That case was thoroughly considered by the court, after full argument, oral and written, and a second time on petition to rehear filed by the plaintiff in error. The court held, upon a consideration of the whole statute, that it was the evident intention of the Legislature that the section just quoted should be construed as if it read as follows, viz.: "That the provisions of this act shall apply to all grand and petit juries in all circuit and criminal courts of this state *in counties of the population herein prescribed.*" We are of the opinion this was a sound construction, and we adhere to it.

The next assignment is that an incompetent juror, one J. A. Baker, was placed upon the jury, over the objection of plaintiff in error. The ground of incompetency insisted upon was that the juror had served upon the regular jury within two years next before he was taken upon the jury which tried plaintiff in error. The question turns upon the proper construction of certain sections of chapter 233, Acts 1905, supra.

Counsel for plaintiff in error insist that while, under section 4 of the act, it is lawful for the jury commissioners to place upon the jury list persons who have served on the regular jury within two years next preceding the making of the list, and the section referred to in terms provides that "service on the regular panel within two years shall not disqualify a person," yet that a person actually drawn in a panel is subject to challenge on this ground. This construction is based on a provision in section 5, which, after directing how the panel shall be drawn from the box, continues: "From this panel the grand and petit jurors shall be made up as now required by law, examining each proposed juror to ascertain if he is qualified." It is conceded that under sections 7 and 8 such prior service is not a disqualification; but a distinction is taken on the ground that the jury made up under these sections is an emergency jury. The language of section 8 on this subject is: "That it shall not be cause for challenge of a person drawn or summoned under this section that he has

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

served on a regular jury within two years. Nor shall service on a jury under this section disqualify or excuse him from serving on the regular juries if his name is regularly drawn from the box thereafter. The clerk of the court shall keep a list of all persons serving on juries, as provided in this section, and at the close of each term shall furnish the same to the clerk of the board, who shall enter opposite each such name the words, 'Served on special jury,' together with the date of such service."

We are of the opinion that this is the correct construction of sections 4 and 5. This view is strengthened by the provisions of sections 11 and 12.

In order that this matter may be placed in the proper light, it is necessary that we read together sections 4, 5, 11, and 12, so far as they bear upon this subject.

In section 4 it is provided: "That it shall be the duty of the jury commissioners to select from the tax books of the county and other sources, names of upright and intelligent men, known for their integrity, fair character and sound judgment, from each and every district in the county, and in proportion to the population of said districts as near as may be, and possessing the qualifications now prescribed by law, except that service on a regular panel, within two years shall not disqualify a person, a list of names numbering not less than one-fifth the whole number of votes cast in the county for presidential electors at the presidential election next preceding the making of said list; provided said list shall not, for any one county, contain more than one thousand, nor less than two hundred and fifty, names. Said list shall constitute the jury list for two years from the making thereof, and shall not, during said years, be added to or taken from except as hereinafter provided. * * * Each of the names on said list shall be written on a slip or scroll of paper and placed in an envelope containing no mark or sign indicating the name within the envelope and then placed in a box to be known as the jury box, and so labeled. Said box shall be kept securely locked and under seal and shall not be unlocked or the seal broken except by the order of and in the presence of the board, and then only for the purpose of drawing therefrom the names of jurors, or making a new list as herein provided, or in open court by order of the circuit or criminal court for good and sufficient cause."

Section 5 provides for the drawing of names from the jury box. Upon the completion of the drawing a report of the names thus obtained is prepared, to be submitted to the court. This report is to be delivered to the clerk of the court, to be filed in his office. The clerk of the court must issue to the sheriff, at least five days before the next regular term of the court, a writ of venire facias commanding him to summon the per-

sons whose names are set out in the report as jurors for that term of court. This section continues: "That at such regular or special term of the court the judge thereof shall first compare the list contained in the report filed with the clerk with the names on the slips or scrolls delivered in open court by the chairman of the board, and if they correspond they shall constitute the panel of grand and petit jurors for that term of the court, and such report shall be spread upon the minutes of the court. From this panel the grand and petit jurors shall be made up as now required by law, examining each proposed juror to ascertain if he is qualified. In the event that by reason of the disqualification of proposed jurors or other cause, the required number of jurors cannot be obtained from said panel, the clerk of the circuit court shall produce in open court the jury box, and said box shall be opened, and there shall be drawn therefrom in the manner provided for the original drawing, except that it shall be done in open court instead of the presence of the board, the number of names deemed by the judge sufficient to complete the juries."

Section 6 provides that a list constituting the regular grand and petit jurors shall be spread on the minutes, "and it shall be the duty of the clerk of the circuit court to enter in the space following the names of every such juror on the jury list the following words, 'Regular jury,' and also the date of such service on the jury."

Section 11 provides that the jury list which the act orders to be made shall be prepared as soon as practicable after the passage of the act. It then continues: "On the first Monday in July, 1905, or as soon thereafter as practicable, and biennially thereafter the board shall make out a new jury list and place the names in the jury box, the names then remaining in the jury box being first removed: Provided, that, if within two years the number of names remaining in the jury box shall have been reduced until they are less than one-third of the number of names on the jury list, then the judge of the circuit or criminal court shall, by an order made either at chambers or in open court, require the board to renew the list and box as though the two years had expired."

Section 12 provides: "That when a new jury list is to be made, the board shall, if practicable, not put thereon the names of those on the list for the preceding two years, who had actually served during that time as regular jurors."

In order that the provisions above set out may be more conveniently contrasted with those contained in sections 7 and 8, we now copy herein these sections. They are as follows:

"Sec. 7. Be it further enacted, that whenever the judge is satisfied that in any case

a jury cannot be obtained from the regular panel, he may, but not earlier than three days before the case is assigned for hearing, cause the jury box to be brought into open court and such number of names as he deems sufficient to obtain such jury to be drawn therefrom, and the sheriff shall forthwith summon the persons whose names" (are) "so drawn," (and) "from the panel so drawn and summoned and the regular panel, the panel shall be made up if practicable, if not, another panel shall likewise be drawn and summoned instant, and so on, until the jury is completed, or" (if) "the jury box" (is) "exhausted before the jury is completed, the sheriff shall summon such other men as may be designated by the presiding judge until the jury is completed: Provided, that in case of emergency the presiding judge may in his discretion, where the regular panel has been exhausted before the jury is completed, furnish the sheriff with additional names, who shall forthwith be summoned by the sheriff, and so on until the jury is completed. The judge shall not place on the list the name of any person who seeks directly or indirectly through another to be summoned as a juror, and such solicitations shall operate to disqualify said persons for jury service.

"Sec. 8. Be it further enacted, that it shall be a misdemeanor punishable by a fine of not less than twenty-five nor more than fifty dollars, for any person to request, or have another request, to be placed upon said jury list. The names drawn from the jury box under this section shall be carefully preserved and returned to the jury box, whether such persons serve on the jury or not, in the same manner as hereinbefore provided with respect to names of those drawn, but not serving as regular jurors. It shall not be cause for challenge of a person drawn or summoned under this section that he has served on a regular jury within two years, nor shall serving on a jury under this section disqualify or excuse him from service on the regular juries, if his name is regularly drawn from the box thereafter. The clerk of the court shall keep a list of all persons serving on juries provided in this section, and at the close of each term shall furnish the same to the clerk of the board, who shall enter opposite each such name the words, 'Served on special jury,' together with the date of such service."

It should be observed, in explanation of the language, "the names drawn from the jury box under this section," appearing in section 8, that sections 7 and 8 of the act under examination were copied from section 7 of chapter 124 of the Acts of 1901, and these two sections should be read as one section in order to be properly understood. It is seen that in section 8 it is declared: "It shall not be cause for challenge of a person drawn or summoned under this section that he has

served on a regular jury within two years, nor shall serving on a jury under this section disqualify or excuse him from serving on the regular juries if his name is regularly drawn from the box thereafter. The clerk of the court shall keep a list of all persons serving on juries provided in this section, and at the close of each term shall furnish the same to the clerk of the board, who shall enter opposite each such name the words, 'Served on special jury,' together with the date of such service." There can be no mistaking the fact that there is a radical difference between the provision thus quoted and those upon the same subject in sections 4 and 5. In section 4 it is provided that service on the regular jury within two years shall not disqualify a person from being placed upon the large lists of from 250 to 1,000 names to be used for two years; but section 5 declares that, when a panel is made up from the names so put in the box, each person whose name appears upon the panel shall be examined to ascertain if he is qualified—referring, of course, to the general qualifications and disqualifications of jurors as laid down in existing laws. That no exception is indicated in favor of persons who have been on the regular jury within two years is manifest from the solicitude shown in section 6, requiring the words "Regular jury" to be put after the name of each person serving on the regular jury at any term, and also by the language of section 12, to the effect that, when a new jury list is made, the board shall, "if practicable," not put on the list the names of persons who have actually served during the preceding two years as regular jurors. The evident purpose of this was to reduce as far as possible the necessity of laying aside from time to time, when panels should be drawn, the names of those who had been on the regular jury. In other words, it appears from these sections that, while the fact that one has served on the jury within two years will not prevent his name going into the jury box, yet he is subject to challenge on that ground when actually drawn on the regular panel. However, there is a use reserved for such persons under sections 7 and 8. These sections provide for emergency jurors. Thus construed, the act is consistent and reasonable.

It is insisted in behalf of the state that, whatever may be the true construction of the sections we have referred to, no error was committed in the present case, because it does not appear that the juror Baker had served on the regular jury within twelve months next preceding the time he was called. It is insisted that the disqualification is not for service within two years, but only for service within twelve months. This is based upon the proposition that Mr. Shannon, in his compilation of 1896, carried forward the amendment which was made by Acts 1883, c. 198, in section 3981 of the Code of Tennessee.

see, into the other sections, which prescribe the qualifications of jurors.

To make this matter plain, it should be stated that the act of 1883 reads as follows:

"An act to amend section 3981 of the Code of Tennessee.

"Section 1. Be it enacted by the General Assembly of the state of Tennessee, that section 3981 of the Code of Tennessee be amended so as to read as follows: The county court of each county shall, at its quarterly session, held next preceding each term of the circuit court, appoint the jurors to serve at the next succeeding court: Provided, that no person shall be summoned or serve on the venire who has served on a venire for a period of two years preceding."

Section 3981 in the Code of 1858 reads:

"The county court of each county shall, at the first session after each term of the circuit court, designate twenty-five good and lawful men to serve as jurymen at the next succeeding court."

Section 3988 reads:

"No court shall appoint any person to serve as a juror more than one time in each period of twelve months, either on the original panel or to fill a vacancy therein; nor any person who has an action pending in the court at the term to which he is nominated."

The above sections appear in article 1 of chapter 5 of title 4 of part 3 of the Code of 1858. Sections 4009 and 4010, appearing in article 3, read as follows:

"4009. Either party to an action may challenge for cause any person presented as a petit juror in either a civil or criminal proceeding who is incompetent to act as a juror under the provisions of the foregoing article.

"4010. Or any person who has a suit then pending for trial at the same term of court, or who has an adverse interest in a similar suit involving like questions of fact, or with the same parties, or any person who has served as juror for one term within the twelve months next preceding."

Mr. Shannon, in making his compilation, changed, in his sections corresponding to section 3988 (Shannon's Code, § 5799) and section 4010 (Shannon's Code, § 5821), the words "twelve months," so as to make each section read "two years."

This action on the part of Mr. Shannon is challenged by the learned Assistant Attorney General, who has conducted the case for the state. The reason assigned is that the act of 1883 amended only section 3981 of the Code of 1858.

It is true that, in terms, the act of 1883 did amend only section 3981, yet all of these sections must be construed in pari materia, and the effect of the amendment of section 3981 was to work a corresponding change in the other sections quoted.

Returning now to the act of 1905, it is correctly urged in behalf of the plaintiff in error that the juror in the present case was not selected under sections 7 and 8 of that act as an emergency juror, but as a regular juror under section 13, which reads as follows:

"Be it further enacted, that if for any reason the court should at any time discover that the jury box has not been filled or renewed, or that the jury list has not been prepared or renewed as required by law, or the panel drawn therefrom, as required by law, or the jury box has been tampered with, the circuit or criminal judge may have the right to investigate said jury box and also the jury list, and see that this act is duly enforced, and should it be discovered that any irregularities or frauds exist, correct them. If for any reason a legal panel is not furnished a circuit or criminal court at any regular or special term as provided by this act, then the judge of said court shall have the right to select a panel, and such additional jurors as may be needed by this court during said term of court."

The record shows that the jury was selected under the circumstances provided for in this section, and that the juror Baker was one of the regular jurors so chosen for membership in the panel. It follows from this construction of the statute that Baker was an incompetent juror, and, inasmuch as he was forced by the trial judge upon the plaintiff in error after he had exhausted his peremptory challenge over his specific objection, we think reversible error was thereby committed.

It results that for the error last mentioned the judgment of the court below must be reversed, and the cause remanded for a new trial.

NASHVILLE TRUST CO. v. FIRST NAT. BANK et al.

(Supreme Court of Tennessee. Jan. 28, 1911.)

1. INSURANCE (§ 203*)—LIFE INSURANCE—RIGHTS OF PARTIES.

Shannon's Code, § 4080, providing that a life insurance effected by a husband on his own life, shall inure to the benefit of the widow and next of kin, to be distributed as personal property, free from claims of creditors, does not prevent a husband from controlling the matter of who shall benefit by an insurance on his life, where the policy is payable to his executors, administrators, and assigns, and in that case the policy is subject to his disposition; but where the policy is in terms payable to his widow and heirs, they take a vested interest, and the husband cannot defeat their interest by assignment.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 168, 471; Dec. Dig. § 203.*]

2. INSURANCE (§ 583*)—LIFE INSURANCE—PROCEEDS—RIGHTS OF PARTIES.

Where a life policy is made payable to the legal representatives of insured, and he dies

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

without making any disposition of the policy, the claim on the proceeds thereof by his widow and next of kin, whether the latter are children or not, will, under Shannon's Code, § 4030, prevail over his general creditors, whether his estate is solvent or not, and though the policy was issued before his marriage.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 1459, 1460, 1485; Dec. Dig. § 583.*]

3. INSURANCE (§ 593*)—LIFE INSURANCE—ASSIGNMENT—EFFECT.

An assignment by a husband of a life policy issued on his life and made payable to his executors, administrators, and assigns, which is absolute in form, but which is in fact made to secure the payment of a particular debt, vests the legal title in the assignee, and the husband's interest in it thereafter is an equity merely; and where he, after payment of the particular debt, permits the policy to remain in the hands of the assignee as a general collateral under the original assignment to secure all accounts he may owe to the assignee from time to time, the widow and heirs at law of the husband are clothed only with his equity, and are not entitled to recover the proceeds of the policy from the assignee without paying the debts due from the husband.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 1452, 1476-1485; Dec. Dig. § 593.*]

4. PLEDGES (§§ 11, 21*)—TITLE OF "PLEDGE."

A pledge must be delivered to the "pledgee," actually or constructively, under an agreement that it shall be held by the pledgee as a security for some debt or engagement of the pledgor, but the pledgee acquires only a special property, with the right to possession until the object of the pledge is accomplished, and though, if the pledgor makes default, the pledgee may foreclose or sell on notice, the absolute title of the pledgor is not divested until foreclosure or sale.

[Ed. Note.—For other cases, see Pledges, Cent. Dig. §§ 28-35, 45; Dec. Dig. §§ 11, 21.* Bills and Notes, Cent. Dig. §§ 480, 494.]

For other definitions, see Words and Phrases, vol. 6, pp. 5412-5417; vol. 8, p. 7756.]

5. INSURANCE (§ 222*)—LIFE INSURANCE—ASSIGNMENT—EFFECT.

Where a husband, who has a policy on his life, payable to his executors, administrators, and assigns, absolutely transfers the policy to secure a particular debt and subsequently permitted the policy to remain in the hands of the assignee, and repeatedly agreed that it should stand as security for any amount for which he might become from time to time indebted to the assignee, the husband was estopped from securing possession of the policy without payment of any debt incurred on the credit of the policy as security.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 492; Dec. Dig. § 222.*]

6. INSURANCE (§ 208*)—LIFE INSURANCE—ASSIGNMENT—ORAL ASSIGNMENT.

An assignment of a life policy may be oral.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 478; Dec. Dig. § 208.*]

7. WITNESSES (§ 142*)—COMPETENCY—TRANSACTIONS WITH DECEASED PERSONS.

Where a corporation is sued by a guardian and a widow as administratrix and individually, the president of the corporation may testify as to transactions with the intestate, because he is not a party to the suit.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 580, 581; Dec. Dig. § 142.*]

Appeal from Chancery Court, Davidson County; John Allison, Chancellor.

Suit by the Nashville Trust Company, Guardian, against the First National Bank and Lucy E. Hart, who filed a cross-bill in her individual capacity. From a decree granting insufficient relief, complainant and the widow appeal. Affirmed.

Lytton Taylor, for appellants. Walter S. Stokes, for appellee.

BUCKHANAN, J. This case is here on appeal from a decree rendered by the chancery court of Davidson county. Appellants here were, respectively, complainant and cross-complainant below. The bill was filed March 12, 1909.

There is no material controversy about the facts. There are two assignments of error, by each of which appellants insist that the court below did not correctly apply the law to the facts. It appears that Len K. Hart died intestate in Davidson county, on February 14, 1909, leaving surviving him his widow, Mrs. Lucy E. Hart, and two minor children. The Nashville Trust Company, appellant, is the guardian of these children, and the widow is the administratrix of the estate of said decedent.

The original bill was filed by said guardian, and the widow as such administratrix, and as widow of said decedent, was joined with appellee bank as a defendant to the bill.

She answered the bill in both capacities, and her individual answer was made her cross-bill. The original bill sought a decree against the appellee, the First National Bank, for the sum of \$4,000, alleged to be two-thirds of the proceeds of a policy of insurance on the life of said decedent, which had been collected by said appellee.

The cross-bill of the widow sought a decree against said defendant for the remaining one-third of said policy of insurance, or the sum of \$2,000.

The appellee bank, defendant below, admitted the collection by it of said \$6,000 life insurance policy, but set up by way of defense that the policy was by its terms payable to the executors, administrators, or assigns of the decedent, and that he had, while in life, made an assignment of said policy to defendant bank, absolute in terms, but, in fact, to secure the payment of a particular debt; and that after the payment of said particular debt, for the space of some seven years or more, and down to the date of his death, said decedent had permitted said policy to remain in the hands of appellee bank as a general collateral, under said original assignment, to secure all amounts said decedent might owe it from time to time, howsoever such indebtedness might arise between them, whether by note, draft, or otherwise; and that therefore said widow and two children of decedent were entitled to recover from it only such of the

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

proceeds of said policy as might remain after the indebtedness held by it, and chargeable against said proceeds, had been deducted by it from the gross amount of \$6,000.

Upon the issues thus made, proof was taken, and final decree was rendered on June 14, 1910, wholly in accord with the contention of appellee bank. It was decreed to be entitled to hold the amount of its indebtedness covering the full sum of the policy, less the sum of \$1,765.37, which, it was decreed, should be paid by it, as follows: One-third to Mrs. Lucy E. Hart, widow, and two-thirds to the Nashville Trust Company, guardian of said minors.

From this decree, the Nashville Trust Company, guardian, and the widow, in her individual right and as administratrix, duly appealed.

The assignments of error are as follows:

First. That the chancellor erred in decreeing that appellee was entitled to have its debt paid out of the proceeds of the policy.

Second. That the chancellor erred in holding that the evidence of Watts, the president of appellee bank, was competent.

We remark in passing that neither of these assignments of error raises any question as to the correctness of the decree in the determination of the amount of the debt of the appellee bank, which was, as it claimed, chargeable against the policy, so that we must assume, from the failure to assign error on this point, that in this respect there was no error in the decree, and that the pith and substance of the assignments of error is that, in whatever amount the decedent may have been indebted to the appellee, no part of the sum was properly chargeable against the policy, and that the chancellor received incompetent evidence in arriving at the contrary conclusion.

Relative to the first assignment of error, it will be noted that by our Acts 1845-46, c. 216, § 3, carried as section 4030 of Shannon's Code, it is provided that a life insurance effected by a husband on his own life shall inure to the benefit of the widow and next of kin, to be distributed as personal property free from the claims of his creditors. But it is a mistake to suppose that by reason of this statute the husband is without power to control the matter of who shall benefit by an insurance on his life, where the policy is payable to his executors, administrators, or assigns. The precise question came before this court in the case of *Rison v. Wilkerson & Co.*, 3 Sneed, 566, where the insurance policy was not by its terms made payable to the widow and children, and was by the husband during his lifetime assigned to a creditor as collateral security for a debt, and it was decided that the creditor was entitled to hold the proceeds to the extent of the debt, and, further, to the extent of the amount of advances made by the creditor after the assignment for the payment of premiums on the policy.

The principle was also applied where the disposition of the policy by the husband in his lifetime was by will, where the policy was payable to his executors, administrators, or assigns, and it was held that the claim of the legatee, under the will, was superior to that of his widow and children, who relied on the statute. *Williams v. Carson et al.*, 9 Baxt. 516.

The principle was again applied in *Catholic Knights v. Kuhn*, 91 Tenn. 214, 18 S. W. 385, and other cases not necessary to mention. In fact this doctrine may be said to be settled beyond dispute or cavil by our authorities, and to be based on the idea that when the policy is payable to the executors, administrators, or assigns of the husband, it is his property and subject to his disposition. Where, however, the policy is, by its terms, made payable on the death of the husband to the widow and heirs, or to his legal heirs, it is equally well settled that they take a vested interest, and the power of the husband to defeat their interest by subsequent assignment is lost. See *Gosling v. Caldwell*, 1 Lea, 455, 27 Am. Rep. 774, and authorities there cited.

It is also well settled that if the policy, by its terms, be payable to the legal representatives of the assured husband, and he die without having made any disposition of it, that by the operation of the statute the claims of his widow and next of kin, whether the latter be children or other kin falling within the terms of the statute, will prevail over the claims of his general creditors in a contest over the proceeds of the policy, whether the estate of the insured be solvent or insolvent, and although in the particular case the policy may have been issued before the assured was married. See *Rose v. Wortham*, 95 Tenn. 507, 32 S. W. 458, 30 L. R. A. 609, citing *Harvey, Adm'r, v. Harrison*, 89 Tenn. 476, 14 S. W. 1083; *Collier v. Latimer*, 8 Baxt. 420, 35 Am. Rep. 711; *Jackson, Orr Co. v. Shelton*, 89 Tenn. 82, 16 S. W. 142, 12 L. R. A. 514; *State, Use, etc., v. Anderson*, 16 Lea, 338.

It is an uncontroverted fact on this record that the policy in the case at bar was by its terms payable to the executors, administrators, or assigns of said decedent. This being true, his power to assign it, so as to defeat the claims of his wife and children under the statute, was absolute. It is an equally uncontroverted fact that this power was exercised by him. He made an assignment of the policy to appellee bank, absolute on its face, by which the full legal title to the policy passed to appellee bank. This assignment was made on September 22, 1896, and acknowledged by the assignor before a notary public on the 23d of September, 1896.

The original bill avers that this assignment was made, and that it was absolute in form, and there is an undisputed copy of it

in the record, which confirms the averment of the bill.

The answers of the widow in her individual right, and as administratrix, respectively, admit that the above averment of the bill is true.

It is not claimed by appellants' pleadings, nor is it shown by any proof, that the appellee bank, by any act or deed, ever parted with the legal title to the policy so vested in it, until after the death of the insured, when, under claim of right, the policy was surrendered by it to the company which issued it, upon payment to the appellee of the sum of \$8,000. Nor is it claimed by the pleadings of appellants, or shown by any proof, that the decedent ever claimed that the appellee had been divested of the legal title to said policy and the right to collect the same upon his death; from the date of the absolute assignment to the date of decedent's death, the legal title and right to collect the policy was in the appellee. Strictissimi juris, the policy was not pledged or deposited as collateral; it was, on the contrary, absolutely assigned. The distinctive characteristics of a pledge or deposit of collateral are that the property must be capable of delivery to the pledgee, and must be delivered to him actually or constructively, and under a contract, the essence of which is that the thing delivered is to be held by the pledgee as a security from some debt or engagement of the pledgor. The pledgee does not acquire absolute title by such a contract, but only a special property in the thing pledged, with the right to possession until the object of the pledge be accomplished. If the pledgor make default, the pledgee may file a bill in equity and foreclose, or he may sell without judicial process on reasonable notice to the pledgor to redeem the pledge. The absolute title to the thing pledged is not divested out of the pledgor until foreclosure or a sale on proper notice by the pledgee. This is the law of pledge or deposit of property, as collateral security for a debt. See *Johnson v. Smith*, 11 Humph. 397, citing *Story on Bailments*.

The theory of appellants was that the policy was pledged. The fact was that it was absolutely assigned, leaving no vestige of legal right to it or the proceeds of it in the decedent. So it was, from the date of the assignment, during his life and at his death. The interest he had in it from the time of the assignment, during his life and at his death, was an equity, pure and simple, and not a legal right. With this equitable interest as his basis of credit, he contracted the debts shown by the record. If he, during life, had sought to recover the policy, and to cancel his absolute assignment of it without paying these debts, he would have been repelled by a court of equity on the ground that he who would have equity must do equi-

ty. His wife and children can have no higher rights than he. The legal right to the policy was not in them, for we have seen that, notwithstanding the statute, written as the policy was, decedent had the right to make absolute assignment of it, and exercised it in such a way as to cut off all their legal rights. They are clothed only with his equity, and as he would have been bound, so they are bound, to do equity.

Aside from the effect of the absolute transfer of the policy, which was in writing, it is well settled that the act of the decedent in permitting the policy which had been so assigned to remain in the hands of appellee, and oft-repeated agreements by him that it should stand as security for any amount in which he might be from time to time indebted to appellee, would have amounted to an estoppel against him, had he, during his life, attempted to secure possession of the policy without payment to appellee of the indebtedness incurred on the faith and credit of the policy as a security.

The assignment of a policy need not be in writing to be valid, but is governed by the rule applicable to ordinary simple contracts. *Joyce on Insurance*, vol. 3, § 2326; *May on Insurance*, § 395; *Bacon on Benefit Societies and Life Ins.* § 297; *Phillips on Insurance*, § 880.

"An oral assignment of a life insurance policy is valid under our law." *Box v. Lanier*, 112 Tenn. 403, 79 S. W. 1042, 64 L. R. A. 458.

There is no merit in the second assignment of error. The witness Mr. F. O. Watts, who was president of the appellee bank, was not a party to this suit, and was a competent witness. *Southern Life Ins. Co. v. Booker*, 9 Heisk. 608, 24 Am. Rep. 344; *Grange Warehouse Association v. Owen*, 86 Tenn. 355, 7 S. W. 457.

It follows that the decree of the chancery court must be affirmed.

LANCASTER et al. v. SCHOOL DIST. NO. 17.

(Supreme Court of Arkansas. Jan. 30, 1911.)

TRIAL (§ 143*)—DIRECTION OF VERDICT—WHEN AUTHORIZED.

Where the testimony is conflicting, and there is evidence tending to establish the issue, the court may not direct a verdict.

[Ed. Note.—For other cases, see *Trial*, Cent. Dig. § 342; *Dec. Dig.* § 143.*]

Appeal from Circuit Court, Baxter County; John W. Meeks, Judge.

Action by F. W. Lancaster and another against School District No. 17. From a judgment for defendant, rendered on a directed verdict, plaintiffs appeal. Reversed and remanded.

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

This suit was brought by appellants before a justice of the peace to recover a balance of \$103.50 claimed to be due them on a written contract for building a schoolhouse for School District No. 17, in Baxter county, and \$100 damages suffered by appellants because of delayed furnishing materials for the building. The district denied any indebtedness to appellants, claimed credit for payments to other carpenters whom it employed to work on the building and their board, amounting to \$50.85, admitted owing \$12.50 for extra work, denied that appellants were damaged at all, and by way of counterclaim alleged that the house was not completed in accordance with the contract, and that the district was thereby damaged in the sum of \$75. Appellants replied, denying the allegations of the counterclaim, that they had hired any carpenters, and that they should be charged for those employed by the directors. Appellants amended their complaint, and joined the school directors as defendants, and their appearance was entered. Defendants then offered to confess judgment for \$31.50. There was a jury trial, and verdict for \$60.58, and defendants appealed to the circuit court.

In the circuit court it was decided there was a misjoinder of defendants, and appellants elected to proceed against the school district. The contract was introduced in evidence, showing that F. W. and W. K. Lancaster agreed to build the schoolhouse, for which the materials were to be furnished, and they were to be paid \$250 by the school district, and that they were to work at the building continuously until completed and "to be responsible for all their own mistakes." Appellants testified that they built the house in accordance with the contract for \$250, that they did extra work amounting to \$38.50, that they were unnecessarily delayed 29 days by the failure to furnish their materials as agreed, that the time of each of them was worth \$3 per day, that they could have been employed but for appellees' refusal to allow them to work anywhere else before the building was completed, that they had only been paid \$185, and that they did not employ any of the carpenters paid by the directors, and notified them not to hire any one, as they expected to do the work themselves, and should not be charged with the amount so paid by appellees. One of the directors testified that the district had paid other carpenters and for their board \$50.85, in addition to the \$185 paid appellants, and that one of appellants was present when three of these warrants were drawn and made no objection; that the building was in bad condition; that the lumber on the ground would be worth more than the building; that the rafters were not braced, and the roof had sagged about 10 inches, and the walls had spread about 4 inches near the center and

at the top; that they had to have four rods put through it, at a cost of \$20, to keep it from spreading further. Several other witnesses testified as to the condition of the building and the cause and amount of this damage. Appellants testified the damage to the building was slight, and caused by the light material furnished them for use in its construction, and not because of poor work, and that it had been accepted by the directors of the district, and the work pronounced well done. Appellants asked the court to give certain instructions; but the court instructed a verdict for appellee, and from the judgment thereon this appeal was taken.

S. W. Woods, for appellants. Horton & South, for appellee.

KIRBY, J. (after stating the facts as above). This was a case for the decision of a jury. The testimony was conflicting, and there was evidence tending to establish the issue. The court erred in directing the jury to return a verdict in favor of the defendant. *Hutchinson v. Gorman*, 71 Ark. 305, 73 S. W. 793; *St. L., I. M. & S. Ry. Co. v. Petty*, 63 Ark. 94, 37 S. W. 300; *Wallis v. St. L., I. M. & S. Ry. Co.*, 77 Ark. 556, 95 S. W. 446; *Neal v. St. L., I. M. & S. Ry. Co.*, 71 Ark. 445, 78 S. W. 220; *State v. Caldwell*, 70 Ark. 74, 66 S. W. 150.

Reversed and remanded for a new trial.

ST. LOUIS, I. M. & S. RY. CO. v. STACKS. (Supreme Court of Arkansas. Jan. 30, 1911.)

1. RAILROADS (§ 346*)—OPERATION—INJURIES TO PERSONS AT CROSSINGS—CONTRIBUTORY NEGLIGENCE—BURDEN OF PROOF.

In an action against a railway company by one injured in crossing the track, the burden of proving contributory negligence is upon the defendant.

[Ed. Note.—For other cases, see *Railroads*, Cent. Dig. §§ 1117-1123; Dec. Dig. § 346.*]

2. TRIAL (§ 260*)—INSTRUCTIONS—REPETITION.

Where the trial court at the request of the defendant railroad gave instructions fully covering the look and listen rule, it was not error to refuse additional ones on the same subject.

[Ed. Note.—For other cases, see *Trial*, Cent. Dig. §§ 651-659; Dec. Dig. § 260.*]

3. APPEAL AND ERROR (§ 231*)—PRESENTATION OF GROUNDS OF REVIEW IN LOWER COURT—SPECIFIC OBJECTIONS TO INSTRUCTIONS.

Where the trial court gives an instruction correctly declaring the law, its faults of verbiage must, under the settled rules of court, be attacked by specific objections; a general one being insufficient to warrant review.

[Ed. Note.—For other cases, see *Appeal and Error*, Dec. Dig. § 231; Trial, Cent. Dig. § 689.]

4. RAILROADS (§ 350*)—OPERATION—INJURIES AT CROSSINGS—QUESTIONS FOR JURY—CONTRIBUTORY NEGLIGENCE.

In an action by one injured while driving over a railroad crossing, the question of con-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

tributory negligence held under the evidence to be for the jury.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 1160–1192; Dec. Dig. § 350.*]

5. RAILROADS (§ 327*)—INJURIES AT CROSSING—DUTY TO LOOK AND LISTEN—CONTRIBUTORY NEGLIGENCE.

A traveler on a highway who crosses a railroad track is guilty of contributory negligence if he fails to look and listen for trains.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 1043–1056; Dec. Dig. § 327.*]

6. RAILROADS (§ 350*)—INJURIES AT CROSSING—QUESTIONS FOR JURY—LOOK AND LISTEN.

Unless the undisputed evidence shows that one injured while crossing a railroad track failed to look and listen, the question of his contributory negligence is for the jury.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 1169–1176; Dec. Dig. § 350.*]

7. RAILROADS (§ 347*)—INJURIES AT CROSSING—ADMISSIBILITY OF EVIDENCE—OBSTRUCTIONS AT CROSSING.

Where one injured at a railroad crossing, consisting of three tracks, claimed that the presence of cars upon the side track prevented him from seeing the approaching train, evidence of calculations as to how far the view was cut off made from observations under conditions like those of the accident was admissible, for the jury might have made it themselves, and, as the point to be determined was how far the view was cut off, the fact that the plaintiff was standing up in a wagon when injured and that the observations were made by one on foot was immaterial.

[Ed. Note.—For other cases, see Railroads, Dec. Dig. § 347.*]

Appeal from Circuit Court, Conway County; Hugh Barham, Judge.

Action by George H. Stacks against the St. Louis, Iron Mountain & Southern Railway Company. From a judgment for plaintiff, defendant appeals. Affirmed.

On November 12, 1908, at about 5:30 o'clock p. m., appellee, while attempting to drive his team and wagon across the track of appellant's line of railroad from south to north, at a public crossing in Plummerville, Ark., was struck by a west-bound local freight train and was permanently injured. He brought suit for damages, alleging negligence on the part of appellant's employes in operating the train. Appellant answered, denying negligence on its part, and alleging contributory negligence on the part of appellee.

The facts and circumstances connected with and attending the accident according to the testimony of appellee are substantially as follows: He was at a gin in Plummerville on the south side of appellant's line of railroad, and drove his wagon and team away, intending to cross the railroad at a public crossing about 200 yards east of the gin. The wagon road from the gin to the crossing is parallel with and close to the railroad track, and is six feet lower. There are three railroad tracks there. The south track is known as the "house track," on which cars are stored. The middle one is the passing

track and the north one is the main track of the railroad. On the day the accident happened there were cars standing on the south track on the east side of the crossing, and they were close up to it. There were also cars, on the middle track, east of the crossing; but these cars were not so close to the crossing. There were three or four of them, and they were 10, 12, or 14 feet east of it. The road crossing there runs north and south, and appellee was attempting to cross from the south. He drove in a trot until he reached the crossing. Appellee was standing up in the middle of the wagon, and, as his team started up the grade to the first or south track, he checked it (but did not stop entirely) to look and listen for trains. He was expecting a passenger train from the west, which was due about that time, but also states that he knew extra trains were run, and that he must look in both directions, and that he did so. The railroad track east of the crossing was straight for one-fourth of a mile, and then made a curve. Appellee drove across the south track to the middle track looking as best he could between the cars, but did not stop his team. Just as his team started to go on the main track, the mules shied, and he hit them, and, as the wagon got on the track, appellee says he remembers the engine striking it, but does not remember anything else. At the time the mules shied, appellee was not where he could see the train. He had not yet gotten past the box cars on the middle track. Appellee did not hear the bell ringing nor the whistle sounded for the crossing. Appellee was severely injured, and one of his legs had to be amputated. No question in regard to the verdict being excessive is raised. Hence it is not necessary to further abstract the evidence showing the extent of appellee's injuries.

Other evidence was introduced by appellee tending to corroborate his statements, both as to the way the injury occurred, and as to cars being on the middle track, east of the crossing. Calvin Sellers, for the appellee, testified: "I am acquainted with the location and direction of the railroad track in the town of Plummerville in this county. I know where the public road crosses the track at the bridge some 150 or 200 feet east of the depot in Plummerville. I have recently examined that track and taken measurements of the distances there. The railroad tracks there are five feet three inches wide, each of them the same width. Between the main line and what is known as the 'passing track' the distance is seven feet and nine inches. Between the passing track and the house track is eight feet six inches. The distance from the south rail of the south track to the north rail of the north track is 32 feet. I have measured the length of an ordinary two-horse wagon. The length from

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

the hind end of the bed to the front end of the tongue is 21 feet. The bed of an ordinary wagon is 10 feet. The width of a box car in addition to the tracks, when standing on the tracks, the side of the car would extend $22\frac{1}{2}$ inches over each rail. That is the ordinary car I measured. Q. Did you, at the time you took these measurements, measure or ascertain how far down the main track one could see who was standing in the center of the road and in the center of the south track with a box car standing up within 18 or 20 inches of the road on the south track? Answer if you did first? A. I did not exactly the figures you give, but I can state how the measurement was made, supposing the box car to have been standing within 12 inches. The Court: Within 12 inches of what? A. Of the east side of the road. Supposing the box car to have been standing one foot east of the wagon road crossing the tracks, and any person standing in the center of the south track at about what we took to be the center of the road a distance of 6 feet by measurement, the distance to the main line could be seen past the corner of the box car, the center of the main line would first be seen 36 feet east of the center of the main line and center of the crossing. I made no measurements of how far down the track cars could have been seen or a train coming if there had been cars on the middle track. I made a diagram of the three tracks there on that occasion. Made it carefully with the instruments I used to make it with. I hardly know to what extent I am educated in mathematics. I have completed the course in arithmetic, algebra, and geometry at the University of Arkansas."

Appellee introduced other evidence to show that it was not quite dark, and that the headlight of the engine was giving a dim light; that no smoke was escaping from the smokestack of the engine, and that the train was gliding in; and that neither the bell was rung nor the whistle sounded for the crossing.

Appellant introduced evidence tending to show that it was against the rules of the company to leave cars standing on the middle or passing track, and that none were standing there when the train came in on the day appellee was injured; that the steam had been shut off, and that the train was not running over 9 miles an hour; that there were 12 cars in the train; that the bell was ringing, and that the whistle had been blown for the crossing; that the headlight was burning; that the engineer and fireman were both keeping a lookout; that the engineer was on the right-hand side of the engine, the side farthest away from appellee; that, as soon as the fireman discovered the peril of appellee, he gave the alarm; and the engineer did all that could be done to stop the train; that the air was working and the train was stopped as quickly as possible.

There was a verdict and judgment for appellee, and the case is here on appeal.

Lovick P. Miles and Thos. B. Pryor, for appellant. G. W. Bruce and Sellers & Sellers, for appellee.

HART, J. (after stating the facts as above). 1. Counsel for appellant contend that the court erred in telling the jury that the burden of proof was upon appellant to show contributory negligence; but the decisions of this court are adverse to their contention. *Aluminum Co. of N. A. v. Ramsey*, 89 Ark. 522, 117 S. W. 568, and cases cited; *St. L., I. M. & S. Ry. Co. v. Sparks*, 81 Ark. 187, 99 S. W. 73.

2. Counsel for appellant also urge that the court erred in refusing certain instructions on the duty of appellee to look and listen while crossing the track of appellant. Other instructions given at the request of appellant fully covered this phase of the case, and it was not error to refuse to multiply instructions on the same point. *Jones & Norris v. Nichols*, 46 Ark. 209, 55 Am. Rep. 575; *Aluminum Co. of N. A. v. Ramsey*, supra.

3. Counsel for appellant insist that the court erred in its instruction on contributory negligence. We do not deem it necessary to set out the instruction. It is copied from one given in the case of *St. L., I. M. & S. Ry. Co. v. Fambro*, 88 Ark. 16, 114 S. W. 230, and is substantially correct. If counsel for appellant had any objection to the verbiage, this defect should according to the settled rules of the court have been met by specific objection.

4. Counsel for appellant with much force urge that the verdict is without evidence to support it because the appellee was guilty of contributory negligence. While the question is close, we think that, when the testimony is considered in the light of all the attendant circumstances adduced in evidence, it cannot be said that there is no substantial evidence to warrant the verdict. The evidence for appellee shows that neither the whistle was sounded nor the bell rung for the crossing; and, while the omission of the engineer to give these statutory signals did not relieve appellee of the duty of looking and listening for the approach of trains, yet they are warnings which he had a right to rely on in determining whether a train was drawing near. According to appellee's own testimony, his view of an approaching train from the east was obstructed by box cars, both on the south and middle tracks. In such case, while the traveler must not relax his endeavor to see approaching trains, yet necessarily he relies to a great degree upon his sense of hearing to discover the approach of a train, and in doing this he listens, not only for the noise made by the running of the train, but for the signals which the engineer is required to give by ringing the bell or sounding the whistle for the crossing. Appellee's testimony tends to show that he was in possession of all his faculties, and

continually exercised them during his passage over the crossing. The testimony adduced by him shows that the headlight was dim, and on that account its rays did not warn him. It is admitted that steam had been shut off, and that the train was drifting or gliding in, and on this account the jury might have inferred that the train came in with little noise, and no smoke escaping to give warning of its approach; that it had rounded the curve before appellee came upon the crossing; and that, for this reason, he could not see it on account of the box cars obstructing his view. If he could not have seen it after it passed the curve, the jury might have found that it would have done no good for him to have stopped his wagon between the south and middle tracks to have tried to look between the box cars on those tracks. It will be remembered, too, that the engineer and fireman, although they testify they were keeping a lookout, did not see appellee or his team until just as they were struck. We think under all the evidence that the question of contributory negligence was one for the jury. "It is too well established by the decisions of this court to need the citation of authority that a traveler along a highway, attempting to cross a railroad track, must look and listen for the approach of trains, otherwise he is guilty of contributory negligence, and cannot recover damages on account of injury resulting therefrom. Unless, however, the undisputed evidence shows that the traveler did not look and listen, then it is a question of fact for the jury to determine, from all the facts and circumstances, whether the precautions which he exercised in that respect were sufficient to acquit him of any charge of negligence." *St. L., I. M. & S. Ry. Co. v. Garner*, 90 Ark. 19, 117 S. W. 763. See, also, *St. L., I. M. & S. Ry. Co. v. Dillard*, 78 Ark. 520, 94 S. W. 617; *St. L. & S. F. Rd. Co. v. Wyatt*, 79 Ark. 241, 96 S. W. 376; *St. L., I. M. & S. Ry. Co. v. Hitt*, 76 Ark. 227, 88 S. W. 908, 990.

5. Counsel for appellant contend that the court erred in admitting the testimony of Calvin Sellers. We do not think so. While the witness was not in a wagon at the time he made his observations as was appellee while crossing the track, still the testimony of appellee shows that he could not see over the box cars when in the wagon on the south track. Sellers' testimony only tended to show at what point the main track would come into the line of vision of a person crossing the south track. He fixed that point with an instrument, and then measured the distance to it from where he was standing on the south track when he fixed it. The calculations he made were such as might have been made by the jury. The point was, Where could the main track be seen after the traveler had passed the point

where his vision was not obstructed by the box cars? It made no difference whether Sellers was high or low, he was only testifying as to the point the main track could be first seen when the obstruction to the vision caused by the box cars had been passed. The jury were entitled to give it whatever weight it carried.

The judgment will be affirmed.

WILSON et al. v. ROGERS.

(Supreme Court of Arkansas. Jan. 23, 1911.)

1. TAXATION (§ 734*)—TAX SALE—VALIDITY—TAX NOT UNPAID.

A sale of land for taxes which had been in fact paid passes no title.

[Ed. Note.—For other cases, see *Taxation*, Cent. Dig. §§ 1470-1473; Dec. Dig. § 734.*]

2. QUIETING TITLE (§ 10*)—TITLE TO SUPERIOR ACTION.

Plaintiff in an action to quiet title must recover on the strength of his own title, and not on the weakness of defendant's.

[Ed. Note.—For other cases, see *Quieting Title*, Cent. Dig. §§ 36-42; Dec. Dig. § 10.*]

3. TAXATION (§ 796*)—TAX TITLE—ACTION TO TEST.

Title by adverse possession of seven years is sufficient to support an action to quiet title against one claiming under a void tax sale.

[Ed. Note.—For other cases, see *Taxation*, Cent. Dig. §§ 1578-1581; Dec. Dig. § 796.*]

4. ADVERSE POSSESSION (§ 43*)—POSSESSION OF MORTGAGE—ADVERSE NATURE.

Where a purchaser of land gives back a mortgage for the purchase money, which is afterwards satisfied, the possession of the mortgagee is in privity with the mortgagor and not adverse to him, and hence there is no break in the continuity of adverse possession so as to make a new point from which the statute of limitations would have to run in favor of a later owner.

[Ed. Note.—For other cases, see *Adverse Possession*, Cent. Dig. §§ 213-225; Dec. Dig. § 43.*]

5. MORTGAGES (§ 187*)—RIGHT OF POSSESSION FOLLOWS TITLE.

A mortgage passes the legal title to the mortgagee, so that, where it contained no reservation of the right of occupancy, the right of possession follows the legal title.

[Ed. Note.—For other cases, see *Mortgages*, Cent. Dig. § 469; Dec. Dig. § 187.*]

6. ADVERSE POSSESSION (§ 43*)—TACKING SUCCESSIVE POSSESSIONS.

If a successive privity exists between them, the last occupant of land may avail himself of the occupancy of his predecessors.

[Ed. Note.—For other cases, see *Adverse Possession*, Cent. Dig. §§ 213-225; Dec. Dig. § 43.*]

7. ADVERSE POSSESSION (§ 43*)—TACKING SUCCESSIVE POSSESSIONS.

In order to create the privity requisite to enable a subsequent occupant to tack his possession to that of a prior occupant, there need not be a conveyance in writing, but it is sufficient if the prior occupant transferred his possession to him, even though by parol.

[Ed. Note.—For other cases, see *Adverse Possession*, Cent. Dig. §§ 213-225; Dec. Dig. § 43.*]

8. ADVERSE POSSESSION (§ 43*) — TACKING SUCCESSIVE POSSESSIONS.

The possession of a prior occupant of land may be passed by operation of law as that of an execution debtor to the purchaser of the land on execution sale.

[Ed. Note.—For other cases, see Adverse Possession, Cent. Dig. §§ 213-225; Dec. Dig. § 43.*]

Appeal from Boone Chancery Court; T. H. Humphreys, Chancellor.

Action by Mary A. Rogers against J. D. Wilson and others. From a judgment for plaintiff, defendants appeal. Affirmed.

Pace & Pace, for appellants. J. W. Story, for appellee.

MCCULLOCH, C. J. Appellee instituted this action in the chancery court of Boone county to quiet her title to a tract of land containing 6.67 acres, situated near the town of Harrison, in that county. Appellee claims investiture of title by adverse possession of her grantors for a period of about 20 years, and she seeks to cancel as a cloud on her title a sale of the land to the state of Arkansas for taxes, which sale is alleged to be void, and a deed to appellants made by the commissioner of state lands pursuant to said tax forfeiture. The evidence shows that the taxes for which the lands were forfeited had been paid, and it follows, therefore, that the tax sale was in fact void. Appellee must recover, if at all, upon the strength of her own title, and not upon the weakness of the title of her adversaries. *Lawrence v. Zimpleman*, 37 Ark. 644; *Sibly v. England*, 90 Ark. 420, 119 S. W. 820, and cases cited.

Appellee's chain of deeds constituting color of title runs back to the year 1870, and the evidence which she adduced tended to establish the fact that her grantors actually and adversely occupied a portion of the land, with color of title to the whole tract, from the year 1880 or thereabout to the year 1895, when one of them conveyed to another grantee that portion of the tract which was occupied, leaving the portion now in controversy unoccupied. If this is true, the occupancy for more than seven years constituted complete investiture of title in appellee, and was sufficient to authorize the chancery court to cancel at her instance the void tax sale. The chancellor found in her favor on the question of adverse occupancy of her grantors, and, after consideration of the evidence, we are of the opinion that it sustains the chancellor's findings.

It is insisted that the continuity of the possession was broken by the occupancy of another person, to whom one of appellee's grantors conveyed the land. In the year 1889 one of them, Henry Watkins by name, conveyed the land to Goodwin, and the latter gave a mortgage back to Watkins to secure the purchase price. The record of this mortgage appears subsequently to have been sat-

isfied, and there is no other conveyance of the land by Watkins to Goodwin or to any of appellee's grantors. The mortgage executed by Goodwin to Watkins contained no reservation of the right of occupancy, and, as the legal title passed under the mortgage, the right of possession followed the legal title. Conceding, without deciding, that the satisfaction of the mortgage restored the legal title to Goodwin, the continued possession of Watkins was not adverse to Goodwin, thus becoming a new point from which the statute of limitations would run, but it was in privity with Goodwin and prevented a break in the continuity of possession. This court in *Mem. & L. R. Rd. Co. v. Organ*, 67 Ark. 84, 55 S. W. 952, approved the following statement of the law on this subject in 2 Wood on Limitations (section 271): "If a successive privity exists between them, the last occupant may avail himself of the occupancy of his predecessors. * * * In order to create the privity requisite to enable a subsequent occupant to tack to his possession that of a prior occupant, it is not necessary that there should be a conveyance in writing. It is sufficient if it is shown that the prior occupant transferred his possession to him, even though by parol. So, too, the possession of a prior occupant may be passed by operation of law, as of an execution debtor to the purchaser of the land on execution sale." We are of the opinion, therefore, that the evidence sustained the finding of the chancellor that there was privity of possession between the occupants for more than the statutory period, and that appellee is entitled to the benefit of it, which vested in her the title, at least against every one except Goodwin. Goodwin being in the chain of appellee's title and possession, the question of title as between him and appellee does not arise.

Appellee also claims title by payment of taxes for more than seven years; but, as her title on that ground is questioned, the views already expressed render it unnecessary to discuss that matter.

We are of the opinion that from the evidence the decree of the chancellor is correct; and the same is affirmed.

ROBINSON et al. v. WYNNE et al.

(Supreme Court of Arkansas. Jan. 23, 1911.)

1. APPEAL AND ERROR (§ 907*) — PRESUMPTIONS—SUFFICIENCY OF WRITING—EVIDENCE.

In an action to foreclose a trust deed to secure a note for \$1,200, plaintiff claimed \$850 as unpaid balance. The evidence showed that defendant made the note and trust deed to cover a loan to enable defendant to purchase certain land. Plaintiff was to get the money, but failed, and only got \$400, and promised to get the balance later. In addition to the \$400, plaintiff transferred to defendant a tract of standing timber, for which defendant agreed to

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes.

pay \$450 by charging it on the mortgage debt. Plaintiff found one Coates cutting timber, and took steps to prevent it, but defendant expressly agreed over the telephone to pay for the timber, and plaintiff sent the papers transferring the timber; and he offered at the same time to pay the difference of \$350 to defendant to make up the amount loaned, but defendant instructed him to credit it on the loan, thus reducing it to the amount sued for. *Held* that, an agreement concerning the sale of timber being evidenced by some kind of writing, the precise nature of which was not shown in the abstract, the writing will be presumed sufficient to satisfy the statute of frauds.

[Ed. Note.—For other cases, see Appeal and Error, Dec. Dig. § 907.*]

2. FRAUDS, STATUTE OF (§ 129*)—WRITING—EVIDENCE.

In such a case, even if the entries were not sufficient to satisfy the statute of frauds, the delivery of the timber to Coates and the agreement of the defendant to pay the price, which was charged on the mortgage debt, where, on the faith of defendant's promise to pay, plaintiff had dismissed the action he had instituted to stop Coates from cutting the timber until the price was paid, took it out of the statute.

[Ed. Note.—For other cases, see Frauds, Statute of, Cent. Dig. §§ 287-292; Dec. Dig. § 129.*]

Appeal from Jackson Chancery Court; Geo. T. Humphries, Chancellor.

Action by E. R. Wynne and another against O. E. Robinson, trustee, and others. From a judgment for plaintiffs, defendants appeal. Affirmed.

J. N. Rachels and Sam T. Poe, for appellants. Brundidge & Neelly, for appellees.

MCCULLOCH, C. J. This is an action to foreclose a deed of trust conveying certain lands in Jackson county, Ark., in trust to secure the payment of a debt evidenced by a note for the sum of \$1,200 executed by A. J. Bell to Geo. C. Griffith. E. R. Wynne, the trustee named in the deed, joins Griffith in the action, which is instituted against Bell and his wife and Chas. E. Robinson, the trustee of his estate in bankruptcy. Plaintiff claims an indebtedness of \$850, being the alleged unpaid balance due on the note after crediting it with the sum of \$350. The trustee, Robinson, filed answer, admitting that the sum of \$400 is due on the mortgage, and no more; and he also filed a cross-complaint against Griffith, claiming an indebtedness of the latter to Bell for the purchase price of a lot of piling, amounting to more than the balance due on said mortgage debt, and he prayed for a decree against Griffith for the balance. The court on final hearing found in favor of plaintiff in the full amount claimed, and rendered a personal decree against Bell, and also decreed foreclosure of the trust deed.

There is a sharp conflict in the testimony. This much, however, is undisputed: Bell executed the note and trust deed to Griffith to

cover a loan of \$1,200 to be made to Bell to enable him to purchase a certain tract of land. Griffith was to get the money for Bell, but failed, and let him have only \$400 at the time of the purchase of the land, promising to let him have the balance later. Griffith testified that, in addition to the \$400 paid to Bell in cash, he transferred to the latter a tract of standing timber, for which the latter agreed to pay him \$450, by having it charged on the mortgage debt. He testified that one Coates first applied to him for the purchase of this timber, but that he declined to sell it to Coates, and told him that, if Bell wanted to buy the timber, he would sell it to him and credit the price, \$450, on the amount which he was to advance to Bell on the loan secured by the mortgage; that afterwards he found Coates cutting the timber and took steps to prevent it, but that Bell called him up over the telephone and expressly agreed to pay for the timber; and that thereupon he sent him the papers transferring the timber. He also testified that subsequently he offered to send Bell a check for \$350 to make up the amount of the \$1,200 loan, but that the latter instructed him to credit it on the loan, which he did, thus reducing it to the amount claimed in the action. Bell denied in his testimony that he agreed to pay \$450 for the timber, but testified that he sold and delivered to Griffith a lot of piling, for which he had not been paid, amounting to the price of \$647.91. Griffith denied owing anything for piling, except possibly four or five sticks, which had been branded by his agent, but which had not been delivered. He testified that he furnished Bell a statement, which was correct, and paid him \$581.66, the amount of balance due on account. There was some corroboration of the testimony of each party; but we are of the opinion that the finding of the chancellor is not against the preponderance of the testimony.

Defendants insist that the sale of the timber and Bell's alleged agreement to pay the price is within the statute of frauds. The testimony is to the effect that Griffith transferred and delivered to Bell some kind of a writing concerning the sale of the timber, the precise nature of which is not shown in the abstract. We must assume, in the absence of a showing in the abstract, that the writing was sufficient to satisfy the statute of frauds. But, if that be not so, the statute is satisfied by the delivery of the timber to Coates and the agreement of Bell to pay the price, which was charged on the mortgage debt. Coates was, according to the testimony, in possession of the timber, cutting it; and Griffith, on the faith of Bell's promise to pay, dismissed an action which he had instituted to stop Coates from cutting until the price should be paid.

Finding no error, the judgment is affirmed.

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

SOUTHWESTERN TELEGRAPH & TELEPHONE CO. v. CITY OF DALLAS.

(Supreme Court of Texas. Feb. 15, 1911.)

1. MUNICIPAL CORPORATIONS (§ 108*)—POWERS—CHANGE OF TELEPHONE RATE—INITIATIVE AND REFERENDUM—CONSTRUCTION OF CHARTER PROVISIONS—"ANY PROPOSED ORDINANCE."

Dallas City charter, granted by Sp. Acts 30th Leg., provides by chapter 71, art. 3, par. 1, that all powers conferred on the city, unless otherwise provided, shall be exercised by the mayor and four commissioners, designated as the board of commissioners. Article 2, § 8, par. 27, gives the city power, by ordinance, to regulate and fix the charges of local telephones. Paragraph 7 provides that "the right is hereby delegated to the city of Dallas, acting through its board of commissioners," to regulate the charges made by corporations, etc., exercising a public privilege, and to change such regulations, but forbids such change except after notice and a fair hearing. Article 8, par. 1, provides that "any proposed ordinance" may be submitted to the board by petition signed by 5 per cent. of the electors voting at the last mayoralty election, when the board shall submit such ordinance without alteration to a vote of the people, and upon its adoption by a majority of the electors it shall go into force. Article 2, § 1, par. 2, provides that the specification of particular powers shall not be a limitation upon the general powers granted, the intention being that the city shall exercise all powers of municipal government not otherwise prohibited. Held, that article 8, par. 1, did not authorize a submission to the electors of ordinances upon any subject of legislation named in the charter, but only upon subjects to which the initiatory method was applicable, and an ordinance regulating telephone rates could not be presented to the electors for adoption, since a fair hearing on the reasonableness of the rate fixed, as required by article 2, § 8, par. 7, could not be had by that method, and hence such an ordinance adopted by the electors was invalid.

[Ed. Note.—For other cases, see Municipal Corporations, Dec. Dig. § 108.*]

For other definitions, see Words and Phrases, vol. 1, pp. 412-433; vol. 8, pp. 7575-7577.]

2. MUNICIPAL CORPORATIONS (§ 65*)—POWERS—AUTHORITY OF LEGISLATURE—INITIATIVE AND REFERENDUM.

The Legislature, in creating municipal corporations, may provide for the submission of proper subjects by the initiative method to the electors of the city.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 157, 158; Dec. Dig. § 65.*]

3. MUNICIPAL CORPORATIONS (§ 58*)—POWERS.

Since a municipal corporation possesses no powers, except those given by its charter, the charter of the city of Dallas, granted by Sp. Acts 30th Leg. c. 71, art. 2, § 1, par. 2, providing that the specification of particular powers shall not be construed as a limitation upon the general powers, and that the city shall exercise all powers of municipal government not otherwise prohibited, adds nothing to the powers expressly granted to the city by its charter, the charter still being the measure of the city's powers.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 145-147; Dec. Dig. § 58.*]

Error to Court of Civil Appeals, Fifth Supreme Judicial District.

Action by the Southwestern Telegraph &

Telephone Company against the City of Dallas. Judgment for the City was affirmed by the Court of Civil Appeals (131 S. W. 80), and plaintiff brings error. Reversed and remanded.

A. P. Wozencraft, W. S. Bramlitt, and D. A. Frank, for plaintiff in error. Jas. J. Collins and John C. Robertson, for defendant in error.

BROWN, C. J. The city of Dallas, having a population of more than 10,000, was granted a charter by the Thirtieth Legislature (Sp. Laws 30th Leg. c. 71), which contains the following provisions pertinent to the issues which are presented by the writ of error in this case:

"Paragraph 1 of article 3 reads: 'All powers conferred on the city shall, unless otherwise provided in this charter, be exercised by a mayor and four commissioners, who together shall be known and designated as the board of commissioners, all of whom shall be elected by the qualified voters of the city at large and shall devote their entire time to the service of the city. The mayor shall be ex officio president of the said board of commissioners, and shall have and exercise all of the powers of a member thereof.'

"Paragraph 27 of section 8 of article 2 reads: 'The city of Dallas shall have the power, by ordinance, to fix and regulate the price of water, gas and electric lights, and to regulate and fix the fares, tolls and charges of local telephones and exchanges; of public carriers and hacks, whether transporting passengers, freight or baggage, and generally to fix and regulate the rates, tolls or charges, and the kind of service of all public utilities of every kind.'

"Paragraph 7 of section 8 of article 2 reads: 'The right is hereby delegated to the city of Dallas, acting through its board of commissioners, to determine, fix and regulate the charges, fares or rates of any person, firm or corporation enjoying or that may enjoy a franchise or exercising any other public privilege in said city and to prescribe the kind of service to be furnished by such person, firm or corporation, and the manner in which it shall be rendered, and from time to time to alter or change such rules, regulations and compensation. The board shall make rules and regulations granting a fair hearing to persons or corporations to be affected by said regulations, and no change in regulations shall be adopted except after notice to the persons affected and after a fair hearing shall be granted them; provided, that in adopting such regulations and fixing such compensation, or determining the reasonableness thereof, no stocks or bonds authorized or issued by any corporation enjoying a franchise shall be considered unless upon proof that the same have been actually

issued by the corporation for money paid and used for the development of the corporate property, labor done or property actually received in accordance with the laws and Constitution of the state applicable thereto; and in order to ascertain all facts necessary for a proper understanding of what is or should be a reasonable rate or regulation, the board of commissioners shall have full power to inspect books and compel attendance of witnesses as provided in subsection 6 hereof and may prescribe all penalties named in subsection 6 for a failure or refusal to attend and testify or produce books.'

"Paragraph 1 of article 8, known as the initiative and referendum article of the charter, among other things, provides: 'Any proposed ordinance may be submitted to the board of commissioners by a petition signed by registered electors of the city equal in number to the percentages hereinafter required. * * * If the petition be signed by the electors equal in number to at least 5 per cent., but less than 15 per cent., of the entire vote cast for all the candidates for mayor at the last preceding general election at which a mayor was elected, then such ordinance, without alteration, shall be submitted by the board of commissioners to a vote of the people at the next general municipal election that shall occur at any time after thirty days from the date of the secretary's certificate of sufficiency attached to the petition accompanying such ordinance. If a majority of the qualified electors voting on said proposed ordinance shall vote in favor thereof, such ordinance shall thereupon become a valid and binding ordinance of the city, and any ordinance proposed by petition, or which shall be adopted by a vote of the people cannot be repealed or amended except by a vote of the people.'

"Paragraph 2 of section 1 of article 2 of said charter provides as follows: '* * * Provided, further, that the specification of particular powers herein authorized shall never be construed as a limitation upon the general powers herein granted, it being intended by this act to grant and bestow upon the inhabitants of the city of Dallas full power of self-government, and it shall have and exercise all powers of municipal government not prohibited by this charter, or by some general law of the state of Texas, or by the provisions of the Constitution of the state of Texas.'

Conforming in all respects to the requirements of the charter, the electors of the city of Dallas, by a majority vote, adopted this ordinance which was duly enrolled by the board of commissioners:

"Be it ordained by the board of commissioners of the city of Dallas:

"Section 1. That no person, firm, corporation, receiver or lessee operating a telephone system in the City of Dallas, shall

charge subscribers more than \$5.00 per month per phone for unlimited single line business service, or charge more than \$2.00 per month per phone for unlimited single line residence service.

"Sec. 2. That bills for such telephone service shall become due and shall be presented on the first day of the month following the rendering of the service, and such bills shall be subject to a discount of 10 per cent. if paid on or before the 10th day of said month.

"Sec. 3. That any person, firm, corporation, receiver or lessee operating a telephone system in the city of Dallas, who shall violate any of the provisions of this ordinance, shall be fined \$200.00 upon conviction in the corporation court of the city of Dallas.'

Paragraph 27 of section 8, art. 2, of the charter of the city of Dallas, declares that the power therein conferred shall be exercised by ordinance, and paragraph 7 of the same section directs that such ordinances shall be enacted by the board of commissioners of the said city. There can be no doubt that the authority to so regulate the business named in the said sections may be exercised by the board of commissioners. The question in this case is, Had the voters the right, also, by the method of initiation prescribed, to present the ordinance in question to the board of commissioners for submission to the qualified voters of the city?

The method by which an ordinance may be submitted is prescribed in paragraph 1 of article 8. The language is: "Any proposed ordinance may be submitted to the board of commissioners by a petition signed by registered electors of the city equal in number to the percentages hereinafter required," etc. Counsel for the city seem to understand this language to mean that an ordinance on any subject of legislation mentioned in the charter may be presented under this method of initiation to the board of commissioners and that such presentation precludes action by the board of commissioners. We are of opinion that the language "any proposed ordinance" means that an ordinance upon any subject to which the initiatory method is applicable may be presented in the manner prescribed to the commissioners. It does not mean that all ordinances upon any subject of legislation mentioned in the charter may be enacted in that manner.

Paragraph 27 of section 8 prescribes that the authority to regulate such business as that involved in this litigation shall be exercised by ordinance, but it does not provide by what department the ordinance shall be enacted, whether by the board of commissioners on their own initiative, or by the voters of the city by the initiatory method prescribed in paragraph 1 of article 8 of the charter. Paragraph 7 of the same section and article reads: "The right is hereby delegated to the city of Dallas, acting through

its board of commissioners, to determine, fix and regulate the charges" etc., after a fair hearing on the reasonableness of such rates. In the exercise of the power to regulate and fix rates, etc., there must be a body who can hear evidence and decide upon the reasonableness or unreasonableness of the rate or regulation, and if that cannot be done by the initiative—the popular vote—then, the authority cannot be exercised in that manner. Can it be necessary to offer argument to show to any man that such hearing as the law provides could not be had in a campaign before the electorate of the city? It is too manifest for controversy.

Can it be supposed that a Legislature would require a board of commissioners to secure a fair hearing to the party to be affected, and yet would permit some unknown party to draft an ordinance, specifying rates and regulations, without the knowledge of any facts, and submit such ordinance to the popular vote where there can neither be an investigation nor any character of ascertainment of the facts? That would be to place upon the language of the charter an unreasonable construction. If the charter provided for the submission of such issues to the voters at large, its validity would, at least, be questionable. In *Telephone Co. v. Los Angeles*, 211 U. S. 280, 29 Sup. Ct. 55 (53 L. Ed. 176), that question was raised and the court said: "The charter of the city also contains a provision that upon petition of 15 per cent. of the voters of the city any ordinance proposed must be submitted to the people, and may be by them adopted. It is said, therefore, that the power of rate regulation might be, in this manner, exercised directly by the electorate at large. It may well be doubted whether such a result was contemplated by the Legislature. There are certainly grave objections to the exercise of such a power, requiring a careful and minute investigation of facts and figures, by the general body of the people, however intelligent and right minded."

The charter of a city is to its citizens and officers the measure of their authority over persons and property. That charter secured to the plaintiff in error "a fair hearing," and, as such hearing was not and could not be had in the adoption of this ordinance, it was not enacted in accordance with the charter and is void.

There is no conflict between paragraph 1 of article 3 and paragraph 27 of section 8 herein copied. They refer to different subjects of legislation, and each can be sustained and applied to its subjects. There is nothing in our Constitution which forbids the Legislature to submit proper subjects to the voters of a city by the initiative. The authority of the Legislature in creating municipal corporations is ample for such purpose. *Brown v. Galveston*, 97 Tex. 1, 75 S. W. 488.

Counsel for the city invoke this provision of the charter: "And provided, further, that the specification of particular powers herein authorized shall never be construed as a limitation upon the general powers herein granted, it being intended by this act to grant and bestow upon the inhabitants of the city of Dallas full power of self-government, and it shall have and exercise all powers of municipal government not prohibited by this charter, or by some general law of the state of Texas, or by the provisions of the Constitution of the state of Texas."

A municipal corporation possesses no power not derived from its charter, therefore the general terms "full powers of self-government," and "all powers of municipal government not prohibited by this charter," add nothing to the terms of the charter. We still must look to the charter for the authority to sustain an act done by the corporation. 28 Cyc. 258, B, Powers; *City of Brenham v. Water Co.*, 67 Tex. 542, 4 S. W. 143.

The charter of the city of Dallas committed the authority to fix and regulate rates of telephone companies to the board of commissioners, which is not a special power, but is the prescribed method of executing a general power; therefore, the clause invoked and quoted above is not applicable to these facts.

The district court erred in holding that the ordinance in question is valid. It is therefore ordered that the judgments of the district court and Court of Civil Appeals be reversed, and that this case be remanded to the district court to be disposed of in accordance with this opinion.

BAILEY et al. v. BLOCK et al.

(Supreme Court of Texas. Feb. 15, 1911.)

1. MORTGAGES (§ 556*)—"DEFICIENCY."

A mortgage "deficiency" is the balance due after exhausting the property given as security.

[Ed. Note.—For other cases, see *Mortgages*, Dec. Dig. § 556.*]

For other definitions, see *Words and Phrases*, vol. 2, p. 1943.]

2. MORTGAGES (§ 556*)—DEFICIENCY—ENFORCEMENT.

Mortgaged property must be sold at foreclosure sale, the proceeds applied, and the deficiency thus ascertained before recourse against property of the debtor other than that mortgaged, whether the fact is to be ascertained by the court as the basis of a deficiency judgment, or by the clerk or referee as the basis of a deficiency execution authorized by the decree of foreclosure.

[Ed. Note.—For other cases, see *Mortgages*, Cent. Dig. §§ 1592-1597; Dec. Dig. § 556.*]

3. MORTGAGES (§ 562*)—DEFICIENCY—EXECUTION.

Rev. St. 1895, art. 1840, requires a mortgage foreclosure judgment to direct the sheriff to sell the property and to make any deficiency out of the mortgagor's property, as in ordinary executions. Article 2343 requires executions to

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

be levied without delay. *Held*, that a sheriff holding an order of sale under mortgage foreclosure cannot estimate in advance the proceeds that will probably result from the sale, and levy execution for the probable balance on other property, the judgment provided for by article 1340 and the writ thereunder being contingent as to any deficiency until it is rendered certain by sale of the mortgaged property; and a sale of mortgagor's general property under a foreclosure judgment before exhausting the mortgaged property is void.

[Ed. Note.—For other cases, see Mortgages, Cent. Dig. §§ 1618-1621; Dec. Dig. § 562.*]

4. EXECUTION (§ 258*)—SALES—ATTACK.

To make an execution sale immune from collateral attack, there must be a valid judgment and execution.

[Ed. Note.—For other cases, see Execution, Cent. Dig. §§ 736-739; Dec. Dig. § 258.*]

5. MORTGAGES (§ 562*)—DEFICIENCY—EXECUTION SALES—ATTACK.

Irregularity in selling a mortgagor's general property on judgment in foreclosure, under Rev. St. 1895, art. 1340, before exhausting the mortgaged property, is subject to collateral attack.

[Ed. Note.—For other cases, see Mortgages, Dec. Dig. § 562.*]

6. APPEAL AND ERROR (§ 1177*)—REVIEW—NECESSITY FOR REMAND.

Though an execution sale under which defendants in trespass to try title claim be adjudged void on review, the cause will be remanded, where an adjustment of equities may be proper.

[Ed. Note.—For other cases, see Appeal and Error, Dec. Dig. § 1177.*]

Error from Court of Civil Appeals of First Supreme Judicial District.

Trespass to try title by Mrs. Alice M. Baller and another against B. Block and another. From a judgment of the Court of Civil Appeals (125 S. W. 955) affirming a judgment for defendants, plaintiffs bring error. Reversed and remanded.

Geo. H. Breaker, I. P. Hutchinson, and Spotts & Matthews, for plaintiffs in error. Ross & Wood, Baker, Botts, Parker & Garwood, G. H. Pendarvis, and H. J. Dannenbaum, for defendants in error.

WILLIAMS, J. This is an action of trespass to try title for land in the city of Houston, the decision of which depends on the validity of a sheriff's sale thereof made in 1886 to A. P. Lufkin, under a judgment in his favor against Mrs. Louise Bremond, independent executrix of the will of Paul Bremond, deceased, to whose estate the land belonged. The plaintiffs in error, plaintiffs below, claim under deeds from Mrs. Bremond, who was also the devisee under the will, and the defendants claim under the prior sheriff's sale. The judgment under which the sale was made established the debt against Bremond's estate, and also foreclosed a mortgage given to secure it on two pieces of land other than that in controversy, in the terms of article 1340, Rev. St. 1895. The order of sale, which was in conformity with the judg-

ment, was received by the sheriff November 5, 1886, and he advertised the mortgaged property for sale on the next sale day, and at the same time indorsed on the writ a levy on the property in controversy, and advertised it also for sale, as under execution on the next sale day. When that day arrived, he first sold one piece of the mortgaged property and offered the other, but received no bid, and then sold the land in controversy to make up a balance of the judgment left unpaid.

It is found by the trial court that the sheriff, before levying on the land in controversy, ascertained that the mortgaged property would be insufficient to satisfy the judgment, and for that reason made the levy on other land.

The question, of course, is whether or not the sale of the land in controversy was void, and the decision of it depends on the effect of several statutory provisions. Article 1340 prescribes that the judgment to be rendered on foreclosure of a mortgage "shall be * * * that an order of such sale issue to the sheriff," etc., directing him to sell the same (the mortgaged property) as under execution in satisfaction of the judgment;" and if the property cannot be found, or if the proceeds of such sale be insufficient to satisfy the judgment, then to make the money, or the balance thereof remaining unpaid, out of any other property of the defendant, as in case of ordinary executions."

Article 2338 prescribes the requisites of executions; the second and third subdivisions being:

"(2) If the judgment be for money simply, it [the writ] shall require the officer to satisfy the judgment out of the property of the debtor, subject to execution.

"(3) If the judgment commands the sale of particular property for the satisfaction thereof, the writ shall be framed accordingly."

Article 2343, which is the chief reliance of counsel for defendant, is as follows: "When an execution against the property of any person is issued to an officer, he shall proceed without delay to levy the same upon the property of the defendant not exempt from execution, unless otherwise directed by the plaintiff, his agent, or attorney."

Much light is thrown upon the meaning and purpose of article 1340 by the history of the development of the law regulating the collection of balances, called "deficiencies," due on mortgage debts after exhaustion of the property given to secure them. Originally, the mortgagee could only enforce his mortgage against the property. Later it was established that, if he had a bond or obligation for the debt collateral to the mortgage, he might, after application of the proceeds of the mortgaged property, maintain an action at law thereon for any balance un-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

paid. Afterwards, by statute, rule of court, or otherwise, it became the practice in some jurisdictions for the creditor, after the foreclosure and sale of the property and the return thereof showing the result, to apply to the court which decreed the foreclosure for a deficiency judgment, and, in other jurisdictions, for the judgment of foreclosure to provide for a report of the sale, the application of the proceeds, and the issuance of execution for any balance ascertained in that way. The last was the procedure in this state (Paschal's Dig. art. 1480) prior to the revision of 1879, when the further advance shown in article 1340 was made. To all of these practices one prominent requirement is common, and that is that the foreclosure sale is to be made, the proceeds applied, and the deficiency thus mathematically ascertained before any proceeding against the property of the debtor, other than that mortgaged, is allowed. This is true whether the fact is to be ascertained by the court as the basis of a deficiency judgment, or by the clerk or referee as the basis of a deficiency execution authorized by the decree of foreclosure. Jones on Mortgages (6th Ed.) §§ 1709a et seq., 1920; Freer v. Tupper, 21 S. C. 81; McCall v. Rogers, 77 Ala. 349; Freeman on Executions, § 10; 27 Cyc. 1746, 1751, 1752, 1754, 1756, 1760, 1761.

Neither the court nor the clerk is allowed by such statutes to estimate in advance the proceeds that will probably result from a sale, and award judgment or execution for a probable balance. Is such a power given to the sheriff by our statute? It as plainly denies it to him, as other statutes referred to deny it to the court or the clerk. The law is so stated in the opinions in Seligson v. Collins, 64 Tex. 314, and Ward v. Billups, 76 Tex. 466, 13 S. W. 308. The point may have been involved in the former case only incidentally and in the latter not at all, but we are satisfied that the statements made of the law are correct. To the same effect are the decisions in Thomas v. Simmons, 103 Ind. 543, 2 N. E. 203, 3 N. E. 381, and Mitchell v. Ringle, 151 Ind. 16, 50 N. E. 30, 68 Am. St. Rep. 212, based upon a statute like ours.

The judgment provided for in article 1340 is contingent as to the deficiency to be enforced against the general estate of the debtor until it is made certain in the way prescribed, viz., by sale of the mortgaged property and application of the proceeds, and this is true also of the writ. Freeman on Executions, § 10. The officer has neither judgment nor writ to empower him to proceed against other property than that mortgaged until the prescribed contingency has happened, viz., the sale and the application of the proceeds rendering certain the amount to be collected as under execution. The writ issued on such a judgment by force of article 1340 may operate as both an order of sale and an ordinary execution, but not necessarily so, since the latter office may be pre-

vented from ever coming into effect by the satisfaction of the judgment from the sale or otherwise; and where it does so operate, its two functions are active successively, and not concurrently. This is made plain by the language of the statute, and results from the fact that the deficiency to be collected, as under execution, is uncertain until the sale has taken place. It is only "then," and "if" the proceeds be insufficient, that the proceeding as under execution is authorized. It irresistibly follows that the function of the writ as a general execution first comes into existence after the sale, and that it is in legal effect the same as the execution formerly required to be issued after the sale and return of the order of sale had taken place. The change in the law merely makes it the duty of the sheriff, instead of the clerk, to ascertain the deficiency after the sale, and empowers him then to proceed under the same writ, instead of a new one.

There is nothing in article 2343 that affects the question. It applies to executions "against the property" of the defendant, to be enforced "against property not exempt from execution," which plainly are those mentioned in subdivision 2 of article 2338, for "money simply" to be satisfied "out of the property of the debtor subject to execution." The procedure under writs like that here in question is prescribed by subdivision 3 of the last-named article to be in accordance with the judgment prescribed by article 1340. It is only where an order of sale becomes an ordinary execution after sale of the mortgaged property, leaving a balance, that the further procedure as under ordinary execution is to be followed. An order of sale is a kind of execution, but it is not the kind referred to in article 2343, or, at least, is not such until a sale of the mortgaged property has been made. We think it clear, therefore, that never before the day on which the sale was made did the judgment or the writ empower the sheriff to proceed against Bremond's estate as under execution.

And this conclusion necessarily answers the contention that the officer's departure from the prescribed course amounted only to an irregularity which did not render the sale void, but only subjected it to direct attack. That contention is founded on the many decisions which hold that purchasers at sheriffs' sales are not affected in collateral proceedings by the officer's failure to take some of the steps required by the statutes preliminary to the making of sales, such as demand upon the defendant to point out property, the making or indorsement of levy, the giving of notice, and the like. The very foundation upon which those decisions rest is that at the time of sale the sheriff holds a valid execution, based upon a valid judgment, under which all the required things could lawfully have been done. Persons bidding may not be in a position to ascertain whether or not the steps preliminary to

sale have been taken, and are entitled to presume that the officer has done his duty. But all the authorities hold that there must, at the least, be a valid judgment and execution, authorizing the sale which the officer undertakes to make.

If what we have said proves anything, it is that the judgment and execution here in question did not empower the sheriff to proceed in any way against the general estate until the mortgaged property had been sold. When that had been done, the further power given was not to sell other property at once, but to make the money remaining unpaid out of such other property, "as in case of ordinary executions." Until the prescribed contingency had happened, the officer had no power to call upon the defendant for, nor to make, a levy, nor to give the notices of sale—in short, to do anything required to be done "in case of ordinary executions." His power was the same, and no more, than it would have been had an execution for the money then, for the first time, been put in his hands, and we presume it will not be contended that a sheriff has power to sell under an execution on the day of its receipt by him. No presumption could protect the purchaser in such case, because the want of power would appear from the face of the writ, and of this every one is required to take notice.

The principal arguments urged against the contention that the sale should be held void are based upon inconvenience. One is the danger that in extreme cases, before the sale of the mortgaged property could be made, the debtor might put his other property out of reach. The answer is that the process prescribed for foreclosure sales is not intended to meet unusual emergencies. For extraordinary cases extraordinary remedies are prescribed. It is to be understood that we are not holding that a mortgagee is bound to proceed for a foreclosure. Whether he may merely seek and obtain judgment for his debt, to be enforced by ordinary execution against the debtor's property indiscriminately, is a question not before us. What we do hold is that when he proceeds under article 1340, and obtains the judgment and order of sale there prescribed, he must proceed in accordance therewith. Neither he nor the officer nor the purchaser is at liberty to disregard one of the most fundamental principles concerning the powers of officers, which is that their powers are prescribed and limited in the process under which they act, and the law controlling its execution, and these powers cannot be enlarged to meet the wishes or necessities of any one. It is true that hardships and losses generally follow mistakes made by officers as to the extent of their powers in such matters, as they often do from other mistakes of law; but it is in the power of purchasers to determine from

the face of the process itself whether or not it authorizes that which is being done. Inconveniences of this kind are small when compared with those which would result from a loose construction of the processes prescribed by law, under which sheriffs are to act.

We hold that the sale was void, and that, upon the facts found, the plaintiffs were entitled to recover, but as an adjustment of equities may be proper, we will remand the cause in accordance with the established practice. *Smithwick v. Kelly*, 79 Tex. 564, 15 S. W. 486; *Wilkin v. Owens*, 102 Tex. 197, 114 S. W. 104, 115 S. W. 1174, 117 S. W. 425, 132 Am. St. Rep. 867.

Reversed and remanded.

DAVIS et al. v. GEORGE et al.

(Supreme Court of Texas. Feb. 15, 1911.)

1. EVIDENCE (§ 390*)—PAROL EVIDENCE—BOUNDARIES.

Where a deed described the land conveyed as beginning at the "northeast corner of G.'s 14 acres," parol evidence that the southeast corner instead of the northeast corner was meant was inadmissible, as the deed was plain and unambiguous.

[Ed. Note.—For other cases, see *Evidence*, Cent. Dig. §§ 1719-1728; Dec. Dig. § 390.*]

2. EVIDENCE (§ 390*)—PAROL EVIDENCE—INTENT.

A deed cannot be collaterally attacked by the parties to it, or their privies, by evidence tending to show an intent different from that which its language unmistakably expresses.

[Ed. Note.—For other cases, see *Evidence*, Cent. Dig. §§ 1719-1728; Dec. Dig. § 390.*]

3. EVIDENCE (§ 425*)—PAROL EVIDENCE.

Where the agreement between a prior grantor and grantee or their intention, as a mere fact, apart from the question as to the legal effect of the deed, were important to an inquiry in the case, the deed would not be the exclusive evidence of such agreement or intention; but when the question is, what land did the deed convey, its legal effect between the parties is the very best invoked, and it must therefore answer the inquiry by its own terms.

[Ed. Note.—For other cases, see *Evidence*, Cent. Dig. § 1862; Dec. Dig. § 425.*]

Certified Question from Court of Civil Appeals of First Supreme Judicial District.

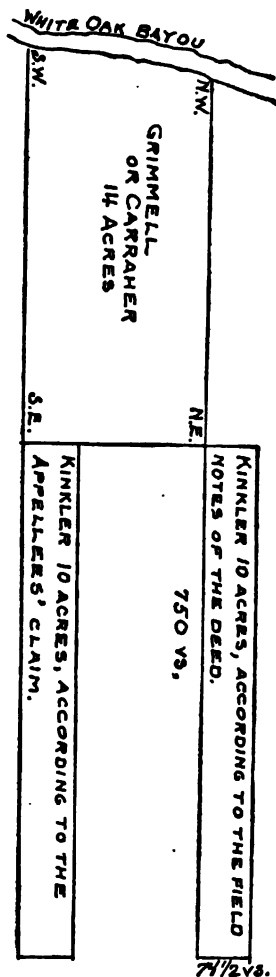
Action by A. P. George and others against J. O. Davis and others. On a certificate as to the admissibility of certain evidence in action for trespass to try title, the evidence was held inadmissible.

E. P. & Otis K. Hamblen, Burke & Tarver, D. F. Rowe, T. M. Kennerly, J. H. Davenport, and Brockman & Kahn, for appellants. D. R. Pearson and C. R. Wharton, for appellees.

WILLIAMS, J. A question as to the admissibility of certain evidence is certified by the Court of Civil Appeals for the First District, accompanied by a statement which shows the action to be one of trespass to

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

try title involving in the way to be stated below the title to the tract of 10 acres of land marked on the following plat "Kinkler 10 acres according to the field notes of the deed":



It appears from the certificate that prior to 1855 one Carl Grimmell owned the tract marked "Grimmell or Carraher 14 acres." In that year one Huddleston conveyed to Grimmell a tract of 50 acres described as follows: "Beginning at the northeast corner of the 14 acres (then owned by Grimmell); thence east 751 varas to a stake; thence north 293 varas; thence west 730 varas to the rim of a gully; thence down said gully to White Oak bayou; thence down White Oak bayou to the northwest corner of the 14 acres; thence east 408 varas to the beginning, containing 50 acres." It was asserted by appellees in the trial, and evidence was offered to show, that the call to begin at the "northeast" corner of the 14 acres was a mistake for the "southeast" corner; and it is stated in the certificate that, if the tract of 50 acres be thus located, it will include both tracts of 10 acres marked upon the map, while, if it be located in accord-

ance with the call in the deed, it will include of those tracts only that before referred to. The bearing of this upon the controversy will appear. In 1856 Grimmell conveyed to Jacob Kinkler 10 acres described as follows: "Beginning at the N. E. corner of Grimmell's 14 acres; thence east 750 varas to a stake; thence north 74½ varas to a stake; thence west 750 varas to a stake; thence south 74½ varas to the beginning." There is no dispute about the location of any line or corner of the tract of 14 acres. Appellees, who were plaintiffs below, claim the land covered by this last description as it is written under bond for title from Grimmell made in 1866 and deeds in accordance therewith from his surviving widow in 1867 conveying lands including such 10 acres, and assert that there was a mistake in the older deed to Kinkler, in that it, too, called for the "northeast" corner of the tract of 14 acres as the beginning when the "southeast" corner was meant. Upon this contention the 10 acres sold to Kinkler would be the tract marked "Kinkler 10 acres according to appellees' claim." The certificate states that the land is now in the suburbs of the city of Houston. In support of this contention, appellees, over the objection of appellants "that the deed referred to from Grimmell to Kinkler was the best evidence as to the location of said land; that the questions and answers thereto were immaterial and irrelevant; that the deed was the best evidence and especially as Grimmell never owned any land south of the northeast corner of the Carraher (Grimmell) 14 acres, and his deed to Kinkler describing the land beginning at the northeast corner of the Carraher (Grimmell) 14 acres running east and thence north and thence west and south to the beginning is plain and unambiguous, and covers land he owned at that time; and that the evidence already introduced shows that Grimmell owned the land that he described in the deed to Kinkler and did not own the land that the witness described; but that the same was owned by Mrs. McGowan"—were permitted to introduce evidence tending to show "that the 10 acres really sold and intended to be conveyed by Grimmell to Kinkler began at the southeast instead of the northeast corner of the 14 acres. * * * This testimony showed that Kinkler took possession of 10 acres so described and had always claimed this as the 10 acres conveyed, that he sold land off of this 10 acres, and his vendees had claimed and occupied the land so conveyed to them. Much evidence was introduced along this line, all showing the intention, as understood by the parties, that the Kinkler 10 acres was located beginning at the southeast corner of the 14-acre tract. The jury so found, and the sufficiency of the evidence to support such finding is not questioned on this appeal."

There is no pretense that these were the

pleadings or parties essential to an action for reformation of the deed. The question is: "Did the trial court err in overruling the objection of appellants, above stated, and admitting the evidence referred to?"

It is to be observed that the certificate does not state the issues that arose in the trial of the case nor the purposes for which the evidence was offered, if they were specified, further than may be inferred from the statement which we have condensed from the certificate. It may easily be conceived that questions might arise in the trial of such an action to the decision of which the evidence stated would be relevant and admissible; but we gather from the certificate that the purpose was to show that the deed from Grimmell to Kinkler did not convey the land subsequently conveyed by Grimmell and his widow to those under whom appellees claim, but conveyed the other tract. Assuming that to have been the purpose, we answer the question in the affirmative.

There seems to be no contention that the description belongs in any class in which parol evidence would be admissible in a controversy between the parties or their privies to aid a court in solving questions left in doubt by its terms. There is no conflict in its calls to justify the disregard of descriptive particulars which appear from the language itself, when considered together to have been mistakenly used, and the following of those which appear to be true, in order to identify the land intended. Nor does the effort to apply the description to the ground give rise to any sort of ambiguity to be removed by parol evidence showing the intention. Both on its face and in its application to the ground, the description is clear and unambiguous and identifies as the land conveyed the 10 acres in dispute. It is too well settled to admit of doubt that such a deed cannot be collaterally attacked by the parties to it or their privies, by evidence tending to show an intention different from that which its language unmistakably expresses.

But it is urged that the parol evidence rule applies only between the parties to the writing and their privies, and not between strangers to it nor between one of the parties and a stranger. That this is to a large extent true of that rule as it is generally expressed is well settled. It might be difficult by a generalization consistent with all the authorities to define the extent to which it is true, and we shall not attempt such a task. Wigmore on Evidence, § 2446. The facts of the case stated permit the illustration of a distinction which in our opinion correct principle makes it necessary to observe. If the agreement between Grimmell and Kinkler, or their intention, as a mere fact, apart from the question as to the legal effect of the deed, were important to any in-

quiry in the case, the deed would not be the exclusive evidence of such agreement or intention; but when the question is, what land did the deed convey, its legal effect between the parties is the very best invoked, and it must, therefore, answer the inquiry by its own terms, since no land was conveyed except by it, and it conveys no land except that which by its terms it undertook to convey. Parol evidence, whether brought by parties or strangers, cannot make it convey land which it does not purport to convey nor prevent it from conveying that which it does clearly purport to convey. Of the authorities cited by counsel for appellees, that which appears to come closest to sustaining their contention is an observation of Judge Roberts in *Hughes v. Sandal*, 25 Tex. 162. It is seldom that ever a dictum of that eminent jurist is found to be inaccurate or careless; but, if his remark should be taken as having the meaning ascribed to it by counsel, we should feel obliged to treat it only as an inaccurate dictum. The parol evidence admitted in that case was correctly held to be admissible under the rule as to latent ambiguities, and if the further reference to the inapplicability of the parol evidence rule to contests between strangers to the deed was intended to apply to a description in a deed in which there was no doubt or uncertainty, it was clearly a dictum; and if it meant that strangers can, by parol evidence, prevent such a deed from conveying land which it clearly undertakes to convey and make it convey land which it clearly does not undertake to convey, it was as clearly erroneous. *Watts v. Howard*, 77 Tex. 71, 13 S. W. 966; *Powers v. Minor*, 87 Tex. 88, 26 S. W. 1071; *Farley v. Deslonde*, 69 Tex. 461, 6 S. W. 786. The description before Judge Roberts was one which could not be applied to the land without the aid of parol evidence properly admitted, and we feel sure he did not mean to assert such a proposition as that just stated. If it were admitted that Grimmell intended to convey the lower 10 acres as contended by appellees, that intention could not effect such conveyance nor prevent the deed, unless corrected in some proper way, from standing as the legal conveyance of the land described in it. A contrary decision would virtually repeal the statutes regulating the conveyance of lands.

GALVESTON, H. & S. A. R. CO. et al. v. JONES.

(Supreme Court of Texas. Feb. 15, 1911.)

1. CARRIERS (§ 219*)—CONNECTING CARRIERS—LIABILITY.

To bring a contract for shipment of live stock over connecting lines within Rev. St. 1896, art. 331a, making connecting carriers jointly liable, where the second carrier acquiesces in the contract made by the initial car-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

rier, etc., the contract must be for through carriage, and the shipment must be received and carried by the connecting carrier under that contract, and hence, where there is no through contract, a receipt by the connecting carrier does not fix joint liability.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 950, 951; Dec. Dig. § 219.*]

2. APPEAL AND ERROR (§ 1084*)—REVIEW—UNIMPORTANT QUESTIONS.

Assignments of error to rulings of the Court of Civil Appeals not affecting the judgment appealed from will not be considered.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4280; Dec. Dig. § 1084.*]

3. CARRIERS (§ 219*)—LIVE STOCK—CONNECTING CARRIERS—DUTY OF INITIAL CARRIER.

An initial carrier of live stock need not permit its cars to go over the connecting line, in the absence of special contract therefor, and is not liable for damage resulting from the unloading at the end of its line in the absence of negligence.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 950, 951; Dec. Dig. § 219.*]

4. CARRIERS (§ 219*)—LIVE STOCK—CONNECTING CARRIERS—LIABILITY.

The initial carrier under an intrastate live stock shipment contract can limit its liability to damage accruing on its own line and in delivering the shipment to the connecting carrier.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 950, 951; Dec. Dig. § 219.*]

5. CARRIERS (§ 229*)—LIVE STOCK—DAMAGES—MEASURE.

The measure of damages for live stock killed in transit is their "market," and not "reasonable," value.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 930, 963, 964; Dec. Dig. § 229.*]

6. APPEAL AND ERROR (§ 1064*)—HARMLESS ERROR—INSTRUCTIONS.

Error in authorizing recovery of "reasonable," instead of "market," value of live stock killed in transit was harmless, where the evidence was restricted to market value.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4221-4224; Dec. Dig. § 1064.*]

7. CARRIERS (§ 213*)—LIVE STOCK—DELAY—DEFENSES.

Under Rev. St. 1895, art. 326, requiring carriers to feed and water stock, if exercise of ordinary care required stock to be unloaded, fed, watered and rested, the carrier was not liable for damages resulting from any reasonable incidental delay.

[Ed. Note.—For other cases, see Carriers, Dec. Dig. § 213.*]

8. CARRIERS (§ 219*)—LIVE STOCK—CONNECTING CARRIERS—DELIVERY.

An initial carrier of live stock need not load it on the connecting carrier's cars, delivery to the latter being sufficient.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 950, 951; Dec. Dig. § 219.*]

9. TRIAL (§ 252*)—UNSUPPORTED INSTRUCTIONS—REFUSAL PROPER.

An instruction on a live stock shipper's duty to minimize damages resulting from a delay in delivery was properly refused where the evidence did not tend to show negligence in managing the stock after their arrival.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 396-612; Dec. Dig. § 252.*]

Error to Court of Civil Appeals, Fourth Supreme Judicial District.

Action by T. B. Jones against the Galveston, Harrisburg & San Antonio Railroad Company and another. From a judgment of the Court of Civil Appeals (123 S. W. 737) affirming a judgment for plaintiff, defendants bring error. Reversed and remanded.

Baker, Botts, Parker & Garwood, W. B. Teagarden, and Boggess & Davidson, for plaintiff in error Galveston, H. & S. A. R. Co. Claude Pollard and R. J. McMillan, for plaintiff in error St. Louis, B. & M. Ry. Co. J. J. Foster, for defendant in error.

BROWN, C. J. Jones entered into a verbal contract with the agent of the St. Louis, Brownsville & Mexico Railway Company to transport 1,400 head of steer cattle from Caesar, Tex., a station on the said railroad, to Placedo, at which place it connected with the Galveston, Harrisburg & San Antonio Railroad Company, there to deliver the cattle to the last-named company to be by it transported to Standart, in Kinney county. By the terms of the parol contract the cattle were to be shipped through in the same cars. At Robstown, a station on the St. Louis, Brownsville & Mexico Railway Company between Caesar and Placedo, an agent of that road entered into a written contract with Jones, which we find in the record, by which the said railroad company undertook to transport the cattle to Placedo, the end of its line, there to be delivered to the Galveston, Harrisburg & San Antonio Railroad Company over which the stock were waybilled to Standart. The contract provided that the St. Louis, Brownsville & Mexico Railway Company should guarantee the rate of freight and also provided that neither carrier should be liable for injuries or damages incurred beyond its own line. The cattle were transported by the first-named company to Placedo and there tendered to the Galveston, Harrisburg & San Antonio Railroad Company in the cars as loaded, upon condition that the latter company would furnish to the first company a like number of stock cars to be used until the return of the cars in which the cattle were shipped. The second carrier was ready to accept the cattle in the cars, but declined to furnish cars to the St. Louis, Brownsville & Mexico Railway Company. After considerable delay the cattle were unloaded from the cars of the first company and were reloaded in the cars of the Galveston, Harrisburg & San Antonio Railroad Company. The Court of Civil Appeals finds that the second company recognized the contract made by Jones with the first company. The cattle were injured by the unloading and reloading at Placedo, and probably this treatment may have caused them to suffer injury between that place and the final destination. The Galveston, Harrisburg & San Antonio Railroad Company carried the cat-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

tie in one train to San Antonio where it unloaded and fed them, and gave them water and rest. Then it carried them to the place of destination in separate trains in which there were other cars than those loaded with the stock. The court finds that the injury occurred in the unloading and handling the cattle at Placedo and in the transportation from Placedo to Standart.

The Court of Civil Appeals held that the contract of shipment made between the defendant in error and the St. Louis, Brownsville & Mexico Railway Company constituted a through shipment from Caesar on the road of the said company to Standart over the line of the Galveston, Harrisburg & San Antonio Railroad Company, and that the latter road acted upon and recognized said contract, therefore, that the case comes within the terms of article 331a, Rev. St. 1895: "All common carriers over whose transportation lines, or parts thereof, any freight, baggage or other property received by either of such carriers for through shipment or transportation by such carriers between points in this state on a contract for through carriage recognized, acquiesced in or acted upon by such carriers shall, in this state, with respect to the undertaking and matter of such transportation, be considered and construed to be connecting lines, and be deemed and held to be the agents of each other, each the agent of the others, and all the others the agents of each, and shall be deemed and held to be under a contract with each other and with the shipper, owner and consignee of such property for the safe and speedy through transportation thereof from point of shipment to destination; and such contract as to the shipper, owner or consignee of such property shall be deemed and held to be the contract of each of such common carriers; and in any of the courts of this state any through bill of lading, waybill, receipt, check or other instrument issued by either of such carriers, or other proof showing that either, of them has received such freight, baggage or other property for such through shipment or transportation, shall constitute prima facie evidence of the subsistence of the relations, duties, and liabilities of such carrier as herein defined and prescribed, notwithstanding any stipulations or attempted stipulations to the contrary by such carriers, or either of them."

Upon its face the contract of shipment expresses the agreement to be that the first company is to transport the cattle to the end of its line at Placedo and there to deliver the same to the Galveston, Harrisburg & San Antonio Railroad Company, limiting the liability of each company to damages arising upon its own line. To bring a contract of this character within the terms of article 331a, the contract entered into by the first carrier must be for carriage from the point of shipment to the destination, and the shipment must be received and carried by the

connecting carriers under that contract. There being in this case no contract for through shipment, the fact that the second company received and transported the cattle is not sufficient to create the joint liability declared by article 331a, and the Court of Civil Appeals erred in so holding. In order to bind the second or subsequent companies jointly with the first, or with any of the other companies, there must be something more than receiving and transporting the goods, or property, because the law requires the carrier to so receive and transport such freight when tendered to it. *Ft. Worth & D. C. R. R. Co. v. Williams*, 77 Tex. 125, 13 S. W. 637.

The Court of Civil Appeals erred in its construction of article 331a and its application of that provision of the statute to the contract in this case, but the error is unimportant because the trial court instructed the jury that the railroad companies were each liable only for the damages which accrued upon its own line. As the judgment must be reversed and the cause remanded for another trial, we deem it proper to correct the error of the Court of Civil Appeals so that it may not mislead the trial court.

The second, third, fourth, and sixth assignments of error relate to rulings of the Court of Civil Appeals which did not in any way affect the judgment of the district court, therefore, they are unimportant in this investigation and will not be considered.

The St. Louis, Brownsville & Mexico Railway Company assigns as error the giving by the trial court of the following instruction: "You are charged that railway companies are not required by law to permit their cars loaded with cattle to go beyond the termini of their own lines, unless the refusal to do so would probably result in damage to the cattle; and in this connection you are charged that if the delay at Placedo was caused by the refusal of the defendant St. Louis, Brownsville & Mexico Railway Company, to permit its cars, loaded with the cattle in question, to go onto the line of the defendant Galveston, Harrisburg & San Antonio Railway Company, and the subsequent transfer of said cattle at Placedo to other cars caused said cattle to be injured—if they were injured—and you further find that the unloading and reloading of said cattle at Placedo was negligence, as negligence is heretofore defined, you are charged that said defendant St. Louis, Brownsville & Mexico Railway Company would be liable to plaintiff in damages for such injury, if any, to the cattle, occasioned by the delay in making said transfer at Placedo, under the instructions which have already been given you." The charge correctly tells the jury that the railroad company was not bound to permit its cars to go onto the line of the second company, but erroneously qualified the charge thus: "Unless the refusal to do so would probably result in damage to the cattle." It

being lawful for the railroad company to refuse to deliver its cars to the connecting line, it must necessarily have been lawful also for it to unload the cattle from its cars at the end of its line, therefore, if the act of unloading, itself, might cause injury, the railroad company would not be responsible for such injury as arose out of the performance of the lawful act. *G., C. & S. F. Ry. Co. v. State* (Tex. Civ. App.) 120 S. W. 1028. If, however, the act of unloading was done at an improper time, or in an improper manner, or was unnecessarily delayed, then the company might be liable, not for unloading the cattle, but for the negligent manner in which the act was done. The giving of this charge was error against the St. Louis, Brownsville & Mexico Railway Company upon a material point, and perhaps may have seriously affected the verdict of the jury against it in the amount of damages assessed.

There are a number of assignments made by this company upon the opinion of the Court of Civil Appeals on questions which cannot possibly have affected the judgment, therefore they will not be reviewed at this time.

The said railroad company also assigns as error the refusal of the court to give this charge to the jury: "You are instructed that the defendant St. Louis, Brownsville & Mexico Railway Company is a common carrier, and as such may limit its liability to damages occurring on its own line, and cannot be required to furnish cars to go beyond its own line, in the absence of a contract so requiring same. If you find that the contract of shipment in question limits the defendant's liability to damages occurring upon its own line, then in arriving at the amount of damages, if any, sustained by plaintiff, you are to look only to such damages as may be shown to have occurred upon defendant's own line of road, and damages, if any, sustained in transferring said cattle to connecting carriers; and if you further find that no damages, such as alleged by plaintiff, occurred upon this defendant's line of road, or in transferring said cattle to connecting carriers, you will find your verdict in favor of this defendant."

The charge refused presented a correct statement of the law applicable to the facts of this case, and we are of the opinion that it should have been given as a guide to the jury in determining what damages, if any, would be properly chargeable to that railroad company.

The trial court charged the jury that "the reasonable value at Standart, Texas, of such cattle as were so killed, or died, if any, in consequence of the negligent delays, if any, at the time they should have arrived there and in the condition they should have been in on arrival but for such negligent delays, if any," would constitute the standard by which they were to determine the amount

for which the railroad company would be liable, and also charged the jury, in effect, that the difference between the value of the cattle which were injured and did not die, in the condition in which they were on arrival at Standart and what their value would have been if they had been delivered in proper condition would constitute the measure of damages in favor of the plaintiff. The complaint made against the charge is that it uses the word "reasonable," instead of "market," value. The market value is the proper standard by which to measure such damages and the charge should so state to the jury, but in this case we find that the witnesses all testified that they knew the market value of the cattle and testified as to what the market value would have been, so there was no injury to the plaintiff by this error.

The other assignments of error presented by the St. Louis, Brownsville & Mexico Railway Company are unimportant, and therefore will not be further considered. As to that company the judgment must be reversed and the cause remanded.

The Galveston, Harrisburg & San Antonio Railroad Company presents an application containing 95 pages of printed matter and 17 assignments of error, many of which we do not think important, as they relate to questions which probably will not arise on another trial.

The charge of the court guarded this company against liability for injuries resulting from the negligence of the other companies, limiting the liability of the Galveston, Harrisburg & San Antonio Railroad Company to delays which occurred after the cattle were delivered to it at Placedo. The court's charge submitted in general terms the question of unreasonable delay in transporting the cattle from Placedo to Standart. The plaintiff's petition alleges only delay at Placedo and San Antonio, and, in general terms, that such delay was negligent and unnecessary. This company requested the court to give to the jury the following charge: "You are further charged, gentlemen of the jury, that the law requires a railroad company that is transporting cattle, to unload and rest and feed and water them en route, whenever this is reasonably necessary, and in computing any delay in transportation, such reasonable time as is so consumed, and the damage proximately flowing therefrom, cannot be charged against such carrier. Applying this rule of law to the facts in this case, you are charged that if, when the cattle reached San Antonio, they were tired, famished, and needed rest, food, and water; or, if the time was up, or about up, within which they should have been fed and watered and rested, then it was the duty of defendant Galveston, Harrisburg & San Antonio Railroad Company to unload and feed and water and rest the cattle there, and they

are not liable for any loss or damage resulting from the delay so occasioned, nor would they be liable for the fatigue or hardships of the cattle, if any, which was necessarily incident to the prudent unloading of the cattle at that point, and if, by reason of such delay and such fatigue of the cattle, if any, as was necessarily occasioned by the stopping to rest, feed and water, and the loading and unloading with reasonable care, as above stated, of the cattle at San Antonio, they were less able to stand up and be carried forward to Standart, and if the cattle suffered injury or damage as a direct and proximate result of this condition, so caused as aforesaid, the Galveston, Harrisburg & San Antonio Railroad Company would not be liable therefor. Refused. W. C. Douglas, Judge."

Article 326 of the Revised Statutes of 1895 reads: "It shall be the duty of a common carrier who conveys live stock of any kind to feed and water the same during the time of conveyance and until the same is delivered to the consignee or disposed of as provided in this title, unless otherwise provided by special contract, and any carrier who shall fail to so feed and water said live stock sufficiently shall be liable to the party injured for his damages, and shall be liable also to a penalty of not less than five nor more than five hundred dollars, to be recovered by the owner of such live stock in any court having jurisdiction in any county where the wrong is done or where the common carrier resides."

As the charge of the court submitted the issue of negligent and unreasonable delay on the road of this company between Placedo and Standart, and there being in the petition no charge of delay on this road except at San Antonio, it is evident that the question of liability must have depended principally, if not entirely, upon the stop made by the company at San Antonio for the purpose of watering, feeding, and resting the cattle. The evidence was sufficient to call for this charge. It was shown that the cattle had been delayed at Placedo in the cars of the St. Louis, Brownsville & Mexico Railway Company for seven hours and from the time of their being loaded had been upon the cars without food, water, or rest about 28 hours when they reached San Antonio. The evidence, we believe, is undisputed that the cattle were in need of water, feed, and rest when the train arrived at the latter place. It therefore became important to the Galveston, Harrisburg & San Antonio Railroad Company that the jury should be instructed properly with regard to its duty under those conditions.

The statute is so plain that there can be no need for argument to apply its terms to the facts of this case. If the railroad company had not stopped the cattle for food, water, and rest in their condition, it would

have been liable to the plaintiff for injuries arising from such failure and also to a penalty not exceeding \$500 to be recovered by the plaintiff. Then, under the instruction of the court and the allegations of the petition, the jury were authorized to understand that there was an issue as to whether the delay at San Antonio was unreasonable. On this issue it was necessary for the jury to be informed as to the duty of the railroad company under the statute. If they believed from the evidence that the condition of the cattle when they arrived at San Antonio was such as to require, in the exercise of ordinary care, that they should be unloaded, fed, and watered; and also given rest, then the railroad company was not liable for any damage which may have been caused by such delay, either directly or incidentally, unless the delay was itself unreasonable for some reason or the cattle were improperly handled. Such facts might constitute a complete defense against the charge of the petition that the delay at San Antonio had caused the injury for which this defendant could be held liable.

The Galveston, Harrisburg & San Antonio Railroad Company requested the court to give to the jury this charge: "You are further charged, gentlemen, that it was the duty of the St. Louis, Brownsville & Mexico Railway Company to make the transfer of the cattle at Placedo—that is, to unload and reload the cattle, and deliver them to the Galveston, Harrisburg & San Antonio Railroad Company, loaded in its cars; and the Galveston, Harrisburg & San Antonio Railroad Company is not, in law, chargeable with any delay, or the direct and proximate result of any delay occasioned by said transfer. Refused." We are of the opinion that the charge was properly refused, for the reason that it expresses the duty of the connecting line to be that it load the cattle upon the cars of the Galveston, Harrisburg & San Antonio Railroad Company. Delivery to the latter road by the initial carrier was all that the law required, but this is unimportant for it does not appear that any such demand was made and this company participated in the act of unloading and reloading the cattle.

This railroad company asked the court to give a charge to the jury with regard to the duty of the plaintiff to use ordinary care to prevent any injury which might result after the cattle were delivered to him from the delay which had occurred in the transportation. It is unnecessary for us to discuss this view of the case, because the evidence is not sufficient to charge the plaintiff with negligence in the management of the cattle after he received them from the railroad company.

For the errors which we have pointed out, the judgments of the district court and the Court of Civil Appeals are reversed as

against both of the railroad companies, plaintiffs in error, and remanded to the district court for another trial.

SHARP v. STATE.

(Court of Criminal Appeals of Texas. Nov. 30, 1910. On Motion for Rehearing, Feb. 22, 1911.)

1. SEDUCTION (§ 50*) — EVIDENCE — INSTRUCTIONS.

Where, on a trial for seduction, two witnesses testified that they had been criminally intimate with prosecutrix on several occasions prior to the intercourse between accused and prosecutrix, the refusal to charge that though prosecutrix yielded to accused under a promise of marriage, yet if before the promise of marriage, she had had criminal intercourse with other persons, accused must be acquitted, was reversible error.

[Ed. Note.—For other cases, see Seduction, Cent. Dig. §§ 80-92; Dec. Dig. § 50.*]

On Motion for Rehearing.

2. CRIMINAL LAW (§ 1144*) — APPEAL — INSTRUCTIONS.

Where the trial court testified positively that he gave a charge that was lost, and not copied in the transcript, and one or two witnesses corroborated him, and the foreman of the jury testified that he had no recollection of the giving of such a charge, the court on appeal would assume that the charge had been given so that the conviction would not be set aside on the ground that the charge had not been given.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 3032; Dec. Dig. § 1144.*]

3. CRIMINAL LAW (§ 594*) — CONTINUANCE — GROUNDS—ABSENCE OF WITNESSES.

Refusal to grant a first continuance on the ground of the absence of a witness who would testify to a material fact in defense was erroneous.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1321, 1322, 1332; Dec. Dig. § 594.*]

4. CRIMINAL LAW (§ 695*) — EVIDENCE—ADMISSIBILITY.

It is not error to permit proof of the reputation of witnesses at the time of the trial as against an objection going only to the weight of the evidence.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1633-1638; Dec. Dig. § 695.*]

Appeal from District Court, Delta County; R. L. Porter, Judge.

Scott Sharp was convicted of crime, and he appeals. Reversed and remanded.

Patteson & Patteson, Lennox & Lennox, and Moore & Park, for appellant. John A. Mobley, Asst. Atty. Gen., for the State.

MCCORD, J. Appellant was convicted of seduction, and awarded a term of five years' confinement in the penitentiary. Numerous questions are presented in the record, but as they are not likely to occur upon another trial, it is unnecessary to mention them.

In the trial of the case two witnesses testified, to wit, Sam Sinclair and Rich Akard, that each had intercourse with prosecutrix

on several occasions, and at a time anterior to the intercourse between the defendant and prosecutrix. The court in its charge to the jury omitted to instruct them upon this issue, but simply directed the jury that if they believed that the prosecutrix was under 25 years of age, and defendant had intercourse with her, and the same was under a promise of marriage, and she yielded her virtue in consideration of that promise, he would be guilty of the offense. The court instructed the jury that "seduction" means to lead an unmarried female under the age of 25 years away from the path of virtue, to entice or persuade her by means of a promise of marriage to surrender her chastity, and nowhere in the charge did he instruct the jury that if at the time she had intercourse with the defendant under a promise of marriage she was an unchaste woman, and had surrendered her person to other men, the defendant could not be guilty. Appellant requested the court to charge the jury that though they might believe that prosecutrix yielded to the defendant under a promise of marriage and that he had intercourse with her, yet if they believe from the evidence that before such promise of marriage, if any, the prosecutrix had had carnal intercourse with some other person or persons, then it would be their duty to acquit. This charge was refused. The facts of the case call for such a charge, and it was error for the court to fail to thus instruct the jury, for if she was not a chaste woman and had before that time had intercourse with other men, she would not be the subject of "seduction" as that term is known to the law. See *Vantrees v. State*, 128 S. W. 383.

For the error indicated, the judgment is reversed and the cause is remanded.

On Motion for Rehearing.

HARPER, J. At a former day of this term the court reversed and remanded this cause, the opinion being by Judge McCORD, on the ground that appellant requested the court to charge the jury that though they might believe that prosecutrix yielded to defendant under a promise of marriage, if the prosecutrix had had carnal intercourse with some other person or persons, then it would be their duty to acquit, and the court had refused said special charge.

The state filed a motion for a rehearing, alleging that defendant had requested two special instructions on that phase of the case, and the court had given charge No. 3 requested by defendant, but same had been lost and not copied in the transcript. The charge alleged to have been given fully covers the point on which the case was reversed, and upon a hearing, the court trying the cause substituted the charge. The trial court testifies he gave the charge as substituted.

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

in substance, at defendant's request, as do one or two other witnesses. The foreman of the jury testifies he has no recollection of such charge having been given. If this was the only error complained of in the case, we would have no hesitancy in granting the motion for rehearing and affirming the case, as the recollection of the trial judge is clear about the matter, but in the record we find defendant's first application for a continuance. It appears that defendant was indicted on June 9th and was arrested on June 10th, and his case called for trial on June 14th, the fourth day after he was arrested. On June 14th he filed an application for continuance on account of the absence of the witness John Tarply, whose home is alleged to be in Delta county, but who was temporarily in Oklahoma. Appellant states that he was arrested on the 10th day of June; "that on the 11th day of June, 1910, he applied for and caused to be issued a subpoena for his witnesses, among others for the witness John Tarply; that said subpoena, with the return of the officer thereon, is here referred to and made a part of this application; that by the said return the said witness, John Tarply, was not served, the return as to him stating that he is out of the county. Applicant stated that for many years the said witness has resided in Delta county, and that until a few days ago applicant still believed that he was in said county, but was informed for the first time about two or three days ago that he was somewhere in the state of Oklahoma, the exact location he did not learn; that he has not been able to ascertain definitely the location of said witness, so as to apply for a commission to take the deposition of the said witness. Applicant states that as soon as the indictment was returned he began to prepare for his defense, and has used due diligence to secure the attendance of his witnesses, and has used due diligence to locate the said witness. Applicant stated that he expects to prove by said witness that prior to October 1 and October 10, 1909, that the said John Tarply had carnal intercourse with the prosecuting witness, Maud West; that he is informed, and so states, that Maud West will testify that she and defendant became engaged to marry each other about the 1st day of October, A. D. 1909, and that defendant by virtue of his promise of marriage, had carnal intercourse with her on the 10th day of October, A. D. 1909." The application contained the other allegations essential to a motion for a first continuance. If the witness would testify to the fact alleged, and the jury believe him, this would be a defense to the charge contained in the indictment, and we think the court erred in not granting the application under the facts in this case. *Kelly v. State*, 33 Tex. Cr. R.

31, 24 S. W. 295; *De Warren v. State*, 29 Tex. 464; *Hyden v. State*, 31 Tex. Cr. R. 401, 20 S. W. 764; *McAdams v. State*, 24 Tex. App. 86, 5 S. W. 826; *Perez v. State*, 48 Tex. Cr. R. 225, 87 S. W. 350.

The court did not err in overruling the motion to quash the indictment, and we do not think there was any error in permitting the reputation of the witnesses at the time of the trial to be proven; the facts relied on to exclude this testimony might go to its weight, but not to its admissibility.

For the error pointed out, the motion for rehearing is overruled.

Ex parte ROPER.

(Court of Criminal Appeals of Texas. Dec. 7, 1910. On Motion for Rehearing, Feb. 8, 1911.)

1. INTOXICATING LIQUORS (§ 269*)—JURISDICTION—INJUNCTION.

The district court has jurisdiction to issue an injunction to restrain a druggist, licensed to sell liquor on prescription, from selling liquor in violation of law.

[Ed. Note.—For other cases, see *Intoxicating Liquors*, Cent. Dig. § 406; Dec. Dig. § 269.*]

2. INTOXICATING LIQUORS (§ 278*)—INJUNCTION.

An injunction restraining a druggist licensed to sell liquor on prescription is not void because it restrains him from selling on prescriptions in accordance with law, as well as without prescriptions in violation of law; the remedy being by motion for its modification.

[Ed. Note.—For other cases, see *Intoxicating Liquors*, Cent. Dig. § 413; Dec. Dig. § 278.*]

3. INJUNCTION (§ 158*)—PRELIMINARY INJUNCTION—VALIDITY.

A preliminary injunction once granted continues in force until the matter is finally heard and determined, in the absence of a motion to dissolve the same, or any acts of the court in respect thereto.

[Ed. Note.—For other cases, see *Injunction*, Cent. Dig. § 341; Dec. Dig. § 158.*]

4. MANDAMUS (§ 31*)—REFUSAL OF COURT TO PROCEED WITH CASE AFTER GRANTING PRELIMINARY INJUNCTION—REMEDY.

Where the court granting a preliminary injunction deliberately refuses to proceed with the case on a proper showing, the party enjoined may by mandamus compel a hearing of the case.

[Ed. Note.—For other cases, see *Mandamus*, Cent. Dig. §§ 74, 75; Dec. Dig. § 31.*]

5. INJUNCTION (§ 230*)—PRELIMINARY INJUNCTION—VALIDITY.

A preliminary injunction remains in force, though terms of court have intervened after its issuance, where there has been no trial, nor any order issued in reference thereto, and, where the party enjoined has never demanded a hearing on the merits, he may not urge in defense of contempt proceedings that he had not been given a speedy trial.

[Ed. Note.—For other cases, see *Injunction*, Cent. Dig. §§ 502-516; Dec. Dig. § 230.*]

6. CONSTITUTIONAL LAW (§ 191*)—EX POST FACTO LAW.

Laws which affect the remedy or procedure merely are not within the scope of the constitutional inhibition against retroactive laws, unless the remedy is entirely taken away, or is so

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incumbered with conditions as to render it useless or impracticable.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. § 534; Dec. Dig. § 191.*]

7. CONSTITUTIONAL LAW (§ 191*)—EX POST FACTO LAW.

The act of 1907, authorizing injunctions to restrain the sale of liquor within any county wherein the sale of liquor has been prohibited by law, is not invalid as an ex post facto law, when applied to a county which had previously adopted prohibition under the local option law, because the statute merely affects the remedy in aid of the local option law without imposing any additional penalty.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. § 534; Dec. Dig. § 191.*]

8. JURY (§ 31*)—TRIAL BY JURY—STATUTES.

The act of 1907, authorizing injunctions restraining persons from selling intoxicating liquors within any county wherein the sale of intoxicating liquor has been prohibited by law, is not invalid as denying the right of trial by jury, because the matter inquired into in proceedings for contempt for violating an injunction relates merely to a violation of the injunction, and not to a violation of the local option law.

[Ed. Note.—For other cases, see Jury, Cent. Dig. §§ 204-219; Dec. Dig. § 31.*]

9. CRIMINAL LAW (§ 162*)—FORMER JEOPARDY—INJUNCTION—VIOLATION.

One committing an act which he is enjoined from committing, and which is a violation of a penal law, may be punished for contempt for violating the injunction, and punished for a violation of the criminal law, and the act of 1907, authorizing injunctions restraining the sale of liquor within counties wherein the sale of liquor has been prohibited, is not invalid as imposing an additional punishment for a violation of the local option law.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 285; Dec. Dig. § 162.*]

On Motion for Rehearing.

10. HABEAS CORPUS (§ 85*)—INJUNCTION—VIOLATION.

Where, in proceedings for contempt for violating an injunction restraining unlawful sale of liquor, the evidence showed that accused, who testified that the business belonged to his minor son, had leased the premises and had obtained in his name the licenses required by law, a finding that he was connected with the business and was liable for a sale in violation of the injunction will not be disturbed on habeas corpus.

[Ed. Note.—For other cases, see Habeas Corpus, Dec. Dig. § 85.*]

Davidson, P. J., dissenting.

Original application for writ of habeas corpus by Ward Roper for his discharge from custody under a commitment issued in contempt proceedings against him. Relator remanded to custody.

Odell & Johnson, for appellant. John A. Mobley, Asst. Atty. Gen., for the State.

RAMSEY, J. On October 29th of this year an application for writ of habeas corpus was presented to Judge McCORD of this court, was by him granted, and the case set down for submission before the full bench on November 9th of the present year.

The application is based on a number of

grounds, all of which will be hereafter noticed. It appears in the record: That about the 17th day of December, 1909, the county attorney of Johnson county made application to Hon. O. L. Lockett, judge of the Eighteenth judicial district, alleging, in substance, that Ward Roper and R. B. Roper, who are alleged to be partners, had made application, through relator, Ward Roper, to secure a license to engage in the sale of liquor on prescription. At this time local option was in effect in Johnson county, and had been for some years. That subsequent to this and a short time before the filing of the petition for injunction relator had violated the provisions of said license, and had made sales of whisky to certain persons named in the petition. After setting all of these matters out in great detail, the petition contains the following averment: "Plaintiff would further aver that R. B. Roper and Ward Roper, doing business as druggists in the place above mentioned, have under the pretense of selling and dispensing intoxicating liquors on a prescription in said Johnson county, Tex., where the unlawful sale of intoxicating liquors has been prohibited by law since the 19th day of June, 1904, and up to the filing of this petition, sold said intoxicating liquors in violation of the law, as above mentioned, and have thereby become the creators and promoters of a common and public nuisance that ought and should be abated." The petition prays, therefore, for a writ of injunction to issue restraining relator and R. B. Roper, or either of them, their agents, servants, employés, and assigns from selling or permitting to be sold, or kept for the purpose of unlawful sale, any intoxicating liquors in their said place of business situated in Cleburne, Johnson county, Tex., as above mentioned, and from creating and promoting a common and public nuisance at their place of business. In his fiat indorsed on said petition on the 17th day of December the district judge directed the issuance of a writ of injunction as prayed for. The injunction, which was in fact issued, goes rather beyond the terms of the petition, and is to this effect: "You, your agents, and employés, are hereby commanded to restrain and desist from in any manner or way selling intoxicating liquors in any place in Johnson county, Tex., and from establishing, maintaining, or conducting in any place in said county where intoxicating liquors are sold, stored, kept, or drank, and from permitting the same to be sold, stored, kept, or drank in any place controlled by you, your agents in said county, until the further order of said district court." In the answer of relator, which included a number of matters as grounds of resisting the attempted imprisonment, it is alleged as a matter of fact by relator Ward Roper that he had no financial

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

interest in the business which he says was conducted by his son R. B. Roper. He admits in this answer that he had obtained the license from the state, as well as the federal license, on account of the fact that his son, R. B. Roper, was then a minor, and presumably unable to obtain same, and that he took it out for his son. It is shown further in the testimony of relator that he rented the building in which was conducted the business, but claims that this was for his son. The answer was not sworn to. The petition charges a partnership between R. B. Roper and Ward Roper. In the absence of any denial of partnership, the court is authorized to assume its existence. Besides if such inquiry could be permitted, there is evidence in the record sufficient to show relator's connection with the business. On hearing, the court found relator guilty of a violation of the injunction, and assessed a fine against him of \$100, and adjudged that he be confined in the county jail for two days.

1. Among other grounds of relief, it is urged that the district court has no authority to issue an injunction under conditions as disclosed in this record, for the reason that, in substance, it is an attempt to prevent the commission of crime by an injunction, and that this is not permitted or sanctioned by law. Almost this precise question came before this court in the case of *Ex parte Allison*, 48 Tex. Cr. R. 634, 90 S. W. 492, 3 L. R. A. (N. S.) 622. The injunction in that case was issued by Hon. O. L. Lockett, restraining Allison from the use of certain premises as a gaming house. Passing on this question, Judge Henderson, speaking for the court, says: "It is urgently insisted by relator that the injunction granted was without authority of law, because it was an attempt on the part of the court to enjoin the commission of a criminal offense. This contention may be conceded as a general proposition. *State v. Patterson*, 14 Tex. Civ. App. 465, 37 S. W. 478; *Ex parte Warfield*, 40 Tex. Cr. R. 413 [50 S. W. 933, 76 Am. St. Rep. 724]. However, the respondent insists that the grant of the injunction in this case was not an attempt to enjoin the commission of a criminal offense, but was an injunction granted against the use of property, the using thereof constituting it a nuisance, and, furthermore, respondent urges that notwithstanding, under the English system of equity jurisprudence, which has come down to us, that courts will not enjoin the commission of crime as crime, yet it is entirely competent for the Legislature to create other matters the subject of equitable cognizance than those recognized under the general system of equity. With regard to the first proposition, we believe it will be conceded that, where property rights are involved, courts will issue injunctions notwithstanding it may embrace a crime; or, if it should not be so conceded, we believe on principle and authority that this proposition cannot be gainsaid. It

will be noted that the act in question is aimed at the restraining of persons from using certain premises or buildings for the purpose of gaming, or of keeping or exhibiting games prohibited by the laws of this state; and does not seek to punish such persons for so using said premises or buildings. As was said in *Warfield's Case*, 40 Tex. Cr. R. 413, 50 S. W. 933, 76 Am. St. Rep. 724: 'An injunction is a mere restraining order, and it will be presumed that the party against whom it is granted will obey it as long as it continues in force; otherwise, as the issuance of the writ is a proper exercise of equity, he will move to dissolve it. A gambling house, under our statute and as recognized by our courts, is a nuisance, and even at common law, as we understand it, such a nuisance could be enjoined at the instance of any one who was injured thereby. Our statute enlarges this right, and assumes that any person within the jurisdiction is injured, and that he can make complaint, and have the restraining order issued. *State v. Patterson*, supra, relied on by relator, recognizes the rule that a gambling house is a nuisance, and can be abated, and that the writ will lie when property or civil rights are involved and some irreparable injury to such rights is threatened or about to be committed for which no adequate remedy exists at law.' It is said further: 'The injury threatened to such rights may, if committed, constitute a crime and subject its perpetrator to punishment under the criminal law, yet, as his punishment would furnish him whose property or civil rights had been irreparably injured by the acts constituting the offense no compensation for such injury, courts of equity will interfere to prevent such an injury, notwithstanding the commission would constitute a criminal offense, not because it would be a crime, but because the injury to such rights would be irreparable. It cannot be said that such interference by a court of equity is an invasion into the domain of criminal law, for no crime has been committed where equity interposes its arm for the protection of property or civil rights. In extending such protection, it may prevent a crime; but, as no one has a right to commit crime, no one should be heard to complain that he is restrained from its commission, when such restraint has been exercised in the jurisdiction of a court for the purpose of preventing him from irreparably injuring another in his property or civil rights.' The court in that case even recognizes the right of the state through her proper officers to enjoin a public nuisance, but that the state must show in such case that the nuisance is an injury to the property or civil rights of the public at large. It was there held that the state did not show such injury to property or civil rights of the public, and an injunction would not lie. This case was decided before the act of the Legislature upon which the injunction at bar was granted was passed. The act in question was

evidently passed to meet the defects pointed out by the court. Here it is provided that such injunction may issue at the instance of any citizen of the state who is authorized to sue in his own name, and that such person shall not be required to show that he is personally injured by the acts complained of. Now, if the Legislature was lawfully authorized to make the provisions in the law, as above pointed out, no one can question the legality of the writ of injunction; and it lies with those challenging the power of the Legislature to point out that provision of the Constitution inhibiting the Legislature from passing such an act. And see *Carleton v. Rugg*, 149 Mass. 550, 22 N. E. 55, 5 L. R. A. 193, 14 Am. St. Rep. 446, and, for authorities, 11 Amer. & Eng. Ency. of Law, pp. 195-197. It must be presumed that the Legislature recognized that the use of such property for gaming purposes was injurious to the public welfare and morals of the community, and under its police power it had the right to enjoin such use." Later this same case came before our Supreme Court. See *Ex parte Allison*, 99 Tex. 455, 90 S. W. 870, 2 L. R. A. (N. S.) 1111, 122 Am. St. Rep. 653. That case, as the record will show, was most elaborately briefed and thoroughly considered.

Chief Justice Gaines, speaking for the court, in his usual masterly style, disposes of this contention in this manner: "It is also urged in argument, in a somewhat indefinite way, that the enjoining of crimes or public nuisances was unknown to the common law, and that, therefore, the Legislature was without power to provide for such injunction. This involves the question whether the procedure provided for in the act is 'due course of the law of the land.' This question has been answered by the Supreme Court of the United States in the case of *Mugler v. Kansas*, 123 U. S. 623, 8 Sup. Ct. 278, 31 L. Ed. 205. There the court say: 'Equally untenable is the proposition that proceedings in equity for the purposes indicated in the thirteenth section of the statute are inconsistent with due process of law.' 'In regard to public nuisances,' Mr. Justice Story says, 'the jurisdiction of the courts of equity seems to be of a very ancient date, and has been distinctly traced back to the reign of Queen Elizabeth. The jurisdiction is applicable, not only to the public nuisances, strictly so called, but also to purpresture upon the public rights and property. * * * In case of public nuisances, properly so called, an indictment lies to abate them and to punish the offenders. But an information, also, lies in equity to redress the grievances by way of injunction.' 2 Story's Eq. §§ 921, 922. The ground of this jurisdiction in cases of purpresture, as well as of public nuisances, is the ability of courts of equity to give a more speedy, effectual, and permanent remedy than can be had at law. They cannot only prevent nuisances that are threatened, and before irreparable mis-

chief ensues, but arrest or abate those in progress, and by perpetual injunction protect the public against them in the future; whereas, courts of law can only reach existing nuisances, leaving future acts to be the subject of new prosecutions or proceedings. This is a salutary jurisdiction, especially where a nuisance affects the health, morals, or safety of the community. Though not frequently exercised, the power undoubtedly exists in courts of equity thus to protect the public against injury. If it be asserted that the procedure for the prevention of crime is novel and unknown to the common law, the answer is obvious. It seems that from the days of Edward the Confessor it was competent for any subject of the realm of England to cause any person to be brought before a magistrate, and to compel him to enter into an obligation, with sureties, to keep the peace, not only as against the complaining party, but also as against all persons in general. 4 Blackstone, Com. 251. Besides, the whole of title 3 of our Code of Criminal Procedure is devoted to the means for the prevention of crime, and provides very much of the same remedies as were allowed at common law. Such being the facts, we fail to see that there is any peculiarity about the writ of injunction, or any peculiar sanctity about criminal or quasi criminal acts, which debar the Legislature from providing that one may be enjoined by a suit in equity from establishing a public nuisance—such as a gaming house."

There is also a most satisfactory treatment of this question by the Court of Appeals in Kentucky in the case of *Respass v. Commonwealth*, 131 Ky. 807, 115 S. W. 1131, 21 L. R. A. (N. S.) 836, where they considered quite a similar question. That court says: "But it was earnestly insisted that the rule should not be applied to nuisances which affect only the morals of the community. We cannot see the force of the distinction. The state is interested in the character of its people, no less than in their health or personal safety. The character of a state depends upon the character of the individuals constituting it. If the people become depraved, the state cannot long exist. It may have wealth, it may have all that goes to make a great state, and yet, if its men are without character, it is a crumbling ruin. The state is as much interested in restraining those things which destroy the character of its people as in those things which destroy their health or personal security. A house such as is described here is not only a rendezvous for the vicious, but a training school to make others like them. That such a house is a public nuisance has been often declared. See *Bollinger v. Commonwealth*, 98 Ky. 576, 35 S. W. 553 [17 Ky. Law Rep. 1122]; *Cheek v. Commonwealth*, 79 Ky. 359; *Commonwealth v. Enright*, 98 Ky. 635, 33 S. W. 1111 [17

Ky. Law Rep. 1183]; *Commonwealth v. Respass*, 50 S. W. 549, 21 Ky. Law Rep. 140; *Cawein v. Commonwealth* [110 Ky. 273] 61 S. W. 275, 22 Ky. Law Rep. 1734. To say that a court of equity may not enjoin a nuisance of this sort, when the criminal laws have proven inadequate, is to say that the commonwealth is unable to protect its citizens. If it may protect its citizens by injunction from such a use of property as would breed a pestilence among the people, upon what principle can it be maintained that it may not by injunction prevent that use of which, while it does not destroy the body, destroys the character, and leaves only the image of a man, unfitting him for the duties of citizenship? We held in *Commonwealth v. McGovern* [116 Ky. 212, 75 S. W. 261, 66 L. R. A. 280], that a court of equity may enjoin the owner of property from allowing it to be used for a prize fight, which congregated upon it a large body of that class of persons that are described here. The same conclusion in effect has recently been reached in *State v. Canty*, 207 Mo. 439, 105 S. W. 1078, 15 L. R. A. (N. S.) 747 [123 Am. St. Rep. 393], by the Supreme Court of Missouri, where a bill like that before us was filed by the Attorney General to enjoin the defendant from continuing to manage and conduct a public exhibition known as 'bull fighting' and 'bull baiting.' The court went very fully into the authorities, and granted the injunction. In *Columbian Athletic Club v. State*, 143 Ind. 98, 40 N. E. 914, 28 L. R. A. 727, 52 Am. St. Rep. 407, the court granted the injunction restraining a prize fight; the decision being substantially the same as in *Commonwealth v. McGovern*. In *State v. Olympic Club*, 47 La. Ann. 1095, 17 South. 599, the same conclusion was reached, and the use of property for a prize fight was enjoined. A like conclusion was reached in *State v. Saunders*, 66 N. H. 39, 25 Atl. 588, 18 L. R. A. 646; *Chicago Fairgrounds Association v. People*, 60 Ill. App. 488, and *Reaves v. Oklahoma*, 13 Okl. 396, 74 Pac. 951. See, also, *Attorney General v. Jamaica Pond Aqueduct*, 133 Mass. 361; *State v. Crawford*, 28 Kan. 726, 42 Am. Rep. 182; *Re Debs*, 158 U. S. 564, 15 Sup. Ct. 900, 39 L. Ed. 1092; *Atty. Gen. v. Heatley*, 1 Ch. 560 (Eng.); *People v. Truckee Lumber Co.*, 116 Cal. 397, 48 Pac. 374, 39 L. R. A. 581, 58 Am. St. Rep. 183; note to *Akers v. Marsh*, 9 Am. & Eng. Dec. in Equity, 453; *Mercer County v. City of Harrisburg*, 66 S. W. 10, 23 Ky. Law Rep. 1744, 56 L. R. A. 583; *Attorney General v. Hunter*, 16 N. C. 12." Other authorities might be cited in support of the right of the state in such case to proceed by way of injunction, but what we have cited, seem conclusive.

2. Again, it is urged as grounds of release that the writ of injunction goes beyond the power of the court to restrain appellant from the unlawful use of property and to engage

in unlawful sales, but effectually restrains him from selling under prescription and in accordance with the law. It may be conceded that the writ, as issued, goes beyond the prayer in the petition for injunction, and beyond the precise limits authorized by law. This would not, however, render the injunction granted absolutely void, but, so far as the court was authorized to issue an injunction, it would and should be upheld. This, as we understand, was directly held by our Supreme Court in *Ex parte Testard*, 101 Tex. 250, 106 S. W. 319. In that case the Supreme Court says: "The petition and the writ in this case undoubtedly stated a case in which, under the decision referred to, the right to the injunction existed, and the ticket which relator is charged with selling fell within the class thus protected. If the petition and writ went further, and if it were conceded that it was to that extent invalid, the concession would not help the relator. He sold a ticket, the sale of which, under any view, was properly enjoined. But we cannot admit the proposition that he had the right to disregard any part of the writ. We think it proper to say further that, if it were conceded that the courts of the state are without power to protect carriers of passengers in their interstate as well as in their intrastate transportation, this could not avail. The injunction applied also to intrastate tickets, and that in question belonged to that class. But we are unable to see that the power of the courts of the state to protect the business of carriers of passengers from unlawful interferences is at all affected by the character of the business, as interstate or intrastate." Therefore this matter cannot avail appellant as ground of relief. It was his right certainly, perhaps his duty, to have moved for a modification of the injunction. He was not authorized merely because it was too sweeping to disregard it altogether.

3. Again, it is complained and urged that the proceedings are invalid, and that appellant was entitled to release for that two terms of court intervened after the temporary writ of injunction had been issued, and there had been no trial, nor had there been any order issued continuing the injunction in force. The contention is, in substance, as we understand, that this, in effect, denied appellant the right of a speedy trial, and enjoined him in respect to matters involved without an opportunity for a hearing. It seems manifest that where a preliminary injunction is once granted, in the absence of a motion to dissolve same, or any action of the court in respect thereto, it continues in force until the matter is finally heard and determined. If there had been a deliberate refusal of the court to proceed with the case at all on a proper showing, it is clear that relator would have a right to mandamus to compel such hearing. In this record, however, it does not appear that any hearing

was ever in fact demanded or refused. It simply appears that the injunction was issued in December, and the case had not been disposed of when these proceedings were had in the October following. In this condition and pending a hearing, it was the duty of relator to stay his hand to respect the law, and he will not be heard when he violates the court's mandate to complain, or when visited with the punishment the law authorizes, that he had not been given a speedy trial where no such trial had been demanded in the original case.

4. Again, it is urged that the proceedings were invalid for that the local option election alleged was held in Johnson county in April, 1904; that the law authorizing an injunction herein was not passed until 1907, and, since said law authorized an additional penalty for violation of this law as applying to an election theretofore held, it imposes an additional burden, is *ex post facto*, and invalid. It seems to us that there is no merit in this contention. It is not provided by the act in question that any additional punishment shall be visited on one violating the local option law for any sale made contrary to its provision. This is merely a statute of regulation, a statute affecting the remedy in aid of the law, and in no sense is a different or additional penalty added thereto. Laws which affect the remedy or procedure merely are not within the scope of the inhibition against retroactive laws, unless the remedy be entirely taken away, or so incumbered with conditions as to render it useless or impracticable. *De Cordova v. Galveston*, 4 Tex. 470; *Morris & Cummings v. State*, 62 Tex. 729; *Langulle v. State*, 4 Tex. App. 312; *Rowland v. State*, 12 Tex. App. 418. Nor can it be maintained that the act in question is invalid because it denies the right of trial by jury. The right of trial by jury in respect to the offense against the law is not controverted by this act. The matter inquired into by the court in this proceeding relates strictly to the matter of contempt, and to the violation of the court's order. This was clearly held by this court in *Ex parte Allison*, *supra*.

5. Nor is it correct to say that this law imposes an additional punishment for the same offense. In treating this precise question in *Ex parte Allison*, *supra*, Judge Gaines says: "Nor do we think that the act in question infringes that provision of the Bill of Rights which declares that 'no person, for the same offense, shall be twice put in jeopardy of life or liberty.' It is true that if he commits the act which he is enjoined from committing, and such act be a violation of the penal laws of the state, he may under this statute be punished for contempt, and also for the violation of the criminal law. But these are not 'the same offense.' In the former case he is punished for a violation of the orders of the court; and in the latter for an offense 'against the peace and dignity of the state.'

One who makes an assault in the presence of the court, in such a manner as to constitute a contempt of court, is punishable, not only for the contempt, but also for the assault."

We have thus treated at some length all of the matters urged by relator as grounds of release. They are all without merit, and for the most part are well settled by this court and our Supreme Court. We have, however, had before us recently a number of cases involving these questions. Their importance and the almost entire change in the personnel of this court within recent years has seemed to be sufficient reason why we should again review the questions and decide them. They all seem to us to be without merit, and, upon an inspection of the entire record and careful consideration of same, we have been led to the conviction that there is no ground shown in the application entitling relator to a release, and it is therefore ordered that he be, and he is hereby, remanded to the custody of the sheriff of Johnson county, Tex.

DAVIDSON, P. J. (dissenting). In view of the two recent decisions—*Ex parte Allison*—in this state holding that the ancillary writ of injunction, equitable only in nature and operation, can be used as original process in the enforcement of the criminal laws and penal statutes for the violation of such laws and statutes it may be useless for me now to further dissent, but I do so looking to the future for a return to correct principles in regard to the questions involved. When the question for the first time came before this court in *Ex parte Allison*, 48 Tex. Cr. R. 634, 90 S. W. 492, 3 L. R. A. (N. S.) 622, I entered my dissent and gave a few reasons for so doing. I thought it was but one of those diversions which occasionally arise in the history of national and judicial life and would soon pass. But in this I may be wrong, and may have thought far afield of what may ultimately happen. I have thought further, and seriously so, over the matter in the light of the opinion rendered by our Supreme Court, and the one written by Judge RAMSEY in this case, as well as the original opinion in 48 Tex. Cr. R. 634, 90 S. W. 492, 3 L. R. A. (N. S.) 622, and I am now the more fully convinced that those decisions are not in accord with our law as it should be or as it was intended to be, or has been understood by our people and the legal profession in the history of our state. I do not believe those opinions are correct, nor do I believe they announce the correct rule in the administration of our criminal law under the questions raised in this case and in those of *Ex parte Allison*. While, for the present any dissent that I may enter will avail nothing, I yet nevertheless do this in order that I may not willingly as a judge be committed to the doctrine that criminal laws can be enforced and penal offenses punished under the ancillary equitable writ of injunction, and that such writ can be substituted for in-

dictments and jury trials thereunder. The history of our race and jurisprudence have always provided as the remedy in penal offenses the trial by jury. Our Constitution is based upon the right of trial by jury in criminal cases. Of this trial the accused may not be deprived under any circumstances, especially in felonies; nor can he be deprived of it in a misdemeanor unless he expressly waives it. The Codes, penal and procedure, point to and revolve around the right of trial by jury, and that right is the great central thought of our entire system of criminal and constitutional law. The Constitution guards and protects that right in the most emphatic commanding language and with guaranties that cannot be legally evaded or set aside either by construction or legislative cobwebby. When our people ordained in the Bill of Rights that "in all criminal prosecutions the accused shall have a speedy public trial by an impartial jury," they meant what they said. They did not mean such trial could or should be had under the writ of injunction. It was not even contemplated by them in the ordaining of that provision in the Constitution that such a contingency could or would arise. The history of our race, its jurisprudence, legislation, and Constitutions, preclude the idea that an accused person could or should be tried under such writ. The process of punishment by injunction for penal offenses, however ingeniously put, is but an insidious attack upon the constitutional right of trial by jury and upon the form and framework of our government by side-line legislation and decision which must be destructive of jury trials if carried to final results. In part now the right to try penal offenses is transferred under injunction process to the judge only without the consent of the accused, and to this extent the jury trial is curtailed and denied. This point having been reached, it may furnish easy facilities upon occasion to destroy the right of trial by jury and relegate the enforcement of criminal laws and punishment thereunder to the writ of injunction, and this to the exclusion of a jury trial and at the hands of the judge only. In that event, the constitutional demanding right of jury trial becomes a relic of past constitutional government. This bulwark of our liberties may be thus set aside and made of noneffect as was the Mosaic laws by the substitution of the tradition of the elders under Jewish history and dispensation. I am not yet persuaded that all statutes are law, or that there is authority of omnipotent power confided to legislative bodies, especially while the Constitution is recognized as a basic principle of government. The history of Texas will show and the history of our people I think will demonstrate that they have been opposed to government by injunction. Our people have struggled against it, denied the right, embraced it in platforms of parties,

and yet the Legislature is upheld in such legislation by our courts of last resort. I place this dissent upon record without intending any reflection upon either the esteemed judges or courts who have differed with me and with a full recognition of their devotion to duty and patriotic love of country.

Without giving further reasons at present, I therefore respectfully enter this my dissent.

On Motion for Rehearing.

HARPER, J. In this case on a former day of this term relator was remanded. Soon thereafter a motion for rehearing was filed on his behalf. In view of the retirement of Judge McCORD by the expiration of his term of office, and the resignation of Judge RAMSEY, and the fact that the personnel of the court has so much changed, it seems appropriate and due to the parties interested that we should notice at some length the several grounds set up in the motion.

All the matters relied on originally and now urged on motion for rehearing were discussed at considerable length in the original opinion which was delivered by Judge RAMSEY, and it seems unnecessary for us to take up these several matters in detail. The substantial questions relied on as a basis for the writ were distinctly held adversely to relator in the case of *Ex parte Allison*, 48 Tex. Cr. R. 634, 90 S. W. 492, 3 L. R. A. (N. S.) 622. Being dissatisfied with the result of that proceeding, soon thereafter Allison made application for writ of habeas corpus to our Supreme Court. On hearing, in an elaborate opinion delivered by Judge Gaines in 99 Tex. 455, 90 S. W. 870, 2 L. R. A. (N. S.) 1111, 122 Am. St. Rep. 653, the same conclusion was reached, and practically all the matters relied upon by Allison there and relied upon by relator here were decided and adjudged adversely to the contentions of relator urged in this case. The Allison Case in both courts, as the official reports will show, was most thoroughly and elaborately argued by counsel of the highest ability, and the opinions of both courts contain intrinsic evidence of the fact that the matters were exhaustively investigated, and that the questions presented received the most careful consideration. There is nothing new in the law of this case, or any view of the law arising from the facts to differentiate or distinguish it from the Allison Case, and unless, therefore, we were prepared to break away from the decisions of both this court and the Supreme Court, we must and should hold adversely to relator in this case. I heartily agree with Judge Ramsey in the following strong statement made by him in the case of *Lewis v. State*, 127 S. W. 808: "We have found it, therefore, unnecessary to state our own opinion. For the reasons given here, we feel that at this late date to sweep aside the established rule and un-

settle the law still further would be, if not judicial usurpation, at least without sufficient warrant in law and utterly inexcusable, and to proclaim ourselves as unworthy to sit on this high tribunal. It should never be forgotten that this is a land where the law reigns supreme. Uniformity and certainty of decision is of the highest importance. We are not so much to declare our personal views of what the law ought to be, but to lay down with as much definiteness and certainty as may be what it is, and, when so adjudged, to enforce it with inflexible fidelity, without passion, and without weakness. If, coming to this high position of power and responsibility, I may, moved by a mere personal opinion, in my day and time, unsettle and undo the work of the great men who have preceded me, consistent, coherent, and undoubted from the day when I was yet a briefless lawyer, the man who on the morrow takes my place will have the same warrant to undo and unsettle the rules we establish, and so on to the end of time. So that from having a country governed, controlled, and regulated by law we shall have a land where the mere personal opinions of the judge in office at the time shall rule the fortunes and control and mar the destinies of a free people, and by force of an election, where such punishment was never considered, condemn the citizen to penal servitude as a felon for an act not held to be such under the decisions of this court time out of mind. Against this doctrine of personal rule and unrestrained absolutism we resolutely set our faces, and prefer to follow the law as it has been so long and so often declared, conscious of our responsibility, and saying with all sincerity of the law that it must and will be upheld, and that, though it slay me, yet will I trust in it."

The same view of the high duty owing by a judge was thus well expressed by Justice White, now Chief Justice of the Supreme Court of the United States, in the case of *Pollock v. Farmers' Loan & Trust Co.*, 157 U. S. 429, 15 Sup. Ct. 673, 39 L. Ed. 759, where he says: "The conservation and orderly development of our institutions rest on our acceptance of the results of the past, and their use as lights to guide our steps in the future. Teach the lesson that settled principles may be overthrown at any time, and confusion and turmoil must ultimately result. In the discharge of its function of interpreting the Constitution, this court exercises an august power. It sits removed from the contentions of political parties and the animosities of factions. It seems to me that the accomplishment of its lofty mission can only be secured by the stability of its teachings and the sanctity which surrounds them. If the permanency of its conclusions is to depend upon the personal opinions of those who from time to time may make up its membership, it will inevitably become a theater of political strife, and its action will

be without coherence or consistency. There is no great principle of our constitutional law, such as the nature and extent of the commerce power, or the currency power, or other powers of the federal government, which has not been ultimately defined by the adjudications of this court after long and earnest struggle. If we are to go back to the original sources of our political system, or are to appeal to the writings of the economists in order to unsettle all these great principles, everything is lost and nothing saved to the people. The rights of every individual are guaranteed by the safeguards which have been thrown around them by our adjudications. If these are to be assailed and overthrown, as is the settled law of income taxation by this opinion, as I understand it, the rights of property, so far as the federal Constitution is concerned, are of little worth. My strong convictions forbid that I take part in a conclusion which seems to me so full of peril to the country. I am unwilling to do so, without reference to the question of what my personal opinion upon the subject might be if the question were a new one, and was thus unaffected by the action of the framers, the history of the government, and the long line of decisions by this court. The wisdom of our forefathers in adopting a written Constitution has often been impeached upon the theory that the interpretation of a written instrument did not afford as complete protection to liberty as would be enjoyed under a Constitution made up of the traditions of a free people. Writing, it has been said, does not insure greater stability than tradition does, while it destroys flexibility. The answer has always been that by the foresight of the fathers the construction of our written Constitution was ultimately confided to this body, which from the nature of its judicial structure could always be relied upon to act with perfect freedom from the influence of faction, and to preserve the benefits of consistent interpretation. The fundamental conception of a judicial body is that of one hedged about by precedents which are binding on the court without regard to the personality of its members. Break down this belief in judicial continuity, and let it be felt that on great constitutional questions this court is to depart from the settled conclusions of its predecessors, and to determine them all according to the mere opinion of those who temporarily fill its bench, and our Constitution will, in my judgment, be bereft of value, and become a most dangerous instrument to the rights and liberties of the people."

Not only is this view of our duty, as I think, conclusive of qualified judges, but there is yet another view from the force and correctness of which, as it seems to me, there can be no escape. The suit out of which this application grew was a civil suit pending in the district court of Johnson county which might, under some conditions

at least, finally reach the Supreme Court of this state, and in respect to which its jurisdiction and judgment might be involved and applied. It was a case in which in the nature of things, since we have no civil jurisdiction, this court can never take cognizance. Now, would it not be indeed an anomaly to say that for disobedience of an injunction issued in a civil case, of which we could never obtain jurisdiction, that we would, for a disobedience thereof, discharge an offender where in the appellate court to which his case would go no such discharge could be obtained? Would it not be an anomaly resulting in legal anarchy to say that if one enjoined in respect to a matter such as is involved in this case, that, if he went across the hall to the Supreme Court and made application to that great tribunal for a discharge, he would be told that under the law as there set up and as heretofore settled in this court no relief could be granted him, and that he would only have to walk across the hall to receive from this court an immunity bath, receive a discharge and absolution from all his sins, and be sent on his way rejoicing with a new song of peace and triumph in his mouth? Such a state of affairs no good citizen, it seems to me can contemplate without alarm. For myself, I am unwilling to see this court made the dumping and clearing house of those who would defy the just authorities of the court. Besides, almost this identical question has received the express approval very recently of this tribunal, in the case of *Ex parte Marie Morgan*, 57 Tex. Cr. R. 551, 124 S. W. 99, which was a petition for writ of habeas corpus on account of an arrest for the violation of an injunction against the keeping of a bawdyhouse. The proceeding was upheld, and the relator refused a discharge. That case did not in terms present the identical question here presented, but was inevitably and of necessity involved in it. In the case of *Lane v. Bill* (Tex. Civ. App.) 115 S. W. 918, out of which *Ex parte Morgan* supra, grew, a law substantially similar to that here attacked, and a proceeding almost identical to the one here assailed, was by the Court of Civil Appeals upheld and sustained.

In this connection, the following quotation from the opinion of Judge Gaines in *Ex parte Allison*, 99 Tex. 455, 90 S. W. 870, 2 L. R. A. (N. S.) 1111, 122 Am. St. Rep. 653, is worthy of note: "It is also urged in argument in a somewhat indefinite way that the enjoining of crimes or public nuisances was unknown to the common law, and that, therefore, the Legislature was without power to provide for such injunction. This involves the question whether the procedure provided for in the act is 'due course of the law of the land.' This question has been answered by the Supreme Court of the United States in the case of *Mugler v. Kansas*, 123 U. S. 623, 8 Sup. Ct. 273, 31 L. Ed. 205. There the court say: 'Equally untenable is the

proposition that proceedings in equity for the purposes indicated in the thirteenth section of the statute are inconsistent with due process of law.' In regard to public nuisances, Mr. Justice Story says, 'the jurisdiction of courts of equity seems to be of a very ancient date, and has been distinctly traced back to the reign of Queen Elizabeth. The jurisdiction is applicable, not only to public nuisances, strictly so called, but also to the purpresture upon public rights and property.'

* * * In case of public nuisances, properly so called, an indictment lies to abate them, and to punish the offenders. But an information also lies in equity to redress the grievances by way of injunction.' 2 Story's Eq. §§ 921, 922. 'The ground of this jurisdiction in cases of purpresture, as well as of public nuisances, is the ability of courts of equity to give a more speedy, effectual, and permanent remedy than can be had at law. They cannot only prevent nuisances that are threatened, and before irreparable mischief ensues, but arrest or abate those in progress, and by perpetual injunction protect the public against them in the future; whereas courts of law can only reach existing nuisances, leaving future acts to be the subject of new prosecutions or proceedings. This is a salutary jurisdiction, especially where a nuisance affects the health, morals, or safety of the community. Though not frequently exercised, the power undoubtedly exists in courts of equity thus to protect the public against injury.' If it be asserted that the procedure for the prevention of crime is novel and unknown to the common law, the answer is obvious. It seems that from the days of Edward the Confessor it was competent for any subject of the realm of England to cause any person to be brought before a magistrate, and to compel him to enter into an obligation, with sureties, to keep the peace, not only as against the complaining party, but also as against all persons in general. 4 Blackstone, Com. 251. Besides, the whole of title 3 of our Code of Criminal Procedure is devoted to the means for the prevention of crime, and provides very much of the same remedies as were allowed at common law. Such being the facts, we fail to see that there is any peculiarity about the writ of injunction, or any peculiar sanctity about criminal or quasi criminal acts, which debar the Legislature from providing that one may be enjoined by a suit in equity from establishing a public nuisance—such as a gambling house. We deem it unnecessary to pursue this discussion further. The principal objections urged against the validity of the act have been fully and ably discussed in the cases of *Mugler v. Kansas*, *Littleton v. Fritz*, and *Carleton v. Rugg*, previously cited, and in all of which the validity of similar statutes was upheld. See, also, *State v. Saunders*, 66 N. H. 39, 25 Atl. 588, 18 L. R. A. 646, in which the main question is ex-

haustively discussed in an opinion characteristic of that eminent court. In this same case, upon a writ of habeas corpus sued out by this relator before our Court of Criminal Appeals, that court maintained the constitutionality of the act in question, and remanded the relator to the custody of the sheriff. That court within its jurisdiction is a court of equal dignity and authority with this court. Courts will not declare an act of the Legislature invalid as being in conflict with the Constitution unless it appear to them to be clearly so. For a stronger reason, they should not so declare where the validity of the statute has been upheld by another court of last resort."

The Supreme Court of the United States, Mr. Justice Miller, rendering the decision in *Ellenbecker et al. v. District Court of Plymouth County, Iowa*, 134 U. S. 31, 10 Sup. Ct. 424, 33 L. Ed. 801, in passing on the questions in this case, says: "The judgment which we are called upon to review is one affirming the judgment of the district court of Plymouth county in that state. This judgment imposed a fine of \$500 and costs on each of the six plaintiffs in error in this case, and imprisonment in the jail of Plymouth county for a period of three months; but they were to be released from confinement if the fine imposed was paid within 30 days from the date of the judgment. This sentence was pronounced by the court as a punishment for contempt in refusing to obey a writ of injunction issued by that court enjoining and restraining each of the defendants from selling, or keeping for sale, any intoxicating liquors, including ale, wine, and beer, in Plymouth county, and the sentence was imposed upon a hearing by the court without a jury, and upon evidence in the form of affidavits. * * * The first observation to be made on this subject is that the plaintiffs in error are seeking to reverse a judgment of the district court of Plymouth county, Iowa, imposing upon them a fine and imprisonment for violating the injunction of that court, which had been regularly issued and served upon them. Of the intentional violation of this injunction by plaintiffs we are not permitted to entertain any doubt, and, if we did, the record in the case makes it plain. Neither is it doubted that they had a regular and fair trial, after due notice, and opportunity to defend themselves in open court at a regular term thereof. The contention of these parties is that they were entitled to a trial by jury on the question as to whether they were guilty or not guilty of the contempt charged upon them, and because they did not have this trial by jury they say that they were deprived of their liberty without due process of law within the meaning of the fourteenth amendment to the Constitution of the United States. If it has ever been understood that proceedings according to the common law for contempt of court have been subject to the right of trial by

jury, we have been unable to find any instance of it. It has always been one of the attributes—one of the powers necessarily incident to a court of justice—that it should have this power of vindicating its dignity, of enforcing its orders, of protecting itself from insult, without the necessity of calling upon a jury to assist it in the exercise of this power. In the case in this court of *Ex parte Terry*, 128 U. S. 289 [9 Sup. Ct. 77] 32 L. Ed. 405, this doctrine is fully asserted and enforced, quoting the language of the courts in the case of *Anderson v. Dunn*, 6 Wheat. 204, 227 (5 L. Ed. 242, 247), where it was said that 'courts of justice are universally acknowledged to be vested by their very creation with power to impose silence, respect, and decorum in their presence, and submission to their lawful mandates'—citing with approbation the language of the Supreme Judicial Court of Massachusetts in *Cartwright's Case*, 114 Mass. 230, 238, that 'the summary power to commit and punish for contempt tending to obstruct or degrade the administration of justice is inherent in courts of chancery and other superior courts, as essential to the execution of their powers and to the maintenance of their authority, and is part of the law of the land, within the meaning of Magna Charta and of the twelfth article of our Declaration of Rights.' And this court in *Terry's Case* held that a summary proceeding of the Circuit Court of the United States without a jury imposing upon *Terry* imprisonment for the term of six months was a valid exercise of the powers of the court, and that the action of the Circuit Court was also without error in refusing to grant him a writ of habeas corpus. The case of *Terry* came into this court upon application for a writ of habeas corpus, and presented, as the case now before us does, the question of the authority of the Circuit Court to impose this imprisonment on a summary hearing without those regular proceedings which include a trial by jury, which was affirmed. The still more recent cases of *Ex parte Savin*, 131 U. S. 207 [9 Sup. Ct. 699] 33 L. Ed. 150, and *Ex parte Cuddy*, 131 U. S. 280 [9 Sup. Ct. 703] 33 L. Ed. 154, assert very strongly the same principle. In *Ex parte Robinson*, 19 Wall. 505, 22 L. Ed. 205, this court speaks in the following language: 'The power to punish for contempts is inherent in all courts. Its existence is essential to the preservation of order in judicial proceedings, and the enforcement of the judgments, orders, and writs of the courts, and consequently to the due administration of justice. The moment the courts of the United States were called into existence and invested with jurisdiction over any subject, they became possessed of this power.' * * * So far from any statute on this subject limiting the power of the courts of Iowa, the act of the Legislature of that state, authorizing the injunction which these parties are charged with violating, expressly declares

that for violating such injunction a person doing so shall be punished for the contempt by a fine of not less than five hundred or more than a thousand dollars, or by imprisonment in the county jail not more than six months, or by both such fine and imprisonment, in the discretion of the court. So that the proceeding by which the fine and imprisonment imposed upon these parties for contempt in violating the injunction of the court regularly issued in a suit to which they were parties is due process of law, and always has been due process of law, and is the process or proceeding by which courts have from time immemorial enforced the execution of their orders and decrees, and cannot be said to deprive the parties of their liberty or property without due process of law. The counsel for plaintiffs in error seek to evade the force of this reasoning by the proposition that the entire statute under which this injunction was issued is in the nature of a criminal proceeding, and that the contempt of court of which these parties have been found guilty is a crime for the punishment of which they have a right to trial by jury. We cannot accede to this view of the subject. Whether an attachment for a contempt of court and the judgment of the court punishing the party for such contempt is in itself essentially a criminal proceeding or not we do not find it necessary to decide. We simply hold that whatever its nature may be it is an offense against the court and against the administration of justice, for which courts have always had the right to punish the party by summary proceeding and without trial by jury, and that in that sense it is due process of law within the meaning of the fourteenth amendment of the Constitution. We do not suppose that that provision of the Constitution was ever intended to interfere or abolish the powers of the courts in proceedings for contempt, whether this contempt occurred in the course of a criminal proceeding or of a civil suit. We might rest the case here; but the plaintiffs in error fall back upon the proposition that the statute of the Iowa Legislature concerning the sale of liquors, under which this injunction was issued, is itself void, as depriving the parties of their property and of their liberty without due process of law. We are not prepared to say that this question arises in the present case. The principal suit in which the injunction was issued, for the contempt of which these parties have been sentenced to imprisonment and to pay a fine, has never been tried so far as this record shows. We do not know whether the parties demanded a trial by jury on the question of their guilty violation of that statute. We do not know that they would have been refused a trial by jury if they had demanded it. Until the trial of that case has been had, they are not injured by a refusal to grant them a jury trial. It is the well-settled doctrine of this court that a part of a statute may be

void and the remainder may be valid. That part of this statute which declares that no person shall own or keep, or be in any way concerned, engaged, or employed in owning or keeping, any intoxicating liquors with intent to sell the same within this state, and all the prohibitory clauses of the statute, have been held by this court to be within the constitutional powers of the state Legislature, in the cases of *Mugler v. Kansas*, 123 U. S. 623 [8 Sup. Ct. 273], 31 L. Ed. 205, and *Powell v. Pennsylvania*, 127 U. S. 678 [8 Sup. Ct. 992, 1257], 32 L. Ed. 253. If the objection to the statute is that it authorizes a proceeding in the nature of a suit in equity to suppress the manufacture and sale of intoxicating liquors which are by law prohibited, and to abate the nuisance which the statute declares such acts to be, wherever carried on, we respond that, so far as at present advised, it appears to us that all the powers of a court, whether at common law or in chancery, may be called into operation by a legislative body for the purpose of suppressing this objectionable traffic; and we know of no hindrance in the Constitution of the United States to the form of proceedings, or to the court in which this remedy shall be had. Certainly it seems to us to be quite as wise to use the processes of the law and the powers of the courts to prevent the evil as to punish the offense as a crime after it has been committed. We think it was within the power of the court of Plymouth county to issue the writs of injunction in these cases, and that the disobedience to them by the plaintiffs in error subjected them to the proceedings for contempt which were had before that court."

In *Rhodes v. Saunders*, 66 N. H. 39, 25 Atl. 588, 18 L. R. A. 655, is a compilation of authorities, all holding that the statute authorizing the issuance of a writ of injunction in this character of case is valid, and that courts have the power to punish for contempt without the intervention of a jury, quoting approvingly the following language: "Every place where a public statute is openly, publicly, repeatedly, continuously, persistently, and intentionally violated is a public nuisance, and may be suppressed."

The question presented in the dissenting opinion of Judge DAVIDSON in respect to these statutes and proceedings operating to deny a citizen the right of trial by jury is opposed to the decisions of this court and our Supreme Court, and the rule generally obtaining elsewhere. We might content ourselves with the above statement. There are substantial reasons vitally affecting the quiet and welfare of the citizenship of the state which were moving considerations before the Legislature for inducing the enactment of these laws, and which are also strong reasons and considerations why they should be here sustained. The legislative history of the last few years will demonstrate that in practically all legislation in support and aid

of local option laws, in respect to gaming and houses of prostitution, men of widely differing views, with reference to the sale of intoxicating liquors under the sanction and safeguards of the law in communities where public opinion sustained such sale, have united in one common bond of fraternity to enact such legislation as might make prohibitory laws effective in communities and sections where such laws had been voted. Again, it is a fact known of all men that in almost every great city and center of this state where the sale of intoxicating liquors is permitted by law that saloon limits have been provided and certain areas fixed in residence sections of such cities where no saloons can be operated. In addition to this, the law fixes a heavy license for one who would sell liquors, and makes quite ample provision for the keeping of an orderly house for the prevention of gambling, the visiting of lewd women, and the inhibition of selling intoxicating liquors to habitual drunkards as well as certain closing hours. The public and the state are interested in the fair and reasonable enforcement of such regulatory laws. If, however, we are to permit one under the guise of keeping a drug store and under the pretense of selling on prescription to convert his place of business into a common tippling house where the scarlet women may abide, and where the habitual drunkard and minor may receive a welcome, and no hours are respected, and no safeguards are provided, where the state's revenue is diminished, and where lawlessness would breed, and law-breakers would find an asylum, infinite damage would be done to the state. It would constitute discrimination and a manifest injustice against the man seeking to do business authorized by law and under the safeguards and provisions of the law. Such a place might be as destructive to property as building a powder mill next to it, and as injurious to society as anything of which one could easily conceive. Now, can it be said that the state has no interest in preventing such a condition of affairs? Is it to be said that the state can only proceed by criminal prosecutions, and that the strong arm of the law by injunction is to be denied the state in its effort to protect society? It is my view, and such seems to be in accordance with the great weight of authorities everywhere, and the settled policy of this state in all the courts, to proceed against such a man with all the power of all the courts and with a mailed hand that would be sufficient for the due and proper protection of society.

It was, however, urged in argument that under the facts of this case relator was entitled to his discharge. The record shows that, as is usual in such cases, the writ of injunction ran against, not only the relator, but against his agents, servants, and em-

ployés enjoining them from the unlawful sale of liquors in the house and place where he was doing business. The evidence shows that the sale took place in the house, and that such sale was an unlawful sale. There is no suggestion that the sale was made by some one not connected as servant or employé in the house, but because the relator testified and claimed on the hearing that he had no financial interest in the business, but that same belonged to his minor son, it is here contended as a matter of law that he is entitled to his discharge. It appears, however, that his son, whom he claims was the owner and proprietor of the business, was a minor. It is shown that relator leased the house. It is shown that he obtained license from the federal government and from the authorities of this state to do business. The business, therefore, was being done under the shelter and sanction of his name and under his authority and with reference to a license issued to him, and not to his son. We can well understand how the court below, acquainted with the parties and familiar with all the facts, might well have rejected as untrue the disclaimer of relator of having any connection with or ownership of the business. It would indeed be a destructive rule of decision to expect this court in the face of a finding by the court below discrediting the contention of relator of lack of ownership in the business, where all the other facts, leasing the house, obtaining license for the conduct of the business, showed his connection, to overturn and discredit the finding of the trial court. We are not prepared to do this, nor do we think we should do it.

A careful consideration of the motion, which was prepared with the utmost skill and presented and argued with the greatest ability, has convinced us that the original disposition of the case was proper, and that no ground exists why it should be set aside. It is therefore ordered that the motion for rehearing be, and the same is hereby, in all things overruled.

DAVIDSON, P. J., dissents.

Ex parte LOOPER.

(Court of Criminal Appeals of Texas. Dec. 7, 1910. On Motion for Rehearing, Feb. 8, 1911.)

1. INTOXICATING LIQUORS (§ 279)—CONTEMPT—FORMER JEOPARDY.

One who has been convicted of selling whisky in violation of the local option law and of an injunction restraining him from selling intoxicating liquors may not, when charged with contempt for violating the injunction, plead his conviction in bar of the contempt proceedings.

[Ed. Note.—For other cases, see Intoxicating Liquors, Dec. Dig. § 279.*]

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

On Motion for Rehearing.

2. INJUNCTION (§ 230*)—CONTEMPT—JURISDICTION OF COURT.

Under the express provisions of Rev. St. 1896, art. 3011, the court may in vacation punish one for a violation of an injunction.

[Ed. Note.—For other cases, see Injunction, Cent. Dig. §§ 502-516; Dec. Dig. § 230.*]

3. EVIDENCE (§ 41*) — JUDICIAL NOTICE — TERMS OF COURTS.

The Court of Criminal Appeals will take judicial notice that in a large part of Texas the district courts convene only twice a year, and that in many of the counties they remain in session for periods of time ranging from one to four or five weeks.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 56-60; Dec. Dig. § 41.*]

4. HABEAS CORPUS (§ 85*)—DISCHARGE FROM IMPRISONMENT FOR CONTEMPT OF COURT—PRESUMPTIONS.

The Court of Criminal Appeals on habeas corpus for the discharge of one imprisoned for contempt for violating an injunction granted by the district court must assume that the injunction was properly granted.

[Ed. Note.—For other cases, see Habeas Corpus, Cent. Dig. §§ 77, 78; Dec. Dig. § 85.*]

Davidson, P. J., dissenting.

Original application for habeas corpus by M. L. Looper for discharge from custody under commitment for a violation of an injunction. Relator remanded to custody.

Odell & Johnson, for appellant. John A. Mobley, Asst. Atty. Gen., for the State.

MCCORD, J. On September 19, 1910, one of the judges of this court granted a writ of habeas corpus to the relator, M. L. Looper, commanding the sheriff having him in custody to appear before this court on the first Monday in October, and show cause why he detained the said M. L. Looper. The showing on the return is that he holds him by virtue of an order issued by the district judge of Johnson county for contempt for violating an injunction that theretofore issued restraining and enjoining the relator from selling intoxicating liquors in any place in Johnson county, Tex., and from the establishing, maintaining, or conducting any place in said county wherein intoxicating liquors are kept and sold in violation of law. All the questions raised in this case have been decided by this court adversely to relator's contention in the case of *Ex parte Roper* (this day decided) 134 S. W. 334, and therefore it will be unnecessary to say anything further on the different questions raised.

However, there is one question in this case that is not in the *Roper* Case that is perhaps necessary to pass upon. It is contended, and the proof shows, that the relator had been tried and convicted in the county court of Johnson county for unlawfully selling whisky in violation of the local option law, and the contention is made here that, by reason of his conviction in the criminal

case, he should be discharged, and he pleads that judgment of conviction in bar of the punishment awarded by the court for contempt, and says that he should be released by reason thereof, because he cannot be put in jeopardy twice for the same offense. This contention is not correct, and is not now an open question in this state. Practically the identical point raised here was decided adversely to relator's contention in the case of *Ex parte Allison*, 99 Tex. 455, 90 S. W. 870, 2 L. R. A. (N. S.) 111, 122 Am. St. Rep. 653. The opinion in that case was rendered by Chief Justice Gaines, and, discussing the proposition that the Legislature has no power to confer upon the courts the authority to enjoin the commission of crime or the establishment or continuance of a public nuisance, Judge Gaines says: "Nor do we think that the act in question infringes that provision of the Bill of Rights which declares that 'no person, for the same offense, shall be twice put in jeopardy of life or liberty.' It is true that if he commits the act which he is enjoined from committing, and such act be a violation of the penal laws of the state, he may under this statute be punished for the contempt, and also for the violation of the criminal law. But these are not 'the same offense.' In the former case he is punished for a violation of the orders of the court; and in the latter for an offense 'against the peace and dignity of the state.' One who makes an assault in the presence of the court, in such a manner as to constitute a contempt of court, is punishable, not only for the contempt, but also for the assault. * * * It is also urged in argument in a somewhat indefinite way that the enjoining of crimes or public nuisances was unknown to the common law, and that, therefore, the Legislature was without power to provide for such injunction. This involves the question whether the procedure provided for in the act is 'due course of the law of the land.' This question has been answered by the Supreme Court of the United States in the case of *Mugler v. Kansas*, 123 U. S. 623, 8 Sup. Ct. 273, 31 L. Ed. 205. There the court say: 'Equally untenable is the proposition that proceedings in equity for the purposes indicated in the thirteenth section of the statute are inconsistent with due process of law. * * * The whole of title 3 of our Code of Criminal Procedure is devoted to the means for the prevention of crime, and provides very much of the same remedies as were allowed at common law. Such being the facts, we fail to see that there is any peculiarity about the writ of injunction, or any peculiar sanctity about criminal or quasi criminal acts, which debar the Legislature from providing that one may be enjoined by a suit in equity from establishing a public nuisance—such as a gambling house.'

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

On the authority of the Supreme Court in that case, we hold that the fact that relator had been convicted for unlawfully selling whisky in violation of the local option law for which he was enjoined from doing cannot, when arraigned before the court for contempt, successfully plead, in bar of the contempt proceedings, the fact that he had been convicted for committing that crime that he was enjoined from doing.

We therefore hold that relator is not entitled to his discharge, and he is therefore remanded to the sheriff of Johnson county.

DAVIDSON, P. J., dissents, and thinks applicant ought to be discharged.

On Motion for Rehearing.

HARPER, J. This case is in most respects identical with the case of *Ex parte Roper* (the motion for rehearing in which has been this day overruled) 134 S. W. 334. It differs, however, from the *Roper* Case in the fact that here the injunction ran directly against *Looper* in person; and again it differs from the *Roper* Case in that the sales shown in evidence were made by *Looper* in person. There is a question, however, arising in this case that is not raised in the other proceedings. That question is this: It appears from the record in the case before us that *Looper* was fined by the court in vacation, and it is urged that this act of the court was utterly and absolutely void, and that relator is therefore entitled to his discharge. Such was the holding of this court in the case of *Ex parte Ellis*, 37 Tex. Cr. R. 539, 40 S. W. 275, 66 Am. St. Rep. 831, where Judge Henderson, speaking for the court, held, in substance, that an order of the district judge imposing a fine for violation of an injunction was void, and on habeas corpus he was entitled to his discharge. That this decision is manifestly incorrect and erroneous is demonstrably clear. None of the authorities cited in that case are in point except the Oregon cases. An inspection of those authorities will demonstrate that the decisions in Oregon so holding in effect were made with reference to and based on the peculiar language of the Oregon statute which seems to deny the court the right to impose punishment for contempt except during term time. In this state our statute provides directly to the contrary. This statute was not called to the attention of the court, and was evidently overlooked. It is as follows: Article 3011, Rev. St. Tex. 1895: "Disobedience of an injunction may be punished by the court or judge, in term time or in vacation, as a contempt." Again, this seems to be the universal rule unless such punishment is inhibited in vacation by statute. The law is thus well stated in that invaluable work, *Cyc.* (volume 9, p. 31): "Subject to statutory restrictions, a judge or court may punish for contempt for violation of court orders at chambers or in va-

cation." In support of this rule the learned author cites the following authorities: *Cobb v. Black*, 34 Ga. 162; *State v. Archer*, 48 Iowa, 311; *State v. Myers*, 44 Iowa, 580; *State v. Loud*, 24 Mont. 428, 62 Pac. 497; *Nebraska Children's Home Society v. State*, 57 Neb. 765, 78 N. W. 267; *In re Sloam*, 5 N. M. 590, 25 Pac. 930; *Lathrop v. Clapp*, 40 N. Y. 328, 100 Am. Dec. 493; *Wickes v. Dresser*, 4 Abb. Pr. 93; *Id.*, 13 How. Prac. 331; *Vose v. Reed*, 1 Woods, 647, Fed. Cas. No. 17,011.

In view of the rule thus obtaining universally, and proceeding with reference to our statute which covers the case in express terms, and from high considerations of public policy, we think that the case of *Ex parte Ellis*, *supra*, is so manifestly erroneous, and so utterly destructive of the vast benefits of the injunction process, that it ought not to stand, and it is hereby in terms overruled. It is a fact of which we must take judicial knowledge as members of this court, and of which we are conscious, that in probably half the area of Texas the district courts convene only twice a year, and that in very many of the counties of this state they remain in session for very inconsiderable periods of time, ranging from one to four or five weeks. Injunctions as we know are sued out, and should be granted only where some irreparable injury is threatened, for which the parties have no adequate remedy at law. A frequent use of injunction is to prevent waste, or, as is somewhat analogous to this case, to prevent the creation of a nuisance, destruction of property, or injury to health or both. If the construction and rule laid down in the case of *Ex parte Ellis* is to be maintained, then it must result and would result that, if an injunction had been obtained to prevent the construction of an open sewer in front of one's private residence, the minute court adjourned the party enjoined might by himself and his servants begin the construction of the sewer, the effect of which would be, when summer with its heat and its sun blistering rays fell upon the foul sewage spreading pestilence and death to the homesteader across the street, that the law would be powerless for five months in the year to afford relief. If it were an injunction against waste, or the cutting down of ornamental trees, in a matter involving the destruction of the subject-matter of litigation, one's adversary who had been enjoined might absolutely destroy it without hindrance, and the arm of the law be powerless to afford any relief. Against this doctrine we protest. It is opposed, as we have seen, to the general rule everywhere. It is in the face of our statute which directly gives authority to the judge in vacation to punish for such conduct, and it is directly destructive of all private rights, and would constitute such a ruinous public policy as to be destructive of civil rights and one against which reason

revolts. Of course, we are proceeding on the assumption that in the first place the injunction was properly granted. That is assumed, and must be assumed in this case. When so granted, there should be no closed season protecting the man who would defy the just authority of the courts.

Finding no merit in the motion for rehearing, it is hereby overruled.

DAVIDSON, P. J., dissents.

SELLERS et al. v. STATE.

(Court of Criminal Appeals of Texas. Oct. 12, 1910. On Motion for Rehearing, Feb. 15, 1911.)

1. CRIMINAL LAW (§ 793*)—INSTRUCTIONS—JOINT RESPONSIBILITY.

Instructions authorizing conviction of assault with intent to murder if defendants committed certain acts were not erroneous as requiring a joint conviction or joint acquittal, where other instructions authorized separate or joint conviction or acquittal.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1858, 1939; Dec. Dig. § 793.*]

2. CRIMINAL LAW (§ 761*)—INSTRUCTIONS—ASSUMPTION AS TO FACTS.

An instruction that, if accused made the assault charged and his codefendant was present, etc., the codefendant was guilty, was not erroneous, as assuming that accused made an assault.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1754-1764; Dec. Dig. § 761.* Homicide, Cent. Dig. § 582.]

3. CRIMINAL LAW (§ 784*)—INSTRUCTIONS—CIRCUMSTANTIAL EVIDENCE.

Where there was positive evidence of assault, it was unnecessary to instruct on circumstantial evidence.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1883-1888; Dec. Dig. § 784.*]

4. CRIMINAL LAW (§§ 642, 1152*)—INTERPRETERS—QUALIFICATIONS—JUDICIAL DISCRETION.

In a trial for assault, it was within the judge's sound discretion, which will not be disturbed, unless abused, to permit a complaining witness to serve as interpreter.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1455, 1598, 3053-3057; Dec. Dig. §§ 642, 1152.*]

5. CRIMINAL LAW (§ 1119*)—RECORD—SUFFICIENCY.

An objection that an interpreter did not fairly interpret the testimony is insufficient, where it does not appear by the record whose testimony he interpreted.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 2931; Dec. Dig. § 1119.*]

6. CRIMINAL LAW (§ 939*)—NEW TRIAL—GROUNDS—NEWLY DISCOVERED EVIDENCE.

Accused is not entitled to a new trial for newly discovered testimony of witnesses who were with him the night of the difficulty, where slight diligence would have discovered the importance of their testimony.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2318-2323; Dec. Dig. § 939.*]

On Motion for Rehearing.

7. CRIMINAL LAW (§ 1035*)—APPEAL—WAIVER OF OBJECTIONS.

Objections to formation of the jury cannot be raised for the first time on appeal, es-

pecially where the record does not disclose the matters complained of.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2636-2638; Dec. Dig. § 1035.*]

8. CRIMINAL LAW (§ 1139*)—APPEAL—PAPERS REVIEWABLE.

The Court of Criminal Appeals cannot consider ex parte affidavits filed with appellant's brief in which new issues are sought to be made.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 3000; Dec. Dig. § 1139.*]

9. HOMICIDE (§ 257*)—ASSAULT WITH INTENT TO MURDER—EVIDENCE—SUFFICIENCY.

Evidence held to sustain a conviction of assault with intent to murder.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 543-552; Dec. Dig. § 257.*]

Appeal from District Court, Jefferson County; W. H. Pope, Judge.

Sam Sellers and Champ Mansfield were convicted of assault, and they appeal. Affirmed as to defendant Sellers, and reversed and remanded as to defendant Mansfield.

B. E. Moore, for appellants. John A. Mobley, Asst. Atty. Gen., for the State.

RAMSEY, J. This case comes to us in rather a singular condition. The appellants were jointly indicted charged with assault with intent to murder upon Alex Brown and John Orby, and the case throughout was submitted as for an assault upon both the parties named. The statement of facts is in considerable confusion. We gather that there must have been another trial of probably one Prater, to which the witnesses frequently refer. There is direct testimony that the appellant Sellers with a knife seriously cut and stabbed Brown, and before he did so that he said, "Let me kill that man," and then struck him. This is deposed by one Petee Capo. Brown himself does not seem to have known just who did cut him. Mansfield is not identified by name by any one as having been present. The testimony speaks of "a fellow with black mustache," and again as "a tall fellow," and again "of that fellow in his shirt sleeves," but nowhere, as we gather from the statement of facts, is there such identification of Mansfield or such connection shown as we think would justify us in the state of the record in affirming the judgment as to him, and the judgment of conviction as to Mansfield will be reversed on the facts. The testimony of the witnesses, if believed, as to Sellers, is sufficient to make out a case, and we will proceed to discuss the questions raised by the record as grounds for reversal.

1. The fourth ground of the motion is that "the court erred in the following portion of his charge: 'If from the evidence you are satisfied beyond a reasonable doubt that the defendants Sam Sellers and Champ Mansfield on or about the time charged in the indictment,' etc.—because said charge

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Index.

did not authorize the jury to believe that one or the other committed the assault, and one or the other did not commit the assault, and made the conviction of both or the acquittal of both depend on what the jury might believe one of defendants did. And again in the same part of said charge the court gave the following: "That said assault was not made under the immediate influence of sudden passion produced by an adequate cause, or not in defense of themselves"—because the jury should have been told that one of defendants might have made the assault under the conditions named above while the other defendant might not have done so, and the jury should have been told as much in plain charge." As to the first criticism of the court's charge, if the paragraph referred to were read alone, there might be some merit in it, but in another paragraph the court charged the jury as follows: "You may find both of defendants guilty or you may acquit both, or you may convict one and acquit the other, and write your verdict in accordance with your finding." Again, the court charged the jury as follows: "If the defendant Sam Sellers made the assault, but Champ Mansfield was present, and, knowing the unlawful purpose of the said Sellers, encouraged him by words, acts, or conduct in the commission of same (if he did commit it), then he would be principal in the crime, and the law would hold him guilty." The last criticism of the charge complained of in the paragraph of the motion above quoted is also claimed to be erroneous, in that the jury should have been told that one of the defendants might have made the assault under the conditions named above, while the other might not have done so. This criticism is answered in what we have said above.

2. Again, counsel complain of the following portion of the court's charge: "If the defendant Sam Sellers made the assault, but Champ Mansfield was present, and, knowing the unlawful purpose of the said Sellers, encouraged him by words, acts, or conduct in the commission of same (if he did commit it), then he would be a principal in the crime, and the law would hold him guilty." This is alleged to be erroneous because it assumed that Sam Sellers had made the assault, and because it was tantamount to telling the jury that Sellers made the assault, and should be convicted without regard to whether he made the assault with malice or to commit murder, or whether he made same when his mind at the time was inflamed, angered, and enraged with sudden resentment, and because there was no evidence that Mansfield was even present during the difficulty, and no evidence that he said anything, did anything, or that he knew an assault had or was about to be made, or that he knew the purpose of any assault by Sellers or any other person. Since the case is to be reversed

in any event as to Mansfield, it is unnecessary to determine whether he could complain of this charge. The complaints of same in so far as they could affect the case of Sellers are not well taken. It contains an express reservation of fact for the jury to find as to whether, in fact, Sellers did commit the assault, and in other portions of the court's charge it was submitted as an issue of fact to be found by the jury as to whether, if guilty at all, he was guilty of assault with intent to murder or aggravated assault.

3. Again, it is complained that the court should have given a charge on circumstantial evidence. As to the appellant Sellers, there can be no merit in this contention, since one of the witnesses testified positively that he struck and wounded the witness Brown.

4. Again, a new trial was sought on the ground that Alex Brown, who pretended to interpret the testimony of the witnesses in the case, did not properly and fairly interpret the testimony, and that such interpretation was untrue, unjust, unfair, and prejudicial to defendants, and was incorrectly, purposely, and wrongfully interpreted; that Alex Brown is and was one of the alleged injured parties with whom appellants were charged with assaulting, and he does not understand or is he acquainted with any of the languages of any of the witnesses who testified against appellants except that of John Orby, the other alleged injured party. This motion is supported by the affidavit of Brown in which he says in substance as follows: "All the witnesses who I interpreted for on the trials of Prater, Sellers, and Mansfield were Greeks I think, except John Orby, and I do not understand their language much. I did not understand them when they were testifying on the trials of the negroes except Orby's much." There was no objection on the trial to this witness acting as interpreter. Ordinarily we should think it bad policy to permit one occupying the position which Brown does in the case to act as an interpreter, and yet in the absence of any proof to the contrary, or any exception taken at the time, we must assume that the court below was either under the necessity of availing himself of the offices of Brown as interpreter, or possessed such clear and convincing proof of his reliability as to make it clear that he was not subject, on account of his relation to the case, to serious objection. This was a matter occurring during the trial, and a matter wisely confided to the discretion of the trial court, and a matter for which we ought not to reverse the case, unless, on the facts shown, in connection with such action, an abuse of this discretion was shown. It will be observed, further, that he says that all the witnesses for whom he interpreted on the trials of Prater, Sellers, and Mansfield were Greeks, except John Orby. Who the

witnesses were for whom he interpreted in this case the record does not show. An inspection of the statement of facts shows that in this case for the state there was adduced the testimony of Alex Brown and Petee Capo, both of whom testified on direct and cross examination that Alex Brown had been called and further cross-examined by appellant, and that John Orby had begun his testimony before any interpreter was sworn at all, and that the state's case closed with the testimony of John Orby, who is not shown by the affidavit to have been a Greek, nor any claim made of any impropriety or failure in the interpretation of his evidence. The record does show that thereafter the appellant introduced Steve Girolomo, and it appears that his testimony was interpreted by Brown, but without objection on the part of appellant, but presumably at his suggestion. In this state of the record, and in the absence of any bill of exceptions, we do not feel that we would be authorized to reverse the judgment.

5. Finally, it is claimed that a new trial should be granted on account of newly discovered testimony, and affidavits of three witnesses are attached to the motion. These are Jennie Spates, Minnie Thomas, and A. J. Ezzell. An inspection of the affidavits of Minnie Thomas and Jennie Spates discloses that on the very night in question, and contemporaneous with the difficulty, they were in conversation with and in the presence of appellant Sellers, and in the nature of things he must have known of their presence on the scene of the difficulty, and the slightest diligence must have visited him with notice of the importance of their testimony. The testimony of Ezzell, who declined to sign an affidavit, but whose testimony was taken on motion for new trial, was not important, and throws but little light on the issue. The record is in great confusion, and we have had some difficulty in gathering from it the precise facts, but, as we understand it, after a careful investigation, there seems to be no error in the record for which the judgment as to Sellers should be reversed.

It is therefore ordered that the judgment of conviction as to Sam Sellers be, and the same is hereby, in all things affirmed, and that the judgment of conviction as to the other appellant, Champ Mansfield, be, and the same is hereby, reversed and remanded for further proceedings in accordance with law.

On Motion for Rehearing.

HARPER, J. At a former day of this term of court, in this case, an opinion was rendered affirming the judgment as to Sam Sellers, and reversing and remanding the judgment as to Champ Mansfield. A motion for rehearing has been submitted on behalf of Sellers, in which appellant seeks to com-

plain of the formation of the jury. No complaint was made in the court below at the time of the selection of the jury, nor in the motion for a new trial, and it is too late to raise this question on appeal, especially as the matters complained of do not appear in the record filed in this court. This court has always held that it cannot consider *ex parte* affidavits filed with the brief of the appellant, in which new issues are sought to be made in this court not made in the trial court. It is not shown that appellant Sellers suffered any injury by reason of the matter complained of.

Appellant complains that the testimony is insufficient, and we have carefully read the record. It appears there was a "free for all fight" at night in front of Girolomo's saloon, and a witness swears that, while Brown and Prater were fighting, defendant Sellers cut Brown in the back. Brown and Prater, it appears, were both cut pretty bad. If the jury believed this testimony, it authorized a conviction.

In regard to the newly discovered testimony, it is such testimony as the defendant must of necessity have known before the original trial, and, had he desired it, the witness was in the town. In addition, while the witnesses testify on the hearing of a motion for a new trial that defendant Sellers was in a nearby house at the beginning of the difficulty, he left the house before the row was over, and they did not know where he went, leaving in plenty of time to have engaged in the fight and do the cutting as testified to by the state's witness.

After carefully reviewing the record, we are of the opinion the motion for a rehearing should be overruled; and it is so ordered.

THOMPSON v. STATE.

(Court of Criminal Appeals of Texas. Oct. 12, 1910. On Motion for Rehearing, Feb. 22, 1911.)

1. CRIMINAL LAW (§ 1110*)—BILL OF EXCEPTIONS—SUFFICIENCY.

A bill of exceptions cannot be aided by a statement in reply to a motion for new trial or by the statement of facts.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. § 2908; Dec. Dig. § 1110.*]

2. DISORDERLY HOUSE (§ 16*)—EVIDENCE—ADMISSIBILITY.

Defendant, accused of keeping a disorderly house, can show by any one cognizant of the facts that people had not frequented the house for immoral purposes at or about the time made by the state's proof.

[Ed. Note.—For other cases, see *Disorderly House*, Cent. Dig. § 23; Dec. Dig. § 16.*]

3. CRIMINAL LAW (§ 1093*)—BILL OF EXCEPTIONS—SUFFICIENCY.

In a prosecution for keeping a disorderly house, a bill of exceptions to exclusion of testimony that witness had watched the house frequently, and had seen no one enter or leave and nothing improper, is insufficient to show error

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

where the time to which the testimony relates is not shown.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 2832; Dec. Dig. § 1093.*]

4. CRIMINAL LAW (§ 1170*)—HARMLESS ERROR—EVIDENCE—EXCLUSION.

It was not reversible error to exclude testimony of one accused of keeping a disorderly house that she had not aided or encouraged any one in conducting such a house, where she was permitted to testify to her connection with the premises and the purposes for which they were kept.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3145–3153; Dec. Dig. § 1170.*]

5. CRIMINAL LAW (§ 450*)—OPINIONS—SUBJECTS.

On a trial for keeping a disorderly house, witness cannot give an opinion as to how long it would take to overcome a house's reputation as being disorderly, that being a question for the jury to determine.

[Ed. Note.—For other cases, see Criminal Law, Dec. Dig. § 450.*]

Appeal from Tarrant County Court; John L. Terrell, Judge.

Mabel Thompson was convicted of keeping a disorderly house, and she appeals. Affirmed.

Warren W. Moore, for appellant. John A. Mobley, Asst. Atty. Gen., for the State.

RAMSEY, J. On the 26th day of February, this year, appellant was found guilty in the county court of Tarrant county of keeping a disorderly house, and her punishment assessed at a fine of \$200 and 20 days' confinement in the county jail. There is evidence in the record amply sustaining the judgment. There is no complaint made of the charge of the court.

1. The first seven bills of exception are substantially to the same effect. Appellant introduced a number of witnesses, and as appears from the bill proposed to prove by such witnesses the following facts: "That witness had been to house of defendant frequently during this time, and had been in said house frequently during this time, and had watched the house, and had seen no man come in and go out, and no woman come in and go out, and nothing improper about the place from the time this order was passed." That it would be competent to show by any witness cognizant of the facts that men and women had not frequented the house in question for immoral purposes at or about the time made by the state's evidence, there would seem to be no doubt. The trouble with the bill of exceptions is that it does not specify any time covered by the state's evidence, nor any time within the period of limitation. It seems to refer to a time when some order was passed. When this order was passed is not shown by the bill nor is it otherwise shown in the record. It is well settled that a bill of exceptions cannot be aided either by a statement in reply to a motion for new trial or by the statement of

facts. *Douglas v. State*, 124 S. W. 933. As presented, the bill of exceptions, tested by its recitals, or read in the light of the entire record, is insufficient in that the time of the matter sought to be shown does not appear to be of such date as to render the testimony admissible.

2. On the trial it was proposed to be shown by appellant that she had not aided or abetted or encouraged any one in carrying on a disorderly house or bawdyhouse upon her premises. This was objected to on the ground that the question was leading, and it called for a conclusion. Appellant testified practically in detail as to her connection with the house in question and the purposes for which it was kept. The testimony in the form sought to be adduced was largely in the nature of a conclusion, and, if admitted, could have added nothing to the strength of appellant's denial that the house in question was a disorderly house.

3. While the witness Douglass was on the stand he was asked the question as to a house which had been run as a disorderly house for a number of years, and which had acquired the reputation of being a disorderly house, and had ceased to be kept for such purpose, how long it would take it to get over that reputation. To this the state objected on the ground that this question was but an argument and called for a conclusion of the witness. The bill recites that if permitted the witness would have testified that it would take several months for such house to get over its reputation if it had been run as a disorderly house for several years. This was not a matter of expert knowledge or a subject about which the witness should have been permitted to testify. If the house had been theretofore conducted as a disorderly house, on an issue that such conduct of the house had been thereafter abandoned, and that it was not so kept at the date of the charge, this would have been a question of fact for the jury to have considered.

Finding no error in the record, it is ordered that the judgment of conviction be, and the same is hereby, affirmed.

On Motion for Rehearing.

PRENDERGAST, J. By the motion for rehearing the appellant for the first time calls our attention to what she claims to be a fatal mistake in that she claims that the affidavit on which the information was based was made on February 3, 1910, while the information was filed on February 2, 1910. There is filed with the record a properly certified copy of both the affidavit and information with the file marks thereon showing that both were made and filed on February 3, 1910. So that there is nothing in appellant's contention on this point.

The only other ground appellant sets up in the motion for rehearing is that this court

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

erred in the original opinion herein rendered in declining to consider her first bill of exceptions. This court did that in the following language: "As presented, the bill of exceptions, tested by its recitals, or read in the light of the entire record, is insufficient in that the time of the matter sought to be shown does not appear to be of such date as to render the testimony admissible." The appellant now contends vigorously that the court was in error in so holding, and claims that the said bill of exceptions shows that the period of time which this evidence covers was from September 6, 1909, down to the very moment of the question. In order to show the question more clearly, we quote in full said bill of exceptions, as follows:

"Be it remembered that upon the trial of the above entitled and numbered cause, the defendant's witness W. C. Turner, being upon the stand, defendant proposed to prove by said witness the following facts, which, if permitted to do so, the witness would have testified to, to wit: Q. Now, Mr. Turner, since that time, have you had occasion to go to defendant's house or about her house since about the 6th of September? A. Twice I think, or maybe three times. Q. For what purpose did you go there? A. Well, the first time I went there was to see Mabel on some business matters. Mr. Parker for the State: I object to what his purpose was. The Court: I sustain the objection. Mr. McLean: We offer to prove by this witness and other witnesses that they have been there at defendant's house frequently during this time, and that they have watched the house, and have seen no man come in and go out, and that they have been in said house a great many times, and that they saw nothing improper about the place from the time this order was passed. And the state by her prosecuting attorney objected to said testimony, which objection was sustained by the court, and the defendant was not permitted to prove the facts by said witness; that said witness would have testified that he had been there—at defendant's house—frequently during the time inquired about, and that he watched the house as an officer, and that he had been in said house a great many times, and that he had seen no man come in or go out of said house, and no woman come in or go out of said house, nor men or women together go in or come out of said house, and that he had not seen anything that was improper from the time the order was passed; that said testimony was material to the proper defense of this defendant, to which action and ruling of the court, in excluding said evidence from the jury, the defendant then and there, at the time, by counsel excepted, and she now tenders this her bill of exceptions, and asks that the same be allowed, signed, and filed as a part of the record in this case, which is accordingly done."

The affidavit and complaint both charge

that the offense was committed on February 2, 1910. The evidence for the state fixes and limits the time of the commission of the offense to February 2, 1910. Even the evidence of the general reputation of the house was limited strictly to the period of time from December 2, 1909, to February 3, 1910. Certainly appellant cannot claim with any show of reason that such proof as was offered by her would be admissible for any time between September 6, 1909, and December 3, 1909, nor from February 3, 1910, to the date of the trial at which the said question was asked and the testimony offered, February 26, 1910. In other words, no such testimony as offered was admissible unless it was confined within the period of time from December 2, 1909, to February 3, 1910. Perhaps it should have been confined to the very period of time the state fixed by its testimony—February 2, 1910. The testimony excluded could have been just as well for the period of time from September 6 to December 2, 1909, and from February 3 to February 26, 1910, as for said period of time between December 2, 1909, and February 3, 1910. The object of the bill is to show this court that the testimony fixed the period of time when the testimony was admissible. Clearly this bill does not do this, because, as stated above, it would just as clearly show that it was for the other times above stated as for the period of time claimed by the appellant. In addition to this, we take it that the claim of what the witness would testify is a mistake. The witness himself had just testified as shown by the bill, that since September 6, 1909, up to the time of the trial—February 26, 1910—he had had occasion to go to defendant's house or about her house, "Twice I think; or maybe three times," and we take it that he would not have immediately changed his testimony as claimed by this bill, to show that he had been at defendant's house "frequently" from September 6, 1909, to the time he was testifying, February 26, 1910, and that "he watched the house as an officer, and that he had been in said house a great many times, and that he had seen no man come in or go out of said house, and no woman come in or go out of said house, nor men or women go in or come out of said house, and that he had not seen anything that was improper from the time the order was passed."

But even to concede that the witness would have so changed his testimony as to have testified what the bill claims he would have testified, still this bill clearly does not show but that this witness' testimony would have been for one or the other of the periods from September 6, 1909, to December 3, 1909, or from February 3, 1910, to February 26, 1910, appellant claiming, as shown by her own contention, that this testimony embraced the period from September 6, 1909, to February 26, 1910. Hence, we conclude, as this court did

in the previous opinion, "as presented, the bill of exceptions, tested by its recitals, or read in the light of the entire record, is insufficient in that the time of the matter sought to be shown does not appear to be of such date as to render the testimony admissible."

The motion for rehearing will be overruled.

RICKETSON v. BEST.

(Court of Civil Appeals of Texas. Jan. 21, 1911.)

1. SEQUESTRATION (§ 16*)—ISSUES—MATERIALITY—EXEMPTIONS.

In an action to recover certain personal property, or its value, the issue being whether the property belonged to plaintiff or defendant, both parties claiming to have acquired title from one alleged to be the owner in payment of a debt, the statute of exemptions constituted no defense and was immaterial.

[Ed. Note.—For other cases, see Sequestration, Cent. Dig. § 16.*]

2. ESTOPPEL (§ 117*)—OWNERSHIP OF PROPERTY—EVIDENCE.

Where, in an action to recover property alleged to have been owned by a firm and transferred to plaintiff in payment of a firm debt, plaintiff pleaded that defendant was estopped to deny that the property had belonged to the firm, evidence in support of such claim should be restricted to what preceded the alleged sale of the property by the firm to plaintiff.

[Ed. Note.—For other cases, see Estoppel, Cent. Dig. § 117.*]

3. SEQUESTRATION (§ 21*)—VACATION OF WRIT—EXEMPLARY DAMAGES—EVIDENCE.

On the vacation of a writ of sequestration, evidence of plaintiff's good faith in suing out the same is material only as against a claim for exemplary damages.

[Ed. Note.—For other cases, see Sequestration, Dec. Dig. § 21.*]

4. SEQUESTRATION (§ 21*)—EVIDENCE—TITLE.

Plaintiff sued for certain property taken in payment of a firm debt, which property defendant claimed under a purchase from one of the members of the firm in payment of such member's individual debt. *Held*, that evidence that plaintiff believed that the property was the property of the firm, followed immediately by his reasons for such belief, showing the inducement to purchase, was admissible.

[Ed. Note.—For other cases, see Sequestration, Dec. Dig. § 21.*]

5. EVIDENCE (§ 168*)—BEST AND SECONDARY EVIDENCE.

A witness may not testify to the contents of a letter to him over objection that the letter was the best evidence, in absence of any attempt to account for the nonproduction of the letter.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 558; Dec. Dig. § 168.*]

6. SEQUESTRATION (§ 21*)—EVIDENCE.

Where plaintiff, having taken certain property from a firm in payment of the firm debt, sued to recover it from defendant, who had purchased it in payment of an individual debt of one of the partners, evidence of plaintiff's ig-

norance of defendant's claim at the time the suit was brought was inadmissible.

[Ed. Note.—For other cases, see Sequestration, Dec. Dig. § 21.*]

7. EVIDENCE (§ 165*)—BEST AND SECONDARY EVIDENCE—CONTENTS OF BILL OF SALE.

Oral evidence of the contents of a bill of sale is inadmissible in the absence of a proper predicate.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 548-555; Dec. Dig. § 165.*]

8. EVIDENCE (§ 158*)—OWNERSHIP OF PROPERTY.

Where certain property, claimed by plaintiff to have been purchased from a firm in payment of a debt, was actually delivered to the firm independent of the execution of a bill of sale, parol evidence as to what property was delivered to the firm was admissible.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 471-526; Dec. Dig. § 158.*]

9. ESTOPPEL (§ 56*)—CHANGE OF POSITION—EVIDENCE.

Plaintiff sued to recover personal property alleged to have been taken by him as the property of a firm in payment of a firm note which he held. Defendant claimed that the property had been the individual property of one of the members of the firm, and had been sold to him by such member. Plaintiff had not surrendered the firm note which was never canceled. *Held*, that he had not changed his position to his prejudice by reason of his alleged purchase of the property in payment of the note, and hence could not claim that defendant was estopped to deny that the property was the property of the firm.

[Ed. Note.—For other cases, see Estoppel, Cent. Dig. § 142; Dec. Dig. § 56.*]

10. SEQUESTRATION (§ 16*)—TITLE—QUESTION FOR JURY.

In proceedings to recover certain personal property taken by writ of sequestration, evidence *held* to require submission of the issue of title to the jury.

[Ed. Note.—For other cases, see Sequestration, Dec. Dig. § 16.*]

Appeal from Tyler County Court; A. G. Reid, Judge.

Action by J. A. Best against I. C. Ricketson. From a judgment for plaintiff, defendant appeals. Reversed and remanded.

Joe W. Thomas, for appellant. J. A. Mooney, for appellee.

REESE, J. This is a suit by J. A. Best against I. C. Ricketson in the county court to recover three mules, one horse, and one wagon and set of harness of the alleged value of \$405, or the value thereof. With the original petition a writ of sequestration was sued out, under which this property was seized on December 5, 1908. On motion the sequestration was quashed. On December 17th an amended petition was filed and another writ issued under which the property was seized. By agreement of the parties the property was turned over to defendant upon his depositing with the clerk \$405 as the value of the property and \$25 to meet the costs of the suit, upon an agreement that if the plaintiff had judgment he should recover the

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

\$405 and the \$25 should be applied to the cost. If the defendant had judgment, the \$430 was to be returned to him. Plaintiff claimed the mules under an alleged purchase from the firm of Ricketson & McCollum, a firm composed of A. Ricketson, father of defendant, and others; the consideration being the payment of a debt of the firm to him, upon the plea that the property belonged to them, which was denied by defendant, who claimed that the property belonged to him by purchase from A. Ricketson, in payment of a debt which he owed defendant, and had never belonged to the firm. Plaintiff pleaded estoppel against defendant, relying also on title in the firm aforesaid which is alleged to have passed to him by the sale. Defendant answered by general denial and general and special exceptions, which need not be here set out, all of which were overruled. Trial with a jury resulted in a verdict and judgment for plaintiff, from which, motion for new trial being overruled, defendant appeals.

There was no error in overruling appellant's exception to that part of the petition setting up estoppel. The facts alleged, if true, would have operated an estoppel upon appellant to deny the ownership of Ricketson & McCollum.

The statute exempting certain property from forced sale for debt offered no defense to the action. The issue was whether the property belonged to appellant or appellee. This disposes of the first and second assignments of error.

In support of appellee's plea of estoppel, evidence was admitted over the objection of appellant as to whether appellee believed the property belonged to Ricketson & McCollum, and as to whether appellant had ever told appellee's agent Mooney that the property belonged to him. The issue presented by the plea was whether appellee had been induced to "change his relation to the property" by the acts and conduct of appellant and had been induced thereby to believe that it belonged to the firm of Ricketson & McCollum. In the trial of such an issue the evidence must necessarily take rather wide range. Such evidence, however, should have been restricted to what preceded the alleged sale of the property to appellee. What occurred afterwards could not have induced the act of appellee in buying the mules.

If appellant had claimed anything more than actual damages for suing out the writ of attachment, such evidence, as tending to rebut a claim for exemplary damages, and showing that appellee acted under an honest belief, when he sued out the writ of sequestration, that the property belonged to him, would have been admissible, but as against a claim for actual damages only it could not have mattered what the belief of appellee or his agent Mooney was as to the ownership of the property, if in fact it belonged to appel-

lant. If it did, the seizure of the property under the writ of sequestration was wrongful and entitled appellant to actual damages therefor. The court upon the trial, however, found that there was no evidence to support the claim for damages for wrongful suing out of the attachment, which finding is supported by the evidence, and the specific objection that the evidence referred to was not limited to what occurred before the alleged purchase of the property by appellee, is not presented by the assignment. With this explanation, assignments of error 4, 5, 9, 10, 11, 12, and 16 are overruled.

The question propounded to appellee, referred to in the eleventh assignment, "Did you have reason to believe that the property was the firm's property?" and the affirmative answer thereto, standing alone, was subject to the objection made to its admission; but it was immediately followed by a question to the witness and his reply thereto, giving his reasons for such belief. Such belief, with the reasons therefor as an inducement to the purchase and prior thereto, was admissible.

The eighth assignment of error must be sustained. It was improper to allow the witness Dean to testify as to the contents of a letter from Mooney to him, over the objection of appellant that the letter was the best evidence. No attempt was made to account for the nonproduction of the letter. This testimony is, however, not important, and would not alone require a reversal.

It was immaterial what was appellee's belief as to the ownership of the property at the time he instituted this suit. Such belief would not support his plea of estoppel nor tend to do so. Nor would it protect him from appellant's claim for actual damages. The fifteenth assignment of error, presenting the question, must be sustained. For the same reason, it was improper to admit the evidence referred to in the fourteenth assignment as to appellee's ignorance of appellant's claim at the time the suit was brought.

There is no merit in the seventeenth assignment. The substantial effect of the testimony which was excluded would have been to get before the jury the contents of the bill of sale from Walls to McCollum. No proper predicate was laid for the introduction of parol evidence of the contents of this instrument, and upon objection of appellee that the writing was the best evidence the testimony was properly excluded. This objection, however, does not apply to the testimony as to what property was delivered by Walls to McCollum, if there was an actual delivery of the property, independent of the execution of the bill of sale. The testimony would indicate that the witness was testifying as to such actual delivery, and there is nothing in the objection to indicate otherwise. The eighteenth assignment is well taken. The nineteenth assignment of error is overruled without discussion.

By the twelfth and twenty-first assignments of error, appellant complains of the charge of the court on the issue of estoppel, and by the thirty-first assignment of the refusal of a special charge that the evidence did not present that issue. The charge given is theoretically correct, if the evidence had presented the issue of estoppel as pleaded; but we are of the opinion that it does not raise this issue. Appellee pleaded that he was induced to sell the goods on the faith of the ownership of the property in question by Ricketson & McCollum; but this is not supported by any evidence. The evidence for appellee tended to show that the property was brought to Tyler county from Burnett county by A. Ricketson, father of appellant, and was used in the turpentine business, in which they were engaged, by Walls & Ricketson, just as other property owned by them, with appellant's consent. Appellant himself was engaged with his father and Walls in the operation of the business, as an employé for wages. Sowell, who appears to have succeeded McCollum in the firm, or to have become a partner in some way, testified that, when the negotiations were going on with regard to the mortgage from the firm to Saunders, appellant and McCollum were present, and that they both gave a list of property to be included in such mortgage, including these mules and one wagon, but that by mistake the property was not included in the mortgage, and there was some evidence as to appellant having rendered some of the property for taxation for the year 1908 in the name of Ricketson & McCollum. This evidence shows the rendition of two mules, but the officer testified that appellant the next day told him that this rendition was a mistake, as some of the property was private property; that is, did not belong to the firm. The entire transaction with regard to the purchase of the property, the consideration being, as alleged, the satisfaction of the note of Ricketson & McCollum to appellee, was managed for appellee by his agent, J. A. Mooney, and it does not appear that he knew, at the time he made the agreement with Sowell to take the property for the note, either the facts testified to by Sowell as above, or about the assessment referred to. Whatever effect may be attached to this evidence, it does not appear that it in any way, or to any extent, affected Mooney's action. It certainly does not appear by any evidence that by his conduct in allowing the firm of Ricketson & McCollum to use the mules in their business, as stated, appellant intended that they should dispose of them in any way as their own, nor that there was any expectation on his part that they would do so, or that the circumstances of his conduct were such as to make it both natural and probable that they would do so. 2 Pom. Eq. § 805. Mooney

seems to have relied alone upon the general appearances arising from the property being used by the firm. There being no occasion requiring him to speak, appellant's failure to do so could not estop him. Much is undertaken to be made of appellant's alleged failure to speak at the meeting between himself, his father, and Mooney at Rockland on October 8th, when informed by Mooney that he had taken the property in satisfaction of the note by agreement with Sowell. Nothing that occurred at that meeting could support the plea of estoppel for the sufficient reason that it had no effect on Mooney's action, as it was after agreement with Sowell, and after Mooney had taken the property. Appellant's silence at that meeting could not, therefore, have operated to influence Mooney's action. Absolutely nothing was done by Mooney after this meeting in the matter of taking the property for the debt. He only proposed to let A. Ricketson have the mules back, if he would turn over a car of spirits and rosin in satisfaction of the debt, which he agreed to do, but which could not be done on account of Saunders' mortgage. All the evidence shows conclusively that this was after the trade had been made with Sowell, and certainly appellant parted with no right of any kind, nor did anything to his prejudice on account of anything that occurred on that occasion.

But for another and more conclusive reason the evidence fails to present the issue of estoppel. If, in fact, the property in question belongs to appellant, and appellee took no title thereto by reason of the sale and delivery thereof to him by Sowell, he suffered no injury, nor was he prejudiced as to any rights he may have had by reason of his agreement with Sowell. Appellee claims to have agreed to take the property in satisfaction of the note of Ricketson & McCollum held by him. The note was not delivered by him, nor was it, in fact, ever canceled. He still has it, and every right thereunder that he had previous to this transaction. His position, if the property belongs to appellant, has been in no way changed for the worse. One of the essential elements of estoppel is that the person claiming the benefits of it must have acted upon the conduct of the person against whom it is urged "in such a manner as to change his position for the worse; in other words, he must so act that he would suffer a loss if he were compelled to surrender or forego or alter what he has done by reason of the first party being permitted to repudiate his conduct and to assert rights inconsistent with it." 2 Pom. Eq. § 805. Appellee still has the note with every remedy he ever had for its collection, so far as the evidence shows.

It was error to charge upon the issue of estoppel at all, and the assignments of error referred to must be sustained.

It is insisted by appellant that there was no evidence to sustain appellee's claim, and that the judgment should be here rendered for appellant for the \$430 deposited with the clerk, with interest. To this we can hardly agree. Much of the evidence relied upon to establish the plea of estoppel is pertinent to the issue of title, and the evidence, all taken together, presents an issue as to the title, independently of estoppel, which was properly submitted to the jury.

None of the other assignments of error presents any grounds for reversal. On the issue of damages the court properly charged that there was no evidence of damages.

If upon another trial appellant recovers judgment, he would be entitled to the \$430 deposited with the clerk, with legal interest thereon from the date of its deposit, together with such actual damages, if any, as he may have suffered by reason of the unlawful seizure of the property under the writ of sequestration from the time of such seizure until it was redelivered to him upon the agreement referred to.

For the errors indicated, the judgment is reversed, and the cause remanded. In view of another trial, we call attention to the fact, not presented by any assignment, that by the judgment appellee recovered both the money and the property, with execution for the one and writ of possession for the other. Judgment should have been for the money only, under the agreement.

Reversed and remanded.

FARMER v. INTERNATIONAL & G. N. RY. CO.

(Court of Civil Appeals of Texas. Jan. 28, 1911.)

1. RAILROADS (§ 274*)—APPROACHES—NEGLIGENCE.

Where the defendant railroad company owned a portion of land on which a town built a sidewalk in front of a depot, partly under certain easement rights from the railroad company, and partly on one of the town streets, the railroad is not liable for injuries to one falling into a hole in the sidewalk through defect or lack of repair.

[Ed. Note.—For other cases, see Railroads, Dec. Dig. § 274.*]

2. RAILROADS (§ 274*)—APPROACHES—NEGLIGENCE.

While the law imposes a duty on railroads to keep in repair the approaches and platforms to and around their depots, no such duty is imposed upon them to keep in repair the streets and sidewalks in a town or city.

[Ed. Note.—For other cases, see Railroads, Dec. Dig. § 274.*]

3. RAILROADS (§ 274*)—APPROACHES—NEGLIGENCE.

Where plaintiff was injured on a sidewalk at a depot between two streets, and one of the streets was between the point where he was injured and the defendant's depot, the town having control of the streets, the railroad's re-

sponsibility related only to the approach from said street to its depot, and it did not undertake to build or keep in repair the crossing to such street.

[Ed. Note.—For other cases, see Railroads, Dec. Dig. § 274.*]

4. RAILROADS (§ 274*)—APPROACHES—NEGLIGENCE.

That a railroad permitted the town to use part of its right of way on which to construct a walk for use of its citizens is not sufficient to impose liability on the railroad.

[Ed. Note.—For other cases, see Railroads, Dec. Dig. § 274.*]

5. CARRIERS (§ 286*)—INJURIES TO PASSENGERS—APPROACHES—NEGLIGENCE.

A railroad company must provide means of access to and from its stations, and where said way is faulty in construction and repair, and a passenger is injured by reason thereof, he is entitled to recover.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 1142-1152; Dec. Dig. § 286.*]

Appeal from District Court, Ellis County; F. L. Hawkins, Judge.

Action by G. T. Farmer against the International & Great Northern Railway Company From a judgment for defendant, plaintiff appeals. Affirmed.

Farrar & McRae, for appellant. Supple & Harding and Baker & Baker, for appellee.

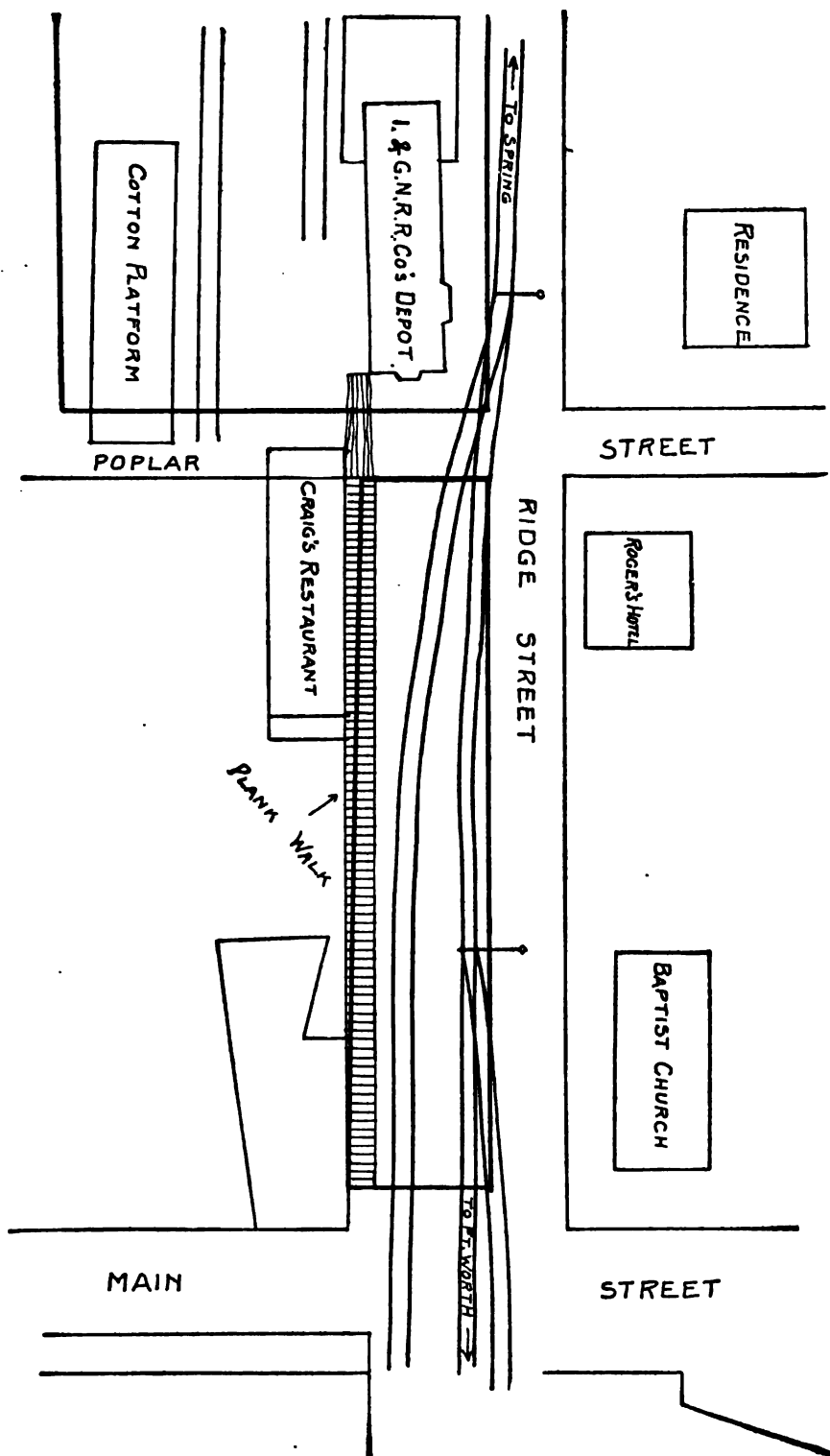
RAINEY, C. J. Appellant brought this suit against appellee to recover damages for personal injuries sustained by him while walking along a plank walk caused and permitted to be built from Main street, in Italy, to its depot for the use of the public and its patrons which it failed to keep in repair; that while plaintiff was going to appellee's depot on a mission of business he was tripped by a plank defectively fastened and caused to fall and was injured. Appellee answered by a general denial, and specially denied that it had anything to do with the construction, maintenance, or ownership of said walk; that said walk was owned and maintained by the town of Italy for its purpose, partly upon land which the appellee had an easement in and partly upon one of the streets, with the permission of appellee, and with the understanding that for its use and occupancy said town was not to plead limitation for appellee's part of the land and to deliver the possession thereof when desired; that the agreement between them was partly verbal and partly by a resolution of the town. Also pleaded contributory negligence.

The court instructed a verdict for appellee and judgment was accordingly rendered. Appellant appeals.

Conclusions of Fact.

The following map shows the situation of the railroad track, sidewalk, and surroundings in the town of Italy where the accident happened:

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes



The plaintiff was on his way to the depot, travelling along the plank walk with his brother to see about checking his brother's bicycle to Brazos Switch, and about what time the train left Sunday evening. The length of the plank walk is about 118 steps and runs from Main street to the depot. After walking about 70 steps appellant stepped on a cross-plank that was defectively fastened, which flew up and tripped him, causing him to fall in a hole 12 or 15 inches wide, made in the walk by two cross-planks that had been removed. The walk was constructed between Main and Poplar streets by laying stringers 2x4 on blocks, and across them were planks three or four feet long. The height of the walk was from 12 to 15 inches from the ground. Across Poplar street there were planks laid lengthwise to the depot. The walk between Main and Poplar streets was run partly along appellee's right of way and partly on land to which the appellee had no claim. The walk was constructed by the town of Italy as a walkway for the use of the public in going to and from the depot principally, but was used by the public indiscriminately. The right of way on which it partly rested had been acquired by the town from the defendant, and it was understood between them that the town's occupancy should not be adverse so as limitation would run and possession was to be delivered to the defendant when desired. The town originally constructed the plank walk and has ever since maintained it, and the defendant has never assumed any control whatever over it, nor in any way made repairs thereon.

Conclusions of Law.

The question for decision is: Do the facts in this case, about which there is no material conflict, show any liability on the part of the railway company for failing to keep in repair the plank walk between Main and Poplar streets in the town of Italy? The law imposes no duty on railroad companies to keep in repair the streets and sidewalks in a town or city. It does impose the duty of keeping in repair the approaches and platforms to and around its depots, but the walk in question cannot be considered an approach to the depot, in the sense of that word as above used. Appellant was injured on said walk at a point between Main and Poplar streets. Between the point where appellant was injured and the depot was Poplar street. The town has control over said Poplar street and the railroad's responsibility relates only to the approaches from said street to its depot; it never undertaking to build or keep in repair the crossing to said street. The mere fact that the railroad permitted the town to use part of its right of way on which to construct the walk for the use of its citizens, is not sufficient to impose liability on the rail-

road. *Neal v. Railway Co.*, 128 N. C. 143, 38 S. E. 474.

The appellant cites several cases where railroads have been held liable for injuries received from defective "approaches" to depots, but in those cases the approaches were immediately adjacent to the depot. We fully concur in the doctrine laid down in *Railway Co. v. Trautwein*, 52 N. J. Law, 169, 19 Atl. 178, 7 L. R. A. 435, 19 Am. St. Rep. 442, where it is held that the company must provide means of access to and from its stations and where said way is faulty in construction and repair and a passenger is injured by reason thereof he is entitled to recover. But the facts of this case are not the same, and we know of no case where a railroad company has been held liable under such a state of facts as presented in this case.

The judgment is affirmed.

ATCHISON, T. & S. F. RY. CO. v. CLASSIN.†

(Court of Civil Appeals of Texas. Jan. 25, 1911. Rehearing Denied Feb. 8, 1911.)

1. RAILROADS (§ 282*)—INJURIES TO PERSONS WORKING ABOUT CARS—JURY QUESTIONS—CONTRIBUTORY NEGLIGENCE.

Plaintiff was employed as car inspector for a railroad company which used the same yards that defendant company used, and had inspected one of defendant's cars, which was to be moved by his road and found it defective, and had advised defendant of the defects, so that it could be repaired by defendant before it was moved. Both the rules of plaintiff company and of defendant required that a blue flag be placed upon cars which were being repaired, and kept there until the repairs were made. Shortly before the accident, plaintiff saw defendant's employé working on the car with a flag placed in front thereof, and shortly thereafter plaintiff approached the car from the opposite direction from the end where the flag was posted, and, seeing the tools used by defendant's employés around the car and supposing the flag was still on the car, plaintiff went under it, and an engine backed against it, injuring him, the flag in the meantime having been removed by defendant's employés. *Held* that, at most, the question of whether plaintiff was negligent in going under the car under the circumstances was for the jury.

[Ed. Note.—For other cases, see *Railroads*, Cent. Dig. §§ 910-923; Dec. Dig. § 282.*]

2. RAILROADS (§ 275*)—INJURIES TO PERSON WORKING ABOUT CARS—NEGLIGENCE.

The flag protecting the repaired car having been removed before the repairs were completed, without plaintiff's knowledge, it was defendant's duty to inform plaintiff of that fact, or to use care in operating its engine on that track, so as to not injure one, such as plaintiff, who might be expected to be about the car while it was being repaired.

[Ed. Note.—For other cases, see *Railroads*, Cent. Dig. §§ 873-877; Dec. Dig. § 275.*]

3. RAILROADS (§ 278*)—INJURIES TO PERSONS WORKING ABOUT CARS—CONTRIBUTORY NEGLIGENCE.

If plaintiff knew that there was no blue flag up on the repaired car when he went under

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

† Writ of error denied by Supreme Court.

it, he was negligent in going under it so as to prevent recovery.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 891-900; Dec. Dig. § 278.*]

4. RAILROADS (§ 278*)—INJURIES TO PERSONS WORKING ABOUT CARS — ASSUMPTION OF RISK.

If plaintiff went under the repaired car to inspect it, knowing that the blue flag had been removed therefrom, he assumed the risk of it being struck by other of defendant's cars coming in on the same track.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 891-900; Dec. Dig. § 278.*]

5. RAILROADS (§ 278*)—INJURY TO PERSON WORKING ABOUT CARS — ASSUMPTION OF RISK.

A car inspector of another railroad company who had requested defendant company to repair one of its cars, so that it could be received by his own company, did not assume the risks of injury from the negligence of defendant's servants in repairing the car, which he was required to reinspect after repaired, unless he knew of such negligence, or should have known thereof in the ordinary discharge of his duties.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 891-900; Dec. Dig. § 278.*]

6. APPEAL AND ERROR (§ 1033*)—HARMLESS ERROR—INSTRUCTIONS—FAVORABLE TO COMPLAINING PARTY.

In an action by a car inspector of another road for injuries sustained while under one of defendant company's cars, which he had requested it to repair, to enable his road to receive it, by defendant's engine coming in on the repair track after the repair flag had been removed, and striking the car, the court instructed that if plaintiff knew that there was danger of the car he was under being struck by others of defendant's cars by reason of the absence of a blue flag, or from any other reason, at the time he went under the car to inspect it, and appreciated or should have appreciated the danger therefrom, he assumed the risk, and cannot recover. There was no evidence that plaintiff knew that the flag was not up when he went under the car, so as to make his knowledge on that question an issue. *Held* that, even if the charge was erroneous, defendant could not claim a reversal on that ground, since it was favorable to defendant.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4052-4062; Dec. Dig. § 1033.*]

7. RELEASE (§ 29*)—PERSONAL INJURIES—EFFECT.

After plaintiff, who was car inspector of another railroad company, was injured while inspecting a car being repaired by defendant's employes by one of its engines backing against the car, plaintiff signed an instrument releasing certain named corporations, including his own company, but not defendant company, from liability by reason of his injury; the release reciting that the payment should not be construed as an acknowledgment of liability by any of the named corporations. The release was signed at the instance of the claim agent of plaintiff's company under an understanding with him that it should not prevent plaintiff from suing defendant for damages, and that the amount paid plaintiff by his claim agent was a gratuity given because of plaintiff's long service, and not as compensation for his injuries. *Held*, that the release did not bar a suit against defendant for the injuries sustained, but his recovery against defendant should be reduced by the amount paid him under the release.

[Ed. Note.—For other cases, see Release, Cent. Dig. §§ 64-70; Dec. Dig. § 29.*]

Appeal from District Court, El Paso County; Jas. R. Harper, Judge.

Action by A. J. Classin against the Atchison, Topeka & Santa Fé Railway Company. From a judgment for plaintiff, defendant appeals. Modified and affirmed.

Terry, Cavin & Mills and A. H. Culwell, for appellant. Patterson & Wallace, for appellee.

JAMES, C. J. This action was by appellee, alleging: That he was an employé of the El Paso & Southwestern Railway Company at Deming, N. M., his employment being that of car inspector. That on November 27, 1908, the defendant, the Atchison, Topeka & Santa Fé Railway Company, maintained yards at Deming wherein cars were repaired, switched, moved, and made up into trains by its employes. That it was plaintiff's duty to inspect all cars in said yards that were to be received from defendant by his employer, the El Paso & Southwestern Railway Company. That on said date a car was there which was to be thereafter delivered to the lines of El Paso & Southwestern System. That it was part of plaintiff's duty, as well as the usual and customary practice, for him to inspect said car in order to ascertain whether or not the same was safe to be operated and hauled over the lines of his employer. That he inspected it, and found it unsafe, and notified defendant and its employes that, before his line would accept same, it would be necessary for them to make certain repairs, and on the morning of the 27th he was informed by defendant's employes that they would proceed to repair the car. That about 2:30 p. m. of said day plaintiff went to the yard to inspect same and to ascertain whether or not it had been repaired, it being then located on ripwork track No. 3, which was used to store disabled cars on which light repairs were to be made. That on reaching same plaintiff discovered there tools of defendant's car repairers, and, in order to ascertain whether or not the repairs were properly made or finished, it became necessary and a part of his duty, and it was the customary practice, to go under the car in order to inspect same, and while there defendant's employes negligently switched a car in on said rip track with great force and violence, and without warning, which car struck the car ahead of the one under which plaintiff was inspecting, causing the latter to move and injure plaintiff. That plaintiff was rightfully in said yards inspecting the car in the usual and customary manner and way in which the work had formerly been done by plaintiff and other persons in said yards. That defendant and its agents knew at said time that plaintiff and other persons were required to go into the yards and inspect cars under like circumstances, and that in inspecting

same it became necessary and a part of their duty to go under the cars. That with such knowledge defendant's employes in charge of one of its switch engines on this occasion in a negligent manner made a running or flying switch and threw a car into said rip track with great force and violence at a dangerous speed without taking precautions to warn plaintiff, whereby it struck the car ahead of the one plaintiff was under, and caused him to be injured as aforesaid.

Plaintiff alleged, in addition: That said rip track was used exclusively as a repair track at and before the happening of the event. That defendant had a rule in force and effect at the time and prior thereto which required its employes when repairing cars on said track to place on the end of the car next to the switch a flag, and to keep same stationed on said car until the work was finished, and that no person or employe of defendant was authorized to move said flag except the employes who were making repairs on cars situated on said track, which rule was for the protection of all persons, including plaintiff, whose duty called them to go in, around, or underneath cars located on the track. That a short time prior to this accident and while defendant's employes were repairing the said car plaintiff saw that said rule had been complied with and said flag placed on the front car. That, when he approached the car on the occasion of his injury, he came up from an opposite direction, and, noticing there the tools of defendant's employes who were repairing the car, he had good reason to believe, and did believe, that said rule was observed, and went under the car to make an inspection. That plaintiff believes and alleges that a short time prior to the accident defendant's foreman in charge of the work with knowledge that the repairs had not been completed, and with knowledge that plaintiff would have to inspect the car when finished, caused the flag to be removed, without warning plaintiff of the fact, and that, therefore, defendant and its agents were guilty of negligence, it being their duty to refrain from moving the flag until the work had been finished and the car examined and inspected by plaintiff. That, if the employes in charge of the switching of said car had exercised ordinary care in switching same, the accident to plaintiff would not have occurred, and that, if defendant's employes had obeyed the rule and not removed the flag, the accident would, in all probability, not have happened.

Defendant answered by general demurrer, denial, and pleaded specially contributory negligence; that plaintiff had no business under the car; that no one knew he was there; that he took no steps to protect himself; and that appellant had the right to move the cars without warning to him; also assumed risk. Defendant further pleaded fellow servant, alleging that the common law prevailed in New Mexico as to fellow servants, and that

under such rule defendant was not liable to plaintiff. Defendant also set up that, if plaintiff was injured as claimed by him, his cause of action has been released, discharged, and satisfied by his receiving the sum of \$215 paid him by the El Paso & Southwestern Railroad Company of Arizona and the El Paso & Southwestern Railroad Company of Texas and other companies, including this defendant, and releasing them according to his written receipt, statement, accord, and satisfaction, annexed to the petition. The release attached recited payment of \$215 paid by the El Paso & Southwestern Railway Company and certain other railway corporations whom it purported to release, but it did not mention or include this defendant. By supplemental petition plaintiff alleged that he was not an employe of defendant; that defendant at the time of the accident had no authority or control whatever over plaintiff, and the work he was engaged in was for the El Paso & Southwestern System, and therefore he was not a fellow servant with defendant's employes; that defendant and plaintiff's master, the El Paso & Southwestern System, were not joint tort-feasors. In respect to this injury, and that, therefore, the release pleaded by defendant is wholly without consideration so far as this defendant is concerned, and is no bar to plaintiff's action, and he is not bound by the terms and conditions of the release, or by reason of his acceptance of the money mentioned in the release. The verdict was for plaintiff in the sum of \$2,500.

The first assignment is that the court erred in refusing a peremptory instruction for the defendant because plaintiff had totally failed to make out a case of liability on the part of defendant. Appellant's contention under this assignment is as follows: "If it shall be held that plaintiff and those whose acts occasioned the injury were not fellow servants, then the appellant says that he is not entitled to recover, because he was a volunteer at the time of the accident, and for whose protection the obligation of lookout or caution did not obtain. It was his duty to see that those steps were taken which would insure his protection, as he was volunteering his service at a time and place not required, and the evidence fails to show that any one knew he was under the car at the time it was moved."

We form the following conclusions of fact from the evidence in view of the verdict.

First. The testimony showed that the persons who were engaged in repairing the car, and who, or one of whom, under the order of their foreman, removed the flag after it had been properly placed on the car next to the switch, without notifying plaintiff of the fact, were servants of and under the control of another master than plaintiff's. The testimony on this question was uncontroverted.

Second. Plaintiff, according to all the evi-

dence, was not a volunteer while engaged in doing the work involved in inspecting and examining the car.

Third. There was ample evidence showing that plaintiff did not ignore or fail to heed the rule; that the work being done was the placing of the car in a condition of repair to enable it to be moved over and received by the El Paso & Southwestern System, subject to plaintiff's inspection; that this work devolved on the defendant, the Atchison, Topeka & Santa Fé Railway Company, and its employes; that plaintiff's duty was to examine and approve the work on behalf of the former company, his employer; that the method prescribed was to post and keep posted the blue flag for the safety of all persons engaged on and about the work, until the work was completed; that plaintiff was informed during the morning of the 27th that the car would be repaired, and the work was commenced by defendant and its employes that morning, but not finished during the forenoon; that defendant's employes left the scene of the work, and some of them went to the blacksmith shop to do some necessary work connected with the repair and to return to it later, leaving their tools there for the purpose; that plaintiff went there in the forenoon, and indicated what was to be done in the way of repairs, and saw at that time the flag was posted as required by the rule. Later, before defendant's employes had returned, he went there in the performance of his duty of inspecting the work, approaching the car from a direction from which he could not see the place where he had seen the flag, and perceiving the tools left there indicating that the work was not finished, he concluded this was the case, and it did not occur to him to notice whether or not the flag was still posted, but, upon the assumption that it had not been removed, he went under the car to make inspection in the customary way of doing this character of work, and while there the car was shunted down and caused his injury. The evidence shows that no one had the right in that yard to post or remove the flag but defendant's employes, and that it had been removed by direction of defendant's foreman.

The testimony was sufficient to warrant the jury in finding the foregoing facts.

Our conclusion of law from the above facts is that they do not present a case which precluded the plaintiff from recovery, for the reason that he ignored or violated a rule. A similar rule was in force in regard to both railway companies. The flag was put out, and it was the duty of the defendant and its employes to keep it there and to refrain from moving it until the work was finished, including the work necessary and proper to be done by plaintiff. No one else than defendant's employes had authority to move it. Plaintiff had seen it posted, and had the right to, and naturally would, assume that it would not be prematurely moved. He did not know that it had been taken away. He

was not bound to anticipate that it would or might be moved and keep his eye upon it, and it was in fact moved by direction of defendant's foreman. The most that can be claimed of plaintiff's action was that he was guilty of negligence; that is to say, that in going under the car he failed to act under the surrounding conditions as an ordinarily prudent person would have done, and this issue was submitted. Defendant's employes having moved the flag prematurely without plaintiff's knowledge, it was defendant's duty to plaintiff to inform plaintiff of the fact or to operate its engines and cars upon that track in such manner as to exercise care to injure no one whose presence might have been expected in and about the car in question while the work of repair was in progress. We therefore overrule the said assignment.

The refused charge, which is the subject of the second assignment, was properly refused, for the reason that it would have, in effect, instructed the jury that it was the duty of plaintiff under the rule, and he could not recover unless before going under the car he posted the blue flag, which, if charged, would have eliminated the inquiry whether or not the circumstances were sufficient to excuse him from so doing.

The third assignment, concerning the refusal of a certain charge on assumption of risk, is overruled for the same reason.

Likewise the fourth assignment.

The fifth assignment is overruled, there being upon the facts no condition of fellow servant.

The sixth assignment complains of that part of the court's charge which stated: "But he does not assume the risks that may be brought about by the negligence of some other person than himself, unless he knew of such negligence, or in the ordinary discharge of his duties must necessarily have acquired knowledge of." The instruction was correct in its application to the facts of this case. It had reference to the negligence of defendant's employes who were not fellow servants with plaintiff.

The seventh assignment is that the court erred in charging: "You are instructed that it was the duty of defendant Atchison, Topeka & Santa Fé Railroad Company to exercise ordinary care to avoid injuring inspectors of the El Paso & Southwestern Railroad Company while engaged in the proper discharge of their duty upon its (defendant's) track." The proposition is: "That defendant owed the inspector no duty until its employes had knowledge of his presence upon its tracks, or that he was in a place of danger in violation of its rules requiring a blue flag to be posted upon its cars; and, in the absence of a blue flag so posted as required by the rule which was known to plaintiff and under which he worked, defendant had the right to presume that said rules were being complied with and that there was no

danger to plaintiff, or any other inspector of a foreign road." The first part of this proposition might possess force if there had been no occasion to expect the inspector to be at the place. The second part might also have force if the circumstances were not such as the evidence shows them concerning the absence of the flag.

The eighth complains of an instruction which was a correct one under the circumstances in evidence in this case.

The ninth complains of this portion of the charge: "If you believe from the evidence that plaintiff knew that there was danger of cars being run down upon and into the cars he was inspecting by the defendant's servants by reason of there being no blue flag posted to give warning, or from any other reason, at the time he went under said car to inspect same, and that he appreciated the danger to himself, or should have appreciated the danger therefrom, but notwithstanding went under said car and ran the risk, then you are instructed that he in that case assumed the risk of being injured, and cannot recover, and, if you so believe the facts to be, your verdict will be for the defendant." The criticism is that it requires the jury to find, in order to find for defendant, that plaintiff knew that there was danger of cars being run down upon and into the car he was inspecting, and that he appreciated the danger therefrom, and the criticism is based upon the proposition thus expressed: "That the rules required plaintiff to post a blue flag whether he knew of the approach of a car or train or not, or whether he appreciated the danger to himself or not, and said rules admitted of no discretion on his part and prohibited any speculation on his part, but made it his duty in every case on every track on going under every car to either post the blue flag or see that same was posted for his protection." We are of opinion that, if plaintiff knew that there was no blue flag up at the time he went under the car, he could not recover, as it would be negligence on his part, and, viewed from the standpoint of risk, he would be held to have assumed the risk of the car he went under being run into.

However, we have read the testimony as it purports to be set forth fully in appellant's brief, and fail to find that there was any testimony showing or tending to show that plaintiff knew that the flag was not up at the time. He testified that he did not know it, and that he approached the car from the opposite direction from when he had seen it in the forenoon while the work was unfinished and acted upon the idea that it was still there, as required to be. There is nothing to show the contrary of this. In this condition of the evidence there was no issue of risk assumed by plaintiff growing out of the fact that he knew at the time the flag was not there. There was an issue as to whether or not he was negligent in going un-

der the car without seeing to it that the flag was still there, but no issue as to whether or not he knew it was not there. Hence the instruction, if deemed erroneous, would not be cause for reversal as after all it gave defendant the benefit of a matter it was not entitled to.

The court instructed the jury to not consider the defendant's plea of release and payment based upon the release introduced in evidence for the reason that this defendant and the El Paso & Southwestern Railroad Company of Arizona and the El Paso & Southwestern Railroad Company of Texas, etc., were not joint tort-feasors. This charge is complained of, and also the refusal of a charge "that the receipt introduced by defendant showing a full settlement of plaintiff's cause of action with the several released companies therein mentioned is a full and complete settlement of his entire claim and cause of action, and that said receipt of itself contains no reservation as to any part of plaintiff's cause of action as a basis for this suit." The release, in substance, was of named corporations, other than defendant, from liability by reason of this injury to plaintiff and of any other cause or matter for the consideration of \$215. The release recited that the payment was not to be construed as an acknowledgment of liability on the part of any of the named companies. Under appropriate pleading plaintiff testified that the payment was a gratuity. He stated: "I negotiated the question of that release with Mr. D. D. Willis, general claim agent of the El Paso & Southwestern System. When I signed that release, it was with the distinct understanding between Mr. Willis and myself that it did not debar me from bringing a cause of action against the Santa Fé Company for damages. He paid me \$215. He said he gave me that as a gratuitous contribution as I had long been in the service of the company. This \$215 was not paid to me in any manner to compensate me for the injury to my foot and loss of my toes." The above was all the evidence on the subject. Following the case of *El Paso & Southwestern Ry. Co. v. Darr*, 93 S. W. 167, we conclude that the release did not operate to bar plaintiff's right to sue this defendant. There was nothing disclosed showing liability on the part of any of the companies named in the release for this occurrence, and they were not joint tort-feasors with defendant. The release negatives any admission of liability by reason of the payment of the \$215, and, in connection with this, the testimony of plaintiff on the subject which was not contradicted in any way showed that it was a gratuity, and not intended as compensation for plaintiff's injury. However, it was on account of his injury that he received this payment, and to that extent we think plaintiff's recovery should be reduced, as was done in said case of *Railway*

v. Darr. Plaintiff consents to this in case we should take that view.

Judgment modified and affirmed.

LANTRY-SHARPE CONTRACTING CO. v. McCracken.†

(Court of Civil Appeals of Texas. Oct. 26, 1910. On Motion for Rehearing, Jan. 4, 1911. On Appellant's Motion for Rehearing, Feb. 8, 1911.)

1. MASTER AND SERVANT (§ 189*) — "VICE PRINCIPAL"—WHO ARE.

One is a "vice principal" who is employed to hire, direct, and discharge employes or to whom the employer has delegated a duty owing to workmen, though otherwise he may be a fellow servant; it being the authority given in a particular matter, and not the grade of service, which determines the issue of vice principal or fellow servant.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 427-437; Dec. Dig. § 189.*]

For other definitions, see Words and Phrases, vol. 8, pp. 7313-7316; vol. 8, p. 7827.]

2. MASTER AND SERVANT (§ 190*)—FELLOW SERVANTS—VICE PRINCIPALS.

Though one be a vice principal as to general management and control of work, if his negligence be that of a collaborer and not in exercising his authority, he is, as to such negligence, a fellow servant and not a vice principal.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 449-474; Dec. Dig. § 190.*]

3. MASTER AND SERVANT (§ 185*)—FELLOW SERVANTS—REPRESENTING THE MASTER.

Where one employé is placed under the control of another, the latter's orders respecting the work are the employer's orders regardless of the grade which the directing employé otherwise holds.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 385-421; Dec. Dig. § 185.*]

4. MASTER AND SERVANT (§ 294*)—VICE PRINCIPALS—INSTRUCTIONS.

In an action for injury to a workman, an instruction stating that the employé whose negligence caused the injury was a fellow servant was properly refused, where there was evidence that he was employed as foreman, and the injured workman had been directed to obey him, and that the injury was caused by an order given by the foreman, though he had no power to hire or discharge.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 1162-1167; Dec. Dig. § 294.*]

5. MASTER AND SERVANT (§ 190*)—ACTS OF VICE PRINCIPAL—RATIFICATION.

If a vice principal on hearing a negligent order given permits it to be obeyed, he thereby makes it his own.

[Ed. Note.—For other cases, see Master and Servant, Dec. Dig. § 190.*]

6. MASTER AND SERVANT (§ 280*)—INJURY TO EMPLOYEES—JURY QUESTION.

In an action for injury to a workman in erecting a rock crusher held proper under the evidence to refuse a peremptory instruction asked by defendant, based on the theory that plaintiff had represented himself to be experienced.

[Ed. Note.—For other cases, see Master and Servant, Dec. Dig. § 289.*]

7. MASTER AND SERVANT (§ 107*) — SAFE PLACE TO WORK—DUTY TO PROVIDE.

Generally, an employer owes a nonassignable duty to furnish a safe place in which his employes are to work, but not when the danger is transitory and due to no fault or plan or construction, but to the nature of the work.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 199-202; Dec. Dig. § 107.*]

8. EVIDENCE (§ 208*) — ADMISSIONS — PLEADINGS—ADMISSIBILITY.

In a personal injury action, it was not error to admit in evidence defendant's abandoned answer which stated how the accident occurred, it not appearing that such answer contained a general denial.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 713, 719; Dec. Dig. § 208.*]

On Motion for Rehearing.

9. MASTER AND SERVANT (§ 153*)—DUTY TO WARN.

An employer need not warn an employé against dangers incident to the work, where the latter has represented himself to be competent and the employer is ignorant of his inexperience.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 314-317; Dec. Dig. § 153.*]

10. APPEAL AND ERROR (§ 742*)—ASSIGNMENTS OF ERROR—SUFFICIENCY.

In an action for injury to an employé, an assignment of error to refusal to direct a verdict for defendant is insufficient to present propositions concerning the employer's duty to provide a reasonably safe place of work and to warn employes representing themselves to be experienced, where the evidence was conflicting on material issues, and where the statement referred to under the assignment showed a conflict of evidence.

[Ed. Note.—For other cases, see Appeal and Error, Dec. Dig. § 742.*]

11. MASTER AND SERVANT (§ 226*)—ASSUMPTION OF RISK—NEGLIGENCE OF MASTER.

An employé's assumption of obvious risks does not release the employer's liability for injury caused by the employer's intervening negligence.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 659-667; Dec. Dig. § 226.*]

12. APPEAL AND ERROR (§ 1001*)—REVIEW—CONCLUSIVENESS OF VERDICT.

A verdict sustained by evidence will not be disturbed on appeal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3922-3934; Dec. Dig. § 1001.*]

Appeal from District Court, Bell County; John D. Robinson, Judge.

Action by W. E. McCracken against the Lantry-Sharpe Contracting Company. Judgment for plaintiff, and defendant appeals. Affirmed.

Harry P. Lawther and A. M. Monteith, for appellant. J. B. McMahon, for appellee.

JENKINS, J. This is a suit to recover damages for personal injuries incurred in the erection of a rock crushing machine, a drawing and description of which will be found in the report of this case on a former appeal. 117 S. W. 454. There will also be

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

† Writ of error granted by Supreme Court.

found in said report a statement of the nature and extent of appellee's injury. We adopt the statements so made as to these matters as our own statements herein. In the last trial of this case in the court below, appellee recovered judgment for \$1,999.50.

1. Appellant assigns as error the giving of the sixth paragraph of the general charge, and the refusal to give special charge No. 4 requested by appellant. Said sixth paragraph is as follows: "You are further charged that an agent or employé who is vested by the master with the authority over other employés to superintend, control, or command other employés or servants, and with authority to direct other employés in the performance of their duties, and not otherwise co-operating with them in the performance of their duties, is a vice principal of such employer, and is not a fellow servant of such other employés, and such employer would be responsible for any damage resulting from the negligence of such vice principal. Now if you find from the evidence that John Bruce was the foreman and carpenter in charge of the construction of said rock crusher plant, and had authority from the defendant to direct the details of said work, and to direct and supervise the workmen engaged upon same, and was at the time of said injury actually directing other employés in the performance of their duties, and not merely co-operating with them in the performance of their duties, then the said John Bruce would not be in law a fellow servant of such other employés or of the plaintiff, and the defendant would be liable to the plaintiff for any injury sustained by him through the negligence of the said John Bruce, if any. You are charged that in this case W. C. Roettiger is a vice principal of the defendant, and the defendant would be liable to plaintiff for any injuries resulting to him from the negligence of said Roettiger, if any."

Said special charge No. 4 is as follows: "In this cause you are instructed that Bruce was a fellow servant with the plaintiff McCracken, and if you find from the evidence that the falling over of the upright timber was directly and proximately caused by an act of Bruce, you will find for the defendant."

*Appellant's proposition under these two assignments is that Bruce was a fellow servant. If the evidence clearly shows that Bruce was a fellow servant, special charge No. 4 should have been given, and it was error to give the sixth paragraph of the charge above set out. But if the evidence shows that Bruce was a vice principal, or if the evidence is contradictory on this point, it would have been error to have given said special charge, or to have failed to charge the law as to vice principals. The facts relied upon to sustain the action of the court in this regard are as follows: One Roettiger was the general manager of appellant in

erecting said rock crusher, and was around and about the same while the work was being done. He employed John Bruce, an expert carpenter, as foreman on said work, and instructed the workmen, and the appellee in particular, to do whatever Bruce told him to do. Bruce was actually directing the work and giving instructions at the time the injury occurred; and, if appellee's testimony be true, gave the order, which a jury might well have found was the proximate cause of appellee's injury. Bruce had no authority to employ and discharge the hands working under him. We hold the following to be the law upon this matter: (1) Where a party has not only the power to direct and control those under him, but also to hire and discharge them, he is a vice principal, and it is not necessary that his acts should be in relation to those things which the master has impliedly contracted to furnish. (2) He is a vice principal to whom the master has delegated a duty which he owes to his servants and has impliedly contracted to perform, though otherwise he may be but an employé and a fellow servant. It is the authority given in the particular matter and not the grade of service which determines the issue as to vice principal or fellow servant. (3) Though one be a vice principal as to the general management and control of the work, if his negligence be that of a collaborer, and not in the exercise of the authority delegated to him, he is, as to such negligence, a fellow servant and not a vice principal. (4) Where one is placed by the master under the control of another, and told to obey his instructions, the orders given by such other in relation to the work in hand, are the orders of the master, without reference to the rank or grade which he otherwise holds in such service. In such case the power to employ or discharge is not necessary.

The following authorities are deemed sufficient to sustain and illustrate the above propositions: *Douglas v. Railway Co.*, 63 Tex. 567; *Russ v. Railway Co.*, 112 Mo. 45, 20 S. W. 473, 18 L. R. A. 823; *Young v. Hahn*, 96 Tex. 101, 70 S. W. 950; *Railway Co. v. Williams*, 75 Tex. 7, 12 S. W. 835, 18 Am. St. Rep. 867; *Railway Co. v. Peters*, 87 Tex. 222, 27 S. W. 257; *Nix v. Railway Co.*, 82 Tex. 476, 18 S. W. 571, 27 Am. St. Rep. 897; *Railway Co. v. Smith*, 76 Tex. 616, 13 S. W. 562, 18 Am. St. Rep. 78; *Railway Co. v. Farmer*, 73 Tex. 85, 11 S. W. 157; *Manufacturing Co. v. Femelat*, 35 Tex. Civ. App. 36, 79 S. W. 869; *Oil Co. v. Anderson*, 41 Tex. Civ. App. 342, 91 S. W. 603; *Oil Co. v. McLain*, 27 Tex. Civ. App. 334, 66 S. W. 228; *Oil Co. v. Burns*, 72 S. W. 629; *McCracken v. Contracting Co.*, 45 Tex. Civ. App. 485, 101 S. W. 520; *Hunt v. Lead Co.*, 104 Mo. App. 377, 79 S. W. 713; *Bane v. Irwin*, 172 Mo. 306, 72 S. W. 523. Such being the law the court did not err under the evidence in this case in refusing to peremp-

torly instruct the jury that Bruce was a fellow servant of appellee, nor in instructing the jury as to what facts would constitute the said Bruce a vice principal. It would have been error for the court to have instructed the jury, as a matter of law, that Bruce was a vice principal, simply from the fact that appellee had been placed under his control, with instructions to obey his orders; for, according to the contention of appellant, appellee was not injured in consequence of any order given by Bruce, but on account of the carelessness of said Bruce and appellee in taking hold of the brace and pulling it towards them (which, if true, would be the act of Bruce as a fellow servant) or in consequence of the negligence of other fellow servants in failing to pull the tag rope, as directed by said Bruce.

2. Appellant complains of the action of the court in submitting to the jury the alleged negligence of Roettiger, the admitted vice principal; the contention of appellant being that the evidence shows that said Roettiger was not present at the time of the injury. The evidence on this issue was conflicting, and it was proper to submit it to the jury. The court did not err in instructing the jury that if said Roettiger was present, and heard the orders given by Bruce, and permitted said orders to be obeyed, the acts of said Bruce in giving the orders would be the acts of Roettiger.

3. Appellant complains of the action of the court in refusing to peremptorily instruct the jury to find for appellant, and in instructing the jury to find for the appellee (other elements of damages being shown) if they found that Roettiger or Bruce, under the direction of Roettiger, placed appellee in a dangerous place, and that Roettiger or Bruce knew of the danger of working in said place, and that appellee was inexperienced in said work, and did not know of its danger, and that said Roettiger or Bruce knew that appellee was inexperienced and did not know of such danger, and each of them failed to warn said Bruce as to said danger. Appellant's contention is (1) that appellee had represented himself as an experienced "topman," and (2) that under the facts of this case it was not the duty of appellant to furnish the appellee with a safe place in which to work. As to whether or not appellee was an experienced "topman"—that is, accustomed to walk on high scaffolding—is material in this case, inasmuch as it reasonably appears that if he had been he might have gotten out of the way after the upright timber began to fall, as did Bruce, who was in equally as dangerous a position at the time. But we do not think that a peremptory instruction to find for appellant should have been given, for the reason that the evidence is conflicting as to the representations made by appellee at the time of his employment. Appellee denies making such representations, but says that he stated

the experience which he had had in this regard, which was limited; and it is further made to appear that both Bruce and Roettiger saw appellee "cooning" around on the beams just before the accident, from which it might be inferred that he was inexperienced in such work. Besides, we think that appellee's right to recover does not depend solely upon the proposition that the place was not a safe one in which to work, as will more fully appear in a subsequent portion of this opinion.

As to the duty of the master to furnish a safe place in which the servant is to work, we understand the general rule to be that such is the duty a master owes to all of his servants, and that this duty is nonassignable and nondelegable; but this duty has no application, when the danger to which the employé is exposed is merely transitory, due to no fault of plan or construction, but is one which from the nature of the work, such transitory conditions frequently arise, which fact must reasonably be known to the servant engaged in such work. *Armour & Co. v. Dumas*, 43 Tex. Civ. App. 36, 95 S. W. 710; *Allen v. Ry. Co.*, 14 Tex. Civ. App. 344, 37 S. W. 171. "The obligation of a master to provide reasonably safe places and structures for his servants to work upon does not impose upon him the duty, as towards them of keeping a building, which they are employed in erecting, in a safe condition at every moment of their work, so far as its safety depends upon the due performance of that work by them and their fellows." *Armour v. Hahn*, 111 U. S. 313, 4 Sup. Ct. 433, 28 L. Ed. 441. While the court would not have been justified in peremptorily instructing a verdict for the appellant on the ground of assumed risk by an experienced workman, or, at least, one who had represented himself to be such, we do not think the issue of an unsafe place in which to work, such fact being unknown to appellee by reason of his inexperience, is an issue in this case, and therefore should not have been submitted to the jury. If the place of work was dangerous to appellee by reason of his inexperience, and without reference to such acts of his fellow workmen as he ought to have anticipated, it was because that being unaccustomed to stand or work on high scaffolding or beams, there was danger that he would fall off if he attempted so to do, a danger equally as apparent to an unskilled workman as to the most experienced. The work upon which he was engaged being that of erecting a high machine, he must be held to have anticipated that it might at any time be rendered unsafe by reason of the negligence of his fellow workmen. The real and only issue in this case is, Was the act of Bruce in his capacity as vice principal the cause of the injury, or was such injury caused by the negligence of appellee's fellow servants in failing to pull on the rope, as ordered by Bruce?

4. The parties to this suit have complete-

ly changed positions since filing their original pleadings herein, and since this case was reversed and remanded by the Court of Civil Appeals for the Sixth District. The original contention of appellee was that the brace which was being hoisted, failed to catch on the upright the first time, and that in attempting the second time to land it, it was pulled down in consequence to obedience to orders given by Bruce. The answer of appellant was that the brace caught on the upright the first time, and that the upright was caused to fall by the joint act of Bruce and appellee in pulling on said brace. Appellee's amended petition upon which he went to trial the last time, alleged that the beam caught on the upright the first time, and that the fall was caused by the men who had hold of the rope pulling when it was in this condition, as ordered by Bruce. Appellant also amended its answer, and, in addition to a general denial, alleged that "upon the first attempt to swing said brace into position it failed to land, and the timber swung back to the south and was hanging loose," and that Bruce ordered the men to give another pull, and that, in doing so, the brace caught on the upright, in consequence of the negligence of the squad on the north failing to pull their tag rope, as ordered to do by Bruce. Now, if it be true, as alleged by appellee that the brace caught on the upright in the first effort to land the same, and while it was in that condition, Bruce negligently ordered the men on the ground to pull and that they did so, thereby pulling the upright over and causing it to fall on appellee, the appellee has a good cause of action. On the other hand, if, as alleged by appellant, the brace did not catch on the upright the first time, but caught the second time by reason of the negligence of appellee's fellow workmen in failing to pull on their rope, as ordered to do by Bruce, appellee has no cause of action.

Upon this material issue, appellee was permitted to read in evidence from appellant's abandoned answer as follows: "Further answering, said defendant, by its attorney, comes and says: That the accident and resultant injuries to plaintiff, the said W. E. McCracken, as set out and alleged in his original petition, were directly and proximately caused by the said W. E. McCracken's own carelessness and negligence in this, to wit: That he and a fellow servant by the name of Bruce were standing, just prior to the accident, upon the second bent of the structure hereinbefore described by the side of the farthest north of the three upright timbers which had been placed upon said bent and temporarily fastened and braced as hereinbefore described, and were engaged in assisting to put into position the permanent brace timber; said brace at the time was suspended from the boom of the derrick and was being swung into position by means of a derrick; and fellow workmen of plaintiff and said

Bruce, upon the ground, were guiding same by means of ropes attached to the end of said brace, one squad of workmen having hold of the rope attached to the end nearest the upright timber. Defendant shows that in swinging brace timber into position desired the derrick block caught upon the top of said central timber; that it thereupon became and was the duty of plaintiff to direct the squad of workmen having hold of the rope attached to the end of said timber brace nearest central upright timber to pull hard on same, which would have disengaged said derrick block from the top of said upright timber; but that, instead, plaintiff, knowing that said upright timber was merely temporarily fastened and braced, said to Bruce, 'Let's give it another pull,' and he and said Bruce with their hands caught hold of said brace timber nearest them, and with all their might carelessly and negligently pulled upon the same, pulling said timber towards themselves; that said derrick block being caught upon the top of said upright timber, as aforesaid, plaintiff and said Bruce thus pulling upon said brace timber, pulled the top of said central upright timber over towards them; and being temporarily braced and fastened, as aforescribed, said upright timber toppled over; but at the start fell very slowly, and plaintiff, had he exercised the care (care) of an ordinary prudent person under similar circumstances, could have gotten out of the way of said falling timber; but that, instead, plaintiff carelessly and negligently, and without the exercise of proper care, turned his eyes away from said falling timber, and without watching the direction in which the same was falling, suffered his left leg and foot to extend in the very way of said falling timber; by reason of which said timber fell upon said leg and foot, causing the injuries set out in plaintiff's petition, and of which he complains," etc.

Appellant excepted to this action of the court, and assigns error thereon. The authorities are in hopeless conflict as to whether or not a statement in an abandoned pleading, not signed or sworn to by the party himself, is admissible in evidence. Those jurisdictions holding that statements of fact in abandoned pleadings, signed by the attorney only, are admissible in evidence, place it upon the ground that an attorney is the agent of his client in matters pertaining to the suit, that his statements in the pleadings are the statements of his client, and that admissions against interest of material facts, however or whenever made, though not conclusive, are always admissible in evidence. Some authorities limit such admission to direct statements of material facts which it must be presumed the attorney obtained from his client. 1 Gr. Ev. § 171, note a.

Other courts have announced what seems to us to be a sound statement, that pleadings in no case, whether abandoned or not, are evidence at all. The contention in this

regard being that the office of pleadings is to arrive at the issue or issues in the case; that what is stated in the petition and not denied in the answer is to be taken as incontrovertibly true; that matters of defense not pleaded are conclusively presumed, for the purpose of the case, not to exist. In other words, if a fact material to plaintiff's recovery, or to the defendant's defense, be not alleged there is no issue as to such fact. Neither is a fact in issue if it be alleged by one party, and not denied by the other; that evidence is that which tends to prove or disprove an issue made by the pleadings; that the pleadings are to be looked to not by the jury to determine what are the facts, but by the court to ascertain what issues of fact are to be determined by the jury. This is doubtless what Judge Roberts meant in *Coats v. Elliott*, 23 Tex. 613 when he said: "They (the jury) had no concern with the pleadings; nor were they the proper subject of discussion before the jury." In *Bauman v. Chambers*, 91 Tex. 111, 41 S. W. 471, Chief Justice Gaines said: "We do not understand that it is ever necessary, or even proper, to read in evidence to the jury the pleadings upon which the parties go to trial. It is the duty of the court to construe the pleadings, and to submit to the jury the issues of fact made by them."

This view of the office of pleadings was in Massachusetts long ago crystallized in a statute, which provides that the pleadings shall not be deemed evidence on the trial, but allegations only, whereby the party is bound. *Phillips v. Smith*, 110 Mass. 61. Among the decisions in other jurisdictions holding that abandoned pleadings are not admissible in evidence are: *Mecham v. McKay*, 37 Cal. 165; *Stern v. Loewenthal*, 77 Cal. 340, 19 Pac. 579; *Wheeler v. West*, 71 Cal. 126, 11 Pac. 871; *Miles v. Woodward*, 115 Cal. 308, 46 Pac. 1076; *Smith v. Davidson* (C. C.) 41 Fed. 172; *Gilmore v. Borders*, 2 How. (Miss.) 824; *Cooley v. State*, 55 Ala. 162; *Callan v. McDaniel*, 72 Ala. 96; *Dennie v. Williams*, 135 Mass. 28. The following Texas cases support the proposition that an abandoned pleading, not signed or sworn to by the party himself, is not admissible in evidence: *Medlin et al. v. Wilkins et al.*, 1 Tex. Civ. App. 465, 20 S. W. 1027; *Electric Co. v. Berg*, 10 Tex. Civ. App. 219, 30 S. W. 464; *Railway Co. v. Reed*, 32 S. W. 123; *Dunson v. Nacogdoches County*, 15 Tex. Civ. App. 11, 37 S. W. 979; *Sweetzer v. Claffin & Co.*, 74 Tex. 670, 12 S. W. 395.

On the other hand, the Court of Civil Appeals for the Fourth District in the case of *Goodbar Shoe Co. v. Sims*, 43 S. W. 1066, reversing its former decision in *Railway Co. v. Reed*, 32 S. W. 123, in *Jordan v. Young*, 56 S. W. 765, and in *Wright v. Mortgage Co.*, 54 S. W. 369, and the Court of Civil Appeals for the Fifth District, reversing its former decision in *Railway Co. v. Wellington*, 57 S. W. 857, held such abandoned pleading

to be admissible. Each of these courts states that it reverses itself upon this proposition on the authority of *Barrett v. Featherstone*, decided by our Supreme Court. 89 Tex. 567, 35 S. W. 11, 36 S. W. 245. We do not understand that case to be authority for the proposition that an abandoned answer, not signed by the defendant, nor sworn to by him, is admissible in evidence. The answer in that case was drawn by the defendant himself, who was an attorney, and was signed and sworn to by him.

In the recent case of *Railway Co. v. De Walt*, 96 Tex. 134, 135, 70 S. W. 531, 97 Am. St. Rep. 868, Justice Williams, in answer to a certified question, held that an allegation of fact in an abandoned pleading was admissible in evidence, but he puts it on the ground that "the certificate only shows that the fact in question was alleged in the plea offered in evidence, by which we understand that such fact was admitted and not otherwise put in issue." Had it been shown that the abandoned plea contained a general or special denial of the fact sought to be proven by that portion of the plea offered in evidence, we think that, under our statute permitting a party to plead inconsistent defenses a very different question would have been presented. See *Duncan v. Magette*, 25 Tex. 249; *Silliman v. Gano*, 90 Tex. 647, 39 S. W. 559, 40 S. W. 391; *Printing Co. v. Copeland*, 64 Tex. 356; *Young v. Kuhn*, 71 Tex. 645, 9 S. W. 861.

In this case, it not appearing that the abandoned plea contained a general denial, upon the authority of *Railway Co. v. De Walt*, supra, we hold that the court did not err in admitting in evidence that portion of it offered by appellee.

For the errors indicated, this case is reversed and remanded.

Reversed and remanded.

On Motion for Rehearing

In our former opinion herein we reversed the judgment of the trial court, for the reason that we did not think that the duty of the employer to furnish an employé with a safe place in which to work was an issue in this case, whether the appellee was an experienced or an inexperienced "topman," and that the court erred in submitting this issue to the jury. Appellant's propositions as to this matter are: (1) "The rule that it is the duty of the master to provide a reasonably safe place and structure for his servants to work upon does not compel him to keep a building which they are employed in erecting in a safe condition every moment of their work, so far as its safety depends on the due performance of that work by them or their fellow servants. Or, differently stated, this obligation has no reference to the safety or condition of the thing the servant is employed to repair or complete." (2) "The master is under no obligation to warn * * * where the servant has represented himself to

be competent, and the master is ignorant of his inexperience."

As indicated in our opinion herein, we think these are sound propositions of law, but appellee insists they are not presented in this case under any proper assignment of error or statement of the facts. A re-examination of the record has convinced us that appellee is correct in this regard. These propositions are made under appellant's eighth assignment of error, which is as follows: "The court erred in refusing to give to the jury special charge No. 1, requested by the defendant as follows: 'In this case you are instructed to find a verdict for the defendant.'" We did not sustain this assignment, and it should not have been sustained, unless under the undisputed facts the appellant, as a matter of law, was not liable for the injuries received by appellee. The evidence was conflicting upon every material fact in the case. The appellee's right of recovery did not depend solely upon the proposition that the place was itself an unsafe one in which to work. Such being the case, the propositions above set out are not pertinent to said assignment. The only statement under said assignment is: "See statement of the case, *supra*." By reference to the preliminary statement referred to, we find the description of the machine and the manner in which appellee was injured fully set out, but such statement shows a conflict in the evidence, and does not justify a peremptory instruction for appellant. Such being the case, we were in error in sustaining said propositions under said assignment.

Upon a careful review of the entire record, we are of the opinion that the judgment of the trial court should have been affirmed. We therefore grant the motion of appellee for a rehearing, and affirm the judgment of the court below.

Motion granted, and judgment affirmed.

On Appellant's Motion for Rehearing.

On a former day of the present term of this court we reversed and remanded this case on account of the supposed error of the trial court in submitting to the jury the issue as to the duty of a master to furnish a servant a safe place in which to work. The charge upon which our decision was based is as follows: "Now, if you find from a preponderance of the evidence that plaintiff at the time of the accident was inexperienced in the work then being done, and did not know of the danger thereof, and if you further find that W. C. Roettiger, as vice principal of the defendant, employed the plaintiff to work for the defendant and placed him under the control and management, in doing his work, of John Bruce, and gave said Bruce authority as foreman to direct the labors of plaintiff and other employes engaged in the erection of said structure; and if you further find that Roettiger and Bruce, or ei-

ther of them, knew of the danger of working at the place where plaintiff was injured, and knew that plaintiff was inexperienced, or while working upon said structure immediately before said accident happened, said Roettiger and Bruce, or either of them, saw from plaintiff's acts and conduct that he was inexperienced, and failed to warn him of such danger, and that such failure to warn plaintiff of such danger was the direct and proximate result of his injuries, if any, you will find for plaintiff, unless you find for defendant under instructions hereinafter given you."

Appellee filed a motion for a rehearing, in which he contended that the trial court did not in fact submit this issue. A more careful examination of said charge convinced us that we had misconstrued the same. As will be seen, said charge is to the effect that if appellee did not know of the danger "of the work being done," and that appellant's agents and vice principals did know of such danger, etc. Such danger as to "the work being done" might arise from the negligence of appellant in attempting to have the same done without reference to the danger of the place in which the same was being done. Appellee contends that the negligence of Bruce, the vice principal of appellant in giving the order to pull on the ropes, under the circumstances under which said order was given, was the proximate cause of the injury; and if this be true, the danger of the place, in the sense that he could not escape from the falling timber as easily as he might have done had he been on the ground, was but a condition and not the cause of the injury.

Appellee's motion for a rehearing having been granted, and the judgment of the lower court affirmed, appellant has filed a motion for a rehearing in which it also asserts that the trial court did not submit to the jury the issue as to a safe place in which to work. The language of appellant's motion in this regard is as follows: "In its general charge the trial court did not instruct the jury upon the obligation of the master to furnish the servant a safe place in which to work; and in its general charge and in the special charges given at appellant's request, instructed the jury as to the law of assumed risk, assumed risk of a known danger, negligence of fellow servants, the duty of the master to warn and the circumstances under which he was relieved of that duty." Such being the case, we see no reason for setting aside the judgment of the court below.

Appellant insists that the court erred in failing to peremptorily instruct the jury to return a verdict for defendant, and cites in its able brief a number of decisions relating to obvious danger and assumed risk. If appellee had been injured in obeying an order of appellant, in the doing of which he must, as a reasonable man, have known that he was exposing himself to danger, and had suf-

ferred injury by the happening of the thing, the danger of which must have been apparent to him, he could not recover for such injury. It often happens that one takes chances in doing a thing where the danger is obvious, and yet is not injured. Now can it be said that because he assumed the risk as to the dangers which were obvious, and was injured by something, the danger of which was not obvious, but which occurred on account of the intervening negligence of the master, that he cannot recover for such injury? The answer is obvious. Take, as an illustration, the case of *Hightower v. Gray*, 38 Tex. Civ. App. 674, 83 S. W. 254, cited by appellant, and which may well take rank as a leading case on this subject. Here the plaintiff was digging a cellar under a house by tunneling under rock, and then striking it and causing it to fall. A rock under which he had tunneled fell upon him of its weight. Held he could not recover. He had been taking chances on this for seven or eight days, and had not been hurt, and yet the danger was obvious to every man who knows the laws of gravitation. But suppose he had tunneled under a rock which had not fallen, and which would not have fallen of its weight, and his employer, unknown to him, had placed a heavy body on the earth above, by reason of which the rock had been caused to fall and injure the employe, could it be contended that because he took the chances of the rock falling of its own weight that he also assumed the risk of the employer's negligence, whereby the rock was caused to fall? Certainly not

It will be seen from the excerpt from appellant's motion as above set out that the issues arising upon the facts of this case were submitted to the jury, and the evidence being conflicting, and sufficient to support the verdict of the jury, we do not feel called upon to disturb the judgment of the court below. We therefore overrule appellant's motion for rehearing.

Motion overruled.

FARMERS' COTTON OIL CO. v. BARNES,†
(Court of Civil Appeals of Texas. Jan. 28,
1911. Rehearing Denied Feb. 11, 1911.)

1 TRIAL (§ 253*)—INSTRUCTIONS—CONSTRUCTION OF CHARGE AS A WHOLE.

A charge in an action for injuries to a servant, which presents affirmatively the servant's theory of the case, is not erroneous for ignoring the defensive issues of assumed risk and contributory negligence, fairly submitted in another charge.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 613-623; Dec. Dig. § 253.*]

2 MASTER AND SERVANT (§ 291*)—INJURIES TO SERVANT—EVIDENCE—INSTRUCTIONS.

A charge in an action for injuries to a servant, which presents affirmatively the servant's theory of the case, should not, in addition

to the facts therein enumerated, require that, to find for plaintiff, the jury must find that he was not guilty of contributory negligence and had not assumed the risk, and thereby impose on him the burden of proving the absence of contributory negligence and the absence of assumption of risk.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 1143, 1144; Dec. Dig. § 291.*]

3 TRIAL (§ 260*)—INSTRUCTIONS—INSTRUCTION COVERED BY CHARGE GIVEN.

It is not error to refuse a requested charge sufficiently covered by the charge given.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 651; Dec. Dig. § 260.*]

4 MASTER AND SERVANT (§ 295*)—INJURIES TO SERVANT—EVIDENCE—INSTRUCTIONS.

Where, in an action for injuries to a servant caught by a set screw in a revolving shaft, there was evidence that the screw could not have been seen at night while the servant was at work, and that he did not know of its existence, a charge that, on entering and continuing in the service, the servant assumed the risk of any injury ordinarily incident to the work, and, if the injury resulted from such an accident, there could be no recovery, and that, if the servant knew that the set screw protruded and was dangerous, or if that was obvious, he assumed the risk, and could not recover, properly submitted the defense of assumption of risk, though it did not conclude, "though the jury should believe defendant to have been guilty of negligence."

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 1168-1179; Dec. Dig. § 295.*]

5 MASTER AND SERVANT (§ 291*)—INJURIES TO SERVANT—ASSUMPTION OF RISK—EVIDENCE—INSTRUCTIONS.

Where, in an action for injuries to a servant caught by an unguarded set screw, the servant testified that he knew that there were many unguarded set screws in the mill, that there must be a set screw in every set collar, and that, if the screws were exposed, he would have to be careful or get caught, but that he had not up to the time of his injury known that the particular set screw or that other set screws protruded, and several witnesses testified that the set screw which caused the injury could not have been seen at night while the mill was in operation, and that the servant did not work in the room except at night, an instruction that the servant could rely on the assumption that the appliances were safe, that he was not required to use ordinary care to see whether they were safe, and that he did not assume the risk of the master's failure to do its duty unless he knew of the failure and attendant risks, or, in the ordinary discharge of his duty, must have acquired the knowledge, was not objectionable as charging that the servant was not required to use ordinary care to see whether the appliances were reasonably safe.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 1138, 1139; Dec. Dig. § 291.*]

6 MASTER AND SERVANT (§ 217*)—INJURIES TO SERVANT—ASSUMPTION OF RISK.

A servant, though he owes no duty of inspection, cannot shut his eyes to dangers obvious to the ordinary man, and he assumes the risks of a danger of which he has actual knowledge and of such hazards as he would have learned by the ordinary circumspection of a prudent man.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 584-592; Dec. Dig. § 217.*]

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

7. MASTER AND SERVANT (§ 288*)—INJURIES TO SERVANT—ASSUMPTION OF RISK—QUESTION FOR JURY.

Whether a servant injured by being caught by an unguarded set screw in a revolving shaft knew of the screw, or whether in the course of his work he must have known thereof or of the danger incident thereto, *held*, under the evidence, for the jury.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 1068-1088; Dec. Dig. § 288.*]

8. MASTER AND SERVANT (§ 235*)—INJURY TO SERVANT—CONTRIBUTORY NEGLIGENCE.

A servant employed as oiler in a mill who knows that there are many unguarded set screws and that there must be a set screw in every set collar, but who does not know that the screws are exposed, need not inspect the appliances, and his failure to make an examination and discover that a set screw which caught him and injured him was exposed did not defeat a recovery.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 710-722; Dec. Dig. § 235.*]

9. TRIAL (§ 260*)—INSTRUCTIONS—INSTRUCTIONS COVERED BY THE CHARGE GIVEN.

Where, in an action for injuries to a servant caught by an unguarded set screw, the court charged that the servant assumed the risk and could not recover if he knew that the set screw protruded beyond the surface of the collar, or if, in the exercise of his duties, he must have necessarily known it, or if the same was obvious, the refusal to charge that if a person of ordinary prudence in the discharge of his duties, and of the knowledge possessed by the servant, would have examined the set screws to see if they were exposed, and if the servant failed to make such an examination, and, if he had made such examination, he would have known the facts, the verdict must be for defendant, was proper; the requested charge being sufficiently covered by the one given.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 657; Dec. Dig. § 260.*]

10. MASTER AND SERVANT (§ 291*)—INJURIES TO SERVANT—EVIDENCE—INSTRUCTIONS.

Where, in an action for injuries to a servant caught by an unguarded set screw, there was no evidence that the protruding screws of which the servant had knowledge were in places where the servant could come in contact with them, except when revolving so slowly that they were not dangerous, the refusal to charge that if there were in the master's mill a number of shafts to which were attached protruding set screws, and the servant knew that a portion of the screws were exposed, and if, with such knowledge, a person of ordinary prudence in the discharge of his duties would have examined the screws to see whether they were exposed, and if the servant failed to make such an examination, the verdict should be for the master, was proper because not justified by the evidence.

[Ed. Note.—For other cases, see Master and Servant, Dec. Dig. § 291.*]

11. APPEAL AND ERROR (§ 1051*)—HARMLESS ERROR—ERRONEOUS ADMISSION OF EVIDENCE.

Any error in admitting testimony to prove a fact shown by other testimony received without objection is not ground for reversal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4161; Dec. Dig. § 1051.*]

Appeal from District Court, Johnson County; O. L. Lockett, Judge.

Action by E. A. Barnes against the Farm-

ers' Cotton Oil Company. From a judgment for plaintiff, defendant appeals. Affirmed.

S. C. Padelford and Ramsey & Odell, for appellant. Walker & Baker, for appellee.

TALBOT, J. This action was brought by the appellee, Barnes, against the appellant to recover damages for personal injuries sustained by him while employed as oiler in the appellant's cotton oil mill at Cleburne, Tex. The petition alleges that the appellant was negligent in permitting a set screw to protrude from a rapidly revolving shaft, and in directing him to put a belt on a pulley attached to said shaft without warning him of the exposed condition of said set screw and of the danger thereof, as a result of which appellee's clothing caught on the screw and his body revolved around the shaft, injuring him in various ways, and requiring the amputation of his right foot above the ankle. The defendant answered by general demurrer, general denial, assumed risk, and contributory negligence. The case was tried by the court and a jury, and resulted in a verdict and judgment in favor of the plaintiff for \$5,750, and the defendant appealed.

Appellant's first assignment of error is that the court erred in the sixth paragraph of its charge to the jury, for the reason that same ignores the defensive issues of assumed risk and contributory negligence, and instructs the jury that, if they find the defendant was negligent in the respects therein charged, to find for the plaintiff, without regard to the question as to whether plaintiff had assumed the risk of injury by reason of his knowledge of such alleged defective condition or otherwise, or was guilty of contributory negligence under the circumstances. The charge was not defective for the reasons claimed. The court in this paragraph of his charge was submitting plaintiff's theory of the case and therein grouping the facts, the existence of which authorized a verdict for the plaintiff. The submission of the defensive issues of assumed risk and contributory negligence was properly reserved for subsequent paragraphs of the charge, in which, and in special charges asked, these issues were fully and fairly submitted for the decision of the jury. This method of submitting the issues is not subject to the criticism that it renders the charge as a whole confusing, misleading, or contradictory. The charge complained of presented affirmatively the plaintiff's theory of the case, and should not have required, in addition to the facts therein enumerated, in order to return a verdict for the plaintiff, that he was not guilty of contributory negligence, and had not assumed the risk of injury, by continuing in the employment of the appellant. *Railway Co. v. Steele*, 50 Tex. Civ. App. 634, 110 S. W. 171. This court has held

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

that a charge which required the jury in a personal injury suit to find, in addition to facts alleged and relied on by the plaintiff for a recovery, that the plaintiff was himself in the exercise of ordinary care at the time injured, imposed the burden of proving the absence of contributory negligence, and was error. *Pares v. Railway Co.*, 57 S. W. 301. The cases referred to by appellant in support of this assignment are not applicable, or do not, in our opinion, sustain its contention.

What has been said also disposes of appellant's second assignment of error.

The third, fourth, and fifth assignments of error complain, respectively, of the court's refusal to give certain special charges requested upon the subject of assumed risk. There was no error in refusing these charges for the reason that each of them was sufficiently covered by the court's main charge and special charges given at the instance of appellant. In the fourth special charge, requested by the appellant, the jury were instructed as follows: "You are instructed that, on entering the service of the defendant and in continuing in its service and in the discharge of the duties he was employed to perform, the plaintiff assumed the risk of any accident or injury ordinarily incident to the character of work which he was employed to perform, and if you believe that the plaintiff's injuries resulted from an accident such as was ordinarily incident to the character of work plaintiff was employed to perform, then, in such an event, you will find for the defendant." And in the ninth paragraph of the general charge they were told: That although they might find from the evidence that the set screw did protrude beyond the surface of the collars, and was in a dangerous condition, yet if they further found from the evidence that the plaintiff knew this, or in the course of his duties must necessarily have known it, or if the set screw was obvious—that is, its condition was apparent to the observation of an ordinarily prudent person situated as plaintiff was—then he assumed the risk, and they should find for the defendant. These charges were sufficient to fully guard the rights of appellant under the facts of this case in respect to the defenses to which they related, and it was not essential that they should have concluded with the language, "even though you should believe defendant to have been guilty of negligence in any one or all of the respects alleged by plaintiff in his petition." The court charged the jury in the eighth paragraph of the general charge as follows: "While the plaintiff was in the employ of the defendant, he had the right to rely upon the assumption that the machinery, tools, and appliances with which he was called upon to work were reasonably safe, and that the business was conducted in a reasonably safe manner. He was not requir-

ed to use ordinary care to see whether this had been done or not. He did not assume the risk arising from the failure of the defendant to do its duty unless he knew of the failure and the attendant risks, or in the ordinary discharge of his own duty must necessarily have acquired the knowledge." This charge is objected to on the ground that it instructs the jury that the plaintiff was not required to use ordinary care to see whether the machinery, tools, and appliances with which he was called upon to work were reasonably safe; the contention being, in effect, that it was shown, without dispute, that the plaintiff knew at the time of his injury that there were a number of protruding set screws upon revolving shafts in the mill at which he was at work, which he had observed in the discharge of his work, and this was sufficient to put him on notice that others might be unguarded also and to require the use of ordinary care to ascertain the condition of the screw, which caused his injuries. Therefore it was error for the court, under such circumstances, to instruct the jury that the plaintiff was not required to see that said screw protruded. We think this contention should not be sustained. While the plaintiff testified that during the time he worked for the defendant he knew there were a large number of unguarded set screws in the mill, and knew from experience that there was bound to be a set screw in every set collar, and that, if the screws were exposed, he would have to be very careful or get caught, and, notwithstanding, witnesses for the defendant testified that so far as they knew all the set screws in the mill were exposed, and that the screw in question could be seen at night when the shaft was making the revolutions per minute it usually made when in operation, yet the plaintiff further testified that he had not up to the time of his injury noticed, and did not know, that the particular set screw causing his injuries, or the other screws, protruded. Several of the witnesses who worked in defendant's mill and who had had from three to four or more years' experience in observing and operating the machinery therein testified, in effect, that the screw which caught plaintiff's clothing and caused his injury could not have been seen at night while the mill was in operation, and that plaintiff did not work in the room in which said screw was situated, except at night. C. M. Horn, who had worked three seasons for the defendant and assisted in putting in the shaft to which the screw in question was attached, said: "As to whether the set screw in question could or could not be seen at night with machinery in operation, I'll answer this way: If a man was looking for that, if that was his business to be looking for it, he might accidentally discover something sticking up. I couldn't be positive about it either way." J. A. Warwick testified: "I have worked up there both

day and night. When the mill was in operation at night, the set screw could not be seen, unless you were looking for it. The light was scarce, and the machine would have to be stopped. The way it was running it couldn't have been seen at all. It was running very rapidly. You could only see a little glimmer where the set screw was located—you couldn't tell what it was." John Lightfoot testified: "When the mill was in operation that way at night, if a man didn't know that that set screw was there, he wouldn't see it at all." G. C. Palmer, who had previously held the same position that appellee held at the time he was injured, stated that this set screw could not be seen at night while the mill was in operation.

We are aware that the law is well settled that, notwithstanding the servant owes no duty of inspection, yet he cannot shut his eyes to dangers that are obvious to ordinary man, and "assumes the risks of a danger of which he has actual knowledge and of such hazards as he would have learned by the exercise of that ordinary circumspection which a prudent man would have used in the particular employment." This rule of law has not in our opinion been violated by the charge under consideration. The court was not authorized to say under the evidence as a matter of law that the appellee actually knew that the set screw causing his injuries protruded or that such condition of the screw was obvious or that appellee in the discharge of the duties required of him must have known by the exercise of that circumspection which an ordinarily prudent man would have used in the particular work in which he was engaged of the hazard to which he was exposed by the negligence of appellant in permitting the set screw to protrude as the evidence shows it did. Whether the projection of the set screw was actually known to appellee before or at the time he was injured by it, or whether it was obvious, or whether in the performance of the work he was directed to do appellee must necessarily have known of such projection and the danger incident thereto; were all questions of fact for the jury, and should have been and were by appropriate instructions submitted to the jury. No duty of inspection rested upon appellee, and, in the absence of knowledge to the contrary, he could rely upon the assumption that the appellant had exercised ordinary care to furnish him reasonably safe machinery with which to work.

The seventh, eighth, and ninth assignments of error are grouped, and complain of the court's refusal to give certain special charges requested by the appellant. Each of these charges is to the effect that if there were in defendant's mill a number of revolving shafts to which were attached exposed or protruding set screws, and plaintiff knew that a portion of said screws were exposed, and that with such knowledge a person of ordinary prudence in the discharge of his

duties would have examined the set screws in question to see whether the same were exposed or protruding, and that the plaintiff failed to make such an examination to discover whether the set screw in controversy was exposed, and that, if he had made such examination, he would have known said fact, then to find a verdict in favor of the defendant. These charges, in effect, imposed upon the appellee the duty of inspection, and were properly refused. If this was not the effect of the charges, then they were properly refused because the law applicable to that phase of the case to which they relate was correctly given in charge to the jury in the ninth paragraph of the court's general charge, wherein they were instructed that the appellee assumed the risk and could not recover if he knew that the set screw protruded beyond the surface of the collar, or if, in the course of his duties, he must necessarily have known it, or if the same was obvious; that is, if its condition was apparent to the observation of an ordinarily prudent person situated as plaintiff was. Again, we think neither of the charges in question was called for by the evidence, and that, had either been given, the jury would have been misled thereby, because there is no evidence showing that the protruding set screws of which the appellee had knowledge were in places where the workmen could come in contact with them, except when they were revolving so slow that they were not dangerous.

Nor did the court err in refusing to give the special charges relating to the question of contributory negligence, and made the basis of appellant's tenth and eleventh assignments of error. These charges, so far as applicable, were sufficiently covered by the instructions contained in the tenth paragraph of the court's charge, and special charges given at the request of appellant.

Appellant's eighteenth assignment of error is to the effect that the court erred in admitting in evidence the testimony of the witness Warwick that he had been caught upon the same set screw upon which appellee's clothing was caught prior to the accident to appellee. Mr. Thompson in his work on Negligence, lays down the rule upon this subject, and which is quoted in appellant's brief, as follows: "Evidence of similar accidents from the same cause, though of slight probative value, is sometimes admitted as tending to prove the dangerous character of the machine. The better rule allows such evidence on the question of the master's knowledge of the condition of an appliance, and for that purpose only. * * * Proof of similar accidents is clearly inadmissible where an employer does not controvert the dangerous character of the appliance, but sets up as a sole defense that the employe assumed the risk by continuing in the employment with knowledge of the danger." It is doubtless true that, in the sense that the undisputed evidence showed that the exposed and pro-

jecting set screw causing the appellee's injuries was dangerous, the dangerous character of said screw was not controverted by the appellant, but, applying the rule literally, it can hardly be said that the sole defense set up by the appellant was that appellee, with knowledge of such danger, assumed the risk thereof by continuing in its employment. But if it be conceded that the appellant did not controvert the dangerous character of the set screw, but set up as a sole defense that appellee assumed the risk by continuing in its employment with knowledge of the danger thereof, still the admission of the testimony complained of was harmless, for the reason that other witnesses, without objection, testified to the same or similar facts. Warwick testified that he was caught on this screw and thrown over the shaft, but was not injured. C. L. Blunt, without objection, said: "I got caught on that same set screw once myself, some time during the season of 1908, about the middle of the season and before Barnes was hurt. I was putting in the belt that run the reel, and my shirt sleeve was caught and torn off." The witness Lightfoot gave testimony of a similar character, without objection. The admission of Warwick's testimony, under the circumstances, furnishes no ground for a reversal of the case.

Assignments of error not discussed have been considered with the conclusion reached that neither of them disclose reversible error and they are therefore overruled. The evidence was sufficient to establish the material allegations of the appellee's petition; that appellee was not guilty of contributory negligence, and had not assumed the risk of the danger to which he was exposed by appellant's negligence.

The judgment of the court below is affirmed.

STARK v. COE et ux.†

(Court of Civil Appeals of Texas. Jan. 21, 1911. Rehearing Denied Feb. 11, 1911.)

1. NUISANCE (§ 5*)—RIGHT TO MAINTAIN.

A railroad company subdividing and selling its lands, but reserving to itself the right to erect warehouses, depots, and other buildings on its right of way, and to lease the same to persons for the warehouses and for the purpose of shipping grain, does not thereby acquire a right to erect a corn-shelling plant on the right of way and operate it so as to create a nuisance, nor does the reservation give a lessee of a portion of the right of way a right to erect such plant and to operate the same so as to create a nuisance, damaging surrounding property, and jeopardizing the health of its occupants of homes adjoining the right of way.

[Ed. Note.—For other cases, see Nuisance, Cent. Dig. § 6; Dec. Dig. § 5.*]

2. NUISANCE (§ 33*)—ACTS CONSTITUTING—EVIDENCE—SUFFICIENCY.

In an action to abate a nuisance caused by the operation of a corn elevator and sheller, evidence held to justify a finding that the plant

and its operation greatly affected the use, comfort, and enjoyment of adjoining property and the health of an occupant, authorizing its abatement.

[Ed. Note.—For other cases, see Nuisance, Cent. Dig. § 89; Dec. Dig. § 33.*]

3. NUISANCE (§ 23*)—PRIVATE NUISANCE—RIGHT OF PERSON AGGRIEVED.

Under Sayles' Ann. Civ. St. 1897, art. 2989, subd. 1, authorizing the court to restrain an act prejudicial to the applicant therefor, one aggrieved by a nuisance seriously affecting his health and life, and the comfortable enjoyment of his home, may sue in equity to abate the nuisance, though the person causing the nuisance is financially responsible for the damages incurred for the injury caused thereby one for which there is no adequate remedy at law.

[Ed. Note.—For other cases, see Nuisance, Cent. Dig. § 57; Dec. Dig. § 23.*]

4. TRIAL (§ 105*)—EVIDENCE—INSTRUCTIONS.

Where evidence is admitted without objection, it is not error to refuse a charge withdrawing the same from the jury.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 260-266; Dec. Dig. § 105.*]

5. NUISANCE (§ 25*)—PRIVATE NUISANCE—PUBLIC CONVENIENCE OR INCONVENIENCE.

Neither the convenience or inconvenience of the public affects one's right to have a nuisance abated, for under Const. art. 1, § 17, one's property may not be destroyed for the convenience of the public, unless he is compensated therefor.

[Ed. Note.—For other cases, see Nuisance, Dec. Dig. § 25.*]

6. NUISANCE (§ 34*)—ABATEMENT—ACTIONS.

In an action to abate a nuisance created by the operation of a corn elevator and sheller, the court properly submitted to the jury the issue whether the plant could be so run as not to materially interfere with the enjoyment of plaintiff's home, for, if the plant might be so remedied that it could be operated without being a nuisance interfering with the use of the home of plaintiff or the health of the occupants thereof, it should not be abated.

[Ed. Note.—For other cases, see Nuisance, Cent. Dig. § 91; Dec. Dig. § 34.*]

7. NUISANCE (§ 34*)—ABATEMENT—EVIDENCE—INSTRUCTIONS.

Where, in an action to abate a nuisance created by the operation of a corn elevator and sheller, the evidence showed that the plant was of modern equipment, and could not be improved on, and that there was no way to prevent dust escaping and entering plaintiff's home to his injury, a charge requiring the jury, in order to abate the nuisance, to find that the plant was a nuisance, and that it could not in the future be so operated by any changes as to prevent the same becoming injurious to the home or health of plaintiff, was beneficial to defendant, and it could not complain thereof.

[Ed. Note.—For other cases, see Nuisance, Dec. Dig. § 34.*]

8. TRIAL (§ 295*)—INSTRUCTIONS—CONSTRUCTION.

The charge of the court to determine its correctness must be considered as a whole.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 703; Dec. Dig. § 295.*]

9. TRIAL (§ 296*)—INSTRUCTIONS—BURDEN OF PROOF—CONSTRUCTION.

Where, in an action to abate a nuisance created by the operation of a corn elevator and sheller near plaintiff's residence, the court correctly charged on the burden of proof, a charge that, if the plant as operated was not a nuisance, the verdict should be for defendant, etc.,

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

† Writ of error denied by Supreme Court.

was not objectionable as shifting the burden of proof on defendant.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 710; Dec. Dig. § 296.*]

10. NUISANCE (§ 36*) — ABATEMENT — JUDGMENT.

Where, in an action to abate a nuisance created by the operation of a corn elevator and sheller, the jury found that the plant could not be operated so as not to become a nuisance, the court did not err in refusing to reform the judgment so as to allow defendant to operate the plant.

[Ed. Note.—For other cases, see Nuisance, Cent. Dig. § 95; Dec. Dig. § 36.*]

11. NUISANCE (§ 25*) — ACTION TO ABATE — EVIDENCE.

In an action to abate a nuisance created by the operation of a corn elevator and sheller, the fact of its public convenience, or the necessities of the surrounding country is not a defense, and evidence that the plant is a public benefit to the people in the community is properly excluded.

[Ed. Note.—For other cases, see Nuisance, Dec. Dig. § 25.*]

Appeal from District Court, Collin County; J. M. Pearson, Judge.

Action by J. C. Coe and wife against J. T. Stark and another. From a judgment for plaintiffs, defendant J. T. Stark appeals. Affirmed.

J. R. Gough and Garnett & Hughston, for appellant. Cockrell, Gray & Thomas and R. C. Merritt, for appellees.

BOOKHOUT, J. Appellees, J. C. Coe and Julia Coe, husband and wife, filed their original petition in the district court of Collin county on the 30th day of July, 1908. They filed an amended petition December 28, 1908, and alleged substantially that they owned lots 2, 3, 4, and 5, in block 6, in the town of Allen, Collin county; that said lots front on the right of way of the Houston & Texas Central Railroad, and that they bought said lots from said railroad company; that they had used the same as a home for 10 years; that the defendants J. T. Stark and said Houston & Texas Central Railroad Company, under an agreement between them of which plaintiffs were not advised, in July and August, 1908, had erected immediately east from and within 130 feet a corn elevator and corn sheller for the purpose of storing and shelling corn; that since the erection thereof defendants had been operating same, and that in doing so the corn is unloaded from wagons at what is known as the "dump," which is at the south end of the plant, and is carried thence by machinery to the elevator and mill, where it is shucked and shelled, and the cobs and shucks are carried thence by machinery to a point 50 yards north of said plant and burned; that in so unloading the corn at the "dump" and in carrying it to the mill, and in shucking and shelling it, and in carrying the cobs and shucks to be burnt, large quantities of smoke, dirt, dust, ashes, and husks escape and permeate the air sur-

rounding said plant, and cover the premises contiguous thereto, and especially the home and premises of plaintiffs, and by reason thereof plaintiffs' home becomes filled with dirt, dust, smoke, ashes, and husks, and that the same cover the bedding, furniture, and floors and everything in their home, which greatly and materially affects the use and enjoyment of the comforts and convenience of their home, and it is thereby practically rendered uninhabitable; that in operating said plant great sounds and noises by reason thereof are given off, and become at times exceedingly obnoxious to plaintiffs, so much so that they cannot enjoy their home; that the mill and elevator is of great height, constructed of iron, and reflects the sun's rays and heat, and the use and comforts of the home for these reasons are greatly interfered with; that said plant was a permanent nuisance, and that by reason of its construction and operation their home had been injured and damaged in the sum of \$1,500; that by reason of having to live in close proximity to said plant and breathe the dirt, dust, etc., that escapes from it and that are deposited in plaintiffs' home, the plaintiff Julia Coe had been injured and damaged in her health, which had become permanently injured, and that she had suffered severe mental and physical pain, and would continue to do so as long as she lived, and alleged such damages in the sum of \$2,500. Plaintiffs prayed judgment for their damages which had already accrued, and that the nuisance be abated, and that defendants be permanently enjoined from operating said plant, and, in case the plant was not so abated, for their damages for the permanent injury to their premises in the sum of \$1,500, and for such injury and damage done to Julia Coe's health in the sum of \$2,500, and for general and equitable relief.

Defendant, Stark, answered by general demurrer and general denial, and that the defendant railway company formerly owned in fee a tract of about 140 acres where the town of Allen is now located; that prior to laying out said town and platting it into town lots it by deed of dedication set aside what is known as the railroad reservation, being a strip of land 250 feet wide extending entirely through the town of Allen; that in said deed of dedication it reserved the right, among other things, to erect on said strip of land warehouses, depots, or any other buildings, and to lease the same to persons for the erection of warehouses and for the purpose of shipping freight; that afterwards the town of Allen was platted with reference to said railroad reservation, and the lots were sold therein with reference to said reservation; that said deed of dedication had been duly filed for record long prior to the sale of any of said town lots, and especially long prior to the sale of the lots to

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

plaintiffs; that said town of Allen is a small village situated in the midst of a very fertile and large agricultural district, which is very densely populated with farmers, who depend exclusively upon agriculture for a living; that the town of Allen is the only available and practical market for their produce; that it is necessary in order to create a market for said produce, and to render the vocation of agriculture in said community profitable, that there should be an adequate market for the sale of said produce; that without an efficient corn sheller and elevator the price of corn at Allen would be considerably depreciated on account of facilities to prepare the same for market, store the same, and handle it; that it is necessary that said elevator and sheller be located on or near said railroad reservation in order that the same might be profitably operated, and enable the owners thereof to pay the full market price for the produce; that the plaintiffs purchased said property with full knowledge, actual and constructive, of the purpose for which said railroad reservation was intended to be used, and with full knowledge that the necessities of the community surrounding Allen and of the citizens of Allen would demand that an elevator and corn sheller should be erected thereon; that the plaintiffs purchased said lots for a much less price than they would have been compelled to pay had said lots been situated in a more desirable locality, free from the noises, smoke, and dust which is necessarily incident, to some extent, in the operation of any industrial enterprise; that the buildings and machinery were erected in accordance with the latest, most modern, and approved appliances for the purpose of corn shelling, having due regard for the prevention of unnecessary noises and the escape of shucks, dust, etc., and for the destruction of all shucks and dust so far as is practicable; that its construction is such that it gives out little or no noise, and that the shucks are conveyed by long air-tight pipes from the sheller to the furnace, and the dust and trash, dirt, and other substances in the corn, except the cob and shucks, are carried by means of air suction from the sheller to the furnace by means of air-tight pipes; that it is necessary for the proper shelling and cleaning of corn to render it fit for market and to enable this defendant to pay the farmers the highest market price for their product; that the corn thus be shelled and cleaned, and that it is proper that in some manner the shucks and dust should be consumed; that the method employed by the defendant for the purpose of consuming the refuse from the corn is the most practical and least offensive that can be constructed; that the noise produced by defendant's plant is no more than the noise, smoke, and dust usually produced in that vicinity and neighborhood by the operation of railroad trains, corn-mills, corn shellers, gins, and other industries

which have been for many years operated in that vicinity, and that he runs said plant only for the purpose of shelling corn brought from the country, which is but a few weeks of the entire year; that the location of said plant was the only practical one that could be obtained for the location of the same. Defendant denied that he had created a nuisance in any respect. The defendant railway company filed its answer, which is substantially like the defendant Stark's above. The cause was tried with the aid of a jury, and resulted in a verdict as follows: "We, the jury, find in favor of plaintiffs that the operation of defendant's corn-sheller plant and appliances therewith be abated, and we further find that plaintiffs recover nothing against the defendant, J. T. Stark, for damages to property or on account of sickness to Mrs. Julia Coe. We further find that the plaintiffs recover nothing against Houston & Texas Central Railroad Company." Said verdict was received and approved by the court, and it entered its order abating the operation of the corn-sheller plant and its appliances, and permanently enjoining and restraining defendant, Stark, from operating the same.

Appellant's motion for new trial having been overruled, he prosecutes this appeal.

It is insisted that the trial court erred in sustaining plaintiffs' special demurrer to appellant's pleading, in substance, that prior to the laying out and platting the town of Allen defendant railroad company owned 140 acres of land, which included said town, that said railroad company by its deed of dedication set aside what is known as the railroad reservation, being a strip of land 250 feet wide extending through said town, and that in said deed of dedication it reserved the right to erect on said strip of land warehouses, depots, or any other buildings, and to lease the same to persons for the erection of warehouses and for the purpose of shipping freight, and that appellant's corn-shelling plant was erected and is being operated upon said strip. There was no error in this ruling. The fact that the railroad company reserved the right to erect warehouses, depots, and other buildings on its right of way, and to lease the same to persons for the erection of warehouses, and for the purpose of shipping freight, would not give said railroad company a legal right to arbitrarily erect a corn-shelling plant on said right of way, and to so operate and maintain said plant as to become a nuisance, interfering with the comforts and use of plaintiff's home adjoining said right of way. Such reservation by the railroad company would not give a third party who leased a portion of said right of way a legal right to erect a corn-sheller plant and elevator, and to operate and maintain the same as to create a nuisance interfering with the enjoyments and comforts of a home adjoining the said right of way. *Railway Co. v. Mott*, 98 Tex. 91, 81 S. W.

286, 70 L. R. A. 579; *Rainey v. Railway Co.*, 99 Tex. 276, 89 S. W. 768, 90 S. W. 1096, 3 L. R. A. (N. S.) 590, 122 Am. St. Rep. 622; *Daniel v. Railway Co.*, 96 Tex. 327, 72 S. W. 579; *Railway Co. v. Anderson*, 36 Tex. Civ. App. 121, 81 S. W. 782; *Boyd v. Schreiner*, 116 S. W. 100; *Sherman Light Co. v. Belden*, 123 S. W. 119, 27 L. R. A. (N. S.) 237.

Again, it is contended that where a person knowingly erects his residence and makes his home upon land contiguous to and adjoining a strip of land which has been dedicated to the uses and purposes set out in the deed of dedication he is not entitled to a decree abating the same as a nuisance; that it appears from the answer that plaintiffs bought their lots next to the strip of land after the record of such deed dedicating such strip of land for uses and purposes such as defendant's elevator and corn-sheller plant; and that for this reason the court erred in sustaining said exception to defendant's answer. The railroad company had the right to erect necessary warehouses and depots in handling its freight, and it, owning the fee in the land, had the right to lease it to be used in any manner not to injure the surrounding property. It could not by leasing the same confer upon the lessee authority to maintain a nuisance thereon, injuring and damaging the surrounding property and jeopardizing the health of the occupants. It is not contended that an elevator and corn-sheller plant is a necessary incident or appliance to the operation of the railroad. The law does not intend that the railroad company can take away the vested rights of the owners of property adjoining its right of way and render their property useless as a home by merely reserving the right to lease its right of way for legitimate purposes. In passing upon a similar question, our Supreme Court in the case of *Railway Company v. Mott*, 98 Tex. 91, 81 S. W. 286, 70 L. R. A. 579, says: "It is claimed by the appellant that since the conveyance of the right of way, made by Wood, to the railroad company, conferred upon appellant the right to establish upon the land so conveyed any business connected with said railway or incident thereto, and the stockpens being a business connected with, and incident to, the railroad, the railroad may by proper care maintain the pens, although they be a nuisance to those residing nearby. * * * At that time the stockpens were situated across the river. Under these circumstances those who sought the removal of the depot into the town could not have intended by using the words, 'business connected with or incident to the railroad,' to mean that the stockpens might be removed upon this right of way upon which the property of the donors abutted. Stockpens used for such purposes are not desirable neighbors for families. Looking at all the circumstances that surround the transaction, and the language used in the conveyance, we think

it was not intended to authorize the railroad company to establish a nuisance in the midst of the residence portion of that town. The fact that the property was not then occupied does not mitigate against this construction," etc. In the instant case the manifest purpose in subdividing and selling its lands by the railroad to citizens was that the lands so sold would be used for homes by the purchasers, and to permit a nuisance such as is shown to exist in this case would defeat this purpose and render the property thus sold useless for the purpose of a home.

Error is assigned to the court's action in refusing appellant's requested charge No. 1, instructing a verdict for defendant. Mrs. J. C. Coe, plaintiff's wife, testified: "I have lived at my present residence at Allen about 16 years. We bought the four lots upon which our residence is situated and improved them. Our residence is west of the railroad, and faces the east, fronts the railroad. * * * That elevator or building was constructed there last July. This is the second season it has been operated. When they dump the corn, there is a great deal of dust and dirt, more especially this year. * * * That dust and dirt and smoot flies into the house, into the openings if they are open, and into the south gallery on the L part of the house, and that occurs most every day they dump. I have noticed the atmosphere while the corn was being dumped, and I could see fine dust in it. After the corn is dumped, * * * it goes over into the elevator and is shelled. The sheller is located north of the dump and east of our house. When they are shelling, there is a lot of dust from the elevator, and it just fills the house full of dust, just covering the furniture in the room, until a white counterpane is more black than white, if the wind is in the right direction; that is, if the wind is in the east or southeast. I get a great deal of dust this year from where they are baling the shucks. * * * They set the shucks afire only once this year. When the wind is in the northeast, we would get a lot of smoke and dust and ashes, and, when they burned the shucks, it was very disagreeable. * * * When the wind is in the east and they are baling those shucks, we cannot see anything for the dust. It just pours in. When the corn is being shelled and the wind is from the east or southeast, we get some dust all the time from these openings. The elevator is much higher than my house, and I imagine it is as high again as my house. I think it is about 60 feet high. When the plant is being operated, we hear a roaring like an engine, * * * and in dumping it makes a noise (the building being made of sheet iron), and in shelling it makes a noise, and in going through these pipes. When the pipe is being operated, the effect of the noise which it makes on people is bad. * * * You would think it is hail sometimes, one part of that is tin that it goes through, and

the noise is so much worse when it goes through this, than when going through the wooden part; that is, it makes a rattling or roaring like hail. The dust, dirt, and smoke just ruins the furniture, and everything in the house in the furniture line. I cover them over with sheets. * * * At night I take them out, and we don't live in the front part of the house during the shelling season. Before the shelling season begun, we stayed on the front gallery, but we haven't had the pleasure of using it lately. * * * We have not occupied the front gallery and those front rooms since they began shelling. We could not do it because there was so much noise and dust and heat from the metal that it would scorch your face. We have just caught the water off the house in barrels since this sheller has been in operation, because it is too dusty and dirty to let in the well. The water we would catch off of our house is dark, red, and dirty looking, and has got dirt and shucks in it from where they bale the shucks. * * * We cannot use the water for drinking. We had never been bothered with that before in catching our water. * * * I cannot live there because the dust is so bad it just keeps me sick. Since the plant has been in operation, we get our water over at a neighbor's, Mrs. Stansell's, and carry it in buckets. My family consists of myself and Mr. Coe. * * * He is 75 years old, and I am 65. I had a great many rigors or dust chills from this dust, and a severe cough caused by the dust."

The evidence shows that there were a number of residences immediately north and immediately south, and adjoining plaintiff's premises, also that Mrs. Leach lived adjoining the right of way, east of the elevator plant. The distance from the elevator to Coe's house was 166 feet. The elevator was 60 feet high, made of iron and wood, and covered on the outside with galvanized iron. The great preponderance of the evidence showing that the corn sheller in its operation greatly affected the use, comfort, and enjoyment of plaintiff's home and the health of one of the occupants, the court did not err in refusing to instruct a verdict for defendant.

Nor did the court err in refusing to give appellant's special charge reading as follows: "The law does not grant relief by injunction to restrain a temporary injury where the person injured has an adequate remedy at law to recover damages for such temporary injury; so that, if you should find and believe from the evidence that dirt and dust or either entered the plaintiff's house from the defendant's corn-sheller plant, but if you find that the injury caused thereby to plaintiff's property and to plaintiff's health or to the health of plaintiff's family (if you find that plaintiff's property or his health or the health of some member of his family were in-

jured by reason of dirt or dust caused from the operation of defendant's corn-sheller plant entering his house) were only temporary injuries, and were not permanent injuries, then you are instructed that the plaintiff is not entitled under the law to have the operation of defendant's corn-sheller plant abated as a nuisance if the defendant is financially responsible, and, if you so find and believe, you will find for the defendant on this issue." A person aggrieved by reason of a nuisance which seriously affects his health and life and the comfortable enjoyment of his home can call to his aid the equitable powers of the court to enjoin and abate the nuisance, and it makes no difference if the person causing the nuisance is financially responsible for the damage incurred. The injury to plaintiff's health and the deprivation of the use of his home was an irreparable injury, and for which plaintiff had no adequate remedy at law. *Sayles' Ann. Civ. St. 1897, art. 2989, subd. 1; Sumner v. Crawford, 91 Tex. 129, 41 S. W. 904; Mitchell v. Burnett, 122 S. W. 537, 538.*

On the trial certain witnesses testified to the effect that if the dirt and dust entered plaintiff's residence so that it could be seen and felt, and that you could mark in the same, and that it would settle upon the beds, walls, and furniture to such an extent that it would discolor or blacken rags which in some instances were exhibited, the witness in your (their) presence, and in some instances dirt and dust which was claimed to have been taken from the beds in said house was shown the witnesses, it would affect the rental value of said premises. The appellant, by a charge, sought to have this evidence withdrawn from the jury, because it is contended it was the opinion of the witnesses, and the evidence was not the subject of expert testimony. The charge was refused, and the court's action in this respect is made the basis of the fifth assignment. There was no error in this action of the court. The evidence having been admitted without objection, it was not error to refuse a charge withdrawing the same from the consideration of the jury. We think it a matter of common knowledge that dirt and dust entering a dwelling house under the conditions as set forth in the requested charge would decrease its rental value.

Error is assigned to the court's action in giving at the request of plaintiff a special charge to the effect that the jury will not consider the fact of convenience or inconvenience of the public in anyway whatever in determining whether or not said sheller and plant should be abated. It is contended that the convenience or inconvenience of the public will be considered in determining whether or not a public utility will be abated, and the charge in this respect stated that as a principle of law which is not law, and,

further, that this charge is on the weight of evidence. Neither the convenience nor the inconvenience of the public could affect plaintiff's right to have a nuisance abated. Plaintiff's private property could not be destroyed, because of public convenience without first compensating him for his property. Const. art. 1, § 17; *Railway Co. v. Edrington*, 100 Tex. 496, 101 S. W. 442, 9 L. R. A. (N. S.) 988; *Boyd v. Schreiner*, 116 S. W. 100.

The eighth and ninth assignments of error complain of the second paragraph of the court's charge, which reads as follows: "You are further instructed that the erection and operation of a corn sheller and other things connected therewith does not in and of itself constitute a nuisance so long as the same does not materially interfere with the comfortable enjoyment of plaintiff's home as a private residence, or does not by reason of dust, and dirt, etc., materially affect the health of the occupants of said house. Therefore if you should find and believe from the evidence that defendant's corn-sheller plant and appliances connected therewith can be so run and operated that the same will not materially interfere with the enjoyment of the comforts of said home, and so as to not materially affect the health of the occupants of said home, then you are instructed that under the law you could not abate said corn-sheller plant; but, on the other hand, if you should find and believe from the evidence that defendant's corn-sheller plant from the manner of its construction and operation does materially affect the enjoyment of the comforts of plaintiff's home, if it does, or does materially affect and threaten the health of the occupants thereof, if it does, and you further find and believe from the evidence that it is not possible or practicable to operate said plant without materially affecting the health or comfort of the occupants of plaintiff's home, then you are instructed if you so find and believe you will return a verdict abating said plant." It is contended that said charge is misleading and on the weight of evidence and without evidence to support it; that so much of it as submitted to the jury the supposed issue as to whether or not the plant could be operated and run in the future "so that it would not materially interfere with the enjoyment of the comforts of the home or materially affect the health of the occupants of said home" is misleading and erroneous, and there was neither pleading nor evidence to support such issues; that the jury should have been confined to what had transpired as shown by the evidence, and not permitted to decide what could or would be done hereafter; that so much of it as submits to the jury as to whether or not it is possible or practicable to operate the plant without materially affecting the health or comfort of the occupants of plaintiff's home is neither supported by the pleadings or evidence; that the charge is on the weight of

evidence. These contentions are not sustained.

The court very properly submitted the issue to the jury in its charge as to whether or not said plant could be so run as to not materially interfere with the enjoyment of the comfort of said home, and so as to not materially affect the health of the occupants of said home. If said plant could have been so repaired or remedied that the same could have been operated without becoming a nuisance interfering with the use of the home of plaintiff or the health of the occupants thereof, then it should not have been abated. The charge complained of was beneficial to defendant, in that it not only required the jury to find that said plant was a nuisance, but the jury under said charge had to further find that the defendant could not in the future so operate the plant by any kind of change or repairs or improvements as to prevent the same becoming injurious to the home or the health of its occupants. There was both pleading and evidence to the effect that the plant was a modern equipment and could not be improved upon, and that there was no way to prevent dust escaping and entering plaintiff's home.

The tenth and eleventh assignments assign as error the sixth paragraph of the court's charge, reading as follows: "On the other hand, if you find and believe from the evidence that plaintiff's (defendant's) plant as operated was not a nuisance, then you will find that the same be not abated, and, if you further find and believe from the evidence that the sickness of Mrs. Coe was not produced by the operation of defendant Stark's corn-shelling plant and appliances connected therewith, then you will find in favor of the defendant on this issue, and, if you further find and believe from the evidence that plaintiff's property has not been permanently damaged by the erection and operation of defendant's plant, then you will find in favor of defendant on this issue." It is insisted that this paragraph shifts the burden of proof, and places the same upon the defendant. The charge of the court must be construed as a whole. The court in other parts of his charge correctly charged on the burden of proof. The paragraph complained of taken in connection with the whole charge does not constitute error.

Again, it is contended that so much of said charge as submitted the issue as to whether plaintiff's property had been permanently damaged by the erection and operation of defendant's plant is erroneous, and was misleading, in that there was no proof that the property had been permanently damaged, and the same is a charge on the weight of the evidence. This criticism is not tenable. There was evidence tending, and which was sufficient to support a finding, that plaintiff's property was permanently damaged by the erection and operation of appellant's corn sheller.

The judgment is responsive to the pleadings, and is supported by the great weight of the evidence. The evidence shows that appellant's plant when operated is a recurring nuisance, and by reason of the dust and dirt, even when there is no wind, the comfortable enjoyment of appellee's home is materially interfered with.

It is contended that the court erred in not modifying the judgment rendered, and in not reforming the same so as to permit defendant to operate his plant and its appliances if the defendant made the changes and improvements set out in the eleventh and twelfth grounds of his amended motion for a new trial. This contention is without merit. The jury having found that said plant could not be operated so as not to become a nuisance, the court did not err in refusing to reform the judgment allowing appellant to operate the plant.

There was no error in the court's action in refusing to permit the defendant to prove by the witness Price Bush that in his judgment the defendant's corn-sheller plant was a public benefit to the people living around Allen. The fact of public convenience or necessity of surrounding country is no defense to an action to abate a corn sheller which is a nuisance to adjoining landowners. *Rainey v. Railway Co.*, 99 Tex. 276, 89 S. W. 768, 90 S. W. 1096, 3 L. R. A. (N. S.) 590, 122 Am. St. Rep. 622; *Townsend v. Norfolk*, 105 Va. 22, 52 S. E. 970, 4 L. R. A. (N. S.) 87, 115 Am. St. Rep. 842, 8 Am. & Eng. Ann. Cas. 558.

We have carefully considered the assignments of error presented in appellant's brief not here discussed, and, because in our opinion they are not well taken, they are overruled.

Finding no error in the record, the judgment is affirmed.

JACKSONVILLE ICE & ELECTRIC CO. v. MOSES et al.†

(Court of Civil Appeals of Texas. Jan. 5, 1911.
Rehearing Denied Feb. 9, 1911.)

1. ELECTRICITY (§ 14*)—INJURIES INCIDENT TO PRODUCTION—CARE REQUIRED.

One operating an electric light plant, and maintaining wires over public highways, must employ such means and take such precautions to guard against injuring those using the highways as the dangerous nature of electricity will render reasonably necessary, and the care exacted under any circumstances is proportionate to the danger to be avoided.

[Ed. Note.—For other cases, see *Electricity*, Cent. Dig. § 7; Dec. Dig. § 14.*]

2. ELECTRICITY (§ 9*)—RIGHT TO PLACE WIRES IN STREETS.

An operator of an electric light plant has no natural right to encroach on the streets with its wires, and it must acquire permission from the proper authorities before the wires are rightfully in the streets.

[Ed. Note.—For other cases, see *Electricity*, Cent. Dig. § 4; Dec. Dig. § 9.*]

3. ELECTRICITY (§ 13*)—INJURIES INCIDENT TO PRODUCTION—DUTY OF CARE.

One acquiring the legal right to erect and maintain electric wires across public highways acquires the right on the implied condition that it will use proper care in the construction of its lines and in keeping the same in condition, so as not to injure those whose business brings them within their reach.

[Ed. Note.—For other cases, see *Electricity*, Cent. Dig. § 6; Dec. Dig. § 13.*]

4. ELECTRICITY (§ 16*)—INJURIES INCIDENT TO PRODUCTION—BROKEN WIRES.

One operating an electric light plant and maintaining over public highways wires carrying electricity sufficient to destroy life must guard, so far as may be reasonably practicable, against ordinary and usual conditions, though it may not be able to construct its wires to withstand extraordinary and unusual weather conditions.

[Ed. Note.—For other cases, see *Electricity*, Dec. Dig. § 16.*]

5. ELECTRICITY (§ 19*)—INJURIES INCIDENT TO PRODUCTION—EVIDENCE—INSTRUCTIONS.

Where, in an action against an electric light company maintaining wires over highways, for death by electric shock from a broken wire, the evidence relied on to show that the wire was struck by lightning shortly before the accident was unsatisfactory, and consisted mainly of the opinion of a witness inspecting the ends of the broken wire, a charge that it was the duty of defendant to exercise ordinary care in the erection of its wires so as not to permit them to get into such condition as might reasonably have been foreseen to be dangerous to persons traveling on the highways in or near which the wires were erected properly left it to the jury to say whether defendant exercised reasonable care to guard its wires against ordinary and usual conditions.

[Ed. Note.—For other cases, see *Electricity*, Cent. Dig. § 11; Dec. Dig. § 19.*]

6. ELECTRICITY (§ 19*)—INJURIES INCIDENT TO PRODUCTION—EVIDENCE—INSTRUCTIONS.

Where, in an action against an electric light company for death by electric shock coming from a broken wire, the evidence showed that a wire charged with a deadly current was lying across a public road where people were probably passing at all hours; that the night was dark; that the danger could not have been seen by travelers; that there had been a rain accompanied by some wind and considerable lightning; and that there was installed as a part of the company's power house an appliance indicating when a wire was grounded—a charge which assumed that the duty of inspection by the company was continuous, and that the diligence of an ordinarily prudent person was the measure of that which was required of the company, and that the law imputed to it such knowledge of the condition of the wires as might have been acquired by the exercise of that degree of circumspection, was proper.

[Ed. Note.—For other cases, see *Electricity*, Cent. Dig. § 11; Dec. Dig. § 19.*]

7. TRIAL (§ 244*)—INSTRUCTIONS—UNDUE PROMINENCE TO PARTICULAR MATTERS.

Where, in an action against an electric light company for death by electric shock received from a broken wire, the court in its general charge defined contributory negligence and directed a finding for the company if the jury believed that decedent's death was the result of his own negligence, the refusal to give a requested charge on the subject of contributory negligence was proper and thereby avoided giving too much emphasis to the issue of contributory negligence.

[Ed. Note.—For other cases, see *Trial*, Cent. Dig. §§ 577-581; Dec. Dig. § 244.*]

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

† Writ of error denied by Supreme Court.

8. TRIAL (§ 261*)—INSTRUCTIONS—REQUESTS—NECESSITY.

Where the court charged generally on an issue, a party could not complain of the failure to give more specific instructions without requesting a correct special charge covering the omission, and the court need not reform an incorrect requested charge, and then give it.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 660, 671, 675; Dec. Dig. § 261.*]

9. TRIAL (§ 194*)—INSTRUCTIONS—WEIGHT OF EVIDENCE.

In an action against an electric light company for death by electric shock received from a broken wire, an instruction that if decedent in getting out of a vehicle after he was told not to do so by the driver was negligent, and his act in so doing and going on the wire caused his injuries, and it was not his duty to get out of the vehicle, and, if he had remained there, he would not have been injured, and, if his getting out of the vehicle contributed proximately to his death, there could be no recovery, though the company was guilty of negligence, was properly refused as on the weight of the evidence for failure to present to the jury the question of negligence in going to where the wire was and coming in contact with it.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 439-466; Dec. Dig. § 194.*]

10. ELECTRICITY (§ 18*)—INJURIES INCIDENT TO PRODUCTION—CONTRIBUTORY NEGLIGENCE.

A driver of a bus at night left the bus while one of the horses was down struggling and the other uneasy to procure light to assist him in discovering the trouble. An occupant of the bus got out of it. He lived only 200 yards distant from where the bus stopped. The horses were left free to run away with the bus should the one that was down extricate himself. After the occupant left the bus, he came in contact with a live broken wire, and was killed. *Held*, that he was not guilty of contributory negligence.

[Ed. Note.—For other cases, see Electricity, Cent. Dig. § 10; Dec. Dig. § 18.*]

11. NEGLIGENCE (§ 122*)—CONTRIBUTORY NEGLIGENCE—EVIDENCE.

Contributory negligence will not be presumed, but must be proved.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. §§ 221-234; Dec. Dig. § 122.*]

12. TRIAL (§ 261*)—INSTRUCTIONS—REQUESTS—SUFFICIENCY.

The rule that where a requested charge, incorrectly framed, is sufficient to direct the court's attention to the issues, the court must give an instruction thereon, applies to cases where there has been a failure to present in the charge a material issue relied on, but it does not apply where the issue has been substantially covered, or where it is sought merely to have placed before the jury, the converse of that which has already been submitted.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 660, 671, 675; Dec. Dig. § 261.*]

13. TRIAL (§ 256*)—INSTRUCTIONS—REQUESTS—SUFFICIENCY.

Where the charge of the court was not affirmatively erroneous on an issue, the failure to present the issue in a negative form may not be complained of in the absence of a requested charge supplying the omission.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 628-641; Dec. Dig. § 256.*]

14. ELECTRICITY (§ 19*)—INJURIES INCIDENT TO PRODUCTION—ACTIONS—EVIDENCE—ADMISSIBILITY.

Where, in an action against an electric light company for death by electric shock re-

ceived from a broken wire, there was no evidence that the wire had undergone any change after the accident and at the time it was observed by a witness, it was proper to permit the witness to testify as to the condition of the insulation on the wires at or near the place of the accident as observed several days after the accident.

[Ed. Note.—For other cases, see Electricity, Cent. Dig. § 11; Dec. Dig. § 19.*]

15. APPEAL AND ERROR (§ 1052*)—HARMLESS ERROR—ERRONEOUS ADMISSION OF EVIDENCE.

Where, in an action against an electric company for death by electric shock, the verdict was not assailed as excessive, the error in admitting evidence of the capitalization of the company was not reversible.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4175-4177; Dec. Dig. § 1052.*]

16. DEATH (§ 33*)—PERSONS LIABLE—CORPORATIONS.

A private corporation including one engaged in supplying electricity is within Rev. St. 1895, art. 3017, cl. 2, authorizing an action for death by wrongful act, negligence, or default of another, and it is liable for injuries resulting in death.

[Ed. Note.—For other cases, see Death, Cent. Dig. § 49; Dec. Dig. § 33.*]

17. CORPORATIONS (§ 423*)—DUTIES—NON-DELEGABLE DUTIES.

The nondelegable duties of a private corporation consist of those primary duties which the law as a matter of public policy imposes as a condition on which the corporation shall exist and carry on business which may injuriously affect the person or property of another, and the failure to perform that class of duties is a personal omission of the corporation, and, if such failure is the result of negligence, the negligence is that of the corporation.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 1692-1695; Dec. Dig. § 423.*]

18. MASTER AND SERVANT (§ 304*)—ELECTRIC COMPANIES—NEGLIGENCE.

The negligent failure of an employé of a corporation operating an electric light plant and using wires for the distribution of dangerous currents of electricity to inspect the appliances, resulting in the death of a person by electric shock received from a broken wire, is the negligence of the corporation, and it is liable within Rev. St. 1895, art. 3017, cl. 2, authorizing an action for death by wrongful act, negligence, or default of another.

[Ed. Note.—For other cases, see Master & Servant, Cent. Dig. §§ 1226-1229; Dec. Dig. § 304.*]

19. ELECTRICITY (§ 13*)—POLES AND WIRES—CONSENT BY PUBLIC AUTHORITIES.

One maintaining electric light wires across a road without having obtained authority for that purpose is maintaining a nuisance; and is responsible absolutely for injuries received by an individual, for the placing of poles and wires on a public highway to furnish light to private persons is not a use for which highways are established.

[Ed. Note.—For other cases, see Electricity, Cent. Dig. § 6; Dec. Dig. § 13.*]

Appeal from District Court, Cherokee County; James P. Gibson, Special Judge.

Action by Minnie L. Moses and others against the Jacksonville Ice & Electric Company. From a judgment for plaintiffs, defendant appeals. Affirmed.

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

Donley & Guinn, John M. King, N. B. Morris, and H. I. Myers, for appellant. John C. Box and R. O. Watkins, for appellees.

HODGES, J. The appellees are the widow and minor children of S. H. Moses, who was killed in September, 1909, by coming in contact with one of appellant's wires charged with a current of electricity. This suit was instituted by them to recover damages sustained on account of his death. The facts, about which there seems to be no controversy, show that the deceased lived with his family in the suburbs of the town of Jacksonville, Cherokee county, and was employed as a boiler maker or repairer by the Texas & New Orleans Railway Company, which maintained a depot at that place. On the night Moses met his death he was going from some point near the Texas & New Orleans depot to his residence, about a mile and a quarter distant and on the north side of the town. He was traveling in what the witnesses call "the bus, or transfer," presumably the character of vehicle usually employed in conveying passengers to and from railway depots. The time is placed at about 2:30 a. m., and the night is described as being very dark. A rain had fallen, and the ground was wet. Some of the witnesses say there had been earlier in the night a rather hard rain accompanied by some wind and considerable lightning, but the testimony does not indicate that it was a storm of any unusual severity. When the bus reached the point on what is designated in the record as Kickapoo street where the latter was crossed by appellant's line of electric light wires, one of the horses fell to the ground, and could not be made to proceed. Not knowing the cause of the trouble, the driver, who was seated on the outside of the vehicle, told the deceased to remain on the inside while he went to procure a light. When the driver returned, he found that his team had gone, and one of appellant's wires was broken and was lying in the street, and also discovered the dead body of Moses lying in such a position as to show that he had been killed by an electrical shock received from the fallen wire. Appellant's line at that place ran east and west. It seems that Kickapoo street ran also in a westerly direction from the principal portion of the town until it reached a point near where the accident occurred. Here it deviated to the south for a short distance, and turned again in a westerly course. Appellant's line of wires ran some distance from and parallel with the street on the south side, intersecting and crossing to the north side, making an oblique angle, at the place where the street changed its course. It was at this point that Moses was killed by the fallen wire. On the east side of the street, and within a few feet of its edge, there stood a large red oak tree, through the branches of which the electric wires passed, and on the opposite, or west, side, about 100 yards distant, was the transformer used by the ap-

pellant on its wires. The petition charged the following acts of negligence: (1) The placing and maintaining of appellant's wires in close proximity to the limbs of the oak tree, and allowing them to come in contact with those limbs, thereby causing the wires to burn and break. (2) Permitting the wire, after it had broken and while charged with electricity, to remain in the street. (3) Failing to have its wires properly insulated. (4) Failing to have suitable appliances for detecting when a wire was grounded or down. (5) That, if it did have such appliances, it failed to use proper diligence in inspecting them for the purpose of ascertaining whether or not any of its wires were down. Appellant answered by general denial, specially pleading that the wire was broken as the result of being struck by lightning during a severe storm prevailing at the time, and that the deceased was guilty of contributory negligence in getting out of the vehicle and coming in contact with the fallen wire. A trial before a jury resulted in a verdict and judgment in favor of the appellees for \$10,000.

Counsel for appellant have presented 19 assignments of error, complaining principally of the charge of the court and the refusal to give special charges. After defining negligence and contributory negligence, and as introductory to that which was to follow, the court instructed the jury as follows: "It was the duty of the defendant to exercise ordinary care in the erection of its wires so as not to permit them to get into such position or condition as might reasonably have been foreseen to be dangerous to persons traveling in or upon the public road or street in or near which the wires were erected." "The defendant is presumed in law to have had such knowledge of the condition of its wires as it could have had by the exercise of that degree of care, prudence, and diligence that an ordinarily prudent person would have used under the same or similar circumstances." It is claimed that, while the principles here announced may not be incorrect as abstract legal propositions, yet, under the peculiar facts of this case, the charge was on the weight of the evidence. "The peculiar facts" relied on to distinguish this from those cases where such instructions might be appropriate consist of the facts pleaded as a special defense, that the wire was broken as the result of a stroke of lightning and that when the deceased was injured the wire was down in the street, but that of this situation appellant had no actual knowledge. The legal effect of the first paragraph quoted above was to tell the jury that the appellant would be guilty of negligence if in the erection of its wires it failed to exercise ordinary care to guard against endangering the safety of those who traveled upon the highway. It is apparently assumed in urging this objection that it was not the duty of the appellant to exercise even ordinary care to protect its line against the consequences of lightning in any of its forms. The testimony

shows that appellant was engaged in the business of operating an electric light plant, that its wires usually carried a current estimated at 2,250 volts, and that this was sufficient to destroy life. It had thus constructed a dangerous agency over a public highway where people were in the habit of passing both during the day and the night. In erecting its wires and in maintaining them afterwards it was the duty of the appellant to employ such means and to take such precautions to guard against injuring those using the highway as the dangerous nature of its agency would render reasonably necessary and prudent. *Citizens' Tel. Co. v. Thomas*, 45 Tex. Civ. App. 20, 99 S. W. 879; *S. A. Gas & Elec. Co. v. Badders*, 46 Tex. Civ. App. 559, 103 S. W. 229; *Lewis v. B. G. Gaslight Co.*, 135 Ky. 611, 117 S. W. 278, 22 L. R. A. (N. S.) 1169; *Day v. Con. L. & P. Co.*, 136 Mo. App. 274, 117 S. W. 81; *Brown v. Con. L. & P. Co. (Mo. App.)* 109 S. W. 1032; *Byerly v. Con. L. & P. Co.*, 130 Mo. App. 593, 109 S. W. 1036; *Gentzkow v. Portland Ry. Co.*, 64 Or. 114, 102 Pac. 614; *Elliott on Roads and Streets*, §§ 821, 822; 2 *Cooley on Torts*, pp. 1492-1494; 1 *Thompson on Neg.* §§ 802, 803. In some jurisdictions it is said that this duty demands the exercise of the utmost care, and in no instance has it ever been held that it is less than a person of ordinary prudence would use under the same or similar circumstances. The care exacted under any circumstances is proportionate to the danger to be avoided; the greater the hazard the greater the care required. *Galveston City Ry. Co. v. Hewitt*, 67 Tex. 473, 3 S. W. 705, 60 Am. Rep. 32; *Railway Co. v. Gormley*, 91 Tex. 393, 43 S. W. 877, 66 Am. St. Rep. 894; 1 *Thompson on Neg.* §§ 25, 26. Appellant had no natural right to encroach upon the street with its wires. If it was rightfully there, it must have been by permission of the proper authorities. Assuming, however, that it had acquired the legal right to erect and maintain its wires across this public road, or street, the implied condition upon which the grant is made is that the grantee will use proper care in the construction of its line and in keeping it in a condition so as not to injure those whose business brings them within its reach. *W. U. Tel. Co. v. Nelson*, 82 Md. 293, 33 Atl. 763, 31 L. R. A. 572, 51 Am. St. Rep. 464. While electric light companies are not expected to build their lines so as to stand extraordinary and unusual weather conditions, they are expected to guard, so far as may be reasonably practicable, against ordinary and usual conditions. And, while they may not be able to construct their lines and fix their wires so that they will withstand extraordinary atmospheric electrical currents, it is certainly their duty to use ordinary care to guard against those which are ordinary and usual. We do not think the charge was improper. The court left it for the jury to say whether or not appellant had conformed to the standard of duty required. *Telephone Co. v.*

Thomas, 45 Tex. Civ. App. 20, 99 S. W. 883; *Roche v. Dale*, 43 Tex. Civ. App. 287, 95 S. W. 1100; *Railway Co. v. Vaughn*, 5 Tex. Civ. App. 195, 23 S. W. 748. The evidence relied upon as showing that the wire was struck by lightning is very unsatisfactory. It consisted mainly of the testimony of one of appellant's witnesses, who gave it as his opinion, after an inspection of the ends of the broken wire, that the break was caused by lightning. He admitted, however, that the same appearances might have resulted from overloading the wire. The engineer who was in charge of the plant that night, and who says he frequently inspected the conditions in the power house, testified, at the instance of the appellant, that no lightning struck the wires that night.

The second paragraph above complained of assumes that the duty of inspection was continuous, that the diligence of an ordinarily prudent person was the measure of that which was required of the appellant, and that the law would impute to it such knowledge of the condition of its wires as might have been acquired by the exercise of that degree of circumspection. A wire charged with a deadly current was lying across a public road where people were probably passing at all hours. The night was dark, and the danger could not be seen and avoided by those traveling that way. There had been a rain accompanied by some wind and lightning. If these atmospheric disturbances were of the intensity claimed by the appellant, they were sufficient to put it upon notice that some of its wires were probably down, and prudence would have suggested an investigation. There was installed within the building used as appellant's power house where its machinery was situated an appliance that indicated when a wire was down, or grounded. An inspection of this was an easy method of inspecting the line. Certainly it was the duty of appellant to exercise ordinary diligence to acquire information so accessible. If so, its failure would render it responsible for the legal consequences. Ignorance would be a sufficient excuse only where ignorance was itself excusable. *Mitchell v. Charleston, etc., Co.*, 45 S. C. 146, 22 S. E. 767, 31 L. R. A. 577; *District of Columbia v. Woodbury*, 136 U. S. 463, 10 Sup. Ct. 990, 34 L. Ed. 477; 1 *Thompson on Neg.* § 802.

The following special charge on contributory negligence was requested by appellant and refused: "Gentlemen of the jury, you are instructed as a part of the law of this case and you will be controlled by this charge in connection with the main charge of the court that if you believe from the evidence that S. H. Moses was guilty of contributory negligence, and such contributory negligence (if any) he was guilty of was the proximate cause of his death, the plaintiff cannot, if you so believe, recover in this case. By 'contributory negligence' is negligence not only on the part of the defendant company,

but on the part of S. H. Moses, who was guilty, and by which they both contributed to the injuries. If S. H. Moses in getting out of the bus after he was told not to do so by Hopper was, under the circumstances then surrounding him, negligent, and his act of getting out of said bus and going on the wire caused his injuries, and it was not his duty to get out of said bus, and if he had remained in said bus he would not have been hurt, and if you believe that his getting out of said bus as aforesaid contributed proximately to his death, then the plaintiff cannot recover, although you may find the agents of the defendant were guilty of negligence in the matters and things charged in their petition, and, if you so find, you will return a verdict for the defendant." The court had in its general charge previously defined contributory negligence, and had also instructed the jury to find for appellant if they believed that Moses' death was the result of his own negligence. Without reference to whether the requested charge was a correct enunciation of the law as applicable to the facts, it occurs to us that had it been given in addition to what was said on that issue in the main charge there would have been too much emphasis placed upon the issue of contributory negligence, if that might be considered an issue in the case. *Ball v. El Paso, 5 Tex. Civ. App. 221, 23 S. W. 835.* The first portion of the special charge was a substantial reiteration of a part of the general charge, to the effect that appellees could not recover if Moses had been guilty of contributory negligence in any respect, and also in giving a further definition of contributory negligence. Assuming, however, that contributory negligence was an issue made by the evidence, appellant undoubtedly had the right to have the facts relied on to establish that defense affirmatively presented to the jury; but, the court having charged generally upon that issue, appellant could not complain of the failure to give more specific instructions without having prepared and requested a correct special charge covering the omission. It was not the duty of the court under such circumstances to reform one that was incorrect and then give it. *Railway Co. v. Shieder, 88 Tex. 166, 30 S. W. 902, 23 L. R. A. 538; M. K. & T. Ry. Co. v. McGlamory, 89 Tex. 139, 35 S. W. 1058; St. Louis S. W. Ry. Co. v. Hall, 98 Tex. 480, 85 S. W. 786.* The particular conduct of Moses which is referred to as constituting contributory negligence, and upon which it was sought to have the jury pass, was in getting out of the vehicle when it was stopped by the driver at the time the animal fell. The wire was evidently lying on the ground in front of where the bus was stopped, presumably under where the horses stood. The door to the bus must have been either on the side or in the rear. It is obvious, therefore, that merely getting out of the bus into the street did not place Moses in contact with the wire, and could not have been the proximate cause of

his death. In order to come in contact with the wire, he must have gone in that direction. This he evidently did, but the special charge does not submit to the jury the question of negligence in going to where the wire was and coming in contact with it, but assumes that if he did this he was guilty of negligence. In this respect the charge was on the weight of the evidence. But, without reference to the form of this requested charge, we think the refusal was justified by the fact that the issue of contributory negligence was not raised by the evidence. According to the testimony of Hopper, the driver, when he left the bus, one of the horses was down struggling, "and the other was an awful fool and was cutting up." Being unable to discover the cause of the trouble on account of the intense darkness, Hopper dropped his lines and went off to procure a light, leaving the animals free to run off with the vehicle should the one that was down extricate himself. Moses lived only about 200 yards distant from where they stopped. Getting out of the closed bus under those circumstances was not only not a negligent act, but a prudent course to take. No witness was present or could tell of the situation when Moses did get out. It may have been that he waited until the horses started off, and got out to save himself from another possible injury. His coming in contact with the wire was in all probability purely accidental. The jury could not have found that he was negligent without indulging in pure speculation and conjecturing facts of which there was no evidence. Contributory negligence will not be presumed; but, like negligence in general, must be proved. *T. & P. Ry. Co. v. Shoemaker, 98 Tex. 451, 84 S. W. 1049; Suburban Elec. Co. v. Nugent, 58 N. J. Law, 658, 34 Atl. 1069, 32 L. R. A. 700; Wilson's Adm'r's v. Railway Co. (Ky.) 86 S. W. 691.* We think the court correctly refused the requested charge.

Two other special charges were requested and refused. One (numbered 3) not only submitted as facts occurrences of which there was no evidence—whether the wire was broken by the falling of a limb—but authorized a finding for the appellant without reference to another issue made by the pleading and the testimony—the failure of the appellant to sooner discover and remove the fallen wire. The other requested charge (numbered 7), in addition to being subject to the objection last mentioned, was also on the weight of the evidence. Appellant by other assignments insists that, if these charges were incorrectly framed, they were nevertheless sufficient to direct the court's attention to the issues to which they related, and that fuller instructions upon those issues should have been given. The rule invoked applies to cases where there has been a failure on the part of the court to present in his charge a material issue of fact relied upon either as a ground of recovery or as a defense to the

action. See *Neville v. Mitchell*, 28 Tex. Civ. App. 89, 66 S. W. 579, and cases there cited. We know of no instance in which it has been held to require further instructions when in the charge already given the issue has been substantially covered, or where it is sought merely to have placed before the jury the converse of that which has already been submitted. The issues to which the special requested charges related had been substantially embraced in the general and special instructions previously given.

There are five assignments based upon the failure of the court to include in his general charge, and in connection with the issues of fact submitted as the basis of the right of the plaintiff to recover, the converse of what was there given. The charge of the court in the respects mentioned was not affirmatively erroneous, and the jury was elsewhere told that the burden of proof was on the plaintiffs. The failure to present the issues in a negative form is a matter of which no complaint can be made in the absence of a requested charge supplying the omission. *Boone v. Miller*, 73 Tex. 562, 11 S. W. 551; *Myer v. Fruin* (Sup.) 16 S. W. 868. At the instance of the appellant, the court gave special charges presenting the main defenses upon which it relied.

Mrs. Moses, wife of the deceased, was permitted to testify as to the condition of the insulation on the wires of the appellant at and near the place where the accident occurred, as observed by her on Monday following the Thursday on which her husband was killed. To this appellant objected, on the ground that the testimony was immaterial and related to the condition of the wires "after the transaction." There was no evidence that the wire had undergone any change between the time of the accident and the time it was observed by the witness. We think the intervening space would affect the weight, rather than the admissibility, of the testimony.

Complaint is also made of the admission of evidence as to the amount of the capital stock for which the appellant had been incorporated. The following is disclosed by the record regarding the testimony and the objections made: Andrews, the chief electrician for appellant, was on the stand, and had testified that he supposed the company was incorporated under the laws of the state of Texas. Counsel for appellee then asked this question: "Capitalized at \$75,000? Answer: That's what they say. Defendant's Counsel: I think the last question is improper. It is immaterial whether it is \$5,000 or \$100,000. Court: I don't know, if the witness knows about it. Defendant: We object because it is immaterial and irrelevant, and except to the ruling of the court." Admitting that the testimony was irrelevant and immaterial, and we think it was, that fact alone would not justify a reversal of the judgment. The er-

ror was technical, and no injury is claimed as the probable result. The size of the verdict is not assailed as excessive.

The principal ground relied on for a reversal of this judgment, if we may judge from the argument of counsel, is embraced in the objection to the following portion of the court's charge: "If you find from the evidence that defendant maintained proper and suitable appliances and devices at its power plant for the purpose of indicating when a wire charged with electricity was broken and down on the ground, but if you find that it failed to exercise ordinary care as to the inspection of such appliances, and you further find that if defendant had inspected such devices or appliances, it could and would have seen and known that such charged wire (if any) was broken and down on the ground in time to have prevented the injury, and that defendant failed to exercise ordinary care as to inspecting such appliances (if any), and if you further find that such failure (if any) was negligence, and that said negligence was a proximate cause of the death of said S. H. Moses, and that deceased was not guilty of contributory negligence and that on account of his death plaintiffs have sustained a pecuniary loss, you will find for plaintiffs." The specific objection is that this charge makes appellant, a private corporation, responsible for the negligent conduct of its servant. It is conceded that the appellant's liability for the death of Moses, if there is any, rests upon the second clause of article 3017 of the Revised Statutes of 1895, which reads as follows: "When the death of any person is caused by the wrongful act, negligence, unskillfulness, or default of another." The testimony shows that the appliance installed for detecting broken or grounded wires was in good working order. On the night of the accident an employé by the name of Woodward was in charge of the plant, and it was his duty to watch this appliance and discover when any break occurred. Woodward testified that he did make observations at short intervals during the night prior to the time he was notified that Moses had been killed, but discovered nothing wrong. As accounting for the failure of this break to manifest itself on the appliance, appellant contends that the broken wire was the one on which the return current came into the power house, and that the end next to the machinery was not grounded, but swung clear of the earth. There was a conflict in the testimony as to whether both ends of the broken wire were on the ground at any time. Witnesses for the appellees testified unequivocally that, when they first arrived upon the scene, both ends were on the ground, and about four or five feet apart. A witness for appellant, one of its employés, who arrived some time afterward, testified that the end of the wire next to the power plant was swinging above the ground. It is

not denied that, if both ends were on the ground, the trouble would have been disclosed in the office. There was testimony tending to show that the wire was probably down as early as 11 o'clock that night. Appellant insists that, if there was any negligence in failing to discover that a wire was down, it was that of Woodward, the man in charge, whose duty it was to inspect the appliance and report the trouble, and that for such negligence it is not made liable by the statute. Upon this phase of the action appellees charged in their petition that the appellant, not one of its employes, was guilty of negligence in failing to inspect the appliance installed for the purpose of ascertaining the condition of its wires, claiming that, if this had been done, it would have been discovered that one of the wires was down in time to have caused its removal before Moses was injured. While this manner of pleading was perhaps a needless statement of details in charging a breach of the general duty to sooner ascertain the condition of the wire and avert the danger, this was nevertheless the substance of the complaint. It is well settled by the decisions of this state that a private corporation, such as the appellant, is included within the terms of the statute before referred to, and under certain circumstances may be held liable for injuries resulting in death. *Fleming v. Loan Agency*, 87 Tex. 238, 27 S. W. 126, 26 L. R. A. 250. The duties of private corporations with reference to their employes and to the public, and for the purpose of determining their statutory liability, may be divided into two classes—the delegable and the nondelegable. The latter consist of those primary or absolute duties which the law as a matter of sound public policy for some salutary purpose imposes as a condition upon which the corporation shall exist and carry on a business which may injuriously affect the persons or property of others. A failure to perform that class of duties is regarded as the personal omission or default of the corporation itself, and, if such failure be the result of negligence, the negligence is that of the corporation, and not that of a servant to whom such nondelegable duties may have been intrusted. Among the primary duties of a corporation operating an electric light plant and using wires for the distribution of a dangerous current of electricity is that of exercising a proper degree of care, not only in the erection of its lines and instrumentalities, but in maintaining them thereafter in a reasonably safe condition. The performance of the latter obligation carries with it another equally absolute—that of making such an inspection of the condition of its property as may be practicable and reasonably essential to the accomplishment of that end. By this means alone can the corporation vouchsafe to the public that degree of protection which the law requires it to render. *Cit. Tel. Co. v.*

Thomas, 45 Tex. Civ. App. 20, 99 S. W. 879; *Standard L. & P. Co. v. Muncey*, 33 Tex. Civ. App. 416, 76 S. W. 931; *S. A. Gas & E. Co. v. Badders*, 46 Tex. Civ. App. 559, 103 S. W. 229; *Day v. Con. L. & P. Co.*, 136 Mo. App. 274, 117 S. W. 81; *Brown v. Con. L. & P. Co.* (Mo. App.) 109 S. W. 1032; *Byerly v. Con. L. & P. Co.*, 130 Mo. App. 593, 109 S. W. 1066; *Dow v. Sunset Tel. Co.* (Cal.) 106 Pac. 587; *Gentzkow v. Portland Co.*, 54 Or. 114, 102 Pac. 614; *Herbert v. Lake Charles I. L. & W. Co.*, 111 La. 522, 35 South. 731, 64 L. R. A. 101, 100 Am. St. Rep. 505; *Elliott on Roads and Streets*, § 882; 1 *Thompson on Neg.* §§ 802, 803. The author last referred to says: "A proprietor dealing with so dangerous and deadly an agency as electricity is bound to a continuous inspection, to the end of seeing that his wires are properly insulated, and to the end of discovering any breakage in them, so as to remove the current, or otherwise render them harmless at as early a period as is consistent with a very high degree of care and diligence. The obligation of exercising a degree of care proportionate to the danger obviously demands nothing less than this. Such a company will hence become liable to pay damages for an injury to a person proximately resulting from its failure to remove, after notice, actual or implied, a wire which had broken from its poles." The fact that such duties must be discharged through the agency of servants and employes does not affect their absolute character. The corporation cannot shift its personal obligations. *Railway Co. v. Kernan*, 78 Tex. 294, 14 S. W. 668, 9 L. R. A. 703, 22 Am. St. Rep. 52; *Cadden v. American, etc., Co.*, 88 Wis. 409, 60 N. W. 800; *Baird v. Rellly*, 92 Fed. 884, 35 C. C. A. 78; *Tierney v. M. & St. L. Co.*, 83 Minn. 311, 23 N. W. 229, 53 Am. Rep. 35; 2 *Labatt on Master and Servant*, pp. 1616-1625; *Evans v. La. Lumber Co.*, 111 La. 534, 35 South. 736; *Norfolk W. R. Co. v. Houchins' Adm'r*, 95 Va. 398, 28 S. E. 578, 46 L. R. A. 359, 64 Am. St. Rep. 791.

We come, then to the question, Did the charge complained of impose upon the appellant responsibility for the negligence of its servant? An answer to this involves the further question, Was the duty to inspect the appliance which appellant had provided for ascertaining the condition of its wires one of appellant's primary or personal duties, or was it one that might be assigned? It appears that appellant was engaged in the business of furnishing electricity to private individuals for the purpose of illumination, and perhaps for other uses incidentally connected with the usual and legitimate operation of such an enterprise. For the purpose, no doubt, of being able at all times, both during the night as well as the day, to readily detect whether or not any of its wires were down or broken, appellant had installed and was maintaining this mechanical device. By an inspection of this instrumentality the

lines themselves could be inspected. When this method is shown to be one of the appellant's own selection, and the one upon which it relied on the night of this accident, it cannot now complain because the court treated it as the one through which the duty of inspection might have been successfully performed. The failure to inspect this appliance was under the facts of this case a failure to inspect the wires. Diligence in making inspections is usually to be measured by the opportunity coupled with the probable demands for a necessity of making them. Having provided this convenient device for performing that service, appellant had thereby enlarged its opportunities, and the fruits of ordinary diligence increased correspondingly. If under those conditions the failure to use that appliance as a means of inspecting the wires was the negligent omission of a non-delegable duty, the fault was that of the appellant. Corporations must of necessity exercise their functions and perform their duties through the medium of subordinates and employes. The fact that an omission is the result of some dereliction on the part of such subordinate or employe to perform a primary duty of the master makes it none the less the default of the employer. The negligence may be chargeable to both. If a corporation cannot assign the duty of making an inspection requiring a personal examination of its lines for the purpose of ascertaining their condition, and thereby evade liability for resulting injuries, we do not think the escape is facilitated by adopting a different method of doing the same thing. The duty is none the less absolute and imperative because it may be performed more easily and readily with the aid of a mechanical device. The manner of its performance does not alter its character, or make that delegable which was not so before. We think the legal effect of the paragraph complained of was to submit to the jury the issue of whether or not the appellant had failed to perform one of its primary and absolute duties. Woodward, the man in charge of the plant on that occasion, was with reference to the performance of this duty more than a mere servant. He was the agent and representative of the corporation itself. A failure upon his part to examine the appliance for the purpose of ascertaining the condition of the wires was a failure of the corporation itself to inspect. We do not think that the charge complained of is subject to the objection urged.

There is, however, a feature of this case which has not been discussed in the briefs of counsel, but to which we think it proper to refer as bearing upon the question of whether or not the court committed the errors complained of in the charges quoted, or in refusing the special charges with reference to appellant's duty. The testimony indicated

that the street or road into which the wire had fallen was outside of the corporate limits of the town of Jacksonville, but that it was a public highway. It was also shown that appellant's wires had been strung across the road without authority having been obtained for that purpose from any one. If this be true, then the appellant was maintaining a nuisance and was responsible absolutely, and without reference to negligence, for whatever injuries were caused by the maintenance of such an obstruction. *Van Horne v. Newark Ry. Co.*, 48 N. J. Eq. 332, 21 Atl. 1034; *Finch v. Riverside Co.*, 87 Cal. 597, 25 Pac. 765; *Jones on Easements*, § 500; 1 *Joyce on Elect.* § 332, and cases cited. The placing of poles and wires upon a public highway for the purpose of furnishing lights to private persons is not one of the uses for which highways are established, and the right to do so must be acquired from the proper authorities. *Freund on Pol. Pow.* § 658. See cases last cited. The public have a right to the free and unobstructed use of the highways of the country. We know no better illustration of the dangers likely to result from hanging wires over public roads than that which is furnished by the facts of this case. That such a menace is in law an obstruction can hardly be questioned. It is true that appellees have not sought to place their right to recover upon that ground, but there is nothing in the pleadings which would preclude the consideration of that fact in determining appellant's liability.

It is unnecessary to discuss the remaining assignments of error, and the judgment is accordingly affirmed.

WILLSON, C. J., did not sit in this case.

CLEGG et al. v. MAYER et al.

(Court of Civil Appeals of Texas. Feb. 8, 1911.)

BROKERS (§ 53*)—SALE OF LAND—PERFORMANCE OF ENGAGEMENT—RIGHT TO COMMISSIONS—PROCURING CAUSE.

In an action by a broker for commissions, plaintiff never having found a purchaser who was either willing or able to buy, and the sale having been made, not to the person to whom plaintiff attempted to sell, but to him and to two others, plaintiff was not the procuring cause of the sale, and was not entitled to commissions.

[Ed. Note.—For other cases, see *Brokers*, Cent. Dig. § 74; Dec. Dig. § 53.*]

Appeal from District Court, Tom Green County; J. W. Timmins, Judge.

Action by Max Mayer and others against T. J. Clegg and others. Judgment for plaintiffs and defendants appeal. Reversed and rendered.

J. J. Neill and C. K. Bell, for appellants.

JENKINS, J. Appellees brought suit to recover of appellants commissions for the

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

sale of lands. They alleged that they were agents for the sale of appellants' ranch, and that they procured purchasers therefor in the persons of T. D. Word, O. H. Word, and C. R. Word, to whom appellants sold said land. The case was tried before the court without a jury, and judgment was rendered for appellees for 5 per cent. commissions on said sale, amounting to \$1,100.40.

The evidence shows that T. J. Clegg in 1905 placed his ranch in the hands of appellees for sale at \$3.50 per acre, agreeing to pay them a commission of 5 per cent. in the event of a sale. T. J. Clegg sold said land in 1906 to T. D. Word and his two sons, H. O. and C. R. Word. In 1905 Mayer described the land to H. O. Word and asked him to look at it, pricing the same to him at \$3.50 per acre. H. O. Word promised to do so, stating that if it suited him, and that if he could interest his father in the transaction, he would purchase it. He spoke to his father about it, but failed to interest him in the purchase. He did not go to look at the land, for the reason that he was informed by another party that it had no protection, by which was meant that it had no brush or brakes on it for the protection of stock from winter storms. H. O. Word afterwards saw Mayer and told him that the land would not suit him, for the reason that it had no protection. Mayer tried to sell to H. O. Word other lands, but failed to do so. Subsequently T. J. Clegg informed Mayer that the price of said land was \$4 per acre. Mayer tried to sell the land to one Clark at this price, and, failing to do so, Clegg informed Mayer that said land was withdrawn from the market, and that, instead of selling it, he had concluded to buy more land and increase the size of his pasture. This action on the part of Clegg appears to have been in good faith, and not for the purpose of avoiding the payment of commissions on a pending sale. No sale was pending at this time.

In July or August, 1906, T. J. Clegg was in the office of appellees when Mayer was trying to sell H. O. Word another tract of land. Mayer stated to Word that if he desired to purchase he had better do so at once, as land was advancing in price; that he could have sold him the Clegg ranch at \$3.50 per acre, but that Clegg afterwards raised the price to \$4 per acre, and had now taken it off the market. Clegg corroborated this statement, and agreed with Mayer that lands in that section were advancing in price. H. O. Word replied that the Clegg ranch would not have suited him anyway, as it had no protection. Clegg said that Word was mistaken in this. H. O. Word testified that he had no idea at that time of buying the Clegg ranch, and Clegg testified that at said time he had no idea of selling said ranch. Nothing was ever said

by Mayer to either of the Words subsequent to this about selling this land. Word was neither able nor willing to buy then, or at any other time, unless his father would assist him. Some two weeks before the sale of the land, T. D. Word met T. J. Clegg, whom he had known for many years, and asked him if he wanted to sell his ranch, stating that one of his sons had recently married, and that the other would do so soon, and that he wanted to help them to buy a ranch. Clegg replied that he had taken his land off the market, but if he could sell at once he would be willing to do so at \$4 per acre. T. D. Word was then on his way to an eastern county, where he was going after some registered cattle. He asked Clegg if he would leave the proposition open until his return, and Clegg agreed to do so. Upon the return of T. D. Word, some two weeks later, he and his two sons met Clegg and bought the land from him at \$4 per acre.

Appellants, under appropriate assignments, present the proposition that the judgment of the court below is not supported by the evidence. In this we concur. The appellees never at any time found a purchaser who was either willing or able to buy. The sale was not made to the party to whom they attempted to sell, but to him and to two others. What was done by appellees in attempting to sell the land to H. O. Word had nothing to do with the purchase of the land by T. D. Word, H. O. Word, and C. R. Word. The acts of appellees were not the efficient cause of said sale. The appellant T. J. Clegg had, in good faith, withdrawn the land from sale by appellees before negotiations for the sale which was made began. For these reasons, appellees are not entitled to commissions on said sale. *Duvall v. Moody*, 24 Tex. Civ. App. 627, 60 S. W. 269; *Brown v. Shelton*, 23 S. W. 483; *Montgomery v. Blering*, 30 S. W. 508; *Burch v. Hester et al.*, 109 S. W. 399; *Karr v. Brooks*, 129 S. W. 160.

In view of the disposition which we make of this case, it is not necessary to pass on the other assignments of error. The evidence in the case was fully developed on the trial; and, as the same shows no cause of action on the part of appellees, we reverse the judgment of the court below, and here now render judgment for appellants.

Reversed and rendered.

HOWARD v. WATERMAN LUMBER & SUPPLY CO. et al.

(Court of Civil Appeals of Texas. Jan. 11, 1911. Rehearing Denied Feb. 9, 1911.)

1. TRIAL (§ 139*)—DIRECTION OF VERDICT.

Where the evidence most favorable to plaintiff is sufficient to raise a question for the jury, it is error to direct a verdict for the defendant.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 332-341; Dec. Dig. § 139.*]

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

2. MASTER AND SERVANT (§§ 288, 289*)—INJURY TO SERVANT—RAILROADS—NEGLIGENCE—CONTRIBUTORY NEGLIGENCE.

In an action by a track surfacer for injuries at a switch, caused by collision of a "shay" engine and log car on which plaintiff was riding, evidence held to make the negligence of defendant and the contributory negligence of the plaintiff questions for the jury.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 1010-1050, 1089-1132; Dec. Dig. §§ 286, 289.*]

3. RAILROADS (§ 358*)—PERSONS ON TRACK—INJURY—CARE REQUIRED FROM TRAIN CREW.

It is the duty of operatives of a railroad train to use ordinary care to discover persons who have a right to be on the track, and failure so to do is negligence which entitles one injured thereby, if not himself negligent, to recover damages.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 1236, 1237; Dec. Dig. § 358.*]

4. MASTER AND SERVANT (§ 288*)—INJURY TO SERVANT—RAILROADS—NEGLIGENCE—CONTRIBUTORY NEGLIGENCE.

In an action by a track surfacer for injuries at a switch caused by collision of a "shay" engine and log car on which plaintiff was riding, held that the question of assumption of risk was for the jury on the evidence.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 1068-1088; Dec. Dig. § 288.*]

5. WORDS AND PHRASES—"DINKEY ENGINE."

A "dinkey engine" is a locomotive of regular pattern, but small size.

Appeal from District Court, Shelby County; James I. Perkins, Judge.

Action by Charles Howard, by next friend, etc., against the Waterman Lumber & Supply Company and another. From a judgment on a directed verdict for defendants, plaintiff appeals. Reversed and remanded.

S. W. Blount and S. M. Adams, for appellant. Davis & Davis and Young & Stinchcomb, for appellees.

McMEANS, J. Charles Howard, a minor, by his father as next friend, brought this suit against the Waterman Lumber & Supply Company and the Texas & Gulf Railway Company for damages for personal injuries alleged to have been sustained by him. Plaintiff afterwards dismissed his suit against the Railway Company, leaving the Lumber & Supply Company as sole defendant. The case was tried by the court with the assistance of a jury; and after all the testimony had been introduced the court instructed the jury to return a verdict for the defendant, which was done, and thereupon a judgment was entered in defendant's favor, from which the plaintiff has prosecuted this appeal.

Appellant's only assignment of error complains of the action of the court in instructing a verdict against him, and this assignment should be sustained if the evidence was sufficient to require the submission of the issues involved to the jury. This requires a discussion of the testimony.

The following facts are undisputed: Upon the date plaintiff alleged he was hurt, and for nine days prior thereto, he was in the employment of defendant in the capacity of track surfacer. Defendant operated two sawmills, one located at Timpson and the other at Waterman. These were about 15 miles apart. The Texas & Gulf Railway ran between these places. The defendant owned and operated a line of railway which connected with the track of the Texas & Gulf Railway about one mile north of Waterman, and ran thence eastwardly into a pine forest from which defendant procured logs to be manufactured into lumber at its mills. Nearly all of defendant's employes who were engaged in surfacing the track of its railroad, and in loading logs on cars to be transported to the mills, lived in Timpson, and it was a part of their contract that they were to be carried to their places of work from Timpson over the Texas & Gulf Railroad to its junction with defendant's road, and thence over defendant's road to their several places of work. In being so transported these employes rode on log cars, which we gather from the testimony were not like ordinary flat cars, but consisted of two sets of trucks connected by a long coupling pole, and over each set of trucks was what is called a bumper, upon which the logs rested, these bumpers resembling the bolsters of the ordinary log wagon. The cars having no flooring, the only place the employes could sit while riding was upon the bumpers. The cars which carried plaintiff and the other employes to their work on the morning plaintiff claimed to have been hurt were moved by a dinkey engine, which is a locomotive of regular pattern but small size, from Timpson to the junction of plaintiff's railroad. There were six cars in the train, three being pushed in front of the locomotive and three pulled behind it. When the train reached the junction the dinkey set some, if not all, of these cars on the defendant's railroad, among those being so placed being the one upon which plaintiff was riding, and this car was left about 75 or 100 yards from the switch that connected the roads, and was the car nearest the switch. Plaintiff was sitting on the bumper of the car that was nearest the switch. After setting the cars on this track the dinkey was run onto the track of the Texas & Gulf Railway, where it was to remain, and where it customarily remained, until defendant's engine which carried the cars to the forest or "to the front" came from Waterman, bringing with it other cars which had previously been hauled to Waterman, loaded with logs for the defendant's mill at that place. This locomotive was called a "shay," and was operated by a system of cogs, and in running made a noise different from that of the dinkey. The dinkey

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

usually reached the switch first and did so on the morning in question. After the cars had been run by the dinky on defendant's track, the employes, numbering from 8 to 12, including plaintiff, remained upon them, sitting in the same places in which they were when the switch was reached. After about 25 minutes the shay left Waterman coming toward the switch, sounding its whistle just as it left, and this was heard by plaintiff. A little later when the shay reached a point about 250 or 300 yards from the switch plaintiff looked and saw the shay coming on the track of the Texas & Gulf Railway, and it was running fast at that time, and after that he did not look at or pay any further attention to it. The shay after slowing up came in the switch pushing a car or cars ahead of it, and began to increase its speed, and, without decreasing its speed but ever increasing it, ran against the car upon which plaintiff was sitting with such force as to derail the car and throw plaintiff to the ground in front of the wheels so that the car being set in motion by force of the impact ran upon and injured him. Plaintiff heard the noise made by the moving shay from the time he saw it up to the moment of the collision but did not look in that direction. The cars upon which he and the other employes were, were placed on the switch to be pushed to the front by the shay, and it was usual, and in fact expected, that defendant's servants would couple the shay or the cars pushed by it to the cars in question before the movement toward the forest was begun. The coupling is made by the use of a chain and pin and is effected by an employe, usually the brakeman, inserting the pin in the link or chain while standing upon the ground, the cars coming together slowly to allow him to do this, but if the brakeman happened to be upon the bumper, the place where plaintiff was, then the coupling is made by him while occupying that position. The facts thus far stated we believe are undisputed. Plaintiff testified that he was sitting with his face to the front, that he saw the shay coming when it had reached a point about 250 or 300 yards from the switch, and that he did not thereafter look, but that he expected it to slow down at the switch and to approach the car upon which he was riding slowly as was done every morning and as was usual; that he heard the shay coming; that he had his back to it and did not look around again; that he heard it puffing and knew it was coming, but did not know how close it was; that if the whistle had been sounded or the bell rung he would have looked; that he did not know the shay was coming then; that the shay had not been running into the cars every morning and it did not generally run into the switch fast but would slow up and move in on the switch; that when the switch was thrown they always slowed up to come in

and that he relied on them slowing up that morning, but that he did not look to see if that was done; that he did not know the shay was as close as it was. "It generally slowed up every morning and I thought it was going to do that that morning. I heard it coming, but did not know how fast it was coming. I did not look around to see how fast or slow it was coming. I did not think it was going to run into the car." He could have seen the shay at all times from the time it entered the switch until it reached the car he was on had he looked. He further testified that the shay would stop at the switch for the switch to be opened, or if it was already open the shay would slow up and couple on to the cars and then carry them on out to the work. "I would remain on the car every morning when we would come from Timpson and they would set us out there, and when the shay would come from Waterman and connect on to us I would stay on the car while they were making the coupling. In switching the cars I never got off of them."

Foster Seawell, another employe of defendant, was riding on the same bumper with the plaintiff and was sitting by him just before the collision. He testified:

"I had been working for that company four months and I was never ordered by any one not to stay on those cars while being connected with others. I never had any orders from anybody not to stay on those cars. That morning that Charley was hurt I was on the car with him. I heard the shay that morning down the road a piece, but was not paying any attention. I noticed it was coming to take us on out; before that morning when the shay would come in on the switch I would remain on the log cars while they were making connections. They had a caboose besides the log cars to ride in, but they didn't take it all the time; they didn't have a caboose that morning. A good while before that they carried it, but along about that time they didn't carry it at all. When that shay would come from the mill and couple on to those cars they would not wait for the men to get on, they would pull out, and some of the men would catch the train and some would walk. On the morning that Charley was hurt I was on the car with Charley. I heard the shay coming before it got there that morning. I was on the car when it got struck that morning—about the time it struck I left it. I remember a good many were on the car at the time and there were some knocked off. There was another boy on that car that was knocked off, he was an Anderson, but I disremember what his first name was. Charley was sitting on that bumper to my back and his side was to me. I saw the shay come in that morning but paid it but little attention, knowing it was coming to take us out, and the time was coming for me to go to work, and I never paid

it much more attention. The first that attracted my attention I looked around and saw it was coming too fast to slow up in time for them to couple, and I kept sitting there watching it kinder on the sly, and I saw they were going to do something, and I lit off about the time they struck, and I gave a jump about the right time or I would have been tumbled off and fastened there too. Charley fell on his face—on his face like I think; he fell to the right side. Charley was not facing towards the switch, he was facing out towards the front. I didn't halloo at Charley when I jumped. I had been remaining on the cars all the time when the shay would come up and couple on to them. The shay didn't come in on the switch that morning at the usual speed. They had not been coming in there that way every morning at all. I had been working for the railroad for some time. I don't know exactly the speed that train was running that morning when I looked around and jumped off, but it was coming faster than it had any business to come and couple on. I couldn't tell exactly how fast it was coming, but it was coming a heap too fast. I jumped because I saw they were going to run into the car I was on. When the shay run around the curve and bumped into the car that Charley and I were sitting on I didn't hear the whistle blow or the bell ring. There was no warning given by the train that backed in there to my remembrance. These hands that were on those cars that didn't jump fell off some way; they saved themselves all right. I didn't have any warning that I must not get on the cars while being switched. I didn't have any warning from any one. I have caught on the cars while they were being switched, and would stay on them while they would be switching, and there was no warning given to me at all not to be on the cars while they were being switched. When they ran into that car that Charley and I were on they knocked it off of the track; it knocked one truck off to my remembrance, and, of course, it might have been more.

"The train slowed up just as it come in the switch. I don't remember whether it slowed up for the switch to be thrown or not, and it come on in and got faster, and I looked back to my side, and I saw they were coming on it to tear up the devil or something and I jumped, and just about the time I jumped it hit. When the train commenced coming in the switch it commenced going fast, it slowed up just before it got to the switch but I don't remember whether it stopped or slowed up for some one to throw the switch or not, but when it started in on the switch it started at full speed. In coupling the cars they had not always been running into them to couple them, they always slowed up and coupled them. When they slow up and couple they don't always stop. Some-

times they would slow up and couple and highball on out to the front. When they coupled them they had to slow up and couple, but they didn't tarry. They never coupled and not stop; they couldn't exactly do that. They always had to stop just a little. The switchman can couple them pretty fast, and they just ease it right on off, and sometimes men would get left. I have gotten left myself. I don't remember exactly the dates that I got left, but I got left once or twice, but it was not exactly at the main line, but I got left out on the tram. I have gotten left because I was not on the car at the time they coupled. I remember looking around at it (the shay). It was just slowing up then. I don't remember whether they were slowing up for the switch then or not, but I remember it slowed up, and when they come around they had a good piece to come, and they kept getting faster and faster, and about two feet before they struck I jumped. It seems about the time I jumped they struck. I noticed just before they come on the switch or as they come on the switch they slowed up some, and then from the switch it kept getting faster and faster, and kept on getting that way until it struck the car. I heard it coming on back. I don't know what to call it, but anyway I heard it coming back, and was not paying it enough attention to notice it like I ought to, and then I looked back and I didn't want to stay there. My heart failed on me, and my decision was the best, too.

"It had been some time since they had carried the caboose out on that train according to my remembrance. Not knowing how long since they had carried the caboose out I am afraid to say, but I know they used to carry me backwards and forwards in the caboose. I don't know whether it has been a month since they had used the caboose or not. I am quite sure it has been over ten days since they had carried the caboose. Those cars have a link at each end kinder like the link in a trace chain, and they use a coupling pin to couple those cars together. Sometimes when a man understands it they don't have to stop still to couple the cars, but the biggest portion of the time they do stop to couple them. The man that couples the cars is a man that is working on the train, and goes out with the car. The man that couples the cars always gets on, except sometimes a man is sitting on the car, and when the car runs up he will put the pin in. Ordinarily the man that couples the cars is out on the ground, and when the car goes up he couples them together, and then gets on the car after he does that. After I saw the train coming I didn't pay it any more attention hardly until it got right up to me, and then I looked back, and saw it was coming in there too swift for me to sit there, and I jumped. If I had been paying it attention I would have gotten off before I did I

suppose, it coming in as swift as it was, and I was talking to some of the boys and remember looking back once and seeing it, and then I looked back again and saw it was coming so swift, and I saw it was my go, and I went. If I had been looking and listening I suppose I could have told how fast it was coming, but I was paying attention to other things. I was doing that morning what I had been doing other mornings—sitting there waiting to go out to work. They didn't offer me any other cars except the ordinary log cars to carry me out. In coupling those cars, when a man has a link in his hand, why they have to stop, but when the link is in the car and all he has to do is to drop the pin they kinder hold the link in one hand and ease it in the drawhead and drop the pin down, and they don't tarry."

There was testimony to the effect that just before the collision defendant's foreman shouted a warning to the employes on the cars and commanded them to get off, but plaintiff and the witness Seawell testified that if any such warning or command was given they did not hear it.

The undisputed testimony shows that the engineer of the shay did not discover the cars on the track ahead of him because of wood being piled up on the tender in such a way as to obscure his view and supposed the track was clear, and the fireman did not see the cars because he was at that time putting fuel in the engine. It seems the first they knew of the cars being on the track was when the collision took place. There was testimony which was contradictory in some particulars of that of the plaintiff and Seawell, but we are not concerned with that in reaching a conclusion as to whether the court should have instructed a verdict. We have endeavored to set out the evidence that was most favorable to the plaintiff, and if that was sufficient to require a submission of the issues involved to the jury it would follow that the court was in error in directing a verdict against him. The trial court after hearing the evidence must have concluded that the testimony conclusively established one of three defenses, viz.: That no negligence on the part of defendant was shown, or, if it was, that under the evidence plaintiff was guilty of contributory negligence as a matter of law, or that his injuries resulted from risks which he had assumed. Can it be said that the evidence did not raise the issue of the negligence of defendant's servants operating the shay in running into the car upon which plaintiff was sitting and injuring him? It has been shown that the engine was observable by persons upon the cars. It was daylight. It had at all times been the custom to place cars brought down by the dinky on the defendant's track to be there coupled to the shay and carried to the woods, and the operatives of the shay were bound to know of this custom. It was also the custom, as shown by the testimony

quoted, for the employes coming from Timpson to remain on such cars when they were being coupled to the shay, and the operatives were bound to know this. Yet the only excuse offered by the engineer for not observing the cars in front of him was that as he had coupled onto some cars just before entering the switch he thought that these were all that were to be carried out to the woods, and that he started out with them, and that the wood on the tender obscured the cars on the track ahead of him from his view. The fireman said he was engaged in firing the engine and for this reason he did not see the cars. This may or may not have been sufficient to relieve them of negligence, for not seeing the cars and for running into them, but that was a question for the jury to determine under all the facts and circumstances in evidence. It is well-settled law in this state that it is the duty of the operatives of a railway train to use ordinary care to discover persons who have a right to be upon the track, and a failure to use such care would be such negligence as to entitle a person who was not himself also guilty of negligence to recover for injuries received in consequence thereof. *Railway v. Watkins*, 88 Tex. 20, 29 S. W. 232; *Railway v. Eason*, 35 S. W. 210; *Railway v. Phillips*, 37 S. W. 620; *Railway v. Crosnoe*, 72 Tex. 83, 10 S. W. 342; *Railway v. Hewitt*, 67 Tex. 479, 3 S. W. 705, 60 Am. Rep. 32. We do not think that the evidence was such as to justify the court in reaching a conclusion that the employes of defendant were not guilty of negligence, as a matter of law, in the operation of the shay at the time in question. Can it be said, then, that the evidence on the issue of plaintiff's contributory negligence was so conclusive that ordinary minds could not differ as to the conclusions to be drawn from it? If not, then it was error to instruct a verdict in so far as the issue of contributory negligence is concerned.

The cars were left on defendant's tracks for the purpose of being carried to the woods by the shay, and to do this it was necessary that the cars and shay be coupled. Plaintiff during the time of his services always remained on the car while the coupling was being effected, and this seems to have been the practice of all the employes who were carried to their work on the cars. To effect the coupling it was necessary that the shay move slowly against the car, and there is nothing in the record to indicate that a coupling made in the usual and ordinary way would produce such a jar as to endanger the employes on the cars, or to create in their minds any apprehension of danger from this source. Plaintiff believed that the coupling would be made carefully and in the usual way, as it had been done every morning during the time of his service, and as the witness Seawell said it was always done; and he had the right to rely upon the assumption that those in charge of the

train would exercise ordinary care in this regard, and in the absence of an actual knowledge upon his part that such care would not be exercised he would not be guilty of contributory negligence in indulging this presumption. He testified that he did not see the shay as it approached and did not know of the speed. He had no reason to anticipate that the engineer would fail to see the cars on the track ahead of him or that the engineer would fail to exercise proper care in making the coupling. Certainly he could not be required to anticipate, under the circumstances proven, that the engineer would run down upon the car with such speed as not to give those on the cars time to get off and with such violence as to throw the car off the track. We think the evidence was sufficient to require the case to go to the jury on the issue of plaintiff's contributory negligence.

The last question to be determined is whether the evidence established that plaintiff's injuries resulted from risks which had been assumed by him. As before shown, the evidence was sufficient, we think, to raise the issue of negligence of the engineer of the shay in causing the collision in which plaintiff was hurt. This, under the facts, was a question for the jury. Risks of injuries due to the negligence of the engineer were not among those assumed by plaintiff under the facts of this case. It follows that if plaintiff's injuries were the result of the negligence of the engineer of the shay, it was for the jury to pass upon the issue of assumed risks and the court should not have taken this issue from them by the peremptory instruction.

We think that the case was one which called for a general charge submitting the issues involved to the jury, and that the court erred in giving the peremptory instruction complained of.

The judgment of the court below is reversed and the cause remanded for another trial.
Reversed and remanded.

RANKIN et al. v. RANKIN.†

(Court of Civil Appeals of Texas. Dec. 21, 1910. Rehearing Denied Feb. 8, 1911.)

1. EXCEPTIONS, BILL OF (§ 27*)—RECITALS—EFFECT AS EVIDENCE.

A bill of exceptions which states that testimony was objected to "because" of certain facts, such as facts disqualifying a witness, is no evidence of their existence.

[Ed. Note.—For other cases, see Exceptions, Bill of, Cent. Dig. § 34; Dec. Dig. § 27.*]

2. WITNESSES (§ 139*)—QUALIFICATION—INDEPENDENT EXECUTORS.

An independent executor can voluntarily resign, so as to enable him to testify as a witness.

[Ed. Note.—For other cases, see Witnesses, Dec. Dig. § 139.*]

3. APPEAL AND ERROR (§ 742*)—ASSIGNMENTS OF ERROR—SUFFICIENCY.

An assignment of error to the admission of evidence is insufficient where the statement thereunder does not show that appellant excepted, nor the ground of his objection, and where there is no reference to the page of the record where the testimony appears.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3000; Dec. Dig. § 742.*]

4. APPEAL AND ERROR (§ 742*)—ASSIGNMENTS OF ERROR—SUFFICIENCY.

Grounds of objection to testimony set out in a bill of exceptions cannot be treated as a statement of facts under an assignment of error to the admission of such testimony.

[Ed. Note.—For other cases, see Appeal and Error, Dec. Dig. § 742.*]

5. APPEAL AND ERROR (§ 742*)—ASSIGNMENTS OF ERROR—SUFFICIENCY.

An assignment of error to the admission of evidence will not be considered where the statement of facts does not exclude circumstances under which the evidence would be admissible.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3000; Dec. Dig. § 742.*]

6. APPEAL AND ERROR (§ 742*)—ASSIGNMENTS OF ERROR—SUFFICIENCY.

An assignment of error will not be considered where it is not a proposition in itself, and none is submitted thereunder.

[Ed. Note.—For other cases, see Appeal and Error, Dec. Dig. § 742.*]

7. APPEAL AND ERROR (§ 742*)—ASSIGNMENTS OF ERROR—SUFFICIENCY.

An assignment of error to an instruction will not be considered where the statement does not show facts making the instruction erroneous, and where no error appears on the instruction's face.

[Ed. Note.—For other cases, see Appeal and Error, Dec. Dig. § 742.*]

8. EVIDENCE (§ 230*) — DECLARATIONS BY GRANTOR—ADMISSIBILITY.

Declarations by a grantor after making a deed are not admissible to disparage the grantee's title as by showing fraud or undue influence, but they are admissible on an issue of his mental condition when he conveyed.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 835-851; Dec. Dig. § 230.*]

9. EVIDENCE (§ 474*) — OPINIONS — MENTAL CAPACITY.

On an issue of undue influence over decedent inducing a deed, witnesses could give their opinion as to her mental condition, and as to whether she was easily influenced, where they stated the means of their knowledge, intimate acquaintance with her, and acts indicative of her weak mind.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 2198; Dec. Dig. § 474.*]

10. EVIDENCE (§ 471*) — OPINIONS — MENTAL CAPACITY.

A witness having shown knowledge as to one's mental condition may state that condition as a fact, and such testimony is not in the proper sense opinion evidence.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 2149-2185; Dec. Dig. § 471.*]

11. EVIDENCE (§ 248*) — DECLARATIONS BY HUSBAND—EFFECT.

Ordinarily one's declarations do not affect his wife's title to her separate estate, but on suit to set aside a deed from decedent to her son's daughter, made without pecuniary consideration on the ground of fraud and undue influence, plaintiffs could show that witness was

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

† Writ of error granted by Supreme Court.

promised his share of decedent's estate if he would not participate in the suit.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 953-964; Dec. Dig. § 248.*]

12. LIMITATION OF ACTIONS (§ 197*)—FRAUD—GRANTOR'S KNOWLEDGE—EVIDENCE—SUFFICIENCY.

As affecting limitations on a suit to cancel a deed for fraud, evidence held insufficient to warrant a finding that by using reasonable diligence grantor could have discovered that defendant was claiming under the deed.

[Ed. Note.—For other cases, see Limitation of Actions, Dec. Dig. § 197.*]

13. CANCELLATION OF INSTRUMENTS (§ 45*)—CANCELLATION FOR FRAUD—PROOF REQUIRED.

A vendor's executor suing to cancel a deed for fraud need show no title other than that conveyed.

[Ed. Note.—For other cases, see Cancellation of Instruments, Dec. Dig. § 45.*]

14. DEEDS (§ 70*)—CANCELLATION FOR FRAUD.

A deed to the grantor's granddaughter obtained by her father's fraud is invalid.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. §§ 165-182; Dec. Dig. § 70.*]

Appeal from District Court, Waller County; Wells Thompson, Judge.

Action by J. T. Rankin, executor, against L. A. Rankin and others. Judgment for plaintiff, and defendants appeal. Affirmed.

A. J. Harvey, Lipscomb & Pool, and W. W. Searcy, for appellants. J. D. Harvey, Keet McDade, J. V. Meek, and J. P. Buchanan, for appellee.

JENKINS, J. This suit was instituted by J. T. Rankin, executor of the estate of his mother, Mrs. Charlotte E. Rankin, to set aside a deed executed by said Charlotte E. Rankin to her daughter-in-law, Mrs. L. A. Rankin, the wife of Harry W. Rankin, one of the sons of said Charlotte Rankin. The grounds alleged for setting aside said deed are fraud and undue influence upon the part of said Harry Rankin.

Conclusions of Fact

From the evidence in the record, we find the following to be the facts as bearing on the issues made by the pleadings:

(1) Mrs. Charlotte Rankin, on June 23, 1897, executed a deed to Mrs. L. A. Rankin, wife of Harry W. Rankin, to 100 acres of land out of a 300-acre tract, in Ellis county, Tex., the consideration recited in said deed being \$25 cash and love and affection. No attack is made on this deed.

(2) On November 24, 1898, the said Mrs. Charlotte Rankin executed a deed to the said Mrs. L. A. Rankin for the remaining 200 acres of said tract of land, for the recited consideration of \$50 cash, and love and affection. This is the deed which is attacked in this suit.

(3) Each of said deeds conveyed title to

Mrs. L. A. Rankin in her separate right. No consideration was paid for the execution of either of said deeds. Both of said deeds were in the handwriting of Harry Rankin, were executed at his house, and when the last deed was executed there was no one present besides the grantor, Harry Rankin and his wife, except one J. T. Houx, who was a particular friend of said Harry Rankin, and who signed the same, and also a written memorandum attached thereto, as a witness. The evidence does not fully develop the circumstances under which the first deed was executed, but does show that the same was at the solicitation of said Harry Rankin.

(4) Said deed to the 200-acre tract was executed under the following circumstances: Mrs. Charlotte Rankin being at the house of Harry Rankin was informed by him that the first deed incorrectly described the land intended to be conveyed, and presented her the second deed, informing her that it was a substitute for the former deed, and conveyed the same land intended to be conveyed by the former deed. Believing these statements to be true, Mrs. Rankin signed the same, and also the memorandum attached to the same. This memorandum recited that Mrs. Charlotte Rankin was to retain possession of said land during her lifetime and was to pay all taxes thereon.

(5) This deed was witnessed by said Houx only, and was not acknowledged before any officer, and was not filed for record until August 17, 1908, nearly ten years after its execution, and some nine months after the death of Mrs. Charlotte Rankin. Neither Harry Rankin nor his wife ever set up any claim to said land during the lifetime of Mrs. Charlotte Rankin, and the execution of said deed, as a deed containing 200 acres of land, was not known to any of the other heirs of Mrs. Charlotte Rankin until some months after her death. Some time after the execution of said last deed they learned that Mrs. Charlotte Rankin had executed a deed to the wife of Harry Rankin for 100 acres of said Ellis county tract. This deed had not been filed for record when the second deed was executed, but was filed for record in Ellis county February 13, 1899.

(6) At the time of the execution of said deeds, Mrs. Charlotte Rankin was over 70 years old. She was, and for some time prior thereto had been, in feeble health and weak in mind, and on account of the condition of her eyes could not see without glasses, and then with great difficulty. This physical and mental condition so continued to the time of her death.

(7) Mrs. Charlotte Rankin had four sons, all of whom, except T. J. Rankin with whom she lived, were married, and all of whom lived in the same town with her. So far

as the record shows, none of the parties ever lived in Ellis county.

(8) Mrs. Charlotte Rankin never knew, nor did she have any reason to suppose, that the second deed was other than it was represented to her to be at the time she signed the same.

(9) The land conveyed in the second deed was worth about \$40 per acre when said deed was executed, and from \$70 to \$75 per acre at the time of the trial.

(10) Harry Rankin had great influence with his mother.

(11) By said deeds conveyance was made to Mrs. L. A. Rankin in her separate right, because there were unsatisfied judgments against Harry Rankin and he was insolvent.

(12) Mrs. Charlotte Rankin executed a will on October 21, 1899, at which time she thought the said deeds executed by her had perhaps been destroyed, but did not feel sure that such was the case. In said will she bequeathed her property equally to her son T. J. Rankin and to her three daughters-in-law, in trust for their children, except that in addition to his one-fourth, she also bequeathed to her son T. J. Rankin, with whom she had long made her home, the home in which she lived. She was at the time of the execution of said deeds a widow, and so remained to the time of her death. The fifth clause in said will was as follows: "I have heretofore given a deed to Lou Adell Rankin to one hundred acres of land in Ellis county, and in the event said deed was not destroyed but still exists, I value the same at \$2,500, and desire that the same be charged up to the interest of said Loudell Rankin in making division of my said estate."

In addition to the general issue, the defendants plead the four-year statute of limitations. No issue was raised by the pleadings as to want of proper parties. The jury returned a verdict for the plaintiff, appellee herein, and judgment was entered cancelling said deed, from which judgment the defendants appealed.

Conclusions of Law.

(1) Appellee objects to the consideration of a number of the assignments herein and to propositions and statements thereunder, as not being in compliance with the rules. One of the propositions under the first assignment of error is: "R. E. Hannay having been named by Mrs. Charlotte E. Rankin in her will as joint independent executor with J. T. Rankin, and having qualified as such executor, could not voluntarily abandon the trust, and being one of the executors under said will could not testify as to conversations with Mrs. Charlotte Rankin." The bill of exceptions shows that appellants objected to the witness Hannay testifying, "Because the pleading of plaintiff and evidence of the witness shows that the witness was named in the will of Mrs. C. E. Rankin as one of the independent executors under

her will, and that he qualified as such, and this suit being by the other independent executor, the witness was disqualified under article 2302 of the Revised Statutes of 1895 from testifying as to statements or declarations made by Mrs. C. E. Rankin to him in reference to the execution of the deed." A bill of exceptions which states that certain testimony was objected to because of certain facts is no evidence of the existence of such facts. In *Ward v. Cameron*, 97 Tex. 472, 80 S. W. 69, the bill of exceptions showed that a deposition was objected to because the party objecting had had no notice of the taking of the same. Mr. Justice Brown, speaking for the court, said: "It will be observed that the bill does not state that the plaintiff had no notice of the taking of the deposition, but makes that one of the grounds of objection. It is necessary for the bill of exceptions to show that the facts upon which the objection is predicated actually existed. The court might have overruled the objection because the fact did not exist." See, also, on this point, *Terrell v. McCown*, 91 Tex. 241, 43 S. W. 2; *Whitaker v. Gee*, 61 Tex. 218; *Henry v. Whitaker*, 82 Tex. 8, 17 S. W. 509; *Hurd v. Brewing Ass'n*, 21 Tex. Civ. App. 296, 51 S. W. 885, 57 S. W. 573; rule 59 Dist. and County Courts (67 Atl. xxiv); article 1361, Rev. St. 1895. Article 724, Code Cr. Proc., is substantially the same as article 1361, Rev. St. The Court of Criminal Appeals have frequently construed this article of the Criminal Procedure in harmony with the above cases. In *Flores v. State* (Tex. Cr. App.) 79 S. W. 809, where the objection was that the witness had been convicted of a felony, the court said: "The bill should have stated this as a fact, and not as a ground of objection." To the same effect is *Wright v. State*, 36 Tex. Cr. R. 35, 35 S. W. 287, and *Norsworthy v. State*, 45 Tex. Cr. R. 339, 77 S. W. 804.

(2) We have here presented the law to the effect that a bill of exceptions stating that certain proceedings were objected to because of certain facts, is not equivalent to a statement of the existence of such facts, for the reason that this proposition is invoked as to a number of other assignments of error. So far as the proposition made by appellants under this assignment is concerned, viz., that an independent executor cannot voluntarily resign his trust, upon the authority of *Roy v. Whitaker*, 92 Tex. 358, 48 S. W. 892, 49 S. W. 367, as well as upon our own construction of the statute in reference thereto, we hold that he can do so. Looking to the statement in appellants' brief under said proposition, we find nothing therein to indicate that he had not done so. Nor would such statement, if the facts existed, be pertinent to the proposition that he could not resign such trust.

(3) For the reason that they are not in compliance with the rules, we sustain appellee's objections to the following assignments

of error, to wit: The seventh: It is not shown in the statement under this proposition that appellants excepted to the admission of the evidence, nor are the grounds of appellants' objection stated. *Railway Co. v. Holzer* (Tex. Civ. App.) 127 S. W. 1063; *Railway Co. v. Adams*, 63 Tex. 206. We are not referred to the page of the record where the testimony of the witness may be found. The ninth: No facts are set out, except that the witness was permitted to testify as stated in the assignment. The grounds of objection as set out in the bill of exceptions, cannot be treated as a statement of the facts. See authorities *supra*. For the same reason we sustain the objection to the tenth, eleventh, thirteenth, fourteenth, fourteenth and one-half, and fifteenth assignments of errors. There are circumstances under which the evidence complained of in these assignments would have been admissible, and the existence of these circumstances were not excluded by the statements made. For instance, under the ninth, thirteenth, and fourteenth assignments, where the propositions are made that the acts and declarations of the husband are not admissible as against the title of the wife to her separate property, this would not be true if the wife was a mere trustee, holding for the benefit of the husband. Such is alleged in the petition herein to be the fact, and the statements do not exclude the existence of such fact. We sustain the objection to the sixteenth assignment, because the same is not a proposition, and no proposition is submitted thereunder. We sustain the objection to the seventeenth assignment, because the statement does not show any facts or circumstances which would have rendered the charge complained of erroneous, and no error appears upon the face of the same. A number, if not all, of the propositions asserted under the excluded assignments are made by appellant under other assignments, and have received our careful consideration.

(4) Under the first, third, fourth, and twenty-second assignments of error (as well as under the tenth and eleventh assignments which we have declined to consider for reasons above set forth) the proposition is presented that the declarations of a grantor made after the execution of a deed are not admissible in disparagement of the title of the grantee; that declarations of such grantor in the absence of the grantee are hearsay; that such declarations are not admissible to prove fraud or undue influence. These are sound propositions of law in the abstract, but are not applicable to the testimony objected to in this case, for the reason that the issues made by the pleadings are fraud and undue influence, which fraud, it is alleged, the son of the grantor was enabled to and did perpetrate; and which undue influence he was enabled to and did exercise upon the grantor by reason of her mental weakness. Where this is the issue, the acts

and declarations of the grantor, whether in the presence or in the absence of the grantee, whether before, at the time, or after the execution of the deed, may be given in evidence, not as proof of the fact of fraud as declared by the grantor, if he has declared such to be the fact, nor as proving the fact of undue influence, if he has declared that he was so influenced, but as circumstances showing the mental condition of the grantor at the time of the execution of the deed; it being reasonably presumed that a person of weak mind might be unduly influenced by things and conditions which might have but little, if any, influence over a person of strong mind, or that a fraud might be perpetrated upon such weak-minded person which would be detected by a person of vigorous intellect. In *re Burns' Estate*, 21 Tex. Civ. App. 512, 52 S. W. 98; *McIntosh v. Moore*, 22 Tex. Civ. App. 22, 53 S. W. 612; *Campbell v. Barrera* (Tex. Civ. App.) 32 S. W. 724; *Waterman v. Whitney*, 11 N. Y. 157, 62 Am. Dec. 76; *Shaller v. Bumstead*, 99 Mass. 112; *Lane v. Moore*, 151 Mass. 87, 23 N. E. 828, 21 Am. St. Rep. 431; *Bates v. Bates*, 27 Iowa, 110, 1 Am. Rep. 261; *Reynolds v. Adams*, 90 Ill. 134, 32 Am. Rep. 20; *Beaubien v. Cicotte*, 12 Mich. 486, 487; *Estate of Goldthorp*, 94 Iowa, 336, 62 N. W. 845, 58 Am. St. Rep. 405; *Thompson v. Ish*, 99 Mo. 160, 12 S. W. 510, 17 Am. St. Rep. 556; *Jones v. McLellan*, 76 Me. 49-51; *Reel v. Reel*, 8 N. C. 248, 9 Am. Dec. 636; *McTaggart v. Thompson*, 14 Pa. 149; *Dennis v. Weekes*, 51 Ga. 24; *Rusling v. Rusling*, 35 N. J. Eq. 120; *Marx v. McGlynn*, 88 N. Y. 358; *Potter v. Baldwin*, 133 Mass. 427; note to *Hess' Will*, 31 Am. St. Rep. 690. As to the nature and character of such declarations that will thus be admitted in evidence, the only limitations seem to be that they must tend, in some degree, to disclose the mental condition of the grantor, and must be sufficiently connected in time as to throw light on the condition of the party's mind at the time of the execution of the deed or will assailed. The following declarations have been held admissible for this purpose: Statements of the testatrix after the execution of her will "expressive of dissatisfaction with it." *Campbell v. Barrera* (Tex. Civ. App.) 32 S. W. 725. "That Daniel Lamb (contestant) would get his (testator's) property after his death, and that he wanted them to have it." In *re Burns' Estate*, 21 Tex. Civ. App. 512, 52 S. W. 99. Statements of the grantor denying that he meant to convey to the grantee the property described in the deed. *McIntosh v. Moore*, 22 Tex. Civ. App. 22, 53 S. W. 612. Many similar statements were held admissible in the cases above cited.

(5) The second, third, fourth and one-half, and fifth (as well as the excluded seventh) assignments of error and propositions thereunder are to the effect that the witnesses should not have been permitted to give their opinions as to the strength of Mrs. Rankin's

mind, and as to whether or not she was easily influenced. The witnesses stated the facts which showed their means of knowledge. They were her grown sons and daughters-in-law, and her relatives, Judge Haney and wife, who had been intimately acquainted with her for many years, knew her physical condition, had transacted business for her, and they detailed many statements and acts by her indicative of the weakness of her mind. Under these circumstances it was not error to permit them to give their opinion as to her mental condition, and as to whether or not she was easily influenced. *Koppe v. Koppe* (Tex. Civ. App.) 122 S. W. 74; *Railway Co. v. Shifflet* (Tex. Civ. App.) 56 S. W. 699; *Johnson v. State*, 42 Tex. Cr. R. 618, 62 S. W. 756; *Carr v. State*, 24 Tex. App. 568, 7 S. W. 328, 5 Am. St. Rep. 905.

It will be seen from an examination of the testimony that neither of the witnesses stated that in their opinion the mental weakness of Mrs. Charlotte Rankin was such that she could not resist the influence of Harry Rankin, or detect the fraud practiced upon her, but simply gave their opinion that she was mentally weak and childish, leaving it to the jury to find the fact, as to whether or not she was so deceived or improperly influenced. We think a better statement of the law is that a witness having shown his knowledge as to mental condition of a party may state such condition as a fact, and that the same is not in the proper sense opinion evidence. Our view of the law in this regard was stated in *Estate of Goldthorp*, 94 Iowa, 336, 62 N. W. 845, 58 Am. St. Rep. 404, 405, as follows: "If from observation alone the witness noticed anything about the decedent which indicated the condition of her mind as to strength or feebleness, we do not see why it does not call for a fact and not an opinion. * * * We think that the evidence that a person acted strangely, or in a childish manner are facts and may be testified to by any one."

(6) The sixth assignment of error is as to the testimony of Gus Rankin that one of the attorneys for appellee told him that Harry would give him his portion of the land if he would have nothing to do with this suit. There was no objection to this evidence upon the part of Harry Rankin, probably for the reason that the evidence shows that he authorized the submission of the proposition; but it is objected to on the part of Mrs. L. A. Rankin, on the ground that the deed in question conveyed the title to her in her separate right, and that her title is not to be affected by the declarations or acts of her husband. This proposition is also asserted under the fourteenth (as well as under the excluded ninth, thirteenth, and fifteenth) assignment of errors. This is a sound proposition of law in a proper case (*Clapp v. Engledow*, 82 Tex. 293, 18 S. W. 146), but does not present any reason why the testi-

mony tending to show fraud on the part of Harry Rankin should not have been received in this case. Mrs. L. A. Rankin was a volunteer in the transaction; she paid no consideration for the execution of the deed; she was not a purchaser for value, but was the beneficiary of the fraud of her husband, if any he committed. Her position was similar to that of one who becomes a party to a previously formed criminal conspiracy, whereby he is held to be bound by the declarations of his coconspirators prior to his entering into the conspiracy. She cannot voluntarily accept the benefits of the fraud, and object to proof of the fraud whereby she acquired title, any more than the receiver of stolen goods would be heard to object to proof that such goods were stolen by another. *Bass v. Peevey*, 22 Tex. 297; *Cox v. Miller*, 54 Tex. 27; *Loan Ass'n v. Baumann* (Tex. Civ. App.) 58 S. W. 51.

The eighteenth assignment of error is as to the charge of the court on the statute of limitation. The only error that could be considered under this assignment of error and the propositions and statements thereunder is specifically presented in the twentieth assignment of error, which is as follows: "The court erred in refusing to give the following charge to the jury: 'If you believe from the evidence that Mrs. C. E. Rankin knew or could have known, by the use of reasonable diligence, more than four years prior to the date of her death that the defendant L. A. Rankin had the deed sought to be canceled in this suit, you will find for the defendants on their plea of limitation.'" We might well overrule this assignment on the ground that the word "had" meant "was possessed of"—that is, that the deed had not been destroyed, and not that she was claiming under the same—and also upon the ground that the statements under these assignments do not indicate that Mrs. Rankin might, by the use of reasonable diligence, have discovered that appellees were claiming under said deed, but we will rest our decision upon the broad ground that there was no evidence tending to show that Mrs. Charlotte Rankin, by the use of reasonable diligence, could have made such discovery; and hence the issue of reasonable diligence was not in the case, and it was not error to fail or refuse to submit the same to the jury.

The court, upon request of appellants, instructed the jury as follows: "The evidence in this cause shows that the deed sought to be canceled was executed on the 24th day of November, 1898, and that Mrs. C. E. Rankin took no steps to have said deed canceled until February, 1903. So if you believe from the evidence in this case that Mrs. C. E. Rankin knew at the time she executed said deed that it was for two hundred acres of land, although she may not have wanted to execute said deed or may have been dissatisfied with the same, the law required her to bring suit to have the same set aside within four years

from the date she executed same if she desired to avoid the same. So if you believe from the evidence that at the time Mrs. C. E. Rankin executed said deed she knew that it conveyed two hundred acres of land and that she failed to file suit to have the same set aside within four years from the date of its execution, then you will find for the defendants on their plea of limitation, and in this connection you are instructed that the law presumes a person knows the contents of all instruments executed by them."

The nineteenth assignment of error relates to the refusal of the court to instruct the jury to return a verdict for the appellants for the reason that no title was shown in Mrs. Charlotte Rankin to the land described in the deed sought to be canceled. This suit being by the executor of the vendor to cancel the deed for fraud, it was not necessary for the plaintiff to show title other than that conveyed. *Perez v. Everett*, 73 Tex. 433, 11 S. W. 388. The case is analogous to that of common source in trespass to try title, in which it is held that claiming title under a deed amounts to an assertion that the grantor had a good title.

The twenty-first assignment of error relates to the sufficiency of the evidence to sustain the verdict. The statement under said assignment does not challenge the sufficiency of the evidence, except as to Mrs. L. A. Rankin. She being a holder without notice, her title must fail, if the evidence be sufficient to show that her deed was obtained by fraud or undue influence of her husband upon the grantor. The evidence is sufficient to have justified the verdict upon the ground that she held the title in trust for her husband.

Finding no error in the record, the judgment is affirmed.

Affirmed.

WM. M. RICE INSTITUTE v. GOOLSBEE.

(Court of Civil Appeals of Texas. April 26, 1909. On Motion for Rehearing, Jan. 25, 1911. Appellee's Motion Denied Feb. 9, 1911.)

1. ADVERSE POSSESSION (§ 31*)—NOTICE OF ADVERSE CLAIM.

The extent of the encroachment on land and not the nature of the use to which the land encroached upon is put, determines its sufficiency as notice of an adverse claim to land not actually occupied.

[Ed. Note.—For other cases, see *Adverse Possession*, Cent. Dig. §§ 128-133; Dec. Dig. § 31.*]

On Motion for Rehearing.

2. ADVERSE POSSESSION (§ 115*)—SUFFICIENCY OF POSSESSION.

Plaintiff's predecessor in title, whose wife owned 120 acres in a survey adjoining the survey in which the 160-acre tract in controversy is located, built a dwelling on the land in controversy just over the line from his wife's land in a small inclosure of about 2 acres, not more than three-fourths of which was on the land

in controversy, and which did not at any point extend more than 60 varas over it, and thereafter built an addition to the dwelling which extended over onto his wife's land. He also built within such inclosure on the controverted land a smokehouse, crib, etc., and built a barn and shop on his wife's land within the inclosure, and the orchard and garden were within it and included the land in both surveys. A lane about 40 feet wide, ran between a 35-acre tract inclosed and cultivated on his wife's land, and the inclosure around the houses, garden, etc. Plaintiff's predecessor knew the correct location of the line between the surveys, and in building his house on the survey in which the controverted land is located intended to acquire the 160-acre tract by limitations. *Held*, that the possession of plaintiff's predecessor was sufficient to raise an issue for the jury of notice to the owner of the 160-tract of an adverse claim to the whole of that tract.

[Ed. Note.—For other cases, see *Adverse Possession*, Cent. Dig. § 694; Dec. Dig. § 115.*]

3. ADVERSE POSSESSION (§ 57*)—CONTINUITY—SUFFICIENCY OF EVIDENCE.

Evidence in an action of trespass to try title, in which plaintiff claimed by adverse possession, *held* to sustain a finding that plaintiff did not claim the tract in controversy adversely until a certain year, so that there was a break in the possession and occupancy of the land, defeating title by limitations.

[Ed. Note.—For other cases, see *Adverse Possession*, Cent. Dig. §§ 277, 278; Dec. Dig. § 57.*]

4. ADVERSE POSSESSION (§ 44*)—CONTINUITY OF POSSESSION.

If there was a break within the 10-year period in the possession and occupancy of a part of a tract claimed by adverse possession, such possession was not sufficient to authorize a claim of title to the whole tract by 10-year limitations.

[Ed. Note.—For other cases, see *Adverse Possession*, Cent. Dig. §§ 226-231; Dec. Dig. § 44.*]

Appeal from District Court, Tyler County; W. B. Powell, Judge.

Action by Andy Goolsbee against the Wm. M. Rice Institute. From a judgment for plaintiff, defendant appeals. Reversed and remanded.

See, also, 45 Tex. Civ. App. 254, 99 S. W. 1031.

Baker, Botts, Parker & Garwood, Parker & Hefner, and Will E. Orgain, for appellant. V. A. Collins and Joe W. Thomas, for appellee.

PLEASANTS, C. J. This is an action of trespass to try title brought by appellee against appellant to recover a tract of 160 acres of land, a part of the International & Great Northern survey No. 2, Tyler county. The only issue in the case is that of limitation. Appellant has a record title to the International & Great Northern survey before mentioned, and appellee was not entitled to recover the land sued for unless he has acquired title thereto under the 10-year statute of limitation. There was a trial jury in the court below which resulted in a verdict and judgment in favor of plaintiff.

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

The facts disclosed by the record upon the issue of limitation are as follows: The International & Great Northern survey, of which the land in controversy is a part, lies immediately west of the lower Addison Sapp survey, the west line of the Sapp being the east line of the International & Great Northern survey. Another Addison Sapp survey known as the "upper Addison Sapp" lies immediately north of the lower Sapp and north of that portion of the International & Great Northern in controversy in this suit, the south line of the upper Sapp being the north line of the lower and the 160-acre tract in controversy. In 1879, T. E. Goolsbee, whose wife owned 120 acres of land in the lower Sapp survey adjoining the International & Great Northern survey, went upon the land in controversy, and made improvements thereon and on the adjoining land of his wife. He built a dwelling house just over the line of the Sapp on the land in controversy and within a short distance of its northeast corner, and inclosed and put in a field of about 35 acres on his wife's land in the Sapp survey. The house was not inclosed with the field, but was in a smaller inclosure of about two acres, not more than three-fourths of which was on the land in controversy. This inclosure was 134 varas from north to south and 80 varas from east to west, and did not at any point extend more than 60 varas over on the land in controversy. Within this small inclosure and on the land in controversy he built a smokehouse, a crib, and a potato house. A few years after he built his dwelling house he made an addition to it which extended over on his wife's land. He also built a barn and shop on his wife's land within said inclosure. His orchard and garden were also within said smaller inclosure and included the land upon both surveys. There was a lane or roadway about 40 feet wide between the field and the inclosure around the houses, garden, and orchard. When he made this settlement he knew where the line of the Sapp survey was, and intended to build his house on the International & Great Northern survey for the purpose of acquiring title to 160 acres thereof by limitation. The evidence is sufficient to sustain the finding that more than 10 years before the institution of this suit T. E. Goolsbee had the 160 acres in controversy surveyed and the corners marked and that he continuously claimed this 160 acres for more than 10 years prior to August 16, 1904, when he and his wife conveyed it to appellee. This suit was brought in December, 1904. During all of the 10 years in which T. E. Goolsbee claimed the land, the premises before described were occupied and used by him, or by tenants under him, but no possession, use, or occupancy was shown of any portion of the land than the small strip before described.

Under its first assignment of error ap-

pellant assails the judgment upon the ground that the possession and use by appellee's vendor, T. E. Goolsbee, of the small portion of the land in controversy before described was not sufficient to give notice to appellant that Goolsbee was claiming 160 acres of its land, and therefore could not, under the 10-year statute of limitation, give Goolsbee constructive adverse possession of that portion of the 160 acres not actually occupied by him. Upon a former appeal of this case a judgment of the court below in favor of plaintiff was reversed and cause remanded. The evidence upon that trial failed to show that T. E. Goolsbee was claiming the specific tract of 160 acres described in the petition during the 10 years of his occupancy of the small portion thereof before described. *Rice v. Goolsbee*, 45 Tex. Civ. App. 254, 99 S. W. 1031. The question we are now called upon to decide, if presented upon that appeal, was not passed upon. In the case of *Bracken v. Jones*, 63 Tex. 184, our Supreme Court held that one could not acquire title by limitation to 160 acres of his neighbor's adjoining land by inclosing and cultivating with land of his own 4 acres thereof for more than 10 years. The ground upon which this decision was based was that the inclosure of so small a portion of land with land belonging to the trespasser was not notice to the owner of a claim to any portion of his land outside of such inclosure. In discussing the question Judge Willie says: "It can scarcely be said that in such a case as the present the possession is notorious, visible, and distinct so as to fulfill the requirements of the 10-year section of the statute of limitation. Whilst the true owner is chargeable with a knowledge of the boundaries of his land, he can hardly be affected with notice that a neighbor, who has encroached a few feet upon his tract, is doing so for the purpose of acquiring title to 640 acres of it. He would rather impute it to a mistake on the part of the apparent trespasser as to the division line between them. Whilst this might not excuse the party trespassed upon for not asserting his right to the land actually occupied by the trespasser, it would certainly save him from such consequences as the loss of a section of his land. The party encroaching would be entitled to no more than the land actually occupied by him."

We think the reasoning of Judge Willie in the case cited is applicable to the facts of this case. The possession of T. E. Goolsbee of the small strip of the land in controversy cannot be disassociated from his possession and use of the larger tract owned by his wife, and the facts of this case present *prima facie* merely a case of a slight encroachment by an adjoining landowner upon the land of his neighbor. Giving full force to the presumption that the owner knows the location of the boundary lines of his land (a presumption which appears to the writer

to be violent when the land is unoccupied and its lines are not marked, and their location can only be fixed by course and distance from marked corners or other known and fixed objects), we do not think the occupancy by Goolsbee of the small strip of land before described should be held sufficient to give notice to the owner of the International & Great Northern survey that such occupant was claiming 160 acres of his land. If the owner of the International & Great Northern survey, knowing the exact location of his line, had gone upon his land and observed that in building his dwelling house Goolsbee had placed it on the line, one portion of the house being on one survey and the remainder on the other, and that the inclosure surrounding said house and the outhouses used in connection therewith were similarly situated—that is, some of them on one survey and some on the other—while the field which formed much the larger portion of the inclosed lands was entirely on the land owned by Goolsbee's wife, we think such owner would have reasonably concluded that this small encroachment upon his land should be imputed to mistake on the part of Goolsbee as to the exact location of the line of his wife's land. The case would be different if Goolsbee had not owned and cultivated the larger portion of the land embraced in the inclosure, because in that event the owner of the land in controversy would not have likely been misled as to the purpose and intent of the occupancy of his land by Goolsbee. The encroachment in this case was much less in extent than that in the case of *Bracken v. Jones*, supra, and we think the extent of the encroachment, and not the character of the use to which the land covered thereby is put, should determine its sufficiency as notice of adverse claim by constructive possession of land not actually occupied.

It seems to us that the owner of land thus held by a trespasser would be more likely misled by the situation shown by the facts of this case than by an encroachment consisting only of inclosure and cultivation of his land. The fact that the dwelling house was partly on one survey and partly on the other, and that the outhouses used in connection with the home were similarly situated would, we think, naturally lead such owner to suppose that the trespasser was on his land by mistake, because it would be unreasonable to presume that one claiming land and intending to acquire title thereto by limitation should designedly so place his improvements as to render such intention doubtful. If the claimant's improvements are designedly placed in this way it should be regarded as an attempt to acquire the land of another by trick or artifice, and the statute should not be made to subserve such purpose. It cannot be said that the possession shown in this case was of that fair, open, and visible char-

acter necessary to constitute adverse possession under our statute of limitation, of any portion of the land in controversy outside of appellee's inclosure. *Bracken v. Jones*, 63 Tex. 184; *Tucker v. Smith*, 68 Tex. 473, 3 S. W. 671; *Titel v. Garland*, 99 Tex. 201, 87 S. W. 1152; *Downs v. Powell*, 116 S. W. 873.

The evidence in the case being undisputed and the facts fully developed, the judgment of the court below should be reversed, and judgment rendered in favor of appellant for all of the land in controversy except that portion within appellee's inclosure, and it has been so ordered.

Reversed and rendered.

On Motion for Rehearing.

At a former term of this court we affirmed the judgment of the court below as to a part of the land involved in this suit and reversed said judgment and rendered a judgment for appellant for the remainder of said land. Appellee in due time filed a motion for rehearing, and the decision of this motion was postponed, and the motion carried over from term to term by orders of this court made and entered in the minutes of the court. The nature and result of the suit and the material facts shown by the evidence are sufficiently stated in our former opinion.

As shown by our former opinion herein, we reversed and rendered the judgment of the court below as to all of the 160 acres of land involved in the suit except that portion covered by appellee's improvements and shown to have been in his actual possession, on the ground that the small amount of appellant's land shown to have been in appellee's possession was, as a matter of law, insufficient to charge appellant with notice of appellee's claim to 160 acres of his land. In view of the holding of the Supreme Court in the recent case of *Smith v. Jones*, 132 S. W. 469, we have concluded that we erred in reversing the judgment on this ground. The possession shown by the evidence was sufficient to raise the issue of notice to appellant of the adverse claim of appellee to the whole of the 160 acres, and that issue having been decided by the jury in appellee's favor, and the sufficiency of the charge submitting said issue not being complained of, the judgment should not be reversed on this ground.

While the undisputed evidence shows continuous use and cultivation of the field on the Sapp survey since 1879, there is evidence in the record which would sustain a finding that appellee's improvements on the 160 acres of land were unoccupied, and no part of said 160 acres was used or cultivated by appellee or any one for him from the spring of 1901 to the spring of 1902. During this time appellee's farm on the land owned by his wife in the Sapp survey was cultivated by R. L. Pope as a tenant of appellee. Pope testified: "I believe that Mr. Goolsbee moved off of that place in 1899. It was the last part of

the year, I think, that Mr. Goolsbee moved off. Then Hy. Cluff moved on it, and was there the year 1900 is the way I remember it; and Henry Cluff left there in March or April of the next year, and he was on that place one year and then up until March or April of the next year, making it 1901. I had place then for the balance of the year. Q. What did you have—did you have anything to do with the patch and all west of the house, did you work any part of that? A. No, sir. (Plaintiff objects to that as leading.) Witness states: The land lying east of the house, on the east side of the road is the land that I worked. There wasn't any land worked west of the road after I had taken charge of it. I don't think there was any garden; I don't remember about that very sure, and won't say positive. There was no one living there in 1901. The first party that moved in there after Henry Cluff moved out I think was Bryant Jefferies. He moved in there in the spring of the next year, 1902, I believe it was. I do not remember what month it was; it was tolerable early in the spring, about March or April. He moved in there about 10 or 11 months—probably 12 months—after Henry Cluff left the place, but I couldn't say as to what time he went there, because I don't remember." The evidence does not conclusively show a claim by appellee and his grantor to the specific tract of 160 acres in suit for 10 years prior to the spring of 1901. T. E. Goolsbee, from whom appellee purchased, testified that he did not claim this specific 160 acres until he had it surveyed, and that he had the survey made in the summer of 1890 or 1891. The surveyor who did the surveying testified that according to his recollection he made the survey in 1896. Upon this testimony the jury might have found that appellee did not claim the specific 160 acres sued for until 1896. If this is true, it follows that a break in the possession and occupancy of the land from the spring of 1901 to the spring of 1902 would defeat appellee's claim of title by limitation.

Such being the state of the evidence the appellant requested the court to charge the jury as follows: "You are instructed that the possession, use, and enjoyment of the farm on the Addison Sapp survey is not such possession and enjoyment and use as will extend to any part of the 160 acres on the I. & G. N. No. 2." The facts above stated called for this charge, or one of similar nature, and it was error for the court to refuse to give it. This error requires a reversal of the judgment.

At the last sitting of this court we entered an order granting appellee's motion for rehearing and affirming the judgment of the court below. That order is set aside upon our own motion, and in lieu thereof it is ordered that the motion for rehearing is

granted, and the judgment of the court below reversed and the cause remanded.
Reversed and remanded.

STATE v. RACINE SATTLEY CO.

(Court of Civil Appeals of Texas. Jan. 23, 1911.)

1. PLEADING (§ 214*)—DEMURRER—ADMISSIONS.

A general demurrer to a petition admits the truth of all facts alleged in the petition and of all inferences reasonably deducible therefrom for the purposes of the demurrer.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 525-534; Dec. Dig. § 214.*]

2. MONOPOLIES (§ 30*)—CONTRACTS IN RESTRAINT OF TRADE—SALE OF GOODS—"TRUST"—"CONSPIRACY."

Under anti-trust law of 1903 (Laws 1903, c. 94), defining a "trust" as a combination of capital by two or more persons to create restrictions in trade or the free pursuit of any business, and defining a "conspiracy" in restraint of trade as an agreement between two or more persons to refuse to buy from or sell to any other person any article of merchandise, a petition, which alleges that a manufacturer of farm implements and vehicles entered into a contract with a dealer therein whereby the manufacturer agreed to give the dealer the exclusive sale of its product, and whereby the dealer agreed not to buy or sell any other makes of like goods, and that the manufacturer and dealer carried the contract into execution to the injury of the people, charges a violation.

[Ed. Note.—For other cases, see Monopolies, Dec. Dig. § 30.*]

For other definitions, see Words and Phrases, vol. 2, pp. 1454-1461; vol. 8, pp. 7613, 7116-7124, 7822.]

3. MONOPOLIES (§ 12*)—RESTRAINT OF TRADE—ANTI-TRUST ACTS.

Under the anti-trust act of 1903 (Laws 1903, c. 94), restrictions in trade are prohibited without regard to their immediate effect on trade.

[Ed. Note.—For other cases, see Monopolies, Dec. Dig. § 12.*]

4. MONOPOLIES (§ 12*)—"CONSPIRACY."

A "conspiracy," within the anti-trust act of 1903 (Laws 1903, c. 94), prohibiting conspiracies in restraint of trade, is a combination between two or more persons to do an unlawful act or to do a lawful thing in an unlawful manner.

[Ed. Note.—For other cases, see Monopolies, Dec. Dig. § 12.*]

5. COMMERCE (§ 33*)—INTERSTATE COMMERCE.

The purchase of goods in one state to be shipped into another is interstate commerce and not within the provisions of the state anti-trust laws.

[Ed. Note.—For other cases, see Commerce, Dec. Dig. § 33.*]

6. EVIDENCE (§ 20*)—JUDICIAL NOTICE—FACTS OF COMMON KNOWLEDGE.

The court will take judicial notice of such facts incident to commerce as are known to all men, and of the fact that wholesale dealers ordinarily make sales to their customers in the state by sending traveling salesmen to their customers' places of business.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 24; Dec. Dig. § 20.*]

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

7. COMMERCE (§ 33*)—INTERSTATE COMMERCE.

A sale by a foreign corporation of goods to be shipped to Texas from its factory in another state, subject to the approval of the corporation at its home office in the state of its origin, is an interstate transaction.

[Ed. Note.—For other cases, see Commerce, Cent. Dig. § 26; Dec. Dig. § 33.*]

8. MONOPOLIES (§ 30*)—CONTRACTS IN RESTRAINT OF TRADE—PETITION.

A petition, in an action by the state against a foreign corporation for a violation of the anti-trust act of 1903 (Laws 1903, c. 94), which alleged that the foreign corporation was a manufacturer of farming implements and vehicles; that it contracted with a dealer in the state in such articles to give him the exclusive sale of its goods, the latter agreeing not to buy or sell any other makes of like goods; that the foreign corporation had traveling salesmen soliciting business throughout the state; that the contract was signed by one of the salesmen; and that the foreign corporation was a wholesale dealer in farming implements and vehicles—was sufficient as against a general demurrer to show that it was the purpose of the foreign corporation to sell goods under the contract at the residence of the dealer in Texas, and that it was its purpose that the contract should be carried into effect in Texas, so that the transaction was not interstate commerce, but was subject to the state anti-trust laws.

[Ed. Note.—For other cases, see Monopolies, Dec. Dig. § 30.*]

9. CONSPIRACY (§ 1*) — ACTS CONSTITUTING "CONSPIRACY."

Where two persons pursue by their acts the same object by the same means, one performing one part of the act and the other another part thereof, so as to complete it with a view to the attaining of the object which they are pursuing, there is a "conspiracy."

[Ed. Note.—For other cases, see Conspiracy, Cent. Dig. §§ 1-5; Dec. Dig. § 1.*]

10. CONSPIRACY (§ 14*) — CIVIL LIABILITY — PERSONS LIABLE.

The act of a conspirator done in furtherance of the common design is the act of all the conspirators, and all the conspirators are joint tort-feasors.

[Ed. Note.—For other cases, see Conspiracy, Cent. Dig. § 14; Dec. Dig. § 14.*]

11. MONOPOLIES (§ 21*)—CONTRACTS IN RESTRAINT OF TRADE—LIABILITY.

Where an agreement in violation of the anti-trust law has been made, and one party thereto pursues the course of conduct agreed on, the law presumes that the acts done by him were the result of the agreement and of entering into it, so that the parties thereto are liable as aiders and abettors and are responsible for the acts of each and all within the anti-trust law of 1903 (Laws 1903, c. 94)

[Ed. Note.—For other cases, see Monopolies, Dec. Dig. § 21.*]

12. COMMERCE (§ 40*)—CONTRACTS IN RESTRAINT OF TRADE—LIABILITY.

Where goods sold and contemplated to be sold under a contract in restraint of trade were to be shipped from a sister state to Texas and there mingled with other goods of the buyer in Texas to become a part of the buyer's stock and to be there sold at retail, and the contract was made with the knowledge and purpose and intent of all the parties thereto that that should be done, the parties were liable for a violation of the anti-trust act of 1903 (Laws 1903, c. 94), as against the objection that the transaction was interstate commerce.

[Ed. Note.—For other cases, see Commerce, Cent. Dig. §§ 29, 30; Dec. Dig. § 40.*]

13. CONTRACTS (§ 33*)—EVIDENCE (§ 451*)—AMBIGUOUS PROVISIONS—EFFECT.

A patent ambiguity in a contract cannot be aided by parol evidence, and, where the written instrument does not evidence a contract without the aid of parol evidence, it cannot be enforced.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 144-154; Dec. Dig. § 33.* Evidence, Cent. Dig. §§ 2085-2092; Dec. Dig. § 451.*]

14. CONTRACTS (§ 9*) — AMBIGUOUS PROVISIONS—EFFECT.

Where there is a patent ambiguity in one clause of a contract which renders it void for uncertainty, the nullity of the clause will not affect the remainder of the contract if there is enough left to constitute a complete contract.

[Ed. Note.—For other cases, see Contracts, Dec. Dig. § 9.*]

15. MONOPOLIES (§ 30*)—PENALTY—ACTION—PETITION.

In an action by the state for the penalty prescribed by the anti-trust law of 1903 (Laws 1903, c. 94) for making a contract in restraint of trade, the fact that the petition annexes, as an exhibit, the contract relied on, which contains blanks which could not be filled by parol evidence in a suit between the parties thereto will not render the petition bad; the making of the contract, and not the contract itself, being the foundation of the suit, so that, the contract being merely evidence, it is immaterial that it only supports the petition in part.

[Ed. Note.—For other cases, see Monopolies, Dec. Dig. § 30.*]

Appeal from District Court, McLennan County; Marshall Surratt, Judge.

Action by the State against the Racine Sattley Company. From a judgment for defendant, plaintiff appeals. Reversed and remanded.

Pat M. Neff and S. R. Scott, for the State.
Allan D. Sanford and Etheridge & McCormick, for appellee.

JENKINS, J. This is a suit in behalf of the state of Texas, brought by the county attorney of McLennan county to recover the penalty provided by statute for the violation of the anti-trust law of 1903. Laws 1903, c. 94. There were originally two suits; one alleging a contract of July 30, 1904, in violation of said statute, and one of December 19, 1904, to the same effect. Said suits were consolidated and tried as one. The appellant filed two trial amendments, after which the court sustained a general demurrer to the petition, and, the appellant declining further to amend, judgment was rendered for the appellee, from which judgment this appeal is prosecuted. Such being the case, the issue is: Did the petition, when taken together with the trial amendments, state a cause of action as against a general demurrer?

The petition, as amended, contained, substantially, the following allegations:

(1) The authority of the county attorney to institute and prosecute this suit.

(2) That the appellee, which will hereafter be referred to as the "Racine Company," at the times of the contracts subsequently

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

alleged were made, and prior thereto, was engaged in the business of selling at wholesale in the state of Texas, including Waco, Tex., farming implements, buggies, etc. It was also alleged that said Racine Company was a manufacturer of such articles, and had a permit to do business in Texas, and had an office at Dallas, Tex.

(3) That at said dates, and prior thereto, the Bomar Hardware & Buggy Company, which will hereafter be referred to as the "Waco Company," was engaged in the hardware and implement business at Waco, Tex., selling articles of the kinds referred to in said contracts to the people of that city and vicinity, where there was a market for such articles, and where many citizens were engaged in the sale and purchase of such articles. That the Racine Company and the Waco Company on July 30, 1904, entered into a contract whereby the Racine Company sold to the Waco Company certain farm implements, etc., and agreed to sell to said Waco Company thereafter, as ordered, such implements as shown by their catalogue made a part of said contract, at the prices and upon terms therein named, to be shipped from Springfield, Ill., to Waco, Tex., there to be distributed among and to become a part of the stock of said Waco Company to be by it sold at retail, and that it was known by said Racine Company, and intended by them, that this should be done. That it was further provided in said contract that the Racine Company would not sell any of its said goods to any one else at Waco, Tex., and that the Waco Company would not buy goods of like character from any one else during the continuance of said contracts, to wit, from said July 3, 1904, to July 31, 1905, and that said parties entered into a like contract with each other on December 19, 1904, to remain in effect to July 1, 1905. Said contract is attached as an exhibit to said petition, and the goods mentioned therein include plows, harrows, stalk cutters, listers, middle breakers, corn and cotton planters, cultivators, wagons, drills, hay tools, and plow shares. Said contracts also contain the following clause: "The Racine Sattley Company agrees to give the party of the second part the exclusive sale of the goods of the class herein ordered in _____ for the season ending July 1, 1905. And the said second party hereby agrees not to buy or sell any other makes of like goods for the same period." Both contracts were alike in all respects, except as to the dates. The petition alleges that, though this blank was left in the written contract, it was intended and agreed by both of said parties that said contract was to be performed and carried out at Waco, Tex., and that it was so carried out at Waco, Tex., in pursuance of said agreement and contract.

(4) That it was the intention of both parties to said contract that it should be car-

ried out and have effect in Waco, Tex., and to affect the market at Waco, Tex., and that, if said articles were interstate traffic when shipped, they lost such character when received at Waco, Tex., and the original packages were broken and mixed with the retail stock of the Waco Company and by it sold at retail, and that it was the purpose and intent of the Racine Company that this should be done.

(5) That said contracts were in violation of the anti-trust laws of this state in that: (a) They are exclusive in character and constitute a conspiracy in restraint of trade. (b) They prevented and lessened competition. (c) They created, and tended to create, a restriction in trade. (d) They created a trust and combination, prohibited by law. (e) They created and carried out a restriction in the free pursuit of business by each of said parties. (f) They regulated and limited the output in said articles. (g) They destroyed all competition in said articles. By either direct averment or by fair intendment, all of such purposes and effects of said contract are alleged to relate to the market at Waco, Tex.

(6) That one of said contracts and all negotiations leading up to the same was made at Racine, Wis., and that the other was signed at Waco, Tex., by the Waco Company and the salesman of the Racine Company, subject to the approval of the Racine Company, and that the same was afterwards approved by said Racine Company at Racine, Wis.

The court did not file its conclusions of law, and we are not advised, except inferentially from the propositions discussed by counsel in their briefs, upon what ground the court sustained the demurrer.

1. The demurrer for the purposes thereof admits the truth of the facts alleged in the petition. In testing the sufficiency of the petition on general demurrer, we must indulge in its favor every reasonable intendment arising from the allegations therein. *Wiggins v. Bisso*, 92 Tex. 219, 47 S. W. 638, 71 Am. St. Rep. 837; *Comer v. Burton Lingo Co.*, 24 Tex. Civ. App. 251, 58 S. W. 970; *State v. Railway Co.*, 99 Tex. 516, 91 S. W. 220; *Raleigh v. Cook*, 60 Tex. 441; *Gas Co. v. State*, 22 Tex. Civ. App. 118, 54 S. W. 291. Upon the authority of the cases above cited and upon those hereinafter referred to, we are of the opinion that, aside from the issue of interstate commerce, and the blank left in said contract, which are the only propositions referred to in the briefs herein, the petition states a good cause of action, upon a general demurrer, and we see no reason why it is not good, even on special demurrer. It undertakes to allege a conspiracy between the parties therein named to do, and that they did, the acts therein named, with the corrupt purpose and intent to effect that which is forbidden by the laws of this state;

and, while in civil actions great latitude is allowed in setting out the particular acts from which a conspiracy is to be inferred, the petition in this case sets out specifically the acts complained of, viz., the making and carrying into effect the exclusive contract of purchase and sale of the articles mentioned. Such articles being of prime necessity to the mass of the people, an exclusive contract in reference to the sale and purchase thereof, if made and carried out in a manner to injuriously affect the people of Waco and that vicinity, would have been indictable at common law. But our anti-trust statute has materially enlarged the doctrine of the common law as to monopolies and combines.

Under our statute the effect on the public of an agreement which is against public policy is not essential; the tendency is enough to bring it within the condemnation of the law. *Brewing Ass'n v. Houck*, 27 S. W. 696; *Gas Co. v. State*, 22 Tex. Civ. App. 118, 54 S. W. 293. In view of our anti-trust statutes and the decisions thereon, it cannot be doubted that it is the settled policy of this state to prevent restrictions in trade. "The law did not intend to regulate restrictions in trade, but to prohibit them entirely, without regard to their immediate effect on trade." *Comer v. Burton Lingo Co.*, 24 Tex. Civ. App. 251, 53 S. W. 970. Our anti-trust statute, among other things, prohibits conspiracies in restraint of trade. A "conspiracy" is a combination between two or more persons to do an unlawful act, or to do a lawful thing in an unlawful manner. The statute declares, among other things, that "the following acts shall constitute a conspiracy in restraint of trade: Where two or more persons, firms, corporations or association of persons who are engaged in buying or selling any article of merchandise, produce or other commodity, enter into an agreement or understanding to refuse to buy from or sell to any other person, firm, corporation or association of persons any article of merchandise, produce or commodity." Again the statute declares: "That a trust is a combination of capital, skill or acts, by two or more persons, firms, corporations or association of persons for either, any or all of the following purposes: To create, or which may tend to create or carry out restrictions in trade * * * or to create or carry out restrictions in the free pursuit of any business authorized or permitted by law. * * * (3) To prevent or lessen competition in the * * * sale or purchase of merchandise. * * * (5) To make, enter into, maintain or carry out any contract, obligation or agreement * * * by which they shall, in any manner, affect or maintain the price of any commodity * * * between themselves and others, to preclude a free and unrestricted competition among themselves or others in the state * * * of any commodity." Acts 1903, pp. 119-121.

Had there been no decisions upon this sub-

ject, we should certainly think that the acts alleged in the petition herein violated this statute. In the light of the decisions, we think there can be no doubt of it. *Brewing Co. v. Templeman*, 90 Tex. 277, 38 S. W. 27; *Fuqua v. Brewing Co.*, 90 Tex. 298, 38 S. W. 29, 750, 35 L. R. A. 241; *Brewing Co. v. Anderson*, 40 S. W. 738, 739; *Brewing Co. v. Durrum*, 46 S. W. 880; *Wiggins v. Blisso*, 92 Tex. 219, 47 S. W. 638, 71 Am. St. Rep. 837; *Gas Co. v. State*, 22 Tex. Civ. App. 118, 54 S. W. 291; *Vaccine Co. v. Burkley*, 22 Tex. Civ. App. 232, 54 S. W. 805; *Buggy Co. v. Fife & Miller*, 74 S. W. 957; *Simmons & Co. v. Terry*, 79 S. W. 1103; *Waters-Pierce Oil Co. v. State*, 48 Tex. Civ. App. 162, 106 S. W. 918; *Id.*, 177 U. S. 28, 20 Sup. Ct. 518, 44 L. Ed. 663; *State v. Railway Co.*, 99 Tex. 516, 91 S. W. 214, 5 L. R. A. (N. S.) 783; *Standard Oil Co. v. State*, 117 Tenn. 618, 100 S. W. 705, 10 L. R. A. (N. S.) 1015; *Industrial Co. v. Baxter*, 125 Mo. App. 494, 102 S. W. 1076, 1077; *State v. Standard Oil Co.*, 218 Mo. 1, 116 S. W. 1004, 1009.

2. It is contended that the demurrer should have been sustained because the contract is alleged to have been made in the state of Wisconsin, that the goods were to be shipped from appellee's factory at Springfield, Ill., to Waco, Tex., and therefore related to interstate commerce.

It is true that the purchase of goods in one state to be shipped into another is interstate commerce, and therefore not within the provisions of the anti-trust laws of this state. But we do not think that it appears from the petition that the sales, except the first one, were contemplated to be made under said contract in another state. The petition alleges that the Waco Company was doing business at Waco, Tex., where it would naturally be inferred, nothing appearing to the contrary, it would make its purchases. We are not to shut our eyes to such facts incident to commerce as are known to all men, among which is that wholesale dealers ordinarily make sales to their customers in this state by sending their traveling salesmen to their customers' places of business. The reason why the first sale cannot be said to have been made at Waco is that it was made subject to the approval of the Racine Company at Racine, Wis.; but it is apparent that the reason for this is that the first sale was made on condition of the approval by the Racine Company of the exclusive contract with the Waco Company. Having thus secured a satisfactory customer for a stated time, it is reasonable to infer that future sales were intended to be made in the ordinary manner, and, if so, they would be made at Waco, Tex. It is alleged that the Racine Company had traveling salesmen soliciting and doing business throughout the state of Texas, and in McLennan county, Tex., and one of the contracts was signed by one of its salesmen. It is the business of a sales-

man to make sales, and it is not to be inferred that salesmen are traveling in Texas for the purpose of making sales in Wisconsin. It is alleged that the Racine Company was doing business in Texas, and in McLennan county, and that it had an office in Dallas, Tex., in charge of its agent and representative. It is alleged that its business was the wholesale of buggies, plows, farming implements, etc. We think that the petition sufficiently alleges as against a general demurrer that it was the purpose of the Racine Company to sell goods under said contract at Waco, Tex., and that it was its purpose and intent that said contract should be and was carried into effect in Waco, Tex.

3. It plainly appears that it was the purpose and intent of the Waco Company that it should and did carry out its part of said contract in Waco, Tex. The petition alleges a conspiracy between the parties to said contract, and the facts alleged constitute a conspiracy. If we are correct in holding that the agreement alleged in the petition was in violation of the laws of the state, if the same was intended to be or was carried into effect in this state, then we have a conspiracy, a necessary part of which was to be, and in fact was, carried into effect by the Waco Company at Waco, Tex. But, says appellee, all of the acts done or contemplated to be done by it were to sell and ship goods, and these acts were to be performed outside of the state. As above stated, we do not so construe the contract; but, for the sake of argument, grant the correctness of this contention, still the Racine Company is no less guilty doing these unlawful acts in Texas, for the reason that the acts of its co-conspirator, the Waco Company, are, in law, its acts.

"If two persons pursue by their acts the same object, by the same means, one performing one part of the act and the other another part of the act, so as to complete it, with a view to the attaining of the object which they were pursuing, this will be sufficient to constitute a conspiracy." Cyc. vol. 8, p. 622. "It is sufficient if the evidence shows (in this case if the petition alleges) that they performed different parts." *Hudson v. State*, 43 Tex. Cr. R. 420, 66 S. W. 668. "The act of a co-conspirator, done in furtherance of the common design, is the act of all (*Gas Co. v. Railway Co.*, 22 Tex. Civ. App. 118, 54 S. W. 292; *Raleigh v. Cook*, 60 Tex. 441; *Standard Oil Co. v. State*, 117 Tenn. 618, 100 S. W. 719, 10 L. R. A. [N. S.] 1015; 8 Cyc. 641, 657), though executed at a remote distance from the other conspirators." 8 Cyc. 683. "Co-conspirators are joint tort-feasors." 8 Cyc. 847, 848. "An offense is deemed to have been committed where any overt act in pursuance of the unlawful combination is performed by any one of the co-conspirators." *Raleigh et al. v. Cook*, 60 Tex. 441; 8 Cyc. 687. Co-conspirators are responsible for the acts of each oth-

er, for the same reason that a principal is responsible for the authorized acts of his agent. "Facet per alium, facet per se." *Waters-Pierce Oil Co. v. State*, 19 Tex. Civ. App. 1, 44 S. W. 946. Where an agreement, in violation of the anti-trust law, has been made, and one party pursues the course of conduct agreed on, the law will presume that the acts by him were the result of the agreement, and will hold all who entered into such agreement as instigators, aiders, and abettors to the act, and therefore responsible for the acts of each and all. *State v. Live Stock Exchange*, 211 Mo. 181, 109 S. W. 677, 124 Am. St. Rep. 776.

4. But aside from the law as to co-conspirators and the matter discussed in subdivision No. 2 of this opinion, does the petition show an interstate transaction? We think not. It alleges that the goods sold and contemplated to be sold under said contract were to be shipped from Springfield, Ill., to Waco, Tex., there to be mixed and mingled with other goods of the Waco Company, and to become a part of its stock to be there sold at retail, and that said contract was made with the knowledge, purpose, and intent on the part of the Racine Company that this should be done. This same contention as to interstate commerce was made in the case of *Waters-Pierce Oil Co. v. State*, 48 Tex. Civ. App. 162, 106 S. W. 918. The Supreme Court of the United States (*Waters-Pierce Oil Co. v. Texas*, 212 U. S. 99, 29 Sup. Ct. 222, 53 L. Ed. 425 et seq.) quotes with approval the charge of the learned trial judge on this subject, as follows: "Oils and other products of petroleum, and goods, wares, and merchandise of any character which the defendant or its agents may have purchased or acquired in any manner outside of the state of Texas, and caused to be transported to its agents or others within the state, are subjects of interstate commerce, when they enter this state, and so remain until such commodities are removed from the original tanks, vessels, and other packages in which they are imported into the state, and become mixed with the common mass of property of similar character in this state. * * * But * * * oil or other commodities purchased by defendant at points outside of the state, and transported into the state and removed from the original packages or vessels in which it was brought into the state, and mingled with property of similar character in the state, is not the subject of interstate commerce, but, on the contrary, is the subject of local commerce, and any agreement, or pool or arrangement entered into by the defendant with reference to such property, or the sale thereof, if any such sale there was, would be unlawful, if in violation of the anti-trust laws of this state." In the case of *Waters-Pierce Oil Co. v. State*, 19 Tex. Civ. App. 1, 44 S. W. 936, the same learned judge charg-

ed the jury, among other things, as follows: "You are further instructed that, even though the contract may have reference to interstate shipments of oils, yet if the parties go further and contract that such oils, after being sold by said Waters-Pierce Oil Company to parties in this state, shall be sold by said parties at a price to be fixed by the duly authorized agents of defendant company, then you are informed that such dealing with said oils, after its sale to parties in this state, is not protected by the interstate commerce laws, but such contracts, if made, are subject to the laws of this state." The same result would follow if said contract, in being carried out in this state, would violate any other provision of the anti-trust laws of Texas. This charge was approved by this court, and a writ of error was denied by the Supreme Court of this state. In *Standard Oil Co. v. State*, 117 Tenn. 618, 100 S. W. 711, 10 L. R. A. (N. S.) 1015, it was held that articles imported into the state and commingled with the common mass of property in the state were no longer articles of interstate commerce. As was said by the Supreme Court of Tennessee in the case above referred to: "If it were otherwise, neither the federal nor the state laws could be enforced in any case." This is obviously true, except as to contracts made and carried out wholly within the borders of a single state. If such is the case, then indeed have the anti-trust laws bound the octopus with a rope of sand, and predatory and oppressive combines, like the wild ass of the desert, can say: "Ha! Ha!" For additional decisions on the issue of interstate commerce, see *Fuqua v. Brewing Ass'n*, 90 Tex. 298, 38 S. W. 30, 750, 35 L. R. A. 241; *State v. Standard Oil Co.*, 218 Mo. 1, 116 S. W. 1046.

5. Appellee's third counter proposition is as follows: "The stipulation in the contract which, because of its supposed violation of the law, was made the basis of this suit, was entirely incomplete, and there exists no exclusive contract between appellee and the Bomar Hardware & Buggy Company."

We presume that this assignment is based on the proposition that a patent ambiguity cannot be aided by oral evidence. Such is the law, and in such case, if the written instrument does not evidence a contract without the aid of oral evidence, it cannot be enforced. Such is the effect of the decisions cited by appellee, viz.: *Morris v. Bank*, 67 Tex. 602, 4 S. W. 246; *Pepper v. Harris*, 73 N. C. 365; *Atkins v. School Trustees*, 77 Ind. 447. In the *Indiana* case suit was brought on written contract for the employment of a school teacher for the scholastic year; the trustees having refused to employ the teacher under said contract. The written contract provided that the teacher should be paid at the rate of \$4.50 per day for the term of _____ weeks, and for his services

should be paid the sum of _____; "the same being the amount of wages agreed upon." The court held that while the same might be treated as an employment for an indefinite term, entitling the party to nominal damages for the breach of same, yet as the blanks in said contract were left, not by mistake, but intentionally, for the reasons that the parties did not know, when the same was made, what would be the length of the scholastic term, and, as there was no averment that the blanks should be filled when such fact should be ascertained, it could not form the basis of a suit to recover a definite amount for a definite term. The *North Carolina* case was a suit upon a written contract, in which A. promised to pay B. \$_____ upon conditions precedent, stated in said contract. Held that, as said contract was unintelligible without the aid of oral testimony, no recovery could be had upon the same. The *Texas* case was a suit upon a note signed by several parties, in which there was a clause authorizing any attorney, in case of default, to waive process, accept service, and confess judgment against _____ for the amount of the note, interest, and 10 per cent. attorney's fees. Under the supposed authority, an attorney appeared, accepted service, and confessed judgment for the interest, principal, and attorney's fees against all of the makers of the note. Held, that he was not authorized to do so. These cases are but applications of the well-established rule of law as to patent ambiguities, above stated.

But there is another rule of law, and that is: If there be a patent ambiguity in one clause of a contract which renders it void for uncertainty, the nullity of such clause will not affect the remainder of the instrument, if there be enough left to constitute a complete contract. For example, in the *Texas* case, supra, the void clause as to confessing judgment did not render the note void; it being a complete contract without said clause. If this rule be applied to this case, it is at least doubtful if the appellee would be benefited by said clause being treated as null and void. Without filling said blank, and treating the word "in" as surplusage, the instrument would show an exclusive contract for the sale of said goods everywhere for the season ending July 1, 1905. However, it is not necessary for us to so hold, and we do not pass upon this point. Again, in the *Texas* case, supra, Chief Justice Willie said that, if it was absolutely necessary to fill the blank with the names of all of the makers of the note in order to give effect to the power conferred, there might be some reason for so doing. Perhaps, if it was necessary to decide the point in this case, it might well be said, in view of the allegations that the goods were to be shipped to Waco, Tex., where the Waco Company was in business, there to be mixed and

mingled with their stock of goods of like character, and to be sold by them at retail, that the blank in said contract could not be consistently filled with any words except "Waco, Tex."

But we rest our decision upon another point, and that is that this is not a suit upon a contract in which judgment is asked for the enforcement of such contract, or for damages on account of the breach of the same, as in the cases cited by appellee. This is a suit to recover a penalty on account of an alleged illegal agreement made and acted upon by the parties thereto. The written contract is but evidence tending to support the charge made by the petition, and it is wholly immaterial that it does not support the entire charge. If the written contract as pleaded would have tended to support any material part of the state's case, it would have been admissible in evidence on a trial of this cause. By way of illustration, suppose the charge was murder, and the defendant is alleged to be a co-conspirator with another party who did the killing. Upon the trial the state offers in evidence a letter written by the defendant to the murderer in which he stated that he will furnish arms, or otherwise aid the murderer in killing — at a certain time, the same being on or about the time the murder was committed, and in connection therewith the state offers to prove, by oral evidence, that the party referred to in said blank was the deceased — would not such letter be admissible in evidence? Undoubtedly so. And it would be equally admissible if, instead of being a letter, it was a written contract in which the defendant agreed for a valuable consideration to furnish such aid, though, if a contract of this nature was enforceable at law, it would be void for uncertainty, and therefore would be subject to general demurrer in a suit to recover the consideration therein agreed upon.

For the reasons hereinabove set out, we think the court erred in sustaining the general demurrer to appellant's petition, and, so holding, we reverse and remand this case.

Reversed and remanded.

MARSHALL & E. T. RY. CO. v. PETTY.

(Court of Civil Appeals of Texas. Feb. 2, 1911. Rehearing Denied Feb. 23, 1911.)

1. RAILROADS (§ 326*)—CONSTRUCTION—NEGLECT—CONTRIBUTORY NEGLIGENCE.

That a railway company fails to perform its statutory duty to maintain an overhead crossing over a highway does not prevent the defense of contributory negligence of a traveler, injured while attempting to use the highway.

[Ed. Note.—For other cases, see Railroads, Dec. Dig. § 326.*]

2. TRIAL (§ 194*)—INSTRUCTIONS—PRESUMPTIONS—WEIGHT OF EVIDENCE.

Where, in an action for injuries to a traveler coming in contact with a railroad trestle over the highway, the evidence showed that sand had been washed down to the road, so that the space between the road and the timbers of the trestle was about six feet, and that plaintiff was injured while attempting to ride under it on horseback in the daytime, a charge that plaintiff could assume that the railroad company had performed its duty of maintaining the crossing in repair for the ordinary safety of the traveling public was erroneous as on the weight of the evidence.

[Ed. Note.—For other cases, see Trial, Dec. Dig. § 194.*]

Appeal from District Court, Harrison County; W. C. Buford, Judge.

Action by J. M. Petty against the Marshall & East Texas Railway Company. From a judgment for plaintiff, defendant appeals. Reversed and remanded.

Near Harleton a public county road goes under a trestle in appellant's railway track. The trestle was constructed in the first instance by appellant over the dirt road. A ravine also runs under the bridge. The dirt road proceeds to the southwest from the bridge up a long slope of a hill. Sand and dirt had so washed in under the trestle that there remained a clearance of only about six feet from the ground to the timbers of the trestle supporting the railroad track, and this condition had existed for some time. The evidence shows that a man could not ride erect on horseback in the road under the trestle without striking the bridge timbers. Appellee passed along the road on horseback, and as he approached the trestle he looked at it in a general way; and, seeing horse and wagon tracks under the bridge, he proceeded to ride under it, and was injured by striking his head on the trestle and by being pressed down against the saddle on the horse. Appellee, who was an old man, testified that he had not been over the road for a long time, and that his eyesight was not good. Appellee predicated negligence in failing to make and maintain a proper crossing for the use of the public. Appellant pleaded contributory negligence. The jury returned a verdict for appellee.

F. H. Prendergast, for appellant. Beard & Davidson, for appellee.

LEVY, J. (after stating the facts as above). The following special charge was given at the request of appellee: "You are instructed that a railroad has the right to construct its road across any highway; but it is the duty of such company to restore such highway to its former state, or to such state as not to necessarily impair its usefulness, and to keep such crossing in repair. And in this connection you are instructed that the plaintiff, as a traveler along the public road, had a right to assume that the defendant

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

company had performed its duty of maintaining said crossing and keeping same in repair for the ordinary safety of the traveling public." Appellant by proper assignment of error challenges this instruction as to the second portion. Assuming that appellant was under statutory duty to make and maintain a proper crossing in suit, the defense of contributory negligence of appellee was nevertheless allowable. *Burnett v. Light & Power Co.*, 102 Tex. 31, 112 S. W. 1040, 19 L. R. A. (N. S.) 504. And in this connection it was conclusively proved that sand from the hill washed down to and settled in the dirt road to the extent that from the dirt road to the first timbers of the trestle there remained a clearance space of only about six feet; and further that the trestle was so low to the road in that condition that a person on horseback could not go under it at all. Appellee proved these facts by several witnesses on his direct examination of them. It was further in evidence that it was daylight, and appellee was riding slowly. Such condition of the crossing existing and being open and obvious, and assuming that it should not be said as a matter of law that there was contributory negligence, clearly there was presented a sufficiency of circumstances to have the jury say, under proper instructions, whether under all the circumstances of the case appellee knew, or by reasonable care could have known, that it was unsafe or dangerous to go under the trestle on horseback. The court did charge to that effect. If appellee were confronted with a situation and condition as shown by the evidence by which by proper care for his safety he could have known that the trestle was too low to ride under, he could not then assume or take for granted that appellant had done its duty towards properly maintaining it as a crossing. And by giving the special charge complained of there was reversible error. The effect of the instruction was to inform the jury that it was the appellant's right to build its track across the public road; but its duty was to keep the crossing in repair, and that appellee could assume or take for granted in this particular instance that it had not been derelict in such duty. It could have impressed the jury with the understanding that the railway company was liable to appellee if the crossing was not properly kept up, and the injury was caused thereby, notwithstanding the want of reasonable care on appellee's part for his own safety. Under such circumstances, the law makes no presumption. The issue was whether appellee knew, or by proper care could have seen,

the condition of the crossing and its safety, and this was one of fact and not of law. The error in giving the paragraph of the instruction complained of is that it was a charge on the weight of evidence. It was but the application to the particular facts of the case of a general rule of evidence.

It is elementary that presumptions are classed and treated as a part of the law of evidence. 1 *Greenleaf* (16th Ed.) c. 6; 2 *Blackstone*, § 371; 4 *Wigmore on Ev.* § 2490 et seq.; 9 *Ency. of Ev.* 877; 16 *Cyc.* 1050. The rule is laid down in the case of *Pasture Co. v. Preston & Smith*, 65 Tex. 448, that, when sufficiency of circumstances to establish a fact is an issue, an instruction which tells the jury what might be presumed is on the weight of evidence, and an unwarranted invasion of the province of the jury. There the court instructed that a deed over 30 years old, which comes from the proper custody, and which is free from suspicion, and which has been acted on by the parties claiming under it, is presumed, as against defense of forgery, to be genuine. In *Reynolds v. Weinman*, 33 S. W. 302, it was ruled that to charge that a sale is presumed to be a lawful sale was in that case a charge on the weight of evidence. In *Moberly v. Railway Co.*, 98 Mo. 183, 11 S. W. 569, it was ruled error to charge that the law presumed plaintiff to have used care. There, as here, was evidence from which plaintiff's negligence could be found. In the case of *Stooksberry v. Swan*, 85 Tex. 563, 22 S. W. 963, the court charged that acts which purport to have been done by public officers in their official capacity and within the scope of their duty will be presumed to have been regular and in accordance with their authority. It was ruled as error as being a charge on the weight of evidence. As said further in the case of *Heldt v. Webster*, 60 Tex. 207: "Any charge as to a presumption arising from a given state of facts, unless in those cases in which the law raises a conclusive presumption, in the nature of things is a charge on the weight of evidence, and, although other parts of the charge given may have been correct, such an error will require a reversal of the judgment."

Appellant makes the further point by assignment that appellee, under the evidence, should be held guilty of negligence as a matter of law. We are not satisfied with the state of evidence in the record on this question, and have doubts about the proper ruling, and have concluded, as the case must be reversed, to not rule on it.

The judgment was ordered reversed, and the cause remanded for another trial.

HARDIN et al. v. ST. LOUIS SOUTHWESTERN RY. CO. OF TEXAS.†

(Court of Civil Appeals of Texas. Feb. 9, 1911.
Rehearing Denied Feb. 23, 1911.)

1. MASTER AND SERVANT (§ 289*)—DEATH OF TRACKMAN—JURY QUESTION—DISCOVERED PERIL.

Evidence in an action for death of a railway trackman struck by a car held sufficient to go to the jury on an issue of discovered peril.

[Ed. Note.—For other cases, see Master and Servant, Dec. Dig. § 289.*]

2. TRIAL (§ 143*) — PROVINCE OF JURY — WEIGHT OF EVIDENCE.

The weight to be given conflicting testimony is for the jury.

[Ed. Note.—For other cases, see Trial, Dec. Dig. § 143.*]

Error from District Court, Bowie County; P. A. Turner, Judge.

Action by Mary Hardin and others against the St. Louis Southwestern Railway Company of Texas. Judgment for defendant and plaintiffs bring error. Reversed and remanded.

James D. Head and Smelser & Vaughan, for plaintiffs in error. E. B. Perkins, D. Uthegrove, and Glass, Estes, King & Burford, for defendant in error.

WILLSON, C. J. In November, 1908, Pat Hardin, then in appellee's service as foreman of a section gang, was run over by one of its cars, in its yard in Texarkana, and killed. Appellants, his widow and children, brought this suit to recover of appellee damages suffered by them on account of his death, which they alleged was due to negligence on the part of employes of appellee. The trial court was of the opinion that it conclusively appeared from the testimony that appellee was not liable for the damages so sustained by appellants, and he therefore instructed the jury to return a verdict in appellee's favor. The appeal is from a judgment rendered in accordance with a verdict as instructed.

It appeared from the testimony that appellee had in its yard two tracks running east and west, parallel with each other and about 12 feet apart from the center of one of them to the center of the other; that the men constituting the section gang were engaged in work near to and on the south side of the one farthest south of said two tracks, designated as the "lead track"; that engine No. 94 was slowly moved west from a point on said lead track east of where the sectionmen were at work, and that as it approached the place where the men were at work Hardin crossed in front of it from the south to the north side of said lead track; that after he had reached the north side of said lead track, as said engine was passing him, moving west, he playfully caught hold of the foot of the fireman of said engine, who was then on the gangway of the engine; that the fire-

man at once disengaged his foot from the hold Hardin had on it, when Hardin, laughing and looking west, stepped backwards towards the east to a point near the one farthest north of said two tracks, designated as the "main line track," when he was knocked down and run over by a coal car loaded with sand, then being pushed west thereon by engine No. 90. Two switchmen, whose duty it was to keep a lookout for persons on or near the main line track and warn them of the approach of engine No. 90 and the car it was pushing, were on said car. One of them, Hosea, was sitting on the right-hand side of the car, 10 or 12 feet from the front end of same—that is, from the end farthest west; and the other, Bruce, was sitting on the left-hand side of the front end of the car. It was shown that the point where the accident occurred was within the corporate limits of the city of Texarkana, and that an ordinance of that city prohibiting the operation within its limits of a railroad engine or car at a greater rate of speed than six miles an hour was in force. The testimony was conflicting as to the rate of speed engine No. 90 and the coal car were moving at the time of the accident. It was sufficient to support a finding that same were moving as fast as 12 miles an hour or as slow as four miles an hour.

In their petition appellants charged appellee with negligence because of various acts and omissions specified, of which, they alleged, its employes had been guilty; but it cannot be said that there was testimony tending to support the allegations made, except so far as they charged negligence in that engine No. 90 and the coal car were being operated at a rate of speed in violation of said ordinance, and in so far as they charged negligence in that Hosea and Bruce, having discovered Hardin to be in a perilous situation from the movement of said coal car and engine No. 90, in time, by means at their command, to have avoided injury to him, failed to resort to such means for his protection. We do not understand appellants to be in the attitude of insisting that engine No. 90 and the coal car at the time of the accident were moving at a greater rate of speed than six miles per hour. On the contrary, we understand their insistence to be that same were moving at a rate not exceeding four or five miles an hour. Therefore the question, and the only question, presented for determination is as to whether the testimony made an issue as to "discovered peril" which should have been submitted to the jury. The witness Coston was the fireman on engine No. 94. He testified that when he took his foot out of Hardin's hand, the latter stepped back toward the main line track and laughed; that Hardin stopped near the main line track, stood still and looked at him as he passed on

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

† Application for writ of error dismissed by Supreme Court.

west on engine No. 94; that he (witness) then placed a coal pick he had in his hand in the place where it belonged on the engine and looked back at Hardin over the edge of the tank, saw that he was in danger of being struck by the coal car being pushed by engine No. 90 approaching from the east, and hallooed to him, "Look out, look out, Pat!" that at this time the coal car was 15 or 20 feet east of Hardin; that after he hallooed at Hardin as stated, Fant, the engineer on No. 94, also hallooed at him, and about the same time he (witness) hallooed at him again; and that Hardin then stepped with his right foot over the south rail of the main line track and was struck by the coal car. The witness Souter was about 100 yards (east, it seems) from the place where the accident occurred. His attention was attracted to Hardin by the backing of the latter towards the main line track as the coal car and engine No. 90 approached him, because he thought if he kept on backing as he was he would be in danger from same; he did not know how many steps backwards Hardin took before he was struck by the coal car, but stated that as the distance between the lead and main line tracks was only 6 or 8 feet "he didn't have to back very far." He was asked by counsel: "Well, did he go as much as that?" and answered, "He backed clear up on that other track in my sight." The witness was unable to say whether Hardin as he backed stopped and stood still at any time or not. Bruce, the switchman who was sitting on the left-hand side of the front end of the coal car as it approached Hardin, testified that as the car he was on approached Hardin, he saw him catch Coston by the foot as the latter stood on the gangway of No. 94; that Hardin was then facing west with his back towards witness; that the car he (witness) was sitting on and engine No. 90 were moving towards Hardin not faster than at the rate of from four to six miles an hour—about as fast, he said, as a man could walk; that he heard Fant halloo at Hardin to "look out," when the latter jumped or stepped right in front of the car which ran over him; and that he (witness) did not halloo at Hardin, because he did not have time and was frightened.

From the testimony referred to showing that Hardin was discovered by Coston, Fant and Souter to be in a position of peril because of the coal car and engine No. 90, we think the jury might have found that Bruce, in the discharge of his duty to keep a lookout for persons in such a situation, discovered Hardin to be in a perilous position; and from the testimony, if they believed it, showing the coal car and engine No. 90 to have been moving at the rate of only four or five miles an hour, to have been 15 or 20 feet from Hardin when Coston discovered

that his (Hardin's) position was a perilous one; and from the testimony showing that after his situation was discovered by them, both Coston and then Fant had time to halloo at him and that he had time to take the step that made his position more perilous, before the car got to the point on the track where it struck him, the jury might have found that Bruce, after discovering Hardin to be in danger, had time in which, by the use of means available to him, he could have prevented the occurrence of the accident. It appeared that Hardin had time, after the warning given him by Coston and Fant, to step further into danger before the coal car reached him. His stepping in that direction probably was due to the fact that, not realizing from whence he was to expect the danger against which he was warned, he instinctively moved from the direction from whence the warning came. Had Bruce been as prompt to warn him in the same way, the jury might have believed that he, instinctively, would have stepped out of the way of the approaching car.

There is testimony in the record in conflict with that we have referred to, but it was for the jury to say whether greater weight should be given to that referred to than to the conflicting testimony, or not.

The judgment is reversed, and the cause is remanded for a new trial.

KEAHEY v. BRYANT et al.

(Court of Civil Appeals of Texas. Jan. 25, 1911. Rehearing Denied Feb. 15, 1911.)

1. TRIAL (§ 68*)—REOPENING CASE FOR FURTHER TESTIMONY—DISCRETION.

It was not an abuse of the sound discretion of the court, under Rev. St. 1895, art. 1293, as to admission of evidence, to refuse admission of testimony, not in rebuttal, offered after the evidence had been closed, and as to an immaterial matter.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 158-163; Dec. Dig. § 68.*]

2. ACTION (§ 65*)—MATTERS ARISING AFTER COMMENCEMENT OF ACTION.

Evidence that after the commencement of the action for rent, in which a distress warrant was levied on crops of the tenant, such tenant made a fictitious transfer of his steam plow is immaterial.

[Ed. Note.—For other cases, see Action, Cent. Dig. §§ 735, 736; Dec. Dig. § 65.*]

3. TRIAL (§ 253*)—INSTRUCTIONS—IGNORING ISSUE.

A requested instruction, having the effect of ignoring an issue raised by the evidence, is properly refused.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 613-623; Dec. Dig. § 253.*]

4. LANDLORD AND TENANT (§ 254*)—LANDLORD'S LIEN—WAIVER.

Where a landlord agrees with her tenant, as an essential part of the rent contract, that he shall have right and authority to sell the

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

crops and pay her her part thereof, and recognizes the agreement by permitting him to sell parts of the crop and by accepting her share from him, there is a waiver of the landlord's lien, which question of waiver is not affected by there being no one before the court claiming the crop.

[Ed. Note.—For other cases, see Landlord and Tenant, Cent. Dig. §§ 1034-1044; Dec. Dig. § 254.*]

5. JUSTICES OF THE PEACE (§ 191*)—APPEAL—LIABILITY OF SURETIES ON BOND.

Under Rev. St. 1895, art. 1670, requiring the amount of the bond on appeal from a justice to the county court to be in double the amount of the judgment, which means in double the amount of the judgment exclusive of costs, the sureties, on affirmance of the judgment, are liable not only therefor, but for the costs of the justice court, only, however, to the amount of the bond, with which limitation the agreement of the bond, that the sureties shall pay off and satisfy any judgment rendered against their principal, is to be construed.

[Ed. Note.—For other cases, see Justices of the Peace, Cent. Dig. §§ 735-750; Dec. Dig. § 191.*]

Appeal from Uvalde County Court; T. M. Milam, Judge.

Action by A. F. Keahey against Albert Bryant and others. From an adverse judgment, plaintiff appeals. Affirmed.

Martin, Old & Martin and J. O. Rouse, for appellant. G. B. Fenley and C. Lawrence, for appellees.

FLY, J. Appellant instituted this suit against Albert Bryant in the justice's court to recover rent and advances in the sum of \$90.20, and also sued out a distress warrant and levied it on four bales of cotton. T. J. Lane & Co., Kessler & Sons, and J. F. Heard intervened in the suit, claiming that they had purchased the cotton. Appellant amended her affidavit for the distress warrant, claiming \$175.30 instead of the original sum sued for. Appellant obtained judgment in the justice's court for \$67.15, and a foreclosure of the landlord's lien on the cotton, and Bryant appealed from the judgment to the county court. His sureties were John Bryant, A. J. Kessler, and J. S. Monkhouse. In the county court the distress warrant was quashed. It seems that the interveners sought to appear in the county court, although they had not appealed from the judgment in the justice's court and had filed no appeal bond, and were not included in the appeal bond made by Albert Bryant, and upon motion they were dismissed from the suit. The cause was tried in the county court, and resulted in a verdict in favor of appellant for \$66.57, and that the landlord's lien did not exist. The court rendered judgment against Albert Bryant and his sureties for the amount found by the jury and for all costs of the justice's court, and against appellant as to the landlord's lien and for all costs incurred in the county court. Appellant and

the sureties have perfected separate appeals from the judgment.

Appellant testified fully that she desired that an item of \$75 for wood should be placed in her original account, but that her attorney refused to place it in the account, because he did not think it proper in an account for advances of supplies, and this accounted for her amendment of her affidavit for a distress warrant. She was uncontradicted, and no question seems to have been made of the truthfulness of her statement, and while the testimony of the attorney she had at that time would have been permissible, we do not think that the matter was material, and therefore overrule the first assignment of error, which is based on the rejection of the testimony after the parties had closed their evidence. The evidence had been closed at the time the testimony of the attorney was offered, and the court exercised a discretion in not reopening the case, which under the circumstances cannot be condemned. The testimony offered was not in rebuttal, and the admission of it was within the sound discretion of the trial judge. Article 1298, Rev. St. 1895.

The fact that Bryant made a fictitious transfer of his steam plow, valued at \$2,500, to another after he was sued in this case was not material and had no bearing upon the issues, and was therefore properly rejected.

An issue as to a waiver of the landlord's lien on the part of appellant was raised by the evidence, and it would have been improper for the court to have ignored the issue, as would have been the case had the first charge requested by appellant been given. Appellant recognized the issue of waiver in another requested charge, which was given by the court. To have instructed the jury to find that a landlord's lien existed, if any sum was found to be due appellant, would have been in the face of the facts, and would have been error. *Compress Co. v. Howard*, 35 Tex. Civ. App. 300, 80 S. W. 119. The facts in the case last cited were that the landlord had agreed in his rental contract that the tenant should sell the crop and pay one-fourth of the proceeds to the landlord, and it was held that the agreement constituted a waiver of the landlord's lien. The facts are very similar to those in this case; there being evidence that appellant agreed with Bryant, as an essential part of the rental contract, that he should have the right and authority to sell the crops and pay appellant her part of it, and that she had recognized the agreement by permitting him to sell parts of the crop and by accepting her share from him. The fact that there was no one before the court claiming the cotton would not affect the waiver of the lien. We conclude that the evidence supports the verdict.

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

The appeal bond given by Bryant in the justice's court was for \$136, a little in excess of double \$67.15, the amount of the judgment. The statute (article 1670, Rev. St.) requires the appeal bond to be in double the amount of the judgment, and in the case of *Yarbrough v. Collins*, 91 Tex. 306, 42 S. W. 1052, the Supreme Court held that double the amount of the judgment did not mean double the amount of the judgment and costs. The appeal bond to the county court was therefore a statutory one, and would render the sureties, in case of a judgment against their principal in the county court, liable for the amount of that judgment to the full amount of the \$136, if that be required to pay the judgment and costs. The county court, however, rendered judgment against the sureties for the amount of the verdict in appellant's favor, together with all costs of the justice's court, which, it appears, amount to \$218.45; the whole judgment rendered in the county court amounting to \$285.02, based on an obligation to pay \$136.

While the appeal bond from the justice's court is to be only in the sum of double the amount of the judgment, it was evidently intended to cover the costs of the justice's court, and to render the sureties liable for the same, to the extent of any sum within the amount they have contracted to pay; that is, they would be liable for the whole amount they had bound themselves to pay in case the judgment of the county court was against their principal for that much. Usually a bond in double the amount of the judgment in a justice's court will secure the judgment and costs upon appeal, and the statute was enacted upon that assumption. The amount provided for is inadequate, however, where, in a case like this, the amount of the judgment is considerably less than one-third of the costs. For this inadequacy in the amount of the appeal the sureties cannot be held liable, for they have contracted and cannot be forced to pay any more than they contracted to pay. It is true they contracted to pay off and satisfy any judgment rendered against their principal, but it must be within the limits of the amount for which they bound themselves. There was no obligation to pay more than \$136, which was, at least, double the judgment in the justice's court. It was error to render judgment against the sureties for any amount greater than the amount of the appeal bond. *Hendrick v. Cannon*, 5 Tex. 248; *Martin v. Sykes*, 25 Tex. Supp. 197.

The judgment will be reformed, so as to render the sureties liable for the judgment against Albert Bryant and for the costs of the justice's court for any sum which, together with the judgment of the county court, will not exceed \$136, and, as reformed, it will be affirmed.

HOUSTON & T. C. R. CO. v. HABERLIN.
(Court of Civil Appeals of Texas. Feb. 15, 1911.)

APPEAL AND ERROR (§ 1058*)—REVIEW—
HARMLESS ERROR—ERRONEOUS EXCLUSION
OF EVIDENCE.

The error in excluding the positive testimony of a witness as to the exact time he examined the boiler of an engine and his statement that the boiler was in first-class condition, ready for use, and that it was his duty to make the examination, is not harmless, though his testimony as to an examination without fixing the exact time and his statement that the materials were good so far as he remembered were received in evidence.

[Ed. Note.—For other cases, see Appeal and Error, Dec. Dig. § 1058.*]

On motions for rehearing, and to enlarge certificate to Supreme Court. Overruled.

For former opinion, see 125 S. W. 107. See, also, 133 S. W. 873.

Baker, Botts, Parker & Garwood and Gregory, Batts & Brooks, for appellant. Allen & Hart, Warren W. Moore, and James H. Robertson, for appellee.

RICE, J. During the last term of this court this case was reversed and remanded, alone upon the ground that the trial court submitted a question of contributory negligence pleaded by the defendant and raised by the evidence as an issue to be found by the jury, holding that the court should have charged the jury that if defendant allowed the water in the boiler to get below the crown sheet, whereby the same became overheated, and that while in this condition he turned the water into it, thereby causing the explosion, then he was as a matter of law guilty of contributory negligence, and hence precluded from recovery, notwithstanding they should also believe that the defendant was guilty of negligence, as charged by plaintiff, in furnishing to him an improperly constructed fire box, and permitting the same to become out of repair, defective, dangerous, and unfit for use. The court, however, held that the other errors assigned were not well taken, and overruled the same. Chief Justice Key, while concurring in the result reached by the majority of the court, declined to agree with them as to the grounds upon which the case should be reversed, holding that the issue of contributory negligence raised was not a matter of law under the pleading and evidence, but was a question of fact to be determined by the jury, and that the charge as given was a correct presentation of the issue so raised. But he further held that the trial court erred in the seventh and eighth paragraphs of its charge to the jury, which it is unnecessary to here set out; and, while concurring with the majority in holding that the trial court did not err in sustaining the objection of plaintiff to the answer of John Stahmer and a number of

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

other witnesses to certain interrogatories, wherein they were asked, after reciting the allegations in plaintiff's petition setting up negligence on the part of the defendant in failing to furnish properly equipped engine, boiler, and fire box, whether or not, in their opinion, such allegations were true or false, but dissented from the opinion of the majority in holding that the answers of said Stahmer and several other witnesses, who described in detail the condition of the engine, boiler, and fire box, together with their opinion based thereon, was inadmissible, for all of which reasons he held that the case should be reversed and remanded. For a fuller statement of both opinions, see 125 S. W. 107 et seq.

A motion by appellee for rehearing was duly filed, which was thereafter overruled, but during the same term the court on its own motion set aside its order overruling the same, and certified the case to the Supreme Court upon the following questions:

First. Whether or not this court ruled correctly in holding that the trial court erred in submitting the issue of contributory negligence to the jury, as held by the opinion of the majority.

Second. Whether the trial court committed error in the seventh and eighth paragraphs of its charge, wherein the jury were instructed, if they found certain facts, to find for the plaintiff, unless they found for the defendant on the issues of contributory negligence submitted to them; that is to say, whether the word "issues," used in said paragraphs of said charge, were calculated to mislead the jury.

Third. Did the majority of the court rule correctly when it overruled the first and second assignments of error holding that the trial court did not err in sustaining appellee's objection to the depositions of the witness John Stahmer and several others referred to in said assignments of error, or was the ruling of the trial court in excluding said testimony erroneous, as held by the dissenting opinion.

It appears from the record and brief of counsel that appellant had propounded written interrogatories to John Stahmer and several other witnesses. Among the direct interrogatories propounded to said witnesses were additional direct interrogatories Nos. 7 and 8, which are as follows:

Additional direct interrogatory No. 7: "In this case plaintiff alleges that the boiler, fire box, bolts, radial stays, taps, threads, stay bolts, crown sheets, sides, and flues of G. H. & S. A. engine No. 443, which exploded or collapsed near Curry, Tex., January 7, 1907, were old, worn, broken, cracked, crystallized, of inferior metal, improperly constructed, out of repair, defective, dangerous, and unfit for use at the time of said explosion. Please state whether you have made such an examination of the remains of said engine, or whether you made such examination of it prior to said accident as enables

you to give an opinion or state as a fact whether or not said allegations are true or false, or whether or not they are in part true and in part false."

Additional direct interrogatory No. 8: "If you have answered 'Yes' to the last question, please state whether in your opinion all of said allegations are true or false, and your reasons for so thinking; and, if you think that some are true and others are false, please state specifically and in detail which you think are true, together with your reason for thinking same, and which of same are false, together with your reason for thinking same false."

To which the witness Stahmer made the following answers:

Answer to interrogatory No. 7: "I made such an examination of this engine prior to the explosion as to enable me to give an opinion as to the truth or falsity of the allegations in this question."

Answer to additional direct interrogatory No. 8: "In my opinion, all of the allegations concerning the fire box, bolts, radial stays, threads, stay bolts, crown sheets, are untrue. My inspection of these parts of this boiler showed the same to be in first-class condition and not defective, dangerous, or unfit for use. There were no leaks in the boiler at the time of my inspection, which means the boiler was in good condition and ready for service. I refer to the inspection on the morning of January 7, 1907. My reasons for so thinking are, no such defects showed up on inspection. It was my duty to find such defects, and my inspection failed to find them. There was nothing in or on the boiler to indicate such defects."

The majority opinion held that the trial court correctly excluded the answers of said witness to each of said interrogatories, while the dissenting opinion held that the witness could not answer that the allegations of the petition were false, yet held that all that part of the answer which related to his inspection of the boiler and the condition of the same at the time of such inspection, together with his opinion thereon, was admissible.

The Supreme Court in answering said certified questions held, first, that the charge on the subject of contributory negligence, as given by the trial court, was correct, thereby sustaining the dissenting opinion in this particular, and answered the second question in the negative, that there was no error on the part of the trial court in giving charges Nos. 7 and 8, thereby sustaining the majority opinion on this feature of the case, and, as to the third question, held that the trial court did not err in sustaining the objection to that part of Stahmer's testimony which undertook to pass upon the truth or falsity of the allegations of plaintiff's petition, but held with the dissenting opinion that that part of the answer of said witness Stahmer which showed that he made an in-

spection of the boiler, crown sheet, and fire box of the engine in question just before the explosion, together with the condition in which he found the same, as well as his opinion predicated upon such inspection, was admissible, as more fully appears from the opinion of the Supreme Court delivered in this case January 25, 1911 (133 S. W. 873).

So that it becomes our duty to hold that we were in error in sustaining the appellee's objection to that portion of the testimony of the witness Stahmer and others, as above indicated in the opinion of the Supreme Court, and for this reason to reverse and remand the case for another trial in the court below, unless, as appellee contends, both in his brief and in his motion to enlarge the certificate, that this error is harmless, because, as he asserts, substantially the same testimony as that excluded was given by each of the witnesses without objection. It would extend this opinion to too great length were we to undertake to set out and compare the testimony of each of said witnesses as admitted with that excluded for the purpose of determining the point raised by appellee; but desire to say that we have carefully made the comparison, and find that the excluded testimony of said witnesses went into minute detail with reference to the mechanism of said engine, boiler, crown sheet, and fire box, showing that the same was constructed out of the best material and in accord with and after the latest models, and that their inspection showed that the same were in all respects in good repair and in good working order at the time of the explosion, while the admitted testimony was general in its nature, and did not undertake to go into detail as did the excluded testimony in these respects, and the latter is fuller and more satisfactory in other particulars. We will, however, call attention in passing to that portion of the testimony of the witness Stahmer that was excluded upon objection of appellee, and compare the same with that portion that was admitted. The following testimony of the witness Stahmer was excluded: "My inspection shows these parts of this boiler (evidently meaning the boiler, fire box, bolts, radial stays, taps, threads, stay bolts, crown sheets, sides, and flues of said engine, as shown from said interrogatories 7 and 8 and his answers thereto) to be in first-class condition, and not defective, dangerous, and unfit for use, which means the boiler was in good condition and ready for service. I refer to the inspection of January 7, 1907. My reasons for so thinking are, no such defects showed up on inspection. It was my duty to find such defects and my inspection failed to find them. There was nothing in or on the boiler to indicate such defects."

The following testimony of said witness was admitted: "My best recollection is that I inspected the fire box of engine No. 443

on the morning of January 7, 1907. I inspected it on January 7, 1907, at Ennis roundhouse; this inspection being made before the explosion. The exact hour I do not remember. There were no leaks in the fire box, and, so far as I can now remember, it was in good condition. The material composing the fire box seemed to be good and was in good condition as to repair, and I found no defects in the fire box." The following differences in the two statements are suggested:

(1) It may be doubtful from the admitted statement as to the exact time when the examination was made, whereas in the excluded statement he was positive and emphatic on this point.

(2) He states the condition of the material in the fire box in the admitted statement to be good so far as he now remembers, whereas in the excluded portion he states it positively and definitely and without qualification.

(3) In the excluded portion he speaks with reference to all parts of the boiler; whereas in the admitted portion he only refers to the fire box, when the allegations of defects referred to all its parts, setting them out specifically.

(4) In the excluded part he shows that it was his duty to make this examination, giving this as his reason for noting its condition with so much particularity, a fact that would likely impress these matters upon his recollection, and which would no doubt cause the jury to attach more importance to his testimony. In the admitted portion no mention is made of his duty in this particular.

(5) In the admitted part he states that the material composing the fire box seemed to be good; whereas, in the part excluded he testified that these parts of the boiler were in first-class condition, not defective, dangerous, and unfit for use—no leaks—which means it was in good condition, ready for use.

These are regarded as material differences, and, without further comment, it is clear to us that the error in excluding said testimony was not harmless, for which reason we think both the motion for rehearing, as well as the motion to enlarge the certificate, should be overruled, and it is so ordered.

Motions overruled.

COUTURIE v. ROENSCH.†

(Court of Civil Appeals of Texas. Jan. 18, 1911. Rehearing Denied Feb. 15, 1911.)

1. EVIDENCE (§ 450*)—PAROL EVIDENCE—WRITTEN CONTRACT—EXPLANATION—NOTES—INTEREST CLAUSE.

Defendant executed a note payable one day after date, containing a clause, "to bear interest at the rate of ——— per cent. per annum

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

† Writ of error granted by Supreme Court.

from ———." Defendant before signing the note caused the blank after the words "rate of" to be marked through with a pen. *Held*, that there was a sufficient ambiguity to warrant parol proof of an agreement between the parties that the note was not to bear interest.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 2066-2084; Dec. Dig. § 450.*]

2. BILLS AND NOTES (§ 125*)—CONSTRUCTION—PATENT AMBIGUITY.

Where a note containing a clause "to bear interest at the rate of ——— per cent. per annum from ———" was filled by drawing a line through the blank after the words "rate of" with a pen, if the note be regarded by reason thereof as containing a patent ambiguity, it should be construed as indicating an essential erasure of the entire interest clause and to show that no interest was to be paid.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. §§ 274-281; Dec. Dig. § 125.*]

3. SET-OFF AND COUNTERCLAIM (§ 58*)—EXTINGUISHMENT OF PLAINTIFF'S DEMAND—INTEREST AND ATTORNEY'S FEES.

Where, in an action on a note bearing no interest, defendant pleaded a counterclaim greater than the amount of the note, due at the time of suit brought, plaintiff could not recover either interest from the date of suit, or attorney's fees.

[Ed. Note.—For other cases, see Set-Off and Counterclaim, Cent. Dig. § 129; Dec. Dig. § 58.*]

4. MASTER AND SERVANT (§ 24*)—CONTRACT OF EMPLOYMENT—TERMINATION.

Defendant having been employed by bankrupts for the season beginning September 1, 1907, and ending August 31, 1908, at a specified salary, bankruptcy proceedings, intervening on April 14, 1908, were a breach of the contract of employment, entitling defendant to recover the full amount of the balance of his salary for the remainder of the year, on his being unable to obtain employment elsewhere during such period.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 25; Dec. Dig. § 24.*]

5. SET-OFF AND COUNTERCLAIM (§ 35*)—NATURE OF CLAIM—BREACH—SET-OFF.

Where defendant's employment contract had been breached by his employers, and the contract term had expired before suit brought to recover on a note executed by defendant to them, the amount due defendant for breach of his employment contract was capable of exact ascertainment and was properly allowed as a counterclaim against the note.

[Ed. Note.—For other cases, see Set-Off and Counterclaim, Cent. Dig. §§ 58-64; Dec. Dig. § 35.*]

6. FACTORS (§ 45*)—ADVANCES—INTEREST.

Where a factor, employed at a stated salary, purchased cotton for his principals, and paid for it out of his own funds, receiving reimbursement by draft, attached to bills of lading for cotton shipped out or on cotton held on open account, he was entitled to interest on the amount advanced.

[Ed. Note.—For other cases, see Factors, Cent. Dig. § 60; Dec. Dig. § 45.*]

7. INTEREST (§ 57*)—"OPEN ACCOUNT"—ADVANCES OF MONEY.

Money advanced under a contract or at the instance and request of another is not an open account within Rev. St. 1895, art. 3102, providing that on all open accounts, when no interest is agreed on by the parties, interest shall be al-

lowed from the first day of January after the same are made.

[Ed. Note.—For other cases, see Interest, Cent. Dig. § 130; Dec. Dig. § 57.*]

For other definitions, see Words and Phrases, vol. 6, pp. 4984, 4985.]

8. BANKRUPTCY (§ 214*)—EFFECT ON RIGHTS OF FACTORS—SALE OF GOODS.

Where defendant was employed to purchase cotton for bankrupts as a factor, and the cotton so purchased was not shipped and sold under the bankrupts' instructions because of their bankruptcy, defendant was entitled to sell the cotton for the best price obtainable and charge the bankrupts with the loss in satisfaction of his lien.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 320; Dec. Dig. § 214.*]

9. FACTORS (§ 47*)—LIENS—POSSESSION.

A factor's possession of goods on which he has made advances as between himself and his principal, is his own and not that of the principal, for the purpose of sustaining a lien.

[Ed. Note.—For other cases, see Factors, Cent. Dig. §§ 65-71; Dec. Dig. § 47.*]

10. FACTORS (§ 1, 47*)—WHO ARE FACTORS—LIENS—ADVANCES.

Where defendant was employed at a stated salary to purchase cotton with his own funds as the principals' agent, defendant was not a mere salaried employe, but was a factor entitled to a common-law lien on all the principals' goods in his possession, and on the proceeds of such as were lawfully sold by him, not only to secure advances, but also for the general balance of his account.

[Ed. Note.—For other cases, see Factors, Cent. Dig. §§ 1, 65-71; Dec. Dig. §§ 1, 47.*]

11. DEPOSITIONS (§ 90*)—READING DEPOSITION—DISCRETION.

Where plaintiff read in evidence the greater portion of a deposition, the court in its discretion properly overruled his objection to the answers to certain ex parte interrogatories propounded to defendant, though he was present in court, and plaintiff had a full opportunity to cross-examine him.

[Ed. Note.—For other cases, see Depositions, Cent. Dig. §§ 248-255, 258-260; Dec. Dig. § 90.*]

12. APPEAL AND ERROR (§ 1054*)—PREJUDICE—RECEPTION OF EVIDENCE.

Where there was sufficient evidence aliunde to sustain the judgment, plaintiff was not prejudiced by the admission of improper evidence, on a trial before the court without a jury.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4185, 4186; Dec. Dig. § 1054.*]

13. EVIDENCE (§ 139*)—SIMILAR MATTERS—CUSTOM OR COURSE OF BUSINESS.

In a suit on a note given by a factor to his principals, in which the factor pleaded a counterclaim on an account, *held*, that plaintiff, having been permitted to go fully into their dealings with defendant, was properly refused permission to go into said principals' customs in dealing with their agents in other states.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 415; Dec. Dig. § 139.*]

14. APPEAL AND ERROR (§ 1041*)—AMENDMENT OF PLEADING—PREJUDICE.

Plaintiff was not prejudiced by permission, granted to defendant, to amend so as to obviate an objection to testimony offered, where the amendment did not change the general tenor of

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

defendant's counterclaim or operate as a surprise.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4106-4109; Dec. Dig. § 1041.*]

15. APPEAL AND ERROR (§ 1073*)—ERROR WITHOUT PREJUDICE.

Plaintiff as trustee of bankrupts sued defendant on a note, and defendant filed a counterclaim on which judgment was rendered for defendant for \$224.55, the balance found in his favor after deducting the amount of the note. This by reason of an error in one of the items was \$36.20 too high. No personal judgment was rendered against plaintiff, however, defendant's sole recourse being the proceeds of certain bagging of the value of \$283 on which his lien was foreclosed. *Held*, that it appearing that the interest on the amount due defendant as found would exceed the amount of the error it was harmless.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4245; Dec. Dig. § 1073.*]

Appeal from District Court, McLennan County; Marshall Surratt, Judge.

Action by Felix Couturie, as trustee in bankruptcy of Gussoni & Co., against Max Roensch. From a judgment in favor of defendant on a counterclaim, plaintiff appeals. Affirmed.

Saunders, Dufour & Dufour and John W. Davis, for appellant. Prendergast & Williamson, for appellee.

JENKINS, J. The appellant is the assignee in bankruptcy of the firm of Gussoni & Co., cotton buyers, who were doing business in New Orleans. Appellee was their representative in the state of Texas, his office being at Waco. On October 3, 1906, appellee executed his note to Louis Castelli for \$2,500, payable one day after date. Castelli was the manager of Gussoni & Co., and the money loaned was in fact the money of said firm, though this was not known to appellee. Appellant instituted this suit to recover the principal of this note, with 6 per cent. interest from the expiration of the three days of grace after the same became due, together with 10 per cent. attorney's fees, it containing the usual attorney's fees clause. Appellant also sued for 1,110 rolls of bagging alleged to be worth \$6,000, alleging that appellee had sold a portion of the same for \$2,770.90 and deposited the proceeds of said sale in the Provident National Bank at Waco, subject to the decision of the court in this case, and had possession of the remainder of said bagging. Appellant sought to recover said \$2,770.90 and the remainder of said bagging. In fact, there were originally two suits, one on the note and one for the bagging, but they were consolidated by agreement of the parties, and we shall treat them as one suit.

Appellee admitted the execution of said note, but alleged that, by oral agreement with Castelli, it was not to bear any interest. He also alleged that at the time said note

was transferred to Gussoni & Co., and at the time of their bankruptcy, and at the time of this suit, Gussoni & Co. were indebted to him largely in excess of the amount of said note, and that they were also indebted to him in excess of the value of said bagging, to wit, in the sum of \$2,350 for salary which had accrued and was payable prior to bankruptcy, and in the sum of \$3,268.13, for moneys advanced by him as the agent and factor of Gussoni & Co. in the conduct of their business at Waco, Tex. He prayed that so much of said amounts as was necessary be allowed as a set-off and counterclaim to said note, and that the same be canceled. He alleged that he had both a common-law lien, as agent and factor, on said bagging, and also a contractual lien thereon and prayed for a foreclosure of his said liens on said bagging, and that, as all of said bagging, except 93 rolls had, by agreement, been sold, and the proceeds, \$2,756.10, deposited in the Provident National Bank to await the trial of this suit, the same be applied, as far as it would go, to the extinguishment of the debt due him by Gussoni & Co.

The case was tried before the court without a jury and judgment was rendered that the plaintiff (appellant) take nothing by his suit on said note; that said \$2,756.10 in said bank be applied to the extinguishment of appellee's debt, as found by the court, and that his lien on 93 rolls of bagging be foreclosed for the balance due him, which the court found to be \$224.55. The respective amounts allowed by the court in favor of each party are as follows, to wit: Plaintiff: Note \$2,500; proceeds of bagging in bank \$2,756.10—total \$5,256.10. Defendant: Exhibit A being various items paid out by appellee for Gussoni & Co. \$2,282.69; interest on same from March 1, 1908, \$258.52; loss on Ballinger cotton \$473.81; loss on Walnut Springs cotton \$115.63; balance on salary \$2,350—total \$5,480.65. Balance in favor of appellee, \$224.55.

Appellant's assignments and propositions are numerous; many of them confessedly being to all intents and purposes duplicates of others. Some of them are not in conformity to the rules. We will not attempt to discuss the assignments *seriatim*, but shall group the legal propositions involved under said assignments.

1. The court, as will be seen from the foregoing statement, did not allow any interest on the note. Appellant objected to the oral evidence of the contract not to pay interest, and asked for a new trial on the ground that there was no legal evidence to sustain the court in this regard. As to interest, the form of said note was as follows: "To bear interest at the rate of — per cent. per annum from —," with the blank after the words "rate of" marked through

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

with a pen. Appellee testified that the agreement to loan him the \$2,500 was made with Castelll in Houston, and that it was agreed that no interest would be charged; that the note was afterwards sent to him at Waco with the blank in the same as to interest; and that he marked out the blank with a pen and returned the note to Castelll at New Orleans. It is true that oral evidence is not admissible to vary the terms of an unambiguous written instrument by proving a contemporaneous verbal agreement as a part of said contract, and not omitted therefrom by fraud, accident, or mistake. It is also true that where nothing is said about interest in a note, it will, as a matter of law, be construed as a contract to pay the legal rate of interest from maturity. It is also true, as contended by appellant, that when a blank in the interest clause is left in a note, as it was in this one, before being signed, that it has the same legal effect as if no reference was made to interest. But in this case said blank was not left undisturbed; a pen mark had been drawn through it. What did this mean? The court held that this showed a sufficient ambiguity to admit oral evidence as to interest. We cannot say, under all the facts in this case, that the court erred in so holding. It is equally as well settled that oral testimony is permissible to explain a written instrument when the same is ambiguous, such ambiguity being a latent one, as that such testimony is not admissible where the written instrument is unambiguous. Appellant insists that, if there was any ambiguity in the interest clause of said note, it was a patent ambiguity, and therefore could not be aided by oral testimony. This is also a sound proposition of law (*Norris v. Hunt*, 51 Tex. 610; *Curdy v. Stafford*, 27 S. W. 823), but if such was the fact in this case, we do not see how it would help appellant. It occurs to us that if the interest clause in said note is so altered as to make a patent ambiguity, it would not leave the note as if no reference had been made to interest, but would rather show an intentional erasure of the entire interest clause, and thereby indicate affirmatively, that no interest was to be paid. Appellant insists that, even though it should be held that the note bore no interest before payment was demanded, the filing of this suit was a demand for payment, and he should have been allowed interest from that date. The answer to this is that, if the court was correct in his findings of fact, the note had been paid before that date by appellee's counterclaim, and, as he did not owe anything on the principal of said note when the suit was filed, no interest or attorney's fees could thereafter accrue on the same.

2. Appellant insists that the court erred in allowing appellee for the remainder of the year after the bankruptcy of Gussoni & Co., on April 14, 1908. The undisputed evidence shows that appellee was employed by Gus-

soni & Co. to conduct their cotton business in Texas for the season beginning September 1, 1907, and ending August 31, 1908, at a salary of \$4,400 per annum; that Gussoni & Co. were adjudged bankrupts on April 14th, 1908, and that appellee was unable to get employment for the remainder of the season. There can be no question but that had Gussoni & Co. voluntarily breached their contract by discharging appellee without cause, under the facts above stated, he would have been entitled to recover of them the full amount of his salary for the remainder of the year. Does the fact that appellee lost his position by reason of the bankruptcy of his employers alter the case? We think not. In *Re Pettigill* (D. C.) 137 Fed. 143, it is said that bankruptcy may be treated as a repudiation, and therefore a breach of the contract. Where a contract for employment is terminated by a bankrupt, the unearned salary of an employe for the balance of the contract year may be liquidated and proven as a claim in bankruptcy against the bankrupt's estate. In *re Silverman* (D. C.) 101 Fed. 219; In *re Grant*, 130 Fed. 881, 66 C. C. A. 78; *Cobb v. Overmann*, 109 Fed. 65, 48 C. C. A. 223, 54 L. R. A. 369, 6 Am. Bankr. Rep. 324. The contract year having expired before this suit was filed, the amount due appellee was capable of exact ascertainment, and it was proper to allow it as an offset and counterclaim. *Railway Co. v. Graham*, 145 Fed. 809, 76 C. C. A. 385, 16 Am. Bankr. Rep. 610; *Stich v. Berman*, 49 Misc. Rep. 104, 96 N. Y. Supp. 743, 15 Am. Bankr. Rep. 467; *Morgan v. Wordell*, 178 Mass. 350, 59 N. E. 1037, 55 L. R. A. 33, 6 Am. Bankr. Rep. 167; In *re Semmer Glass Co.*, 135 Fed. 77, 67 C. C. A. 551.

3. Appellant insists that the court erred in allowing appellee interest for the money advanced by him to Gussoni & Co., for the reason that he was a volunteer. Appellee testified that this money was advanced under a contract with Gussoni & Co. in substance as follows: He was to buy cotton for Gussoni & Co. and pay for the same out of his own funds, and when the same was concentrated at Waco, if ordered shipped out, he was to draw for the purchase price of same with bill of lading attached; if any of it was not shipped out, he drew on open account. The evidence shows that Gussoni & Co. had no funds at Waco during that season with which to buy or margin cotton, and that all cotton bought by them was paid for by the Provident National Bank through an arrangement made by appellee with the bank in his own name, and upon his individual responsibility. This evidence is sufficient to sustain the finding of the court on this issue. Appellant further insists that the money advanced was an open account, and therefore appellee, if entitled to interest at all, was not entitled to interest before the 1st of the following January. Money advanced under a contract, or at the instance and request of

another, does not constitute an open account within the meaning of article 3102, Rev. St. 1895. Where not controlled by statute, as in case of open account, interest may be allowed by way of damages as compensation for the injury inflicted. *Heidenheimer & Co. v. Ellis*, 67 Tex. 423, 3 S. W. 666; *Watkins v. Junker*, 90 Tex. 586, 40 S. W. 11.

4. Appellant assigns as error the finding of the court that appellee should be allowed the loss on cotton. The cotton was purchased by appellee for Gussoni & Co., and in their name; but for their bankruptcy it would have been shipped and sold under their instructions. Their bankruptcy having prevented this, appellee had the right to sell the cotton for the best price obtainable and charge them with the loss. The evidence shows that he did this. The judgment of the court was that he had a lien on this cotton, which proposition of law will be discussed in the next paragraph of this opinion in reference to the bagging.

5. The appellant assigns as error the judgment of the court establishing a lien in appellee's favor as to the unsold bagging, basing his proposition upon the alleged fact that appellee was only the salaried employé of Gussoni & Co., and therefore his possession being the possession of his principal, he could have no lien, because he did not have possession. It is true that as to the rest of the world the possession of the agent is the possession of the principal, but as to his lien against his principal the possession of the agent is his own possession and not the possession of the principal. If this was not true, an agent could never have a lien on the property of his principal. The court found that appellee was not the mere salaried servant of Gussoni & Co., but that he was the agent and factor of said firm. The evidence is sufficient to sustain this finding. A factor may receive his compensation by way of a fixed salary. *Winne v. Hammond*, 37 Ill. 99. A factor has a common-law lien upon the goods of his principal in his possession, and upon the proceeds of such as are lawfully sold by him, to secure the payment of the general balance between himself and his principal, including advances, charges and disbursements made upon or in reference to these particular goods. *Mechem on Agency*, § 1032. No express contract for such lien is necessary. *Haebler v. Luttgen*, 61 Minn. 315, 63 N. W. 720. This statement of the law applies to and will sustain the judgment of the court as to the cotton sold at a loss. In so far as the bagging is concerned, the appellee alleged that he had a contract lien thereon, and the evidence on this issue is sufficient to sustain the judgment of the court as to the bagging.

6. Appellant assigns as error the action of the court in overruling his objections to the answers to certain *ex parte* interrogatories propounded to the appellee. Appellant read in evidence the greater portion of

this deposition, but objected to the remainder being read by appellee on the ground that appellee was present in court and could be interrogated by his attorneys. Appellee was upon the stand as a witness and appellant had full opportunity to cross-examine him. But, aside from this, permitting his answers to be read was a matter in the discretion of the court. *Ry. Co. v. Renken*, 15 Tex. Civ. App. 229, 38 S. W. 830; *Schmick v. Noel*, 64 Tex. 408; *O'Conner v. Andrews*, 81 Tex. 23, 16 S. W. 631; *Dillingham v. Hodges*, 26 S. W. 87; *Ry. Co. v. Burnett*, 42 S. W. 314.

7. Appellant objected to certain testimony because the same was not responsive to the questions, and because it appeared to be the conclusion of the witness. In some of these, appellant is not sustained by the record, in some he is, but as to such, an examination of the record shows that there was testimony allunde sufficient to sustain the judgment, and the trial being before the court, it is not to be presumed that the court was influenced by such illegal testimony. In one instance during the progress of the trial, the court so stated to appellant's counsel. It is not always easy to determine, when evidence is given, whether the answer is the opinion of the witness, or a shorthand statement of the facts. If in such case the trial is before a jury, and the proposed evidence is sufficiently material, it would be a proper practice to retire the jury during the discussion of the admissibility of the evidence, and where the evidence has been erroneously admitted, it should be withdrawn from the jury. But when tried before the court it is but fair to presume, where the contrary does not appear, that the court, in rendering judgment, rejected such evidence from his consideration; and if the legal evidence sustains the judgment, it will not be presumed that the losing party has suffered injury from admission of the same. *Saving & Loan Co. v. Peck*, 20 Tex. Civ. App. 111, 49 S. W. 160.

8. The court did not err in not allowing appellant to prove the custom of Gussoni & Co. in dealing with their agents in other states. He was allowed to go fully into the dealing of said firm with the Texas office at Waco.

9. Appellant moved to exclude certain testimony, because there was no pleading as a predicate for the admission of such testimony. Thereupon the appellee, over objections of the appellant, was permitted to file a trial amendment which did not change the general tenor of appellee's cross-action, but set out with greater particularity the date and terms of the oral contract of October, 1907, about which appellee had testified, and the motion to exclude said testimony was overruled. Appellant did not and does not contend that he was surprised by said amendment. There was no error in the action of the court in this regard. *Canal Co. v. McFarland*, 94 S. W. 400.

10. Appellant complains of the judgment

of the court being for a greater amount than the evidence justified. Among other items allowed appellee by the court was loss on Ballinger cotton, \$473.81. Appellee admits error in this item to the amount of \$36.20, but contends that the judgment should not be reversed on this account, for the reason that no personal judgment was rendered against appellant, and that all he can get out of the judgment is the proceeds of the 93 rolls of bagging, of the value of \$283, upon which his lien was foreclosed, and that the interest on the amount due him, as found by the court, would far exceed the said sum of \$36.20. We think appellee is correct in this contention.

Finding no reversible error in the record, the judgment is affirmed.

Affirmed.

DALLAS OIL & REFINING CO. v. CARTER.

(Court of Civil Appeals of Texas. Jan. 21, 1911. Rehearing Denied Feb. 11, 1911.)

1. MASTER AND SERVANT (§ 291*)—INJURIES—INSTRUCTIONS—REQUEST—CAUSE OF ACCIDENT.

Where, in a stationary engineer's action against his employer for injuries claimed to have been caused by slipping on oil, which had been negligently permitted to run down onto the floor from the engine, there was evidence that plaintiff was injured by catching his clothes in the machinery, and not by slipping on the floor, it was error to refuse a requested charge by defendant that, unless the jury believed that plaintiff slipped and fell, causing the injuries as alleged, they should find for defendant.

[Ed. Note.—For other cases, see Master and Servant, Dec. Dig. § 291.*]

2. MASTER AND SERVANT (§ 154*)—MASTER'S DUTY—WARNING OF DANGER.

Where an employer promised his stationary engineer at the close of the workday on Saturday to remedy a defective condition in the engine room made by the dripping of oil onto the floor, the employer was not bound to warn the engineer when he went to work on the next Monday morning of the dangerous condition created by the oil on the floor, in addition to the fact that the oil was still there; the engineer being familiar with the danger.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 308, 309; Dec. Dig. § 154.*]

3. MASTER AND SERVANT (§ 270*)—INJURIES—ACTIONS—ADMISSION OF EVIDENCE.

In an action for personal injuries to an employee, by falling into machinery because of the slippery condition of the floor, evidence that, after plaintiff was injured, his superintendent directed a platform to be built, to prevent others from falling where plaintiff fell and was injured, was not admissible.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 918; Dec. Dig. § 270.*]

4. DAMAGES (§ 143*)—PERSONAL INJURIES—PLEADING AND PROOF.

The petition in an action for personal injuries must allege the particular consequences of the injuries, in order to admit evidence there-

of, if such consequences do not naturally and necessarily result from the injuries alleged.

[Ed. Note.—For other cases, see Damages, Cent. Dig. § 410; Dec. Dig. § 143.*]

Appeal from District Court, Dallas County; Kenneth Foree, Judge.

Action by R. M. Carter against the Dallas Oil & Refining Company. From a judgment for plaintiff, defendant appeals. Reversed and remanded.

G. D. Hunt, Thomas & Rhea, and Spence, Knight, Baker & Harris, for appellant. Geo. H. Plowman, W. J. J. Smith, and Jno. C. Robertson, for appellee.

TALBOT, J. Appellee, Carter, brought this suit against the appellant, Dallas Oil & Refining Company, to recover damages for personal injuries alleged to have been sustained by him through the negligence of appellant. The plaintiff alleges that he was serving defendant in the capacity of engineer in charge of certain stationary engines; that through the negligence of defendant lubricating oil, placed upon engines in a part of the establishment other than that under the care of plaintiff, was permitted to run down on the floor of the room where plaintiff was at work, causing the floor to be slippery and dangerous; that plaintiff complained to the vice principal of defendant, and a promise to repair was given him; that the promised repairs were not made, yet, notwithstanding this, defendant negligently failed to warn plaintiff of the failure to make repairs, and that thereafter, while working about the engines under his charge, plaintiff slipped in a pool of oil that had been allowed to collect on the floor, and in falling against one of the machines in motion sustained the injuries of which he complains. The defendant pleaded a general denial, assumed risk, contributory negligence, and that the injury resulted from plaintiff's permitting his sleeve to come in contact with the machinery in such a manner as to cause his hand to be caught and injured. A jury trial resulted in a verdict and judgment in favor of the plaintiff for \$8,000, and the defendant appealed.

The first assignment of error complains that the court erred in refusing to give appellant's special requested instruction No. 2, which is as follows: "Unless you believe from a preponderance of the evidence that the plaintiff slipped and fell, and the accident resulted therefrom as alleged by him, you should not consider any other issue submitted to you, but return a verdict for the defendant." "The proposition under this assignment is that, where the evidence offered by the defendant in a suit for personal injuries negatives the theory of the case alleged by plaintiff and testified to by him and his witnesses, the defendant is entitled to have given a requested charge, affirmatively

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

submitting to the jury the negative of the sole theory urged by plaintiff, where such negative is not submitted in any other charges given by the court to the jury." That this proposition embodies a correct statement of the law is affirmed by many decisions of the appellate courts of this state, and that it should have been given in this case admits of no doubt in our opinion. As is insisted by appellant, "one of the most serious controversies in the case concerned the circumstances of the accident; the plaintiff contending that he slipped and fell, as a result of oil on the floor, the defendant contending that he did not slip and fall, as alleged by him, but was hurt while standing on the foundation block of one of the engines trying to oil same. In the second paragraph of the general charge, the court instructed the jury to the effect that, if the plaintiff was in the employ of the defendant as its engineer, and that, while so employed, oil was placed on a pulley overhead in an adjoining room to where plaintiff was working and was allowed to run down a post extending from the said room to the place where the plaintiff was required to work, that plaintiff called the attention of the defendant to the danger and unsafety of said place, and that defendant promised to remedy said dangerous conditions, and would prevent the oil from running down on the floor; * * * and if they further found that on the next work-day after making said promise oil was permitted to run down from said pulley on the post onto the floor where the plaintiff worked, causing plaintiff to fall and receive the injuries complained of, etc., * * * to find for the plaintiff." This was the only charge given by the court on the issue as to the manner in which the accident and injury to plaintiff occurred. Neither in the general charge, nor by a special charge, did the court submit to the jury affirmatively the negative side of the issue as to whether the plaintiff was injured in the manner alleged by him, nor did the court submit in any way the plaintiff's theory as to how the accident happened, or tell them that, if the plaintiff was hurt while standing on the foundation block of the engine, trying to oil the engine as charged by the defendant, he could not recover.

The plaintiff, among other things, testified: "I had to go between that pulley block and oil the engine. The oil ran down that post on the floor, right between the wall and the pulley block. I slipped and fell, and, to keep from going into that big wheel that turns across that little idler in there, in front of me, I grabbed the pulley block to prevent from falling over in that wheel, and it swung me around and swung my arm over the eccentric and on top of that other. There was a plain oil cup, and I had on a heavy sateen shirt, and that shirt caught in that oil cup, and just allowed my hands and fingers to get over in there. If I had

not caught there, it would have crushed my whole body. I would have fallen right in sideways, and it would have caught my arm and shoulders, but it just caught my hand and fingers, and I snatched my hand back, and I did not know what was the cause of the fall, but looked around to see, and this oil had run down that post and was on the floor, and I had slipped in it. The oil on the floor made the floor slippery. It covered a space about the size of your hat, or a little larger. It was not very thick. I could not say just how thick it was; but it was in a sort of pool. It just ran down around there and spread out like a pool. The thing the engine rested on was a pedestal, and behind that there was a place where the floor was [speaking of the pedestal foundation of the engines]. This foundation was there at the time. In getting up to the oil cups, I would step up to where I could reach them better. I did not tell him [Mr. Kimbrough, the vice principal] that I was attempting to regulate that feeder and the top of the cup caught my sleeve and jerked my hand into that eccentric."

On the other hand, the witness Harrison testified: "About a year or so ago Mr. Carter got hurt out there, and at that time I was standing at that window, the one next to the engine room, leaning over in the window. Mr. Carter came around by me as I was standing there, and said something—I don't know what it was—but he went on to oil the engine there, and I turned my head and was looking at the pressroom, and Carter passed back by me—I know where that engine is situated, and the window that I speak of is right at that engine. The base of the engine is a cement foundation, and he passed right by it and came back by it, and he passed right along to oil the engine and the eccentric and bearings; but as he went he did not slip or fall. I never asked him to make any statement at that time, but heard him make an expression. He said, 'I caught my sleeve on the eccentric,' but I don't remember who it was he was talking to or who asked him about it. When he told whoever it was about the accident he did not say anything about slipping or falling. When I was in the window, Carter came around there, and before I had looked away he had passed the point where the oil came through, and after he had stepped up on the base of the engine, I turned my head and looked into the pressroom." Kimbrough, superintendent and vice principal of the defendant, testified: "I asked him [plaintiff] how he got hurt, and he said his sleeve got caught in the eccentric cup and jerked his hand into the eccentric. He did not say anything to me at that time about either falling or slipping. He said the cup was stopped up and he was adjusting it to make it feed properly." Crane, a witness for the defendant, testified: "The first time I saw Mr. Carter after the accident I saw him in the pressroom, while he was lying

down. He told me at that time that a cup on the eccentric caught his sleeve and jerked his hand into the eccentric. I did not hear him say anything at that time about slipping or falling."

The special charge under consideration presented affirmatively the negative of the issue submitted by the court's charge, and having been requested, its refusal, in view of the testimony, was clearly error. *Dallas Con. Elec. St. Ry. Co. v. Conn.*, 100 S. W. 1019; *Dallas Con. Elec. St. Ry. Co. v. McGrew*, 115 S. W. 344; *Railway Co. v. Ayres*, 83 Tex. 268, 18 S. W. 684; *Railway Co. v. Johnson*, 100 Tex. 237, 97 S. W. 1039; *Northwestern Texas Traction Co. v. Moberly*, 109 S. W. 483.

The case of *Railway Co. v. Ayres*, supra, was a suit, like the present, for damages for personal injuries, and it was an issue in the case whether the injuries proved were permanent. The railway company requested a charge that, "unless it was shown affirmatively by a fair preponderance of the evidence that the plaintiff's injuries are of a permanent character, you will disallow his claim for injuries of that character." The refusal of this charge was held to be error, the court saying: "Had no additional instruction been requested upon the point, the charge of the court would have perhaps been deemed sufficient; but as the evidence was conflicting, it was the sole province of the jury to determine whether or not the probable effects of the injuries would be to impair the proper or natural use of plaintiff's neck and shoulder in the future, and the defendant was consequently entitled to an affirmative presentation by instructions to the jury of the negative side of the question." In the case of *Railway Co. v. Johnson*, 100 Tex. 237, 97 S. W. 1039, the negligence alleged consisted in the porter moving the stool placed for passengers to step on in alighting from the train, and there was evidence that it was not moved, but that the plaintiff stumbled in getting down the steps, and the Supreme Court held that the railway company was entitled to have a requested charge given that plaintiff could not recover, unless moving the stool was the cause of his fall. Chief Justice Gaines said: "Now the plaintiff having predicated his case upon the negligence of the porter in removing the stool just as he was stepping from the car, he could recover only by proving the facts as alleged. The negligence of the porter in that respect was put in issue by the general denial, and under the circumstances of the case we think that the defendant was entitled to have the jury affirmatively instructed that, if the moving of the stool was not the cause of the accident, it was entitled to a verdict." Excerpts from other cases illustrating the rule might be given, but we deem it unnecessary. The charge upon the question of contributory negligence requested by the defendant, and giv-

en by the court, was not equivalent to the special charge in question.

Appellant's second assignment of error complains of the second paragraph of the court's charge, which, among other things, tells the jury, in substance, that if the plaintiff called the defendant's attention to the danger of the place where he was directed to work, and defendant promised to remedy the dangerous condition thereof and failed to do so, and oil was permitted the next workday after such promise to run down the post onto the floor where plaintiff worked and caused plaintiff to fall and receive the injuries of which he complains, and that defendant failed to warn the plaintiff that the repairs had not been made, and of the dangers of the situation in which plaintiff was placed, and if the failure to warn the plaintiff was the proximate cause of plaintiff receiving the injuries complained of, and that in failing to warn the plaintiff of the dangers of the situation in which he was placed at the time of the accident, etc., to find for the plaintiff. Several objections are urged to this paragraph of the charge, but the only very serious one we think is contained in the fifth proposition, which is as follows: "Even where the master has, upon the complaint of the servant, promised to repair conditions claimed to be dangerous, the failure to make the promised repairs, and the further failure to give warning that they have not been made, does not impose upon the master the additional duty of warning the servant of the dangers of his employment, especially where the servant is a mature, experienced man, fully cognizant of all conditions and dangers incident to the state of nonrepair complained of." It will be observed that the charge here referred to not only imposed upon the defendant the duty to warn plaintiff of its failure to make the promised repairs, but also of the dangers of the place promised to be repaired. If it be conceded that, having failed to make the repairs, it was the defendant's duty to have notified the plaintiff of that fact before he went to work on Monday following the promise to repair, still, under the facts of the case, it was not the duty of the defendant to have warned the plaintiff of the dangers of the place, and the instruction to that effect was material error. The evidence shows that the alleged promise to repair, if made, was made about the close of business on Saturday, and that the accident occurred on the following Monday morning; that the plaintiff knew full well the dangers attending the presence of oil on the floor where he was required to work, and that, unless it had been removed, the place on Monday morning, when he returned to work, was still dangerous. Under such circumstances, it was not the duty of the defendant to warn him that the repairs had not been made, and also of the dangers of the situation in which he was placed. That

the effect of the charge was to impose such duty, and that to so do was an affirmative misdirection of the jury, seems very clear. In other respects, we think the charge is free from reversible error.

The sixth assignment of error complains of the court's action in admitting in evidence, over the defendant's objection, that portion of a written statement purporting to be signed by the witness, John Holt, with reference to a statement made by the defendant's superintendent as to the platform at the place where plaintiff claimed to have been hurt, and in allowing the jury in their retirement to take said statement with them. The objectionable matter in the statement is as follows: "Then [meaning after the plaintiff was hurt] superintendent told me [John Holt] to build a platform to prevent a man falling where Carter [the plaintiff] fell." It is well settled, as contended by appellant, that in a suit for personal injuries to an employee, predicated upon the alleged negligence of the employer in not furnishing a safe place to work, evidence of substantial repairs at the place where the plaintiff was working, and in which he claims the defects resulting in his injury existed, is inadmissible. In this instance, however, it appears that a part of the written statement in question was admissible for the purpose of contradicting or impeaching the witness Holt, and the consideration of the statement by the jury was expressly limited by the court's charge to that purpose, and the jury told that it was not "evidence of the facts therein stated." The consideration of the statement being thus restricted, it may be that its admission does not constitute reversible error, but in view of another trial we think it proper to say that, should the question again arise, the defendant's rights would be much better guarded and protected, and no injury suffered by the plaintiff, if only so much of the statement as tends to impeach the witness be allowed read to the jury, and the objectionable portion thereof wholly excluded. It does not occur to us that it was necessary, as we understand counsel for the plaintiff to argue, for the statement to be before the jury while deliberating upon their verdict, in order for them to determine, by comparison of the signature to the statement with the known handwriting of the witness Holt, whether said statement was genuine.

Appellant's ninth, tenth, and eleventh assignments are grouped, and are to the effect that the court erred in permitting the plaintiff and Dr. McIver to testify, over objection of the defendant, with reference to the wound and ulcer on plaintiff's right arm and the surgical operation thereon, and the consequences resulting to plaintiff's arm by reason thereof; and that the court erred in refusing to charge the jury, at defendant's request, that if they should find for plaintiff, then, in estimating the compensation to which

he was entitled, they should not consider injury to plaintiff's arm. We are inclined to think these assignments, under the pleadings, are well taken. Plaintiff alleged, regarding his injuries, that "his hand was caught between the iron cogs and in the powerful and dangerous machinery of the defendant, and his right hand was lacerated and torn, and he was greatly bruised and wounded in divers places on his body, and caused to suffer severe physical pain and mental anguish, and was compelled to employ doctors and undergo a surgical operation, whereby he lost all the fingers of his right hand, and was greatly injured and permanently injured and rendered a cripple for life; that defendant failed and refused to perform its duty to plaintiff, whereby he was injured for life as aforesaid, and caused to suffer and will continue to suffer during the remainder of his natural life." The testimony of the plaintiff objected to was to the effect that the doctors split his arm from his wrist to a point up near his elbow and run a gauze through it, and that his arm was practically destroyed. That of Dr. McIver was substantially as follows: "We performed two operations; the second one was to his [plaintiff's] arm, where we had to put in a tube, because he had blood poison, which had progressed up there from the hand. We put him under the influence of chloroform to do that." The defendant objected to the testimony relating to the second operation and relating to the injury to the arm, and to the effect of the injury to the arm, because the allegations of the plaintiff's petition did not justify such proof, there being no allegation of injury to the arm and no allegations of the described effects of the injury to plaintiff; and, further, because it appears that the effect of the injury to the arm resulted from septic poisoning.

It is well settled in this state that to admit proof of damages which do not naturally and necessarily result from the injury alleged, the petition must set up the particular effects or consequences claimed to have followed the injury. *Campbell v. Cook*, 86 Tex. 632, 26 S. W. 486, 40 Am. St. Rep. 878; *Railway Company v. Linton*, 109 S. W. 942. The difficulty experienced by the courts is not in determining what the general rule is upon this subject, but in its application to the particular facts of the case before them. In this case, however, we are inclined to the opinion that the septic or blood poison shown to have developed in plaintiff's arm, and the operation made necessary on account thereof cannot be said to be natural and necessary consequences of the alleged injury to plaintiff's hand, and, there being no allegation in the petition that plaintiff's arm was so affected, and this operation necessary, as a result of the alleged injury to his hand, or of any other injury alleged, the admission of the testimony complained of was error. But if we are mistaken in this view of the mat-

ter, then, as the case will be reversed and remanded on other errors, the question can and should be eliminated by an amendment of plaintiff's petition.

The twelfth assignment of error complains of the court's charge on the measure of damages, with reference to the time lost by plaintiff as a result of his injuries. The plaintiff pleaded physical and mental suffering as a consequence of the injuries alleged, and that because of said injuries he was confined to his home for four months, etc. This is the only allegation of lost time found in the petition. Plaintiff testified: "I was confined to my room 120 days, and was confined to my bed pretty nearly that length of time. After I was confined to my bed that 120 days, it was a long time before I was able to go back to my work. I don't know exactly what length of time, but it was several months. At the time I was injured, I was getting \$2 per day." The charge authorized a recovery for all time lost from labor in the past. This, in view of plaintiff's pleading, limiting the time lost by him as a result of his injuries to four months "in the past," and his testimony to the effect that it was a long time—several months—after the four months' confinement to his room before he was able to go back to work, permitted a recovery for disability and lost time in the past in excess of his allegations, and was affirmative error.

There are other assignments of error, but they need not be discussed. None of them disclose reversible error, and they will be overruled.

For the errors indicated, the judgment of the court below is reversed, and the cause remanded.

METROPOLITAN ST. RY. CO. v. HOUGHTON.†

(Court of Civil Appeals of Texas. Jan. 28, 1911. Rehearing Denied Feb. 18, 1911.)

EVIDENCE (§ 558*)—EXPERT WITNESSES—EXAMINATION—BIAS—REBUTTAL.

One suing a street railway company for personal injury, having shown on the company's medical expert's cross-examination that he testified for the company in many cases, the company, to rebut any inference of witness favoring the company, could, on redirect examination, show that it frequently settled claims on his report, and that 75 per cent. of the cases examined by him for the company were settled on his recommendation, etc.

[Ed. Note.—For other cases, see Evidence, Dec. Dig. § 558.*]

Rainey, J., dissenting.

Appeal from District Court, Dallas County; Kenneth Force, Judge.

Action by L. F. Houghton against the Metropolitan Street Railway Company and others. Judgment for plaintiff, and the named defendant appeals. Reversed and remanded.

Baker, Botts, Parker & Garwood and Spence, Knight, Baker & Harris, for appellant. M. M. Parks and Carden, Starling, Carden & Hemphill, for appellee.

BOOKHOUT, J. This is a suit for damages on account of personal injuries alleged to have been sustained on April 26, 1907, while a passenger on one of the cars of the Rapid Transit Railway Company. Appellee, in his second amended original petition, alleged, among other things, in substance: That he is a citizen of Dallas county, Tex.; that defendant is a corporation duly incorporated under the laws of the state of Texas; that while a passenger on one of the defendant Rapid Transit Railway Company's cars, and standing on the rear platform thereof, a car belonging to and operated by the defendant Metropolitan Street Railway Company negligently ran into and against the car upon which he was a passenger, demolishing the rear platform thereof, and seriously and permanently injuring him in his knee and other portions of his body. Plaintiff alleged his damages to be \$20,000. The defendant Metropolitan Street Railway Company answered by general demurrer and general denial. The case was tried on June 23, 1909, resulting in a verdict and judgment in favor of plaintiff in the sum of \$5,000. Defendant's motion for new trial having been overruled, it prosecuted an appeal.

Error is assigned to the court's action in denying the defendant railway company the right to show by its witness Dr. C. M. Rosser, in substance, that the company more frequently settled cases on his examination and report than were tried in the court. Many propositions are presented under this assignment. The first three, which fully present the appellant's contention, are as follows: First. The plaintiff having proven that the defendant's witness Dr. C. M. Rosser was subject to call to testify in cases of the kind then being tried, if the street car companies thought his testimony important, and having further testified that he did testify for the defendant in a great many cases, the defendant had the right, upon re-examination, to explain such testimony away as due to some other cause than the emotion desired to be shown by it, and as not indicating a bias in defendant's behalf or a deep-seated hostility toward claimants in personal injury suits. Second. When the cross-examination of a witness tends to show bias of the witness, on re-examination by the party offering the witness, such explanations may be made as tend to rebut the inference of hostility to show that the facts elicited on cross-examination were consistent with fairness and good faith, even though such testimony would otherwise be

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

† Writ of error denied by Supreme Court.

irrelevant. Third. When an attempt is made on cross-examination to discredit a witness and show bias in the defendant's favor, the defendant ought to have the benefit of any bias or feeling the other way, as calculated in some degree also to affect his testimony.

During the trial Dr. C. M. Rosser was called as a witness by defendant, and testified that he was a practicing physician and surgeon, and has been for the past 20 years, and that he is the general surgeon of the defendants, the Metropolitan Street Railway Company and the Rapid Transit Railway Company. In response to questions propounded by plaintiff's counsel on cross-examination of Dr. Rosser, he testified: "At the time of the alleged injury I represented the three street railway companies here, the Metropolitan, Rapid Transit, and Consolidated. I am subject to call in cases of this kind if the street car companies think my testimony important. I do testify for the defendant in a great many cases. I testify the truth as nearly as I can."

After the above testimony had been developed by plaintiff's counsel, certain questions were asked and proceedings had on the redirect examination of the witness, as follows: Question by the attorney for the railway company: "Mr. Carden asked you if you did not frequently testify for the defendant. I ask you if we do not a great deal more frequently settle cases on your report?" To this question and the answer sought to be elicited counsel for plaintiff objected upon the ground that it was immaterial and irrelevant, which objection was sustained by the court, to which defendants then and there in open court excepted. Had the witness been permitted to answer he would have answered in the affirmative. The question was then asked: "I will ask you to state if more cases are not settled by these defendants on your recommendation than are ever tried in court?" To which question and the answer sought thereby counsel for plaintiff objected on the ground that same were immaterial and irrelevant, which objection was sustained, and the defendants, Metropolitan Street Railway Company and Rapid Transit Railway Company, in open court, excepted. The witness, if permitted, would have answered this question in the affirmative. The witness was then asked: "I will get you to state, Doctor, in what percentage of cases that you have examined the plaintiff, at the instance of these defendants, have such cases been settled on your recommendation?" To which question and answer sought thereby plaintiff's counsel objected on the ground that it was immaterial and irrelevant, which objection was sustained, to which counsel for defendants then and there in open court excepted. Had he been permitted to answer the witness would have testified that 75

per cent. of the cases in which he examined plaintiff for the defendants were settled on his recommendation. Again, the witness was asked: "I will get you to state to the jury and the court whether more cases are settled on your recommendation after an examination of parties injured by this company than are ever sued upon?" To which question and the answer sought to be elicited thereby counsel for plaintiff objected on the ground that it was immaterial and irrelevant, which objection was sustained by the court, to which the defendants, Metropolitan Street Railway Company and Rapid Transit Railway Company, then and there in open court excepted. Had the witness been permitted he would have answered that more cases were settled upon his recommendation after examination of the party injured than were ever sued upon.

We are of the opinion that there was error on the part of the trial court in sustaining the objection to these questions, and in excluding the answers of the witness. The testimony introduced by plaintiff on cross-examination of the witness that: "I am subject to call to testify in cases of this kind if the street car companies think my testimony important, and I do testify for the defendant in a great many cases. I testify the truth as nearly as I can"—was evidently brought out to show a hostility on the part of the witness to plaintiff's case, and a bias on his part in favor of the railroad company. The plaintiff having, on cross-examination of the witness, introduced evidence tending to show hostility on his part against plaintiff, and a bias in favor of the defendant, the defendant on redirect examination was entitled to show by the witness that the company a great deal more frequently settled cases on his report, and that 75 per cent. of the cases examined by him at the instance of the railroad were settled on his recommendation. Had it been shown that 75 per cent. of the cases examined by Dr. Rosser at the instance of the railroad were settled by the company on his recommendation, such evidence would have had a tendency to remove any hostility to plaintiff and any bias in favor of the railroad which the jury may have believed existed on his part. We conclude that the trial court erred in sustaining the exceptions to the questions and excluding the testimony. *Wigmore on Evidence*, vol. 2, §§ 952, 1119; *Clapp v. Wilson*, 5 Denio (N. Y.) 289; *United States v. 18 Bbls. High Wines*, 8 Blatchf. 475 (25 Fed. Cas. No. 15,033); *Am. & Eng. Enc. of Law*, pp. 1142, 1143; *Rice on Evidence*, vol. 3, art. 372; *Sayles v. Fitz Gerald*, 72 Conn. 391, 44 Atl. 735; *People v. Zigouras*, 163 N. Y. 250, 57 N. E. 406; *Comer v. Thornton*, 38 Tex. Civ. App. 287, 86 S. W. 20; *Strong v. State*, 85 Ark. 536, 109 S. W. 538, 539; *Underhill on Evidence*, § 854b; *Greenleaf on Evidence*, vol. 1, § 468.

Mr. Wigmore, in his valuable work on Evidence, in vol. 2, § 932, states the rule as follows: "On the general principle of explaining away circumstantial evidence any circumstance of conduct or expression, or of the external situation, of the witness may be explained away as due to some other cause than the emotion desired to be shown by it, or as not indicating a deep-seated hostility. * * * When to a witness is imputed hostility to the opponent, the true process of explanation consists of showing that the facts offered do not really indicate the conclusion suggested; i. e., the hostility. Thus, when the counter evidence does not attempt to do this, but admits the hostility and desires to show that it was justifiable by the opponent's conduct, the offer is improper in two ways, first, because it does not at all explain away, but concedes that hostility exists, and, secondly, because it tends to prejudice unfairly the cause of the opponent by showing him to be an unjust man; and for these reasons such evidence may be excluded." The same authority, § 1119, says: "A denial of the fact of bias or the like by other testimony is always allowable, for any testimony of the opponent admissible to prove a discrediting fact must of course in fairness be allowed to be met by testimony denying the alleged fact."

In the case of *Clapp v. Wilson*, 5 Denio (N. Y.) 289, the court said: "It is, however, quite evident that the referees reported in favor of the plaintiff because they discredited Carr, as they could hardly have reported in his favor on any other ground. This being the case, and it being a fact in the cause that Carr was the defendant's son-in-law, I think they should have permitted the defendant to show that he and the witness had been for some time at variance. * * * When attempts had been made to discredit the witness and show a bias in the defendant's favor, the defendant ought to have the benefit of any bias of feeling the other way as calculated in some degree also to affect his testimony."

In the case of *United States v. 18 Barrels High Wines*, 8 Blatchf. 475 (25 Fed. Cas. No. 15,033), Circuit Judge Woodruff announced the rule as follows: "There is nothing, I think, in the objection to the testimony given by way of explanation of the conduct of the witness Avery. It was not given as evidence in chief to affect the claimants on the question in issue, but only to avoid the effect of facts elicited by the claimants on their cross-examination. When cross-examining counsel see fit to call out from the witness collateral facts which tend to create distrust of his integrity, fidelity, or truth, it is entirely competent and proper for the adverse party to ask of the witness an explanation which may show that the facts thus elicited were in truth wholly consistent with his integrity, fidelity and truth, although they thereby prove circumstances

foreign to the principal issue, and which, but for such previous cross-examination, they could not be permitted to prove."

In the *American-English Encyclopedia of Law*, vol. 30, pp. 1142, 1143, the rule is stated as follows: "An attack on the credibility of witness by direct evidence of bad character or reputation may be refuted by evidence of his good character; and other discrediting testimony by evidence in explanation or contradiction, given by witness himself, or in many instances, by other witnesses called for that purpose. * * * Thus, a witness against whom evidence has been introduced tending to show bias in favor of the party calling him or against adverse party may be supported by evidence in rebuttal which tends to disprove the fact."

In *Rice on Evidence*, vol. 3, art. 372, the author in commenting upon the rights of a party introducing a witness when such witness has been attacked by proof of conviction of crime, says: "It is a matter of no small importance to know that relief may be afforded in part at least for those unfavorable impressions by eliciting upon redirect examination testimony from witness declaratory of his innocence of the crime charged, and this although record of conviction is produced. Such a record is not conclusive of a person's guilt, and witness has the right to show his innocence and relieve himself from the stigma of conviction."

Sayles v. Fitz Gerald, 72 Conn. 391, 44 Atl. 735. In this case defendant was executor of the will of John Reilly, deceased. In discussing the right of the defendant to make an explanation of what appeared to be discrediting testimony, the court said: "After defendant had testified that deceased, just before his death, told him that he owed no one but Mrs. Butcher, and on cross-examination admitted that several bills had been presented and that they had been paid by him, he should have been allowed to explain that he compromised these claims rather than subject the estate to the expense of litigation."

In *Comer v. Thornton*, 38 Tex. Civ. App. 287, 86 S. W. 20, opinion by Justice Eidson, the court held: "If facts are brought out on cross-examination which tend to impeach the integrity or character of the witness, or to impugn the motive of the witness who is a party to the suit, as relating to certain acts or conduct on his part in reference to the suit, he will be permitted on redirect examination to explain what induced or made necessary such acts or conduct on his part, and thus show, if he can, that such acts or conduct are consistent with the truthfulness of his present statement."

In *Lenfest v. Robbins*, 101 Me. 180, 63 Atl. 730, the court held that: "When impeaching conduct of a witness is drawn out upon cross-examination which is indicative of deep-seated hostility and bias on his part against one of the parties, it is error to

exclude all explanation of such conduct upon the redirect examination." While defendant in this case was on the stand testifying in his own behalf, plaintiff on cross-examination developed the fact that defendant had not spoken to the plaintiff for two years. On redirect examination the defendant was asked: "You were asked if you had spoken to Mr. Lenfest during the last two years. I will ask the question, Why didn't you speak to him?" to which question and answer sought to be elicited objection was made and sustained. Counsel for defendant stated: "I think I have the right to show it was not on my client's side." In commenting on this ruling the Supreme Court of Maine said: "Standing unexplained, the conduct of the defendant might indicate a long-standing hostility on his part at the time of the assault. It matters not who was in fault. The first ground stated as to the purpose of the question is not tenable. To show who was in fault would be in effect to concede the hostility and justify it. The second ground stated, however, rests on a solid foundation. The defendant had the right to show that the 'bad terms'—hostility—was not on his side. He had a right to explain the circumstances and show that his failure to speak to the plaintiff did not indicate a deep-seated hostility, such as would be likely to lead him to assault him or to influence his testimony and affect his credibility at the trial. *Wigmore, Ev. 952. In Williams v. Gilman, 71 Me. 21, it was held that a party could not, upon cross-examination, introduce testimony of collateral facts and then object to an explanation of them. The fact that the defendant had not spoken to the plaintiff for two years before the assault was drawn out by the plaintiff. Its natural effect was to impeach his credibility and raise an inference of long-standing hostility which might discredit his account of what took place at the time of the assault. He was entitled to give such explanation as he could. In State v. Reed, 62 Me. 129, a witness was permitted to testify what was his reason for giving contradictory testimony at a former trial, and it was there said that 'to refuse an opportunity to explain would be in effect to condemn a party without a hearing.' A party has as much right to explain his impeaching conduct as a witness has to explain his contradictory statements. The right is given in order that the jury may have the facts necessary to form a correct judgment as to the motive and credibility of the witness."*

In *Strong v. State, 85 Ark. 542, 109 S. W. 538, 539*, the court in majority opinion held: "The appellant, on cross-examination, asked a witness for the state if his brother-in-law and appellant had not had some trouble this summer, and the witness answered in the affirmative. The prosecuting attorney, on redirect examination, asked the wit-

ness the following questions: 'Q. I will ask you if you have been threatened by anybody as to what you might swear, by anybody connected with defendant? Q. I will ask you has anybody connected with the defense told you what they would do if you would come here and tell the truth?' And the witness answered: 'A. I heard a fellow say yesterday, and he did not say who it was, that I had better not testify against Sim Strong.' These questions and the answer thereto were over the objections and exceptions of appellant. It would have been incompetent for the state to show that one of its witnesses had been threatened by some one, without connecting the defendant with it. But as the appellant had sought to discredit the witness by showing that he was biased on account of a difficulty that appellant had with the brother-in-law of the witness, it was proper for the state in rebuttal of this, and not as original evidence, to show that the witness had been told by some one that he had better not testify against appellant. This testimony was competent on the question of the bias or prejudice of the witness, and tended to rebut the idea that the witness was biased against appellant. It went to the question of bias, and was competent as affecting the credibility of the witness. Moreover, the majority of the judges are of the opinion that the testimony of threats was too remote and indefinite to prejudice appellant."

Justice McCulloch, while concurring in the judgment, dissented from the reasoning of the majority of the court and stated the rule in the following forcible language: "I am not content to rest my concurrence in the judgment on the ground that the testimony of witness White concerning threats made to him was not prejudicial to the defendant, if it was inadmissible. It will be remembered that this testimony of the witness was given on redirect examination by the prosecuting attorney after he had stated on cross-examination that his brother-in-law and the defendant had had a difficulty, and that he (witness) was a witness in the case. This testimony was drawn out by the defendant to show bias on the part of the witness, and the state had a right, on redirect examination, to rebut this by showing that no bias existed in favor of the state, or by showing that the bias, if any, was in favor of the defendant. This, under the familiar doctrine of the right of a party to introduce evidence to support or rehabilitate the credibility of his witness after it has been attacked by his adversary. Prof. Wigmore says: 'In the process of rehabilitating an impeached witness there are four possible stages of the case at which the attempt may be made—the cross-examination of the impeaching witness, the re-examination of the impeached witness, the direct examination of a new witness called in rebuttal, and the reopening of the case

after both sides have closed.' 2 Wigmore on Evidence, § 1100. The same learned author in another place (section 1119) on this subject says: 'A denial of the fact of bias or the like by other testimony is always allowable, for any testimony of the opponent admissible to prove a discrediting fact must of course in fairness be allowed to be met by testimony denying the alleged fact.' The rule is also stated clearly in the American and English Encyclopedia of Law (volume 30, p. 1143): 'A witness against whom evidence has been introduced tending to show bias in favor of the party calling him or against the adverse party may be supported by evidence in rebuttal which tends to disprove the fact.' When a defendant, by drawing out facts on cross-examination of a state's witness tending to show bias on the part of his witness, introduces that issue, the state has the right to rebut this by showing any fact tending to establish the absence of bias in its favor. Now, the defendant, in order to how bias on the part of the witness, would have to show that the witness was testifying under stress of threats which the jury might conclude influenced his testimony. Underhill on Criminal Evidence, p. 307. The state enjoyed the same privileges after the credibility of its witness had been drawn in question, and for the purpose of restoring his credit could introduce that kind of testimony tending to show that there was in fact no reason why the witness should be biased in favor of the state, or by showing that his bias was in favor of the defendant. Objection is made that this testimony had an improper tendency to create in the minds of the jury an impression that either the defendant or his friends had attempted to intimidate state's witnesses. If fears were entertained by defendant that the jury would consider the testimony for any such purpose, he should have requested the court to instruct the jury not to consider it for that purpose. As the testimony was admissible for one purpose it was the duty of the party who anticipated an improper consideration of it for another purpose to ask the court to prevent that."

The assignments of error not discussed have been carefully considered and, because we are of the opinion they do not point out error, the same are overruled.

For the error indicated, the judgment is reversed and the cause remanded.

RAINEY, C. J. I feel constrained to disagree with the conclusion reached by my Brethren in regard to the admissibility of Dr. Rosser's testimony excluded by the court. It is well settled that when an attempt is made on cross-examination to discredit a witness and show bias in the defendant's favor, the defendant has the right to intro-

duce testimony which has a tendency to relieve the witness of such discredit. But I do think the testimony offered does not, in the least, tend to relieve the witness of the suspicion of bias in favor of the defendant that his testimony on cross-examination had a tendency to create. The testimony offered—that more cases had been compromised by the defendant on the reports made by him than ever tried in court—in my opinion does not in any way tend to show a want of bias in the witness. It in no way explains his feelings toward the defendant. It would show his loyalty to the defendant, and that it had confidence in him, and was willing to act on his reports as to the injuries received by the party injured. He doubtless made faithful reports from which the defendant concluded it was more advantageous to it to settle by compromise than litigate; then how can it be said that as the defendant saw fit to compromise such cases it tended to show that the witness was not biased in its favor, I am unable to say. Believing the testimony offered would introduce a collateral subject not pertinent to any issue in the case, the evidence was not legitimate, and the lower court did not err in so holding.

SKINNER et ux. v. D. SULLIVAN & CO.

(Court of Civil Appeals of Texas. Jan. 18, 1911. Rehearing Denied Feb. 22, 1911.)

1. EXECUTION (§ 269*)—SALE OF LAND—INTEREST ACQUIRED BY PURCHASER.

While indebted to plaintiff, defendant S. called A.'s attention to certain lots which they purchased together, A. paying the price, plaintiff later reimbursing him to the extent of \$1,000 belonging to his wife's separate estate, he having taken it and so applied it without her knowledge. Title was made to A. with the understanding that S. was to have a half interest, and afterwards A. sold three of the lots and reimbursed himself for the amount he advanced, leaving three lots remaining undisposed of. Plaintiff levied on S.'s interest, which was thereupon claimed by his wife. Held, that the wife was entitled to a proportionate interest in the property corresponding to her contribution to the purchase price, and that the balance representing the interest of S. passed to plaintiff as purchaser under the execution.

[Ed. Note.—For other cases, see Execution, Cent. Dig. § 768; Dec. Dig. § 269.*]

2. EXECUTION (§ 163*)—MOTION TO QUASH—DENIAL.

Where, pending an action to subject a debtor's alleged interest in certain real estate to plaintiffs' judgment, plaintiffs levied on such interest and were about to sell the same, the court did not err in refusing to quash the execution on motion; the same questions being presented by the motion as were involved in the action.

[Ed. Note.—For other cases, see Execution, Dec. Dig. § 163.*]

3. APPEAL AND ERROR (§ 931*)—CASE TRIED BY COURT—IMPROPER TESTIMONY—PRESUMPTION.

Where a case is tried by the court without a jury, it will be presumed that improper testi-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

mony admitted over objections was not considered as a basis of the judgment.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3766; Dec. Dig. § 931.*]

Error from District Court, Bexar County; J. L. Camp, Judge.

Action by D. Sullivan & Co. against H. O. Skinner and wife. Judgment for plaintiffs for part of the relief demanded. Defendants bring error, and plaintiffs file cross-assignments of error. Affirmed.

W. W. King, for plaintiffs in error. Clark & Bliss, for defendants in error.

NEILL, J. D. Sullivan & Co., a firm composed of D. & W. O. Sullivan, brought this suit on May 14, 1909, against H. O. Skinner, Ida V. Skinner, his wife, and Martin J. Arnold, alleging in their original petition, in substance: That on October 2, 1900, they recovered a judgment against H. O. Skinner and his wife, Ida V., for the sum of \$1,228.13, with interest from its date at the rate of 10 per cent. per annum, with a foreclosure of a lien on certain lands to secure its payment, and directing that, if after the sale of the land the proceeds were not enough to discharge the judgment, plaintiffs have execution against H. O. Skinner for the balance; that after said land was sold as directed, and the proceeds applied towards the payment of the judgment, there remained unpaid on the same the sum of \$1,166.65 on December 4, 1900, the date of the application thereto of proceeds of said sale; and that thereafter executions were issued on the judgment for such balance against H. O. Skinner, but without avail. That on January 28, 1901, plaintiffs caused an abstract of said judgment to be filed and recorded in the office of the county clerk of Bexar county, duly indexed, and in every respect complying with the law to fix a lien on any land then owned or thereafter acquired by the defendant H. O. Skinner. That on February 9, 1909, the last-named defendant and Martin J. Arnold each owned an undivided one-half interest in lots Nos. 1, 2, 3, 8, 9, and 10 of block 5, New City block 1902, in the city of San Antonio, Bexar county, Tex., but the legal title thereto was in Arnold, the deed to said property being made to him. That the fact that Skinner owned any interest in said lots was unknown to plaintiffs until on May 13, 1900, when Martin J. Arnold and H. O. Skinner sold B. J. Cumesky Nos. 8, 9, and 10 of the same, but that the title to the other three remained in Arnold and Skinner, in which the latter owns an undivided half interest. That plaintiffs caused an execution to be issued on said judgment and the same to be levied on all the right, title, and interest that H. O. Skinner has or had in and to said three lots on January 28, 1901, or at any time thereafter up to and including May 14, 1909,

at 10 o'clock a. m. Wherefore they allege they have acquired a lien to all the right, title, and interest of said Skinner in said lots Nos. 1, 2, and 3, in block 5, New City block 1902, in the city of San Antonio, Bexar county, Tex. That Ida V. Skinner is setting up some sort of claim to the alleged interest of her husband in said lots in which plaintiffs have a lien by reason of the facts before alleged claiming that the lots are her separate property, thereby preventing plaintiffs from realizing on their judgment and the interest levied on from bringing enough to satisfy the same.

The petition closes with a prayer that upon final hearing plaintiffs have judgment that said one-half interest in said lots is subject to their judgment aforementioned, that such interest be sold to satisfy the same, and that the claim of Ida V. Skinner to said undivided half interest be decreed invalid and removed as a cloud upon the title for their costs, etc. The defendant H. O. Skinner answered the petition by a general demurrer and denial. His wife, Ida V., filed a separate answer which contains also a general demurrer and general denial, and a special denial that her husband, H. O. Skinner, owns any interest in the property in controversy, or that any interest therein ever belonged to their community estate. She further alleges in her answer that said property is and was at the date of its purchase owned, one-half by her codefendant Martin J. Arnold, and the other one-half by her as her separate property, the same having been purchased and paid for with money of her separate estate, and the title taken in the name of Arnold for convenience of transfer, and to save expense of notary fees in taking acknowledgments.

Afterwards, on June 17, 1909, the defendant Ida V. Skinner filed a motion in the case against the plaintiffs to restrain the sale of the property under the execution theretofore levied upon the same. She alleged in the motion substantially: That since the institution of the suit plaintiffs have caused B. D. Lindsey, sheriff of Bexar county, to advertise the property in controversy to be sold as under execution as the property of H. O. Skinner before the courthouse door of Bexar county on the first Tuesday in July, 1909, it being the 6th day of said month; that the suit was brought by plaintiffs, first, to have the title to the property in controversy adjudged to be in H. O. Skinner and subjected to their execution against him, and, second, to foreclose their alleged judgment lien, and that, by reason of the institution of such suit, plaintiffs elected to pursue such remedy and abandoned their right to have the property sold under execution. This motion was heard and overruled on June 19, 1909. On August 2, 1909, the defendant M. J. Arnold answered by averring

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

his ownership of an undivided one-half interest in the property in controversy, and that neither plaintiffs nor his codefendants have any interest in such undivided interest claimed by him, and that he makes no claim against plaintiffs, nor his codefendants, as to the other undivided half interest in the same. On November 9, 1909, plaintiffs filed their first amended original petition, which, after reiterating the allegations in the original one, alleges that under and by virtue of the execution issued on May 14, 1909, upon their judgment and levied by the sheriff of Bexar county on all the interest of H. O. Skinner in the property in controversy, the same was on July 12, 1909, sold by said sheriff at public outcry at the door of the courthouse of Bexar county, Tex., to the highest bidder for cash, after giving due notice of such sale as required by law, and bought in by D. Sullivan, one of plaintiffs, for them both, he being the highest bidder therefor at said sale, whereupon the said sheriff duly executed plaintiffs a deed conveying to them said property, that plaintiffs are the owners of an undivided one-half interest in and to the lots so levied upon, sold, and conveyed by virtue of such levy sale and deed, but if plaintiffs are mistaken as to the effect of said sale and conveyance, and have not acquired title to said half interest in said lots by virtue thereof, then they have a lien on an undivided one-half interest therein. The petition closes with a prayer that plaintiffs have and recover of defendants the title and possession of an undivided one-half interest in said lots so levied upon, sold, and conveyed to them; and in the alternative for a judgment against defendants foreclosing their lien on an undivided one-half interest in said property, ordering it sold to satisfy the balance due on said judgment, and decreeing the cancellation of defendant's claim thereto as a cloud upon plaintiffs' title to such undivided interest, for costs, and general relief.

By a trial amendment Ida V. Skinner alleged that since the institution of the suit plaintiffs caused the property in controversy to be sold under execution as the property of her husband; and that the sheriff, by virtue of such sale, made and delivered them a deed thereto, which she prayed be canceled as a cloud upon her title. The case was tried without a jury, and the court upon hearing the evidence ordered, adjudged, and decreed that plaintiffs have and recover of defendants H. O. Skinner and Ida V. Skinner and Martin J. Arnold title and possession of an undivided half interest in the three lots involved in the suit, subject to a charge, however, of \$1,000, without interest in favor of the defendant Ida V. Skinner; the court finding as a matter of fact, and holding as a matter of law, that there is due her such sum in her separate right, and that she has a lien upon such undivided half interest adjudged plaintiffs in the three lots,

and that upon their paying her such sum plaintiffs' title to said undivided interest shall become absolute. It was further adjudged that the defendant Martin J. Arnold is the owner in fee simple of the other undivided half interest subject to no charge whatever. The plaintiffs excepted to said judgment in so far as the same establishes the charge in favor of Ida V. Skinner of \$1,000 against the part of the land recovered by them, and gave notice of appeal. The defendants H. O. and Ida V. Skinner also excepted to the judgment in so far as the same awards to plaintiffs a recovery of title and possession of one-half of said lots and gave notice of appeal. The writ of error was sued out by the last-named defendants. Both plaintiffs and defendants in error have assigned errors.

In considering the questions raised by the assignments the defendants in error, D. Sullivan & Co., will for convenience hereafter be called plaintiffs, and the plaintiffs in error, H. O. and Ida V. Skinner, will be termed defendants. As many of the matters presented involve questions of law and facts, our conclusions of fact and law will not appear separately in what we shall have to say in disposing of them, though the opinion will be so written that the facts found will readily be distinguished by the legal mind from the law pertaining to them.

We at once overrule the defendants' first and second assignments of error, which assert that it appears from the undisputed evidence that the property in controversy was partly paid for with the separate means of the defendant Ida V. Skinner and the balance paid for from profits derived from the sale of her separate estate; and, that such facts so appearing, the court erred in rendering judgment in favor of the plaintiffs, who were execution purchasers from her husband for any interest in the property. If it so appeared as asserted in the assignments, there would be no doubt about their being well taken. But a careful consideration of all the testimony, in the light of the law pertaining thereto, has failed to lead us to such a conclusion of fact as they declare. The testimony induces us to these conclusions: H. O. Skinner having found six lots—Nos. 1, 2, 3, 8, 9, and 10, block 5, New City block 1902, in the city of San Antonio, called M. J. Arnold's attention thereto, and they together bought all of them on speculation, M. J. Arnold paying the entire purchase price of \$5,500. Skinner reimbursing him in the sum of \$1,000, and the deed was made to Arnold with the understanding that said Skinner was to have a half interest in them. Afterwards Arnold sold three of the lots—Nos. 8, 9, and 10—for \$4,500, and reimbursed himself for the amount he had advanced, leaving the three lots in controversy undisposed of.

If Skinner owned any interest in these lots, it appears from the undisputed evidence that the plaintiffs acquired such interest under

execution as alleged in their pleadings. The evidence shows that at the time the purchase was made and the purchase price paid for the six lots Mrs. Skinner knew nothing about the transaction, nor had she been informed of its contemplation, either by Arnold or her husband. Therefore, when the lots were bought and deed made therefor, the legal title was in M. J. Arnold to all the six lots. But they having been purchased by him and H. O. Skinner in accordance with their agreement, the latter became the equitable owner of an undivided one-half interest in them subject to the payment of half of the purchase money advanced by the former. Before the three lots were sold by Arnold, H. O. Skinner had paid Arnold \$1,000 of the purchase money. This, together with the sum of money received from their sale, and appropriated by Arnold in reimbursement of the amount advanced by him for H. O. Skinner for all of the lots, left the three lots in controversy free from any charge against them in Arnold's favor. If the \$1,000 paid by H. O. Skinner was his own, he then was the equitable owner of an undivided one-half interest in them. But we conclude from the evidence that it appears to a reasonable certainty that the \$1,000 paid by Skinner was not community property nor his own, but was of his wife's separate estate; her husband having taken it and used it toward paying for his half interest in the six lots.

By the sixth assignment of error, it is asserted by defendants that, inasmuch as the court found that \$1,000 of the purchase price was the separate funds of Mrs. Skinner, it erred in giving her judgment for that amount, without interest, instead of rendering judgment in her favor for the proportion of the property that such sum of money bore to the entire purchase price. The plaintiffs in reply to this concede that, if the \$1,000 was hers, the court should have rendered judgment that plaintiffs recover title to an undivided $\frac{7}{22}$ interest in the property, free from any charge, leaving the other $\frac{4}{22}$ interest in Mrs. Skinner and that the title to the other $\frac{11}{22}$ interest remain in M. J. Arnold, and prays that the judgment be so reformed in order to correct such error. Therefore, without pausing to further consider the assignment, the judgment will be reformed in accordance with the wishes of both parties.

The third and fourth assignments are predicated upon the erroneous assumption that the entire purchase price was paid with funds of Mrs. Skinner's separate estate. We can perceive no prejudicial error in the court's refusing defendant's motion for an order to suspend the sale of the property under execution; for the motion involved the same issues that were presented and disposed of in the trial of the case.

If, as is claimed in a number of plaintiffs'

cross-assignments, improper testimony was admitted over their objections, it will be presumed, inasmuch as the case was tried without a jury, that it was not considered by the court in reaching the conclusions upon arriving at its judgment.

Further than they are involved in what has been said in this opinion, the remaining cross-assignments need not be considered.

The judgment of the district court will be reformed in accordance with the wishes of the parties as indicated by what we have said in disposing of the sixth assignment, and, as thus reformed, affirmed.

STANDARD UNDERGROUND CABLE CO. v. SOUTHERN INDEPENDENT TELEPHONE CO. et al.†

(Court of Civil Appeals of Texas. Jan. 18, 1911. Rehearing Denied Feb. 15, 1911.)

1. CORPORATIONS (§ 406*)—AUTHORITY OF OFFICERS AND AGENTS—PRESIDENT.

The president of a corporation has no power to buy, sell, or contract for the corporation, nor to control its property or funds, in the absence of anything in the act of incorporation or the action of the board of directors conferring such power on him, directly or by implication.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 1611-1614; Dec. Dig. § 406.*]

2. CORPORATIONS (§ 398*)—AUTHORITY OF OFFICERS AND AGENTS—AUTHORITY OF DIRECTORS—STATUTES.

Under article 661, Rev. St. 1895, providing that the directors of a corporation shall have the general management of its affairs, and article 656, by which the directors or trustees of a corporation shall choose one of its number president, corporate powers can only be exercised under the authority of the directors.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 1592-1594; Dec. Dig. § 398.*]

3. PLEADING (§ 422*)—DEFECTS—INSUFFICIENCY OF VERIFICATION—WAIVER.

Where a corporation in its answer to an action for the price of goods pleaded the facts and by an answer of non est factum denied the authority of its president to bind it, without verifying such answer by oath of its proper officer, and there was no objection or exception to the answer on that ground, and evidence to support the answer was given, as well as evidence in rebuttal, the objection to the answer of the want of a verification is waived by the plaintiff, and no advantage thereunder can be taken in the appellate court.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 1414-1417; Dec. Dig. § 422.*]

4. EVIDENCE (§ 94*)—BURDEN OF PROOF—PROOF OF NEGATIVE—DEFECTIVE PLEA OF NON EST FACTUM.

A defective plea of non est factum, when not objected to, merely shifts the burden of proof of the contract to the defendant.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 116, 117; Dec. Dig. § 94.*]

5. CORPORATIONS (§ 410*)—OFFICERS AND AGENTS—AUTHORITY—PRESIDENT—BOARD OF DIRECTORS.

The plaintiff sold goods to an electric company, billing them to itself with drafts against

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

† Writ of error denied by Supreme Court.

the company, knowing that they were intended for use in the construction of a telephone system, and that the purchaser's contract was only with an individual contractor for the telephone company. The telephone company shortly afterwards reorganized and transferred all its property to a new company, the defendant herein, of which the individual contractor was president and contractor for the construction of its plant. The new company assumed no debts of its predecessor. The goods were never tendered or delivered to the defendant company, but the plaintiff subsequently procured defendant's president to sign a writing containing false recitals as to the claim, and to undertake therein to become liable to plaintiff for the goods. The by-laws of defendant company authorized the president to preside at meetings and to sign checks and contracts, and provided that the board of directors should manage its affairs. There was no action by the board of directors as to any part of the transaction, and they did not ratify the president's undertaking or receive any benefit thereunder. *Held*, that the president was not authorized to execute the undertaking, and that the defendant company was not liable.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 1629-1632; Dec. Dig. § 410.*]

6. CORPORATIONS (§ 306*)—OFFICERS—UNAUTHORIZED ACTS—LIABILITY TO THIRD PERSONS.

Want of authority in the president of a corporation to bind the company by the execution of an undertaking to pay for goods sold to a third person will not render the president personally liable on an implied warranty of payment.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 1457, 1458; Dec. Dig. § 306.*]

Appeal from District Court, El Paso County; A. M. Walthall, Judge.

Action by the Standard Underground Cable Company against the Southern Independent Telephone Company and against officers of defendant company in their individual capacity. Judgment for defendants, and plaintiff appeals. Affirmed.

F. G. Morris, for appellant. R. V. Bowden, for appellees.

FLY, J. Appellant instituted one suit against the Southern Independent Telephone Company to recover the value of certain construction material for a telephone line, based on an alleged contract executed in the corporate name by A. M. Brett, as president, and Lorion Miller, as secretary, and another against the persons named on the same contract in their individual capacity. The causes were consolidated, and amended petitions were filed, in one count of which it was sought to hold the corporation and in the other the individuals. The cause was submitted to the court without a jury, and judgment was rendered for appellees.

In 1901 the Southern Independent Telephone & Telegraph Company was chartered under the laws of Texas, and was authorized to construct and maintain a telephone and telegraph system in the city of El Paso. In August, 1901, the corporation made a con-

tract with A. M. Brett, and paid the full consideration to her, for the construction of its plant or system. Afterwards A. M. Brett entered into a contract with the Southern Electric & Machinery Company, by which it agreed to construct the plant or system for Brett, which she had contracted to construct for the Telephone and Telegraph Company. The Electric Company, in furtherance of its contract, purchased of appellant certain telephone cables, the value of which is sued for in this cause. The cables were shipped to El Paso early in 1902, being consigned by appellant to itself, and drafts on the Electric Company, with bill of lading attached, were sent to an El Paso bank, which was instructed to notify the Electric Company, and instructions were given not to deliver the cables until the drafts were paid. The cables were not paid for, and were finally stored by appellant in El Paso.

Appellant is a corporation, with its principal office in Pittsburg, Pa., and J. R. Wiley was its western manager, with headquarters in Chicago, Ill., and Johnston and Dean were sales agents, located in St. Louis, Mo., who acted in all the transactions herein involved under the control and direction of Wiley. In October, 1902, the appellee the Southern Independent Telephone Company, a corporation, was organized under the laws of Texas to construct, maintain, and operate a telephone system in the city and county of El Paso, and the Southern Independent Telephone & Telegraph Company transferred all of its rights, franchises, and property to A. M. Brett, and she subsequently transferred them to the Southern Independent Telephone Company, which for brevity will be called the "Telephone Company." She nor the Telephone Company assumed any liability at that time for the debts of the Electric Company, which ordered the cable from appellant. When the transfer was made, the original telephone and telegraph company discontinued business and ceased to exist, but without formal dissolution. On October 28, 1902, the Telephone Company, just organized, entered into a contract with A. M. Brett for the construction of its plant and system similar to the contract made between her and the old telephone company, and paid to her the full consideration in stocks and bonds of the corporation, and A. M. Brett immediately made another contract with the Electric Company for the construction of the plant. Appellant's manager and sales agents were fully apprised of the contracts between the old and new telephone companies and A. M. Brett and her contracts with the Electric Company, and the contracts were exhibited to them and the situation fully explained before the cable was shipped.

After the cable had been shipped, Wiley endeavored to induce A. M. Brett to assume payment for the cable, but she did not as-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

sume payment for the same, and on January 17, 1903, while Mrs. Brett was on a visit to Chicago, a letter, which was prepared by F. A. Rinehart, appellant's treasurer, in its office in Pittsburg, was presented by Rogers, Wiley's chief clerk, to Mrs. Brett for her signature. It was fully prepared for signing, and Rogers told her that, if she would sign the letter, "it would greatly appease the people in the home office, and make them feel a little more comfortable. They only wanted it to make good feeling, * * * that it was a letter strictly, and in no way a contract." The letter was signed, and is as follows: "Chicago, Ill., January 17, 1903. Mr. F. A. Rinehart, Treas. Standard Underground Cable Co., Pittsburg, Pa.—Dear Sir: At the request of your Chicago office, we write you in explanation of the facts relating to cable now in storage at El Paso, Texas, which was shipped by you to the Southern Electric & Machinery Company in January and February, 1902. This cable was ordered by the Southern Electric & Machinery Company, through Johnston and Dean, of St. Louis, Mo. The Southern Electric & Machinery Company were contractors doing construction work for the Southern Independent Telephone & Telegraph Company. When the drafts, bills of lading and receipted invoices attached arrived at El Paso they were not paid by the Southern Electric & Machinery Company. Consequently, the drafts, bills of lading and invoices went back to you at Pittsburg. The cables were, however, stored by railroad companies at El Paso, and by subsequent arrangement made with your Chicago agency, it was agreed that the Southern Independent Telephone & Telegraph Company would take the cables (which had been of course purchased for their use) and would pay the amount of your drafts, and dated January 29th, 1902, for \$3,985.19, the other dated February 12, 1902, for \$2,494.00, with interest thereon from date, and would also pay all the freight and storage charges which accumulated upon said cables at El Paso; this, of course, being subject to the understanding that when this was done there would be a rebate allowed by your company of ninety-six cents per hundred pounds on account of freight charges. Subsequently, the Southern Independent Telephone & Telegraph Company was reorganized under the name of the Southern Independent Telephone Company, which company is the present owner of the telephone franchise in El Paso, where it is intended that these cables should be used. This new company has stepped into the shoes of the old one and has assumed its undertaking to accept and pay for these cables and the charges thereon as mentioned above. This matter has been the subject of frequent negotiation with your Chicago office and the cables have been held at El Paso pursuant to our request, with the understanding that we would soon get our financial

affairs in such shape as to be able to take and pay for the cables. We have written this letter because we understood from your Chicago agent that the Standard Underground Cable Company is uneasy about the situation, and we desire you to know that we expect very shortly to get our financial arrangements made so as to be able to discharge our obligations, that we appreciate that the time was given by your company and the cables were allowed to remain at El Paso instead of being shipped away, upon the distinct understanding which has been recognized by this company that it would take and pay for the cables, together with interest on the invoice price and all freight, storage and other charges which may have accrued at El Paso, subject, however, to the deduction for freight hereinbefore referred to, and a reduction in the aggregate amount of the two bills, to \$7,636.69, including reels which will be credited to us at invoice price when returned to factory, charges prepaid. Yours Truly [Signed] Southern Ind. Tel. Co., by A. M. Brett, President. Lorion Miller, Secretary." There had been no previous understanding as to binding the Telephone Company for the cable, nor was there any at the time the letter was signed. At that time the cable was in the possession of appellant in El Paso, Tex., and so remained until it was damaged by fire on January 29, 1905. After the fire, appellant shipped the damaged cable to Pittsburg and used it in its factory, crediting the account with \$3,049.85, all that could be realized for it. The cable was at all times in the possession of appellant, and was insured in El Paso by appellant, and it collected from the insurance companies, in full for the damages by fire, the sum of \$3,640.94.

Mrs. A. Brett was president of the old telephone and telegraph company and W. V. Smith was its secretary, and, from the date of the organization of the present Telephone Company to a period beyond that in which transactions involved in this suit were had, she was its president, and Lorion Miller was its secretary. The president was authorized by the by-laws "to preside at all meetings of the stockholders and of the directors, and to attend meetings of any committee when requested by the chairman, to sign all checks and certificates of stock, contracts, and instruments, and to cause the seal of the corporation to be attached thereto when required." No action was ever taken by the board of directors of the Telephone Company relative to the cables or any of the transactions in controversy in this action, and no tender of the cables was ever made to the Telephone Company, nor was any contract ever made by the original Telephone and Telegraph Company with appellant or any one else in connection with the cables, and the present Telephone Company never at any time assumed any obligation in relation thereto with appellant or any one else. The Tele-

phone Company never had any communication with appellant, or its agents, relative to the matters in controversy, unless the letters of Mrs. Brett can be considered its letters. There was never any agreement on the part of the Telephone Company to purchase or pay for the cable, unless the letter herein copied be construed as such agreement. The by-laws of the appellee Telephone Company provided that the board of directors should have the management and control of the affairs of the corporation, and Mrs. Brett was never its general manager, nor had any authority as president, except as conferred by the by-laws. The Electric Company agreed with Mrs. Brett, in her capacity as contractor, to furnish all material to construct the plant, and charge the same to her at the cost thereof plus 5 per cent., and in the purchase of the cable it was arranged by and between the Electric Company and appellant that the cable should be billed to the former at about \$1,500 in excess of the market value and in excess of what appellant was to receive, the purpose being to enable the Electric Company to obtain from A. M. Brett such excess, denominated by witnesses a "rake off," and that excess or "rake off" is included in the amount which appellant seeks to recover from the appellees. The latter knew nothing about the "rake off" until after the letter of January 17, 1903, was signed. In the petition on which this cause was tried no credit was allowed for the \$3,640.94, received by appellant from the insurance companies. The letter signed by Mrs. Brett and Miller could not have evidenced a settlement of any matters between appellant and the Telephone Company, nor the acknowledgment of an existing debt, because up to that time there had never been any transactions or negotiations of any character whatever between the parties, and there was no existing debt, and the authorities cited by appellant refer to settlements of pending difficulties or transactions between the parties. It would be absurd to discuss matters of settlement between the parties where there were none to be settled. It was proved beyond doubt that there had never been any negotiations between appellant and the old or new Telephone Company as to the purchase of the cables, and the recitals or statements to that effect in the letter were utterly false, and had no foundation whatever in fact, and were concocted by Rinehart, appellant's treasurer, in Pittsburg. The assumption of an imaginary debt of the old telephone company could not bind any one, for the simple reason that it was imaginary, and had no existence and could not be assumed. The recitals that the Electric Company was doing construction work for the old company was untrue, and appellant knew it at the time the letter was signed, and it knew that it had never been agreed that the old company would take the cables and pay

the drafts of appellant and freight and storage charges, and that no negotiations had ever taken place between appellant and the appellee Telephone Company about cables or otherwise, and knew that it had never assumed the debt or in any manner recognized it as binding the corporation. There is in the letter no assumption of the debt, and the narration of a number of falsehoods could not have the effect of rendering the Telephone Company or any one else liable for the debt of another with which it was in no privity whatever. The Telephone Company had not at that time received any consideration for the assumption of the debts of the Electric Company, and its assumption of a debt founded upon the recital of a tissue of falsehoods did not bind it to pay the debt.

In the case of *Howard v. Windom*, 86 Tex. 560, 26 S. W. 483, cited by appellant, the letter construed by the court had reference to a promissory note executed by the writer of the letter, and the only question was whether the writer had stayed the running of the statute of limitation by his language, and renewed his debt. It has no applicability to the facts of this case. In the case of *Lumber Co. v. Dickey*, 27 S. W. 955, decided by this court, and cited by appellant, the parties had a settlement of open accounts between them, and Dickey acknowledged that on a settlement he was indebted to the lumber company, and there was no claim that there had been any mistake or fraud, and, of course, Dickey was held liable on his acknowledgment of his indebtedness, and that he could not go back of it. That decision gives no aid nor comfort to appellant in this case. In the case of *Lenz v. Railway Company*, 111 Wis. 193, 86 N. W. 607, cited by appellant, the Supreme Court of Wisconsin held that, where one railroad company bought the property of another and assumed its debts, it was liable for such debts, but it did not hold that an assumption of the debts of the railroad which had no existence rendered it liable to pay the debts of still another party. It is apparent from a letter written on April 24, 1903, by appellant's general manager to Mrs. Brett, that appellant did not consider that the property had been sold to the Telephone Company, or that it was bound for the purchase money, for he speaks of returning the cables to Pittsburg, and wanted Mrs. Brett to inform him "frankly what the prospect is for you to take the cables and pay for them immediately."

It clearly appears that the directors of the Telephone Company had never authorized Mrs. Brett to buy any material or assume any debts for them, and the by-laws did not clothe her with any such authority, and the general law as to the authority vested in the president and secretary of a corporation to make purchases, or to assume the indebtedness of another, must be looked to to deter-

mine the power and authority vested in Mrs. Brett. It is the general rule that the president of a corporation has no power to buy, sell, or contract for the corporation, nor to control its property or funds, in the absence of anything in the act of incorporation or the action of the board of directors clothing him with such power. He has without such special authority no more control over the corporate property and funds than has any other director. *Titus v. Railroad*, 37 N. J. Law, 98; *Potts v. Wallace*, 146 U. S. 689, 13 Sup. Ct. 196, 36 L. Ed. 1135; *Wait v. Nashua Ass'n*, 66 N. H. 581, 23 Atl. 77, 14 L. R. A. 356, 49 Am. St. Rep. 630; *Brush v. Montgomery*, 114 Ala. 433, 21 South. 960; *Hamilton v. Bates* (Cal.) 35 Pac. 304. In the last case cited, it was held that a corporation cannot be held liable where its president, without corporate action, being shown, assumed the debts of a person, even though the money arising from the transaction came into possession of the corporation. In the case now at bar, no action was taken by the directors or stockholders of the corporation in regard to the cables either before or after the letter was signed by Mrs. Brett, and there is no claim of the ratification of her acts by the corporation. No advantage was gained or profit reaped by the Telephone Company by reason of the execution of the contract. The rules in regard to presidents of corporations organized under the laws of Texas are laid down in *Fitzhugh v. Franco Land Company*, 81 Tex. 306, 16 S. W. 1078, and in *Land Co. v. McCormick*, 85 Tex. 416, 23 S. W. 123, 34 Am. St. Rep. 815, and it is held that the president could not bind the corporation without authority from the board of directors, either given directly or by implication. It is not claimed that any such authority was given by the board of directors of the Telephone Company.

It is provided in article 661, Rev. St. 1895, that the directors shall have the general management of the affairs of the corporation, and it is provided in article 656 that such directors or trustees shall choose one of their number president, and shall appoint a secretary and treasurer and such other officers as they may deem necessary for the corporation, and it is clear that corporate powers can only be performed under the authority of the board of directors. Neither the statutes nor the by-laws conferred any power on the president to buy material for the corporation, the only power given him in the by-laws in connection with contracts being the authority to sign them, of course, after they have been authorized by the directors. Mrs. Brett never informed Wiley that she was buying the material for the corporation, but told him she was purchasing the supplies for herself. He knew that she wanted the supplies as a contractor. The following cases are in point: *Murray v. Lumber Co.*, 143

Mass. 250, 9 N. E. 634; *Lyndon Mill Co. v. Lyndon Lit. Inst.*, 63 Vt. 581, 22 Atl. 575, 25 Am. St. Rep. 783; *Des Moines Mfg. Co. v. Telford Milling Co.*, 9 S. D. 542, 70 N. W. 839. In the cited case of *Lyndon Mill Co. v. Lyndon Literary & Biblical Inst.*, the president and four of the trustees determined to make repairs for the corporation, and the president bought the lumber and it was charged by the milling company to the appellee, and the Supreme Court of Vermont said: "A single trustee or director has no power to act for the institution which creates his office, except in conjunction with others. It is the board of trustees or directors only that can act. If the board of trustees or directors makes a president, trustee, or any other person its officer or agent to act for it, then such officer or agent has the same power to act, with the authority delegated to him, as the board itself. His authority is in such case the authority of the board. It not appearing that Hall was authorized by a majority of the defendant's trustees to purchase the lumber in question upon the credit of the defendant, the case must be disposed of upon the assumption that he had no such express authority."

Appellant knew that Mrs. Brett had a contract with the Telephone Company to furnish all material and construct the plant, knew that the statements in the letter were false, and that Mrs. Brett had no authority, express or implied, to bind the Telephone Company. Appellant knew that, if the trade had been consummated, it was for the benefit of Mrs. Brett, and not for the corporation. That she so informed Wiley is uncontradicted. It would not matter what authority Mrs. Brett had from the corporation. She was not representing the corporation in signing the letter, and appellant knew it. However, Mrs. Brett was not the general manager of the corporation, and had no authority to purchase material for it.

The Telephone Company fully pleaded the facts connected with this transaction, and denied the authority of Mrs. Brett to bind it, and the answer was not excepted to by appellant on the ground that it was not verified by affidavit, although several exceptions were filed. No objections were urged to the testimony tending to support the answer, and it is only after the cause is filed in this court that the position is assumed that the court erred in holding that the contract was not executed by authority of the Telephone Company, "because there was no valid or effectual pleading by defendant of the issue of non est factum, in that its pleading denying the authority under which said contract was executed was not verified by oath of defendant, or its proper officer or agent." None of the decisions cited by appellant supports its contention. Those cases turn on objections to evidence when offered on pleas not verified

by affidavit, but none of them holds that a plaintiff can keep silent as to the plea of non est factum in the trial court, and raise no objection to evidence offered by the defendant, and even offer original evidence to show authority in the president to bind the company and in rebuttal of the plea, and then obtain full benefit of the defects in the plea in the appellate court. The authorities are against the proposition of appellant. In the case of *Williams v. Balles*, 9 Tex. 61, it was held: "The defendant could not be permitted to throw upon the plaintiff the burden of proving the execution of the instrument or the cause of action, although under such defective plea, if not objected to in time, he might adduce evidence to support his own defense." That decision is cited with approval in *Insurance Co. v. Wicker*, 93 Tex. 390, 55 S. W. 740. The defective plea merely shifts the burden of proof from the plaintiff to the defendant, if it is not assailed, and, if he fails to establish his plea by proof, the plaintiff will recover. In the case of *Fisher v. Bowser*, 1 Posey, Unrep. Cas. 346, the court, after copying the statutes as to pleas of non est factum, said: "These statutes have no ambiguity in language used, and the courts have applied them as written. A plea of non est factum not sworn to requires, as does a general denial, the production of the instrument declar-

ed on. As to imposing upon the party pleading such instrument the burden of proving its execution, or his cause of action stated therein, it is a nullity. It may, if not excepted to, perhaps, form the basis of allowing the defendant the right to introduce his testimony, with the burden against him. *Williams v. Balles*, 9 Tex. 64; *Drew v. Harrison*, 12 Tex. 279."

Mrs. Brett made no representation that she had authority to execute the contract for the corporation, and she told the general manager of appellant that she was buying supplies for herself. The material was never tendered nor delivered to the company, nor was there any offer to deliver it. As late as July, 1904, appellant wrote Mrs. Brett, as an individual and not as an officer, agent, or representative of appellee Telephone Company, and inquired as to when she would take the cables. Appellant was charged with knowledge that Mrs. Brett had no authority to bind the company. Appellant claims that the cables were sold to the Telephone Company, and not to Mrs. Brett, and, knowing that she had no authority to bind the corporation, she could not be held on an implied warranty.

The conclusions of fact, together with our conclusions of law, dispose of all the assignments of error.

The judgment is affirmed.

JAMES v. HOLDAM et al.

(Court of Appeals of Kentucky. Feb. 24, 1911.)

1. WITNESSES (§ 139*)—COMPETENCY—TRANSACTIONS WITH DECEASED.

One of several heirs, suing to annul an erasure in a deed whereby decedent's wife's name was substituted for decedent's, was disqualified to testify that he drew the deed and that it was drawn and delivered to decedent.

[Ed. Note.—For other cases, see *Witnesses*, Cent. Dig. §§ 582-597; Dec. Dig. § 139.*]

2. FRAUD (§ 50*)—PRESUMPTIONS.

Fraud is not presumed.

[Ed. Note.—For other cases, see *Fraud*, Cent. Dig. § 46; Dec. Dig. § 50.*]

3. ALTERATION OF INSTRUMENTS (§ 27*)—EVIDENCE—PRESUMPTIONS.

Changes in an instrument, such as the name of a grantee, are presumed to have been made before delivery, and the burden is on one charging a fraudulent alteration to prove it.

[Ed. Note.—For other cases, see *Alteration of Instruments*, Cent. Dig. § 234; Dec. Dig. § 27.*]

4. ALTERATION OF INSTRUMENTS (§ 29*)—EVIDENCE—SUFFICIENCY.

Evidence held insufficient to show a fraudulent substitution of decedent's wife's name for decedent as grantee in a deed.

[Ed. Note.—For other cases, see *Alteration of Instruments*, Cent. Dig. §§ 259-263; Dec. Dig. § 29.*]

Appeal from Circuit Court, Lincoln County.

Action by Louana J. Holdam and others against Margaret B. James. Judgment for plaintiffs, and defendant appeals. Reversed and remanded.

Geo. E. Stone, P. M. McRoberts, and Jas. S. Pirtle, for appellant. Edelen & Davis, for appellees.

HOBSON, C. J. J. W. James died intestate on February 25, 1906, without issue, and this suit was brought against his widow, Margaret B. James, by his sisters and the children of a deceased brother, as his heirs at law, who alleged in their petition that on June 28, 1901, Catherine McAllister sold and conveyed to J. W. James a tract of land in Lincoln county, and that after she had delivered the deed to him some person without right or authority fraudulently erased the name of J. W. James from the deed, and substituted therefor the name of M. B. James; that James died the owner of the land. They prayed that the erasure in the deed be held void, and that they be adjudged the owners of the land, which was then in the possession of Margaret B. James. An answer was filed by Margaret B. James, in which the allegations of the petition as to the mutilation of the deed were denied, and it was alleged that she was the owner of the land. Proof was taken, and on final hearing the circuit court entered a judgment in favor of the plaintiffs as prayed. Mrs. James appeals.

J. F. Holdam, who was one of the plaintiffs in the case, gave a deposition in which he

testified that he drew the deed referred to; that it was drawn as a deed to J. W. James; that, after he drew it, it was signed by Mrs. McAllister, and then delivered by him to James. This is the sum of his evidence. The circuit court sustained the defendant's exceptions to this deposition, on the ground that he was testifying for himself as to a transaction with the decedent. This was proper. James, being dead, cannot testify as to what took place between him and Holdam; and Holdam cannot testify for himself as to these matters. Holdam is not only a party to the action, but is interested in the recovery, as his wife is a sister of James, and, if she recovers the land, he will take an interest in it as her husband, if he survives her.

The only other evidence in the record is the testimony of the county clerk, who recorded the deed, and Mrs. James, who was put on the stand by the plaintiffs. The county clerk testified that J. W. James brought the deed to him and ordered it recorded; that on the back of the deed the name of J. W. James appeared, but that, on opening the deed, he found that the deed was made to M. B. James. This is all that he knows about the transaction. The sum of Mrs. James' evidence is that she was not present when the deed was executed, and did not see the deed until several months after her husband's death. Her testimony shows, in substance, that she had no personal knowledge as to how the deed was written, or when or why or by whom any change was made in it. She also testified that her husband always told her that the place was hers; that he told her this from the time he bought the land, telling her to improve it all she wanted to, as it was hers.

The original deed itself has been brought up for our inspection. It shows on its face that, as it was originally written, J. W. James was the grantee; that the letters "J. W." have been erased, and the letters "M. B." written in the place of them. It also shows in one place that the word "his," before the words "heirs and assigns," has been changed to "hers," and in another place the word "his" has been left unchanged. There is absolutely no proof in the record as to when or by whom the changes in the deed were made. It is very evident, from all the proof, that they were made before the deed was lodged with the county clerk for record; for the record in the county clerk's office corresponds with the deed as it now appears.

The law does not presume fraud. It does not presume, in a case like this, that a change was made in a written instrument without authority. The presumption in such cases is that all changes made in a written instrument were made before delivery, and the burden of proof to show fraud is on him who charges fraud. *Letcher v. Bates*, 6 J. J.

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

Marsh, 526, 22 Am. Dec. 92; Welch v. Chandler, 13 B. Mon. 420; 1 Greenleaf on Evidence, § 564; N. W. Trust Co. v. Levtzow, 23 S. D. 562, 122 N. W. 600; Farmers' Nat. Bank v. McCall, 25 Okl. 600, 106 Pac. 866, 26 L. R. A. (N. S.) 217; Ernster v. Christianson (S. D.) 123 N. W. 711.

The deed did not come from the possession of M. B. James. It was in the possession of J. W. James, and came out of his possession, when delivered by him to the county clerk, in the condition it is now in. The plaintiffs sue as his heirs and stand in his shoes. It is evident that J. W. James knew that this land stood in his wife's name. He had the deed recorded in this condition, and lived five years thereafter, telling his wife that it was her land. Now that he is dead, the deed cannot be assailed for fraud by his heirs at law, who claim under him, merely because it appears on the face of the deed that alterations were made in it after it was first written. Under the proof, the court should have dismissed the petition.

Judgment reversed, and cause remanded for a judgment as above indicated.

ILLINOIS CENT. R. CO. v. MAYES.

(Court of Appeals of Kentucky. Feb. 21, 1911.)

1. DAMAGES (§ 132*)—PERSONAL INJURIES—EXCESSIVE DAMAGES.

In an action for personal injuries by a laborer, an award of \$1,999 damages was not excessive, where the injury caused strangulated hernia that confined the man to his bed for some weeks and necessitated a dangerous surgical operation, coupled with a loss of time, amounting to \$95 and \$205 expended for medical attention, together with the pain and permanent impairment of earning capacity.

[Ed. Note.—For other cases, see *Damages*, Cent. Dig. §§ 372-385; Dec. Dig. § 132.*]

2. MASTER AND SERVANT (§ 191*)—INJURIES TO SERVANT—NEGLIGENCE OF FELLOW SERVANTS—LIABILITY OF MASTER.

Where a servant is injured through the negligence of a servant in a different department of service, the master is liable, though negligence is slight, and a section hand shoveling cinders from a car can recover for the slight negligence of those in charge of an engine which bumped into the car.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. §§ 475-479; Dec. Dig. § 191.*]

3. MASTER AND SERVANT (§ 278*)—INJURIES TO SERVANT—FELLOW SERVANTS—GROSS NEGLIGENCE—EVIDENCE.

Where a servant shoveling cinders out of a car was injured by the jar from the manner the engine was bumped into the car to loosen the cinders, evidence held to warrant a finding that the negligence was gross.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. §§ 954-972; Dec. Dig. § 278.*]

4. APPEAL AND ERROR (§ 1068*)—REVIEW—HARMLESS ERROR—INSTRUCTIONS.

Although an instruction warranted the jury in awarding punitive damages, it was harmless, if the award was only compensatory.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. § 4228; Dec. Dig. § 1068.*]

Appeal from Circuit Court, Graves County. Action by Isam Mayes against the Illinois Central Railroad Company. From a judgment for plaintiff, defendant appeals. Affirmed.

Trabue, Doolan & Cox, C. L. Sivley, and Robbins & Thomas, for appellant. Stanfield & Stanfield, for appellee.

LASSING, J. This is an appeal from a judgment of the Graves circuit court, awarding appellee \$1,999 for injuries sustained through the alleged negligence of other employes of the appellant company. The facts out of which the litigation grows are as follows: The plaintiff, a negro man, 54 years of age, was, on October 26, 1909, as one of a special gang of sectionmen, engaged in gauging and spiking the track at a point near Kevill's Mill in Mayfield, a short distance north of the passenger depot. About 10 o'clock in the day four or five car loads of cinders were hauled in by a local freight train from Paducah. These cars were to be unloaded on the track, at or near the place where the work was being done, by the crew of which appellee was a member. Upon being placed on the main track, the engine was cut loose from the cars containing the cinders, and the plaintiff and other members of his crew were ordered by the section foreman under whom they were at work to unload the cars with shovels. This they proceeded to do. While he was on the car engaged as indicated, an engine was bumped into the cars for the purpose of dislodging the cinders, after the sides of the cars, which were on hinges, had been opened up. When the engine struck the car, but little, if any, warning was given that it was going to do so, and it appears reasonably certain from the evidence that appellee did not get this warning until just at the moment of the impact, when some one shouted, "Look out." He tried to save himself by grabbing to the side of the car, but was thrown so violently that, although he caught the side of the car, his hold was broken loose, and he fell on his back upon an iron piece or bar in the bottom of the car, producing the injury complained of. Thereafter he underwent a surgical operation for strangulated hernia, which confined him to his bed for some weeks, and, at the date of the trial, he was still complaining of the effects of the injury.

Considering the fact that he had been compelled to go to an expense of \$205 for medicine and medical treatment, and had lost three months' time, for which he sought to recover \$95 (leaving but \$1,699 as compensation for his pain and suffering and the permanent impairment of his power to earn money), it is apparent that the claim on the part of appellant, that the verdict is grossly excessive, cannot be seriously considered. In

fact, according to the weight of the testimony, the injury for which appellee had to undergo the operation was a serious one, and that he has suffered greatly because thereof, there is no room for doubt. As it is apparent that he will hereafter suffer and be greatly inconvenienced because of this injury, we are further of opinion that the damages awarded were not more than strict compensation, and, although authorized by the instructions, if they found the negligence gross, to award punitive damages, the jury allowed only for compensation.

Appellant complains of the instructions on the measure of damages, and insists that in the form given it permitted the jury to award double damages, in authorizing a recovery for such time as the appellee has lost, and it was reasonably certain he would lose, and also for the permanent impairment of his power to earn money, and cites and relies upon the case of *Blue Grass Traction Co. v. Ingles*, 140 Ky. 488, 131 S. W. 278. In that case it is expressly stated that, if an instruction along the line indicated in his brief by appellant is desired, it must be requested. No such request was made; and hence the failure of the court to give this instruction cannot be relied upon as reversible error.

Appellant's most serious contention is that the court permitted the plaintiff to recover for the failure on the part of the appellant's servants in charge of the work to exercise ordinary care for his safety; whereas, it is most earnestly contended, no recovery could be had under such circumstances, except for the failure to exercise slight care, i. e., except for gross negligence. As between employes associated together in the conduct of the work, the principle contended for by appellant has been frequently applied, and in such cases no recovery can be had, except the negligence be gross. But as to employes in a different department of the service, ordinary negligence may be, and frequently is, held to be sufficient to justify a recovery. In *L. & N. R. Co. v. Brown*, 127 Ky. 732, 106 S. W. 795, 32 Ky. Law Rep. 552, 13 L. R. A. (N. S.) 1135, this rule is thus stated: "But when the servant is injured by employes of the same master, who are not directly associated with him, and with whom he is not immediately employed, and whose qualifications for the place they occupy he has no means of knowing, and in whose selection he has no voice, and over whose conduct and actions he has no control, and against whose carelessness and negligence he cannot protect himself, he may recover damages from the master for injuries received through their negligence, whether it be ordinary or gross, and without any reference to the position or place the servant causing the injury holds." Here the negligence, if any, consisted in the bumping of the engine into the cinder car without giving timely or

sufficient notice to enable appellee to protect himself from injury. Appellee was a member of a section gang, and was in no wise connected with the operation of the engine or the train, but was engaged in an entirely different department. Hence he may recover for ordinary negligence, if only ordinary negligence is shown. But, upon a consideration of the entire record in this case, we are of opinion that the jury would have been warranted in finding the negligence gross; for the section foreman testifies that the proper and usual way to unload these cars is to set the brake, and then have the engine move five or six feet away and bump into the cars, and shake them so that the cinders will fall therefrom. According to his testimony, when the bumping is properly done, the cars are not moved at all, the brakes being set; but here the bump was so hard that, although the brakes were set, the cars were moved from 6 to 30 feet; the testimony of the witnesses varying. Hence the plea that the bump was unusual, violent, and unnecessary is supported by an abundance of proof. Had the bump been no heavier than the foreman says was usual, no injury would have resulted.

We do not pass upon the question as to whether or not the punitive damage instruction was authorized, for we are satisfied that no more than compensation was allowed, and such instruction was not prejudicial.

Judgment affirmed.

LOUISVILLE & N. R. CO. v. ROE.

(Court of Appeals of Kentucky. Feb. 24, 1911.)

1. MASTER AND SERVANT (§ 217*)—INJURY TO SERVANT—ASSUMPTION OF RISK.

Where a railroad maintains obstructions over its tracks which imperil the safety of servants whose duty carries them upon the top of cars, the servant's knowledge of the existence of these obstructions does not cause an assumption of risk.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. § 596; Dec. Dig. § 217.*]

2. MASTER AND SERVANT (§ 286*)—INJURY TO SERVANT—NEGLIGENCE—EVIDENCE.

In an action for personal injuries received by a train brakeman in consequence of being struck by a tunnel gauge and thrown from a car, the question of the railroad's negligence *held*, under the evidence, to be one for the jury.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. §§ 1010-1050; Dec. Dig. § 286.*]

3. DAMAGES (§ 132*)—PERSONAL INJURIES—MEASURE OF DAMAGES.

Where a young man 19 years old had his right wrist broken, was bruised and injured about the body and face, and his hearing was probably permanently impaired, \$2,600 awarded as damages was not excessive, but only compensatory.

[Ed. Note.—For other cases, see *Damages*, Cent. Dig. §§ 372-385; Dec. Dig. § 132.*]

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

4. APPEAL AND ERROR (§ 1068*)—REVIEW—HARMLESS ERROR—INSTRUCTIONS.

Where a jury awards only compensatory damages, an instruction allowing them to award punitive damages is harmless error.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4228; Dec. Dig. § 1068.*]

5. DAMAGES (§ 216*)—PERSONAL INJURIES—INSTRUCTIONS—PAIN AND SUFFERING.

An instruction upon the question of damages in a personal injury case, which charged that, if the jury found for the plaintiff, they should award him what they believed to be a fair compensation for the mental and physical pain endured, and for what pain and suffering he would thereafter endure, is not defective in failing to charge that there should be no award, unless it was reasonably certain that future pain and suffering would ensue.

[Ed. Note.—For other cases, see Damages, Cent. Dig. §§ 548-555; Dec. Dig. § 216.*]

6. TRIAL (§ 234*)—INSTRUCTIONS—EVIDENCE.

Where an instruction on the measure of damages allowed the jury to award a fair compensation for pain and suffering, and for future pain and suffering, including fair compensation according to the evidence for loss of time, and diminished earning power from injuries believed to be permanent, it cannot be taken to allow compensation for a mere belief in a loss of time or earning power, not based on evidence.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 535; Dec. Dig. § 234.*]

7. TRIAL (§ 260*)—REFUSAL OF INSTRUCTIONS.

Where the instructions fully cover the case, others may be refused.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 651; Dec. Dig. § 260.*]

Appeal from Circuit Court, Whitley County.

Action by Thomas Scott Roe, by his next friend, against the Louisville & Nashville Railroad Company. From a judgment for plaintiff, defendant appeals. Affirmed.

H. H. Tye, J. W. Aicorn, Chas. H. Moorman, and Benjamin D. Warfield, for appellant. J. N. Sharp, for appellee.

MILLER, J. The appellee, Roe, aged 19, and a freight brakeman in the employment of the appellant railroad company, was injured on September 13, 1907, while in the discharge of his duties near Solway Tenn., immediately north of the "Copper Ridge Tunnel."

On April 21, 1907, an accident in the tunnel had resulted in a caving in of about 319 feet of the tunnel, thereby closing it for that distance and rendering it unfit for the use of appellant's trains. It was not until June 20, 1907, that appellant succeeded in clearing the tunnel, so that it could be used by its trains; and during the period between April 21, 1907, and June 20th of that year, appellant used the tracks of the Southern Railway Company over a different route. By June 20th the debris had been removed from the tunnel, and it was again used for the passage of appellant's trains. It was necessary, however, that the tunnel should be made safe for future use, and, with that purpose in view, the appellant put a force of from 50 to 75 men at work enlarging the

tunnel opening through the mountain, and putting in a concrete lining in place of the timber lining that had theretofore supported the opening. It was considered that the concrete lining was to be preferred, both on account of its strength and durability and the elimination of the danger from fire. This work took about three months, and was not completed until about September 28, 1907. During the time the improvements were being made in the tunnel, appellant sent about 25 trains through the tunnel every day. In order to carry on the work, scaffolding and other appliances used in that character of work were erected in the tunnel, and this necessarily reduced the space therein which would ordinarily be used for the trains. The timbers were so arranged as to leave sufficient space only to permit cars of ordinary size to pass through the tunnel; and in order to guard against sending into the tunnel cars that were too large to pass safely through the opening while the scaffolding was there, a tunnel gauge was constructed about a half mile distant from each opening of the tunnel. These gauges were constructed by placing poles upon either side of the track, and by placing over the track, and attached to the poles, light pieces of timber that would leave a space in width and height on the sides of and above the track that was equal to the open space left between the timbers in the tunnel through which the cars would pass. In this way it was easy to determine when a car was too large to go through the tunnel without striking the scaffolding; for, if the car, either by its great width or its height, would strike the side or the top of the tunnel gauge, either of those facts would show that the car was too large to pass safely through the tunnel, and it would then be cut out of the train and sent back. The tunnel was about 2,300 feet in length, and this precaution was necessary for the protection of the men at work inside of the tunnel. Roe was front brakeman on a north-bound freight train composed of from 30 to 35 cars. After the train had passed through the southern tunnel gauge and through the tunnel, it went onto a side track just north of the tunnel for the purpose of permitting a south-bound train to pass. After the south-bound train had passed, Roe's train started north, and he threw the switch that let his train pass onto the main track. He then climbed back to the top of a box car, and walked back to the fourth car for the purpose of transmitting to the engineer the signals that were expected from the flagman when the rear end of the train had passed from the switch to the main track. When that was accomplished, it was necessary for the flagman to throw the switch, lock it, and get back onto the train; and, as it required from one to two minutes for this to be done,

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

the train was required to slow up, in order that the flagman might regain the train. At this point the track curved to such an extent that the engineer could not see the flagman, and it was necessary for Roe, being the front brakeman, to pass the signals from the flagman to the engineer. While Roe was standing or walking along upon the top of the fourth box car, looking southwardly for the signal from the flagman, and with his back toward the engine, the car passed under the tunnel gauge and knocked him off, and onto a gondola car, which was the next car in the train. His right arm was broken near the wrist, his face was bruised, his knee was hurt, and it is claimed that his hearing in one ear has been permanently injured. He sued the company and recovered a verdict for \$2,600, and from the judgment based upon that verdict, the company appeals.

The grounds relied upon by the appellant for a reversal are: (1) That the trial court erred in not sustaining appellant's motion for an instruction peremptorily directing the jury to find for it; (2) that the damages are grossly excessive, due, as it is claimed, to an instruction which authorized the jury to award punitive damages in addition to compensatory damages; and (3) that the court erred in instructing the jury, and also in refusing to give instructions asked by appellant.

The argument for a peremptory instruction for the appellant is based principally upon the fact that Roe had been working for appellant for a year; that the gauge was in full view of persons on the train; that appellee was an experienced brakeman; and, further, that he knew of the existence of the tunnel gauge that struck him and caused the injury. It is true, Roe had been working for appellant for about a year as a brakeman on freight trains which passed through the Copper Ridge tunnel, but he had been sick and had laid off for some two weeks before he was hurt; and the train on which he was hurt was the first on which he worked after the gauge was erected. The only information that Roe had of the existence of the tunnel gauge had been acquired a short time before the accident, while he was traveling over this route on the rear end of a passenger train, when his attention had been called to it by a fellow passenger. He saw it, but there is no evidence that he knew its size, the height of the top crosspiece of the gauge, or that he noticed its exact location with reference to the road. He says he did not know of the presence of the gauge at the time he was struck, and that no one had called his attention to it. The appellant contends, however, that notice had been given of the existence and location of the tunnel gauge by bulletins posted upon the bulletin boards at the principal stations along the road, and that it was Roe's duty, under the rules of the company, to read these

bulletins for the purpose of protecting himself against injury from temporary obstructions which the company might find necessary to place along its track. Roe denies that he ever saw or read a bulletin in connection with the existence of this tunnel gauge, and there is no evidence beyond the fact that he saw it from the passenger train, above referred to, that he had ever seen or knew of it. The tunnel gauge had been placed there for the protection of the tunnel and the men at work in the tunnel. Under this state of facts, was the company entitled to a peremptory instruction?

The duty of the company is laid down as follows in 26 Cyc. 1130: "A railway company is bound to exercise reasonable care and diligence to prevent obstructions or erections on, over, or near its tracks which are a source of danger to its servants, and will be held liable for injuries occasioned by its neglect of duty. If a railway company knowingly maintains or permits a bridge over its track so low that brakemen cannot perform their duties on the top of the cars with reasonable safety, it is liable to a brakeman who, having no knowledge of the dangerous character of the bridge, is struck by it and injured while in the performance of his duty. In the absence of a statutory requirement on the subject, the failure of a railway company to maintain whipping straps, teltales, or bridge guards to warn brakemen who are on top of a train that it is about to pass under a bridge so low as to imperil their lives is not legal negligence, unless such devices are so manifestly serviceable as to command the consensus of intelligent railroad men, and such men do not honestly differ in judgment as to their utility."

A tunnel gauge, in construction and effect, is very similar to an overhead bridge, except that it is usually more dangerous to brakemen, since it generally leaves a smaller space above the top of the car. While a bridge may have any height above the top that convenience of construction may dictate, a tunnel gauge, having been made for the purpose of measuring the contracted space within the tunnel, must necessarily be no larger than that contracted space.

The question of a railroad's duty and liability to its employés in the construction of overhead bridges was carefully considered in *Cincinnati, etc., R. Co. v. Sampson's Adm'r*, 97 Ky. 65, 30 S. W. 12, 16 Ky. Law Rep. 819, where this court laid down the following rule as to the reciprocal rights and duties of the railroad company and its employés in cases of that character: "The employé assumes the ordinary risks pertaining to an employment that is often and necessarily attended with much danger, but this does not exempt the railroad company from liability when reasonable precaution on its part would save its employé from harm, and in a case like this where the exercise of the slightest care

would have prevented the accident. There can be and has been no reason assigned in this case why a corporation with the means to construct a railway would, in the construction of small or large bridges, leave them in such a condition as involves its employés [brakemen] in imminent peril when passing through them, when with a small expenditure such structures in this regard could be made perfectly safe. We are aware of many reported cases, some of which have been referred to by counsel, where the absence of ordinary care and the means of knowing the condition of the bridge by the employé have been held as relieving the railway company from responsibility in such cases. This court, however, has not followed or approved those decisions in reference to such structures, but, on the contrary, in the case of *Derby's Adm'r v. Kentucky Central Railroad Company*, 4 S. W. 303, 9 Ky. Law Rep. 153, plainly intimated that, if the intestate in that case had been required to be on top of the car as it passed through the structure in discharge of his duty, and was killed by reason of its being too low for the cars to pass under, the brakeman standing erect upon them, a recovery would have followed. In that case the jury by their verdict said the structure was sufficiently high to enable one standing erect on the cars ordinarily used by the company to pass through safely, and the judgment for the defendant was affirmed not only on the ground that the intestate knew the car he was on was too high for him to stand upon, but for the additional reason that he was master of the train, and had made it up, placing in the train this high car that belonged to another road."

In *Louisville & Nashville R. R. Co. v. Cooley's Adm'r*, 49 S. W. 339, 20 Ky. Law Rep. 1372, Cooley was a brakeman on a freight train, and while sitting on the rear box car his head came in contact with the timbers of a bridge, and he was instantly killed. In that case this court said: "Without going into a discussion of the question, it is sufficient to say that it was negligence on the part of the company to have a bridge constructed as was this one. It was a constant peril to the lives of its employés, whose duties called them on top of trains. When a brakeman's life is lost in consequence of such negligence, the company cannot excuse itself by simply showing that he knew, before receiving the injury, the bridge was so low that he could not pass over it with safety while standing on top of the cars. Exigencies or other causes may arise in the discharge of his duties which may cause him to forget the danger with which he is threatened, and thus cause his failure to avoid injury. Cooley was killed on the first day he served as brakeman on the road, between Paris and Maysville, and while appellant endeavored to show that he had knowledge of the location of the bridge and the danger at-

tending passing over it, there is no evidence that he knew the exact distance from the top of the car to the overhead timbers. If he failed to measure the exact distance between the top of the car and bridge with his eye, or did so, but failed, after reasonable effort, to get his body in an exact position to avoid a collision with the bridge, it seems to us that the appellant should suffer the loss, and not the intestate's estate." It will be seen that the *Cooley Case* is, in its controlling facts, very similar to the case at bar, and in that case the court ruled that the trial judge properly submitted the question to the jury.

In *Derby's Adm'r v. Kentucky Central Co.*, 4 S. W. 303, 9 Ky. Law Rep. 153, 155, Derby, a conductor, lost his life while walking on or descending from a box car on a train that was passing through an overhead bridge; and, in considering the rights and duties of the master and servant under such circumstances, this court said: "We think the rule is that railroad companies are not bound to furnish appliances absolutely safe, but that they must use reasonable care to provide such as are reasonably adequate and safe for the use of their employés. The latter, in accepting the employment, assume all the ordinary risks of the business; but, if engaged in operating the trains, they cannot well know, and it is not a part of their business to ascertain, the condition of the appliances in use, unless they are immediately under their care and subject to their control. They do not contract with reference to them. Thus a brakeman has a right to rely upon the company using reasonable care in providing a safe track. He has no opportunity to inspect it; it is not a part of his business; and, unless he, in fact, knows of its defective condition, and recklessly exposes himself to the danger, he is not chargeable with neglect. The master cannot place an additional or extra risk upon the servant without notice to him."

The doctrine as announced in the *Sampson Case*, supra, has been approved and followed by this court in *Hughes' Adm'r v. Louisville & Nashville R. R. Co.*, 104 Ky. 774, 48 S. W. 671, 20 Ky. Law Rep. 1029, *Finley v. Louisville Ry. Co.*, 103 S. W. 343, 31 Ky. Law Rep. 740, and *Louisville & Nashville R. R. Co. v. Hahn's Adm'r*, 135 Ky. 251, 122 S. W. 142.

Furthermore, it appears from the testimony of King, appellant's bridge supervisor, that a device known as a "telltale" could have been erected as a protection against danger from the tunnel gauge, and at a reasonable expense. A "telltale" is made by erecting poles upon either side of the track, with an overhead connecting crossbar, from which several leather straps or ropes are hung at a distance that will show the open space in the bridge or tunnel through which the train is about to pass. If the straps touch the head of the brakeman while standing upon the car, he is thereby notified that

the open space in the bridge or tunnel will strike his head, and that he must prepare for it. Some states have statutes requiring "telltals" to be erected to give warning of all overhead obstructions, and, though we have no statute upon that subject in Kentucky, we do not see why it is not a reasonable precaution that should be taken by a railroad company for the protection of its employes. This is particularly true in the case of a tunnel gauge, which, by reason of its purpose, is necessarily more contracted as to its size, and therefore probably fully as dangerous to the brakeman as a tunnel or an overhead bridge. We are of opinion, therefore, that the court properly overruled appellant's motion for a peremptory instruction.

The second objection is based upon the alleged error contained in the third instruction to the jury, which reads as follows: "If you find for the plaintiff under instruction No. 1 above, then you will give to him in your verdict what you may believe from the evidence to be a fair compensation for the mental and physical pain and suffering which he has endured by reason of his injuries, if any, and which you may believe from the evidence he will hereafter endure, if any, by reason of such injuries, including a fair compensation, according to the evidence, for any loss of time caused thereby and for any loss of power to earn money caused thereby, including any diminution of his power to earn money in the future by reason of the permanency of his injuries, if you believe they are permanent, even though you may believe that such injuries were the result of the ordinary neglect or negligence of the defendant only; and if you shall further believe from the evidence that the plaintiff's injuries were caused by and were the result of the gross or wanton negligence of the defendant, as defined above in instruction No. 2, then you may, in your discretion, find any additional sum for the plaintiff by way of punitive damages or punishment for the injuries done to him as to you shall seem right and just from all the evidence, not exceeding in all, for the plaintiff, the sum of fifteen thousand dollars (\$15,000.00), the amount claimed in the petition."

It is claimed that the damages are grossly excessive, and that the finding of the jury was brought about, or aggravated, by the clause in the above instruction which authorized the jury to award punitive damages. We are clearly of opinion, however, that this objection is not well founded, for the reason that the size of the verdict shows that it was not awarded as a punishment against the appellant. Where a young man 19 years old has had his right wrist broken, and was otherwise bruised and injured, with his hearing probably permanently impaired, it can hardly be claimed that \$2,600 is any more than

compensation for his injuries, suffering, loss of time, and diminution of power to earn money in the future. In *Illinois Central R. Co. v. Mayes*, 142 Ky. 382, 134 S. W. 436, this court declined to reverse a judgment for damages for personal injuries, where it appeared that the award was not more than strict compensation, although the jury had been instructed that they might, in their discretion, as was done here, award punitive damages, if they found the negligence was gross. We are of opinion that the verdict in this case comes within that rule.

It is further contended that, in using the words, "and which you may believe from the evidence he will hereafter endure, if any, by reason of such injuries," in the third instruction, they should have been qualified so as to tell the jury that they could not award anything on account of future pain and suffering, unless it was reasonably certain that he would endure future pain and suffering. We think this criticism of the instruction is hypercritical. The instruction as drawn, when fairly construed, carries the idea that the future pain and suffering should be reasonably certain in order to authorize the jury to award anything to the appellee upon that account.

It is also contended that instruction No. 3, which authorized the jury to find damages on account of future loss of time and loss of earning power, is open to the same objection, and also to the further objection that, as to the permanency of appellee's injuries, the instruction did not require the jury to believe "from the evidence" that the injuries were permanent, but authorized a recovery upon this ground, "if you believe they are permanent." The instruction must be read as a whole; and we conclude that when so read it necessarily meant, and that the jury must have understood it to mean, that they could not return a verdict from any mere belief that they might have, in the absence of evidence upon that subject. The instruction repeatedly required them to base their findings upon the evidence; and we are satisfied that the instruction as drawn was not prejudicial to the appellant.

The instructions given by the court fully covered the case, and it was not error to refuse the specific instructions asked by the appellant.

The judgment is affirmed, with damages.

BEVINS v. COLLINSWORTH.

(Court of Appeals of Kentucky. Jan. 5, 1911.)

1. PUBLIC LANDS (§ 151*)—LANDS OF STATE—ENTRY AND SURVEY—EFFECT.

Under Ky. St. §§ 4702-4704 (Russell's St. §§ 2758a1-2758a3), providing for the entry and survey of public lands by appropriators, neither the entry nor the survey passes the legal title from the state, but vests in the appropri-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

ator only an inchoate right on which a subsequent legal title may be erected, and is effective to withdraw the land from further appropriation.

[Ed. Note.—For other cases, see Public Lands, Cent. Dig. §§ 411-437; Dec. Dig. § 151.*]

2. PUBLIC LANDS (§ 151*)—APPROPRIATION—VACANT LANDS.

Ky. St. § 4702 (Russell's St. § 2758a1), declares that none but vacant lands shall be subject to appropriation, and that every entry, survey, or patent shall be void so far as it embraces land previously entered, surveyed, or patented. Section 4703 (Russell's St. § 2758a2) declares that any person wishing to appropriate vacant and unappropriated land may on application to the county court obtain an order authorizing him to enter and survey any number of acres not exceeding 200, and by an entry in the surveyor's book may appropriate the lands called for in one or more parcels. And section 4704 (Russell's St. § 2758a3) provides that the surveyor shall survey the entries in succession from the point of time in which the same were made. *Held*, that where defendant, believing that he had actually surveyed an entire vacant area which he had previously entered, had possession of a part of the land entered exclusive of the survey, and had repeatedly, openly, and continuously exercised acts of proprietorship indicating a purpose to become the owner in every sense, and such continuation was known to plaintiff at the time of the action, and plaintiff, a county deputy sheriff, attempted to survey and enter the lands not included in defendant's survey, plaintiff's attempt to enter and appropriate such land was void, notwithstanding defendant had never received a patent therefor, under the rule that others than the state cannot call in question collaterally such irregularities in proceedings to locate the same land.

[Ed. Note.—For other cases, see Public Lands, Cent. Dig. §§ 411-437; Dec. Dig. § 151.*]

Appeal from Circuit Court, Pike County.

Action by Mont. Bevins against M. B. Collinsworth. Judgment for defendant, and plaintiff appeals. Affirmed.

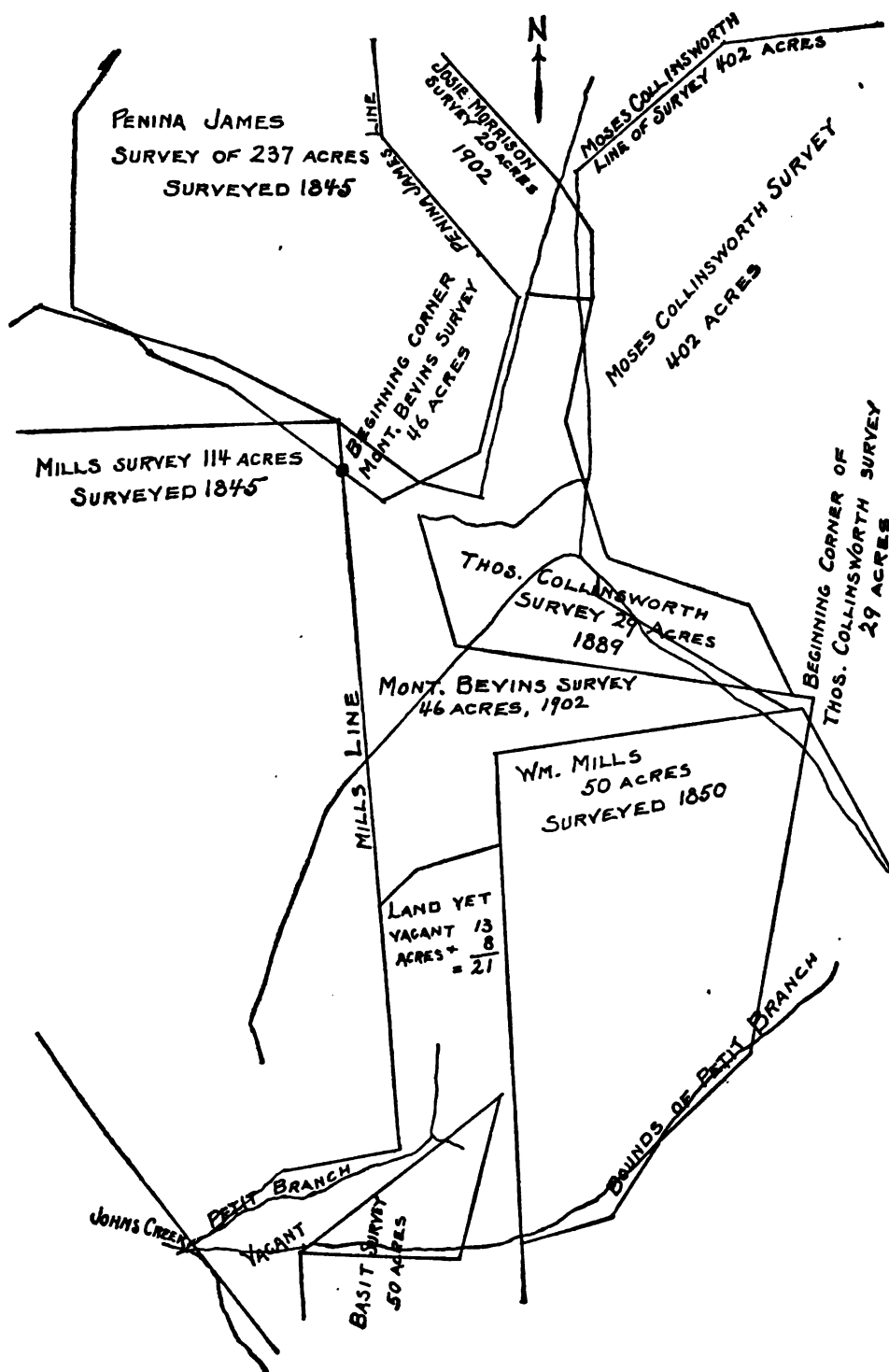
James M. Roberson, for appellant. Butler & Moore, for appellee.

O'REAR, J. On September 2, 1889, there was entered on the surveyor's books in Pike county the following: "Entered land warrant No. 283 for 50 acres for Thos. Collinsworth on the vacant and unappropriated land of Pike county and located it on the following land on the Petit Br. of Johns Cr. in between and binding on two surveys one for 50 acres made in the name of Wm. Mills and one for 164 acres in the name of the same party and binding on the land of the heirs of Moses B. Collinsworth, running so as to include the vacant and unappropriated lands in said bounds, binding also on the lands of Penina James. James M. Staton, S. P. Co., by Wm. M. Connolly, D. S." It is conceded that prior thereto Thomas Collinsworth had purchased and caused to be issued to him a land warrant (No. 283) from the Pike county court for 50 acres of vacant and unappropriated lands in Pike county. The surveyor of Pike county certified as fol-

lows: "Surveyed on the 7th day of Sept. 1889, for Thomas Collinsworth twenty-nine (29) acres of the vacant and unappropriated land of Pike county, Kentucky, by virtue of part of a Pike county court land warrant. No. 283 for fifty (50) acres, dated Sept. 2, 1889, which warrant is herewith filed. Said land is situated on the head waters of the Petit's branch of John's Creek, Pike county, Kentucky, and bounded as follows: Beginning at two hickories, two chestnut oaks, and two black oaks," etc., proceeding to describe the boundary by courses, distances, and timber corners. The survey was not registered in the land office at Frankfort, nor was a patent issued upon it. The remainder of the boundary entered has never been surveyed for Collinsworth, and of course no patent has issued for it to him. Many years prior to 1889, Thomas Collinsworth had taken a deed for a larger boundary of land, including the territory covered by his entry. He believed that it was all covered by patents owned by his grantor. But discovering in 1889 that this parcel was not so covered, he took the steps indicated. He then believed that the survey of 29 acres covered all the vacant lands in the boundary covered by his entry. But it did not. Thereafter he continued to exercise acts of ownership over the entire area covered by his entry, cutting and selling from it a large quantity of sawlogs, and clearing and inclosing a small parcel of it. Upon his death, this land, with other lands, was sold to pay his debts, and has been conveyed to appellee, who continued to exercise similar acts of ownership, and claimed it, listing it for taxation, and doing as any owner would with open woodland forest. In 1902 appellant, who was then a deputy surveyor of Pike county, surveyed for himself 46 acres upon a land warrant issued to him shortly prior thereto, so as to embrace part of the same land covered by Thomas Collinsworth's prior entry, and the most of that included in his 29-acre patent. Appellant caused his survey to be registered in the land office, and a patent to issue to him for the 46 acres. At the time of his survey he knew that Thomas Collinsworth had caused an entry and a survey to be made in that neighborhood, but then did not investigate to learn precisely where the land was located. His survey was surreptitious, being purposely concealed from appellee, who had become the owner of the Thomas Collinsworth claim. Appellant then brought this suit against appellee, asserting title, and alleging that appellee was cutting timber and threatening to fence the land embraced in the 46-acre patent. An injunction staying further trespass was obtained. The circuit court dismissed appellant's petition, and he consequently prosecutes this appeal.

A plat of the territory in dispute is submitted to show more fully the situation:

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes



Appellant's contention is that Thomas Collinsworth abandoned his entry, as well as his survey, by failing for so long to carry into grant the title he sought to procure. Or, if that be not true as to that surveyed, it is true as to that entered and not surveyed. The opinion in *Bryant v. Wood*, 90 Ky. 530, 14 S. W. 498, 12 Ky. Law Rep. 454, is relied on. For the correct application of the controlling principle of that case, a study of the statutes and other decisions construing them is necessary.

The present statute regulating the appropriation of vacant lands (sections 4702-4705, Ky. St. [Russell's St. §§ 2758a1-2758a4]) is substantially the same, on the points here involved, as were the General Statutes, in force when appellee's entry and survey were made, and the same as during the existence of Revised Statutes (1856 to 1873), and the same as was the act of 1835 (Loughborough's Statute Laws of Kentucky, pp. 386-388). Only vacant and unappropriated lands are the subject of disposal by the county courts. Section 4702, Ky. St. "None but vacant lands shall be subject to appropriation under this chapter. Every entry, survey, or patent made or issued under this chapter, shall be void, so far as it embraces lands previously entered, surveyed or patented." Section 4704, Ky. St. As to an entry of vacant lands for purposes of appropriation, section 4703, Ky. St., provides: "Any person who wishes to appropriate any vacant and unappropriated lands, may, on application to the county court of the county in which the same lies, and paying therefor such price as the court may allow, not less than five dollars per hundred acres, obtain an order of court authorizing him to enter and survey any number of acres of such land in the county, and not more than 200 acres. The party obtaining such order may, by an entry in the surveyor's book of the county describing the same, appropriate the quantity of land it calls for in one or more parcels, as he may think proper; but no one person shall, under this chapter, enter, survey, or cause to be patented, more than 200 acres of land in any one county." By section 4704, Ky. St., the surveyor is required to survey the entries in the succession in the point of time in which the same are made. We thus see that the proper entry is the pre-emption of the right of survey. Neither the entry nor the survey passes the legal title from the state. But they vest an "inchoate right" in the entrant (*Flippin v. Hays*, 3 Metc. 215), upon which subsequent legal title and rights may be erected, as well as withdraw from further appropriation the land so designated.

It may be conceded that lands once entered, or even surveyed or patented, may be recovered by the commonwealth, as for fraud practiced in their procurement, or for some irregularity in proceeding that would vitiate it. Instances too numerous are shown

where the state might, but has not, taken advantage of some wrong done it to repossess the title and land. If the state has not chosen to do so, it may be because it was deemed that actual settlement and improvement were the main considerations, and that where these have resulted it did not matter so much by what looseness of proceedings it was accomplished; that it were better to leave undisturbed those who through ignorance, or in good faith, had invested in the title, than to exact a more scrupulous regard for mere proceedings. But, however that may be, the policy of the state seems to have been not to proceed against such entrants; and the courts have steadfastly refused to let others call in question collaterally such irregularities. *Bledsoe v. Wells*, 4 Bibb, 329; *Jennings v. Whitaker*, 4 T. B. Mon. 51; *Marshall v. McDaniel*, 12 Bush, 381; *Atchley v. Latham*, 2 Litt. 362; *Pearson v. Baker*, 4 Dana, 322; *Cain v. Flynn*, 4 Dana, 501; *Ray v. Barker*, 1 B. Mon. 368; *Sutton v. Menser*, 6 B. Mon. 438; *Taylor v. Fletcher*, 7 B. Mon. 81; *Little v. Bishop*, 9 B. Mon. 246; *McMillan v. Hutcheson*, 4 Bush, 616.

The system in Kentucky by which public lands east of the Tennessee river have been appropriated is open to grave confusion, if not abuse. If two or more enter, survey, or patent the same land, it results in confusion of rights, therefore weakening values and unsettling the stability of titles to lands. Nothing aside from war could be more hurtful to a state. It was therefore that the commonwealth, which had inherited its system as well as its lands from Virginia, who had already granted hundreds of thousands of acres by such proceedings, early endeavored by legislation to put a stop to further cause of confusion. The statute in its present form, substantially, was enacted early in the last century. Its aim was primarily to prevent confusion of titles. The fiat was inexorable. Land once entered or surveyed, or patented, was by virtue of that fact withdrawn from further entry, survey, or patent. It was not meant to leave it to the judgment of the county surveyor, much less to the junior entrant, to determine whether the preceding acts had been sufficient, and to bring it into dispute by a test between them. That is precisely what was intended to be prevented. It was to remove the possibility of such controversy, and, incidentally, to protect the public from mere speculative claims, and the litigious adventurer. It was therefore this court, in *Goosling v. Smith*, 90 Ky. at page 159, 13 S. W. at page 438, 11 Ky. Law Rep. at page 992, speaking of that part of section 4704, Ky. St., quoted above, said: "The language quoted precludes necessity of concurrence of entry, survey, and patent by and for one party in order to render void subsequent entry, survey, or patent of the same land for another; but in express terms makes the existence of either sufficient." The

same declaration was adhered to in *Kirk v. Williamson*, 82 Ky. 161; *Davidson v. Coombs*, 5 Ky. Law Rep. 812; *Terry v. Johnson*, 96 Ky. 95, 27 S. W. 984, 16 Ky. Law Rep. 307. In *Gibson v. Board*, 102 Ky. 505, 43 S. W. 684, 19 Ky. Law Rep. 1588, the question was again examined, with evident care. Although unwilling to venture upon a reason for certain features of the statute supposed to be inconsistent, the court concluded: "We feel that we should adhere to the previous rulings of the court." *Gibson v. Board* has been followed by the cases of *Miracle v. Arnett*, 44 S. W. 641, 19 Ky. Law Rep. 1855; *Boreing v. Hurst*, 45 S. W. 522, 20 Ky. Law Rep. 185; *Morgan v. Morgan*, 45 S. W. 497, 20 Ky. Law Rep. 191; *Ohio & B. S. R. R. Co. v. Wooten*, 46 S. W. 681, 20 Ky. Law Rep. 386; *Cornett v. Combs*, 53 S. W. 32, 21 Ky. Law Rep. 838; and *Gray v. Peay*, 82 S. W. 1006, 26 Ky. Law Rep. 990. In *Boreing v. Hurst* a survey had been made in 1869, but it was not carried into grant until 1894. Another survey was made covering the same land November 12, 1889, which was carried into grant July 14, 1890. The court held the junior survey void under the statute. The case of *Gray v. Peay*, supra, is very much like the case at bar. *Peay, Sr.*, had entered and surveyed the land in 1873, but failed to get a patent. Nevertheless he took possession, exercising similar acts of ownership to those of *Collinsworth* in this case. In 1884 *Gray* surveyed and patented the land. *Gray's* survey and patent were held void under the statute. In *Aulick v. Colvin*, 6 B. Mon. 289, 43 Am. Dec. 164, it was held that one entitled to a pre-emption might maintain an action against one who had subsequently procured a patent to issue for the land, to cause its conveyance to the former, provided his conduct showed he had not abandoned his pre-emption, citing *Johnson v. Gresham*, 5 Dana, 542, and *Harrison v. Woodruff*, 6 Dana, 188. And in *Goosling v. Smith*, supra, the court observed: "While therefore, the party who makes the first entry of land then subject to entry may, if necessary, enforce by judicial proceedings his right to have survey first made, nevertheless, if there has been already either an entry or survey made of the same land by another, his entry, survey, and patent are, in the meaning of the statute, to be treated as void."

Now, taking up the case of *Bryant v. Wood*, supra, relied on by appellant: *Wood* caused a survey to be made on his warrant in 1853. It was never carried into grant. Nor did he take possession or indicate a purpose to do so. In 1884 a patent issued upon a junior survey in the name of *Bryant*. In 1888 *Wood* sued *Bryant* in equity to restrain him from cutting timber on the land. The court said, inter alia: "The party by survey acquires a claim to the land or what has been termed by this court 'an inchoate title.' *Flippin v. Hays*, 3 Metc. 215. If he

fails to return the survey to the land office within the time fixed by statute, this inchoate right still exists, and may be perfected by grant, vesting him with the legal title from the time of its issue. This certainly does not mean, however, that this inchoate right is to exist forever, regardless of the position of the parties. * * * The appellee never carried his survey into grant. It was made 35 years ago. He furnishes no reason for his long delay, and doubtless none exists. He has never, so far as the record shows, been in possession of the land; and now, after the state has granted it to others, and they have paid for it, and are in possession of it, and have likely improved it, more or less, he springs up, as if from a Rip Van Winkle sleep, and asserts claim to it. * * * Whether you term it an inchoate right or title which he acquires, it is but an equity. The law looks to, and public policy requires, a perfection of it by grant within a reasonable time. The party may lose the inchoate right by neglect or laches on his part. He may, by long delay, lead the state, and individuals acting in good faith, to believe he has abandoned it and all intention of perfecting it by grant."

Earlier in the opinion the court asserted that the plaintiff must recover upon the strength of his own right. The court did not say, nor intimate, that *Bryant's* survey and patent were not void. *Goosling v. Smith* had been decided April 17, 1890. *Bryant v. Wood* was decided October 11, 1890. The two cannot be held in conflict. *Bryant v. Wood* was rested on the doctrine of laches, available in equity to deny a plaintiff, who has a legal right, but who has slept on it so long as to have induced others to suppose it did not exist, the right to recover against one whom he has by his conduct probably misled, and who in good conscience ought not to be disturbed. The situation here is radically different. *Bevins* was not misled. He knew to the contrary. *Collinsworth* was in possession of a part of the land entered (exclusive of his survey) and had repeatedly, openly, and continuously exercised such acts of proprietorship as indicated a purpose to become owner in every sense. He believed he had actually surveyed the entire vacant area which he had previously entered. His conduct is such, as before remarked, as was shown by the entrant in *Gray v. Peay*, supra. But whether *Collinsworth* had such title as he might have maintained an action at law or in equity upon is beside the present inquiry. He is not suing as plaintiff. Appellant must recover upon strength of his title, regardless of the weakness of his adversary's. The statute and every case examined are to the effect that his survey is void. So is his patent. He is without a standing in this suit.

Collinsworth's heirs may yet perfect their survey by having a patent issue, if there be no valid defense by the state. And as his

entry has not been satisfied, nor his warrant exhausted, he may yet have survey and patent for the balance, so far as anything hindering is here disclosed.

The judgment of the circuit court is affirmed.

COURIER-JOURNAL CO. v. PHILLIPS.

(Court of Appeals of Kentucky. Feb. 21, 1911.)

1. LIBEL AND SLANDER (§ 112*)—ACTION—EVIDENCE—WEIGHT AND SUFFICIENCY.

In an action for libel, evidence held to show that the published statement as to the pursuit of plaintiff and his arrest on the charge of passing counterfeit money was true.

[Ed. Note.—For other cases, see Libel and Slander, Cent. Dig. §§ 325-341; Dec. Dig. § 112.*]

2. LIBEL AND SLANDER (§ 54*)—DEFENSES—TRUTH.

The substantial truth of matter complained of as libelous is a complete defense.

[Ed. Note.—For other cases, see Libel and Slander, Cent. Dig. § 152; Dec. Dig. § 54.*]

Appeal from Circuit Court, Powell County.

Action by M. A. Phillips against the Courier-Journal Company. From a judgment in favor of plaintiff, defendant appeals. Reversed and remanded.

Jouett & Jouett, Bennett H. Young, and John D. Atkinson, for appellant. C. F. Spencer and Hazelrigg & Hazelrigg, for appellee.

LASSING, J. The Louisville Courier-Journal, in its issue of April 12, 1908, published the following article:

"Calls 'Counterfeiter' and Attracts Crowd Which Joins Intensely Exciting Hue and Cry.

"Gus Neurath Says He Saw Man Pass Counterfeit Money—Fugitives Run into Arms of Police.

"'Stop, counterfeiter!' shouted Gus Neurath, Bailiff of the City Court, in stentorian tones at Fifth and Jefferson Streets shortly after ten o'clock last night. Two hundred people, including the bailiff, two lieutenants of police and a little man, who was always in front and repeatedly turned upon and slapped by the objects of the chase, pursued two men from Fifth and Jefferson Streets to Sixth Street and Congress Alley. When it was all over M. A. Phillips of Stanton, Ky., was arrested on charge of passing counterfeit money and carrying concealed a deadly weapon; his nephew, Samuel Scott, on a charge of suspected felony; and the little man clamoring for an action at law for his slaps.

"The trouble had started in Weyler & Kurz saloon, at Fifth and Jefferson Streets. Neurath chanced to stop there with several friends and was invited by Phillips to take a drink at his expense. Neurath says that he noticed that the dollar bill which Phillips put on the counter in payment for the drinks

was a counterfeit. He accordingly swallowed the treat, but not the alleged transgression. Scarcely had Phillips and Scott, who was with him, left the saloon when Neurath informed the bartender of the alleged counterfeit and left the saloon in pursuit, summoning all the counterfeiters within the radius of his 'bailiff's' voice to halt under penalty of the law. Phillips and Scott immediately took to their heels, with a crowd that grew in a twinkling to 200 after them. A little man who gave his name as S. H. Gills led the chase. Whenever he came close enough to the fugitives he was slapped in the face, he said, and fell back a few yards.

"The hue and cry came down Jefferson Street and in Sixth Street, rousing from their desks at Central Police Station Lieuts. Doran and Wehrle, who had just been lamenting the dullness of the night and hoping that Kl Kl the desperate, would come in their direction. Two seconds later the two lieutenants, both coatless and portly, were vying with each other in vaulting the railing in front of the station. A moment later they had stopped and arrested the two fugitives, with the slapped and clamorous Gills joining them at the triumphal finish.

"Phillips admitted having passed the dollar bill in question, but declared that he had done so unaware of its questionable character, having himself received it at Lexington. He declared that he was a lawyer and that he lived in Stanton, Ky. When arrested he had a revolver in his possession. Scott, whose home is said to be in Mt. Sterling, was held on charge of suspected felony. He says that he was merely accompanying Phillips and denies the charge against him."

Conceiving that a wrong had been done him by reason of this publication, M. A. Phillips brought suit in the Powell circuit court against the paper for libel. Upon motion, all of the printed article was stricken out, except the following:

"Calls 'Counterfeiter' and Attracts Crowd Which Joins Intensely Exciting Hue and Cry.

"Gus Neurath Says He Saw Man Pass Counterfeit Money.

Fugitives Run into Arms of Police.

"'Stop, counterfeiter!' shouts Gus Neurath, Bailiff of City Court, in stentorian tones at Fifth and Jefferson Streets shortly after ten o'clock last night. When it was all over, M. A. Phillips of Stanton, Kentucky, was arrested on charges of 'passing counterfeit money' and 'carrying concealed a deadly weapon.'"

The defendant answered, and for defense pleaded the truth of the publication. On this issue the case was tried out before a jury, with the result that plaintiff recovered a verdict for \$1,500. The paper appeals.

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

Three grounds are relied upon for reversal: First, error in not instructing the jury peremptorily to find for the defendant; second, misconduct of plaintiff during the trial; and, third, that the verdict is excessive.

The facts, as developed by the testimony, are as follows: Plaintiff, who lived in Stanton, Ky., had gone to Louisville to assist his son out of some character of trouble in which he had become involved on account of a strike among the employes of the street car company. He had been in Louisville several days, and, on the night before the publication complained of, in company with a relative named Scott, went into a saloon and there met Gus Neurath, bailiff of the city court, whom he asked to join them in a drink. The drinks were served, and plaintiff tendered in payment what appeared to be a silver dollar. The necessary change was given him, and he and Scott left. Immediately that he was gone, Neurath asked the barkeeper to let him see the dollar given him by plaintiff. When it was exhibited he pronounced it a counterfeit. Thereupon he summoned a man named Hart to assist him, and together they went in search of plaintiff and Scott. They found them in a lodging house not far away, and calling them out, Neurath told plaintiff that they were wanted for passing counterfeit money. Plaintiff assured the officer that, if it was counterfeit, it was a mistake, and that he would rectify it. But despite his protests, as well as those of Scott, they were started down the street toward the station house. After going a short distance, Scott broke away from Hart and ran down the street, pursued by Hart and several others, who were attracted by the shout of Neurath, "Stop, counterfeiter!" or "Stop, counterfeiter!" Neurath says that at the same time plaintiff tried to get away from him, but that he grabbed and held him. This plaintiff denies. The shouting and chase attracted quite a crowd, and Scott was soon captured by two police officers into whose arms he ran. Neurath and Phillips caught up with him, and together they were taken to the station house, and the charges of passing counterfeit money and carrying concealed a deadly weapon were placed against plaintiff. A small pistol was found in his hip pocket. Phillips gave bond, and later each charge was dismissed.

By his rulings during the trial, and in his instructions, the court limited the consideration of the jury to three questions: (1) Was there a cry of "Counterfeiter" made with reference to Phillips? (2) Was a crowd attracted, which joined in the hue and cry? (3) Was it true, or substantially true, that the bailiff, Neurath, cried out, with reference to Phillips, "Stop, counterfeiter!"?

On these pivotal points, appellee testified as follows: "And about that time Scott broke and ran. I stayed with Neurath, and Neurath caught hold of me. * * * I had a little double Derringer pistol in my right

hip pocket, and he got hold of that. He caught onto it that way [indicating], and he held to me. I protested. * * * 'By God,' he says, 'you have got to go to jail,' and he held onto me." "Q. Mr. Phillips, is it not true that at the time you were being held there and Scott ran, that there was a cry of 'Counterfeiter'? A. Yes, sir. Q. Was anybody there—was there a crowd? A. I did not see but very few. Q. Well, how many? A. Well, I could not see over a dozen people. There was a man by the name of Stringer there who went over to the station, and I tried to find him, but can't find him. Q. Did Gus Neurath cry out 'Counterfeiter'? A. He hollered 'Counterfeiter' or 'Stop, counterfeiter', or something like that, meaning Scott; they was then after Scott."

Jacob Wehrle testifies to a conversation between Neurath and Phillips at the jail, as follows: "Q. What passed between him and Neurath? A. He said that Neurath had no right to arrest him. There was some argument about breaking away. Neurath asked him why he wanted to break away. Q. What did Phillips say? A. Phillips said he had no warrant. He said, 'You had no right to arrest me, and that is the reason I wanted to get away. You have no right to arrest me at all.'"

Upon the same point, Robert Donahue testifies: "Q. Do you know what charge was preferred against him—what he was arrested for? A. Well, it was about between 9 and 10 o'clock on Saturday night. I was coming down Jefferson street to the barber shop below Jefferson on Fifth. When I was going into the barber shop door, I heard somebody holler, 'Catch them counterfeiter,' and I seen a man running down there, and I seen some man running up Jefferson street and run in towards Market. Mr. Hart was in behind him. I heard somebody say that the man that Neurath had was trying to get away from him, too. Q. Did you go back to where he was? A. Yes, sir; and he was trying to get away from Mr. Neurath. They were using some kind of language there. There was such a crowd I could not understand what they were saying; but what attracted my attention was, as I was going into the barber shop, somebody hollered, 'Catch them counterfeiter.'"

Several other witnesses testified to hearing the bailiff call out, "Stop, counterfeiter," or "Stop, counterfeiter." In answer to the question where he and Hart went with Scott and Phillips after arresting them, Neurath testifies as follows: "We proceeded from Fifth. We got to Fifth and Jefferson, and Mr. Hart had Mr. Scott, and I had hold of Mr. Phillips—of his back pocket this way [indicating]. I felt his pistol, a Derringer pistol, and I suspected that he try to hurt us; and I thought Scott might try to get this pistol, and I got between them. And when we got nearly to the Willard Hotel on Fifth street, he wrenched away from Hart,

and about that time Phillips wrenched away from me. Q. Did you make any attempt to catch them? A. I did, sir; I said, 'Catch them counterfeiters.' Q. Of whom were you speaking when you said, 'Catch the counterfeiters'? A. Mr. Phillips and this man Scott."

It will thus be seen that all the witnesses are practically agreed that the bailiff, Neurath, called out, "Stop, counterfeiter" or "Stop, counterfeiters," and the only difference between the testimony of Neurath and Phillips is that Phillips says that when Neurath cried "Stop, counterfeiter," he did not refer to him, whereas Neurath says he did. A crowd did gather and join in the pursuit, and Phillips says he was informed that he was arrested for passing counterfeit money; and he admits he had a pistol in his pocket when arrested. Thus not only is the publication proven to be substantially true, but every material allegation thereof literally true. For, while appellee says that, when Neurath called out "Stop, counterfeiter," he meant or referred to Scott, Neurath says he meant appellee, and that at that time appellee also was trying to get away. This appellee denies, but does say that when Scott ran Neurath "caught hold of me," and "held on to me"; and, following a statement that Neurath told him with an oath he had to go to jail, said "he held onto me." Wehrle says that at the jail, when Neurath asked appellee why he wanted to break away from him, appellee responded, because "you had no right to arrest me. That is the reason I wanted to get away." Donahue says he heard some one say, about the time that Scott was caught, that "the man that Neurath had was trying to get away from him, too," and that when he went to where Neurath and appellee were, "he was trying to get away from Neurath."

When read in the light of the attendant circumstances and the testimony of the witnesses present, we are constrained to accept as true what Neurath says he meant, and to whom he referred, when he called out, "Stop, counterfeiter." It was appellee who had given the dollar that was pronounced spurious; it was appellee against whom the charge of passing counterfeit money was preferred; and when one man had escaped and he claims the other was about to do so, Neurath says he meant to stop appellee when he called out, "Stop, counterfeiter." Appellee, of course, cannot know to whom Neurath referred, and his opinion cannot be permitted to weigh against and overthrow the positive testimony of Neurath to the contrary. This is especially so when the veracity and credibility of the witness Neurath are not called in question. The publication did not assert that appellee had passed counterfeit money, or that he was a counterfeiter, but merely that he was charged with having done so,

and that the arresting officer, when he called out "Stop, counterfeiter," referred to appellee. Appellant assumed the burden of proving that these acts occurred, and that these statements were made as published. In our opinion the proof offered fully supports its defense.

The establishment of the truth of the matter complained of as libelous is a complete defense. Cooley on Torts (3d Ed.) p. 416; Townshend on Slander, 306; Malone, etc., v. Carrico, 16 Ky. Law Rep. 155; and Rollins v. Louisville Times Co., 90 S. W. 1081, 28 Ky. Law Rep. 1054. And where a publication, made in good faith, is shown to be substantially true, there can be no recovery. Vance v. Louisville Courier-Journal Co., 95 Ky. 41, 23 S. W. 591, 15 Ky. Law Rep. 412; Evening Post Co. v. Richardson, 113 Ky. 641, 68 S. W. 665, 24 Ky. Law Rep. 456; and Rollins v. Louisville Times Co., 90 S. W. 1081, 28 Ky. Law Rep. 1054. Appellant having shown that the report upon which the article was based was furnished by a reliable reporter of long experience, and that it accepted and published the article in good faith as a news item, relying upon its truth, and the evidence showing that the article was substantially true, the motion for a peremptory instruction should have been sustained.

Judgment reversed, and cause remanded for further proceedings consistent herewith. Whole court except O'REAR, J., sitting.

AMERICAN ENGINEERING & CONSTRUCTION CO. v. CRAWFORD.

(Court of Appeals of Kentucky. Feb. 14, 1911.)

1. DAMAGES (§ 185*)—INJURIES TO PERSONS—EVIDENCE.

In an action for injuries to a child from being kicked by a mule, conflicting evidence as to whether subsequent deafness was caused by the injuries held sufficient to sustain a verdict for \$1,000 damages for the injuries.

[Ed. Note.—For other cases, see *Damages*, Dec. Dig. § 185.*]

2. DAMAGES (§ 132*)—EXCESSIVE DAMAGES—PERSONAL INJURY.

Where a child nine years old was kicked by a mule, and fell on his head with such force as to cause a concussion of the brain, and he became deaf in one ear and somewhat deaf in the other ear, and at the time of the trial, one year after the injury, he still suffered pain, and had been under the treatment of a physician during that time, an award of \$1,000 damages is not so excessive as to warrant the Court of Appeals in disturbing it.

[Ed. Note.—For other cases, see *Damages*, Cent. Dig. § 385; Dec. Dig. § 132.*]

3. TRIAL (§ 317*)—MISCONDUCT OF STENOGRAPHER—OBJECTIONS—WAIVER.

Misconduct of the official stenographer in addressing the jury during the trial by look and gesture giving clear indication of his partiality for plaintiff's side of the controversy, and indicating satisfaction with rulings by the court against the defendant, and in otherwise showing

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his bias to the side of the plaintiff, is waived when first presented to the trial court on motion for new trial by affidavits then filed; one of the affidavits being by the president of defendant company who was present during the trial, and saw what occurred.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 751; Dec. Dig. § 317.*]

Appeal from Circuit Court, Jefferson County, Common Pleas Branch, First Division.

Action by Raymond D. Crawford against the American Engineering & Construction Company. From a judgment for plaintiff, defendant appeals. Affirmed.

Wehle & Wehle, for appellant. J. W. S. Clements and Thos. E. Hall, for appellee.

HOBSON, C. J. Raymond D. Crawford, a little boy nine years old, brought this suit against the American Engineering & Construction Company to recover damages for an injury sustained by him from being kicked by one of its mules, working in a wagon on one of the streets of Louisville. The little boy with some friends was playing on the street, and, as he passed near the mule, was kicked by him. The action to recover damages is based on the ground that the mule was a dangerous and vicious animal with a propensity to kick those who might come about him, that this was known to the defendant and its servants, and with this knowledge they used the mule upon the streets, and negligently permitted the children to come near it without warning them of the danger, and, by reason of their negligence in this regard, the little boy was suffered to come near the mule on the street without warning, and he was thus injured. There was sufficient evidence of the dangerous character of the mule and of negligence on the part of the defendant's servants in charge of the team in suffering the little boys to come about it without warning to take the case to the jury. Under instructions which are not complained of, the jury found for the plaintiff in the sum of \$1,000, and, judgment having been entered upon the verdict, the defendant appeals.

Two grounds are relied on for a reversal. The child was kicked by the mule in the stomach, and fell upon his head with such force as to cause concussion of the brain. He was quite sick for some days, was delirious from the blow upon the head, and vomited and suffered considerably from the blow in the stomach. After three or four weeks he recovered sufficiently to return to school. The injury occurred on the 22d of December, 1908. The following spring, in March or April, he showed signs of deafness. At first he was deaf in the left ear, but at the trial in December, 1909, he was also deaf somewhat in the right ear. At the time of the trial he still suffered pain from the injury, and had been under treatment of a phy-

sician since the injury occurred. The physician who treated him stated on the trial, in substance, that the concussion of the brain indicated congestion or inflammation, and, if the child had congestion or inflammation where the auditory nerve passes, it would be reasonable that he would be deaf. His hearing was good before the injury, and the deafness set up afterwards and in the time that it might reasonably be expected to result. The defendant introduced two physicians who testified that they had made an examination of the child, that his hearing was as shown by the proof for the plaintiff, but that the deafness was not due to any trouble with the auditory nerve, and was due to a catarrhal affection. It is insisted for the defendant that the verdict of the jury is palpably against the evidence, but we cannot say that it is. The credibility of the witnesses is peculiarly for the jury. The jury had a right to accept the conclusions of one doctor rather than the conclusions of the two others. It was a matter of opinion, and we cannot say that the jury abused a sound discretion in crediting the physician who had treated the child from the time of his injury, rather than the other two physicians who had examined him shortly before the trial. He received a very painful injury and under all the evidence had suffered a great deal. We cannot say that the verdict for \$1,000 is so excessive as to warrant us in disturbing it.

It is also insisted that the official stenographer was guilty of misconduct on the trial, in this: that he sat directly in front of the jury and facing them, and by look and gesture addressed to the jury during the trial gave clear indication of his partiality for plaintiff's side of the controversy, that by very noticeable movements he very clearly indicated satisfaction of rulings that were made by the court against the defendant, and by motions, gestures, and laughter showed his bias to the side of the plaintiff. This complaint was first presented to the trial court on the motion for new trial by affidavits then filed. The affidavits deal in conclusions rather than facts. As the stenographer sat in front of the jury he necessarily would look toward them when he looked up, and it is not at all clear from the affidavits that the officer was guilty of any misconduct. But, aside, from this, one of the affidavits referred to is filed by the president of the company who was present during the trial and saw what occurred. If there was any misconduct on the part of the officer, it was incumbent upon the defendant to present the matter then and there to the court. It could not quietly go through the trial with knowledge of the facts, take its chance of getting a verdict, and complain if the verdict was against it. A matter of this sort must be promptly brought to the attention of the court when the party knows of it, and, if

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes
134 S.W.—29

not then complained of, it is waived. *Drake v. Drake*, 107 Ky. 32, 52 S. W. 848, 21 Ky. Law Rep. 636.

Judgment affirmed.

LOUISVILLE & N. R. CO. v. BAYS' ADM'R.
(Court of Appeals of Kentucky. Feb. 22, 1911.)

1. RAILROADS (§ 367*)—INJURIES TO PERSONS ON TRACK—LOOKOUT DUTY.

A lookout duty on railroad engines and cars exists where they are operated in incorporated cities and towns and other places where the presence of persons on the track should be reasonably anticipated, and, where such duty exists, the engine and cars must be run at such a speed and be under such control that the lookout will be serviceable in case danger is seen; the duty not being properly performed where the person on watch is not in a position to see.

[Ed. Note.—For other cases, see *Railroads*, Cent. Dig. § 1258; Dec. Dig. § 367.*]

2. RAILROADS (§ 367*)—INJURIES TO PEDESTRIANS—WARNING.

A reasonable warning of the approach of an engine and cars should be given, where they are being operated along a track where the presence of persons on the track should be reasonably anticipated.

[Ed. Note.—For other cases, see *Railroads*, Cent. Dig. § 1257; Dec. Dig. § 367.*]

3. RAILROADS (§ 362*)—OPERATION OF ENGINE AT NIGHT—LIGHTS.

The backing of an engine or cars in the dark without a light in front in an incorporated city or town, or places where the presence of persons on the track could be reasonably anticipated, is negligence.

[Ed. Note.—For other cases, see *Railroads*, Cent. Dig. § 1249; Dec. Dig. § 362.*]

4. CARRIERS (§ 247*)—PASSENGERS—TERMINATION OF RELATION.

Where a passenger has reached his destination, and a reasonable time within which to leave the station has elapsed, his rights as a passenger cease.

[Ed. Note.—For other cases, see *Carriers*, Cent. Dig. §§ 991, 992; Dec. Dig. § 247.*]

5. RAILROADS (§ 274*)—TRESPASSERS—LOOKOUT DUTY—EVIDENCE.

Decedent and his companions, after alighting at their destination, which was a straggling hamlet, unincorporated, and without a street or alley, consisting of about 20 or 25 houses, remained under the station platform shed from 11 o'clock p. m. until nearly 1 o'clock on account of a rainstorm, when decedent left his companions and started to cross the tracks to a restaurant and was killed by a switch engine which was backing out of a switch parallel with the main track in front of the depot, as plaintiff claimed, without warning. *Held*, that decedent was a trespasser, and, since defendant was under no obligation to keep a lookout for persons who might be on the track at such a place and hour, it was not liable for decedent's death.

[Ed. Note.—For other cases, see *Railroads*, Cent. Dig. § 869; Dec. Dig. § 274.*]

Appeal from Circuit Court, Knox County.

Action by J. Wesley Bays' administrator against the Louisville & Nashville Railroad Company. Judgment for plaintiff, and defendant appeals. Reversed and remanded.

James D. Black, J. W. Alcorn, and Benjamin D. Warfield, for appellant. B. B. Golden, for appellee.

HOBSON, C. J. Four Mile is a station on the Louisville & Nashville railroad about 17½ miles west of Middlesboro. In September, 1907, J. Wesley Bays, and a number of others, went from Four Mile to Middlesboro. Bell county is dry, but whisky is sold at Middlesboro. The party left Middlesboro for Four Mile about 10 o'clock at night on the regular passenger train. Bays had a half gallon of whisky, and the others of the party had, some more, some less. The train reached Four Mile about 11 o'clock, or a little before. When they got off the train at Four Mile, it was very dark and rainy. They lived several miles from the station, and after the train left they all remained under the station platform shed. The county road ran just south of the depot, and only a few feet from it. North of the depot, and about as far from it as the county road, is the main track of the railroad, and a few feet further north is a side track, called in the record the "loading track." About 30 feet south of the loading track, and opposite the shed, is a restaurant. West of the restaurant, and adjoining it, is a store and the post office. About 12:50 that night, a switch engine pushed some cars in on this loading track past the depot up towards the western end of that track. Shortly after this train was pushed in, Bays said to a friend that he would go over to the restaurant and get them a lunch. He then went down the steps of the platform and started across toward the restaurant. Two other men about the same time started across following Bays to get them a watermelon. As these men got near the loading track, the switch engine, which had been cut loose from the cars it had taken in, was backed out and dashed past them, just before they reached the track. As the engine passed them, they saw the back of a man on the far side of the track whom they took to be Bays. After the engine passed, they went on into the restaurant, not supposing that Bays was hit. Not long afterward, however, Bays' body was found on the loading track about 75 feet east of where he was last seen, and from all the circumstances it may fairly be inferred that he was caught by the engine and carried by it to the point where he was found and there run over. This action was brought by the administrator of Bays against the railroad company to recover for his death on the ground that he was killed by reason of its negligence. The proof for the plaintiff on the trial by the members of the party who testified was to the effect that there was no light on the rear of the engine as it backed in, that no signal was given of its approach, and that it came very fast. The proof for the defendant was to the effect

that the engine had a headlight in front and a headlight on the back of the tender; that the bell of the engine was ringing; and that it was running about 8 or 10 miles an hour. The weight of the evidence as to the light on the tender and the ringing of the bell is with the defendant, but its evidence shows that there was nobody on the rear of the tender as it was backed; that the fireman was ringing the bell; that the engineer was at the throttle; and that neither of them could see a person on the track over the coal that was piled on the tender. The circuit court, refusing to instruct the jury peremptorily to find for the defendant, instructed them in substance that, if the place where Bays was struck was a place where the presence of persons on the track should be anticipated, it was the duty of the defendant to give reasonable notice of the approach of its engine, maintain a proper lookout, and run the engine at such speed as ordinary care for the safety of such persons required. The jury returned a verdict in favor of the plaintiff for \$5,500, on which the court entered judgment. The defendant appeals.

The only question we deem it necessary to consider on the appeal is whether a peremptory instruction to find for the defendant under the evidence should have been given. This court has in a number of cases held that a lookout duty on railroad engines and cars exists in incorporated cities and towns and other places where the presence of persons on the track should be reasonably anticipated; also that, where the lookout duty exists, the engine and cars must be run at such speed and under such control that the lookout will be serviceable in case danger is seen; that a lookout is not sufficient where the person looking out is not in a position to see; that reasonable warning of the approach of the train must be given; and that the backing of the cars or an engine in the dark without a light in front in such localities is negligence. *Shelby v. C., N. O. & T. P. R. R. Co.*, 85 Ky. 224, 3 S. W. 157, 8 Ky. Law Rep. 928; *Conley v. C., N. O. & T. P. R. R. Co.*, 89 Ky. 402, 12 S. W. 764, 11 Ky. Law Rep. 602; *Gunn v. Felton, Receiver*, 108 Ky. 561, 57 S. W. 15, 22 Ky. Law Rep. 268; *L. & N. R. R. Co. v. Lowe*, 118 Ky. 260, 80 S. W. 768, 25 Ky. Law Rep. 2317, 65 L. R. A. 122; *I. C. R. R. Co. v. Murphy*, 123 Ky. 787, 97 S. W. 729, 30 Ky. Law Rep. 93, 11 L. R. A. (N. S.) 352, and cases cited. The court has also held in a number of cases that the railroad company owes no duty to trespassers on its tracks at other places, except to avoid injuring them after their danger is discovered. *Brown v. L. & N. R. R. Co.*, 97 Ky. 228, 30 S. W. 639, 17 Ky. Law Rep. 145; *L. & N. R. R. Co. v. Redmon*, 122 Ky. 385, 91 S. W. 722, 28 Ky. Law Rep. 1293; *C. & O. R. R. Co. v. Nipp*, 125 Ky. 49, 100 S. W. 246, 30 Ky. Law Rep. 1131.

It is plain that the danger to Bays was not discovered, and that if he was a tres-

passer no recovery can be had for his death unless the place at which he was struck was one where a lookout duty was required. While Bays was a passenger when he reached Four Mile, his rights as a passenger ceased after he had had a reasonable time to leave the station. He and his friends could not remain under the station platform indefinitely as passengers. The accident occurred about two hours after he reached the station, and they were not then under the shed as passengers. *I. C. R. R. Co. v. Laloge*, 113 Ky. 896, 60 S. W. 795, 24 Ky. Law Rep. 693, 62 L. R. A. 405; 6 Cyc. 541, 542; *Sandifer v. L. & N. R. R. Co.*, 89 S. W. 528, 28 Ky. Law Rep. 464. They had no more right then to use the tracks of the railroad company than if they had never been passengers on the train. So the case comes to this: Was he at a point where the railroad company owed him a lookout duty? The proof for the plaintiff on the trial showed that Four Mile is a straggling hamlet, unincorporated, without a street or an alley, consisting of about 20 or 25 houses; that a spur track turns off there and goes up Four Mile creek to some coal camps about three miles off where 1,000 or 1,200 men are employed; that another spur track turns off near there, which goes to the Jellico mines, some miles further away, and across Cumberland river, where a number of miners are also employed; that, from both of these mines, persons come to Four Mile to take the train, and many of them in coming walk along the railroad tracks to the station; that about 1,000 tickets a month are sold at the station; and that the tracks about the station and approaching it are much used by pedestrians. But this proof as to the presence of persons on the track relates mainly to train time, ordinary business hours, and a reasonable time thereafter. There is no proof of the use of the track by pedestrians at a late hour of the night to any considerable extent. The restaurant referred to usually closed at 10 o'clock. On the night in question, it had remained open because it was pay day at the mines, and some miners who had come in had remained there eating, etc., on account of the storm. We think the evidence well warrants the conclusion that about train time there was such a use of the tracks about the station that a lookout duty was then required as to persons coming to the trains or otherwise lawfully using the station grounds; but here the passenger train had passed two hours before, and there was no train to stop at this station for a number of hours. The proof tends to show that the railroad tracks all about the station were used by people, and there is nothing in the evidence to show that the point where Bays was struck was any more used than other points about the station, or near it, except the fact that the restaurant and post office were near there. Most of the houses in the

place were on the same side of the railroad as the restaurant; but the depot was on the other side, and there was of course much passing from or to it about train time, and more or less such passing during business hours at the depot, but not in the late hours of the night. By reason of the fact that the coal from the mines referred to was brought to Four Mile and there put on the trains, the side tracks and yards there were much used by the railroad company. The point where Bays was struck was in the yard. It has been well said that a railroad track is a signal of danger, and that those who trespass upon a railroad track take the risk unless it is at a point where a lookout duty is imposed. This must be especially true in a much used yard of a railroad company, where, from the necessity of the business, the engines and cars must be constantly moved about. So the case turns on the question whether on the facts shown the railroad company owed Bays a lookout duty. The answer to the question must depend upon the law as it has been heretofore laid down by this court in the cases decided by it.

In *L. & N. R. R. Co. v. Howard*, 82 Ky. 214, the intestate lost his life near the town of Chicago in Marion county, while walking along the railroad at a late hour of the night, by reason of the fact that no lookout was kept on a train coming up behind him. Holding that there could be no recovery, the court said: "In the case before us the railroad company had the exclusive right to the use of the road at the place where the appellee's intestate lost his life, and we see no reason for making the company responsible, unless it should appear that those in charge of the train, after discovering the condition and danger of the party exposed, could, by the exercise of the proper care, have avoided the injury."

In *Ky. Central R. R. Co. v. Gastineau*, 83 Ky. 119, where the deceased lost his life in the yard of the company at Lexington, the court again said: "A railroad company has the right to the exclusive use and occupation of its yard or track, except at crossings or such places as the public are, by law, authorized to use; otherwise, it could not properly perform its duties to the public. It is not required to anticipate the intrusion of others, and the one who enters upon them without right does so at his peril."

In *Shackleford's Adm'r v. L. N. R. R. Co.*, 84 Ky. 43, 4 Am. St. Rep. 189, the deceased was employed at a section house on the railroad, and there was a path leading across the railroad to the section house used by the persons living there. The deceased, while crossing the railroad on this path, was struck by an approaching train which failed to keep a proper lookout or to give any signals of its approach to the county road crossing near by. Sustaining the circuit court in giving the jury a peremptory instruction to find for the defendant, the court said: "She

was not injured, however, at a place where the public had a right to be, but at a point upon the track where the right of the company was exclusive, and where a reckless use would not necessarily endanger the lives of persons, as would be the case in a town or upon a public thoroughfare. The speed of the train, under such circumstances, cannot constitute neglect as to one who voluntarily places himself upon the track, and where he has no right to be, and thus carelessly exposes himself to injury. Railroad trains must give the customary signals at public places or public crossings. The failure to do so is negligence; but this is required for the safety of passengers, trainmen, and the public using, and who have the right to use, the track at such public ways, and not for the purpose of protecting those who, as trespassers, may be crossing or using the track elsewhere."

In *McDermott v. Ky. Cent. R. R. Co.*, 93 Ky. 413, 20 S. W. 381, the plaintiff had been injured in the yards at Paris, Ky., by a backing train moved at a rapid rate of speed without any warning of its movement. Sustaining the circuit court in instructing the jury peremptorily to find for the defendant, the court said: "Accordingly, as moving engines and cars to and fro in the yard of a railroad company is indispensable to safe and proper conduct of its business, it should be no more obliged to specially look out for presence of those who may go there without right than for trespassers on the main track away from the yard. For to require the bell rung or whistle blown at every movement of an engine in the company's yard to and from a coal chute, water tank, or turntable, however slowly or short the distance it might have to go, or that an extra employé be placed upon every backing engine simply to warn or look out for presence of persons having no right or reasonably expected to be there, when not at all necessary for safety of persons or property legally entitled to care and protection by the company, would be unreasonable and oppressive."

In *Brown v. L. & N. R. R. Co.*, 97 Ky. 223, 30 S. W. 639, 17 Ky. Law Rep. 145, the deceased was killed within the corporate limits of the city of Louisville, but at a point where the territory had not been laid off into streets, and where there was no density of population. There was evidence that the train was not properly manned or equipped, and by reason of this the man was killed. This court, holding that the peremptory instruction to the jury was proper, said: "We think the better doctrine is that simple acquiescence on the part of a railroad company in the use of its track in this way does not confer authority or right, nor amount to license so to use; that decedent, being a trespasser and a wrongdoer at the time of his injury, had no right to complain of the size or weight of the train, nor of its speed (further than it should not be run in a city at

a reckless and dangerous rate), nor of its machinery or brakes, that they were insufficient, nor that it was not properly manned."

The rule laid down in these cases has been followed in many subsequent cases. In *Oatts v. C., N. O. & T. P. R. R. Co.*, 22 S. W. 330, 15 Ky. Law Rep. 87, the injury occurred at Burnside station. Oatts was standing on the railroad track trying to arrange some horses which he had loaded on a car on the side track. A car was pushed down the track by an engine without warning by bell or whistle, and injured him. The peremptory instruction which was given by the circuit court was sustained. In *Hoskins v. L. & N. R. R. Co.*, 30 S. W. 643, 17 Ky. Law Rep. 78, the deceased was killed within the corporate limits of Pineville, in what was called "Wasaota," by a train running very rapidly and giving no warning of its approach. A peremptory instruction was given the jury by the circuit court, and this, on appeal, was affirmed. In *Gherkins v. L. & N. R. R. Co.*, 30 S. W. 651, 17 Ky. Law Rep. 201, the intestate was killed at Highland Park, a station a few miles south of Louisville, by a hand car running very rapidly up behind him without warning while a freight train was passing on the other track. The court said: "It is manifest that the deceased was, at the time he was injured, a trespasser, in a legal sense, upon the property of appellee, to the exclusive use of which it was entitled, and that there was no public crossing at or near the place where the accident occurred. It is the settled doctrine of this court that nothing short of a failure on part of the company to exercise reasonable diligence in avoiding the accident after discovery of the danger to the trespasser will make the company liable."

In *L. & N. R. R. Co. v. Wade*, 36 S. W. 1125, 18 Ky. Law Rep. 549, the injury occurred at the station of Woodburn in Warren county, a much larger place than Four Mile. The plaintiff, while walking along the railroad track in Woodburn, was struck by a piece of timber projecting from a passing freight train, and injured. On the authority of the cases above cited, it was held that, there being no proof to show that the servants of the railroad company knew of the dangerous condition of the timber or the peril of the plaintiff, the court should have instructed the jury peremptorily to find for the defendant.

In *Lyons' Adm'r v. I. C. & R. R. Co.*, 59 S. W. 507, the intestate was killed at a late hour of the night near Mayfield, Ky. Affirming a judgment dismissing the plaintiff's petition, we said: "There was no reason for appellee's employes in charge of the train anticipating the presence of anybody at this remote point at that time of night."

In *Hoback v. Louisville, etc., R. R. Co.*, 99 S. W. 241, which was a similar case, we

again said: "Even though appellee knew that its track, at the place in question, was used by people in that locality, and had been so used in passing from their homes to the neighboring villages, yet this use, so far as the proof shows, had been confined principally to Sundays and to reasonable hours in the daytime, and appellee would certainly have no right to expect nor be required to be on the lookout for trespassers upon its track at the dead hour of midnight."

In *Gregory v. L. & N. R. R. Co.*, 79 S. W. 238, the plaintiff was hurt at Artemus by being struck by a train on a foggy morning, when, as he claimed, no lookout was maintained. In *C. & O. R. R. Co. v. See*, 79 S. W. 253, the injury occurred at Normal, where the land had been laid out in streets but had not been built up. In both of these cases, under the previous rulings of the court, it was held that there could be no recovery.

In *Brackett v. L. & N. R. R. Co.*, 111 S. W. 710, 33 Ky. Law Rep. 921, 19 L. R. A. (N. S.) 558, we had before us an injury occurring at this same station of Four Mile. In that case there were two cuts of cars standing on the loading track with a space of about three feet between them, very near the point where the deceased here was killed. While the intestate was passing through this space, a train backed in on the side track, and ran against one of the cuts of cars, causing it to close up the space, thus catching and killing her. It was held that there could be no recovery, as the space was not left for people to pass through, and she was a trespasser.

We do not see that this case can be distinguished from those cited. If the railroad company did not owe the deceased a lookout duty, it violated no duty which it owed him. If it owed him a lookout duty, it owed a like duty at all points in its yard, or near its yard; for under the evidence we do not see that a line could be drawn anywhere, and it could be said that a lookout duty existed on one side of the line and not on the other. At this late hour of the night, it cannot be said that the railroad company was under a duty to anticipate the presence of persons on its tracks, and under the evidence the court should have instructed the jury peremptorily to find for the defendant.

Judgment reversed, and cause remanded for further proceedings consistent herewith.

LONG v. DOUTHITT.

(Court of Appeals of Kentucky. Feb. 23, 1911.)

1. APPEAL AND ERROR (§ 1002*)—FINDINGS—CONCLUSIVENESS—CONFLICTING EVIDENCE.

A verdict on a disputed question of fact will not be disturbed on appeal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3935; Dec. Dig. § 1002.*]

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

2. EVIDENCE (§ 474*)—OPINIONS—VALUE OF STOCK—KNOWLEDGE OF WITNESS.

In an action by the purchaser of corporate stock against a stockholder and director to recover the purchase price on the ground of misrepresentations as to its value, evidence that the stock was worthless in 1905, based on information obtained by the witnesses in 1907, they not knowing of its value in 1905, was not admissible.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 2215-2218; Dec. Dig. § 474.*]

3. APPEAL AND ERROR (§ 1051*)—HARMLESS ERROR—ADMISSION OF EVIDENCE—FACTS OTHERWISE ESTABLISHED.

Error in admitting evidence was not prejudicial to appellant where he virtually admitted at trial the facts testified to.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4161-4170; Dec. Dig. § 1051.*]

4. CORPORATIONS (§ 121*)—STOCKHOLDERS—SALE OF STOCK—LIABILITY.

If a stockholder and director of a corporation sold stock, falsely representing that it was worth a certain amount per share, with the intent that the purchaser should rely upon such representation, and when he knew, or, by reasonable diligence could have known, that his representations were false, and the purchaser did rely thereon, the purchaser could recover the difference between the real value of the stock and its value as represented.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. § 505; Dec. Dig. § 121.*]

Appeal from Circuit Court, Graves County.

Action by H. B. Douthitt against Z. T. Long. From a judgment for plaintiff, defendant appeals. Affirmed.

W. J. Webb and Speight & Dean, for appellant. Wheeler & Hughes and Robbins & Thomas, for appellee.

CARROLL, J. The appellant Long was a stockholder and director in the May Pants Company of Mayfield, Ky., and in October, 1905, sold to the appellee Douthitt 23½ shares of stock for \$141.50 per share. This suit was brought by Douthitt to recover the amount so paid, upon the ground that the stock was worthless at the time of his purchase, and that he had been induced to buy it by the guaranty and representation of Long that it was worth the price paid. Upon a trial, he recovered a judgment for \$2,673, and this judgment we are asked to reverse for errors in the admission of evidence and in giving and refusing instructions. We may at the outset say that although the pleadings presented several issues, there was no issue of fact made by the evidence except the one relating to what was said by the parties in reference to the value of the stock at the time and before it was purchased.

The appellee testifies that the stock was worthless at the time of his purchase, and the appellee was not asked to and did not deny this fact. Nor did he dispute that at the time of the sale and for some years before he was a stockholder and director in the corporation. The appellee testifies

that: "At the time the trade was consummated, my brother and I were standing there about the bank, and Mr. Long approached me and asked: Had I thought anything more about the trade; and I told him I hadn't thought much more about it. So my brother asked him what the stock was worth, and he said it was worth \$141.50 a share. He says, 'Is it worth that on the books, Zack?' Mr. Long says: 'Yes; I am a director in the concern, and know what I am talking about, and I guarantee it to be worth \$141.50 per share.' So I traded with him then. Q. Tell the jury what you said to him after that—tell what you said? A. I told him if he would guarantee the stock to be good, to be worth that, I would accept his proposition. Q. I don't care anything about the proposition—the trade was closed then, was it? A. Yes, sir." The appellant denied that he guaranteed the stock to be worth \$141.50 or any other sum, or that he made any representations concerning it except as appear in the following answers: "A. Yes; some time in November, myself and Dr. Carney were standing in the door, standing there in the buggy store, and Mr. Douthitt came along, and we had a few words. He said that he had moved to Paris, Tennessee, and wanted to sell me his home upon South Eighth street, I believe it was. I told him I didn't know as I wanted to buy any house. I told him I might trade for it. He asked what I would trade him; and I told him some May Pants stock. He asked me what the stock was worth, and I told him I didn't know, but I thought it was worth \$141.50 on the books, I would not be positive. I says, 'You can go and see for yourself.' I asked him what he asked for his house and lot, and he said, '\$3,000.' I told him I didn't think it was worth that, but I told him I might give him \$2,750 in stock at the book value, that he could investigate—to go himself and ask Mr. Minton, the bookkeeper, what it was worth. Q. That is what took place? A. Yes, sir. Q. You made the statement that the book value was \$141.50? A. I told him I thought it was. Q. Did he come back? A. Yes; he went off and was gone about 25 or 30 minutes, and then come back. Q. When he came back in 25 or 30 minutes, what took place? A. He come back and said he had investigated and found out it was worth \$141.50, and says, 'I will trade with you.'" Both parties were corroborated in their respective statements by witnesses who testified that they heard what took place; and, if no error of law was committed to the prejudice of appellant, there is no reason why the finding of the jury upon the disputed issue of fact should be disturbed.

The first error assigned by counsel for appellant is that Turner, Allen, Wright, and

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

Gardner were permitted to testify that the stock was worthless in 1905, although each of them said that their opinion was based upon information that had come to them in 1907 and that personally they did not know anything about the condition of the corporation in 1905. This evidence was incompetent, but it was not prejudicial, because it was not denied by appellant or any witness in his behalf that the corporation was insolvent and the stock worthless in 1905. In short, as appellant virtually admitted everything that these witnesses testified to that is now complained of, it is manifest that their evidence did not in any way prejudice his defense, because as before stated he only made one defense.

In one instruction the court told the jury in substance that if they believed from the evidence that at the time the appellant sold the stock he represented to the appellee that it was then worth \$141.50 per share, or any sum materially more than its actual value, with the intention that appellee should rely upon the representations, and that he did rely upon them, and that appellant knew or by the exercise of reasonable diligence could have known that his representations were false, then the jury should find for appellee in damages the difference between the real value and the represented value of the stock.

In another, the jury were told that if they believed appellant guaranteed that the stock was worth \$141.50 per share, and that it was worth less than that amount, they should find for appellee the difference between the guaranteed and actual value.

The jury were further instructed that "the defendant (appellant) as director of the corporation was required to exercise reasonable diligence to understand the condition of the company, such as an ordinarily prudent man would use in the management of his own business under similar circumstances, and if you believed defendant exercised such care, the law is for the defendant and the jury should so find; unless you believe the state of facts set out in the instructions 1 and 2."

No objection is made to the instruction authorizing a recovery if the jury believe appellant guaranteed the value of the stock, but the other instructions are assailed upon the ground that under them the jury had the right to find against the appellant if they believed from the evidence that appellant knew or by the exercise of reasonable diligence could have known that his representations as to the value of the stock were false. It is argued that the jury should have been instructed that the appellant was not liable unless he knowingly, falsely, or fraudulently represented that the stock was worth \$141.50; while under the instructions given he was made liable if as a director he knew or by the exercise of reasonable diligence

could have known that his representations were false.

In *Allen v. Neale*, 134 Ky. 690, 121 S. W. 612, a question similar to the one now being considered was before the court, and the ruling was adverse to the contention of counsel for appellant.

In *Ligon v. Minton*, 125 S. W. 304, Minton, a director in the May Pants Company, was sued by Ligon to recover the amount paid for stock in this corporation. The ground of the suit being that Minton as a director had signed statements issued to the public, misrepresenting the condition of the affairs of the corporation, on the faith of which statements Ligon was induced to purchase the stock. In the course of the opinion the court said: "The published statements made by the directors of a corporation were representations to the public concerning its affairs, and the directors promulgating the statement will not be heard to say that it was innocently made if in fact it was materially false; they are held by our statute to know that which it was their legal duty to know, and which they would have known but for a failure to discharge their duty; that unequivocal statements of fact in such a statement, purporting to be of the knowledge of the directors, and being of facts presumably within their knowledge, will be deemed fraudulent in law, if materially untrue. One whose duty it is to know, and who speaks as if he had discharged that duty, is held in law to know, and will not be heard to say against those relying on his statement that in truth he did not know. He should speak the truth or be silent. The statement was issued to the public. The latter were invited and expected to deal with the corporation, and concerning its affairs, in reliance upon that statement. When one of the public does deal with the corporation, or with one of the directors, buying shares of the stock of the corporation at a figure justified only by the truth of the public statement, the statement is deemed as made to such purchaser, and for the purpose of inducing his purchase. If false, it was fraudulent. The purchaser had two remedies open to him. One was an action in equity for rescission. The other was for damages for the deceit. * * * In the one, he elects to hold the thing purchased, and sues to recover the difference between the price paid for it, and its value in its true condition as of the date of the purchase, with interest in the discretion of the jury."

We are unable to perceive any difference in principle between the law applicable in that case and this. In that case it was held that a director was liable in damages to a person who had purchased stock from him upon the faith of statements as to the condition of the corporation, which were false; the court citing with approval the *Allen Case*, holding that a director in a corpora-

tion must exercise reasonable diligence to ascertain the condition of the corporation and must be presumed to know all the facts which ordinary diligence would have made known to him, and that he could not close his eyes to the existence of facts which he ought to know. In the case before us the court instructed the jury in accordance with the principles announced in the two cases mentioned. The liability of a director should certainly not be less where he makes a personal statement upon the faith of which he is enabled to sell his stock than it is in a case where he is enabled to sell it by reason of a signed statement issued by him to the public.

Finding no error in the record, the judgment is affirmed.

LUCAS v. COMMONWEALTH.

(Court of Appeals of Kentucky. Feb. 22, 1911.)

1. CRIMINAL LAW (§ 1202*)—PUNISHMENT—SUCCESSIVE OFFENSES—SUFFICIENCY OF VERDICT.

Under Ky. St. § 1130 (Russell's St. § 3154), providing that every person convicted a second time of felony, the punishment of which is confinement in penitentiary, shall be confined not less than double the time of the first conviction, but that judgment in such cases shall not be given for the increased penalty unless the jury shall find the fact of former conviction, where accused had been formerly convicted of murder and imprisoned for 7 years, a verdict finding him guilty as charged and placing his punishment at 14 years in the penitentiary was sufficient to authorize the double penalty, though the fact of former conviction is not expressly stated.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 3263; Dec. Dig. § 1202.*]

2. CRIMINAL LAW (§ 1202*)—PUNISHMENT—SUCCESSIVE OFFENSES—EVIDENCE.

In view of Ky. St. § 1627 (Russell's St. § 86), providing that a copy of any record properly filed in the clerk's office of any court shall on proof of the execution of the original be admitted as evidence in lieu thereof, the reading by the deputy clerk of a court, in which defendant had been formerly convicted, of certified copies of the verdict, judgment of conviction, and sentence in the former case, his testimony that the defendant in this case was the same as the defendant in the former case, and the admission of the defendant that he was the same man, was sufficient to justify a judgment imposing punishment at confinement not less than double the time imposed on the first conviction.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 3261; Dec. Dig. § 1202.*]

Appeal from Circuit Court, Nelson County.

David (alias J. D.) Lucas was convicted of maliciously cutting and stabbing with intent to kill, and appeals. Affirmed.

E. E. McKay, for appellant. James Breathitt, Atty. Gen., and Tom B. McGregor, Asst. Atty. Gen., for the Commonwealth.

MILLER, J. The appellant, David (alias J. D.) Lucas, was indicted, tried, and con-

victed of the crime of wilfully and maliciously cutting and stabbing Hiram Kendall, with the intention of killing him. Coupled with that charge, the indictment also charged Lucas with having been theretofore convicted in the Lee circuit court of the crime of murder, and sentenced to a seven-year term in the penitentiary. This last paragraph of the indictment as to the former conviction was added for the purpose of doubling appellant's punishment in case he should be found guilty of the first charge contained in the indictment.

Kendall and Lucas resided upon farms in the same neighborhood in Nelson county. On the day of the cutting Kendall, as he was going to Bardstown, about 5½ miles distant from his farm, met Lucas in front of a store on the roadside. Lucas rode with Kendall in his buggy up the road to Lucas' place, where they separated, Kendall going on to town. Kendall left Bardstown about noon on his return journey; and, as he passed Lucas' farm, Lucas was at the gate, waiting for him. Kendall had bought a quart of whisky in town, and, Lucas having gotten into the buggy with Kendall, the two men proceeded down the road towards Kendall's home. Kendall had begun drinking while in Bardstown, and both men kept it up. They passed Kendall's house a few miles further down the road, and went to Boone's home for the purpose, as Kendall said, of buying a hog from Boone. They did not find Boone at home, and returned to Kendall's home. Kendall's gate opened on the road in front of his house, which set back some distance from the road. It was here that the difficulty occurred; and there is considerable conflict between the two men as to what happened. Lucas says that Kendall had become very drunk by that time, and that he himself was drunk, that Kendall refused to let Lucas get out of the buggy, and that finally Lucas made an effort to get out by force, whereupon both of them fell over the wheel onto the road. Lucas says Kendall caught him by the throat and was choking him, when he (Lucas) drew his knife and began to cut Kendall. On the other hand, Kendall says that when they arrived at the front gate, and he started to get out of the buggy, Lucas insisted on keeping the buggy and taking it home with him, and, upon Kendall's remonstrance and objection, Lucas hit him over the head with the butt end of the buggy whip, and finally knocked him down. However the difficulty may have started, it is clear that Kendall was knocked down in the road near the buggy, and that Lucas stabbed him several times while there. About that time Kendall's mother and 12 year old daughter came running from the house and called to a man working in an adjoining field to come to their assistance,

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

saying that Lucas was killing Hiram. Kendall's mother and daughter succeeded in getting Kendall inside the front gate, whereupon Lucas returned to the buggy, took something out of it, and then followed Kendall, his mother, and daughter inside the inclosure and beyond the gate, and again repeatedly stabbed him. He did not desist until the child caught the knife in her hand, and had been severely cut. Lucas then returned to the buggy, got into it, and started up the road; but, upon arrival of a man from the adjoining field, he abandoned the buggy, and ran up the road towards his home. Kendall was confined to his bed for some four or five weeks, and finally recovered.

The court instructed the jury upon the law as to willful and malicious cutting, the former conviction, and cutting in sudden heat and passion. The court also gave the usual instruction as to a reasonable doubt and a separate instruction which directed the jury to fix appellant's punishment at confinement in the penitentiary for a period of time double the term of imprisonment adjudged against him on the former conviction, if they should find him guilty of the malicious cutting charged in the indictment.

There is no serious complaint against the instructions. It is practically conceded that they covered every phase of the law of the case that was presented by the evidence. It is insisted, however, that the verdict as rendered is not sufficient to warrant the double penalty provided by the statute in cases of this character. Section 1130 of the Kentucky Statutes (Russell's St. § 3154) reads as follows: "Every person convicted a second time of felony, the punishment of which is confinement in the penitentiary, shall be confined in the penitentiary not less than double the time of the first conviction; and if convicted a third time of felony, he shall be confined in the penitentiary during his life. Judgment in such cases shall not be given for the increased penalty, unless the jury shall find, from the record and other competent evidence, the fact of former convictions for felony committed by the prisoner, in or out of this state." In this case the jury's verdict is as follows: "We, the jury, find the defendant David Lucas, alias J. D. Lucas, guilty as charged in the indictment, and place his punishment at fourteen (14) years in the state penitentiary." It is urged that this verdict does not find the appellant guilty of the charge of former conviction in the Lee circuit court as stated in the indictment, and that so much of the verdict as finds appellant guilty as charged in the indictment may have referred to the cutting in sudden heat and passion, which is a mere misdemeanor, and which, under the instructions, could have been the verdict in this case. In other words, it is insisted that the statute is not satisfied unless the verdict should

show the fact of former conviction of felony committed by the prisoner. This question, however, is no longer an open one in this state. *Oliver v. Commonwealth*, 113 Ky. 230, 67 S. W. 983, 24 Ky. Law Rep. 84, was a trial under an indictment for the crime of malicious cutting and wounding with intent to kill, coupled with the charge of a former conviction for malicious shooting, and in that case the verdict read as follows: "We, the jury, find the defendant guilty as charged in the indictment, and fix his punishment at ten (10) years in the penitentiary." This court affirmed the judgment entered upon that verdict, although it did not show, in terms, that the jury found there had been a former conviction. The same question was decided in *Herndon v. Commonwealth*, 105 Ky. 197, 48 S. W. 989, 20 Ky. Law Rep. 1114, 88 Am. St. Rep. 308. In considering the statute in that case, the court said that its purpose was to guarantee to the defendant a trial by jury on the question of former conviction, and that it was not necessary for the jury to incorporate in its verdict a finding of former conviction. It was sufficient if the verdict fixed a punishment under an instruction which properly presented that question. The instructions given in this case followed the instructions given in the two cases above referred to.

It is further contended that the court erred in admitting in evidence certified copies of the record of the Lee circuit court showing the former conviction of Lucas in that court for murder. The commonwealth introduced the deputy clerk of the Lee circuit court, who read to the jury certified copies of the verdict, judgment of conviction, and the sentence in the former case. The clerk also testified that Lucas, the defendant in this case, was the same man who was defendant in the former case in Lee county, and that he had known him from childhood. Besides, Lucas himself admitted he was the same man. Moreover, section 1627 of the Kentucky Statutes (Russell's St. § 86) provides that a copy of any record or paper properly filed or lodged in the clerk's office of any court shall, upon proof of the execution of the original, be admitted as evidence in lieu thereof. *Smith v. Gowdy*, 96 S. W. 566, 29 Ky. Law Rep. 832; *Greenleaf's Evidence* (Lew's Ed.) § 507. The evidence above mentioned fully satisfied the requirements of the statute, and justified fixing the punishment at confinement not less than double the time imposed on the first conviction. *Gragg v. Commonwealth*, 104 S. W. 285, 31 Ky. Law Rep. 873; *Tall v. Commonwealth*, 110 S. W. 425, 33 Ky. Law Rep. 541.

Being clearly of the opinion that the verdict and judgment were fully authorized by the law and the evidence, the judgment of the lower court is affirmed.

PERRY v. VEAL.

(Court of Appeals of Kentucky. Feb. 23, 1911.)

1. LANDLORD AND TENANT (§ 120*)—TENANCY AT WILL—TERMINATION—DEATH OF TENANT.

The rights of a tenant at will in the land terminate at his death.

[Ed. Note.—For other cases, see Landlord and Tenant, Cent. Dig. § 419; Dec. Dig. § 120.*]

2. LANDLORD AND TENANT (§ 119*)—TENANCY BY SUFFERANCE.

Where defendant's husband was only a tenant at will, so that his rights terminated at his death, she resided on the land after his death as a tenant by sufferance, if a tenant at all.

[Ed. Note.—For other cases, see Landlord and Tenant, Cent. Dig. § 429; Dec. Dig. § 119.*]

3. CHAMPERTY AND MAINTENANCE (§ 7*)—SALE OF LAND—PERMISSIVE POSSESSION.

The possession of one who merely occupied land by permission of the owner as a tenant by sufferance was not adverse, so that the sale of the land by the owner was not champertous as to her.

[Ed. Note.—For other cases, see Champerty and Maintenance, Cent. Dig. § 82; Dec. Dig. § 7.*]

Appeal from Circuit Court, Owen County.

Action by M. S. Veal against Pearl Perry. From a judgment for plaintiff, defendant appeals. Affirmed.

James H. Settle, for appellant. John W. Douglas, for appellee.

LASSING, J. Some years prior to March 1, 1910, M. B. Perry bought a tract of land of about a hundred acres. His brother, E. R. Perry, moved onto this land shortly after its purchase, and built a small house on it at an expense of possibly \$150 to \$200. M. B. Perry was a man of means, while his brother was poor. After he had taken charge of the farm, E. R. Perry used and enjoyed it as a home, and rented out portions thereof to whom he pleased, until his death in January, 1909. It is not claimed that E. R. Perry owned the land, but there is evidence to the effect that his brother bought it to provide him a home. After his death, his wife, it appears, desired to remain upon the farm, and requested Dr. Green Perry, another brother, to intercede and get permission for her to remain upon the place during that year. She denies that she made such a request. But, whether she did or not, she was, with the consent of M. B. Perry, permitted to continue on the farm and occupy the house. In August, 1909, M. B. Perry and his wife sold and conveyed the land to M. S. Veal, and about March 1, 1910, he wanted possession of the land. The widow refused to surrender, and he brought a suit to dispossess her. A trial before the county judge resulted in a verdict in favor of appellee. On appeal the question was tried in the circuit court, with the same re-

sult. Being dissatisfied therewith, Mrs. Perry appeals and seeks a reversal here.

She alleges that she has been in the adverse possession of the land for a number of years, and was in the adverse possession thereof at the date of its sale to appellee, and that the sale was therefore champertous; that she was at no time a tenant of M. B. Perry, and did not become, by virtue of the sale to appellee, a tenant of appellee's; and that he was without right or authority to proceed to oust her in the way and manner in which he did. Her husband did not own the land, but was, under the most favorable construction that can be placed upon the evidence, a tenant at will of his brother's. All rights which he had in the land terminated at his death, and thereafter appellant, if a tenant at all, was a tenant by sufferance. The decided weight of the testimony is to the effect that, after the death of her husband, appellant sought and was granted permission from her brother-in-law, through his agent, to occupy the place. Her occupancy, therefore, was not adverse to, but under the owner, M. B. Perry, and his sale to appellee was not champertous.

No complaint is made that appellant was proceeded against without due or sufficient notice. Her only defense is that she was not a tenant of appellee's vendor, and, the proof being against her upon this point, we are of the opinion that the judgment of the lower court is right, and it is therefore affirmed.

RENDER v. CITY OF LOUISVILLE et al.
(Court of Appeals of Kentucky. Feb. 22, 1911.)**1. MUNICIPAL CORPORATIONS (§ 907*)—HOSPITALS—BONDS—CONSTITUTIONAL LAW.**

Act March 14, 1910 (Laws 1910, c. 8), authorizing cities to issue bonds for a public hospital, if the voters so determine, is not unconstitutional for failing to expressly require a two-thirds vote within Const. § 157, requiring such vote before cities can become indebted beyond the current revenues.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 1895; Dec. Dig. § 907.*]

2. CONSTITUTIONAL LAW (§ 205*)—SPECIAL PRIVILEGES—BIPARTISAN BOARDS.

Act March 14, 1910 (Laws 1910, c. 8) § 1, providing for a bipartisan hospital board, does not violate Bill of Rights, § 3, prohibiting special privileges, in that it requires the board to be appointed from the Democratic and Republican parties excluding members of other political parties.

[Ed. Note.—For other cases, see Constitutional Law, Dec. Dig. § 205.*]

Appeal from Circuit Court, Jefferson County, Chancery Branch, First Division.

Action by L. M. Render against the City of Louisville and others. Judgment for defendants, and plaintiff appeals. Affirmed.

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

Trabue, Doolan & Cox, for appellant. Clayton B. Blakey and Huston Quin, for appellees.

SETTLE, J. This action was instituted in the court below by appellant, a taxpayer of the city of Louisville, against the appellees, city of Louisville, its mayor, and the persons composing the commissioners of hospital of the city of Louisville, to enjoin the issuance by the city of \$1,000,000 of bonds for use in erecting and furnishing a city hospital. The city of Louisville claims the right to issue the bonds under authority conferred by an act of the General Assembly of the commonwealth of Kentucky approved March 14, 1910, entitled "An act to enable cities of the first class to construct a public hospital" (Laws 1910, c. 8), which provides that, in order to obtain money for the construction and furnishing of such hospital, the general council of a first-class city may adopt an ordinance submitting to the voters thereof, at the November election, 1910, the question of whether the bonds of the city should be issued for that purpose, and that such ordinance should specify the total number and amount of the bonds to be issued, not exceeding \$1,000,000, the date and maturity thereof, the rate of interest they should bear, and how payable. Also, that the ordinance should contain the necessary details in reference to the execution and delivery of the bonds, their denomination, interest coupons to be attached, tax to be levied to pay the interest thereon, and create a sinking fund to retire the bonds at maturity. The act empowers the mayor of a city of the first class, having in contemplation the issuance of bonds for the construction of a hospital, to appoint four persons—two from the Democratic party and two from the Republican party—who, with the mayor as an ex officio member, shall constitute the commissioners of hospital of such city, with capacity as such to contract and be contracted with, sue, and be sued, and provides that to these commissioners shall be intrusted the control of the work of constructing and maintaining the hospital, also the duty of fixing the price of the bonds, selling the same, and receiving the proceeds; but with the proviso that none of them shall be sold for less than par, and that any premium obtained from their sale shall constitute a part of the sinking fund for their ultimate retirement.

It appears from the averments of the petition that the general council of the city of Louisville, pursuant to the authority conferred upon it by the act mentioned, adopted such an ordinance with respect to the holding of the required election, issuance of bonds, and other steps, as is by the act prescribed, and that the mayor duly appointed, with the approval of the general council, the four persons, two from each of the parties named, who are to act as commissioners of hospital. It further appears that, after due notice, the

question of whether \$1,000,000 of bonds maturing 40 years after date bearing interest at the rate of 4½ per cent. per annum, payable semiannually, should be issued by the city of Louisville for the purpose of constructing and furnishing a public hospital, was, as directed by the act and ordinance mentioned, submitted to the qualified voters of the city at the November election, 1910, and that at such election two-thirds of the qualified voters, voting upon the proposition, voted for the issuance of the bonds; that is to say, of 15,942 votes cast thereon, 11,892 were cast in favor of the issuance of the bonds and 4,050 in opposition thereto. It further appears from the averments of the petition that the appellee city of Louisville is now ready to issue and place in the hands of its commissioners of hospital, for sale upon the market, the bonds for the construction of the hospital, but that appellant objected in the circuit court to its doing so on the grounds, as alleged, that the act providing for the issuance and sale of the bonds is unconstitutional and the ordinance adopted in pursuance thereof invalid. Appellees filed a joint demurrer to the petition, which the circuit court sustained, and, appellant failing to plead further, judgment was entered refusing the injunction asked and dismissing the petition, and from that judgment he has appealed.

The constitutionality of the act of the Legislature authorizing the bond issue in question is assailed in the brief of appellant's counsel upon two grounds: "(1) That in providing for the issuance of the bonds, if the voters of the city shall determine that such bonds shall be issued (section 10 of the act), the Legislature failed to comply with a provision of section 157 of the Constitution of Kentucky, which requires the affirmative vote of two-thirds of the voters before bonds can be issued under such circumstances. (2) That the act (section 1) in requiring that two of the members of the hospital commission shall be members of the Democratic party and two members of the Republican party is in conflict with and repugnant to section 3 of the Constitution of Kentucky." So much of section 157 of the Constitution as bears on the question under consideration provides as follows: "No county, city, town, taxing district, or other municipality shall be authorized or permitted to become indebted, in any manner or for any purpose, to an amount exceeding in any year, an income or revenue provided for such year, without the assent of two-thirds of the voters thereof, voting at an election to be held for that purpose; and any indebtedness contracted in violation of this section shall be void." It was not necessary that the act should embody the provisions of section 157 of the Constitution referred to or words of similar import, in order to make valid the election held in the city of Louisville to determine whether the bonds should be issued, or to make valid the issuance

of the bonds following such election. It is not required that an act of the Legislature shall have incorporated in it any provision of the Constitution bearing on the matter therein made the subject of legislation. It is sufficient that it does not in terms or meaning conflict with any provision of the Constitution, and in determining whether the act conforms to that instrument it is to be tested by and in the light of its provisions.

In the case of Board of Education of Winchester v. City of Winchester, 120 Ky. 594, 87 S. W. 768, 27 Ky. Law Rep. 994, objection was made that an act of the Legislature under which an election had been held authorizing the issue and sale of bonds by the city of Winchester for the erecting of a school building was in conflict with section 157 of the Constitution. In refusing to sustain the objection we said: "Every provision of the Constitution is mandatory. When it is provided that an indebtedness to a certain amount shall not be incurred without the assent of two-thirds of the electors voting at an election to be held for that purpose, it necessarily follows from the constitutional provision that such an indebtedness may be incurred with the assent of two-thirds of the voters. The Legislature can neither subtract from nor add to the constitutional requirement. The constitutional provision regulates the subject, and removes it from legislative control." Oooley, Const. Limitations, p. 64. It is proper to add in this connection that we also held in the case supra, that the meaning of section 157 of the Constitution is that the assent of two-thirds of the electors whose votes are cast on the question of incurring the indebtedness is all that is necessary; otherwise, the section of the Constitution, supra, would have required the Legislature to indicate by statutory enactment some means of ascertaining the entire number of legal voters in the municipality. Montgomery County Court v. Trimble, 104 Ky. 629, 47 S. W. 773, 20 Ky. Law Rep. 827, 42 L. R. A. 738; Tipton, etc., v. City of Shelbyville, etc., 107 S. W. 810, 32 Ky. Law Rep. 1123. Section 5 of the ordinance adopted by the general council of the city provides that: "None of the bonds shall be prepared or issued unless at said election two-thirds of those voting on the said question shall vote in favor of the issuance of said bonds." While this provision of the ordinance would not have cured the omission from the act of the Legislature of a like provision, if its insertion therein had been necessary to its constitutionality, its presence in the ordinance shows that the general council knew that two-thirds of the votes cast at the election must favor the issuance of the bonds to authorize their issuance; and also that the publication of the ordinance would inform the voters of the city of that fact and prevent any misapprehension as to the vote required to carry or defeat the proposition. It is not apparent that

any reason exists for our holding either that the act or ordinance under consideration violates section 157 of the Constitution.

We now come to the consideration of appellant's second and final contention, which is, as previously stated, that section 1 of the act in question in providing that two of the commissioners of hospital shall be appointed by the mayor from the Democratic party and two from the Republican party, violates section 3 (Bill of Rights) of the Constitution, which declares: "All men, when they form a social compact, are equal; and no grant of exclusive, separate public emoluments, or privileges shall be made to any man or set of men, except in consideration of public services; but no property shall be exempt from taxation as provided in this constitution; and every grant of a franchise, privilege or exemption, shall remain subject to revocation, alteration, or amendment." As well argued by counsel for appellees and conceded by counsel for appellant, if the act should be held unconstitutional for the reason last urged, then upon the same ground could the provisions of the present election law with respect to the appointment of the state board of election commissioners and precinct election officers be held unconstitutional; for they are selected equally from the two political parties that polled the largest vote at the last preceding election for state officers or presidential electors, which were the Democratic and Republican parties. But in the case of Herndon v. Farmer, 114 Ky. 200, 70 S. W. 632, 24 Ky. Law Rep. 1045, we held the statute of 1898 and that of 1900, both relating to the subject of elections, constitutional.

In the case of Miller, etc., v. City of Louisville, etc., 99 S. W. 284, 30 Ky. Law Rep. 664, we had before us for consideration the constitutionality of a statute authorizing cities of the first class to submit to the voters thereof the question whether bonds should be issued for the raising of money to construct sewers. The first section of the act provided, as does the act now under consideration, that the mayor of such cities should appoint four persons who, with the mayor as a member ex officio, should constitute a sewerage commission, two of the appointees to be members of the Democratic party and two members of the Republican party. Section 3037b, Ky. St. (Russell's St. § 858). In our opinion the statute was not open to the objections made to it, and its constitutionality was upheld. It is true objection was not specifically made to that part of it which provided for the appointment by the mayor of a bipartisan board of sewerage commissioners, but, as the entire statute was before us and its constitutionality was assailed upon various grounds, the fact that we did not in the opinion discuss the provisions with respect to the personnel of the sewerage commission gives some force to the argument of

counsel that we found no reason for holding it unconstitutional because of those provisions.

It is stated in the written opinion of the judge of the circuit court, and not denied by appellant's counsel, that the question of the city of Louisville issuing bonds for sewerage purposes was twice defeated by the voters of that city, and that the necessary two-thirds majority was not obtained until the statute was so amended as to allow the appointment of a bipartisan commission, following which the third election was held, resulting in a majority in favor of the bond issue of more than two-thirds of the votes cast. It may be that the benefits arising from the control by a bipartisan commission of the sewerage system of Louisville influenced many of the votes cast for the issuance of the hospital bonds; but, whether so or not, we are unable to see that the provisions of the act authorizing the appointment by the mayor of the hospital commission from the two leading political parties will violate the Constitution, or prove disastrous to the interests of the city of Louisville.

It is urged against this feature of the act that it requires a political test as a qualification for office, and creates special privileges in contravention of the Constitution. In our opinion the constitutional provision referred to does not apply to legislative enactments fixing the qualifications for membership on a municipal board of commissioners. The requirement that the commissioners be equally selected from the two political parties imposes no constitutional restriction upon them, nor does it add any new qualification not allowed by the Constitution; and, as the commission is not a permanent body, its members do not hold their places to the exclusion of all others. It is true that an elector who does not ally himself with the Democratic or Republican party cannot be appointed to membership on the board, but there is no such thing as the right to hold office; and, if the language of the act had been that the commission should be composed of two members from each of the two leading or dominant political parties in the city or state, the appointees would nevertheless have to be selected equally from the Democratic and Republican parties. No elector of the city is deprived by the act of any privilege so far as voting is concerned, as the members of the hospital commission are appointed by the mayor, not elected by the voters. The latter may, however, vote for the mayor, who holds and exercises the power to appoint the hospital commissioners, and in that way they have a voice indirectly in the appointment of the commissioners. It is very common for Legislatures in creating municipal boards and commissions to provide that the members thereof shall not all be of the same political faith, and to direct that they

shall be selected from the dominant political parties. There can be no valid objection to the right of the Legislature to fix the qualifications of the members of such boards, or to provide that they shall be appointed from the two principal political parties. It is designed to secure in the action of the board impartiality and freedom from political bias, and violates no provision of the Constitution. Moreover, it is the province of the Legislature to determine whether such a requirement is wise. It is apparent that the Democratic and Republican parties were named in the act as the parties from which to appoint the members of the hospital commission, because they are, and for many years have been, the dominant political parties in the city of Louisville and in the state. But, if in the future other political parties should get in ascendancy, it would do no violence to the meaning of the statute, to the rights of the city, or the holders of the hospital bonds for the mayor to appoint the members of the hospital commission equally from the two leading or dominant political parties, whatever may be the names under which such parties exist.

Our attention has been called to a number of authorities cited in the briefs of counsel, some of which differ radically from the conclusions we have reached in the case at bar. Among these are the cases of *State ex rel. Holt v. Denny*, 118 Ind. 449, 21 N. E. 274, 4 L. R. A. 65; *Evansville v. State*, 118 Ind. 446, 21 N. E. 267, 4 L. R. A. 93; *State ex rel. Geake v. Fox*, 158 Ind. 126, 63 N. E. 19, 56 L. R. A. 893; *People ex rel. Leroy v. Hulbut*, 24 Mich. 44, 9 Am. Rep. 103; *Attorney General v. Detroit*, 58 Mich. 213, 24 N. W. 887, 55 Am. Rep. 675. All these cases involved statutes, in some respects like the one under consideration, which were held unconstitutional, and at least two of them were so held as violative of provisions similar to those contained in section 3 of our Constitution. This is notably true of *Attorney General v. Detroit*, supra.

We find, however, among the authorities cited, the following, which seem in harmony with the views we have expressed: *Churchill v. Bemis*, 45 Neb. 724, 64 N. W. 348; *People ex rel. Grinnell v. Hoffman*, 116 Ill. 587, 5 N. E. 596, 8 N. E. 788; *Patterson v. Barlow*, 60 Pa. 80; *Iowa v. Sargent (Iowa)* 124 N. W. 339, 27 L. R. A. (N. S.) 719. The opinion of the majority of the court in the case last cited very ably and exhaustively discusses the question raised by appellant's second contention in this case, and sustains the constitutionality of the statute substantially like the one before us. Its logic satisfies us of the correctness of the conclusion at which we have arrived.

Finding no error in the judgment of the circuit court, it is hereby affirmed.

POTTER v. COMMONWEALTH.

(Court of Appeals of Kentucky. Feb. 21, 1911.)

1. CRIMINAL LAW (§ 800*)—INSTRUCTIONS—"MALICE AFORETHOUGHT."

An instruction that the words "with malice," as used in the instruction, denoted a wrongful act intentionally done, and that the term "aforethought," as used, meant a predetermination to do the act, however suddenly or recently formed before the act was done, sufficiently defined "malice aforethought," especially when taken in connection with another instruction defining "feloniously" as meaning to proceed from an evil heart or purpose, done with the deliberate intention to commit a crime, though the definition of malice aforethought did not require that the act be done "without legal excuse."

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1810; Dec. Dig. § 800.*

For other definitions, see Words and Phrases, vol. 5, pp. 4304-4306; vol. 8, p. 7714.]

2. HOMICIDE (§ 300*)—INSTRUCTIONS—SELF-DEFENSE.

The court instructed that if accused, without malice, etc., when it was not in his own apparent necessary defense, killed decedent, the jury should find him guilty of manslaughter, but if he killed decedent in his apparent necessary self-defense the jury should acquit, and in the selection of the means accused was necessarily permitted to exercise his own judgment, and could act from appearances if he acted reasonably, and, if when he killed decedent he believed and had reasonable ground to believe that he was in imminent danger of great bodily harm from decedent unless he resorted to the means used, the jury should acquit. *Held*, that the instructions sufficiently charged that if accused believed, or had reasonable ground to believe, that he was in imminent danger, he could act upon such appearances in self-defense and kill.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 614-632; Dec. Dig. § 300.*]

Appeal from Circuit Court, Jefferson County, Criminal Division.

Virgil Potter was convicted of murder, and he appeals. Affirmed.

See, also, 124 S. W. 317.

Edwards, Ogden & Peak and Wm. H. Sweeney, for appellant. James Breathitt, Atty. Gen., and Tom. B. McGregor, Asst. Atty. Gen., for the Commonwealth.

LASSING, J. Appellant, Virgil Potter, was indicted, tried, and convicted of the crime of murder in the Jefferson circuit court. He complains that the instructions given were prejudicial, and on this ground alone seeks a reversal. He admitted striking the blow which inflicted the wound resulting in the death of his victim, but he justified on the ground of self-defense. Of the instructions given, but three are complained of. They are those defining "malice aforethought" and the instructions on voluntary manslaughter and self-defense, and are as follows:

"The words 'with malice,' as used in the instructions herein, denote a wrongful act, intentionally done, and by the term 'aforethought,' as used in instruction No. 1, is meant a predetermination to do the act, how-

ever suddenly or recently formed in the mind before the act is done.

"If the jury believe from all the evidence, to the exclusion of a reasonable doubt, that at the time, place, with the weapon, and in the manner set forth in instruction No. 1, the accused Virgil Potter did, without malice, in sudden heat and passion, or in sudden affray, when it was not in his own apparent necessary self-defense, kill and slay Romie Reed by striking and wounding him in and upon his head, body, arms, limbs, or person of him, the said Romie Reed, with a hatchet, and from which striking and wounding the said Romie Reed did die within a year and a day thereafter, they will find him in that case guilty of the crime of voluntary manslaughter, an offense included in the indictment, and may fix his punishment for a term in the penitentiary of not less than 2 years nor more than 21 years, in the discretion of the jury.

"If the accused, Virgil Potter, struck, wounded, and killed Romie Reed in his apparent necessary self-defense, then the jury should find the accused not guilty. For the law allows in the necessary self-defense such means as are necessary, and in the selection and use of the means the accused was necessarily permitted to exercise his own judgment, and could act from appearances so that he acted reasonably; and if, at the time the accused struck, wounded, and killed Romie Reed, if he did so, he believed, and had reasonable grounds to believe, that he was in imminent danger of great bodily harm, whether it endangered life or not, at the hands of the said Romie Reed, unless he resorted to the means used, then the use of the means was justifiable, and the jury should find the accused not guilty."

The objection to the instruction defining "malice aforethought" is that the court failed to tell the jury that the act, to constitute malice aforethought, must be done without lawful excuse, according to a predetermined plan, no matter how recently or suddenly formed. The instruction given, while not in the usual form, in our opinion meets the requirements of the law. In *Clark v. Commonwealth*, 111 Ky. 443, 63 S. W. 740, 23 Ky. Law Rep. 1029, the phrase "malice aforethought" is defined as "a predetermination to do the act of killing without legal excuse, and it is immaterial how suddenly or recently before the killing such determination was formed." And in *Bohannon v. Commonwealth*, 71 Ky. 481, at page 494, 8 Am. Rep. 474, in condemning an instruction in which the definition of "malice aforethought" was given as "a predetermination to kill, however suddenly or recently formed in the mind of the person killing before the fatal act," the court said: "If the plea of self-defense had not been relied on, and the sole effort of the

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes.

appellant had been to reduce the killing from murder to manslaughter, this definition might not have been calculated to prejudice his rights; but, standing as it does without any subsequent modification or explanation, it is in effect a determination by the court that killing in necessary self-defense of one's person or property may be killing with malice aforethought, and therefore legally murder. A killing to constitute murder must be done unlawfully, and unless it be unlawful it cannot have been done with malice aforethought, although it may have been predetermined."

There is a marked distinction between the instruction condemned and the one under consideration. There the court told the jury that it was "a predetermination to kill," etc., without the addition of any qualifying or explanatory words. Here the jury is told that malice aforethought "denotes a wrongful act intentionally done," etc. If the act is wrongful, it is without "legal excuse," and as, under the instruction given, the jury had to find that the act of striking was wrongful before they could find it to be malicious, we are of opinion that, in the form given, this instruction was neither misleading nor prejudicial. The jury understood it as well as if the qualifying phrase "without legal excuse" had been substituted for the word "wrongful." Our conclusion in this particular is strengthened by the further fact that, in instruction No. 5, the court defined the word "feloniously" to mean "proceeding from an evil heart or purpose, done with the deliberate intention to commit a crime." When this definition is read in connection with the definition of the phrase "with malice aforethought," the jury, before they could find the accused guilty of murder, must have determined from the evidence that the blow producing the injury was struck, not only wrongfully, but "with a deliberate purpose to commit a crime."

The criticism of the other instructions is that they leave the jury to determine from the proof whether or not there was apparent necessity for appellant to act; whereas, the jury should have been told that, if they believed from the evidence that appellant believed, or had reasonable ground to believe, that he was in danger, then he had a right to act, etc. The principle contended for by appellant's counsel is well and firmly established by numerous decisions of this court upon this subject. But we think the instruction given, while not in the usual form, clearly conveyed this idea, and the latter part of the self-defense instruction so clearly states this law as to leave no room for doubt.

Upon full consideration, we are of opinion that the instructions fairly submitted to the jury the case of the commonwealth and the defense of the accused, and when this is done the ends of the law are satisfied.

Perceiving no error in the conduct of the trial prejudicial to the rights of appellant, the judgment is affirmed.

ANDERSON COUNTY v. COLLINS.

(Court of Appeals of Kentucky. Feb. 21, 1911.)

1. TAXATION (§ 545*)—COLLECTION OF TAXES—STATUTES—APPEAL.

Act March 15, 1906 (Ky. St. §§ 4019-4281s [Russell's St. §§ 5904-6230]), relating to revenue, specifically provided for the collection of taxes on all subjects of taxation, and repealed so much of the act of 1904 (Laws 1904, c. 40) as provided for the payment of taxes assessed on distilled spirits in warehouses to the county clerk, re-enacting so much of the act of 1902 (St. 1903, § 4111) as required payment of such taxes to the officers entitled to receive the same within the state, county, taxing district, city, or town, thus providing for the collection of such taxes in a county by the sheriff and not by the county clerk.

[Ed. Note.—For other cases, see Taxation, Dec. Dig. § 545.*]

2. TAXATION (§ 549*)—COLLECTION BY IMPROPER OFFICER—FEES.

Where taxes assessed on distilled spirits within a county are erroneously paid to the county clerk, instead of to the sheriff, who is entitled to collect the same, the clerk was not a de facto sheriff, and hence collections by him would not relieve the county from liability to the sheriff who was always ready, able, and willing to collect the taxes for the fees he would have received had he been permitted to do the work.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. § 1043; Dec. Dig. § 549.*]

Appeal from Circuit Court, Anderson County.

Action by R. S. Collins against Anderson County. Judgment for plaintiff, and defendant appeals. Affirmed.

F. R. Feland and Wilkes H. Morgan, for appellant. Lillard Carter and G. A. Williams, for appellee.

CLAY, C. Appellee, R. S. Collins, was the duly elected and acting sheriff of Anderson county for the term beginning January, 1906, and ending January, 1910. During that time he executed all the bonds required by law. In making his settlements with the commissioner appointed by the county, he was not charged with the taxes assessed and levied upon distilled spirits in bonded warehouses located in that county, nor was he credited with commissions for collecting the same. He brought this action in June, 1909, against Anderson county, to surcharge the settlements on the ground of mistake and to recover 4 per cent. of the taxes collected by Anderson county upon distilled spirits. The amount sued for was \$1,021.16. For this sum the court entered judgment in his favor, and the county of Anderson appeals.

During his incumbency in office, H. S. Wise was county clerk of Anderson county. Wise claimed the right to collect the taxes

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

in question. Appellee insisted that it was his duty to collect the taxes, and that he was entitled to his commissions thereon. The matter was submitted to the county attorney then in office, and he gave it as his opinion that it was the duty of the county clerk to collect the taxes. Although appellee acquiesced in this arrangement, he did so under protest, and insisted all along that the law did not confer upon the county clerk the power to collect the taxes. During this controversy the independent warehousemen paid their taxes direct to Wise, the county clerk. The sum so paid amounted to \$4,434.25. During the same period the Kentucky Distilleries & Warehouse Company made its checks payable to appellee, as sheriff. Upon receipt of these checks, appellee indorsed them and delivered them to H. S. Wise, who was both county clerk and county treasurer. The sum so paid amounted to \$21,095.34. The amount for which judgment was given is 4 per cent. of the sum paid direct to the county clerk and 4 per cent. of the sum for which the checks were made payable to appellee, and indorsed by him and turned over to Wise. Appellee had already received 10 per cent. upon the first \$5,000 collected in each of the years involved in this action. He now claims 4 per cent. upon the taxes as a part of the residue of the taxes collected during the years in question.

The first question to be determined is: Whose duty is it, under the act of 1903, to collect taxes on distilled spirits?

The present law on the subject may be found in the act of March 15, 1906, which is chapter 108 of the Kentucky Statutes (Russell's St. §§ 5904-6230). Section 4105 of that act provides for certain reports to be made to the auditor of public accounts by the owners of warehouses. Section 4106 requires the auditor to submit those reports to the board of valuation. Section 4107 authorizes the board of valuation to assess the spirits for taxation. Section 4108 directs the board to certify to the auditor of public accounts the value of the spirits as assessed for state tax, and directs the auditor to certify to the county clerks of the respective counties the amount liable for county, city, town, or district taxation, and the date when the bonded period will expire on such spirits. This section concludes as follows: "The report shall be by the county clerk filed in his office, and by him certified to the proper collecting officer of the county, city, town or taxing district for collection." Section 4109 makes the custodian of the spirits on the 1st day of September in the year the assessment is made liable for all taxes. Section 4110 prescribes when such taxes shall become due, and provides that the taxes on each year's assessment shall bear legal interest until paid. Section 4111 is as follows: "Every owner or proprietor of a bonded warehouse in which distilled spirits

may be stored, as contemplated in the preceding section, shall, on the first day of January, May and September next after said government tax shall have been paid, become due, or be removed from the warehouse, make and transmit to the auditor of public accounts and the clerk of the county court in which the spirits may have been at the time of the assessment, a statement sworn to by the person whose duty it is to make the report, showing the quantity of spirits on which the government tax has been paid or has become due, and what spirits have been removed from the warehouse during the preceding four months, the years in which such spirits were assessed for taxation, and the county, city, town or taxing district in which the warehouse is situated in which the spirits were stored at the time of the assessment, and shall, at the same time, pay all taxes and interests on such spirits due the state, county, taxing district, city, or town to the officers entitled to receive the same. The report herein required shall be made by the owner or proprietor of such bonded warehouse whether any spirits are stored in such warehouse or not at the time the report is due." Section 4129: "The sheriff, by virtue of his office, shall be collector of all state, county and district taxes, unless the payment thereof is, by law, especially directed to be made to some other officer."

All the foregoing sections were taken, word for word, from the act of 1902, which may be found in chapter 108 of the Kentucky Statutes of 1903; the only difference being that section 4111, in directing the owner of the warehouse to pay all taxes, inserts the words "and interest," and adds at the end of the section: "The report herein required shall be made by the owner or proprietor of such bonded warehouse whether any spirits are stored in such warehouse or not at the time the report is due." In the year 1904 the Legislature amended section 4111 of the Kentucky Statutes (Carroll's Edition of 1903) by adding after the word "same," which was the concluding word of that section, the following: "Such report herein required to be made to the auditor of public accounts, shall in each instance be accompanied by a remittance and payment of the taxes due upon such spirits, which said taxes shall be by the auditor turned into the state treasury; and such report herein required to be made to the clerk of the county court shall in each instance be accompanied by a remittance and payment of the taxes due the county upon such spirits, which said taxes shall be by said clerk turned into the county treasurer, or paid out to such person or persons, as the fiscal court may by order direct." Laws 1904, c. 40.

The solution of the question before us depends on whether or not the act of 1906 repealed the foregoing act directing the tax

on distilled spirits to be paid to the county clerk. The act of 1902 (section 4129) provided that the sheriff, by virtue of his office, should be collector of all state, county, and district taxes, unless the payment thereof was, by law, especially directed to be made to some other officer. There was nothing in that act, or any other, which directed the taxes on distilled spirits to be paid to some other officer. Therefore the sheriff was, under that act, the officer authorized to receive taxes on distilled spirits. This construction was recognized in the case of *Shawhan v. Harrison County*, 116 Ky. 490, 76 S. W. 407, 25 Ky. Law Rep. 734. This condition was changed by the act of 1904. The effect of that act was to repeal so much of section 4108 of the act of 1902 as required the county clerk to certify the report made to him by the auditor of public accounts to the proper collecting officer of the county; having the report in his possession and on file in his office, he was no longer required to certify it to himself. When the Legislature took up the question of revenue and taxation in the year 1906, it re-enacted section 4111 of the act of 1902 and omitted entirely therefrom the amendment thereto embraced in the act of 1904. Not only did it do this, but, after the word "same," it inserted an additional provision. Furthermore, the act of 1906 contains the following repealing clause: "All acts and parts of acts in conflict with this act are hereby repealed, except the act of 1904, approved March 24th, 1904, which is chapter 104 of Session Acts 1904, fixing a tax of fifty cents on each barrel of blended or rectified whisky, which act is not hereby repealed, but left in force as it now is. If any section in this bill shall be held to be unconstitutional, that fact shall not affect any other section of the act, it being the intention of the General Assembly in enacting this bill to enact each section separately, and if any proviso or exception contained in any section of this bill shall be declared unconstitutional, that fact shall not affect the remaining portion of said section; it being the intention of the Legislature to enact each section of said bill and each proviso and exception thereto separately."

The act of 1904, in question, is not chapter 104 of the Session Acts of 1904, fixing a tax of 50 cents on each barrel of blended or rectified whisky, which is excepted from the provisions of the repealing clause. Moreover, by the act of 1906, section 4129 of the act of 1902, providing that the sheriff should, by virtue of his office, be collector of all taxes unless the payment thereof was, by law, especially directed to be made to some other officer, was re-enacted; likewise section 4108, requiring the county clerk to certify the report made to him by the au-

ditor of public accounts to the collecting officer of the county, city, town, or taxing district for collection. When we consider these facts, together with the provisions of the act of 1906, which is very specific in regard to all subjects of taxation as well as the method of collecting the same, we conclude that it was the evident purpose of the Legislature to return to the method provided by the act of 1902 for the collection of taxes upon distilled spirits, and again to confer this power upon the sheriff of the county; and that by purposely omitting the act of 1904, conferring the power upon county clerks to collect such taxes, it intended to and did repeal that act. *Bevins v. Commonwealth*, 86 S. W. 544, 27 Ky. Law Rep. 735.

But it is insisted for appellant that appellee is not entitled to recover in this action because the county clerk actually collected the taxes, and the fees for collecting the same were paid to him by the county. In this connection it is urged that the same doctrine should apply as in case of payment by the state, county, or municipality, before judgment of ouster, to a de facto officer, by which the state, county, or municipality is protected from all liability to the de jure officer for the salary so paid. The county clerk, however, was not a de facto sheriff. He was not trying to exercise the duties of a sheriff under color of office. He simply performed one of the duties of the sheriff under and by virtue of his office as clerk. Only a small amount of the taxes were paid direct to the clerk; by far the greater portion was paid to the sheriff, and by him turned over to the clerk. So far as these latter taxes were concerned, the sheriff actually performed all the duties required of him by law. He made the collections and indorsed the checks to the clerk, who was also the county treasurer. But, aside from this fact, the sheriff was ready, able, and willing to perform the duties required of him by law with respect to the taxes in question. He protested all the time against the action of the clerk, and yielded only because the county attorney, the official adviser of county officers, gave it as his opinion that the clerk was entitled to collect the taxes in question. Under such circumstances, he cannot be deprived of his compensation. Where there are two contestants for the same office, the county may be excused for not knowing which one is the rightful claimant; but, if it pays fees due one officer to an entirely different officer who is not authorized to perform the services or to receive the fees, it does so at its peril, and such payment will not bar a recovery by the officer entitled to the fees.

Judgment affirmed.

CORNETT v. BURCHFIELD.

(Court of Appeals of Kentucky. Feb. 21, 1911.)

1. APPEAL AND ERROR (§ 283*)—REVIEW—MOTION FOR NEW TRIAL—NECESSITY.

The fact that a suit for partition was tried by ordinary proceedings, as authorized by the Code, did not change it into an action at law, so as to require a denial of a motion for new trial and the separation of the law from the facts by the court, in order to justify a review of the merits on appeal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1668-1668; Dec. Dig. § 283.*]

2. APPEAL AND ERROR (§ 171*)—THEORY OF TRIAL.

Where parties treat an action as a suit in equity in the circuit court, it will be so treated on appeal, though the case has been tried by ordinary proceeding.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1053-1069, 1161-1165; Dec. Dig. § 171.*]

3. BOUNDARIES (§ 37*)—SURVEY—CONTENTS—EVIDENCE.

Defendant claimed title to the land in controversy under a patent, the exterior lines of which contained 78,262 acres, from which was deducted 32,147 acres previously patented and 5,675 acres of other surveys, leaving 40,400 in the patent. Defendant introduced R., who made the survey of the plat, and he testified that the land in controversy was within the exterior lines of the patent, and the map which he filed showed all the different patents covering any part of the land. It also appeared that defendant's patent was older than the patent under which plaintiff claimed. *Held* not sufficient to establish prima facie that the land in controversy was not within the exclusions referred to.

[Ed. Note.—For other cases, see Boundaries, Dec. Dig. § 37.*]

4. FRAUDS, STATUTE OF (§ 71*)—SALE OF LAND—CONTRACT.

A contract for the sale of land must be in writing.

[Ed. Note.—For other cases, see Frauds, Statute of, Cent. Dig. § 113; Dec. Dig. § 71.*]

5. EVIDENCE (§ 400*)—WRITTEN CONTRACT—VARIANCE BY PAROL.

A writing must be construed according to the fair meaning of the words used, and, in the absence of fraud or mistake, cannot be varied by parol, so that a written contract giving an option to purchase cannot be shown by parol to have been intended as a bond for title.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 1778-1793; Dec. Dig. § 400.*]

6. TENANCY IN COMMON (§ 19*)—PURCHASE OF OUTSTANDING TITLE—OPTION—ACCEPTANCE.

Defendant having obtained an option for 30 days from September 17th to purchase the interest of devisees in a tract of land under a prior patent, his father, as his agent, on October 11th wrote the agent of the devisees referring to a deed inclosed which was not satisfactory, and asking the agent to draw a deed to defendant and have the same returned, executed, by October 15th, when the writer would be in L. to close the deal. This letter referred to a warranty deed, while the option only provided for a quitclaim. After writing such letter, defendant's father purchased in defendant's behalf a half-interest in the land under the same title by which complainant held, and subsequently purchased the outstanding title from such devisees. *Held*, that the letter was not an acceptance of the option, and hence

that, when defendant purchased such outstanding title, he was the owner of an undivided interest with complainant under the later title, and as such the purchase inured to the benefit of both; defendant acquiring at most a lien on complainant's half of the land to the extent of the amount paid to relieve complainant's interest of the outstanding title.

[Ed. Note.—For other cases, see Tenancy in Common, Dec. Dig. § 19.*]

Appeal from Circuit Court, Harlan County.

Suit by D. C. Burchfield against Denver B. Cornett for partition. Judgment for complainant, and defendant appeals. Reversed and remanded for judgment for complainant, with modifications.

W. F. Hall and Green & Van Winkle for appellant. Metcalf & Jeffries and H. C. Clay, for appellee.

HOBSON, C. J. About the year 1883, patents were issued to Nicholas Shell and others for about 650 acres of land in Harlan county. They conveyed to D. C. Burchfield a half interest in these lands on January 20, 1897. The other half interest passed by certain conveyances to Missouri B. Hurst. On October 15, 1907, she and her husband sold her undivided half interest in the land to D. B. Cornett. D. C. Burchfield on October 26, 1909, brought this suit against Cornett alleging these facts, and asking that the land be divided between them. Cornett filed an answer in which he denied that Burchfield owned a half interest in the land, and pleaded that he was the owner of the whole of it. The issue was made up, proof was taken, and on final hearing the circuit court entered a judgment in favor of Burchfield as prayed. Cornett appeals.

The first question made on the appeal is that, as there was no motion for new trial and no separation of the law and facts by the court, no question is presented except the sufficiency of the pleadings to support the judgment. The petition is not styled a petition in equity, but both sides took their proof by depositions and treated the case as an action in equity. The case was conducted and decided in the lower court as an action in equity, and it involves matters of purely equitable cognizance. In disposing of a similar objection in *Salzer v. Arnett*, 62 S. W. 1031, 23 Ky. Law Rep. 321, we said: "No motion was made for a new trial within three days after the judgment was given, and there was no separate finding of law and facts by the county court. It is insisted for appellees that, as it is provided by the statute that 'the case shall be tried and decided as an ordinary action' [Civ. Code Prac. § 499, subd. 10], in the absence of a motion for a new trial, or a separate finding of law and fact, no question can be considered in this court except the sufficiency of the pleadings to support the judgment. The purpose of the statute in allowing the case to be tried

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

as an ordinary action is to afford a speedy trial without the cost or delay of taking depositions, as in equity actions. The summary remedy thus provided applies only to the proceedings in the trial court. The statute has no reference to a proceeding subsequent to the trial. An appeal from the judgment is governed by other provisions of the Code. No motion for a new trial or separation of law and facts is required in an equity action to bring the whole case before this court. The only issue made here was whether Morton Arnett had been advanced by his father his entire share of the estate. This was strictly an equitable issue. Realizing this, both the parties took their proof by depositions, and no oral evidence was offered on the trial. The issue being exclusively equitable, and the action having been treated and tried by both the parties as an action in equity, it should be so treated in this court on the appeal. The absence, therefore, on a motion for a new trial or separate findings of law and facts, does not deprive appellants of a hearing in this court on the merits of the case."

We adhere to the rule thus laid down, and under it the case must be heard here upon its merits. The parties may under the Code try the case as an ordinary action; but when they treat it as an action in equity in the circuit court, it will be so treated on appeal.

Cornett bases his claim of ownership of the land on a deed from the devisees of Charles O. Lockard, to whom a patent was issued in the year 1873. The exterior lines of the patent contain 78,262 acres from which is deducted 32,147 acres previously patented, also 5,875 acres of other surveys, leaving in the patent 40,400 acres. This patent, being 10 years older than the Shell patents, is superior to them. But it is insisted that Cornett failed to show that the land in controversy is not within the exclusions set out in the Lockard patent. He introduced on the trial W. T. Rice, who had made a survey of the land and a plot of it. Rice testified that the land in controversy is within the exterior lines of the Lockard patent, that the map he files shows all the different patents that cover any part of the Lockard land, and that the Lockard patent is the oldest patent that covers any of the land in controversy. In *Steele v. Bryant*, 132 Ky. 569, 116 S. W. 755, we held evidence practically such as this sufficient prima facie to show that the land was not in the exclusions referred to in a similar patent.

The remaining question in the case arises in this way: Burchfield insists that if his cotenant, Cornett, bought in an outstanding title, his purchase inures to the benefit of both of them. Cornett conceded the rule to be that a purchaser of an outstanding title by a joint tenant inures to the benefit of his cotenants, but insists that the rule has no application here for the reason that he

bought the Lockard title before he bought the Hurst title. *Venable v. Beauchamp*, 3 Dana, 321, 28 Am. Dec. 74; *Sneed v. Atherton*, 6 Dana, 276, 32 Am. Dec. 70; *Field v. Farmers' Bank*, 110 Ky. 257, 61 S. W. 258, 22 Ky. Law Rep. 1708. He admits that he bought the Hurst title on October 15, 1907, but he claims to have bought the Lockard title on September 17, 1907. To show this he introduces a written contract of that date entered into between him and the Lockards. So much of the writing as is material to the question here is in these words: "Now, then, in consideration of the sum of \$50 cash in hand paid, the receipt of which is hereby acknowledged, said parties of the first part give to said Cornett, an option to purchase the boundary of land hereinafter described for the sum of \$2,500 for a period of 30 days from the 17th of September, 1907, upon the following terms and conditions." It will be observed that this gives an option to purchase, but it does not bind Cornett to purchase, or vest any title in him. He introduced some parol evidence to the effect that the writing was intended as a bond for title, but this is incompetent. A contract for the sale of land must be in writing. The writing must be construed according to the fair meaning of the words used, and, in the absence of fraud or mistake, it cannot be varied by parol.

Cornett also insists that he accepted the option given him above by a letter written by his father and agent, A. B. Cornett, on October 11, 1907, to M. J. Holt, the agent of the Lockard devisees. That letter is in these words: "Dear Sir: Referring to contract between the heirs of C. O. Lockard and Denver B. Cornett, dated September 17, 1907, I inclose herewith a deed which my son has drawn for the property contracted. I notice the deed does not make proper statement as to the payment of the \$1,250 deferred payment and the certificates of acknowledgment are not properly drawn as to the wives of the grantors. Please draw a deed from these parties to Denver B. Cornett, containing the same description, warranty, timber assignment, etc., as the one inclosed and have the same returned to you by the morning of next Tuesday, October 15th, and I will be in your office in Louisville to close the deal. The description we have set out is the best that can be had until further surveys are made. Yours very truly, A. B. Cornett."

There is this objection to this letter being treated as an acceptance of the option: The writer does not purport to speak for Denver B. Cornett, and he seems to contemplate not closing the deal by the letter, but closing it on October 15th when he gets to Louisville. He incloses a deed which he says is not sufficient, and requests that the deed be drawn containing the same description, warranty, etc. The option called for a quitclaim deed. The deed inclosed was not a quitclaim deed. The letter therefore was not an acceptance

of the option as given. After writing this letter, A. B. Cornett went to the house of Missouri Hurst, and bought her half interest in the land for \$2,500. On October 15th he went on to Louisville, and on the next day closed the trade with the Lockard devisees, paying them at the rate of \$1 an acre for the land. When he so closed the trade, he was the joint owner with Burchfield. His purchase of the outstanding title inured to the benefit of his cotenant, but Burchfield must repay to him his half of the money so expended in buying in the outstanding title of the Lockards to the land in controversy. To this extent Cornett has a lien on Burchfield's land for the money with interest from the time it was paid. The circuit court erred in not adjudging him a lien as above indicated. On the return of the case a judgment will be entered adjudging to Cornett a lien on Burchfield's land for one-half of the sum paid the Lockards to obtain the release of their title to the land in controversy at \$1 an acre for the number of acres in the tracts in dispute.

Judgment reversed, and cause remanded for a judgment as herein indicated.

CITY OF LOUISVILLE v. CARTER.

(Court of Appeals of Kentucky. Feb. 23, 1911.)

1. MUNICIPAL CORPORATIONS (§ 745½*)—GOVERNMENTAL FUNCTIONS—NEGLIGENCE.

In an action against a city for injuries caused by a garbage wagon attached to a sprinkling wagon, both used by defendant in care of its streets, defendant was not liable, whether the sprinkling wagon was engaged in sprinkling or was being drawn to another part of the city, so long as the city employes were engaged in a governmental function.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. §§ 1568, 1569; Dec. Dig. § 745½.*]

2. MUNICIPAL CORPORATIONS (§ 745½*)—NEGLIGENCE—BEST APPLIANCES.

A city is not required to use the best or any particular means in the conduct of its governmental business, and, while hitching a garbage wagon used for clearing streets of refuse to a sprinkler may not have been the best way of hauling the garbage wagon, no liability for damages attaches to the city for such act, as the city employes were engaged in pursuance of a governmental function.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. §§ 1568, 1569; Dec. Dig. § 745½.*]

Appeal from Circuit Court, Jefferson County, Common Pleas Branch, First Division.

Action by Harry Carter against the City of Louisville. From a judgment for plaintiff, defendant appeals. Reversed and remanded.

Huston Quin and Clayton B. Blakey, for appellant. Edwards, Ogden & Peak, J. L. Richardson, and H. O. Williams, for appellee.

LASSING, J. While playing in the street, Harry Carter, an 11 year old boy, was run

over by one of the wagons belonging to the city of Louisville and severely injured. Alleging that his injury was due to the negligence of the employé of the city in charge of the wagon, through his next friend, he sued to recover damages therefor. The city denied liability. A trial resulted in a verdict in plaintiff's favor for \$300. The city appeals.

A question is raised by the city as to the identity of the wagon which ran over the boy. It is urged that the evidence does not sustain the charge that the injury was inflicted by one of the city wagons. But, from the conclusion which we have reached, we will treat the case as though it were clearly established that the injury was done by a wagon belonging to the city.

Plaintiff charges, and we treat it as true, that one of the city's sprinkling carts was being driven through the streets and that it had another wagon, used by the street cleaning department, hitched onto it. This last wagon, it is claimed, injured the boy. It is conceded by the plaintiff's counsel that, if the injury had been inflicted by the sprinkler while being used in sprinkling the street, no recovery could be had. But it is urged that, inasmuch as the sprinkler was not being used for sprinkling purposes, but to haul another wagon, a different rule applies. In other words, that, as the sprinkler was not then being used for sprinkling the street, no governmental duty was being discharged, and hence liability attaches for the negligence of the driver.

We are unable to draw the distinction which appellee's counsel would make between an injury resulting from the negligent use of the sprinkler while actually sprinkling, and one while the sprinkler was being drawn through the city from one part thereof to another. In the numerous cases that have been decided by this and other courts, holding that a city is not liable for an injury that resulted through the negligence of its employes engaged in the discharge of any of those duties commonly called "governmental functions," the opinion in each is rested upon the idea that, as the city is a branch of the state government, an arm of the state, it is against public policy to permit it to be sued for the negligence of those of its servants engaged in the discharge of some duty which has for its aim the protection of the life, health, or property of the citizens. In none of these opinions, to which our attention has been called, has the distinction here contended for been made.

In *Greenwood v. City of Louisville*, 13 Bush, 226, 28 Am. Rep. 263, it is held that no recovery can be had against a city for an injury resulting from the negligent operation of a fire engine in responding to a fire call. The case has not been presented where a re-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

covery was sought for an injury resulting from the negligent operation of a fire engine returning from a fire, though we can see no difference between the two. The fire engine must be kept in a place provided for it. After the fire has been extinguished, the engine must be returned to this place provided for its safety and keeping. The employes of the city are as much engaged in the discharge of a governmental duty in returning the fire engine to its proper place as they were in taking it from the engine house to the fire. It is all one duty.

And so, in case of an injury resulting from the negligent operation of a street sprinkler, in *Kippes v. City of Louisville*, 140 Ky. 423, 131 S. W. 184, it is held that no recovery can be had. But it is argued that no recovery was allowed in that case because the injury resulted while the sprinkler was being used in sprinkling the streets. If this argument is sound, then, so long as the sprinkler is flushing or sprinkling the street, no recovery can be had for an injury resulting from the negligence of its driver; but when its tank is empty, and the wagon is being driven to the water plug, hydrant, or other place where the tank may be filled, the city is liable for any injury that may result on this trip. We are not disposed to adopt this view, but hold that, whether the sprinkler is being taken to the place where it is to be used, or back to the place where it is to be kept after it has been used, or hauled through the streets of the city for the purpose of filling the tank, is immaterial. These acts are all part and parcel of the necessary work which the employes in charge of the street sprinkling department have to do in order to efficiently carry on that work.

It is argued that, even conceding this to be true, still the men in charge of the sprinkler had no right to use the sprinkler to haul the garbage wagon, or city wagon, through the streets; that this was not a governmental work. Adopting this view, it would then come to a question as to the motive power that the city might use in removing its wagons from one part of the city to another. These carts, or wagons, used for the purpose of clearing the streets of the city and removing the waste and refuse matter therefrom, are certainly employed in a use that is for the general public good; and hence the function which the city exercises in their use is a governmental function. It becomes necessary at times to move these wagons from one point in the city to another. How shall this be done? By hitching a team to them or an engine? Or by hitching them to another wagon belonging to the city that happens to be there? It seems that the necessary answer to this is that the city shall be permitted, or left free, to adopt such means as it desires for their removal, and in the means employed the public can have no possible in-

terest or concern. If no liability attaches for an injury resulting from negligence of employes of the city engaged in this governmental work, then it is immaterial by what means they are moved, for liability cannot attach in any event. It is true that possibly it would have been safer and better for the city to have required this wagon to be removed by hitching a horse or team of horses to it, rather than by attaching it to the rear of this sprinkler; but the city is not required to use the safest or best or any particular means in the conduct of its governmental business. The manner in which they shall be moved from one part of the city to another is, and must of necessity be, left to the discretion of the city authorities, and no ground of complaint is afforded because one method of moving these wagons is adopted or used in preference to another.

We are clearly of opinion that, under the facts stated, about which there is no contrariety of opinion, plaintiff was not entitled to recover, and the motion for a peremptory instruction should have been sustained.

Judgment reversed, and cause remanded for further proceedings consistent herewith.

HILL et al. v. MOTTLEY et al.†

(Court of Appeals of Kentucky. Feb. 21, 1911.)

1. INTOXICATING LIQUORS (§ 34*)—LOCAL OPTION ELECTIONS—VALIDITY.

Under Ky. St. § 2560 (Russell's St. § 4059), providing that no local option election in a city shall be held on the same day on which an election for the county is held, except in cities of enumerated classes, but not prescribing how the election in the city shall be conducted, an election in a city held in separate booths and by other officers than those conducting the election for the county on the question, "Are you in favor of prohibiting by law, the sale of liquors within the city?" is properly conducted.

[Ed. Note.—For other cases, see *Intoxicating Liquors*, Cent. Dig. § 42; Dec. Dig. § 34.*]

2. ELECTIONS (§ 220*)—BALLOTS—MANNER OF MARKING.

A ballot of an elector marked by an election officer without compliance with the mandatory provisions of Ky. St. § 1475 (Russell's St. § 4034), is properly rejected.

[Ed. Note.—For other cases, see *Elections*, Cent. Dig. § 190; Dec. Dig. § 220.*]

3. ELECTIONS (§ 299*)—CONTESTS—EXAMINATION OF BALLOTS.

Where the testimony in an election contest as to the number of ballots cast in violation of a statute was mere guesswork, the court properly examined the ballots to arrive at the true situation.

[Ed. Note.—For other cases, see *Elections*, Cent. Dig. §§ 306, 307; Dec. Dig. § 299.*]

4. ELECTIONS (§ 219*)—MANNER OF VOTING.

A ballot of a voter who votes on the table in the election booth without being sworn is properly rejected.

[Ed. Note.—For other cases, see *Elections*, Cent. Dig. § 189; Dec. Dig. § 219.*]

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

† Rehearing denied April 14, 1911.

5. INTOXICATING LIQUORS (§ 37*)—LOCAL OPTION ELECTION—FRAUD—BRIBERY—EVIDENCE.

That a number of persons favoring the sale of liquor went on the bonds of negroes who were arrested for illegal voting at a local option election did not show fraud or bribery.

[Ed. Note.—For other cases, see Intoxicating Liquors, Cent. Dig. § 42; Dec. Dig. § 37.*]

6. INTOXICATING LIQUORS (§ 37*)—LOCAL OPTION ELECTION—FRAUD—BRIBERY—EVIDENCE.

The practice of the "wet" and "dry" sides in a local option election in procuring certificates from the county clerk and paying the fee therefor for persons who had lost their certificates is not evidence of fraud and bribery, in the absence of proof that the practice was corruptly engaged in.

[Ed. Note.—For other cases, see Intoxicating Liquors, Cent. Dig. § 42; Dec. Dig. § 37.*]

7. INTOXICATING LIQUORS (§ 37*)—LOCAL OPTION ELECTION—FRAUD—BRIBERY—EVIDENCE.

Fraud and bribery connected with a local option election may not be presumed from the mere fact that on the night before the election a large crowd of negroes gathered at the "wet" headquarters, where speeches were made to them, and where they were given beer and lunch.

[Ed. Note.—For other cases, see Intoxicating Liquors, Cent. Dig. § 42; Dec. Dig. § 37.*]

8. INTOXICATING LIQUORS (§ 37*)—LOCAL OPTION ELECTION—FRAUD—BRIBERY—EVIDENCE.

Proof that, when ballot 244 was reached in a precinct in a local option election, the number was "344," instead of "244," that the ballots were prepared by a newspaper favoring the "wet" side, and that the clerk changed the figures on the primary and secondary stubs from "344" to "244," was not proof of a plan to impress on the illiterate voter, whose vote was being purchased, that his vote was being marked to indicate whether he voted as he agreed to.

[Ed. Note.—For other cases, see Intoxicating Liquors, Cent. Dig. § 42; Dec. Dig. § 37.*]

9. INTOXICATING LIQUORS (§ 34*)—LOCAL OPTION ELECTION—MISCONDUCT OF OFFICERS.

That challengers and other officers of a local option election stated to voters as they came in to vote that they were "good fellows," and that they knew how to vote "wet," was not such misconduct as to invalidate the election.

[Ed. Note.—For other cases, see Intoxicating Liquors, Cent. Dig. § 42; Dec. Dig. § 34.*]

10. EVIDENCE (§ 78*)—IMPROPER CONDUCT OF ATTORNEY.

An attorney of a party may talk to the witnesses of the adverse party, and, so long as he does not act corruptly, no presumption can arise that the adverse party would have produced additional proof, had it not been for such conduct.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 98, 100; Dec. Dig. § 78.*]

11. INTOXICATING LIQUORS (§ 37*)—LOCAL OPTION ELECTION—BRIBERY—EVIDENCE.

That "wet" workers at a local option election carried voters to and from the polls in automobiles and carriages was not evidence of bribery.

[Ed. Note.—For other cases, see Intoxicating Liquors, Cent. Dig. § 42; Dec. Dig. § 37.*]

12. INTOXICATING LIQUORS (§ 37*)—LOCAL OPTION ELECTION—BRIBERY—EVIDENCE.

The testimony of witnesses that in different parts of the city on the day of the local op-

tion election they saw a man in a buggy hand something to another man is not evidence of bribery, in the absence of anything to show that the latter was a voter.

[Ed. Note.—For other cases, see Intoxicating Liquors, Cent. Dig. § 42; Dec. Dig. § 37.*]

13. INTOXICATING LIQUORS (§ 37*)—LOCAL OPTION ELECTION—BRIBERY—EVIDENCE.

Evidence held not to show that voters had been bribed to vote "wet" at a local option election.

[Ed. Note.—For other cases, see Intoxicating Liquors, Cent. Dig. § 42; Dec. Dig. § 37.*]

14. ELECTIONS (§ 295*)—BRIBERY—EVIDENCE.

Fraud and bribery at an election must be established either by direct proof or by circumstances from which the inference of fraud or bribery naturally follows, and facts creating only a suspicion or mere conjecture are insufficient.

[Ed. Note.—For other cases, see Elections, Cent. Dig. §§ 297, 299; Dec. Dig. § 295.*]

15. ELECTIONS (§ 295*)—BRIBERY—EVIDENCE.

The irregularities alleged to show fraud and bribery at an election must be considered singly and together, and, when so considered, the question is whether they are sufficient to show so much fraud or bribery as to leave the mind in doubt as to the result of the election, in which case only can the court set it aside.

[Ed. Note.—For other cases, see Elections, Cent. Dig. §§ 297, 299; Dec. Dig. § 295.*]

Appeal from Circuit Court, Warren County.

Election contest by N. F. Hill and others against E. L. Mottley and others. From a judgment sustaining the election, the contestants appeal. Affirmed.

Bradburn & Basham and B. F. Procter, for appellants. T. W. & R. C. P. Thomas, Sims & Rodes, and Grider & Harlin, for appellees.

CLAY, C. This appeal involves the validity of a local option election held in Bowling Green, a city of the third class, on June 28, 1910. The result was 1,109 votes in favor of the sale of spirituous, vinous, and malt liquors in said city, and 1,027 votes against such sale, or a majority of 82 votes in favor of the sale. The election was contested, and the contest board for Warren county sustained the election. An appeal was then taken to the Warren circuit court, and there the election was again sustained. From the judgment entered in that court the contestants appeal.

The grounds of contest are (1) that the election was void on account of the manner in which it was conducted; (2) that there was a sufficient number of illegal votes cast to overcome the majority in favor of the sale of spirituous, vinous, and malt liquors; and (3) that there were such bribery, fraud, and irregularities as to nullify the election. These grounds will be considered in the order named.

1. Was the election void on account of the manner in which it was held? On April 13, 1910, there was lodged with the judge of the Warren county court, and filed in the office of the clerk thereof, a petition signed by

the requisite number of legal voters of each precinct in Warren county requesting the court to order a poll to be opened at all the voting precincts in said county on the 14th day of June, 1910, to take the sense of said voters on the proposition whether or not spirituous, vinous, and malt liquors should be sold, bartered, or loaned in said county. On April 29th, and before any action was taken upon the petition referred to, a petition signed by the requisite number of legal votes in each precinct in the city of Bowling Green was filed praying the court to order a poll to be opened in all the voting precincts in said city to take the sense of the legal voters thereof upon the proposition whether or not spirituous, vinous, and malt liquors should be sold in said city. The petition asked that the election be ordered to be held on the same day as that ordered to be held for Warren county. On May 9, 1910, the court entered an order directing that an election be held on June 28, 1910, for Warren county, and that upon the same day and the same time a separate election should be held in the city of Bowling Green. The court first ordered that the two elections be held by the same officers, but upon separate ballots, which were to be placed in separate boxes and counted separately. Subsequently, upon application by representatives of each side, the court modified his original order, and directed that the election in the city be held in separate booths and by other officers than those who conducted the election for the county. The polling places for the county and for the city in each precinct were placed near each other. In this manner the election was held with the result above indicated.

It is earnestly insisted that this method of conducting the election was contrary to the mandatory provisions of the statute, and that, therefore, the election is void. Section 2560 of the Kentucky Statutes (Russell's St. § 4059) provides in part as follows: "No election in any town, city, district or precinct of a county shall be held, under this article, on the same day on which an election for the entire county is held, except that cities of the first, second, third and fourth classes may hold an election on the same day on which an election for the entire county is held." The other part of the statute has no bearing upon the question under consideration. It will be observed that there is nothing in the statute directing how an election in a city of one of the specified classes shall be conducted. The statute simply authorizes such an election to be held on the same day on which an election for the entire county is held. It does not prescribe that such an election shall be held in the same voting places, or by the same officers or upon the same ballot. That being true, it cannot be said that one method or another violates the mandatory provisions of the statute. As the city of Bowling Green is a part of Warren

county, the citizens of that city had a right to vote upon the question of prohibition, not only as affecting the city, but as affecting the entire county. No confusion resulted from their not understanding whether they were voting upon the proposition as it affected the entire county or as it affected only the city. The question upon the ballots for the separate election held in the city was in the following form: "Are you in favor of prohibiting by law the sale, barter, or loan of spirituous, vinous, or malt liquors within the city of Bowling Green, said prohibition to apply to druggists?" By submitting the question in this form, the voters of the city understood exactly the question upon which they were voting. We therefore conclude that the manner of conducting the election was proper.

2. Was there a sufficient number of illegal votes cast to overcome the majority in favor of the sale of spirituous, vinous, and malt liquors? There was proof to the effect that a number of persons in three precincts stated that they were unable to vote without being instructed, and thereupon the clerk, or some other officer, placed a dot with a pen or pencil in the square where the voter indicated his purpose to vote. None of these voters were sworn. Section 1475 of the Kentucky Statutes (Russell's St. § 4034) provides: "Any elector who declares, on oath, that, by reason of inability to read the English language, he is unable to mark his ballot, may declare his choice of candidates or party ticket to the clerk, who, in the presence of the judges, sheriff and challengers and the elector, shall, with his pencil, mark a dot in the appropriate place for the cross-mark, to indicate the choice of the elector. The clerk shall then fold and deliver the ballot to the elector, and instruct him to retire to the booth and there mark his ballot by making a cross-mark either in the squares showing dots or any other squares he may desire. In all other respects he shall vote as is required of other electors. In case any person applying to vote is blind, and shall so declare on oath, the clerk shall be allowed to mark his ballot for him in the presence of the other officers of election, and the challengers allowed by law; or, in case any person shall be so physically disabled as to be unable to mark his ballot, and shall so declare, on oath, the clerk shall have the right to mark his ballot as in the case of a blind person applying to vote. Any one making a false declaration under this provision of this section shall, upon conviction, be fined in any sum not exceeding fifty dollars, and be disfranchised for a period of two years; and any clerk who shall willfully deceive any elector in marking any ballot, or willfully mark the same in any other way than as requested by said elector, shall be guilty of felony, and, upon conviction, shall be imprisoned in the penitentiary for not less than two nor more than five years." It is manifest that the votes

so marked were cast in violation of the mandatory provisions of the above statute. The circuit judge, therefore, properly held that all such votes were illegal. To arrive at the number of such votes, the trial judge examined the ballots himself, not only with his naked eye, but under a magnifying glass. Wherever he found that a ballot indicated that it had been marked in the manner pointed out, he rejected it as illegal. There are 63 such ballots. Of these 55 were voted "wet" while 8 were voted "dry." It is not insisted that the trial judge made any mistake in his figures; but it is earnestly argued that the oral testimony shows that a much larger number of persons than the ballots indicated voted in the same manner. The witnesses who testified stated that there must have been from 50 to 125 such ballots. It is manifest, however, that such evidence was mere guesswork. For this reason, the trial judge rejected such evidence, and properly held that the only reliable method for arriving at the true situation was to examine the ballots.

The trial court also found that in the Electric Light House precinct one voter voted on the table without being sworn, and voted "wet," while in the same precinct seven voters voted on the table without being sworn, and voted "dry." He also found that in Kister's Mill precinct one voter voted on the table without being sworn, and voted "wet," while three voters voted "dry" in the same manner. He further found that in the Police Courtroom precinct there were two "dry" votes which were cast in the manner set out above. Thus of this character of votes two were "wet" and twelve "dry." The trial judge properly held that none of these votes should be counted, and made proper deductions therefor. It is not contended, nor does it appear, that he made any mistake in his figures. The trial court also deducted from the "wet" side the votes of 19 negroes who were paid money, either on the day of the election or the day after. Several of these negroes testified that they were employed a few days before the election to work for the "wet" side, and that they were paid for their services, and not for their votes. While there may be some doubt as to whether all these votes should have been excluded, we shall not disturb the finding of the lower court upon this question. The record also shows that five persons who were not entitled to vote voted "wet." These votes were properly excluded, and there is no contention that the lower court's figures in this regard are incorrect. In deducting the 19 purchased votes, the trial court was in doubt as to whether all should be deducted, for the reason that they might have been included in the list of those whose ballots had been improperly dotted. However, he gave the contestants the benefit of the doubt, and no complaint arises on this score. After deducting all the illegal votes

on each side and giving the contestants the benefit of every doubt, the trial judge held that there was still a majority of 14 votes in favor of the sale of spirituous, vinous, and malt liquors in the city of Bowling Green. Upon a careful consideration of the whole record we see no reason for disturbing his finding either of law or facts.

3. Were there such bribery, fraud, and irregularities as to nullify the election? Under this head, it is complained that the "wets" had a bonding syndicate that went on the bonds of the negroes who had been arrested. The negroes arrested certainly had the right to give bond, and the persons who went on their bonds had the right to do so. The fact that a number of persons on the "wet" side went on such bonds is not evidence of fraud or bribery. As a further evidence of fraud and corruption, we are cited to the fact that the "wet" side procured certificates from the county clerk and paid the fee therefor for persons who had lost their certificates. This practice, however, was not confined to the "wet" side. Those on the "dry" side did the same thing. The fact that this was done cannot be considered as evidence of fraud and bribery, in the absence of other evidence tending to show that the practice was corruptly engaged in.

Much stress is laid upon the fact that on the night before the election a large crowd of negroes gathered at the "wet" headquarters, where speeches were made to them and they were given beer and lunch, and that on the day of the election these same negroes marched to the polls under the escort of certain leading business men of the city. The "dry" side, however, also held meetings, where speeches were made and lunches were served, and friends of that side went to the polls in large numbers. Fraud and bribery cannot be presumed from such facts.

It is also insisted that in one of the precincts it was ascertained that when ballot No. 244 was reached the number was "344," instead of "244"; that, as the ballots were prepared by a newspaper in favor of the "wet" side, this should be construed as an evidence of fraud. It appears that the clerk changed the figures on the primary and secondary stubs from "3" to "2." It is therefore insisted that this was a part of the plan to impress the illiterate voter whose vote had been purchased that his vote was being marked so as to indicate whether or not he voted as he agreed to vote. Why the voter should reach this conclusion from the changing of the figures any more than from the fact that the clerk wrote the voter's name on the stub or his own name on the ballot we are unable to see. The mere statement of appellant's proposition shows that the inference they would have us draw from the facts is too strained to justify us in assuming that the mistake in the numbers upon the stubs of the

ballots was a part of a plan to carry the election by fraud.

It is also insisted that there was improper conduct on the part of certain officers conducting the election. In this connection we are referred to the fact that there was evidence tending to show that certain challengers and other officers stated to voters as they came in to vote that they were "good fellows," they knew how to vote "wet." Conceding that this practice was indulged in, it cannot be contended that either the voter to whom such an improper remark was addressed or all the voters of the entire city should be disfranchised for such misconduct. To do so would be to make an election depend, not upon the result as indicated by the ballot, but upon the propriety or impropriety of remarks made by the officers conducting the election.

Under this head, it is further contended that contestants could have shown that more than 19 voters were bribed had it not been for the action of contestees and their attorneys in meeting and talking to witnesses summoned by contestants. We have carefully considered the evidence upon this point, and it utterly fails to show that contestees or their attorneys used, or attempted to use, any corrupt or unlawful means to prevent contestants' witnesses from testifying. There is no law forbidding an attorney from talking to the witnesses of the opposing party, and, so long as the evidence fails to show that in doing so he acted corruptly, no presumption can arise that the opposing party would have produced proof of additional fraud had it not been for such conduct on the part of the attorneys.

There was some evidence tending to show that certain negro voters upon going into the booths held their ballots above their heads; and it is insisted that this was done for the purpose of showing the "wet" workers on the outside how they had voted. The trial judge found that this charge was not sustained by the weight of the evidence, and upon a careful consideration of all the evidence upon this point we see no reason to disturb his finding.

Witnesses were introduced who testified to the fact that "wet" workers were engaged in carrying voters to and from the polls in automobiles and carriages. Two or three witnesses testified to seeing one person give another person some money. Other witnesses testified that in different parts of the town they saw a man in a buggy or carriage hand something to another man. The carrying of voters to and from the polls in vehicles is a practice that has always been indulged in, and is not subject to criticism. The fact that a witness sees one person hand something to another without showing that the other is a voter cannot be considered as evidence of bribery.

Much stress is laid upon the testimony of an employé for a furniture establishment,

which furnished certain chairs to be used at the "wet" headquarters. He claims that he went to the "wet" headquarters on the day after the election, and there saw 200 or 300 negroes. He asked two or three of them what they were doing there, whereupon they replied that they were there to get the money for what they had done in the election. One of these negroes afterwards testified that he received \$7 for his services. While the porter was there, he claims a man came to the door, and said, "I am now ready for the Gas House precinct." From these facts we are asked to infer that all the negroes present had been bribed, and that the man who made the alleged remark was ready to settle next with the voters who were purchased in the Gas House precinct. The weakness in this argument consists in the fact that the remark made by the two or three negroes with whom the porter talked as to what they were doing there cannot be construed as binding on all the others present and as evidence of the fact that the others were there for the same purpose. Furthermore, the remark attributed to the two or three negroes did not show that they were there to receive money for their votes, but for what they had done in the election. The two or three negroes referred to may have performed legitimate services for which they were entitled to compensation. Nor can we assume from the remark made by the white man who came to the door that he meant that he was ready to pay the negroes in the Gas House precinct for their votes which they had cast on the day of the election.

The record shows, and the trial judge found, that a majority of the negro voters were on the "wet" side. We are not to indulge in the presumption that they were bribed to espouse that side. Fraud and bribery are never presumed. They must be established by proof. To do this, direct evidence is not always necessary. Fraud and bribery may be proved by circumstances. In the latter case the circumstances must be such that the inference of fraud or bribery naturally follows from the facts so proved. Facts that tend to create only a suspicion, strained inference, or mere conjecture are not sufficient. Appellants have proceeded upon the theory that all the negroes were bought. They then interpret everything that took place on the day of election or the next day in the light of that theory. Such is not a correct method of reasoning. On the contrary, the various irregularities alleged must be considered singly and together; and, when so considered, the question is: Were they sufficient to show so much fraud, bribery, intimidation, and violence as to leave the mind in doubt as to the result of the election? It is not sufficient to show that the election might have been affected by fraud. It must affirmatively appear that it was so affected.

The evidence for appellants does not measure up to this standard. Here, then, we have a case where the election was properly held, and the result properly certified. There is no proof of intimidation or violence. After deducting all the votes which there is any evidence to show were purchased, and all the votes shown by competent proof to have been illegally cast, although the former may be included in the latter, and thus giving to the contestants the benefit of every doubt, there still remains a majority in favor of the side represented by the contestees. While this court will not hesitate to declare invalid an election where there is sufficient proof of fraud or bribery to leave the mind in doubt as to the result, it is committed to the doctrine that elections are not to be set aside for slight or trivial causes. To set aside this election would be to disregard this salutary rule, and would tend to destroy that confidence in elections which is absolutely essential to a full and fair expression of the popular will. *Motley v. Willson*, 82 S. W. 1023, 26 Ky. Law Rep. 1011; *Skain v. Milward*, 138 Ky. 200, 127 S. W. 773. Recognizing this rule, the trial judge held the election valid. A careful reading of the entire record convinces us of the soundness of his conclusion.

Judgment affirmed.

HALE'S HEIRS v. RITCHIE et al.

(Court of Appeals of Kentucky. Feb. 23, 1911.)

1. LIMITATION OF ACTIONS (§ 76*)—DISABILITY SUPERVENING AFTER ACCRUAL OF CAUSE OF ACTION.

Ky. St. § 2505 (Russell's St. § 212), provides that action for recovery of real property can only be brought within 15 years. Section 2506 (Russell's St. § 213) provides that such period may be extended three years to persons who were under disability at time of accrual. Section 2507 (Russell's St. § 214) provides that such time shall not be extended for disability not existing when the right of action accrued, nor for disability of the heirs of such person. Section 2508 (Russell's St. § 215) provides that such period cannot be extended beyond 30 years from accrual of the action by reason of death or disability. Defendants and their ancestors had been in peaceable possession of land for 50 years, and plaintiff's ancestor conveyed her undivided interest in the land in 1859 to H., who thereafter became insane while litigation commenced in 1858 was pending, in which defendants' ancestors claimed title to the property by adverse possession. *Held*, that an action for partition commenced by the heirs of H. in 1908 was barred, H.'s right of action having accrued in 1859, and his subsequent insanity not affecting the running of the statute; and, his disability being removed by his death in 1882, the action might have been brought within three years after that time, and it was immaterial that when he died his heirs were under disability, this not tolling the statute, and in any event more than 30 years having elapsed from the time H.'s cause of action accrued.

[Ed. Note.—For other cases, see *Limitation of Actions*, Cent. Dig. §§ 417-420; Dec. Dig. § 76.*]

2. LIS PENDENS (§ 24*)—SUBSEQUENT PURCHASERS.

Where a person purchased land from a defendant in a partition suit, he took subject to the rights of the other parties to the action.

[Ed. Note.—For other cases, see *Lis Pendens*, Cent. Dig. §§ 38-46; Dec. Dig. § 24.*]

Appeal from Circuit Court, Meade County.

Action for partition by Felix G. Hale's heirs against Francis Ritchie and others. From a judgment overruling a demurrer to the answer, plaintiffs appeal. Affirmed.

C. C. Fairleigh and P. L. Turner, for appellants. J. W. Lewis, for appellees.

HOBSON, C. J. This action was brought by the heirs at law of Felix G. Hale against the heirs at law of Thomas B. Burch and certain other persons claiming under them. The plaintiffs alleged that Leonard Burch, who died a resident of Meade county prior to 1850, owned a large tract of land in that county; that he left surviving him seven children, one of whom, Susan Woodall, by deed bearing date October 27, 1859, conveyed her one-seventh interest in the land to Felix G. Hale. They prayed a partition of the land, and that their one-seventh interest be set apart to them. The defendants filed an answer, in which they pleaded, among other things, that Susan Woodall had sold her interest in the land to Thomas Burch long before the deed to Hale was made; that Burch was then in possession claiming as his own her undivided one-seventh of the land; that he and those claiming under him had been in actual, peaceable, and adverse possession of the land claiming it as their own against all the world for more than 50 years. They pleaded and relied on the statute of limitation of 15 years and 30 years in bar of the plaintiffs' action. The plaintiffs filed a demurrer to the defendant's answer in so far as it pleaded limitation, and an agreement of record was entered that the plea of limitation should be tried out on the records alone without taking any proof; the records referred to being four former suits in the Meade circuit court which were referred to in the petition. The circuit court upon a hearing of the matter overruled the demurrer, and, the plaintiffs refusing to plead further, dismissed the action. The plaintiffs appeal.

The transcript filed in this court of the former suits has been filed with the transcript of this case, and we have considered the question as it was submitted to the circuit court under the agreement of the parties. The facts shown are these: In the year 1855 the heirs at law of Leonard Burch recovered a judgment for a tract of 700 acres of land, one-seventh of which is the thing here in controversy. In 1858 one of the heirs instituted an action against Thomas B. Burch for a partition of the land be-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

tween the seven heirs; Susan Woodall being made a defendant to the petition. Three other actions for the same purpose were subsequently commenced. Thomas B. Burch filed an answer in these actions in which he alleged that he was the rightful owner by purchase of four-sevenths of the land; one-seventh being the share of Susan Woodall. He also claimed that he had a lien on all the land for certain expenses he had incurred in the litigation by which it was recovered. Mrs. Woodall filed no pleading in these cases, and asserted no right to the land, although Thomas Burch distinctly pleaded that he had purchased her interest in the land. Thomas Burch died in 1863. In 1865 the four actions were consolidated, and, having been revived against his heirs at law, were finally tried in 1879, when a judgment was entered by which three of the heirs of Leonard Burch were each adjudged entitled to one-seventh of the land, and Thomas Burch's heirs to four-sevenths; one of these being the share of Susan Woodall. Commissioners were appointed to divide the land, which was done. A controversy then arose as to rents and profits between the three persons who had each been adjudged one-seventh of the land, and Thomas Burch's heirs. See *Burch v. Burch*, 82 Ky. 622.

It is unnecessary for us to determine whether Thomas Burch had in fact acquired the title to Susan Woodall's one-seventh of the land in 1858, when the litigation over it between the heirs of Leonard Burch began. The transcript before us of the record in those actions is not complete, but it is a partial record made up upon a schedule. There is enough in it, however, to show beyond doubt that Thomas Burch in 1858 was in possession of the land claiming the interest of Susan Woodall by purchase, holding it as his own and adversely to her and all the world. This possession which he then had has been continued from that day to this, unbroken, as far as the record shows. It is alleged in the petition that Felix G. Hale became insane while that litigation was pending, and remained insane until his death in 1882, but no explanation is offered of the delay to set up a claim to this land from 1882 to 1908, a period of 26 years. Susan Woodall was a party to the partition suit filed in the year 1858, and her deed to her son Felix G. Hale was made more than a year after that suit was begun. He is therefore a lis pendens purchaser. Sections 2505, 2506, 2507, and 2508, Ky. St. (Russell's St. §§ 212-215), are as follows:

"An action for the recovery of real property can only be brought within fifteen years after the right to institute it first accrued to the plaintiff, or the person through whom he claims." Section 2505.

"If, at the time the right of any person to bring an action for the recovery of real prop-

erty first accrued, such person was an infant, married woman, or of unsound mind, then such person, or the person claiming through him, may, though the period of fifteen years has expired, bring the action within three years after the time such disability is removed." Section 2506.

"The time within which an action for the recovery of real property may be brought shall not be extended by reason of any disability which did not exist when the right to bring the action first accrued, nor by reason of any disability of the heirs of the person to whom the right first accrued." Section 2507.

"The period within which an action for the recovery of real property may be brought shall not, in any case, be extended beyond thirty years from the time at which the right to bring the action first accrued to the plaintiff, or the person through whom he claims by reason of any death or the existence or continuance of any disability whatever." Section 2508.

Felix G. Hale's right of action to recover the land accrued to him in 1859, for Thomas Burch was then in possession and claiming the land as his own under his purchase from Susan Woodall from whom Hale purchased. If Hale became of unsound mind after his cause of action accrued, this did not affect the running of the statute, and if he was of unsound mind when his cause of action accrued, and so remained until his death in 1882, the disability being removed by his death, the action might have been brought within three years after that time. But although, when he died, his heirs at law were under disability, this did not affect the running of the statute of limitation. Passing all of this, we find that more than 30 years elapsed from the time that Hale's cause of action accrued before this suit was brought, and the action is necessarily barred under the 30-year statute.

Judgment affirmed.

EAST TENNESSEE TELEPHONE CO. v. BOARD OF COUNCILMEN OF CITY OF FRANKFORT.

(Court of Appeals of Kentucky. Feb. 22, 1911.)
TIME (§ 9*)—EXCLUDING FIRST DAY—APPEAL
AND ERROR.

Under Civ. Code Prac. § 760, providing that a decision does not become final "until after thirty days, excluding Sundays, from the day on which the decision is rendered," a petition filed on February 21st for rehearing, where decision was rendered January 17th, is in time, since, when time is counted from a day, the day is not counted.

[Ed. Note.—For other cases, see Time, Cent. Dig. §§ 11-32; Dec. Dig. § 9.*]

Response to motion to file petition for rehearing.

For former opinion, see 133 S. W. 564.

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

HOBSON, C. J. The opinion was delivered January 17th. The petition was tendered February 21st, and was in time, if January 17th is not to be counted. By section 760 of the Civil Code of Practice the decision does not become final "until after thirty days, excluding Sundays, from the day on which the decision is rendered." The rule is that, when the time is counted from a day, the day is not counted. *Board of Council v. Farmers' Bank*, 105 Ky. 811, 49 S. W. 811, 20 Ky. Law Rep. 1635, and cases cited. The petition is therefore in time.

Motion sustained.

HOOGE et al. v. HOOGE.

(Court of Appeals of Kentucky. Feb. 23, 1911.)
DIVORCE (§ 271*) — ALIMONY — ACTION ON JUDGMENT—RELIEF.

In 1899 plaintiff obtained a divorce from defendant, and was awarded the custody of the two children and \$20 a month as alimony. Shortly thereafter defendant left the state, and has since resided in another state, and has never paid any alimony; plaintiff having supported herself and children. Until the death of a relative leaving insurance policies in which defendant's interest amounted to about \$1,170, defendant had no property upon which plaintiff could levy execution upon her judgment for alimony. Defendant is poor, has been sick repeatedly, and his interest in the insurance policies is all the property he has, and he owes several hundred dollars, which he cannot otherwise pay. *Held*, that the amount allowable was in the court's sound discretion, and it properly allowed plaintiff something over \$1,100 out of the proceeds of the insurance policies; some \$2,500 being due her under the judgment.

[Ed. Note.—For other cases, see Divorce, Dec. Dig. § 271.*]

Appeal from Circuit Court, Jefferson County, Chancery Branch, First Division.

Action by Nellie Hooge against Thomas E. Hooge and others. From a judgment for plaintiff, defendant Hooge appeals. *Affirmed*.

Chatterson & Blitz, for appellant. Frank Daugherty and Edwards, Ogden & Peak, for appellee Hooge. Humphrey & Humphrey, for appellee Connecticut Mut. Life Ins. Co.

NUNN, J. Appellee Hooge instituted this action, averring that she obtained a divorce from appellant, Thomas E. Hooge, in April, 1899, and the custody of their children, two girls, who were at that time about 6 and 8 years of age, and also a judgment against appellant for \$20 a month alimony; that soon after the judgment was rendered appellant left the state, and, as she understands, has resided in Chicago, Ill., ever since; that he has never paid anything on the alimony; that she, by her own efforts, aided by her relatives and friends, has maintained herself and supported and educated her children, who are now about 17 and 19 years of age. She alleged that appellee had no property out of which she could make the

judgment for alimony, or any part thereof, but that his father died in Louisville a short time before the institution of this action, and he had two policies in the Connecticut Mutual Life Insurance Company, which she made a party; and that appellant's interest in the two policies amounted to about \$1,170. The insurance company answered, admitting the allegations as to it, and paid appellant's part of the policies into court. Appellant answered, admitting that appellee had maintained herself and the children since the divorce without any aid from him. He alleged that she had let 10 years elapse, that during that time no effort was made by her to enforce the judgment for alimony, and that by her conduct she had lulled him into believing that neither alimony nor any assistance would be expected of him. He stated that he was poor; that he had not been able to accumulate anything; that he had been sick repeatedly, and had had financial difficulties; that his interest in the policies was all he had; that he owed \$200 or \$300, which he was unable to pay unless he could receive his interest in the policies; and that he was willing and proffered to divide his interest in the policies equally with her. Appellee replied, and refused to accept his proposition, and averred that by reason of his having no property she had made no attempt to collect the alimony; that he had at all times been a nonresident of this state since the judgment was rendered, and for that reason she took no legal steps to collect same. The two parties were the only ones to give depositions. They each sustained the allegations of their pleadings. The lower court gave appellee the amount paid in by the insurance company, from which appellant prosecutes this appeal.

Appellant relies upon the cases of *Franck v. Franck*, 107 Ky. 362, 54 S. W. 195, 21 Ky. Law Rep. 1093, *Gerrin's Adm'r v. Berry*, Judge, 99 S. W. 944, 30 Ky. Law Rep. 978, and *Montgomery v. Offut*, 136 Ky. 157, 123 S. W. 676, as supporting his contention that the lower court erred in its judgment. These cases support the principle that the amount allowed in such actions should be determined by the sound discretion of the court. In other words, the court was not compelled to award the amount as fixed by the judgment in the action for divorce and alimony. If the court had allowed all that was due under that judgment, it would have been about \$2,490; but the court allowed her something over \$1,100. In two of the cases referred to, the parties had married again; but it appears that they have not in the case at bar. Appellant has worked for and supported himself alone for 10 years, and appellee, for the same length of time, has supported herself and two girls, whom she has also educated, and whom appellant was under moral and

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

legal obligations to support and educate, or, at least, to aid in so doing. In our opinion, the amount allowed appellee was a small sum for appellant to have to pay, and he has no cause to complain.

For these reasons, the judgment of the lower court is affirmed.

ANDERSON v. COMMONWEALTH.†

(Court of Appeals of Kentucky. Feb. 23, 1911.)

CRIMINAL LAW (§ 1159*)—APPEAL—FINDINGS—CONCLUSIVENESS.

Where there was some evidence sustaining a conviction, the Court of Appeals will not disturb it.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3074-3083; Dec. Dig. § 1159.*]

Appeal from Circuit Court, Boyd County.

Charles Anderson was convicted of violating the local option law, and he appeals. Affirmed.

Zerfoss & Weakley, for appellant. Jas. Breathitt, Atty. Gen., and Tom B. McGregor, Asst. Atty. Gen., for the Commonwealth.

NUNN, J. This prosecution was for the violation of the local option law, which was in force in Ashland, Ky. There was no objection before or during the trial to the indictment, by demurrer or otherwise, nor were there any objections made to the testimony, except to the introduction of the United States government licenses which were held by appellant; nor was there any objection to the instructions given by the court. Under this state of the record, it is unnecessary for the court to consider and discuss the matters raised in appellant's brief. There was some evidence of guilt, and we will not disturb the finding of the jury.

For these reasons, the judgment of the lower court is affirmed.

UPCHURCH et al. v. SUTTON BROS. et al. (Court of Appeals of Kentucky. Feb. 22, 1911.)

1. ADVERSE POSSESSION (§ 114*)—CHARACTER—EVIDENCE.

In order to divest one who holds under title from the commonwealth of title by adverse possession, such possession must be shown by positive proof to have been open, notorious, exclusive, hostile, continuous, and adverse for 15 years before bringing the suit.

[Ed. Note.—For other cases, see Adverse Possession, Cent. Dig. §§ 682-690; Dec. Dig. § 114.*]

2. ADVERSE POSSESSION (§ 57*)—POSSESSION BY TENANTS—PROOF.

Where land is claimed adversely by possession of different occupants, the intention with which each occupant entered and the continuity of the occupancy must be proved.

[Ed. Note.—For other cases, see Adverse Possession, Cent. Dig. §§ 277, 278; Dec. Dig. § 57.*]

3. ADVERSE POSSESSION (§ 60*)—CHARACTER OF POSSESSION—RECOGNITION OF SUPERIOR TITLE.

One who enters upon land under a void patent, and upon demand for possession by the owner acknowledges his superior title and agrees to hold possession for him, is estopped from afterwards claiming by adverse possession, unless he has notified the owner, 15 years before the latter sues for the land, that his possession has become hostile.

[Ed. Note.—For other cases, see Adverse Possession, Cent. Dig. § 287; Dec. Dig. § 60.*]

4. ADVERSE POSSESSION (§ 60*)—CHARACTER OF POSSESSION—RECOGNITION OF SUPERIOR TITLE—PERSONS BOUND.

The heirs and representatives of one estopped to claim land by adverse possession, by acknowledging the superiority of another's title and agreeing to hold possession for him after having entered upon a void patent, are also estopped from claiming adversely.

[Ed. Note.—For other cases, see Adverse Possession, Cent. Dig. § 287; Dec. Dig. § 60.*]

5. QUIETING TITLE (§ 12*)—RIGHT OF ACTION—POSSESSION TO SUSTAIN ACTION.

Possession of land through tenants will support an action to quiet title.

[Ed. Note.—For other cases, see Quieting Title, Cent. Dig. §§ 8-12, 44, 45; Dec. Dig. § 12.*]

6. APPEAL AND ERROR (§ 213*)—PRESENTATION BELOW.

Where defendant in an action to quiet title did not move to transfer the case to the law docket to try the question of his possession before a jury, and moved for trial before the chancellor, he cannot complain on appeal that he was not permitted to try the question of possession before the jury.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 1305; Dec. Dig. § 213.*]

Appeal from Circuit Court, Wayne County.

Action by Sutton Bros. and another against Ruth Upchurch and others. From a judgment for plaintiffs, and dismissing defendants' counterclaim, defendants appeal. Affirmed.

O. H. Waddle & Son and Jos. Bertram, for appellants. Frank Chinn and Harrison & Harrison, for appellees.

SETTLE, J. This action was instituted by the appellees, State National Bank and Sutton Bros., its lessees, to quiet the title of the former to certain lands in Wayne county, described in the petition. Various persons in possession of parts of the lands were made defendants. The lands were patented by the commonwealth to P. W. Hardin in 1873, who many years later sold and conveyed them to the appellee State National Bank, and they are now occupied by the appellees Sutton Bros. under a lease from the bank. Among the lands described in the petition is a 200-acre tract known as the "Gum Pond survey," two parcels of which, one of 100 acres and the other of 50 acres, are claimed by the appellants, Ruth Upchurch and others, widow and heirs at law of Shadrick Upchurch, deceased. Appellees admit that appellants own the title to the 100 acres referred to, but deny their title or right to

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

† Rehearing denied March 18, 1911.

the 50-acre tract, which appellants claim by adverse possession of more than 15 years, and for the purpose of quieting their alleged title to the 50 acres appellants' answer was made a counterclaim. It appears that Shadrick Upchurch, deceased, obtained a patent from the state to the 50-acre tract; but the patent was issued 18 years after the grant to Hardin, and appellants' alleged right to this tract rests alone upon the alleged possession of 15 years claimed by the answer and counterclaim. The circuit court entered a decree declaring the appellee bank owner of the 50-acre tract, quieted its title to same, and dismissed appellants' counterclaim; and from that judgment the latter have appealed.

It appears from the evidence in the case that P. W. Hardin in 1892 went upon these lands with a surveyor and caused the lines thereof to be run. At that time Shadrick Upchurch, who owned an adjacent tract, was in possession of the 50 acres now in controversy, and had erected a cabin thereon, which was then occupied by a person claiming to be his tenant; but in an interview which then took place between Upchurch and P. W. Hardin he admitted, in the presence of W. C. Bell, the surveyor, and Silas Dishman, that Hardin's title to the land was superior to his (Upchurch's) patent, and that Hardin then agreed with him that he might remain in possession of the cabin and land as Hardin's tenant, with the right to use firewood therefrom and to cultivate the few acres of cleared land around the cabin. The depositions of Bell and Dishman appear in the record, in which they testify to the foregoing facts, and we do not find that they were contradicted by any of appellant's witnesses. Their testimony, therefore, establishes the fact that Hardin's superior title to the 50-acre tract was recognized in 1892 by Shadrick Upchurch, and that the latter then became Hardin's tenant thereon; and we are further unable to find in the record that such tenancy was ever denied or repudiated by Shadrick Upchurch before his death, which occurred about 8 years before the institution of this action.

It is true that the appellant Ruth Upchurch, and three or four witnesses introduced in her behalf, testified that Shadrick Upchurch claimed to own the land down to the time of his death, and that he had possession thereof by various tenants; but this testimony is, after all, quite indefinite, as it fails to show what tenants of Shadrick Upchurch occupied the land, how long any one of them remained upon it, or upon what terms they, or any of them, held the possession under Shadrick Upchurch. In other words, appellants' testimony fails to show an unbroken possession of the land for the time necessary to constitute such possession a bar under the statute; nor is there any evidence of a convincing character tending to show that the possession was adverse to Hardin or his grantees. Appellees' witness

es Bell and Dishman appear to be persons of mature age, intelligence, and good character, and their positive testimony as to Shadrick Upchurch's recognition of Hardin's title and the fact of his tenancy under Hardin was, we think, sufficient to influence the chancellor to render the judgment complained of.

It is well settled that, before the owner of land holding under title from the commonwealth can be divested of his title by the mere possession of another, such possession must be shown by positive proof to have been open, notorious, exclusive, hostile, continuous, and adverse for a period of 15 years before the institution of the suit, and of such a character as to give a cause of action for every moment of that time. And when such possession is claimed under different tenants, the intention with which each tenant entered, and that the tenancy was unbroken, must likewise be proved. *Ashcraft v. Courtney*, 121 S. W. 625; *Sowder & Myers v. McMillan's Heirs*, 4 Dana, 456.

It is also well settled that one who enters under a void patent, and upon demand for possession by the true owner, acknowledges the superior title of such owner, and agrees to hold possession under him, is estopped to plead adverse possession to the suit of the owner and those claiming under him, unless he had given notice to the owner fifteen years before the suit was filed, that he changed his amicable possession into a hostile possession. And when the ancestor is estopped under these circumstances his heirs and representatives are likewise estopped. *Haffendorfer v. Gault*, 84 Ky. 124; *South's Adm'r v. Marcum*, 22 S. W. 844, 15 Ky. Law Rep. 339; *Gay v. Moffitt*, 2 Bibb, 506, 5 Am. Dec. 633; 1 Cyc. pp. 1030-1032; *Field's Heirs v. Napier*, 80 S. W. 1110, 26 Ky. Law Rep. 240.

Viewed as a whole, appellants' evidence is not sufficient to show either that Shadrick Upchurch ever repudiated the title of appellees or their grantor, Hardin, or denied his holding of the land as a mere tenant for them; and it is manifest that, if his widow and heirs have done so since his death, it was not as much as 15 years before the institution of the suit. Therefore the latter are now estopped to deny such tenancy. Indeed, the proof does not show that appellants ever openly or formally denied their tenancy until after the institution of appellees' action, and they were, therefore, the tenants of appellees at the time of the institution of the suit; and through them and one Turner, who was likewise a tenant of appellees and in possession of the land, the latter had at the time of the institution of the action such actual possession, as well as title, as permitted them to sue in equity to quiet their title.

Appellants' complaint that they were not permitted an opportunity to try the question of possession before a jury is unavailing, as they made no motion to transfer the case to

the law docket for that purpose, and themselves moved for a submission and trial before the chancellor.

Finding no cause to disturb the judgment, the same is affirmed.

NATIONAL BANK OF THE REPUBLIC v. CURRENT et al.

(Court of Appeals of Kentucky. Feb. 17, 1911.)

1. STATUTES (§ 231*)—CONSTRUCTION—REVISION.

Where the statute construed is a revision, the old as well as the new statute may be looked to, to determine what change was made in the law; it being presumed that the Legislature did not intend that the revised statute should include a subject omitted therefrom in the revision.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. § 312; Dec. Dig. § 231.*]

2. BILLS AND NOTES (§ 107*)—VALIDITY—STATUTORY PROVISIONS—PEDDLER'S NOTE.

Ky. St. § 4215 (Russell's St. § 6159), relating to revenue and taxation, requires all peddlers to pay a license. Section 4216 (Russell's St. § 6158) provides that all itinerant vendors of lighting rods, goods, wares, merchandise, clocks, watches, jewelry, and other named articles, "and any other thing not hereinafter specially exempt, shall be deemed peddlers," but does not include "patent rights" therein. Section 4218 (Russell's St. § 6161) provides that no one shall be deemed a peddler for selling tinware, agricultural implements, and other named articles. Prior to the revision of 1906 (Laws 1906, c. 22, art. 12, subd. 3, § 2), section 4216 named "patent rights" as articles of sale by peddlers. Section 4223 (Russell's St. § 1800) requires all notes given to a peddler for purchases to have written across the face the words "Peddler's Note," and provides that all notes given for such articles or rights, not so marked on their face, shall be void except as against a peddler. *Held*, that one vending patent rights was not required to take out a license as a peddler, so that a note given for patent rights was not void in the hands of a purchaser for value, because the words "Peddler's Note" were not written across its face.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. § 227; Dec. Dig. § 107.*]

3. STATUTES (§ 212*)—CONSTRUCTION.

The court should not assume that a statutory provision means nothing.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. § 289; Dec. Dig. § 212.*]

Appeal from Circuit Court, Jefferson County, Common Pleas Branch, 3d Division.

Action by the National Bank of the Republic against W. G. Current and another. From a judgment dismissing the petition on demurrer, plaintiff appeals. Reversed and remanded, with directions to sustain demurrer and for further proceedings.

Henry Burnett and William English, for appellant. Hines & Norman, for appellees.

O'REAR, J. Current and Wood executed two promissory notes to the American Automatic Advertising Company for \$706.25 each, which before maturity were discounted to appellant for value. The notes were given

for the price of certain rights to the exclusive use of patented articles in territory in Kentucky. Appellees, the makers, defended on the ground that the notes were given to itinerant persons, and for the rights named, and as they were not indorsed "Peddler's Note," as required by section 4223, Ky. St. (Russell's St. § 1800), they were void. They also pleaded that the consideration for the notes had failed. Appellant demurred to the answer. The demurrer was overruled. Appellant elected to stand on its demurrer, and the petition was accordingly dismissed.

By section 4215, Ky. St. (Russell's St. § 6159), all persons who are by that article deemed peddlers are required to pay a license for plying their vocation. Section 4216, Ky. St. (Russell's St. § 6158), then reads: "All itinerant persons vending lightning rods, goods, wares, merchandise, clocks, watches, jewelry, gold, silver, or plated ware, spectacles, drugs, perfumery, and any other thing not hereinafter specially exempt, shall be deemed peddlers." By section 4218, Ky. St. (Russell's St. § 6161), no person shall be deemed a peddler for selling tinware, agricultural implements, sewing machines, portable mills, books, pamphlets, papers, meat, stoneware, or farm or garden products, nor merchants or their agents, for selling by sample. Section 4216, Ky. St. supra, is a reenactment of section of same number in a previous edition of the Kentucky Statutes. It is contained in the chapter on Revenue and Taxation.

Prior to 1906 that section was in the same language as present section 4216, except that, following the words "lightning rods," there was the clause, "patent rights, or territory for the sale, use or manufacture of patent rights." In 1906 the law of the state relating to revenue and taxation was revised, and an entirely new act substituted for the old chapter on that subject. Section 4216 was re-enacted in the same language first above quoted, omitting the clause last quoted. Acts 1906, c. 22, art. 12, subd. 3, § 2. In construing statutes, not only the language used must be looked to, but where the statute under consideration is a revision of a previous one on the subject, it is competent to examine the old as well, to see what change, if any, the Legislature has made. Any material change between the two cannot be passed over by the courts as insignificant. It must be presumed that the Legislature meant something by being at the pains to make the change, else it is most likely that they would have left the enactment alone as it was. So when an entire clause, relating to a particular one of a class of subjects, has been omitted, it is a reasonable inference that the Legislature did not intend that the subject omitted should thereafter be embraced in the terms of the statute.

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

Under section 4216, Ky. St., as it existed prior to 1906, this court had construed that a note given as consideration for the use of a patent right in this state, not indorsed as required by section 4223, Ky. St., was void. *Bohon's Assignee v. Brown*, 101 Ky. 354, 41 S. W. 273, 19 Ky. Law Rep. 540, 38 L. R. A. 503, 72 Am. St. Rep. 420; *Bugg v. Holt*, 97 S. W. 29, 29 Ky. Law Rep. 1208; *Rumbley v. Hall*, 107 Ky. 349, 54 S. W. 4, 21 Ky. Law Rep. 1071. It had also been held that section 4215, requiring the taking out of a license by vendors of patent rights, was unconstitutional. *Hays v. Commonwealth*, 107 Ky. 655, 55 S. W. 425, 21 Ky. Law Rep. 1418; *Commonwealth v. Petty*, 96 Ky. 452, 29 S. W. 291, 16 Ky. Law Rep. 488, 29 L. R. A. 786. The statute—subdivision 3, art. 12, c. 108, Ky. St. (Revenue and Taxation), being Russell's St. §§ 6158-6167—defining the duties and liabilities of peddlers, had a two-fold object: One to produce revenue from itinerant merchants and vendors of merchandize; the other, the protection of the public against imposition and fraud by such. It is not certain that the Legislature would have enacted the statute as to either of its aspects without the other. So, when this court had decided that the revenue feature failed, because violative of the federal Constitution as to vendors of patent rights, but held good as to the protection of the public from the imposition by them by removing their notes from the class of negotiable instruments protected in the hands of innocent holders for value, the Legislature came again to consider the subject. It seems to have receded from its purpose of subjecting notes given in payment of patent rights to defense in the hands of any holder, although acquired in good faith, in usual course, for value. It may also have considered that the greater benefit to the public lay in placing this class of commercial paper on the same footing as that enjoyed by all other commercial paper, except peddlers' notes.

If such was the legislative purpose, then the clause which we here find was adopted was just such as would likely effect it. Nor can we regard the phrase at the close of the section (which was also in the old section), "and anything not hereinafter specially exempt," as contravening the purpose to which we ascribe the change in the section. Section 4216 was defining who are to be deemed peddlers. Section 4215 required a license upon the business of peddling by "all persons who are by this article deemed peddlers." As we have seen, vendors of patent rights were not included in the article as peddlers of whom a license was required, because to do so violated the Constitution of the United States. Nevertheless it has been held in *Bohon v. Brown*, supra, that vendors of such rights could be subjected, if named by the statute, to the burden of having their notes made

nonnegotiable—not because they were required to pay a license, but because it was in the nature of a police regulation. In the act of 1906 such persons were not required to pay a license, nor were they described, in the section defining who were peddlers, as falling within that class. The re-enacted section 4216, omitting the clause as to vendors of patent rights, was intended, we think, to conform to decisions of this court, so as to require only licensed peddlers to have their notes indorsed as required by section 4223. Hence the phrase in section 4216, "and anything not hereinafter specially exempt," means anything to sell which a license is required by section 4215. This construction gives some meaning to the legislative action. The converse would be to hold that nothing was intended by it. That we ought not to assume.

The judgment is reversed, and cause remanded, with directions to sustain the demurrer to the answer, and for proceedings not inconsistent herewith.

HOLTMAN v. BULLOCK.†

(Court of Appeals of Kentucky. Feb. 16, 1911.)

MALICIOUS PROSECUTION (§ 24*)—PROBABLE CAUSE—INFERENCE FROM RESULT OF PROSECUTION—PLEA OF GUILTY.

Plaintiff in a suit for malicious prosecution had been arrested for breach of the peace on a warrant sworn out by defendant, and while in jail, and without any opportunity to see her friends or obtain advice, she was told by direction of defendant that if she would confess a penalty would be assessed, but would never be collected, but if she did not confess she would have to stay in jail. She therefore confessed; but, learning that the penalty was suspended only for 10 days, she withdrew her confession, and was acquitted of the charge. Held, that plaintiff's plea of guilty was not a bar to her suit for malicious prosecution.

[Ed. Note.—For other cases, see Malicious Prosecution, Cent. Dig. § 53; Dec. Dig. § 24.*]

Appeal from Circuit Court, Jefferson County, Common Pleas Branch, Second Division.

Action for malicious prosecution by Louise Bullock Holtman against J. R. Bullock. From a judgment for defendant, plaintiff appeals. Reversed and remanded.

D. Moxley, for appellant. D. R. Castleman and Pryor & Castleman, for appellee.

NUNN, J. This action was brought by appellant against appellee for malicious prosecution. The petition was in the usual form. The answer denied the malicious prosecution, and alleged that, after appellant was arrested under a warrant procured by appellee for breach of the peace, she confessed her guilt, and was fined \$100, and sentenced to 50 days' imprisonment in the county jail, which was suspended by written request for 10 days, and appellee pleaded such action upon her part as a bar to this proceeding.

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

† Rehearing denied April 13, 1911.

The facts of the case, as they appear in the record, are about these: Appellee procured a warrant for the arrest of appellant to be issued by Squire Meglemery, and after her arrest she was carried to the county jail, and there, by the direction and consent of appellee, she was told that if she did not confess she would have to remain in jail, but that if she would confess a penalty would be assessed against her, but would be suspended, and never collected. Under these circumstances, she did confess, and a judgment was rendered as stated; and she, afterwards learning that it was suspended for only 10 days, appealed to the circuit court. That court decided that she could not change her plea, and dismissed the appeal, and she then prosecuted it to this court, which reversed the action of the circuit court. *Holtman v. Commonwealth*, 129 Ky. 710, 112 S. W. 851. After the case was remanded, she was tried in the circuit court for a breach of the peace, and acquitted. She then brought this action. She alleged that she entered her plea of guilty, while in jail, to the offense of a breach of the peace, when she was not guilty, and that she entered such a plea under the directions and consent of appellee, who knew she was not guilty of any offense. The lower court sustained appellee's plea in bar, and she has appealed.

The only question to be determined is whether a plea of guilty, made under the circumstances alleged in this case, is a bar to a suit for malicious prosecution for that offense. Both parties cite the case of *Duerr v. Ky. & Ind. Bridge & R. Co.*, 132 Ky. 228, 116 S. W. 325, as authority for their position. Appellee cites from the opinion in that case the following: "But the appellant completely closed the door of the courts to his petition for redress, when he admitted that he had pleaded guilty to a charge that was made unjustly, as he avers, against him." The appellant in that case pleaded guilty after the advice of counsel of his own selection. It is nowhere shown nor intimated that the appellee had anything to do with making or with getting him to confess. That is unlike this case, as the appellant herein was in jail, and had no opportunity of seeing a friend or any one for advice, and she alleged that appellee consented to and directed this method of obtaining her confession.

The court also said in the case above cited: "There is, however, an exception to the rule that a judgment of conviction is conclusive evidence of the fact that there was probable cause for the prosecution, and this exception is that if the accused alleges in his petition that the prosecution and conviction were procured by fraud, corruption, or perjured evidence, and supports these allegations by sufficient evidence, he may, notwithstanding the conviction, maintain his action

and recover damages for the malicious prosecution." And again it is said: "But if he can prove that the judgment of conviction against him was unjustly obtained, thereby in effect establishing his innocence, notwithstanding the judgment, he will occupy in the eyes of the law the same position as if he had been discharged or acquitted." A number of cases are cited to support these views, which we believe to be correct; and if the judgment of confession was obtained from appellant as she alleged in her petition, it is no bar to this proceeding, and if she can show that the prosecution of her in the criminal court was malicious and without probable cause, she can maintain this action.

For these reasons, the judgment of the lower court is reversed, and remanded for further proceedings consistent herewith.

EWALD IRON CO. v. COMMONWEALTH.
(Court of Appeals of Kentucky. Feb. 24, 1911.)
CORPORATIONS (§ 618*)—EXPIRATION OF CHARTER — CLOSING BUSINESS — REASONABLE TIME.

By analogy to Ky. St. §§ 3858, 3859 (Russell's St. §§ 3888, 3889), allowing two years for the settlement of estates of decedents, a corporation, after its expiration for business purposes, has two years as a reasonable time to close up its affairs.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 2457-2458; Dec. Dig. § 618.*]

Extended opinion.

For former opinion, see 131 S. W. 774.

HOBSON, C. J. In fixing two years as a reasonable time for a corporation to close up its business, the court followed the statute regulating the settlement of the estates of deceased persons. Ky. St. §§ 3858, 3859 (Russell's St. §§ 3888, 3889). The corporation expired for business purposes on November 5, 1905. The property held in its name should be taxed in its name and as its property until November 5, 1907. After that time it should be taxed in the name of L. P. Ewald, and as his property. It is important in these tax matters that a definite rule be laid down, that the parties may conform to it and avoid litigation, cost, and penalties.

The former opinion (140 Ky. 692, 131 S. W. 774) is extended as above indicated.

UNITED STATES FIDELITY & GUARANTY CO. v. PAXTON.

(Court of Appeals of Kentucky. Feb. 21, 1911.)

1. PRINCIPAL AND SURETY (§ 185*)—SURETY COMPANIES—INDEMNIFICATION—STATUTES.

Ky. St. § 723 (Russell's St. § 4364), provides that surety companies may stipulate for indemnity from the parties for whom they shall so become responsible. *Held* that, to entitle a surety company to demand indemnity, its prin-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes
134 S.W.—31

principal's obligation to indemnify must have been contained in the contract.

[Ed. Note.—For other cases, see *Principal and Surety*, Dec. Dig. § 185.*]

2. PRINCIPAL AND SURETY (§ 174*)—SURETY COMPANIES—INDEMNITY—STATUTES.

Under Ky. St. § 723 (Russell's St. § 4364), relating to surety companies, authorizing them to stipulate for indemnity from parties for whom they shall become responsible, sections 4659, 4663, 4664 (Russell's St. §§ 2027, 2031, 2032), providing a means by which sureties may obtain indemnity, have no application to a corporation created for the purpose of becoming surety for compensation on official bonds, so as to authorize a surety company to proceed thereunder and obtain indemnity in a case where no contract for indemnity had been made.

[Ed. Note.—For other cases, see *Principal and Surety*, Dec. Dig. § 174.*]

Appeal from Circuit Court, Anderson County.

Proceeding by the United States Fidelity & Guaranty Company to limit its liability and for indemnity as surety on the official bond of J. R. Paxton, as court commissioner. From an order denying such relief, the company appeals. Affirmed.

Wilkes H. Morgan, for appellant. F. R. Feland, for appellee.

CARROLL, J. Pursuant to notice previously given that on June 15, 1910, the motion would be made, the appellant on this date filed in the Anderson circuit court the following motion: "Comes the United States Fidelity & Guaranty Company, surety upon a bond of J. R. Paxton, as commissioner and receiver of the Anderson circuit court, which bonds were executed in pursuance of section — of the Kentucky Statutes, and files a copy of a notice served upon him, and moves the court to enter an order requiring J. R. Paxton to execute new bond in pursuance of the Kentucky Statutes aforesaid, with other sureties, on or before the — day of —, 1910, and that said new bond, when given, shall operate as a discharge of the United States Fidelity & Guaranty Company from all liability for the acts of J. R. Paxton as aforesaid thereafter done, and that said bond shall contain stipulations and covenants to indemnify the United States Fidelity & Guaranty Company against any loss or damage legally incurred by reason of its suretyship upon the bond executed by it as aforesaid." In answer to this motion, Paxton, on June 20, 1910, filed a response, in which he set up that the United States Fidelity & Guaranty Company was his surety on his official bond as commissioner for three years immediately prior to the 6th day of July, 1909, for which service it required him to pay an annual premium of \$25; that on July 6, 1909, he came into court and executed a new bond, with individual surety, which bond was accepted and approved by the court,

and was and is from its date a full and complete guaranty of his official liability; that there was no provision in law and no necessity in fact for any order acquitting the company of liability; and that it had no right to demand indemnity. He further stated that he had faithfully discharged all the duties of his office, and that there was no existing or past liability for which the company was or could become liable, and further set up that on July 6, 1910, he was reappointed commissioner and receiver of the Anderson circuit court for a new term of office beginning that day, and thereupon executed a new bond, with individuals as his surety, conditioned that "he shall faithfully perform and discharge the duties of his said office, and shall well and truly account for and pay over all sums of money heretofore or hereafter received by him by virtue of said office to the person or persons to whom he is ordered by the court to pay the same." On November 23, 1910, Paxton filed an amended response, and on that day a demurrer to the response as amended was overruled, and the court, in holding the response sufficient, dismissed the motion. The motion, notice, and response, and the orders of court relating thereto, constitute the entire record in the case.

It will be observed that the motion was not disposed of until some months after Paxton was appointed for a new term, upon the expiration of the term for which the appellant company had been surety upon his bond. Under section 392 of the Kentucky Statutes (Russell's St. § 2929), each circuit court is authorized to appoint a commissioner for a term of four years, and it is provided that the commissioner shall execute bond with surety to be approved by the court for the faithful performance of the duties of his office, which bond shall be renewed once in each year, and oftener if required. Section 4659 of the Kentucky Statutes (Russell's St. § 2027), providing a means by which sureties upon bonds may be released, reads: "If a surety in any official bond, or bond of a personal representative, guardian, curator, assignee or trustee, committee of a lunatic, master commissioner, receiver, or in any bond or covenant which by law may be required to be executed in court, or before an officer at the commencement or during the progress of any civil judicial proceeding, wishes to be relieved from future liability and to obtain indemnity for such as may have been incurred, or either, he may, by written notice to the principal obligor require him, by a day named therein, to appear before the court in which the original bond was given, or in whose clerk's office the same is required to be kept, or if the bond was not given in any court, or required to be kept in any office, then before the circuit court for

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

the county in which the principal resides, or if he has no residence in this commonwealth, then in the circuit court for the county of the residence of the surety." And section 4663 (Russell's St. § 2031) provides that: "If a new bond is given it shall operate a discharge of all the sureties making the motion from all liability for the acts of the principal thereafter done; and if the object be so specified, the bond shall contain a stipulation or a covenant to indemnify the said sureties against any loss, cost or damage legally incurred by reason of said suretyship." And section 4664 (Russell's St. § 2032) provides that: "If a new bond is not given on the day named in the notice or fixed by the court, the party moved against shall be at once removed from office, if an officer, or, if not, his powers revoked, or he be deprived of all right further to act in discharge of the duties or functions of the trust, post or employment; and the court shall make all needful orders for the protection of the surety and the benefit of the state or trust which had been confided to him."

Section 723 of the Kentucky Statutes (Russell's St. § 4364), relating to appellant and similar companies, and authorizing them to become sole surety in designated bonds, provides in part that: "It shall be lawful for said company to stipulate and provide for indemnity from the parties aforesaid for whom they shall so become responsible, and to enforce any bond, contract, agreement, pledge or other security made or given for that purpose." We construe this statute to mean that, if a surety company desires to be in a position to demand indemnity from its principal, it must so stipulate in the contract, and that, if it fails to do this, it cannot require its principal to indemnify it. It would therefore seem that the sections of the statute cited, providing a means by which sureties may obtain indemnity, have no application to a corporation created by law for the purpose of becoming surety for compensation in official bonds, unless the contract so provides, and, as it does not appear that the appellant company contracted with Paxton for indemnity, it could not require him to furnish it.

But, assuming that a surety company, in the absence of a contract, cannot require indemnity from its principal, the question is suggested: Can it, upon notice and motion, be relieved from future liability pending its contract of suretyship, without tendering back so much of the premium paid as would be unearned if it was released? This inquiry it does not seem necessary to answer, because several months before the motion in the lower court was disposed of, and the ruling appealed from entered, the suretyship of the appellant had expired, as well as the term of Paxton for which it became his sure-

ty, and he had been reappointed for a new term and had executed bond with new sureties.

Looking at the case for appellant from any standpoint, it was not entitled to the relief asked, and the judgment is affirmed.

PATRICK et al. v. BIRKHEAD, Judge.
(Court of Appeals of Kentucky. Feb. 24, 1911.)
TRUSTS (§ 329*) — TRUSTEES — ACCOUNTING — JUDGMENT.

Where, in proceedings to compel a settlement of a trustee's account, the court sustained exceptions to the report of a commissioner and entered an order directing the trustee to pay to the beneficiary within 90 days \$200, and \$25 a month thereafter, until further order of court, from which order the trustee appealed and obtained a supersedeas, such order did not deprive the court of further jurisdiction to proceed with the settlement at the next term, and to order the trustee to pay a further sum to the beneficiary.

[Ed. Note.—For other cases, see Trusts, Dec. Dig. § 329.*]

Petition by W. T. Patrick and others for a temporary restraining order against T. F. Birkhead, Judge of the Daviess Circuit Court, to restrain the enforcement of a judgment pending appeal. Denied.

E. B. Anderson, for plaintiffs. La Vega Clements and Ben D. Ringo, for defendant.

HOBSON, C. J. In Patrick v. Patrick, 135 Ky. 307, 122 S. W. 159, it was held that W. T. Patrick held the estate under the will of his father, in trust for the benefit of his mother during her life or widowhood, with remainder to him at her death. On the return of the case to the circuit court after that decision, it was referred to a commissioner to report a settlement of the accounts of the trustee, and show the amount in the trustee's hands belonging to his mother. A report was filed by the commissioner, exceptions were filed to it, and on December 29, 1910, the court sustained the exceptions and quashed the master's report. He also entered an order directing the trustee to pay his mother within 10 days the sum of \$200, and to pay her \$25 on the 1st day of each month thereafter, beginning February 1, 1911, until the further order of the court. The case was set for hearing on the first day of the January term. W. T. Patrick prayed an appeal from so much of this order as directed him to pay his mother the money referred to, executed a supersedeas bond, and took out a supersedeas. At the January term, the master commissioner having filed another report, and it appearing that the mother was destitute and without means of support, and it appearing from the commissioner's report that a much larger sum was due her, the court, on her motion, ordered the trustee to pay her the sum of \$190 on the next day.

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

He did not pay the money, and, having been adjudged by the court guilty of contempt, he has filed in this court his petition against the circuit judge, under section 110 of the Constitution, seeking to restrain the circuit court from enforcing his judgment, and he has entered a motion for a temporary restraining order, to remain in force until the motion for the writ may be heard. The circuit judge has filed a response to the motion, and the case is submitted on the application for the temporary writ.

The writ is applied for on the ground that the circuit judge was without authority to modify at one term a judgment which he had entered at another term, and that when he had entered a judgment at one term, and it was superseded, he was without authority to enter other judgments at another term. The facts of the case do not bring it within the rule relied on. The circuit judge made in December an order directing the payment by the trustee of a certain sum to the beneficiary to supply her temporary needs, and set the case over for hearing on the merits to the January term. At the January term, when the commissioner had filed his report, the circuit judge did not modify the order which he had made in December, but, on the facts which he had then before him, made a further order directing another sum of money to be paid to the beneficiary. From their very origin, courts of equity have controlled matters between trustee and cestui que trust, requiring the trustee from time to time to do that which in good conscience he should do. When the chancellor here made a temporary allowance to the beneficiary at one term, he did not lose control over the case. He still had the case before him to settle the trust, and require the trustee to execute it properly, and he had full power at the next term to direct the trustee to pay other money to the beneficiary. The propriety of the chancellor's order will not be reviewed on a motion of this sort. He was not proceeding without his jurisdiction.

The motion for a temporary writ is overruled.

FRANKS v. SMITH.

(Court of Appeals of Kentucky. Feb. 14, 1911.)

1. MILITIA (§ 15*)—AUTHORITY OF GOVERNOR—AUTHORITY TO CALL INTO ACTION—SERVICE.

Const. § 69, declares that the supreme executive power of the commonwealth shall be in the Governor. Section 75 makes him commander of the militia, except when called into the service of the United States. Section 81 requires him to take care that the laws are faithfully executed, and Ky. St. § 2672 (Russell's St. § 4695), provides that when he deems it necessary for the safety or welfare of the commonwealth, or when any actual, or threatened invasion, insurrection, etc., requires mili-

tary force in aid of the civil power to enforce the law, or to preserve the peace and security of the rights and lives or property of its citizens, he may order into active service so much of the state guard or military force of the commonwealth as he may deem necessary. Section 2673 (section 4696) provides that the military shall always be subordinate to the civil power, and section 2674 (section 4697) declares that when in active service the Governor may direct the commanding officer of the military force to report to the civil authorities where the force is employed. Held, that the Governor, as commander in chief of the militia, may order the militia into active service, and direct its operations without request from any civil officer of the city, town, or county, and without placing them under the orders of the civil authorities or any of them, in the territory into which they are sent.

[Ed. Note.—For other cases, see Militia, Cent. Dig. § 6; Dec. Dig. § 15.*]

2. CONSTITUTIONAL LAW (§ 73*)—DEPARTMENTS OF GOVERNMENT—EXECUTIVE AUTHORITY—INTERFERENCE BY JUDICIARY.

Since the Governor is the supreme civil authority in the state, and by virtue of his office, as commander in chief of the militia, may call the same into active service in his discretion, the exercise of such discretion is not subject to restraint or control by the courts, because to do so would be an interference by the judiciary with the executive department.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. §§ 134-137; Dec. Dig. § 73.*]

3. MILITIA (§ 1*)—CONTROL—CIVIL AUTHORITIES.

Under Ky. St. § 2673 (Russell's St. § 4696), providing that the military shall be at all times and in all cases in subordination to the civil power, the state militia in active service, and in every emergency which arises therein, is subject to the control of the civil authorities.

[Ed. Note.—For other cases, see Militia, Cent. Dig. § 1; Dec. Dig. § 1.*]

4. MILITIA (§ 19*)—PERFORMANCE OF MILITARY DUTY—ACTS OF SOLDIERS—CIVIL LIABILITY.

A member of the state militia as a soldier in active service is not relieved from civil liability for his acts while so engaged on the ground that he acted in obedience to orders received through the regular military channels.

[Ed. Note.—For other cases, see Militia, Cent. Dig. §§ 43, 44; Dec. Dig. § 19.*]

5. MILITIA (§ 15*)—AUTHORITY OF SOLDIERS.

A member of the state militia, while in active service, under the command of his superior officer, has the same power as a peace officer of the state, being entitled to the same immunity as is afforded to such officers in the performance of their duty, and hence by the common law, and by Cr. Code Prac. § 36, he may make an arrest without a warrant when a public offense is committed in his presence, or when he has reasonable grounds to believe that the person arrested has committed a felony, and also in cases of riot, rout, unlawful assemblies, or when two or more persons have confederated or banded together to intimidate, threaten, alarm, disturb, or injure any person, or molest or destroy property.

[Ed. Note.—For other cases, see Militia, Dec. Dig. § 15.*]

6. FALSE IMPRISONMENT (§ 7*)—ARREST BY MEMBER OF STATE MILITIA—AUTHORITY.

The state militia having been called out to quiet night riding in the county, defendant, a sergeant, and certain privates were detailed by their captain to watch a certain highway

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

at night, with orders, if during any unusual hour of the night they encountered men traveling the highway in numbers of more than two, to halt them, receive their explanation, and, if necessary, to search them, and if they were found carrying concealed weapons to arrest and take them into camp. About midnight, defendant and his fellow soldiers encountered plaintiff and five others traveling on the highway, and after halting and searching them found pistols in the buggy of plaintiff and one other of the party. Pursuant to orders they were arrested and taken to camp, and on the next morning turned over to the civil authorities on the unfounded charge of carrying concealed weapons. The evidence being insufficient to sustain the charge, they were discharged; there being no proof that plaintiff had theretofore or was then about to commit a public offense of any kind. *Held*, that plaintiff's arrest was unjustifiable, and that defendant and his companions participating therein were liable for false imprisonment.

[Ed. Note.—For other cases, see False Imprisonment, Dec. Dig. § 7.*]

Appeal from Circuit Court, Caldwell County.

Action by R. Sidney Smith against L. C. Franks and others. From a judgment for plaintiff against Franks alone, the latter appeals. Affirmed.

James Breathitt, Atty. Gen., John F. Lockett, Asst. Atty. Gen., and John Gates, for appellant. R. W. Lisanby, for appellee.

CARROLL, J. The questions presented by this record relate to the power of the Governor to order into active service the militia of the state, and the civil rights and liabilities of militiamen while so engaged, as well as the subordination of the military to the civil authorities in the territory into which they are directed to go. These important questions come up in an action to recover damages for false arrest, brought by the appellee, Smith, a private citizen of Caldwell county, Ky., against the appellant, Franks, McFarland, Cook, Kennedy, and Gans, members of the state militia. During the trial, the action against Kennedy and Cook was dismissed without prejudice by the appellee, and the court peremptorily instructed the jury to return a verdict in favor of McFarland and Gans. After the action was thus disposed of as to these parties, it proceeded against the appellant, Franks, and the jury assessed the damages against him in the sum of \$1,000. From a judgment upon this verdict Franks appeals, and from the order of the trial court directing a verdict in favor of McFarland and Gans the appellee, Smith, prepared, but did not prosecute, an appeal. At the time, and before the arrest complained of, Gans was captain of Company C, Third Infantry, Kentucky State Guards, and Franks was a sergeant, and Cook, McFarland, and Kennedy were privates in the same company. In making the arrest of Smith, they were acting under the orders of superior officers in the military service, and independent of the civil author-

ities of Caldwell county. They did not report to or receive any directions from the sheriff or jailer of Caldwell county, or the mayor or marshal of the city of Princeton, or any other civil officer in the city of Princeton or the county of Caldwell, in which county they made the arrest complained of.

The separate answers of Franks, McFarland, Cook, Kennedy, and Gans, which were substantially the same, admitted the arrest and detention of Smith by them, and in justification of their acts they set up that they were at the time regularly enlisted and duly qualified and acting members of Company C, Third Regiment, Infantry, of the Kentucky State Guards, and members of a detachment of said regiment stationed at Princeton, in Caldwell county, Ky.; that Capt. Gans was under the command of E. B. Bassett, the duly appointed, qualified and acting major of said regiment, and Bassett, as major, had general command of the militia then in active service in Western Kentucky under orders from Augustus E. Willson, Governor of the commonwealth and commander in chief of the militia of the state; that on the afternoon of the 26th of November, 1908, Capt. Gans received information from Maj. Bassett that a movement or raid of armed men known as "night riders" was expected to be made that night in the neighborhood of Hopson and Wallonia, in Caldwell county, and was ordered by him to detail a squad of men from his detachment into said neighborhood to prevent if possible any trouble resulting from such movement or raid; that pursuant to and in obedience to said orders Gans detailed Franks, McFarland, Cook, and Kennedy on such described duty, directing them that if during any unusual hour of the night they encountered men traveling the highways in numbers more than two, to halt them, receive their explanation for so traveling at such hours, and, if deemed necessary, to search them, and if they were found carrying concealed weapons to arrest and bring them into camp at Princeton, to be thereafter turned over to the civil authorities of the county; that these orders were given by Gans, and obeyed by Franks, McFarland, Cook, and Kennedy in the performance of their duty as members of the state militia, and in obedience to orders received from superior officers; that on November 27th, about midnight, Franks, McFarland, Cook, and Kennedy, who were stationed on one of the public highways of Caldwell county, encountered the appellee, Smith, and five other men traveling on the highway, and after halting and searching them found in the buggy of Smith and one other of the party pistols, and in pursuance of their orders took them into camp at Princeton, permitting the other four travelers to go on their way; that they had no ill will or feeling against Smith, nor

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

any real or fancied cause for having such feeling; nor did they mistreat or cause him to be mistreated except by arresting and delivering him to Capt. Gans in pursuance to orders.

With respect to the evidence, it only seems necessary to say that Franks, Cook, Kennedy, and McFarland, acting under the orders of their captain, arrested Smith some time after 10 o'clock at night as he was traveling on a public highway in company with five other persons in buggies, and that finding in the buggy in which he was riding a pistol owned by him, he was arrested and carried to Princeton, the headquarters of Capt. Gans, and there kept in custody by Gans until the next morning when he was turned over to the civil authorities upon the unfounded charge of carrying concealed about or upon his person a deadly weapon, as this weapon was found not on his person, but in the buggy. There is no evidence that Smith had theretofore or was then about to commit a public offense of any kind. In company with his neighbors who had attended a lodge of which they were members, he was on his way home at the time of his arrest. There is some evidence that he was treated in an abusive and insulting manner by the soldiers who arrested him, and that he suffered on account of exposure to the cold of the night. But, for the purposes of this case, we will not go into the question of any misconduct on the part of the arresting officers, preferring to treat the case, as the facts justify us in doing, as if Smith while peaceably and rightfully traveling on the public highway was arrested and detained without authority, unless warrant for his arrest and detention sufficient to justify the militiamen can be found in the orders that were given to them by their superior officer. We will also assume that the arrest and detention of Smith was made in strict obedience to orders received by Franks and his comrades from their superior officer, Capt. Gans; and that Capt. Gans received the orders that he gave to Franks and the privates from his superior officer, Maj. Bassett; that Maj. Bassett was acting in obedience to and under the authority of the Adjutant General of the state; and that the Adjutant General was acting under orders from the Governor of the state. In short, we will take it for granted that the militiamen were regularly ordered into active service by the Governor of the state, and that everything the officers and privates did was strictly in obedience to orders issued by their superior officers and received by them in accordance with the laws and regulations governing the state militia.

Treating the facts in this way, it is the contention of counsel for Franks that a soldier in active service is not amenable to the civil authorities for his reasonable acts performed in strict obedience to the orders of his superiors, and that in an action against him for false arrest or for false imprison-

ment or detention, he can depend upon his military orders for protection, and if they were reasonable and he did not exceed the authority conferred by them, they are a complete justification for his conduct; while counsel for the appellee, Smith, insists: First. That the Governor has no authority in law to order into active service the state militia, unless requested so to do by the civil authorities of the county, city, or town into which they are directed to go and operate, and so everything they did was in violation of law. Second. That a soldier, although regularly called into active service and acting within the strict line of his military orders, has no power to make an arrest or to do any act that a private citizen might not do, and therefore he can make no defense that will justify his acts except such a defense as any private citizen might make if sued upon a similar cause of action.

Considered from the standpoint of counsel, two principal questions naturally suggest themselves: First. Has the Governor in the exercise of the authority conferred upon him by law and without being requested so to do by a civil officer of any city, town, or county, the power to call out and order into active service the state militia, and direct their movements and operations without placing them under the orders or control of the civil authorities or any of them in the territory into which they are sent? Second. Are members of the state militia when acting in obedience to orders given to them by a superior officer liable in a civil action for making an arrest or doing any other reasonable act they are commanded by a superior officer to do?

Section 69 of the Constitution declares: "The supreme executive power of the commonwealth shall be vested in a chief magistrate, who shall be styled the 'Governor of the Commonwealth of Kentucky.'"

Section 75 provides that: "He shall be commander-in-chief of the army and navy of this commonwealth, and of the militia thereof, except when they shall be called into the service of the United States; but he shall not command personally in the field, unless advised so to do by a resolution of the General Assembly."

And section 81 commands that: "He shall take care that the laws be faithfully executed."

Section 2672, Ky. St. (Russell's St. § 4695), in the chapter relating to the state militia, reads: "It shall be the duty of the Governor, whenever he may deem it necessary for the safety or welfare of the commonwealth, or when any actual or threatened invasion, insurrection, domestic violence or other danger to the public interest makes it necessary to employ military force in aid of the civil power of the government for the enforcement of the law, or to preserve the peace and the security of the rights and lives or property of the citizens, to order into active service so much of the state guard or

military force of the commonwealth as he may deem necessary. The state guard can be ordered into active service only by the Governor."

Section 2673 (section 4696) reads: "The military shall be at all times and in all cases in strict subordination to the civil power."

And section 2674 (section 4697): "When in active service the Governor may direct the commanding officer of the military force to report to any one of the following named officers of the district in which the said force is employed—mayor of a city, sheriff, jailer or marshal."

We find from these sections of the Constitution and statute that the Governor is the chief civil officer of the commonwealth, and is charged with the duty of taking care that the laws of the state are faithfully executed; that he has authority to order the militia into active service whenever or wherever he may deem it necessary to secure the safety or welfare of the commonwealth or to preserve the peace or lives or property of citizens of the state; that the militia can only be ordered into active service by him, but that it shall be at all times in strict subordination to the civil authorities. It will be observed that there is no limitation either in the Constitution or statute upon the power vested in the Governor to order into active service the militia of the state or to direct into what locality they shall go or operate. He is made the sole judge of the necessity that may seem to demand the aid and assistance of the military forces of the state in suppressing disorder and restoring obedience to the law. The presumption of course is that he will not exercise this high power unless it becomes necessary to maintain peace and quiet and protect the life or property of the citizen, after the local civil authorities have shown themselves unable to cope with or control the situation. But to his good judgment and sound discretion the law has left the final decision as to whether the military arm of the state shall be ordered into active service. If he acts wisely and prudently, well and good. If he acts hastily or unwisely or imprudently, there is no power in the courts to control or restrain his acts. Any attempt on the part of the judicial department of the state so to do would be an interference by one department of the government with the power lodged in another department, and a violation of section 27 of the Constitution of the state, providing: "The powers of the government of the commonwealth of Kentucky shall be divided into three distinct departments, and each of them be confined to a separate body of magistracy, to wit: Those which are legislative, to one; those which are executive, to another; and those which are judicial, to another." And section 28, reading: "No person, or collection of persons, being of one of those departments, shall exercise any power properly belonging to either of the others, except in the

instances hereinafter expressly directed or permitted."

The power thus lodged in the Governor is extensive, unrestrained, and subject to abuse. But all power is subject to abuse. If the fact that power might be abused was sufficient to deny the granting of it, there could be no final authority, and everything must be referred back to the people—the source of all power. Of course, a system of government that was denied the authority to take final action would be too weak and inefficient to maintain itself or afford due measure of security and protection to the people who created and established it; and in many instances it would entirely fail to accomplish the purpose of its existence. The power to call out the state militia was vested in the Governor, the chief executive officer of the state, for the wise and wholesome purpose of enabling him to carry into effect the mandate of the Constitution that he must "take care that the laws be faithfully executed." If this power was not lodged in him, then this provision of the Constitution would be an idle and meaningless phrase, because, although charged with the duty of taking care that the laws of the state should be faithfully executed, he would have no authority to enforce the obligation imposed upon him. It is only through and with the aid of the state militia that he can make effective the authority conferred by the Constitution, and it was for this purpose that the Legislature enacted section 2672, Ky. St., before cited. The power conferred by this section is ample to meet every emergency that may present itself, and it gives to the chief executive of the state the fullest authority to call to his assistance in any contingency that may arise a force sufficient to quell disorder and restore peace. Under the sanction of this statute he may act independently of any other civil authority if he desires to do so, or he may act in conjunction with the other civil authorities. He may on his own initiative order out the state militia, or he may wait until requested so to do by the local authorities in the community in which they are needed. He may place the militia at the disposal of the civil authorities, or he may, through military channels, control and direct, within lawful bounds, their movements and operations. Which of these courses he will pursue, he alone is to judge. The Constitution and statute have given him this power, and we could not if we desired abridge it. *Ela v. Smith*, 5 Gray (Mass.) 121, 66 Am. Dec. 356. For his conduct in ordering out and controlling the movements and operations of the state militia, the Governor is answerable only at the bar of public opinion, unless it be that abuses might warrant impeachment proceedings. It cannot for a moment be entertained that the Governor must delay action until requested by the local authorities. This limitation upon his constitutional duty would in many instances deny him the right to take

prompt and decisive action to suppress threatened or actual disorder or violence and enforce obedience to the law. It would interfere with the express authority conferred upon him by the statute, and would in many instances and in many places be disastrous to the peace and welfare of the state. Primarily, the enforcement of the law is with the local civil authorities, but at times they are too weak to control the lawless elements that exist in every society, and at other times they might be in sympathy with the forces who want to take the law into their own hands. But, whatever the reason that may exist for the failure or inability of the local civil authorities to suppress violence and disorder, when it comes to pass that they cannot or will not do it, then it is not only the right but the plain duty of the Governor to act. Ours is a government of law. Under its authority and through its agencies alone wrongs must be redressed and rights protected. Unless this were so, there would be no assurances of peace or quiet for the law-abiding and order-loving who constitute so large a part of our people. The life and the property of the citizen would be insecure, and the lawless, reckless, and violent would be at liberty to exercise at will their disregard of civil authority. In every age of the world and in every state and country, it has been found necessary to the stability and efficiency of government that there should always be at its command a military force to support the civil authorities in times of disorder and riot; and this is so because there has never been and will never be a time in the history of any state or country in which the passions and prejudices of the people, when aroused by some real or fancied wrong, have not prompted men to take into their own hands the redress of genuine or imaginary injuries or the enforcement of what they conceived to be their rights. For the truth of these statements we need not go beyond our own commonwealth. In every Constitution we have had, provision has been made for a military force, and one of the first laws enacted after the establishment of the state had for its purpose the creation of a state militia. The men who placed, and who have kept, these provisions in the organic law as well as the statute knew the temper of our people—what they had done, and what they would do. Indeed the history of the state, from its beginning, is filled with examples of attempts—too many of them successful—to disregard and overthrow the law. When an emergency arises calling for quick and decisive action to protect life or property from violence, and the local civil authorities are unable or perhaps unwilling to afford protection, must the Governor of the state, in disregard of his oath and duty, sit supinely by and witness lawless men burn or destroy the property of the citizen, or kill or drive him from his home or business, while waiting for a call from the local officials that

may never come, before ordering out the forces that can and will restore order, preserve peace, and protect life and property? Or, should he, when confronted with a situation like this, do his duty under the Constitution and law? There can be but one answer to this question. The honor and dignity of the state, its good name at home and abroad, as well as the imperative obligation resting upon every government to maintain peace within its borders and protect the lives and property of its people, demand that he shall act with all the power and force at his disposal to suppress the existing disorder and violence. The supremacy and authority of the law at all times and places must be asserted and maintained at all hazard and at whatever cost. There should not be a moment in the life of any orderly, well-established and republican form of government, like ours, when it has not the means and the ability to give to every citizen that peace, safety, happiness, and protection guaranteed to him by the Constitution. Having this view of the power and duty of the Governor, it must nevertheless be kept in mind that in its exercise he acts in his capacity as a civil officer of the state and not as commander in chief of its army. As the chief civil magistrate of the state, he calls out and must direct in accordance with law the movements and operations of the military forces. "The military shall be at all times and in all cases in strict subordination to the civil power." It is so written in section 22 of the Bill of Rights. We have not, and cannot have, in this state a military force that is not and will not be subordinate to the civil authorities. The military cannot in any state of case take the initiative or assume to do anything independent of the civil authorities. Ours is a government of civil, not military, forces. The militia in active service and in every emergency that arises in such service is subordinate to the civil power. The soldier and the citizen stand alike under the law. Both must obey its commands and be obedient to its mandates.

It follows from these considerations that we are not disposed to agree with the doctrine announced by the Supreme Court of Colorado in *Re Moyer*, 35 Colo. 159, 85 Pac. 190, 12 L. R. A. (N. S.) 979, 117 Am. St. Rep. 189, that in certain emergencies the civil law may be suspended by military orders. Or with the Supreme Court of Pennsylvania in the case of *Commonwealth v. Shortall*, 206 Pa. 165, 55 Atl. 952, 65 L. R. A. 193, 98 Am. St. Rep. 759, where, in discussing the relative supremacy of the military and civil authorities in a state of case in which the civil authorities being unable to preserve peace and quiet the military of the state was called out to restore order, said: "Martial law exists whenever the military arm of the government is called into service to suppress disorder and restore the public peace. * * * The resort to the military arm of

the government therefore means that the ordinary civil officers to preserve order are subordinated, and the rule of force under military methods is substituted to whatever extent may be necessary in the discretion of the military commander. To call out the military and have them stand quiet and helpless, while mob law overrides the civil authorities, would be to make the government contemptible and destroy the purpose of its existence. The effect of martial law therefore is to put into operation the powers and methods vested in the commanding officer by military law. So far as his powers for the preservation of order and security of life and property are concerned, there is no limit but the necessities and exigencies of the situation. And in this respect there is no difference between a public war and domestic insurrection." We are not willing to concede that in any exigency that may arise the military is superior to the civil authorities. We do not apprehend that any conditions could come up that would justify us in so holding. Nor do we believe that the time will ever come when the military forces of the state, acting under and in obedience to the civil laws of the state, will not be able to control under the authority conferred by these laws any situation that may present itself.

We will now endeavor to determine what protection, if any, from civil or criminal liability the soldier has when acting in obedience to the orders of his superior officer. What may he do and yet be safe from suit at the hands of those he has molested in the performance of his military duty? These questions involving as they do the rights and liabilities of the soldier in active service are of great importance, but, with the aid of precedents, we will attempt to lay down a safe yet efficient rule for guidance in cases in which they may arise.

The views concerning these questions presented in argument are widely separated. To restate them: One is that the soldier engaged in active service should be treated as a private citizen, with no more authority than such a citizen to make an arrest, suppress disorder, or prevent crime. The other is that the military forces of the state when called into active service have the right to take such action as in the judgment of the commanding officer may be necessary to control the situation, and the right to act in obedience to orders received through regular military channels, and that when so acting they are not amenable in the civil or criminal courts for executing any reasonable orders received from a commanding officer. In our opinion, each of these positions is open to serious objection. One gives too much power to the military; the other, not enough. One makes the soldier a mere figurehead, the other a machine to do the bidding of his superior. If we are not permitted to look to the common law for the au-

thority of the private citizen to assist in suppressing disorder and restoring peace, and must be confined as insisted by counsel to the statute law of the state, the only authority given in this respect is found in section 37 of the Criminal Code of Practice, providing that "a private citizen may make an arrest when he has reasonable grounds for believing that the person arrested has committed a felony," and in section 38 providing that a magistrate or judge may order a private person to arrest any one committing a public offense in his presence. It must be manifest that if this is the limit of his authority, and that the soldier has no more, it would be a useless thing to call out the militia to aid the civil authorities in suppressing disorder or restoring peace, unless they were placed under the control of the mayor or marshal of the city, or sheriff or jailer of the county, into which they were ordered to go. As the right of a private citizen to arrest is confined, except when acting in the immediate presence of a magistrate or judge, and in obedience to his direction, to cases in which he has reasonable grounds for believing that the person he is about to arrest has committed a felony, there are few instances in which he could efficiently act to suppress disorder or prevent threatened violence. Irreparable injury may be done to both person and property without the offense being a felony, and it is rare that offenses are committed in the presence of a judge or magistrate. Lawless bands or assemblages of persons might disturb the peace, engage in riotous conduct, threaten the life or property of the citizen, assault and beat him, destroy his property and drive him from his home and business, and yet not commit a felony. A body of rioters might put and keep the people of any community in terror, commit innumerable depredations and infractions of the law, be a continual menace to the peace and quiet of the people, and yet their conduct would not amount to a felonious act. In short, they could commit almost every species of malicious mischief that reckless and evil disposed men could think of, to harm the persons and injure the property of those who had incurred their enmity, and yet the private citizen under the statute quoted, unless to protect himself or his family or his property, would not have the legal right to interfere. In view of these limitations imposed by law upon the right of private citizens to take part in suppressing disorder, it needs no argument to demonstrate that if the power of the soldier is no greater than that of the private citizen the law creating and sustaining the state militia had better be abolished. This limitation would paralyze the military arm of the state and subject it to the contempt of all classes of people. It is no answer to say that this humiliating spectacle might be avoided if the militia were directed to report to and receive orders from one

of the civil officers we have mentioned and thereby have authority to take such lawful action as the civil officer might direct. In some instances this might be a satisfactory solution of the difficulty suggested; in others, it would not. As we have pointed out, conditions might be such that the civil officers would be in sympathy with the rioters, or indifferent to the conditions existing, or afraid to assert authority, and it was to provide for a contingency in which conditions like this might appear that the law invested the Governor with the power to control and direct within legal bounds the operation of the militia without subjecting them to the supervision of other civil officers. And for the reasons heretofore stated, we are not disposed to adopt a rule of action that would under any circumstances prevent or interfere with the Governor of the state in his efforts to restore peace and assert and maintain the authority of the law. On the other hand, to say that the state militia acting in obedience to military orders may commit any act that may suggest itself to the commanding officer as being necessary to restore peace and quiet, although such act might be a greater violation of law than was committed by the person it was visited upon, would place the militia above the civil authorities, and give to the soldier power not conferred upon the civil officer charged with the duty of enforcing the law. The command of the officer would take the place of the statute, and there would be no limitation upon his conduct except such as his judgment and discretion might dispose him to adopt. We can find no warrant, either in the Constitution or statute of the state or the history of constitutional government, for investing the military forces of the state with arbitrary power like this. Of course, we have not in mind a state of case in which actual war between contending armies, or nations, or states exists, as it would be entirely beyond the scope of the questions we are considering to venture an opinion much less lay down any rule of action for the government of military forces operating in territory where a state of war actually prevailed.

It is said, however, that the investment of the officers and privates of the state militia with the power and immunity claimed in argument would not be abused, and that it must be presumed they would act in a reasonable and prudent manner, using no more force than was reasonably necessary to accomplish the purpose intended. But we cannot give our consent to this proposition for two reasons: In the first place, it would be a violation of the law of the state as we understand it; and, in the second place, the history of military affairs is not calculated to inspire the belief that at all times soldiers will act with prudence and discretion. Indeed, the facts of the case before us illustrate the unreasonable extent to which the

militia will go in furtherance of what they conceive to be their duty. Capt. Gans testifies that: "My general instructions to patrol at night which covers this case were that when two or more men were found between 10 and 4 o'clock, that they were always covered of course, when they were halted, with our guns, and to question them and find out if they could what they were doing out, and where they were going, and to search them if they thought it necessary, and if they found arms to bring them into camp to be turned over to the civil authorities." This order was given and carried into execution by the arresting officers, although at the time and for weeks preceding there had been no violence or disorder in the neighborhood or community in which the arrests were made. The only excuse or defense made for the arrest of Smith is that Capt. Gans in giving the orders, and Franks and his comrades in executing them, were acting under orders received from superior military officers. And it is earnestly insisted that these orders furnished a complete justification for the arrest and detention of Smith, and the trial court should have so ruled. It is said in argument that it is the duty of a soldier to obey, without inquiry or question, all reasonable orders received from his commanding officer, and that as this was such an order as a person of common sense might believe to be warranted by the surroundings the soldier is not liable to suit for obeying it. If this argument is sound, then it naturally and logically follows that any private citizen may at any time and under any circumstances be deprived of his liberty and left without redress for the injury done him. If soldiers armed with guns have authority to arrest and take into custody in the midst of a peaceful community persons whom they find riding on the public highway after 10 o'clock at night, who are not charged with and have not committed any offense against the law, and who are in an orderly and well-behaved manner returning to their homes, they can also, by the same authority, and without any other reason or cause, take the private citizen from the midst of his family, the farmer from his plow, the blacksmith from his forge, and the merchant from his place of business. In fact, no person at any time or place would be free from military arrest and detention. It may be and doubtless is true that, looking at the matter from a military standpoint, the order to act as Franks did was not such an unreasonable command as that a soldier of common sense would feel authorized to refuse to obey. But be this as it may, conduct like this is such an intolerable invasion of private rights, and so at war with the principles set forth in the Bill of Rights, that "the people shall be secure in their person, houses, papers, and possessions from unreasonable search and seizure" (section 10), that we cannot consent that

all military orders, however reasonable they may appear, will afford protection in the civil or criminal courts of the state. We have in this state an elaborate system of common and statute law, intended to, and that in fact does, meet every requirement of an orderly and well-regulated society. There is no interference with the peace or quiet of the citizen or molestation of his person or property that under these laws may not be punished. All these offenses against law and order have been carefully created and defined, and it cannot be seriously insisted that the mere dictum of a military officer may supersede the lawmaking department of the government, or that a soldier of his own will can convert into offenses against the peace and dignity of the commonwealth acts that the Legislature in its wisdom did not deem proper to so denominate. This condition can only exist when the civil law has been supplanted by the military, and the soldier is greater than the magistrate. As said by the Supreme Court of Illinois in *Johnson v. Jones*, 44 Ill. 142, 92 Am. Dec. 159: "The right of the citizen to his personal liberty, except when restrained of it upon a charge of crime and for the purpose of judicial investigation or under the command of the law pronounced through a judicial tribunal, is one of those elementary facts which lie at the foundation of our political structure. The cardinal object of our Constitution, as it is the end of all good government, is to secure the people in their right to life, liberty, and property. The more certainly to attain this end the framers of our Constitution not only proclaimed certain great principles in the Bill of Rights, but they distributed governmental power into three distinct departments, each of which, while acting in its proper sphere, was designed to be independent of the others. To the legislative department it belongs to declare the causes for which the liberty of the citizen may be taken from him; to the judiciary department, to determine the existence of such causes in any given case; and to the executive, to enforce the sentence of the court. If a citizen can be arrested except upon a charge of violated law, and for the purpose of taking him before some judicial tribunal for investigation, then it is plain that the executive department has usurped the functions of the other two, and the whole theory of our government so far as it relates to the protection of private rights is overthrown. * * * As no charge is made, no judicial investigation had, it is left entirely to the caprice of the government to determine what persons shall be seized. The power to thus arrest being once conceded, every man in the state, from the Governor down to the humblest citizen, would hold his liberty at the mercy of the military officer in command."

If, then, the soldier is not protected, from suit or prosecution by his military orders,

the inquiry naturally suggests itself, What can he do to save himself from punishment for refusing to obey the command of his superior officer, from liability in a civil action by the person he has wronged, or from criminal proceedings on the part of the commonwealth? This embarrassing position in which the soldier finds himself is well treated in the *Law of the Constitution* by Dicey, p. 281, where he says: "A soldier is bound to obey any lawful order which he receives from his military superior. But a soldier cannot any more than any civilian avoid responsibility for breach of the law by pleading that he broke the law in bona fide obedience to orders of the commander in chief. Hence, the position of a soldier may be both in theory and in practice a difficult one. He may, as it has been said, be liable to be shot by a court-martial for disobedience of orders, or to be hanged by a judge and jury if he obeys it. * * * What is, from a legal point of view, the duty of a soldier? The matter is one which has never been absolutely decided. The following answer given by Mr. Justice Stevens is, it may be fairly assumed, as nearly correct a reply as the state of the authorities make it possible to provide: * * * 'The only line that presents itself to my mind is that a soldier should be protected by orders for which he might reasonably believe his officer to have good grounds for giving. The inconvenience of being subject to two jurisdictions, the sympathies of which are not unlikely to be opposed to each other, is an inevitable consequence of a double necessity of preserving on the one hand the supremacy of the law, and on the other the discipline of the army.' * * * While, however, a soldier runs no substantial risk of punishment for disobedience to orders which a man of common sense may honestly believe involve any breach of law, he can under no circumstances escape the chance of his military conduct becoming the subject of inquiry before a civil tribunal and cannot avoid liability on the ground of obedience to superior orders for any act which a man of ordinary sense must have known to be a crime." To the same effect is *Medley's Constitutional History*, p. 481.

In Hare's *American Constitutional Law*, vol. 2, c. 41, p. 906, this learned writer lays it down that: "When a riot assumes such proportions that it cannot be quelled by ordinary means, and threatens irreparable injury to life or property * * * arms may be used as in battle to bear down resistance, and if loss of life ensues the circumstances will be a justification. The measure does not however cease to be civil, or fall beyond the rules which apply when a house is entered in the night by burglars, or a traveler shoots a highwayman who demands his money. Nor will it change its character because the military are called in and the sheriff delegates his authority to the commanding offi-

cer. As Lord Mansfield showed in the debate on the Lord George Gordon riots, in 1780, soldiers are subject to the duties and liabilities of the citizens, although they wear a uniform and may like other individuals act as special constables or of their own motion for the suppression of a mob, and if the staff does not suffice, employ the sword. The intervention of the military does not introduce martial law in the sense in which the term is understood under despotic governments and even been by some distinguished jurists, because agreeably to the same great magistrate and the settled practice in England and the United States they are liable to be tried and punished for any excess or abuse of power, not by the martial code, but under the common and statute law."

Running through these authorities, and others that we have examined, will be found the principle that the soldier is amenable to the civil authorities for his acts in violation of law; but that "yet a soldier runs little risk in obeying any order which a man of common sense so placed would regard as warranted by the circumstances. And if the circumstances are such that the command may be justifiable, he should not be held guilty for declining to decide that it is wrong with the responsibility incident to disobedience unless the case is so plain as not to admit of a reasonable doubt." Hare's Am. Con. Law, vol. 2, c. 41, p. 920; Dicey, *Law of the Con.*, p. 285; *Commonwealth v. Shortall*, 206 Pa. 165, 55 Atl. 952, 65 L. R. A. 193, 98 Am. St. Rep. 759; *Luther v. Borden*, 7 How. 45, 12 L. Ed. 581; *Mitchell v. Harmony*, 13 How. 115, 14 L. Ed. 75; *Ex parte Milligan*, 4 Wall. 2, 18 L. Ed. 281; *McCall v. McDowell*, 1 Abbott (U. S.) 212, Fed. Cas. No. 8,673; *United States v. Clark* (C. C.) 31 Fed. 710; *Riggs v. State*, 3 Cold. (Tenn.) 85, 91 Am. Dec. 272; *Christian Co. Court v. Rankin*, 2 Duv. 502, 87 Am. Dec. 505; *Hogue v. Penn.*, 3 Bush, 603, 96 Am. Dec. 274.

With the liability of the soldier under the military law for refusing to obey the orders of his superior officer we are not much concerned in disposing of the matter before us. Whether the military law can punish him or not for disobedience of an order that if executed would involve him in civil or criminal liability, is a question that it is well to postpone answering until it comes up. But, what orders of his superior a soldier may obey and be exempt from civil liability, and what orders his obedience of will subject him to suit, are before us and must be disposed of. Upon this point, after mature consideration, we have reached the conclusion that any military order, whether it be given by the Governor of the state or an officer of the militia or a civil officer of a city or county, that attempts to invest either officer or private with authority in excess of that which may be exercised by peace officers of the state is unreasonable and unlawful; and if it is obeyed, the officer or private giving obedience sub-

jects himself to such punishment and liability as the penal and civil laws of the state might inflict against a private individual guilty of similar transgression of the law or the rights of the citizen. We feel at liberty to thus define the limits within which soldiers may lawfully act, because all the authorities agree that the courts may at the instance of any person who has been aggrieved or on behalf of the commonwealth inquire into their acts and doings and determine whether or not they have been guilty of any conduct that would subject them to liability or punishment. The only difference between our ruling and that obtaining in the authorities cited is that we define more precisely than they do what orders a soldier is justifiable in executing, and hold as a matter of law that these orders are confined to such as a peace officer in the discharge of his duty might execute. In respect to these orders, the powers of the military and local civil officers of the state are identical. What one cannot do, neither can the other; what one may do, so may the other. The soldier has the same measure of protection and is subject to the same liability, whether he is acting under the orders of a military officer, independent of the local civil authorities, or is acting under immediate direction of these authorities. Neither has the right to give any orders or directions except those that a peace officer of the state might rightfully execute; and if the soldier does only what a peace officer may do, then he is entitled to the immunity afforded peace officers in the performance of their duty. This rule of conduct is of course not free from objection, but upon the whole we think it furnishes a reasonable guide for the militia, and describes with as much accuracy as conditions will permit the lines within which they may act with safety and beyond which they may not go without peril. Its observance will protect the quiet and orderly citizen from disturbance, and arrest and leave the lawbreaker to be dealt with as his conduct deserves.

Let us now see what the military can do surrounded by this limitation upon its power, and whether or not it can be an efficient force in every emergency that may require its assistance. In treating this aspect of the case, we shall not undertake to go into details concerning what a peace officer may or may not lawfully do. Cases presenting this question come up in so many different forms that, excepting some general principles that are applicable to all, each case must be adjudged by the facts it presents, and it would be outside the scope of the matter before us to undertake any discussion of this feature. It has been treated of in numerous opinions of the court. We are chiefly interested in the inquiry whether or not if the power of the militia is confined to the doing of those things that a peace officer may rightfully do, will its operations be so embarrassed that it cannot successfully master any conditions

that it may be called on to deal with. Under section 26 of the Criminal Code of Practice sheriffs, constables, coroners, jailers, marshals, and policemen are peace officers; and other officers are so designated by various sections of the statute. Section 36 of the Criminal Code of Practice provides that "a peace officer may make an arrest, without a warrant, when a public offense is committed in his presence or when he has reasonable grounds for believing that the person arrested has committed a felony"; and in other sections of the Criminal Code and statute and under the common law there are provisions further defining the powers and duties of peace officers in cases of riots, routs, unlawful assemblies, or when two or more persons have confederated or banded together for the purpose of intimidating, threatening, alarming, disturbing, or injuring any person or molesting or destroying any property. Under the common law and these various statutes the military acting as peace officers would have the right to arrest any person who had committed a felony, or was committing in their presence an act that constituted a public offense under the statute or at common law, and the right to disperse, control, and suppress riots, routs, unlawful assemblies or bodies of men acting in concert for the purpose of intimidating, threatening, alarming, disturbing, or injuring any person or molesting or destroying property, with all the means and force necessary to accomplish these ends. *Ela v. Smith*, 5 Gray (Mass.) 121, 66 Am. Dec. 356; *Russell on Crimes*, vol. 1, pp. 266-289; *Blackstone's Com.* vol. 4, p. 143. This statement does not of course describe all the conditions under which the military acting as peace officers may make arrests or disperse disorderly or other gatherings. It is only intended in a general way to illustrate that when the militia is armed with the power and authority of peace officers, under the statute and at common law, there need be no apprehension that they cannot effectively control any situation demanding their presence. The militia of the state are in truth peace officers. The purpose of their existence is to preserve the peace and quiet of the state in its broadest sense, and when this has been done, the life and property of the citizen is secure.

It results from what we have said that the conduct of Franks and his associates in arresting Smith was indefensible. He had not committed any act that would justify a peace officer in arresting or detaining him. Gans and McFarland participated in his detention and so were equally liable with the others, but no appeal is prosecuted against them.

It is said that the verdict against Franks is excessive, but we are not disposed to disturb it on this ground.

Wherefore the judgment is affirmed.

SMALLHOUSE v. KELLER.

(Court of Appeals of Kentucky. Feb. 21, 1911.)

PRINCIPAL AND AGENT (§ 62*)—DUTY AND LIABILITY OF AGENT.

One merely authorized by another to act for him and represent his one-tenth interest in a lease is under no duty to use his own means to make erections on the leased property, required by the lease to prevent a forfeiture thereof.

[Ed. Note.—For other cases, see *Principal and Agent*, Cent. Dig. § 99; Dec. Dig. § 62.*]

Appeal from Circuit Court, Warren County.

Action by H. H. Keller against Edward Smallhouse. Judgment for plaintiff. Defendant appeals. Affirmed.

W. B. Gaines and Thos. W. Thomas, for appellant. Sims & Rodes and A. C. Dulaney, for appellee.

NUNN, J. It appears from the record that in the early part of 1907, and prior thereto, appellant and appellee resided in Cartersville, Mo. Appellant was president of an ice manufacturing establishment, and appellee was a deliverer of ice. It seems that the ice company charged appellee with the ice he received, and he would afterwards settle with the company therefor. It further appears that W. H. Allen, O. L. Bryant, Wm. Everett, and appellee took a mining lease near Cartersville, Jasper county, on 20 acres of land and sublet it to others to do the mining under certain conditions. Appellee owned a one-fifth interest. Appellant was, in some way, informed that appellee owned an interest in the lease, and he began to negotiate with appellee for the purchase of it, and they finally reached an agreement to the effect that Smallhouse, appellant, was to become the purchaser of one-half of appellee's interest at the price of \$3,000. This was a verbal agreement, and matters moved along under it, each owning one-tenth interest in the lease, until December 31, 1907, when a settlement was made between appellant and appellee. It appears that at the time of the settlement appellee owed the ice company, of which Smallhouse was president, \$725 for ice which they deducted from the amount Smallhouse had agreed to pay appellee for a one-tenth interest in the lease, and the note upon which this action was instituted was executed for the balance of the purchase price.

Appellant claims that appellee deceived him in the trade; that appellee represented that all the provisions in the lease had been fulfilled; that the mine was in full operation, and that he had kept concealed from him certain provisions in the lease which, if not complied with, would forfeit it; and that their failure to comply with these provisions had caused a forfeiture of the lease. The record shows that at the time the agreement was made both of the parties resided

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

in Missouri, that appellant investigated and had every opportunity to ascertain the true situation, and it is evident that appellee did not deceive him in any particular. Appellant received royalties from the mining property from the time he became interested in it until it was forfeited, as herein-after explained, amounting to \$200 or \$300. The parties named took the lease from one J. W. Burch, and it has been of record since August, 1906. By the terms of the lease the lessees were required, among other things, to furnish on the lease a pair of scales with which to weigh the mineral and to also erect an office thereon. These things were never done. W. H. Allen was manager of the lease at the time the trade was made until near the time when the forfeiture took place, but two or three weeks before the forfeiture Keller and Smallhouse, possibly one or two of the others, made an effort to supplant Allen with appellee, Keller, and each of them gave Keller a writing. We copy the one executed by Smallhouse: "I hereby authorize H. H. Keller to act for me and represent my one-tenth interest in the lease of Allen & Co. on 20 acres of the Burch land in the Duenweg district until the 1st day of January, 1909." It appears that the other writings were in substance the same as this one. Appellee undertook to look after the mines, but never at any time had full control. Allen, the previous manager, had only \$42 in the bank of the company's money, and that was to his credit as manager, and he would not transfer it to the credit of Keller nor draw a check for the benefit of the company. The company had no other means except the lease, and appellee could not erect the office and furnish the scales, nor do anything required by the terms of the lease, without furnishing the money himself, and this he refused to do, as the others would not contribute their part. Consequently Burch gave notice of the forfeiture in the latter part of 1908. He gave the notice to all the parties named, Smallhouse included, but it seems that he never received his until after the forfeiture. As soon as Smallhouse gave the above copied writing to Keller, he left for Texas, where he remained for a while and then went to Bowling Green, Ky., where he has since resided. Keller tried to find him while he was in Texas by both letter and telephone, but could not. Appellant pleads a counterclaim of \$3,000 damages occasioned, as he alleges, by the negligence of Keller in suffering the forfeiture of the lease. He claims that Keller should have put the money up to comply with the terms of the lease and thereby avoid the forfeiture and the loss of his interest. It appears that Keller, during the two or three weeks he had charge of the leased property, did everything he could to prevent the forfeiture,

except to use his individual means to carry out the terms of the lease. It appears that Smallhouse, Keller, and one of the others agreed to put up their part of the money which was necessary; but the others refused to do so. These three appeared anxious to prevent the lease from being forfeited, but the others refused to put any of their individual means into it.

The only question to be determined is whether the writing referred to bound Keller to use his own means to prevent the forfeiture. There is nothing in the record requiring him to do that. The writing gave him authority to look after and represent Smallhouse's interest; but there is nothing in it requiring him to put up any money for Smallhouse or any of the others interested in it. Nor did the law, on account of his position, require him to use his individual means to protect the lease for all concerned.

For these reasons, the judgment of the lower court is affirmed.

ESTES v. ESTES.

(Court of Appeals of Kentucky. Feb. 14, 1911.)
FRAUDS, STATUTE OF (§ 74*)—INTEREST IN LANDS—CONTRACT TO CONVEY.

Where plaintiff purchased land, paying for it himself, his oral agreement to permit defendant to occupy it for a specified time for a certain rent, and then to convey it to him for the price paid for it, is void as to the agreement to convey, being within the statute of frauds (section 470, Ky. St. [Russell's St. § 1775]).

[Ed. Note.—For other cases, see *Frauds, Statute of*, Cent. Dig. §§ 122-131; Dec. Dig. § 74.*]

Appeal from Circuit Court, Scott County.

Action by John W. Estes against George Estes. From a judgment for defendant, plaintiff appeals. Affirmed.

B. M. Lee, for appellant. J. F. Askew, for appellee.

NUNN, J. Some time in the early part of 1904 appellee, Geo. Estes, purchased from one Sparks, who was agent for some heirs, the tract of land the right of possession to which is in dispute in this action, and paid the purchase price, \$2,500, therefor. Before the time of the purchase, John Estes, appellant, was looking over the land with the view of buying it, but had no means with which to pay for it. At the time appellant's brother, George Estes, purchased the land, he agreed with appellant that he might occupy the land for three years for certain rents, with the privilege of buying during that time or at the end thereof, by paying him the amount which he paid for the land. This verbal agreement ran for three years, at the end of which time they had a settlement of rents, and, John being unable to buy the land, George gave him two years more upon the same terms. John paid only forty odd

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

dollars rent the last two years, and at the end thereof was still unable to buy, so he saw one Hutchcraft, a neighbor, and got him to agree to furnish him the money and take a mortgage on the land. He caused this fact to be telephoned to his brother, who resided in Lexington, on March 4, 1900, and requested his brother to convey him the title, so he could execute the mortgage to Hutchcraft. Appellee refused to accept the proposition because, as he stated, Hutchcraft would get the land under his mortgage, and he wanted to keep it, unless it could go to appellant, and for the further reason that the five years had ended in which he had a right under the verbal agreement to pay for the land. George Estes then got out a writ of forcible detainer, which resulted in a mistrial in the country and was taken to the county judge, where it was decided in favor of appellee, and appellant filed a traverse and took the case to the circuit court where, upon the conclusion of the testimony, the court gave the jury a peremptory instruction in behalf of appellee. We infer that the court gave this instruction because the agreements between the parties were not in writing, and therefore not binding upon either party. The statute of frauds and perjuries (section 470 Ky. St. [Russell's St. § 1775]), requires all such contracts to be in writing.

In the case of *Griffin & Wife v. Coffey, etc.*, 9 B. Mon. 452, 50 Am. Dec. 519, the court said: "It has been held that if a party makes a purchase in his own name, and upon his own credit, a verbal agreement to make the purchase for another is within the operation of the statute of frauds." See, also, *Parker's Heirs v. Bodley*, 4 Bibb, 102, and *Hocker, etc., v. Gentry, etc.*, 3 Metc. 463. Many other cases might be cited to the same effect.

The testimony in this case, in substance, is that appellee bought the land and paid his own money for it; that he made an agreement with appellant, whereby he was to have the use of the land at certain rents for five years and the privilege of buying it within that time at the price he, appellee, paid for it. This being a verbal agreement and in violation of the statutes, it is not enforceable by either party. The case would have been different if appellant had had the title to the land and it was being sold from him by the sheriff or commissioner, and appellee had agreed to buy and pay for it with an understanding with appellant that he should have the right to redeem it. This would have amounted to a mortgage and given appellee only a lien for the money he paid out, with its interest, and such liens can be extended by verbal agreement without violating the statute. Appellant never had any interest in this land, and consequently a verbal promise by appellee to sell it to him

was within the statute of frauds, and not binding upon either party.

The case of *Reeder & Kleete v. Maria Bell*, 7 Bush, 255, does not conflict with the authorities above cited. In that case Bell was in possession, under a previous landlord, when the contract was made with appellants. Bell agreed to remain on the land for six years and take care of it, and was to have the privilege of buying it during that time. Appellants undertook to put his widow out long before the time elapsed, and the court said that it could not be done. The tenancy had not expired, and the proceeding was against a person other than the one with whom the contract was made.

For these reasons, the judgment of the lower court is affirmed.

WIEDEMANN v. CRAWFORD.

(Court of Appeals of Kentucky. Feb. 16, 1911.)

FRAUDS, STATUTE OF (§ 76*)—PURCHASE OF LAND—PARTNERSHIP—AGREEMENTS.

An agreement between plaintiff and defendant to purchase real estate at commissioner's sale, defendant to advance the purchase money by way of loan, the property to be taken by them on stated shares, was not within the statute of frauds.

[Ed. Note.—For other cases, see *Frauds, Statute of*, Dec. Dig. § 76.*]

Appeal from Circuit Court, Campbell County.

Action by L. J. Crawford against Charles Wiedemann. From an order sustaining a demurrer to the answer, defendant appeals. Reversed and remanded.

Dolle, Taylor & O'Donnell and Ramsey Washington, for appellant. Jas. C. & B. A. Wright, for appellee.

CARROLL, J. The appellee, Crawford, in September, 1900, filed his petition in equity against the appellant, Wiedemann, in which he set out that in January, 1900, the suit of Charles Wiedemann against the Highland Hotel Company for a sale of the property of that company was pending in the Campbell circuit court; that he and Wiedemann were then each owners of preferred and common stock in said company, and each had a claim for money loaned to it, and that in January, 1900, they entered into the following written agreement: "Both owning preferred stock in, and claims against, the Highland Hotel Company, and its property being about to be sold in receivership proceedings, we agree to purchase at the sale under such order, in the name of some one agreed upon by us, all real estate excepting the Shelley Arms property of said the Highland Hotel Company, and all its personal property, at a figure not exceeding the claims (excluding the stock claims) against said hotel company, and that our interests and ownership in such

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

purchase shall be in proportion to the sums invested heretofore by us in the enterprise of said hotel company, including both common and preferred stock and loans. As Mr. Wiedemann will probably be absent when said sale occurs, the question of purchasing at a higher figure, shall be a matter of agreement between Clarence Wagner, representing said Wiedemann, and L. J. Crawford." That afterwards they agreed on L. C. Widrig as the person to purchase the property for them under the agreement. That on March 8, 1909, the real estate mentioned in the agreement and the personal property of the Highland Hotel Company was by the master commissioner in said case, and under the orders of sale therein, sold to L. C. Widrig, and the sale was reported to and confirmed by the court in March, 1909. That afterwards each of them paid for the property sold as above stated, in proportion to their respective interests, estimated and agreed upon between them as follows: The interest of Crawford being $29\frac{23}{70}$ per cent. and the interest of Wiedemann $70\frac{43}{70}$ per cent. That afterwards, in September, 1909, the property purchased by Widrig was by order of court conveyed to him. He further set up that prior to the 30th day of March, 1909, Wiedemann, acting through Clarence Wagner, his attorney in fact, entered into an agreement with Crawford that Widrig should buy for Crawford and Wiedemann the Shelley Arms property, and that Wiedemann should advance by way of a loan the sum necessary to pay for the same at the sale thereof by the master commissioner, and that on March 30, 1909, Widrig purchased the Shelley Arms property for Crawford and Wiedemann pursuant to said agreement, and the sale was reported and confirmed by the court. That afterwards Wiedemann in accordance with the agreement paid to the master commissioner the purchase price of the Shelley Arms property, and in September 1909, it was conveyed to Widrig. He averred "that Widrig held the title to all of the property conveyed to him as before stated as trustee for himself and Wiedemann, as their interests appear in the written agreement," but that in September, 1909, Wiedemann secretly and fraudulently procured Widrig to convey to him all of said property in violation of the rights of Crawford. He prayed that the court direct Wiedemann to convey to him an undivided $29\frac{23}{70}$ interest in all of the real and personal property purchased and conveyed as above stated, and that the conveyance of the Shelley Arms property should contain a lien in favor of Wiedemann to secure the payment of its purchase price, \$23,000, with interest.

In an amended and substituted answer filed by Wiedemann, he admitted that the written agreement as to the Highland Hotel Company property (excepting the Shelley Arms property) was entered into, and that it was agreed that Widrig should purchase

the property, except the Shelley Arms property, for himself and Crawford in accordance with the terms of the agreement, and that it was so purchased and conveyed to Widrig. He also admitted that their interests in this property were as set out in the petition; but he denied that Crawford had paid his proportion of the purchase price, setting up that this property (excepting the Shelley Arms property) was sold for \$54,450, and that three bonds were executed by himself, each for one-fourth of the purchase price, and one-fourth thereof was due in cash on the day of the sale, but was not paid. That afterwards the court directed the master commissioner to collect all of the purchase price excepting \$9,000, which was to remain a lien upon the property, and that on June 25, 1909, he paid the entire purchase price, excepting this \$9,000, and what was paid by Crawford. The substance of this portion of the answer being, that \$9,000 of the purchase price was unpaid; that Crawford, excepting his proportion of this, which was unpaid, had paid his proportion of the remainder of the purchase price less \$1,183.93, which he owed to Wiedemann on account of his having paid the entire purchase price. He further averred that, although frequently requested so to do, Crawford had failed to pay him the \$1,183.93 due, and consequently he took to himself a deed to the property, but expressed his willingness to convey (excepting the Shelley Arms property) to Crawford an undivided $29\frac{23}{70}$ interest in it upon the payment by Crawford of \$1,183.93, with interest, and tendered a deed so conditioned.

In respect to the Shelley Arms property, he denied that at any time, acting through Wagner or any other person as his attorney or agent, he entered into an agreement with Crawford by which Widrig should buy for them the Shelley Arms property, or by which he should advance by way of a loan a sum necessary to pay therefor, or any part thereof, and denied that this property was purchased by Widrig pursuant to any such agreement. He further set up that during his absence in Europe, and prior to the sale of this property, Crawford falsely represented to Wagner, who was at that time his agent, that he (Wiedemann) had agreed with Crawford to buy the Shelley Arms property for their joint use, and that he (Wiedemann) was to advance the purchase price. That acting upon the belief that these representations were true, Wagner agreed with Crawford that Widrig should buy the Shelley Arms property in his own name for Wiedemann and Crawford, and that they should each pay the same proportion of the purchase price they had theretofore agreed to pay for the other property. He further set up that upon learning of the representations made by Crawford to Wagner, and the agreement made as a result thereof, he promptly repudiated the same. And further pleaded

that the agreement in reference to the Shelley Arms property, if any was made, was void because within the statute of frauds, in such cases made and provided. He admitted that Widrig conveyed to him the Shelley Arms property upon the payment of the full purchase price by him.

To these amended and substituted pleadings a general demurrer was filed and sustained, and, Wiedemann declining to plead further, a judgment was rendered directing him to convey to Crawford an undivided $29\frac{2}{10}$ per cent. interest in all the property except the Shelley Arms property, subject to a lien for the \$9,000 due on the purchase price; no mention in the judgment being made of the \$1,183.93 alleged to be due by Crawford on the purchase price of this property. He was also directed to convey a like interest to Crawford in the Shelley Arms property; the judgment reciting that Wiedemann should have a lien upon this property to secure the payment of $29\frac{2}{10}$ per cent. of the purchase price thereof due by Crawford.

So much of the judgment as relates to the property, except the Shelley Arms property, is objectionable because the answer of Wiedemann, which stands admitted by the demurrer, states that he paid for Crawford on account of the purchase price of this property \$1,183.93, and that this sum was yet due and unpaid by Crawford. It seems from an order made in the case that the court was induced to ignore this defense, because Wiedemann failed to assert it as a counterclaim against Crawford; but it was not necessary that he should have done this. Crawford did not owe Wiedemann anything, nor did Wiedemann have any demand against Crawford that he could assert in a counterclaim. Under the written agreement relied on by Crawford, each was to pay his proportion of the purchase price, and Crawford averred he had done so, while Wiedemann denied it, thereby making an issue of fact that the court should have disposed of. Accepting as true the allegations in Wiedemann's answer, Crawford was not entitled to a conveyance until he had paid his proportionate part of the purchase price, and the court should have ascertained the amount due by Crawford and directed its payment before ordering a conveyance by Wiedemann.

As to the Shelley Arms property, assuming that the agreement set up by Crawford between himself and Wagner as the authorized agent of Wiedemann was made, and that it was in writing, the first question is, Was it a valid and enforceable contract, or, within the statute of frauds, and therefore not binding upon either party? To clearly apprehend this question, we may, at the risk of repetition, state that the substance of this verbal agreement was that Wiedemann, through his authorized agent, Wagner, agreed with Crawford that one Widrig should buy at commissioner's sale the property, and

Wiedemann should advance by way of a loan a sum sufficient to pay for the same. But it is not shown what interest Crawford should have in this property.

In the case of Garth v. Davis, 120 Ky. 106, 85 S. W. 692, 117 Am. St. Rep. 571, 27 Ky. Law Rep. 505, it appeared that Davis and Johnson by parol agreement between themselves entered into a copartnership to buy certain lots of land, the agreement providing that each should buy in his own name for the partnership certain of the lots, which they each did buy, and that both were thereafter to pay for and own them as copartners. The question before the court was whether this oral agreement between Davis and Johnson was within the statute of frauds, and therefore not enforceable, and it was held that the contract was not within the statute. In principle there seems no difference between that case and this.

In Vaught v. Hogue, 107 S. W. 757, 32 Ky. Law Rep. 1061, Vaught filed his petition against Hogue, charging that they had entered into a contract, by the terms of which Vaught was to furnish certain sums of money for the purchase of a tract of land, and in consideration of the fact that he agreed to furnish the money Hogue bound himself to repay the money, and agreed that the timber upon the land should belong to both of them, and, after paying the expense of cutting and removing, the profits were to be divided equally. That, in pursuance of this agreement, he furnished Hogue the money to purchase the land, but that Hogue procured the deed to be made to himself without the knowledge or consent of Vaught. The plea of the statute of frauds was interposed by Hogue, and in disposing of the case the court said: "In our opinion the contract relied on by plaintiff Vaught was not within the statute of frauds. It was agreed between himself and the defendant Hogue that he should furnish the defendant money to buy a certain tract of land, and that the defendant should repay to him the money so furnished, and that all the profit made on the transaction should be divided equally between them. Whether they may be regarded as partners in the transaction, or jointly interested in the venture, or it be considered that Hogue was acting as the agent of Vaught in the purchase of the land, the contract was an enforceable one." To the same effect is Siler v. Jones, 110 S. W. 255, 33 Ky. Law Rep. 317.

There is a well-marked distinction between this class of cases and those of which *Estes v. Estes*, 142 Ky. 261, 134 S. W. 494, is an example. To illustrate, if A. agrees with B. that he will buy real property not owned by B., and then conveys the same to B., the agreement is not enforceable, as held in the *Estes Case*. But, if the agreement is that A. shall buy real property on the joint account of A. and B., or in partnership, or he is acting as the agent of B., then the con-

tract is valid, as held in the cases, *supra*. There is also another class of cases in which verbal agreements have been held valid, as where land is purchased at execution or decretal sale under an agreement between the debtor and the purchaser that the latter shall convey it according to the terms agreed upon. *Fishback v. Green*, 87 Ky. 107, 7 S. W. 881, 9 Ky. Law Rep. 959. Upon the authority of the cases cited as applicable to the question before us, we conclude that the agreement, if made, was not within the statute; but, as it was denied, the court should have heard proof before disposing of it.

Conceding that the agreement, if made, was not invalid as being contrary to the statute, it is yet insisted that, as stated in the petition, it is too vague and indefinite to be enforced. As the case must be reversed, we will not express any opinion upon this point, but the lower court should require Crawford to make his petition more specific in respect to the interest he should have, and when and how he was to reimburse Wiedemann on account of the amount paid for him, and from the pleadings and evidence the court must determine whether or not the contract was sufficiently definite to be enforceable, and also if Wiedemann authorized Wagner to enter into the agreement. Upon a return of the case each party may file such additional pleadings as they desire.

Wherefore the judgment is reversed, with directions to proceed in conformity with this opinion.

HANKINS v. COLUMBIA TRUST CO. et al.

(Court of Appeals of Kentucky. Feb. 10, 1911.)

1. POWERS (§ 33*)—EXECUTION—EVIDENCE.

An intended execution of a power will be inferred, where there is some reference to the power in the will or other instrument, or a reference to the property which is the subject on which the power is to be executed, or where the provisions in the will or other instrument, executed by the donee of the power, would otherwise be ineffectual or a mere nullity.

[Ed. Note.—For other cases, see Powers, Cent. Dig. §§ 110-120; Dec. Dig. § 33.*]

2. WILLS (§ 75*)—EXECUTION—STATUTES.

Ky. St. § 4845 (Russell's St. § 3968) provides that a devise shall extend to any real estate over which the testator had a discretionary power of appointment, and to which it would apply if the estate was his own property, unless a contrary intention appears in the will. Section 4839 (section 3962) declares that a will shall be construed, as to the real and personal estate comprised therein, to speak and take effect as if executed immediately before the death of the testator, unless a contrary intention appears. *Held*, that such sections change the common-law rule that a will executed before the creation of a power of appointment would not operate to execute the subsequently created power; and hence that a will devising all testatrix's property, in general terms, to a particular devisee was a sufficient execution of a pow-

er of appointment, created after the execution of the will, but before her death.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 194; Dec. Dig. § 75.*]

3. WILLS (§ 75*)—MARRIED WOMEN—AUTHORITY TO MAKE.

Under Gen. St. 1873, c. 113, § 4, in force in 1881, providing that a married woman may, by will, dispose of any estate secured to her separate use by deed or devise, or in the exercise of a written power to make a will, while the will of a married woman attempting to devise her general estate was absolutely void for incapacity, her attempt by will to execute a testamentary power was not void, because the power did not then exist, but would become effective by the subsequent acquisition of the power before her death.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 194; Dec. Dig. § 75.*]

4. WILLS (§ 28*)—RIGHT TO WILL—MARRIED WOMEN—STATUTES.

The effect of Act March 15, 1894 (Laws 1894, c. 76), providing that a married woman, of sound mind and 21 years of age, may dispose of her estate by will, was to enlarge the wife's power of disposition and enable her to dispose of her estate of any kind, both general and separate, thereby superseding Gen. St. 1873, c. 113, § 4, limiting her right to the disposition of her separate estate, and the exercise of a power of appointment by will.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 55-58; Dec. Dig. § 28.*]

5. HUSBAND AND WIFE (§ 110*)—MARRIED WOMEN—PROPERTY RIGHTS.

There is no distinction under the chancery rules arising out of the formal nature of a wife's separate estate, whether it vested at common law, by statute, or in equity.

[Ed. Note.—For other cases, see Husband and Wife, Cent. Dig. §§ 401-407; Dec. Dig. § 110.*]

6. HUSBAND AND WIFE (§ 119*)—CONVEYANCE OF WIFE—SEPARATE ESTATE.

A husband's deed conveying real estate to his wife in consideration of love and affection, with power to her to dispose of it by last will, did not create a separate estate in the wife.

[Ed. Note.—For other cases, see Husband and Wife, Cent. Dig. §§ 424-429; Dec. Dig. § 119.*]

7. WILLS (§ 75*)—MARRIED WOMEN—AUTHORITY TO WILL—POWER.

Gen. St. 1873, c. 113, § 4, in force in 1881, provided that a married woman might, by will, dispose of her separate property, or exercise a written power. Ky. St. § 4839 (Russell's St. § 3962) declares that a will shall speak as if executed immediately before testator's death, and section 4845 (section 3968) provides that a devise shall extend to any real or personal estate over which the testator had a power of appointment. A married woman, in 1881, executed a will by which she devised all her property, of whatever kind, to her husband, who, in July, 1894, conveyed certain real estate to her, with power to her to dispose of it by will. *Held* that, since the will was absolutely void for want of power in testatrix, at the time it was made, to make a valid will of her general estate, it was also void under the act of 1894 (Laws 1894, c. 76), conferring power on married women to will generally, so far as it was a will of the wife's general property; but, she having authority to make a valid exercise of the power of appointment by will at the time it was made, the will constituted a valid exercise of such power.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 194; Dec. Dig. § 75.*]

Appeal from Circuit Court, Jefferson County, Chancery Branch, First Division.

Suit by the Columbia Trust Company and others against T. H. Hankins, to compel specific performance of a contract for the sale of land. Judgment for complainants, and defendant appeals. Affirmed.

E. L. McDonald, for appellant. R. C. Kinkead and H. H. Nettelroth, for appellees.

SETTLE, J. Francis Bernet, a resident of the city of Louisville, died January 10, 1909, testate. By his will, which was duly admitted to probate in the Jefferson county court, his executors named therein, the appellees, Columbia Trust Company and Peter Dietsen, were directed to sell for cash the testator's real and personal estate and apply the proceeds to the satisfaction of legacies made to certain of the testator's kindred and three benevolent institutions of the city of Louisville. Pursuant to the power thus conferred, the executors, following their qualification, sold to the appellant, T. H. Hankins, at the price of \$2,400, a lot situated on Preston street, in the city of Louisville, which was a part of the real estate left by the testator. The executors prepared and tendered appellant a deed to the lot in question, but he declined to accept the deed, or to pay the consideration agreed upon for the lot. Thereupon, appellees instituted this action against him in the court below for a specific performance of the contract, again tendering, with the petition, the deed which appellant had theretofore refused to accept. The appellant by answer denied that the testator, Francis Bernet, owned the lot at the time of his death, and averred that the deed tendered him by the executors of the will would not vest in him the title thereto. It was further averred in the answer that the lot was conveyed by Francis Bernet to his wife, Mary Bernet, by deed dated July 12, 1894, recorded in the Jefferson county court clerk's office, which deed recited that it was made in consideration of the natural love and affection the grantor had for his wife; and by which deed it was provided that the wife should have the power and authority to dispose of the lot by her last will and testament; that Mary Bernet died March 1, 1908, leaving a will which bore date November 30, 1881, and was probated in the Jefferson county court on March 5, 1908, and by this will she devised to her husband, Francis Bernet, all her property of whatsoever kind; that, as the will of Francis Bernet was executed before the passage of the act by the Legislature of Kentucky, which authorized married women to make a valid will devising real estate, it did not invest the husband with the title to the lot in question, and that the power to dispose of it by will conferred upon her by the deed from her husband, having been given after the execution of the will, could not be exercised by the wife, and that upon the death of Mary Bernet the title

to the real estate attempted to be devised by her will vested in her heirs at law, subject to the husband's life estate therein as tenant by curtesy. A demurrer was filed by appellees to the answer, which the circuit court sustained. Appellant refused to plead further, and judgment was entered specifically enforcing the contract, as prayed in the petition. Appellant being dissatisfied with the judgment has appealed.

Our consideration of the question presented by the appeal leads us to concur in the judgment rendered by the circuit court, and as the opinion written by the judge of that court (now a member of this court) contains an elaborate review of all the authorities, both English and American, bearing upon every aspect of the question involved, and so aptly and correctly expresses our views thereon, we hereby adopt and publish the same as our opinion in the case:

"The Columbia Trust Company and Peter Dietsen, as executors of the will of Francis Bernet, bring this suit for the specific performance of a contract for the sale of a lot of ground on Preston street, in Louisville, to the defendant Hankins. Prior to July 12, 1894, Francis Bernet was the owner of said lot, and on that day he conveyed it to Mary Bernet, his wife, in consideration of natural love and affection, with power to her to dispose of it by last will and testament. Mary died on March 1, 1908, leaving a will which she had executed on November 30, 1881, more than 12 years before she acquired this property, whereby she devised 'all of her estate real and personal by which she might die seized or possessed' to her husband, Francis. Francis died testate on January 10, 1909, having devised the property in question to the plaintiff, as his executor, with power of sale. Hankins refuses to take the title, because Mary, being a married woman, had no power, in 1881, to make a will of her land, except such as may have been secured to her separate estate by deed or devise, or in the exercise of a written power to make a will, as is provided by statute, and that the execution of her will in 1881 was not, as defendant claims, a valid execution of the power of appointment subsequently given her in the deed of 1894. If that contention be sound, it is clear that the legal title to this lot is in the heirs at law of Mary Bernet, and not in the executor of Francis, her husband.

"In speaking generally on this subject, that eminent authority, Sir Edward Sugden, says: 'It is firmly settled that a mere general devise or bequest, however unlimited in terms, will not comprehend the subject of the power, unless it refer to the subject or to the power itself, or, generally, to any power vested in the testator.' 1 Sugden on Powers (3d Ed.) 416.

"The result of the modern authorities is summarized in the Cyclopaedia of Law and Procedure as follows: 'While there is some conflict of authority, the better view seems

to be that a will, executed prior to the creation of a power, cannot be held an execution thereof, in the absence of statutory provisions to the effect that a will so executed should be operative in such a manner.' Volume 31, page 1130.

"In the leading American case of *Blagge v. Miles* (1841) 1 Story, 426, Fed. Cas. No. 1,479, Judge Story said: 'It is now admitted to be established, as a general rule, that the intention of the testator is the pole star to direct the court in the interpretation of wills. Similar doctrines now generally prevail in regard to the execution of powers, and especially in regard to their execution by last wills and testaments. The intention to execute the power must be apparent and clear, so that the transaction is not fairly susceptible of any other interpretation. If it be doubtful, under all the circumstances, then that doubt will prevent it from being deemed an execution of the power. Three classes of cases have been held to be sufficient demonstration of an intended execution of the power: (1) Where there has been some reference in the will, or other instrument, to the power; (2) or a reference to the property, which is the subject on which it is to be executed; (3) or where the provision in the will or other instrument executed by the donee of the power would otherwise be ineffectual or a mere nullity; in other words, it would have no operation, except as an execution of the power.'

"The rule just stated was approved in *Blake v. Hawkins*, 98 U. S. 315, 25 L. Ed. 139, and in *Lee v. Simpson*, 134 U. S. 672, 10 Sup. Ct. 631, 33 L. Ed. 1038, and is generally, though not universally, recognized throughout the country, where it has not been altered by statute. *Lane v. Lane* (1903) 4 Pennewill (Del.) 368, 55 Atl. 184, 64 L. R. A. 849, 103 Am. St. Rep. 122. This rule of construction was a necessary result of that other common-law rule, which declared that a will devising real estate took effect at the date of its execution; and, by analogy, a will taking effect before the creation of a power of appointment would not operate to execute the subsequently created power. *Jones v. Southall*, 32 Beav. 31; *In re Philipps*, L. R. 41 Ch. Div. 417; *Re Hayes* (1900) 2 Ch. 332; *Murray's Estate*, 13 Wkly. Notes Cas. (Pa.) 552; *Matteson v. Goddard*, 17 R. I. 299, 21 Atl. 914; *Harvard College v. Balch*, 171 Ill. 275, 49 N. E. 543; *Dunn's Appeal*, 85 Pa. 94; *Lepley v. Smith*, 13 Ohio Cir. Ct. R. 189.

"The rule has, however, been affected by the following sections of the Kentucky statutes:

"'4839. A will shall be construed with reference to the real and personal estate comprised in it, to speak and to take effect as if it had been executed immediately before the death of the testator unless a contrary intention shall appear by the will.' (Russell's St. § 3962.)

"'4845. A devise or bequest shall extend

to any real or personal estate over which the testator has a discretionary power of appointment and to which it would apply if the estate was his own property, unless a contrary intention shall appear by the will' (Section 3968.)

"It thus appears that section 4839 removes the technical reason for the rule by making the will take effect after the grant of the power, while section 4845 dispenses with the requirements that the will should refer to the power of appointment or the property which is the subject on which it is to be executed.

"In speaking of this last section, in *Herbert's Guardian v. Herbert's Ex'r*, 85 Ky. 147, 2 S. W. 686, 8 Ky. Law Rep. 752, the court said: 'The exercise of the power, if it had been attempted by the will of Sidney Herbert, would certainly not have been good at common law, because it nowhere appears from the face of that paper that such was his purpose. This doctrine has been modified by our statute. This provision of the statute evidently means that when the power of appointment is given, to be exercised by a last will, that a devise of the testator's whole estate to the person who, in the testator's discretion, he has the right to designate, the person thus designated will take under the devise, and the same shall be regarded as an execution of the power, although the power given may not be mentioned or referred to.' See, also, *Payne v. Johnson*, 95 Ky. 184, 24 S. W. 238, 609. These two sections from our statute are taken from, and are substantially identical with, sections 24 and 27 of the English wills act. St. 7 Wm. IV & 1 Vict. c. 26.

"Applying the English act in *Thomas v. Jones*, 2 Johns. & H. 475, 31 L. J. Ch. (N. S.) 732, Vice Chancellor W. Page-Wood said: 'The twenty-fourth section enacts that every will shall be construed with reference to the real and personal estate comprised therein, to speak and to take effect as if it had been executed immediately before the death of the testator, unless a contrary intention shall appear by the will; and by the twenty-seventh section (for the two are connected together) it is enacted that a general devise of real estate shall be construed to include any real estate which the testator may have power to appoint in any manner he may think proper, and shall operate as an execution of such power, unless a contrary intention shall appear by the will. The twenty-fourth section draws down the will to the date of the death of the testator, thus getting over the difficulty as to after-acquired property. It seems to me to be the true construction of the statute, coupling the twenty-fourth and twenty-seventh sections together, that a will may operate as an execution of all powers in the testator immediately before his death. If that construction, which was come to in *Stillman v. Weedon*, 16 Sim. 26, 18 L. T. Ch. (N. S.) 40, be sound (and Lord St. Leonards does not dissent from it),

a person *sui juris* must be held to intend his will to operate on powers which he has not at the date of executing it, but which he acquired before his death.' The same construction was given the statute in *Corfield v. Pollard*, 3 Jur. (N. S.) 1203, and in *Hodson v. Dancer*, 16 Week. Rep. 1101.

"The modified rule under the statute as laid down in the English case last above cited seems entirely sound; and, as the Kentucky statute is substantially the same as the English statute which has been construed in these cases, it seems entirely proper that the construction there given should be followed here. I therefore conclude that a will may, under the statute, execute a power of appointment thereafter created.

"It is contended, however, that, although it be true in ordinary cases that a will executed in 1881 would under our statutes be a valid execution of a power subsequently granted in 1894, it cannot so operate in this case, because Mary Bernet was a married woman in 1881; and since, at that time, she had neither a separate estate nor a power of appointment, her will was invalid for want of capacity to then make it.

"The General Statutes of 1873 which were in force in 1881, when Mary Bernet made her will, provided as follows: 'A married woman may by will dispose of any estate secured to her separate use by deed or devise or in the exercise of a written power to make a will.' Chapter 113, § 4.

"We have here two classes of cases in which a married woman could then make a will: First, she could so dispose of her separate estate; and, second, she could also make a will in the exercise of a written power of appointment; and while the deed of July 12, 1894, from Francis to his wife, Mary, did not create in her a separate estate, it did give her 'the power and authority to dispose of the said property by her last will and testament.'

"But in discussing this point we should not overlook the plain and evident distinction between the general incapacity of a married woman, in 1881, to make a will devising her general estate, and her incapacity to execute a testamentary power for want of a present existence of her power. In the first instance her will, like the will of an infant or an insane person, is absolutely void for all purposes, as was held in *Gregory v. Oates*, 92 Ky. 532, 18 S. W. 231, 13 Ky. Law Rep. 761; while her will made in the exercise of a testamentary power of appointment, although it may prove abortive for want of a then existing power, it may, nevertheless, like powers granted to persons *discovert*, become effective by the acquisition of the power before her death. In this latter case, the statute saved the power of appointment by making it take effect after the creation of the power; thus bringing it within the general rule that a will may under our statutes be a valid exercise of the power of appoint-

ment subsequently created. *Hickman v. Brown*, 88 Ky. 378, 11 S. W. 199, 10 Ky. Law Rep. 952, is not at all inconsistent with this view, because in that case Mrs. Brown, at the time of her death, had neither separate estate nor the power of appointment—the only two contingencies under which she could then make a valid will.

"This subject was well discussed by Vice Chancellor Sir W. Page-Wood (afterwards Lord Chancellor Hatherly), in *Thomas v. Jones*, *supra*, in the following language: 'I have now to consider the effect of the eighth section. In *Bernard v. Minshull* the question was, whether a general gift by a married woman would operate to pass property over which she had only a testamentary power. And the argument there was, as here, that the intention of the eighth section was that no will by a married woman should be valid, except such a will as she might have made before the passing of the act. The explanation I then gave (to which I still adhere) was that, inasmuch as a previous section had enacted that all property might be disposed of by will which seemed to be a general and complete enactment, it was necessary to introduce the two sections, seventh and eighth, by one of which it is declared that no will made by an infant under 21 shall be valid, and by the other, that no will made by a married woman shall be valid, except such a will as might have been made before the passing of the act. That answers Mr. Williams' argument. He suggests that if you construe the twenty-fourth section as applying to the case of a married woman, then a married woman having made a simple will, and becoming *discovert* before death, the twenty-fourth section would make the will valid. The answer is that the eighth section was meant to meet that case. In the same way as to infants, it may be argued that an infant may attain full age, and that a will made before that time would speak from his death and become valid. And so it would but for the seventh section, which annuls all wills made by persons under incapacity from the moment of their being made; and the true construction, I apprehend, of the seventh and eighth sections is that the statute does not give capacity to those who have no testamentary capacity; but when persons have capacity to will, as in the case of a married woman with a testamentary power, then you must deal with the will so made according to all the rules of construction which are laid down by the acts as to wills in general. That is the conclusion to which I come upon that part of the subject. This lady having capacity to make a testamentary appointment in the first instance, it is no answer to say that she had no capacity to will because she is not yet a survivor; that would apply just as much to a *feme sole*, or a man, and does not depend on the special incapacity of *coverture* which the eighth section was inserted to preserve. A man has no capacity

to make a gift under a power before he has acquired it. Nevertheless, when a testator makes a general bequest and afterwards acquires a power, that power takes effect by virtue of the general bequest, and the rule applies equally to a married woman. The construction I give to the eighth section is that it disables a married woman from doing anything which before the passing of the act she could not have done by reason of her coverture; it preserves the incapacity of her coverture as it stood before the act, but, as regards any incapacity arising from matters independent from coverture, applicable to men and women alike, the statute was not intended to draw a distinction between married women and other persons. The state makes the will operate as if executed immediately before the death, and the effect of this is, in the case of a married woman, that she must be regarded as a married woman executing the instrument immediately before her death, and passing thereby everything of which, at the time of her death, she had acquired a power of disposing.' This case was approved, upon appeal, in an opinion by Lord Westbury. 1 De Gex, J. & S. 63.

"In applying the general rule as heretofore announced, I can see no reason for putting the wife, who has an express power of appointment given her, upon a different footing from her husband, who exercises no greater power of appointment under a like power. Every reason that sustains his right to exercise, by will, a power subsequently granted to him, equally sustains the wife's similar right, where a statute gives her the right to make a will.

"3. But it is contended, not only that the will of 1881 was not an effective disposition under the General Statutes of a separate estate thereafter acquired, but that it could not be an effective disposition of a separate estate under the act of 1894, because, in 1881, Mrs. Bernet could only devise her equitable separate estate, while, under the act of 1894, she is given power to devise her statutory separate estate.

"The act of March 15, 1894, known as the Weissinger 'Married Woman's Act' (Laws 1894, c. 76), and now embodied in part in section 2147, Ky. St. (section 4654, Russell's St.), provides as follows: 'A married woman if she be of sound mind and 21 years of age may dispose of her estate by last will and testament subject to the provisions of this act.'

"This argument is based upon the two erroneous propositions, that this land was held by Mrs. Bernet as her separate estate, and that the Weissinger act empowered the wife to dispose of her separate estate without a written power, or, rather, made a separate estate of what had theretofore been general estate, so as to enable her to devise it under section 4 of chapter 113, Gen. St., above quoted.

"It is evident, however, that the purpose and effect of the act of 1894 was to enlarge the wife's power of disposition by enabling her to dispose of her estate of any kind, both general and separate estate, whereupon the old provision found in section 4 of chapter 113 of the General Statutes necessarily disappeared from our statutes. And in view of the fact that the statute of 1881 gave a married woman a right to dispose of her estate 'secured to her separate use by deed or devise,' while the act of 1894 gives her the right to dispose of her estate of every kind, it cannot be said that the Legislature intended to draw the distinction contended for. Moreover, the trend of modern authority supports the conclusion that there is no distinction under the chancery rules arising out of the formal nature of the wife's separate estate, with reference to whether it vested at common law, or by statute, or in equity. *James v. Gray*, 131 Fed. 401, 65 C. C. A. 385, 1 L. R. A. (N. S.) 321; *Pomeroy's Eq. Juris.* (2d Ed.) §§ 79 and 90.

"But this case presents no such question. There is no separate estate or any attempt to dispose of one. The terms of the deed are not sufficient to create a separate estate, and the fact that her husband conveyed the land directly to his wife does not have the effect of creating a separate estate in the wife. *Cralne v. Edwards*, 92 Ky. 109, 17 S. W. 211, 13 Ky. Law Rep. 499.

"4. The deed by which Francis Bernet conveyed this lot to his wife, Mary, was executed and delivered July 12, 1894, after the Weissinger act of March 15, 1894, had become effective as the law; and it is contended by plaintiff that her will of 1881, invalid then as a disposition of her general estate, became valid by virtue of the Weissinger act of 1894, without ever having re-executed her will made in 1881. It is argued that she knew that the act of 1894 had given her the right to dispose of her property by will, and that by another express provision of the statute her will would be treated as if it had been executed immediately before her death; and under these circumstances—there being no restrictions as to either right—she might well inquire, Why should she be required to go through the formality of making a new will?

"It is true the Weissinger act of 1894 not only supplanted section 4 of chapter 113 of the General Statutes, which had confined a married woman's rights to make a will to the two cases of her separate estate and the exercise of a written power of appointment, but it enlarged her power by wiping out these restrictions. But the power granted by the Weissinger act was not in existence when Mrs. Bernet made the will in 1881; and it is the absence of that power which invalidates the will, except as to the exercise of appointment—a power expressly given her by the statute then in force. I think this

question is concluded against the plaintiffs by the decision in *Gregory v. Oates*, 92 Ky. 532, 18 S. W. 231, 13 Ky. Law Rep. 761.

"Mrs. Bernet's will does not, by its terms, purport to exercise any power of disposition, and it is only by virtue of section 4845, Ky. St., above quoted, that it can be construed to be a valid execution of the power. The will is drawn in general terms, and would, undoubtedly, have disposed of her general estate if it had been executed after the passage of the Weissinger act of 1894. But when Mrs. Bernet executed her will in 1881, she had no power to dispose of her general estate. So, while her will is a good execution of the power subsequently created, it is not a valid will under the Weissinger act. Page on Wills, § 93; *Anderson v. Miller*, 6 J. J. Marsh. 573; *Mullock v. Souder*, 5 Watts & S. (Pa.) 193.

"I conclude, therefore, that under our statutory modification of the common-law rule, a will may effectively execute a power of appointment thereafter created, and that the will applies equally to the will of the married woman executed in 1881, pursuant to the authority then existing under the General Statutes, by which a married woman could make a will in the exercise of a power; and that, while Mrs. Bernet's will of 1881 was not a valid will under the Weissinger act of 1894, it operated as a valid exercise of the power of appointment under the rule above mentioned."

Judgment affirmed. Whole court, except MILLER, J., sitting.

CITY OF NEWPORT v. SCHOOLFIELD. (Court of Appeals of Kentucky. Feb. 15, 1911.)

1. MUNICIPAL CORPORATIONS (§ 365*)—STREET IMPROVEMENTS—CHARACTER OF MATERIAL—WAIVER.

By formally accepting street improvement with knowledge of the brand of brick used, a city waived a requirement in the contract for another brand.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. § 898; Dec. Dig. § 365.*]

2. MUNICIPAL CORPORATIONS (§ 354*)—CONTRACTS—POWER OF COUNCIL COMMITTEES.

Under Ky. St. §§ 3094, 3096 (Russell's St. §§ 1205, 1207) giving the general councils of certain cities control over street improvements, a committee of the council is powerless to modify a contract for such an improvement.

[Ed. Note.—For other cases, see *Municipal Corporations*, Dec. Dig. § 354.*]

3. MUNICIPAL CORPORATIONS (§ 360*)—STREET IMPROVEMENTS—IMPLIED CONTRACTS.

No implied promise by a city to make payment above the contract price of a street improvement arises from its acceptance of work with knowledge of beneficial changes therein.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. §§ 892, 892½; Dec. Dig. § 360.*]

4. MUNICIPAL CORPORATIONS (§ 374*)—STREET IMPROVEMENT CONTRACTS—BREACH BY CITY—RIGHTS OF CONTRACTOR.

A street contractor having begun work on being notified to proceed under his contract, though he had notified the city that he would not build the street under the contract price because cost of labor and material had advanced while he was delayed in commencing work, cannot recover damages for the city's breach of the contract in so delaying him.

[Ed. Note.—For other cases, see *Municipal Corporations*, Dec. Dig. § 374.*]

5. ESTOPPEL (§ 78*)—CLAIMS IN OPPOSITION TO CONTRACT—RIGHT TO ASSERT.

A party to a written contract cannot execute his part, and then claim rights in opposition to the contract in the absence of fraud, accident, or mistake.

[Ed. Note.—For other cases, see *Estoppel*, Cent. Dig. §§ 204-210; Dec. Dig. § 78.*]

Appeal from Circuit Court, Campbell County.

Action by R. L. Schoolfield against the City of Newport. Judgment for plaintiff, and defendant appeals. Reversed, with instructions.

C. T. Baker, for appellant. Samuel C. Bailey, for appellee.

MILLER, J. Pursuant to a resolution of the general council of the city of Newport, its mayor entered into a written contract on September 10, 1906, with the appellee, Schoolfield, by which Schoolfield agreed to reconstruct Eleventh street between Brighton and Isabella streets, in said city, with concrete curbing and a brick roadway, at the prices specified in the contract. Section 76 of the specifications which were made a part of the contract, reads as follows: "The work shall be commenced when directed by superintendent of public works and city engineer ——— days after the execution of the contract, and shall be completed within sixty days thereafter, unless an extension of time is granted by the general council, but delay caused by the suspension of work by order of the superintendent of public works or city engineer shall not be included as against the contractor in computing said time."

The petition alleges that it was well understood between the contracting parties that such notice would be given within 10 days from the day of signing the contract. The work was greatly delayed in waiting upon the street railway company, which was to lay its concrete foundation under its tracks before the street could be reconstructed. Finally, on July 18, 1907, Schoolfield addressed a written communication to the general council of the city stating that, since the signing of the contract, he had at all times been ready to perform his undertaking thereunder, but had been prevented from doing so by the city; and that in the meantime the cost of labor and the prices of the materials that would be necessary to carry out the contract had so greatly increased

that he could not proceed with said contract, unless the defendant would pay the cost of labor and material in excess of what would have been the cost thereof had he been permitted to perform the contract within a reasonable time. The contract called for Peebles block in the reconstruction of the brick pavement. In his communication to the council Schoolfield further said that Peebles block could not be obtained, but that some other block, acceptable to the council, could be used. He estimated the extra cost at \$1,236.70, and closed his communication as follows: "Therefore, if you desire me to proceed, I request that you agree to pay the difference between the price of labor and materials at the time said contract was entered into, and the price of same at the present time to me, and allow me to substitute the Logan block or some other block acceptable to the general council." The only action taken upon the communication by the general council was to refer it to the law and improvement committee and the city solicitor. On August 10, 1907, pursuant to a resolution of the general council, the city engineer wrote to Schoolfield as follows: "You are hereby directed to proceed with your contracts on Eleventh street and on Tenth street. Omit the iron protection strips on both contracts." On August 14, 1907, the mayor of the city, pursuant to the same resolution, wrote Schoolfield as follows: "You are hereby notified to immediately proceed with the construction of Eleventh street between Brighton street and Isabella street, pursuant to your contract with the city of Newport, of date September 10, 1906." Schoolfield began work on August 10, 1907; and having completed it to the satisfaction of the city, it accepted the work and paid Schoolfield \$4,735.49 therefor on September 17, 1908, that being the amount called for by the contract. It became necessary, however, in doing the work to substitute some other block in place of the Peebles block, which could not be obtained; and, with the consent of the improvement committee of the general council, Athens block was used in the construction of the pavement. The general council took no action upon Schoolfield's request that he be allowed to use a substitute in the place of the Peebles block; and the only authority he had to make that change was the verbal consent of the improvement committee.

On April 4, 1910, Schoolfield brought this suit against the city of Newport to recover \$1,429.73, which he was compelled to pay for the materials and labor in making the street, in excess of the sum he would have been required to pay if he had done the work within a reasonable time after the making of the contract. A demurrer to the petition was overruled. In addition to a traverse, the answer pleads (1) that the appellant had paid Schoolfield \$4,735.49 on February 17,

1908, in satisfaction of the work under the contract; (2) that the ordinance under which the contract was made had not been published or advertised in a newspaper, as required by law; and (3) that the appellee, without the authority of the appellant, had used Athens block brick in the reconstruction of the street in place of Peebles block brick, as required by the contract, and that by reason thereof the appellant had been damaged in the sum of \$1,429.73. The two last-named defenses have been practically abandoned; they were not urged upon the trial in the circuit court, and are not insisted upon here. Moreover, the defense that appellee had used Athens block brick in the reconstruction of the street instead of Peebles block brick is not well laid, in view of the fact that the appellant has formally, and by a proper resolution, accepted the street as made, and has paid for it with full knowledge of the fact, and as a compliance with the contract. In addition to the question of law raised by the demurrer to the petition, the case was chiefly tried below, and has been urged here, upon the first defense above set forth, which pleads that when appellant paid the \$4,735.49 on February 17, 1908, it paid the appellee all that was due him under the contract, and in full compliance therewith.

Upon the trial below, the appellant offered to show that the improvement committee of the council had an agreement with Schoolfield, whereby he was permitted to change the block from Peebles block to Athens block, which was an inferior block, in consideration of his agreement to do the work at the same prices as those called for in the original contract. The circuit court declined to allow the city to show that fact, because no such issue had been raised by the pleadings. The court overruled appellant's motion for a peremptory instruction to the jury to find for the defendant. The petition is framed upon the idea that the work having been performed after appellee's notice to the general council and pursuant to their subsequent notice to proceed with the work, there was an agreement on the part of the city to permit him to do the work under the suggested altered terms. The petition does not in its terms ask damages; it merely alleges that, in response to Schoolfield's communication to the general council, that body directed the mayor to notify Schoolfield to commence work under the contract, and that he had done the work. The court, however, instructed the jury upon the theory that this was a case for damages, and the jury found for the plaintiff and fixed the damages at \$964.75. From a judgment for that amount the city of Newport prosecutes this appeal. The several views of the law of this case as presented by the parties thereto may be discussed under the following three heads: (1) Was the work done under the contract as

modified by the improvement committee and appellee? (2) Has appellee a right to maintain this action upon a contract to be implied from the benefits received by the appellant? And (3) the work having been done under the original contract, has appellee a cause of action for its breach?

1. Did the agreement between Schoolfield and the improvement committee amount to a new contract, or a modification of the original contract? Section 3094, Ky. St. (section 1205, Russell's St.), provides that the general council of cities of the second class (Newport being a city of that class) shall have and exercise exclusive control and power over the streets and highways, including the paving and repaving thereof; while section 3096 (section 1207) provides that the general council may provide for the construction and reconstruction of streets by ordinance. No other body, officer, or agent is given authority to do this work, and the general council may authorize it by ordinance only. In the case at bar, the improvement committee had no authority to change the old contract or to make a new contract with Schoolfield for the reconstruction of the street; since the Legislature in its wisdom had lodged that power with the general council of the city, consisting of two separate boards whose action was to be approved by the mayor. It would, indeed, be an unusual exercise of this important power if a committee of one or both of these boards should be allowed to exercise the power which can only be exercised by both boards and in the manner pointed out by the statute. In Abbott's late work on Public Corporations, § 170, the rule is announced in the following explicit terms: "The legal principle cannot be too often repeated that a public corporation is not bound by acts of its agents coming within the apparent scope of their power and authority. Their authority to act must be explicit and direct that the corporation be bound. There are found therefore many contracts made or attempted to be made by public officials held invalid which, if executed on behalf of a private corporation or a natural person, would be enforced. The power of public officials to bind a corporation in the making of a contract or of the corporation itself to contract is closely scrutinized, and, unless the same clearly appears, its existence will not be presumed. Contracts made by officials concerning matters which do not come within the scope of duties thus specified, or for which authority does not exist, cannot be enforced. This doctrine is most emphatically applied in connection with those acts involving the expenditure of public moneys. The authority of public agents or officials being thus special and limited, all persons dealing with them are charged with notice of such limitations, and are bound at their peril to ascertain the nature and the extent of their authority, and especially is this true

of acts or duties conferred specifically by statute."

In *Trustees of Bellevue v. Hohn*, 82 Ky. 1, the town contracted with Hohn for the improvement of certain streets, which were to be paid for by assessments against the abutting property holders. Having failed to hold the property owners liable for the debt, for want of power in the town to bind them, Hohn sued the town; and, as in the case at bar, undertook to enlarge his case beyond the terms of his written contract by averring in his petition that the contract was entered into with the express understanding that the trustees of the town would take such steps as would make the property holders liable. In overruling this contention, this court said: "The duties and powers of municipal corporations are prescribed by statute, and to make them liable, like natural persons, would be to license those who are invested with corporate control to place onerous burdens upon the inhabitants in the way of taxation and otherwise, regardless of the powers and restrictions found in the charter, and by which alone the rights of the corporation must be determined. Courts have found it necessary to execute the powers expressly granted, and to refuse to make corporations liable upon implied promises by reason of benefits received. This is done for the protection of the inhabitants of the corporation, and because the only power the corporation has is from the law creating it, and, instead of recognizing a more liberal rule, the courts are inclined to hold corporations and their agents within the letter of their grant."

In *District of Highlands v. Michie*, 107 S. W. 216, 32 Ky. Law Rep. 761, Michie sued the district for \$150 for fees due for legal services rendered it. He had been employed by the year, under a contract with the district, at an annual salary of \$200, which had been fully paid. Michie admitted that he had no contract with the district to perform the services for the value of which he sued, except under a conversation with one or more of the district trustees. The services for which he sued were outside of his routine duties as the employed attorney of the district, and were, in fact, extra services not covered by his contract, but rendered to and accepted by the district. So, it will be seen that the Michie Case, in all of its essential principles, strongly resembles the case at bar. In holding that it was incumbent upon Michie, in order to recover, to show a duly authorized contract of employment with the district, this court said: "The trustees of a city or other municipal corporation may not, in their individual capacity, employ counsel to represent it in litigation; nor does the fact that an attorney renders services to a municipal corporation entitle him to recover for such services under an implied contract. Municipal corporations must contract through their duly authorized boards,

and the individual trustees have no authority to contract for them. *Murphy v. City of Louisville*, 9 Bush, 189; *City of Covington v. Hallam & Myers*, 16 Ky. Law Rep. 128; *City of Owensboro v. Weir & Walker* [95 Ky. 158, 24 S. W. 115] 15 Ky. Law Rep. 506; *Carroll v. City of St. Louis*, 12 Mo. 444; *Dillon on Municipal Corporations*, § 400. Assuming the services of the plaintiff to have been fully worth, in intrinsic merit, the amount claimed by him, it still follows that without a duly authorized contract he was not entitled to recover on a quantum meruit; and the fact that the corporation received the benefit of his services does not, as said before, create a contract by implication."

This doctrine is too firmly established by repeated decisions in this jurisdiction to need further elaboration. *South Bellevue Lot Association v. Town of Bellevue*, 58 S. W. 443, 22 Ky. Law Rep. 541; *Lowery v. Lexington*, 116 Ky. 157, 75 S. W. 202, 25 Ky. Law Rep. 392; *Perry County v. Engle*, 116 Ky. 504, 76 S. W. 382, 25 Ky. Law Rep. 813; *Allen County v. Fidelity & Guaranty Co.*, 122 Ky. 835, 93 S. W. 44, 29 Ky. Law Rep. 356; *McDonald's Adm'r v. Franklin County*, 125 Ky. 205, 100 S. W. 861, 30 Ky. Law Rep. 1245; *Big Sandy R. R. Co. v. Floyd County*, 125 Ky. 345, 101 S. W. 354, 31 Ky. Law Rep. 17; *Floyd County v. Allen*, 137 Ky. 575, 126 S. W. 124, 27 L. R. A. (N. S.) 1125. It will be seen, therefore, that the case at bar comes squarely within the rule laid down in the foregoing decisions of this court, and that there can be no recovery upon the agreement alleged to have been made with the improvement committee, for the reason that that action was a nullity, and left the original contract standing in full force and effect.

2. But is an implied promise to pay for this work to be raised by the fact that the city has accepted the work with the full knowledge of the changes that were made and benefits rendered by reason of the work? In *Murphy v. City of Louisville*, 9 Bush, 194, *Murphy* constructed a street under a contract which had not been executed in the manner required by the statute, and for that reason no recovery was had against the owners of the property. *Murphy*, however, sued the city upon the theory, that having derived a benefit from his labor, the law implied a promise on the part of the city to pay for it. But the court rejected that contention in the following language: "Nor is the corporation liable for the value of the work by reason of any implied promise to pay, upon the idea that the city derived a benefit from it. If so, as previously argued, it would dispense with the exercise of the power conferred by those in authority to execute contracts, and the contractor, or the party performing the work at the instance of any official of the corporation or even inhabitant of the city, could make improvements beneficial to the corporation, and there-

by create an implied contract on the part of the city to pay. If the alleged contract is made otherwise than as required by the ordinance, it is not binding; and if not obligatory as a contract, the law creates no promise to pay. The difference between the contract of a private person and that of an officer of a corporation is this: An individual has the right to make, alter, or ratify a contract at his own will and pleasure with the consent of the party contracting with him; or if he stands by and permits others to work for him, and accepts the work, the law implies a promise to pay its value; while an officer of a corporation has no power to make a contract except in the manner pointed out by the statute from which the power is derived. *Zottman v. San Francisco*, 20 Cal. 96 [81 Am. Dec. 96]" And in the *Michie* Case, above referred to and quoted from, this court expressly said that the fact that the corporation had received the benefit of *Michie's* services did not create a contract by implication on the part of the city.

Again, in *Floyd County v. Allen*, *supra*, where *Allen* had sued the county for labor and materials furnished in making a bridge, without a contract, this court said: "The testimony shows that the county judge prior to the making of the improvement went to the place improved and the home of appellee and advised and requested him to make the improvement, and that the justice of the peace in that district also requested it. It is also insisted for appellee that the county should be compelled to pay him the claim for the reason that it made no objection to the work as it progressed and it reaped the benefits of his expenditure and labor. This presents a very equitable view in his behalf, and would prevail against an individual or private corporation, but the consequences would be disastrous to hold that it should apply to the state or county. To permit the citizen to select his own time, place, and manner, even with the advice and consent of one or two of the officials, in which to furnish material and labor for needed repairs or improvements on a public highway of the county and hold the county responsible for the price charged, upon the ground that it had been benefited thereby, would be ruinous to the county and have the effect to supersede the power of the fiscal court whose duty it is under the law to manage such affairs. * * * In the case at bar there was no action of the county court. The judge and a justice of the peace acted privately in the matter."

And in the *Hohn* Case, above referred to, the court used this language: "The contract was void so far as it attempted to make the lot owners responsible, and there is no implied promise by the city to pay, because the lot owners were never bound; this fact appellees knew when they made the contract. That contract is in writing, and by its terms

the appellant, the town, is in no event to become responsible. Neither fraud nor mistake is alleged, and, if such an averment had been made, it can afford no relief as against the appellant."

It should be borne in mind that this is not a case where mere restitution is demanded of that which the municipality has unlawfully received, and a restitution would not vary or increase the burden of the taxpayer. In that class of cases recovery is allowed in quasi contract, because restitution does not impose upon the taxpayer any additional burden beyond his prescribed obligation as a citizen. But in the case at bar, Schoolfield's contract required the city to pay one-half of the cost of the street and the property owners to pay the other half, and he is now asking that the city pay, not one-half of the extra cost, but all of it. If the city should be required to pay upon either basis, the taxpayer's burden would be increased to the extent of the payment, above what he had the right to expect under the contract between Schoolfield and the city. From these abundant authorities we must further conclude that Schoolfield cannot recover from the city of Newport upon an implied liability.

3. This work having been done under the original contract, can Schoolfield recover damages for the alleged breach thereof? Upon that proposition the circuit judge ruled affirmatively; and in doing so, we think he was in error. Section 17 of the specifications provided as follows: "All claims for damages must be made in writing to the superintendent of public works and city engineer at the time the damage occurs, or the cause of the claim arises. Unless such claims are so presented, it shall be held that the contractor has waived such claims, and shall not be entitled to receive any pay for same. No extras of any kind will be allowed, unless ordered in writing by the city engineer, and the price for same agreed upon in advance."

It is not pretended that this claim arises under this clause or that appellee has proceeded as is therein required. Nevertheless, we have here an express provision of the contract covering damages and compensation for extras of every kind, with the further provision that they shall not be allowed unless ordered in writing by the city engineer, and the price for same agreed upon in advance. The contract further provided that the work should be commenced "when directed by superintendent of public works and city engineer ——— days after the execution of the contract." Assuming that the circuit judge was right in holding that

the contract required the notice should be given within a reasonable time after the execution of the contract on September 10, 1906, we cannot concur in his conclusion that Schoolfield had the right to do this work under the contract, and then claim a measure of compensation different from that provided by the contract. If the city broke its contract by refusing to permit Schoolfield to do the work, it was liable for the breach. But that is quite a different liability from that set up in the petition. Clearly, if the city had declined to carry out the contract, and had refused to permit Schoolfield to build the street, his remedy was in damages for the breach of the contract; and his measure of damages would have been the profit he could reasonably have made in the construction of the street. But since the city made no change in the contract, Schoolfield had no right to assume that he could proceed with the reconstruction of the street under a new contract, or without a contract, and recover from the city in any way different from that provided in the original contract. A party to a written contract will not be permitted to execute his part thereof, and then claim rights in opposition to the contract, in the absence of fraud, accident, or mistake practiced upon him in its execution. Schoolfield's notification to the general council that he could not build the street under the prices called for in the contract did not, in the absence of an agreement on the part of the city, enlarge or change his rights under the contract. Moreover, Schoolfield having been notified to proceed with the work under his contract as it then existed, he certainly knew from the two notices to that effect that he was expected to work under the contract or not at all; and having proceeded with his work pursuant to those notices, and having received the pay for his work as called for by the contract, the respective contractual rights of Schoolfield and the city of Newport have been satisfied. Any other claims or obligations upon either side are beyond the contract and unenforceable.

Under any view of the case Schoolfield was not entitled to recover, and the demurrer to his petition should have been sustained; and, the demurrer having been erroneously overruled, the appellant's motion for a peremptory instruction to find for it should have been sustained.

Wherefore the judgment of the circuit court is reversed, with instructions to take further proceedings consistent with this opinion.

STATE v. BELFIGLIO.

(Supreme Court of Missouri, Division No. 2.
Feb. 7, 1911.)

1. HOMICIDE (§ 268*)—QUESTION FOR JURY—SUFFICIENCY OF EVIDENCE.

Evidence in a homicide case tending to prove the defendant's guilt *held* sufficient to carry the case to the jury.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. § 562; Dec. Dig. § 268.*]

2. HOMICIDE (§ 268*)—TRIAL—INSTRUCTIONS—NATURE OF MEANS OR INSTRUMENT USED—DEADLY WEAPON.

Whenever a mortal wound is inflicted with any weapon other than an instrument generally known and classified as a deadly weapon, the court should submit to the jury the issue of whether or not the weapon used was of a deadly nature.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. § 562; Dec. Dig. § 268.*]

3. HOMICIDE (§ 3*)—TRIAL—INSTRUCTIONS—NATURE OF MEANS OR INSTRUMENT USED—“DEADLY WEAPON.”

Where the weapon used by the defendant in a homicide case, a steel screw-driver, was of such a nature that defendant was able to drive it through the skull of an adult with one hand, at a single blow, and where the weapon was introduced at the trial, although no description of it is preserved by the evidence, an instruction telling the jury, as a matter of law, that it was a “deadly weapon,” is properly given.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. § 5; Dec. Dig. § 3.*]

For other definitions, see Words and Phrases, vol. 2, pp. 1853-1856; vol. 8, p. 7627.]

Appeal from St. Louis Circuit Court; Geo. H. Shields, Judge.

Florindo Belfiglio was convicted of manslaughter in the fourth degree, and he appeals. Affirmed.

Chas. P. Johnson and Silver & Dumm, for appellant. E. W. Major, Atty. Gen., and Chas. G. Revelle, Asst. Atty. Gen., for the State.

BROWN, J. Defendant was convicted of manslaughter in the fourth degree in the circuit court of St. Louis city, for the act of feloniously stabbing and killing, with a screw-driver, one Albert L. Reid, on April 28, 1909, and prosecutes this appeal from a judgment of that court imposing a punishment of nine months' imprisonment in jail.

Defendant is an electrician and locksmith, while the deceased was a clothes presser. The evidence on behalf of the state is to the effect that defendant was called upon to fix a door lock for deceased on April 28, 1909, and, upon informing deceased that he could not fix the lock so as to make the key thereto work in a satisfactory manner, deceased became angry, and a fight immediately ensued. After clinching and scuffling a few seconds, during which no serious harm resulted to either combatant, deceased struck defendant a heavy blow on the nose with his fist, knocking him down. Thereupon defendant arose and stabbed deceased

in the left temple with a steel screw-driver with which he had been trying to fix the door lock. The screw-driver passed through the skull of deceased into his brain, and produced a mortal wound from which he died on the following day.

The defendant testified that deceased knocked him down three times, and that he struck the fatal blow with the screw-driver just as he was rising the third time. The whole testimony leads us to believe that deceased brought on the fight by his domineering remarks, while defendant was not as anxious to avoid the difficulty as a law-abiding man ought to have been under similar circumstances. Defendant and deceased were of nearly the same size. Defendant proved a good reputation as a peaceful and law-abiding citizen prior to this unfortunate occurrence.

Defendant complains that the evidence is not sufficient to support the judgment, that such a clear case of self-defense was proven as to warrant this court in discharging the defendant, and that the trial court committed reversible error in instructing the jury that the screw-driver with which deceased was killed was a deadly weapon.

To our minds the evidence tending to prove defendant's guilt was strong enough to carry the case to the jury, and we are unwilling to disturb the judgment on the facts detailed by the witnesses. *State v. Mathews*, 202 Mo. 143, loc. cit. 147, 100 S. W. 420.

The complaint that the trial court ought to have submitted to the jury the issue of whether or not the screw-driver with which the fatal wound was inflicted was a deadly weapon presents a more difficult problem. Whenever a mortal wound is inflicted with any weapon other than a gun, pistol, large knife, or some other instrument generally known and classified as a deadly weapon, it is usually necessary for the court to submit to the jury for its determination the issue of whether or not the weapon used was of a deadly nature. *State v. Clancy*, 225 Mo. 654, 125 S. W. 458; *State v. Harris*, 209 Mo. 423, 108 S. W. 28. However, in a case like the one at bar where the weapon used was of such a nature that defendant was able to drive it through the skull of an adult with one hand, at a single blow, and where the weapon was introduced at the trial, but no description of it preserved in the evidence whereby this court may know its size, length, weight, or whether sharp or blunt at the point, we will assume that the learned trial judge did not err in telling the jury as a matter of law that it was a deadly weapon.

Finding no reversible error in the record, we affirm the judgment.

KENNISH, P. J., and FERRISS, J., concur.

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

STATE v. HOAG.

(Supreme Court of Missouri, Division No. 2.
Feb. 7, 1911.)

1. CRIMINAL LAW (§ 1036*)—OBJECTIONS—PRESENTATION BELOW.

Where accused did not object below to alleged improper questions, he cannot first raise the objection on appeal.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2639-2641; Dec. Dig. § 1036.*]

2. RAPE (§ 59*)—PROSECUTION—JURY QUESTIONS.

Evidence held to raise the issue of assault with intent to rape, so as to authorize an instruction submitting such issue.

[Ed. Note.—For other cases, see Rape, Cent. Dig. §§ 88-100; Dec. Dig. § 59.*]

3. RAPE (§ 59*)—INSTRUCTIONS—LESSER OFFENSES—ASSAULT.

In a prosecution for assault with intent to rape, in which there was evidence that accused ran his hand under prosecutrix's dress and placed it on her sexual organ, it was error not to instruct on the law of common assault; that offense being necessarily included in the charge of felonious assault in view of Rev. St. 1909, § 4904, providing that upon indictment for a felonious assault accused may be convicted of a lesser offense.

[Ed. Note.—For other cases, see Rape, Cent. Dig. §§ 88-100; Dec. Dig. § 59.*]

4. CRIMINAL LAW (§ 824*)—INSTRUCTIONS—LESSER OFFENSE—NECESSITY OF REQUEST.

In view of Rev. St. 1909, § 5231, requiring the court to instruct upon all questions of law necessary for the information of the jury, where the evidence shows that accused may be guilty of an offense included within that charged in the indictment, the court should instruct upon such minor offense, whether requested or not.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1996-2004; Dec. Dig. § 824.*]

Appeal from Circuit Court, Cass County; Nick M. Bradley, Judge.

Arthur Hoag was convicted of feloniously attempting to rape a 13 year old child, and he appeals. Reversed and remanded for a new trial.

Jas. T. Burney and A. A. Whitsitt, for appellant. E. W. Major, Atty. Gen., and John M. Dawson, Asst. Atty. Gen., for the State.

BROWN, J. Defendant is charged by indictment with violating section 4482, Rev. St. 1909, by feloniously attempting to rape and carnally know one Jessie Pearl Sears, a female child of the age of 13 years.

The defendant and prosecutrix reside in Union township in Cass county, Mo. The defendant is a married man, a photographer by occupation, and resides with his father on a farm in a house located only a few hundred feet from a church. At the time of the alleged crime, he was employed to or had voluntarily assumed the duty of building fires in this church for the accommodation of patrons of a Sunday school taught therein. The evidence of the prose-

cutrix recites that she was 13 years old in September, 1909, and resides with her father and mother on a farm about one mile south of the church above mentioned; that 20 minutes before the hour of 10 o'clock in the forenoon of February 27, 1910, she left her home and walked to the church to attend Sunday school. On entering the church she found the defendant there alone, and asked him if he had completed some pictures which he had taken of her a few days before. He replied that he had not, but handed her some other pictures to examine; and, while she was sitting on a bench in front of the stove looking at these pictures, he sat down by her, and, putting one of his hands up under her dress, placed it on her sexual organ, and with the other hand tapped her under the chin. She tried to push his hand out from under her dress; but he refused to remove it until he looked out of the window of the church and saw, only a few yards distant, one John Dempsey, a small boy, approaching. Then he went away and left her alone, informing her that he would not tell anybody, and that he would make her a postal card, and it would be all right. Within a few minutes after this occurrence, the pupils and teachers of the Sunday school assembled at the church. Mrs. Addie Laughlin, who taught the prosecutrix her Sunday school lesson, testified that the usual disposition of prosecutrix was to be cheerful and pleasant, but on that day she seemed to be restless, worried, and mad. After the Sunday school was dismissed, the prosecutrix went home, and about 4 o'clock in the afternoon of that day informed her mother of the defendant's conduct, and, when her father learned it, he caused the defendant's arrest.

Sheriff Sid J. Hamilton took with him one Walter Welborn and arrested the defendant on the 1st day of March, 1910. While they were taking defendant to his home preparatory to removing him to the county seat, one of them told him that he regretted the affair on account of defendant's wife, whereupon the defendant replied that he hated it too, "but that sometimes a man's passion would get the best of him." After giving bond and returning home, one Frank Roblett asked the defendant what he had been arrested for, and he replied, "I am charged with assault with intent to rape, but I haven't killed anybody, and they can't put a man in the penitentiary for feeling of a girl's ———." Roblett seemed to have a very unfriendly feeling toward defendant.

The testimony of defendant was that, when the prosecutrix came into the church and asked him about the pictures, he told her that he had not yet made her pictures, but laid several others in her lap for her to examine, and that when he picked them up out of her lap he patted her on the chin

and told her he would make her a postal card, but denied placing his hand under her dress, and denied all efforts and intent on his part to have sexual intercourse with her. He claimed that both he and the prosecutrix saw the small boy, John Dempsey, approaching the church before he began showing her the pictures, and, it then being the hour when the patrons of the Sunday school should assemble, they were expecting parties to come in every minute. It was also shown that from the windows of the church any one approaching from the south could have been seen about 300 yards. The Dempsey boy came from that direction, and it was clearly possible that defendant and prosecutrix could have seen this boy approaching before defendant committed the alleged assault. Defendant denied the alleged statements testified to by witnesses Hamilton and Welborn who arrested him, saying he was sure he did not use the word "passion" in the sense they gave it in their evidence, and also denied the alleged admission testified to by witness Roblett. He also proved by a large number of witnesses that his reputation for truth and morality, up to the time of his arrest, was good. The evidence of previous good character could not have been stronger.

The defendant assigns as error the action of the trial court in permitting the state to propound improper questions to his character witnesses; in excluding evidence of statements made by defendant to his wife after his arrest; in refusing to sustain a demurrer to the evidence; and also in failing to instruct the jury on the law of common assault. The defendant did not object to the alleged improper questions propounded to his character witnesses in the trial court, and that point is not open to him here. The court committed no error in refusing to allow defendant to testify to statements made by him to his wife.

As to whether or not the evidence was sufficient to justify the court in submitting to the jury an instruction authorizing a conviction for assault with intent to then and there have carnal knowledge of the prosecutrix, we find that, under the admitted facts, the assault, if committed, was committed in the church at the very time when defendant knew that many persons were likely to arrive and did arrive within a few minutes, and that the defendant could have had little or no hope that he could commit the crime without being detected in the act; yet, notwithstanding these facts, we cannot hold that the court erred in refusing to sustain a demurrer to the evidence. These attendant circumstances, coupled with the defendant's prior good reputation, would render it somewhat improbable that he would undertake the commission of such a heinous crime at the time detailed by the prosecutrix; yet

our reported cases contain many examples of attempts to commit rape under circumstances which rendered detection practically a certainty. *State v. Shroyer*, 104 Mo. 443, 16 S. W. 286, 24 Am. St. Rep. 344; *State v. Smith*, 80 Mo. 516; *State v. Alcorn*, 137 Mo. 121, 38 S. W. 548. It is a matter of common knowledge that some persons will incur greater risks to gratify their lustful desires than to attain any other end.

We have read the record most diligently and can discover no indication of any reason or motive for the prosecutrix or her father preferring a false charge against the defendant, and we are convinced that, while the defendant and the prosecutrix were alone, he took improper liberties with her. It was for the jury to say whether or not she told the truth, and, if so, how far he would have gone with his caressing or improper advances had not the small boy, John Dempsey, appeared on the scene.

The complaint of the defendant that the trial court erred in failing to give the jury an instruction on the law of common assault seems to us to be well taken. The crime of common assault is necessarily embraced in the charge of felonious assault. Section 4904, Rev. St. 1909. While the evidence does not disclose an assault in the ordinary meaning of that word, yet the placing of his hand under the dress of the prosecutrix in a lascivious manner, if he did so, though he entertained no intent to have sexual intercourse with her at that particular time, was, under the law, an assault more culpable than a blow delivered in anger. *State v. White*, 52 Mo. App. 285; *State v. Fulkerson*, 97 Mo. App. 599, 71 S. W. 704; *Goodrum v. State*, 60 Ga. 509.

If the jury believed the evidence of prosecutrix, and yet, from the surrounding circumstances, did not believe defendant intended to have sexual intercourse with her at the particular time when she testified that he placed his hand under her clothes, then clearly they would have been justified in finding him guilty of common assault. When, as in the case at bar, the evidence shows that a defendant may not be guilty of the offense charged, but may be guilty of an offense necessarily embraced in the charge, it becomes the duty of the trial court to instruct the jury upon such minor offense whether it be requested to do so or not. Section 5231, Rev. St. 1909; *State v. Palmer*, 88 Mo. 568; *State v. Lackey* (decided at this term, but not yet officially reported), 132 S. W. 602.

For the error of the trial court in failing to instruct the jury on the law of common assault, as applicable to the evidence in this case, its judgment is reversed, and the cause remanded for a new trial.

KENNISH, P. J., and FERRISS, J., concur.

BRADBURY v. WIGHTMAN.

(Supreme Court of Missouri. Feb. 9, 1911.)

1. ELECTIONS (§ 269*)—CONTEST—NATURE OF RIGHT.

The right to contest an election is not a natural right, but exists, if at all, in the Constitution or statutes.

[Ed. Note.—For other cases, see Elections, Cent. Dig. §§ 245, 246; Dec. Dig. § 289.*]

2. ELECTIONS (§ 273*)—CONTESTS—JURISDICTION.

Rev. St. 1899, § 7056 (Ann. St. 1906, p. 3424 [Rev. St. 1909, § 5951]), giving the Supreme Court jurisdiction of contested elections for judge of Supreme Court, judge of the St. Louis and Kansas City Courts of Appeals, Superintendent of Public Schools, Secretary of State, State Auditor, Treasurer, and Attorney General, pursuant to Const. 1875, art. 8, § 9 (Ann. St. 1906, p. 255), providing that the trial of contested elections of all public officers, except Governor and Lieutenant Governor, shall be by the courts of law, and that the General Assembly shall, by general law, designate the court by whom the several classes of election contests shall be tried, does not give the Supreme Court jurisdiction of a contest of election of Railroad and Warehouse Commissioner.

[Ed. Note.—For other cases, see Elections, Dec. Dig. § 275.*]

Graves, J., dissenting.

In Banc. Election contest by Thomas Bradbury against Frank A. Wightman. Proceedings dismissed.

W. M. Williams and Wm. C. Marshall, for contestant. Selden P. Spencer and Lon O. Hocker, for contestee.

WOODSON, J. At a general election held in this state on November 6, 1910, the plaintiff was a candidate for the office of Railroad and Warehouse Commissioner on the Democratic ticket, and the defendant was a candidate for the same office on the Republican ticket. On the face of the returns, the latter received a majority of the votes cast, and was duly declared elected. In proper time plaintiff instituted contest proceedings in this court against the defendant, challenging the legality of his election on several grounds, and asking that he be ousted from said office, and that the former be declared elected. The defendant filed a motion to dismiss the proceedings, for the reason that this court had no jurisdiction to hear and determine a contest for the office of Railroad and Warehouse Commissioner. It is thus seen that the sole question presented for our determination is: Has this court jurisdiction over the cause?

The right to contest an election is not a natural right, such as the right of life, liberty, and property, but exists, if at all, in the written laws of the state, the Constitution or statutes.

Counsel for contestor bases his right of contest upon section 9 of article 8 of the Constitution of 1875 (Ann. St. 1906, p. 255), and section 7056, Rev. St. 1899 (page 3424, Ann.

St. 1906), now section 5951, Rev. St. 1909. Said constitutional provision reads as follows: "The trial and determination of contested elections of all public officers, whether state, judicial, municipal or local, except Governor and Lieutenant Governor, shall be by the courts of law, or by one or more of the judges thereof. The General Assembly shall, by general law, designate the court or judge by whom the several classes of election contests shall be tried, and regulate the manner of trial and all matters incident thereto; but no such law, assigning jurisdiction or regulating its exercises, shall apply to any contest arising out of any election held before said law shall take effect." In pursuance to that constitutional mandate, the Legislature enacted said section 7056, which reads as follows: "All contested elections for judge of the Supreme Court, judge of the St. Louis and Kansas City Courts of Appeals, Superintendent of Public Schools, Secretary of State, State Auditor, State Treasurer and Attorney General, shall be heard and determined by the Supreme Court, or any three judges thereof in vacation: Provided, that no judge of said court, who is a contestant or contestee in such election, shall be permitted to hear and determine the same." This section as it now exists was first enacted April 26, 1877 (Laws 1877, p. 248, § 1). Prior thereto all contests of elections for state officers mentioned in said section were contestable in the State Senate.

By reading said constitutional provision, it will be seen that it undertakes to do two things: First, it takes from the Senate the power to hear and determine contested elections of all public officers, whether state, judicial, municipal, or local, except Governor and Lieutenant Governor; and, second, to confer that power and jurisdiction upon courts of law, or in one or more of the judges thereof, as the Legislature may designate by general law. It should also be observed that said constitutional provision does not itself undertake to name the courts or the judges who shall hear and determine such contested elections, but in express terms it empowers the Legislature to designate the courts or judges who shall try and determine the same. The question now presents itself: Has the Legislature designated any court or judge to try and determine a contested election for the office of Railroad and Warehouse Commissioner?

Section 7056 provides that the Supreme Court shall have jurisdiction to hear and determine contested elections for supreme judge, judges of the St. Louis and Kansas City Courts of Appeals, Superintendent of Public Schools, Secretary of State, State Auditor, State Treasurer, and Attorney General; but said section makes no provision whatever authorizing this court to hear and determine

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

a contested election for the office of Railroad and Warehouse Commissioner; nor has our attention been called to any other section of the statute so empowering this court to do so, and, after diligent search, we have been unable to find any such statute, and therefore conclude that none such exists, and, further, that the law has made no provision for a contest of the election to that office in this court at least.

Practically the same question here presented was involved in the case of *State ex rel. Francis v. Dillon*, 87 Mo. 487. There a certificate of election was duly issued to the relator, as mayor of the city of St. Louis; and Mr. Ewing, the Republican candidate who ran against relator for the office of mayor, filed in the circuit court of the city of St. Louis a proceeding to contest the election. Judge Dillon, one of the judges of said circuit court, assumed jurisdiction of said cause and proceeded to try and determine the contest, when a writ of prohibition was issued from this court requiring him to show cause, etc. The respondent filed his return, setting up, among other things, the foregoing facts in justification of his claim of jurisdiction to try the contest. In that case the contestor contended that section 5528, Rev. St. 1879, gave the circuit court of the city of St. Louis the power to hear and determine an election contest for the office of mayor of the city of St. Louis. That section only provided for contests of elections of county officers in the various counties of the state, and was silent as to a contest of election for the office of mayor of the city of St. Louis. It was there contended that the provisions of the statute were broad enough, and if properly construed would include the officers of the city of St. Louis, notwithstanding the city was not mentioned in the statute. In that case this court held that the Legislature had neglected to obey the constitutional mandate before mentioned by failing to provide for contest of the office of the mayor of the city of St. Louis, and for that reason the circuit court had no jurisdiction to hear and determine the cause, and for that reason Judge Dillon was prohibited from proceeding with the trial of the cause.

The only difference between that case and this one is the fact that there no jurisdiction was given the circuit court to try and determine any contested election case for municipal offices, while here the statute gives this court jurisdiction to hear and determine all contested election cases for state officers, except that of Railroad and Warehouse Commissioner. There is no difference in principle between the two cases. That case is controlling in this.

We are therefore of the opinion that the motion to dismiss the proceedings should be sustained, and it is so ordered. All concur, except GRAVES, J., who dissents in separate opinion. KENNISH and BROWN, JJ., not sitting.

GRAVES, J. (dissenting). I do not concur with my Associates in the view that this court is without jurisdiction in this case. It is true that Rev. St. 1909, § 5951 (Rev. St. 1899, § 7056 [Ann. St. 1906, p. 3424]), does not expressly include the office of Railroad and Warehouse Commissioner; but such office is a state office. The power for the Legislature to act as to contests in elections is found in section 9 of article 8 of the Constitution (Ann. St. 1906, p. 255), which reads: "The trial and determination of contested elections of all public officers, whether state, judicial, municipal or local, except Governor and Lieutenant Governor, shall be by the courts of law, or by one or more of the judges thereof. The General Assembly shall, by general law, designate the court or judge by whom the several classes of election contests shall be tried, and regulate the manner of trial and all matters incident thereto; but no such law, assigning jurisdiction or regulating its exercises, shall apply to any contest arising out of any election held before said law shall take effect." This constitutional provision, so far as contests before the courts are concerned, divides the officers into three general classes, i. e.: (1) "State"; (2) "judicial"; and (3) "municipal or local." That there was a classification as above clearly appears from what follows in the section, for it is therein provided that the General Assembly shall pass a general law designating the court or judge "by whom the several classes of election contests shall be tried." The word "classes," as hereinabove used in this section of the Constitution, evidently refers to the classification first above made in the same section and as we have above set out.

By Rev. St. 1909, § 5951, *supra*, the Legislature complied with this constitutional provision, and by this general law made the contests of state officers, as they then existed, triable before this court. At first these contests were before the State Senate. 1 Rev. St. 1855, p. 709, §§ 77, 78. In 1877, under the Constitution of 1875, the jurisdiction as to state officers was changed from the Senate to the Supreme Court. Acts 1877, p. 248. At the time the contest statute was first passed, it included all the state officers then provided for by law. Since then new state officers have been named and their offices created. Yet, whilst this is true, they belong to the one class, i. e., state officers. And, whilst it is further true that these new state officers are not specifically mentioned in the contest statute above mentioned, yet it will not do so strictly apply the maxim, "*Expressio unius est exclusio alterius*," as to exclude from this general class these after-created state offices and subsequently named state officers.

Speaking of the maxim, *supra*, in 38 Cyc. 1122, it is said: "Nor will it generally exclude the application of the statute to things of the same class as those expressly men-

tioned which have come into existence since the passage of the statute." With the same rule under consideration, the Supreme Court of Maine, in *Hurley v. Inhabitants of South Thomaston*, 105 Me., loc. cit. 306, 74 Atl. 736, said: "But, as stated in *Endlich* on the Interpretation of Statutes, § 112: 'The language of the statute is generally extended to new things which were not known and could not have been contemplated by the Legislature when it was passed. This occurs when the act deals with a genus, and the thing which afterwards comes into existence is a species of it.' *Portland v. N. E. Tel. & Tel. Co.*, 103 Me. 240 [68 Atl. 1040]." To a like effect is *Northern Counties Trust v. Sears*, 30 Or. 388, 41 Pac. 931, 35 L. R. A. 188.

It is clear that, when the first contest statute was passed, the Legislature made a class of all state officers and first provided for their contests to be heard by the Senate, and then later, under a change of the Constitution, by the Supreme Court. To this class have been added other officers, and such other officers, including this plaintiff, should not and cannot be excluded under the maxim aforesaid.

I am of opinion that this court has jurisdiction, and, for the reason here hurriedly expressed, I dissent from the order and judgment entered declining jurisdiction.

STATE v. CANNON.

(Supreme Court of Missouri, Division No. 2.
Feb. 7, 1911.)

1. INDICTMENT AND INFORMATION (§ 110*)—SUFFICIENCY—LANGUAGE OF STATUTE.

An information under Rev. St. 1909, § 4750, charging a keeping of gaming tables in the language of the statute, is sufficient.

[Ed. Note.—For other cases, see *Indictment and Information*, Cent. Dig. §§ 289-294; Dec. Dig. § 110;* *Gaming*, Cent. Dig. §§ 226, 230.]

2. CRIMINAL LAW (§ 301*)—ARRAIGNMENT—NECESSITY.

Filing a demurrer to the information after waiver of formal arraignment and plea of not guilty did not withdraw the plea so as to require new arraignment.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. § 687; Dec. Dig. § 301.*]

3. INDICTMENT AND INFORMATION (§ 125*)—DUPLICITY—GAMING.

Counts for keeping gaming tables were not double because they charged that accused enticed and permitted divers persons to play thereon.

[Ed. Note.—For other cases, see *Indictment and Information*, Cent. Dig. §§ 334-400; Dec. Dig. § 125;* *Gaming*, Cent. Dig. §§ 224, 232.]

4. INDICTMENT AND INFORMATION (§ 132*)—ELECTION BETWEEN COUNTS—NECESSITY.

The state should have been required to elect on which of two counts charging keeping a poker table and a crap table, respectively, it would rely.

[Ed. Note.—For other cases, see *Indictment and Information*, Cent. Dig. §§ 425-453; Dec. Dig. § 132;* *Gaming*, Cent. Dig. § 234.]

5. CRIMINAL LAW (§ 1167*)—HARMLESS ERROR—REFUSAL TO REQUIRE ELECTION.

Refusal to require election between counts for keeping gaming tables was harmless, where a conviction was had on one count only.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. § 3101; Dec. Dig. § 1167.*]

6. GAMING (§ 74*)—POKER TABLES.

Rev. St. 1909, § 4750, prohibiting gaming tables, embraces poker tables.

[Ed. Note.—For other cases, see *Gaming*, Cent. Dig. §§ 190-198; Dec. Dig. § 74.*]

7. CRIMINAL LAW (§ 741*)—PROVINCE OF JURY—WEIGHT OF TESTIMONY.

The weight of testimony is for the jury, and not for the court.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. § 1705; Dec. Dig. § 741.*]

8. CRIMINAL LAW (§ 1159*)—VERDICT—CONCLUSIVENESS.

A verdict sustained by evidence will not be disturbed on appeal.

[Ed. Note.—For other cases, see *Criminal Law* Cent. Dig. §§ 3074-3083; Dec. Dig. § 1159.*]

9. GAMING (§ 98*)—EVIDENCE—SUFFICIENCY.

Evidence held to sustain a conviction for keeping a gaming table.

[Ed. Note.—For other cases, see *Gaming*, Cent. Dig. §§ 291-298; Dec. Dig. § 98.*]

Appeal from Circuit Court, Jasper County; Henry L. Bright, Judge.

Charles Cannon was convicted of gambling, and he appeals. Affirmed.

Clay & Davis, for appellant. E. W. Major, Atty. Gen., and John M. Dawson, Asst. Atty. Gen., for the State.

KENNISH, P. J. At the February term, 1910, of the circuit court of Jasper county, the prosecuting attorney filed an information jointly charging the appellant, Charles Cannon, and F. W. Potts, and L. W. Smith, under section 4750, Rev. St. 1909, with the offense of having set up and kept divers gaming tables and gambling devices. The information charged the offense in the language of the statute and in two counts; the only difference in the counts being that the gaming table described in the first is a poker table with the paraphernalia incident to the playing of that game, while the second describes a crap table and the dice used in the playing of the crap game. The record shows the filing of certain dilatory motions by the defendants; but, as these motions and the rulings of the court thereon are not preserved in the bill of exceptions, they are not open to review on this appeal and need not be further noticed. The defendants waived formal arraignment and entered a plea of not guilty. Before announcing himself ready for trial, the defendant, Charles Cannon, moved the court for a separate trial, and a severance was granted. Thereupon the defendant, Charles Cannon, demurred to the information on the ground that it did not state facts sufficient to constitute an offense under the laws of this state. The de-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

murrer was overruled, and the defendant was put upon his trial, which resulted in a verdict of guilty under the first count of the information, his punishment being assessed at a term of two years in the penitentiary, and an acquittal on the second count. After the proper motions were filed and overruled, judgment was pronounced, and the defendant appealed to this court.

The evidence for the state tended to prove these facts: The Southern Club Saloon Building is located on the corner of Church and Allen streets in Webb City, this state. It is a double, two-story structure, and at the time of the alleged offense one room on the ground floor was occupied as a dram-shop, known as the "Southern Club Saloon," and the other room on the ground floor was used as a pool hall. The large room in which the defendant was charged with keeping gaming tables was upstairs over the pool hall and could be reached by two inside stairways, one leading up from the rear of the saloon and another from the front; also, by a third stairway from the outside. This room over the pool hall, on the night of the 11th of December, 1909, and for some weeks before, was fitted up with poker and crap tables and had been used as a common gambling room. On the last-mentioned date, while gambling on both the poker and crap tables was going on, officers raided the place, found a large number of men therein, made several arrests, and seized the tables, gambling devices, and paraphernalia used in carrying on the games. These tables and devices were produced in the courtroom at the trial, were referred to and identified by the witnesses, and were introduced in evidence. They were tables adapted, devised, and designed for the purpose of playing games of chance for money, property, and poker chips, and were so used on the night of the 11th of December, 1909, and for several weeks prior to that date. The defendant and his codefendant, Potts, were generally at this gambling room, and there was evidence that each had supplied money to continue the games at times when more money was needed for that purpose. Once or twice Potts had furnished the necessary money to the defendant when the latter was acting as dealer at the crap table. A. O. Walker, a dealer at one of the tables when the raid was made, testified that he was employed and paid for his services at said gambling room by the defendant; that he had seen the defendant run the said poker table, sometimes playing and taking charge of the game, looking after the take-off which went to the house; and that the defendant had furnished him with the sum of \$42.50 that night to use in the game at the crap table.

The defendant testified in his own behalf and denied that he had employed Walker as a dealer at the gambling room, or that he had furnished Walker any money to be used in the games, and further denied that he

had any interest in the gambling rooms located over the Club Saloon or adjacent to it. The defendant moved the court to require the state to elect upon which count of the information it would ask a conviction, both at the close of the evidence for the state and at the close of all the evidence. The defendant also moved the court to require the state to elect upon which of the several charges contained in each count of the information it would proceed to trial. The court overruled the motions to elect, submitted the case to the jury upon instructions authorizing a verdict of guilty upon one or both counts of the information, or an acquittal upon one or both counts, accordingly as they should find and believe from the evidence. The jury returned a verdict of guilty under the first count and of acquittal upon the second count, as before stated.

1. The information and each count thereof properly charges the offense in the language of the statute, is in form as approved by this court, and the court did not err in overruling the demurrer. *State v. Chauvin* (Mo.) 132 S. W. 243; *State v. Rosenblatt*, 185 Mo. 114, 83 S. W. 975; *State v. Mathis*, 206 Mo. 604, 105 S. W. 604, 121 Am. St. Rep. 687; *State v. Lee*, 228 Mo. 480, 128 S. W. 987.

2. It is assigned as error that the defendant was not arraigned after the withdrawal of his plea of not guilty. The record shows that the defendant waived formal arraignment and entered a plea of not guilty, and it does not show that this plea was withdrawn. The filing of the demurrer thereafter did not have the legal effect of withdrawing the plea of not guilty, and after a ruling thereon a new arraignment was not necessary. *State v. Gleseke*, 209 Mo., loc. cit. 340, 108 S. W. 525.

3. Complaint is made that the court erred in overruling defendant's motion to require the state to elect upon which of the several charges contained in each count of the information it would proceed to trial. Each count charged the setting up and keeping of one gaming table only, and the averment that the defendant enticed and permitted divers persons to bet and play thereon did not make the count double, and the motion to elect was properly overruled. *State v. Ames*, 10 Mo. 743; *State v. Nelson*, 19 Mo. 393. See, also, *State v. Mathis*, 206 Mo. 604, 105 S. W. 604, 121 Am. St. Rep. 687.

4. At the close of the evidence for the state, and again at the close of all the evidence, the defendant moved the court to require the state to elect upon which count it would ask a conviction, and defendant's instruction numbered 4, which the court refused, declared the law to be that the jury could not convict upon both counts of the information, although they should believe from the evidence that the defendant set up and kept both tables as charged in the two counts of the information. It is contended by appellant that the court erred in not requiring the

prosecuting attorney to elect, and in refusing said instruction numbered 4.

The defendant's instruction numbered 4, in so far as it declared the law that the defendant could not be convicted upon both counts, was a correct statement of the law applicable to the facts in evidence, and the court should have required the prosecuting attorney to elect upon which count he would ask a conviction, or have submitted the case to the jury upon instructions authorizing a conviction under either count, as they found the facts to be, but not upon both. *State v. Carragin*, 210 Mo., loc. cit. 371, 109 S. W. 558, 16 L. R. A. (N. S.) 561. In the *Carragin Case*, at the close of an exhaustive review of the cases of this and other courts upon the subject of the joinder of felonies in the same indictment or information, this court, speaking through Gantt, J., said: "We know of no case under our practice in which an accused may be tried and convicted of two distinct felonies except in the case of burglary and larceny, which is expressly allowed by statute." It was held in the *Carragin Case* that reversible error was committed by the trial court in instructing the jury that they might find the defendant guilty upon both counts of the indictment and in refusing to require the prosecuting attorney to elect. However, in that case the defendant was convicted under both counts, so that the error of the court was clearly prejudicial. The counts in the information in this case charged the same offense, the gambling table and gambling device as described being the only difference, and it is always competent for the state to charge the offense and have the same submitted to the jury upon two or more counts when the offense is so charged in the different forms to meet the evidence as it may develop at the trial, and but one conviction is sought. *State v. Carragin*, 210 Mo. 351, 109 S. W. 558, 16 L. R. A. (N. S.) 561; *State v. Hargraves*, 188 Mo. 337, 87 S. W. 491; *State v. Sutton*, 64 Mo. 107; *Kelly's Crim. Law & Prac.* § 203.

The court was not in error in submitting the case to the jury upon both counts in the alternative and authorizing a conviction under either as they might find the facts to be. The error consisted in authorizing a conviction under both counts, and in thus treating the two counts as charging separate felonies, instead of the same felony charged in different forms. As the jury did not act upon the erroneous instruction, but convicted upon one count only, the question now before us is not, as in the *Carragin Case*, as to whether a conviction upon both counts can be upheld, but, rather, did the court properly instruct the jury, and did the evidence warrant the verdict upon the first count, under which alone a verdict of guilty was returned? The jury was fully instructed upon all questions of law applicable to the evidence upon the first count of the information upon which the verdict was based, and, although the

court by its instructions also authorized a verdict of guilty upon the second count, yet, as the defendant was acquitted upon that count, he cannot be heard to complain of error which did not operate to his prejudice.

5. Numerous complaints have been made as to alleged errors in the refusing and giving of instructions, and almost every page of the transcript of the evidence contains one or more objections by defendant and exceptions saved to the ruling of the court thereon. We have examined these complaints and alleged errors, and find that practically all of them have been answered by the recent decisions of this court construing the statute upon which this prosecution was based. Questions as to whether the statute is leveled against only such gaming tables as are used in games known as "bank games," or whether a poker table set up for gaming purposes comes within its provisions, which are ably discussed in appellant's brief, have been passed upon by this court adversely to appellant's contentions, and we are not disposed to reconsider them in each subsequent appeal. *State v. Chauvin*, 132 S. W. 243; *State v. Mathis*, 206 Mo. 604, 105 S. W. 604, 121 Am. St. Rep. 687; *State v. Hall*, 228 Mo. 456, 128 S. W. 745.

6. It is earnestly urged that the court erred in refusing the defendant's instruction in the nature of a demurrer to the evidence under the first count of the information, and this complaint necessitates a brief review of the incriminating facts in evidence relied upon to sustain the verdict. The testimony of all the witnesses who testified upon the subject leaves no room for doubt that the statute against setting up and keeping gaming tables and devices, as construed in the decisions of this court, was being openly and flagrantly violated in the room over the pool hall in the Southern Club Saloon Building on the night of December 11, 1909, and for some weeks prior thereto. The tables and paraphernalia, the use of chips and money in the poker games played, the large number of persons permitted to engage in the games and the take-off charged by the house, of which facts there is no dispute, make this case exceptional in the satisfactory evidence by which these facts were proven. The important remaining question is: Was there evidence tending to prove that the defendant set up or kept such gaming table at the time and place as charged in the first count of the information?

It was shown that the witness Walker, who was in charge of one of the tables at the time of the raid, had known the defendant, Cannon, some years before in the state of Kansas, and that the defendant had employed and paid Walker to take charge of the tables and had furnished him money when it was needed to use in the game; that appellant's codefendant, Potts, who was much in evidence around the gambling room

and saloon, had furnished money to appellant to be used when needed in keeping up the games; that the defendant, a few days before the date of the offense charged, had painted the room and made other repairs. In addition to the foregoing, it was in evidence that the defendant was seen around the poker tables in charge of the game, sometimes playing himself, and attending to the take-off which went to the house, or standing around and watching the games.

It must be admitted that the witness whose testimony identified the defendant and connected him directly with the setting up and keeping of the gambling tables as charged was shown to be discredited, not only by his record and character, as disclosed by his own testimony, but because of his admission on the witness stand of his own guilt, and therefore that he was an accomplice in the crime. This feature of the case, as made against the defendant, was given due recognition by the court, and a proper instruction was given to the jury directing them that, on account of the witness having been by his own admission an accomplice in the crime, his testimony should be received with great caution.

It is the peculiar province of the jury, and not of the court, to determine the weight to be given to the testimony of the witnesses, and as the testimony of Walker and the other witnesses for the state, if believed, warranted the finding of the jury, this court will not disturb the verdict. *State v. Richmond*, 186 Mo. 71, 84 S. W. 880; *State v. Smith*, 190 Mo. 706, 90 S. W. 440; *State v. Sassaman*, 214 Mo. 695, 114 S. W. 590.

There was substantial evidence tending to prove the guilt of the defendant, and therefore the court did not err in refusing to direct an acquittal, as requested by the defendant.

We have examined the record carefully, and, finding no prejudicial error therein, the judgment should be affirmed, and it is so ordered.

FERRISS and BROWN, JJ., concur.

STATE v. WALKER.

(Supreme Court of Missouri, Division No. 2.
Feb. 7, 1911.)

1. SEDUCTION (§ 32*)—CRIMINAL RESPONSIBILITY—GOOD REPUTE OF PROSECUTRIX.

In a prosecution for seduction upon promise to marry, the good repute of the prosecutrix is an essential element of the crime.

[Ed. Note.—For other cases, see *Seduction*, Cent. Dig. § 55; Dec. Dig. § 32.*]

2. CRIMINAL LAW (§ 800*)—INSTRUCTIONS.

In a prosecution for seduction under promise to marry, the words "good repute," as used in the evidence and as set forth in instructions, need not be defined, under Rev. St. 1909, § 5321, requiring necessary instructions on ques-

tions of law, as they could not have misled the jury, being plain English words in common use.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. §§ 1808-1810; Dec. Dig. § 800.*]

3. CRIMINAL LAW (§ 956*)—NEW TRIAL—MOTION FOR—AFFIDAVIT—MATTERS NOT INCLUDED IN MOTION.

Where facts in affidavits presented after a motion for new trial were not included in the motion, they cannot be considered in ruling on the motion.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. § 2373; Dec. Dig. § 956.*]

4. CRIMINAL LAW (§ 958*)—NEW TRIAL—MOTION—NECESSARY AFFIDAVIT.

In a prosecution for seduction, the defendant was not entitled to a new trial on the ground of newly discovered evidence set out in the motion, where the motion was not supported by the affidavit of the person relied upon to testify to such evidence.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. § 2401; Dec. Dig. § 958.*]

5. SEDUCTION (§ 44*)—EVIDENCE—ATTENDING CIRCUMSTANCES.

In prosecutions for seduction, the relations of the defendant, with all the attending circumstances leading up to the promise of marriage and alleged seduction, are competent evidence on behalf of the state.

[Ed. Note.—For other cases, see *Seduction*, Cent. Dig. § 78; Dec. Dig. § 44.*]

6. SEDUCTION (§ 44*)—EVIDENCE—COMPETENCY.

In a prosecution for seduction, certain letters of defendant to prosecutrix by which he sought to win her affection held competent evidence against him.

[Ed. Note.—For other cases, see *Seduction*, Cent. Dig. § 78; Dec. Dig. § 44.*]

7. CRIMINAL LAW (§ 829*)—INSTRUCTIONS.

If an instruction correctly declares the law, it is not error to refuse an instruction upon the same subject asked by defendant.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. § 2011; Dec. Dig. § 829.*]

8. SEDUCTION (§ 50*)—INSTRUCTIONS TO JURY—CORROBORATION.

In a prosecution for seduction, an instruction that the promise of marriage must be corroborated by other evidence than the prosecutrix's, which may be "by preparation she may have made for marriage, if any," is not erroneous on the ground that, by the quoted words prosecutrix is allowed to corroborate her own testimony by her self-serving acts.

[Ed. Note.—For other cases, see *Seduction*, Dec. Dig. § 50.*]

Appeal from Circuit Court, Benton County; C. A. Denton, Judge.

Dave Walker was convicted of seduction under promise of marriage, and he appeals. Affirmed.

W. S. Jackson, Henry Lay, and G. W. Barnett, for appellant. E. W. Major, Atty. Gen., and Jno. M. Dawson, Asst. Atty. Gen., for the State.

KENNISH, P. J. The defendant was tried and convicted in the circuit court of Benton county, upon an information charging the offense of the seduction, under promise of marriage, of one Maude C. Yeager, an unmarried female of good repute, under the age of 21

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

years. His punishment was assessed at imprisonment in the penitentiary for a term of two years, and, from the judgment pronounced, he appealed to this court.

At the trial, the evidence for the state tended to prove the following facts: That Maude C. Yeager, the prosecutrix, was an unmarried female of good repute, under 21 years of age, and that she had resided in Benton county since her infancy; that when she was of tender years her mother died, and she was brought up by her relatives, having made her permanent home with her half-sister after she was 10 years of age. She had known the defendant, who was about 8 years her senior, since childhood. In the year 1905 the defendant began waiting on her, as a suitor, and in the year 1906 they became engaged to be married. This engagement, because of a disagreement, was broken, and in January, 1907, the prosecutrix went to the town of Lamonte, not far distant from her home, where she was employed as a domestic. She remained there the most of the time for about two years. While at Lamonte the defendant corresponded with her, and his letters, couched in the most endearing terms, were introduced in evidence. Because of a second disagreement, the correspondence was discontinued. The prosecutrix returned to her home at the town of Edmunson in July, 1908, and thereupon the defendant resumed his attentions to her. On the night of the 15th of February, 1909, the prosecutrix attended a masked ball in the company of another young man who had been paying her some attention since her return from Lamonte. The defendant was present at the ball, and requested a private talk with the prosecutrix, during which he told her of his intentions to get married, and of his love for her. The prosecutrix then promised to cease keeping company with the young man with whom she had attended the ball that evening, and, from that time on, she kept company regularly with the defendant, and with no other suitor. The defendant thereafter constantly waited upon her, calling at her home two or three times a week, and taking her to public gatherings, as is usual in such cases, until July 3, 1909. On Sunday night, April 4, 1909, while calling upon the prosecutrix at her home, the defendant promised to marry her, and the promise was accepted. Thereafter, on the 18th day of April, 1909, under the promise of marriage theretofore made, and at defendant's solicitations, the prosecutrix yielded to him, and as a result of the intercourse which followed she became pregnant, of which fact she informed the defendant about the 1st of July, following. On the 3d day of July the defendant took her to the town of Cole Camp, near by, where she had secured employment. When she informed the defendant of her condition, she urged the necessity of their early marriage, and he said he would begin to build

a house the next week, and that she need not "worry about that at all." While at Cole Camp, not hearing from the defendant, she wrote several times, and sought to communicate with him by telephone, but failed to reach him or receive any response to her letters. On the 13th day of August, 1909, the defendant married another woman. The prosecutrix testified that she had made preparation to get married, such as buying some furniture, and in this she was corroborated by other testimony. The defendant was a witness in his own behalf, and denied that he had ever promised to marry the prosecuting witness. Evidence was also introduced tending to prove that the prosecuting witness was not of good repute, and that she was over 21 years of age at the time of the alleged offense.

1. Error is assigned in the failure of the court to give an instruction to the jury defining "good repute," as an element of the offense charged. A separate instruction was not given on the subject of "good repute," neither was such an instruction asked by the defendant. In the general instruction numbered 1, given by the court of its own motion, the jury were instructed that, to authorize a conviction they must believe and find "that Maude C. Yeager was, at the time of the seduction, if any, a woman of good repute in the community in which she lived and among those who knew her." The good repute of the prosecutrix is clearly an essential element of the crime charged in this case; an element necessary to be found by the jury before they were authorized to return a verdict of guilty against the defendant. It is provided by section 5231, Rev. St. 1909, that: "The court must instruct the jury in writing upon all questions of law arising in the case which are necessary for their information in giving their verdict." It will be observed that the statute requires instructions only upon such questions of law arising in the case as are necessary for the information of the jury. The words "good repute," as used in the evidence, and as set forth in instruction numbered 1, as an element of the offense charged, could not have been misunderstood by the jury. Witnesses on the one side testified that the reputation of the prosecutrix for virtue and chastity was good, while those on the other side said it was bad. These words are not technical in their meaning, but are words well understood and in common use. The rule applicable in such cases, as concisely stated in the thirteenth syllabus of the case of *State v. Sattley*, 131 Mo. 464, 33 S. W. 41, is: "That ordinary, plain English words, used in instructions, are not required to be defined." See, also, *State v. Gregory*, 170 Mo. 598, 71 S. W. 170; 12 Cyc. 613. As to the issue of the good repute of the prosecutrix, instruction numbered 1 in this case is identical with an instruction given in the case of *State v.*

Meals, 184 Mo. 244, 256, 83 S. W. 442, 446, and this court, speaking of the instruction in that case, said that it "carefully, fully and expressly requires the jury to find every essential fact necessary to constitute the offense defined by the statute." The same instruction given in the Meals Case is referred to with approval by this court in the later case of *State v. Fogg*, 206 Mo., loc. cit. 715, 105 S. W. 618. The prosecutions in both the Meals and Fogg Cases were under the same statute upon which the information was based in the case before us. We, therefore, hold that appellant's first assignment of error is without merit.

2. It is urged that the court erred in refusing to grant a new trial on the ground of newly discovered evidence. This complaint is based upon the eighth ground of the motion for a new trial, in which it is alleged that the prosecutrix, prior to the date of the offense charged, was guilty of specific acts of unchastity with one John Carrico, at the town of Lamonte. It is further alleged that the defendant was unable to obtain the affidavit of the said Carrico in time to be filed with the motion for a new trial, but that defendant believed he could procure such affidavit of the said Carrico to the facts stated, in time to be filed in support of the motion at the March term, 1910, of that court. The cause was continued upon the motion for a new trial until the March term, but the defendant failed to file the affidavit of Carrico in support of the alleged newly discovered evidence. Affidavits were filed in which the affiants purported to state what Carrico had said to them relative to the alleged misconduct of the prosecutrix with him, and other affidavits were filed as to specific acts of misconduct by the prosecutrix, which were not included as newly discovered evidence in the motion for a new trial. It is needless to discuss the affidavits last mentioned, for the reason that if the facts contained therein were not included in the motion for a new trial, then manifestly the affidavits could not be considered by the court in its ruling upon the motion. The defendant was not entitled to a new trial on the ground of the newly discovered evidence set out in the motion, because the motion was not supported by the affidavit of the witness Carrico, who, it was alleged, would testify to the newly discovered facts upon which a new trial was asked. In the case of *State v. McCollough*, 171 Mo., loc. cit. 575, 71 S. W. 1003, this court said: "The contention that is most earnestly urged is the error of the court in refusing to grant a new trial upon the ground of newly discovered evidence. As to this contention, the motion for a new trial is only supported by the affidavit of the defendant. It falls in an essential particular to conform with the long and well-settled rule announced by this court, in this, that the affidavits of the witnesses who it is alleged will testify to the newly discover-

ed facts must "accompany the motion for a new trial." *State v. Bowman*, 161 Mo., loc. cit. 94, 62 S. W. 996.

3. It is disclosed by the evidence that defendant began paying his attentions to the prosecutrix, as a suitor, in 1905; that after going with her for about six months, a disagreement caused him to cease his attentions to her for about an equal period; that he then resumed his attentions for about six months, during which time they became engaged to be married; that soon thereafter another disagreement resulted in breaking the engagement, and another cessation of their association until January, 1907. At the date last mentioned, prosecutrix went to Lamonte, about 50 miles distant, at which place she had secured employment, and for about six months thereafter the defendant corresponded with her, writing letters which would lead her to believe that he entertained a deep affection for her. These letters did not, in any manner, refer to a promise of marriage. They were introduced in evidence at the trial, over the objection of the defendant, and the ruling of the court, in so admitting them, is assigned as error. From this statement it appears that at the time of this correspondence no engagement existed, and although the correspondence had ceased for some time before the prosecutrix returned to her home, the defendant, immediately upon her return, renewed his attentions to her, and, shortly thereafter, his promise of marriage, under which he accomplished her undoing. It is the recognized law, in seduction cases, that the relations of the defendant and the prosecutrix, together with all the attending circumstances leading up to the promise of marriage and alleged seduction, are always competent evidence on behalf of the state. We know of no principle of law, nor has our attention been called to any authority, which renders these communications, by which the defendant sought to win the heart and love of the prosecutrix, inadmissible against him on a trial for seduction. His attentions to her before she went to Lamonte were admitted without objection. Why were not the letters admissible for the same reason? We think they were admissible, and that the court properly so ruled. *Faulkner v. State* (Tex. Cr. App.) 109 S. W. 199. A case of the character of that now before us is not to be disposed of on the principles of law applicable to the rights of parties to an ordinary contract, such as an abandonment by mutual consent, or the merger of all antecedent negotiations into the terms of the contract. The abiding character of the love and confidence implied in an engagement of marriage is a fact which is fundamental in human nature and which does not readily yield to disagreements or even broken engagements, a fact of which the defendant in this case was well aware and quick to take advantage.

4. Appellant's fourth and fifth assignments

of error may properly be treated together. In the fourth assignment, complaint is made of the ruling of the court in refusing to give appellant's instruction upon the subject of the corroboration of the evidence of the prosecutrix, required by law, as to the promise of marriage, and the fifth assignment is based upon alleged error in the giving of instruction numbered 2 by the court, of its own motion, upon the same subject. If instruction numbered 2 is a correct declaration of the law upon the subject of the necessary corroboration of the prosecutrix, then it is well settled that the court was not in error in refusing an instruction, upon the same subject, asked by the defendant. *State v. Fogg*, 206 Mo. 696, 105 S. W. 618; *State v. Sassaman*, 214 Mo. 695, 114 S. W. 590; *State v. Wooley*, 215 Mo. 620, 115 S. W. 417.

It is not necessary to set out the whole of said instruction numbered 2. The part of which complaint is made is the following: "The jury are further instructed that they cannot find that there was a promise of marriage upon the evidence of Maude Yeager alone; but under the law her evidence as to the promise of marriage must be corroborated; that is, confirmed, either by direct and positive evidence, as to the promise of marriage, or by preparation which the prosecutrix may have made for marriage, if any, or by facts and circumstances which usually attend the engagement of marriage." The particular clause in that part of the instruction quoted, of which appellant specifically complains, is "or by preparation which the prosecutrix may have made for marriage, if any." It is contended that if the corroboration in the clause complained of be sufficient under the statute, then it is always within the power of the prosecutrix, by self-serving acts, to supply the necessary corroboration of her own testimony as to the promise of marriage.

In the recent case of *State v. Fogg*, 206 Mo. 696, 105 S. W. 618, a case cited by appellant, this court had under consideration, as in the case at bar, a complaint of the appellant that the court erred in failing to give an instruction, at the request of the defendant, upon the subject of the corroboration of the prosecutrix, necessary under the law, as to the promise of marriage. Passing upon the question thus before it, this court, at page 709, said: "In our opinion there was no error in the refusal of this instruction. The subject of the necessity of the corroboration of the prosecutrix in order to warrant a conviction was sufficiently covered by instruction numbered 4, in which the court told the jury that 'you cannot find that the promise of marriage was made by the defendant to the prosecutrix on the testimony of the prosecutrix alone; to warrant you in finding that a promise of marriage was made by the defendant, the testimony of the pros-

ecutrix as to such promise of marriage must be corroborated by other and independent testimony. This corroboration may be by the proof of statements of defendant in relation thereto, if any were made; preparation which the prosecutrix may have made for marriage, if any; or by the continuous courtship for such a period of time as in the course of ordinary affairs an engagement of marriage between the defendant and prosecutrix would be presumed to exist." The court further calls attention in that case to the fact that another instruction told the jury that, "to support the charge of such promise of marriage, it is necessary that the evidence of the prosecutrix be supported by that of the witnesses or by corroboration of acts or circumstances which convince your minds of the truth of the testimony in that respect." It will be found that instruction numbered 1, in the case in hand, contains a counterpart of that referred to by the court in the *Fogg* Case, as being a part of instruction numbered 7.

As this court has thus so recently passed upon and approved an instruction, of which the instruction in this case, upon the point under consideration, is an exact copy, we are not disposed to enter upon a discussion as to whether or not it is theoretically a correct exposition of the law upon the subject of the corroboration of the prosecutrix.

Finding no prejudicial error in the record, the judgment should be affirmed. It is so ordered.

FERRISS, J., concurs. BROWN, J., concurs in the result.

STATE v. THORNTON.

(Supreme Court of Missouri, Division No. 2.
Feb. 7, 1911.)

PARENT AND CHILD (§ 17*)—NEGLECT TO SUPPORT — CRIMINAL PROSECUTION — "NECESSARY."

Rev. St. 1909, § 4492, provides that if any father without lawful excuse neglects to provide such infant with "necessary" food, etc., he shall be punished. Defendant and his wife separated, the wife going to her father's house, taking with her one child of the marriage, and another was born at the house of the wife's father, and both the children were there supplied with all necessary food, etc. Defendant after the separation contributed nothing to their support. Held, that "necessary" food, clothing, and lodging, as used in the statute, is food, etc., which the infant actually needed at the time; and that as the infant children were receiving necessary food, etc., defendant was not guilty.

[Ed. Note.—For other cases, see Parent and Child, Cent. Dig. §§ 176-181; Dec. Dig. § 17.*]

For other definitions, see Words and Phrases, vol. 5, pp. 4705-4710; vol. 8, p. 7729.]

Appeal from Circuit Court, Boone County; N. D. Thurmond, Judge.

Turner S. Thornton was convicted for re-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep't Indexes

fusing and neglecting to provide necessary food, clothing, and lodging for his infant children, and he appeals. Reversed, and defendant ordered discharged.

McBaine & Clark and W. H. Rothwell, for appellant. E. W. Major, Atty. Gen., and Jno. M. Dawson, Asst. Atty. Gen., for the State.

FERRISS, J. Defendant was convicted at the April term, 1910, of the circuit court of Boone county, upon an information which reads as follows: "L. T. Searcy, prosecuting attorney within and for the county of Boone, in the state of Missouri, informs the court that Turner S. Thornton, on the 2nd day of November, 1909, at the said county of Boone, and state of Missouri, being then and there the father of two infant children, born in lawful wedlock, under the age of sixteen years, to wit, Margarite Thornton, aged two years, and Rudolph Thornton, aged five months, feloniously, unlawfully, willfully and without lawful excuse, did refuse and neglect to provide for said infant children necessary food, clothing and lodging, and the said Turner S. Thornton, in the county and state aforesaid, from the second day of November, 1909, to the 28th day of February, 1910, and thence hitherto, did feloniously, unlawfully, willfully and without lawful excuse refuse and neglect to provide necessary food, clothing and lodging for his said infant children aforesaid, against the peace and dignity of the state." This information is based upon section 4492, Rev. St. 1909, which provides: "If any mother of any infant child, under the age of sixteen years, or any father of any such infant child, born in or legitimated by lawful wedlock, or any person who has adopted any such infant child, or any master or mistress of an apprentice, under such age, or other person having the legal care and control of any such infant shall, without lawful excuse refuse or neglect to provide for such infant or apprentice necessary food, clothing or lodging, or shall unlawfully and purposely assault such infant or apprentice, whereby his life shall be endangered or his health shall have been or shall be likely to be permanently injured, the person so offending shall, upon conviction, be punished by imprisonment in the penitentiary not exceeding three years, or by imprisonment in the county jail not exceeding one year, or by a fine of not more than one thousand dollars, or by both such fine and imprisonment."

The following facts are practically conceded: The defendant, Turner S. Thornton, when about 19 years old, married Metta Baldwin on October 21, 1907. The couple lived together until February, 1909, when they separated, the wife returning to her father's house, where she continued to live up to the date of the trial; the husband returning to the home of his mother, and remaining there. The wife took with her to her father's home the one child which had been

born of the union, a girl, Margarite. A second child was born to her in her father's house in September, 1909. The children were supplied by the wife's father, up to the date of the trial, with all necessary food, clothing, and lodging, and, as testified by the mother, "were well taken care of." From and after the separation, in February, 1909, the defendant contributed nothing to the support of the children. Defendant was an average laborer, earning about \$1 a day. He on one occasion sent for the baby, when it was three or four months old, but was refused. He made some attempt to meet his wife and her father to talk over matters with a view to an arrangement about the children, but the effort failed. There was some evidence that defendant and his mother wished to take the girl to live with him and his mother. The evidence for the state shows that the wife refused to give up the children. It is evident from the testimony that the defendant refused to support the children so long as they were retained in the custody of the mother. It is equally clear that the mother and her father did not propose to recognize any right in the father except the right to contribute to the support of the children, the mother to retain the exclusive custody and control.

Whether this conviction can be sustained depends upon the construction of section 4492, set out above. If, as contended by the defendant, it is a crime to fail to provide food, clothing, and lodging, only when they are actually lacking, and the failure to so provide shall endanger the life or health of the infant child, then it is clear that the evidence does not sustain the charge. The state proved that the children were amply supplied with food, clothing and lodging by the wife's father, who seems to have been in full sympathy with his daughter's purpose to keep the children in his household, and entirely away from their father. If, on the other hand, as contended for by the state, it is a crime under this statute for the father to refuse to supply food, clothing, and lodging, regardless whether they are supplied from other sources, and regardless whether life or health is endangered, if mere failure to furnish support is a crime, then the evidence sustains the charge. The defendant admits that he did not support the children.

The statute penalizes the refusal of the father to supply necessary food, etc. Under the law pertaining to necessities, a necessary article is one which the party actually needs. It is not enough to show that the article is per se classed as necessary, such as food and clothing. It must also be actually needed at the time. The law will imply and enforce a contract by an infant to pay for necessities out of his estate. This because "otherwise he might suffer for the want of them." Parsons on Contracts (9th Ed.) p. 355. Or, as another writer puts it, "based on the necessity of their situation." Tyler on Infancy, p. 107. The fundamental principle of the

law of infancy is this: It is essential to the welfare of the state that infants be fed, clothed, lodged, and educated; and also that the state shall not be burdened with their care. So long as infants are properly cared for, the state is not interested as to the source from whence the supplies come. If an infant has an estate, the law will compel him to support himself out of his estate, provided he is not otherwise supplied; but the law will not impose upon his estate a contract to pay for articles which he does not in point of fact need, because he is already supplied, although the articles may be per se regarded as necessary to his proper nurture. So with regard to the custody of minor children, this belongs primarily to the father, but if the welfare of the child requires it, the court will award the custody to the mother; the primary consideration being the good of the child. We apprehend that the enactment of the penal statute in question was inspired by the same idea, namely, the welfare of the child, and upon the grounds of public policy adverted to above.

The Legislature did not enact this law for the purpose of punishing parents for failure to do their duty as such. Such a purpose would smack too strongly of paternal government. The only legitimate object of the statute is to secure to infants, who are in future to become citizens of the state, proper care; such care as is necessary to protect their lives and health. In other words, to prevent destitution. It follows from the foregoing that if infant children are receiving necessary food, clothing, and lodging from any source, there is no occasion for the state to interfere by penal law or otherwise. Construing section 4492 in the light of the above reasoning, and as applied to the facts in this case, it denounces a penalty for refusal or neglect to supply an infant child with such food, clothing, and lodging as it actually needs. Upon the showing made by the evidence for the state, the instruction (No. 1) asked by the defendant at the close of the state's case should have been given. Cases analogous to this have been passed upon in Georgia and Kentucky. The statute construed by the Supreme Court of Georgia is as follows: "If any father shall willfully and voluntarily abandon his child, leaving it in a dependent and destitute condition, he shall be guilty of a misdemeanor." Code Ga. 1895, vol. 3, § 114.

The case of *Dalton v. State*, 118 Ga. 196, 44 S. E. 977, reversed a conviction under this statute. The court said: "The evidence adduced on the trial showed that the father was willing for the wife to leave him and return to her relatives. The child, which she took with her, was between four and five

years of age, and was, of course, dependent. The evidence, however, does not disclose that the child was destitute at the time of the abandonment, or had even become destitute up to the time of the trial. So the case turns upon the question whether the father is guilty if he fails to provide for his child after the separation, even though the child may be abundantly supplied with all necessities of life. While it is true that a father is under a moral and legal obligation to support his minor child, it is not also true that, if he fails to do his duty, he may be convicted under the above section of the Code although the child is fully provided for by others. The father cannot be convicted unless it be shown that the child was not only dependent, but in a destitute condition. If it is not destitute, but is amply supplied with all necessities, the father cannot be convicted. It is true he may have violated his moral and legal obligations in abandoning the child at all; but, as criminal statutes must be construed strictly, we are constrained to give this statute this interpretation."

The Kentucky statute provides: "A parent or other person having the care or custody, for nurture or education, of a child under six years of age, who willfully deserts the child in a manner showing a reckless disregard to life or health, and with the intention wholly to abandon it, is punishable by imprisonment in the penitentiary for not more than three years." Section 329, Ky. St. 1894.

Passing upon this statute in *Richie v. Commonwealth*, 64 S. W. 979, the Supreme Court of Kentucky found the fact to be that the parents had separated, leaving one child, about one year old, in the care and custody of its mother and grandmother, who lived together, and that after the separation it was carefully provided for by them, but that the accused had contributed nothing to its support. The court said: "Certainly, it cannot be claimed that leaving a child less than one year old in the custody and care of its own mother shows a reckless disregard either to its life or health. The trial judge seems to have proceeded upon the idea that the mere failure to provide for the support of a child under six years of age rendered the defendant liable to the penalty denounced by the statute. There is no testimony in the record conducing to show the guilt of the accused, and we think the circuit judge erred in not directing the jury to find the defendant not guilty."

The views above expressed by us dispose of the case, and the discussion of other questions raised is unnecessary.

The judgment is reversed, and the defendant ordered to be discharged.

KENNISH, P. J., and BROWN, J., concur.

STATE v. WARREN.

(Supreme Court of Missouri. Division No. 2.
Feb. 7, 1911.)

1. RAPE (§ 20*)—INFORMATION—SUFFICIENCY.
An information for rape *held* sufficient in form and substance.

[Ed. Note.—For other cases, see Rape, Dec. Dig. § 20.*]

2. RAPE (§ 12*)—EVIDENCE—SUFFICIENCY.

In a prosecution for rape, the state must not only prove that prosecutrix was so mentally deranged as to be incapable of understanding the moral nature of the act, or of giving assent thereto, but must also show that the defendant knew of and took advantage of this mental infirmity or that he intended to have carnal knowledge by force, if necessary, and regardless of her consent.

[Ed. Note.—For other cases, see Rape, Cent. Dig. § 11; Dec. Dig. § 12.*]

3. RAPE (§ 12*)—ELEMENTS—MENTAL INFIRMITY OF PROSECUTRIX.

Carnal intercourse with a woman, incapable from mental infirmity of giving consent, is rape, unless the man is ignorant of the infirmity and its extent, believes he has her consent, and has no intention to have intercourse without her consent.

[Ed. Note.—For other cases, see Rape, Cent. Dig. § 11; Dec. Dig. § 12.*]

4. RAPE (§ 36*) — EVIDENCE — BURDEN OF PROOF.

Where a woman yields an apparent consent to the act of intercourse, the burden is on the state, in a prosecution for rape, to show that she was incapable because of mental disease, of assenting to or dissenting from the act, and that the defendant knew of such incapacity.

[Ed. Note.—For other cases, see Rape, Cent. Dig. § 47; Dec. Dig. § 36.*]

5. RAPE (§ 12*)—ELEMENT—MENTAL CAPACITY OF PROSECUTRIX.

In a prosecution for rape upon a woman mentally incapable of assenting to the act of intercourse, it is not enough to show merely that she was weak-minded and that the defendant knew that fact.

[Ed. Note.—For other cases, see Rape, Cent. Dig. § 11; Dec. Dig. § 12.*]

6. RAPE (§ 51*)—EVIDENCE—SUFFICIENCY.

In a prosecution for rape, evidence *held* insufficient to show that defendant knew that prosecutrix was mentally incapable of giving her consent to the act of intercourse.

[Ed. Note.—For other cases, see Rape, Dec. Dig. § 51.*]

7. RAPE (§ 12*) — ELEMENTS — INCAPACITY OF PROSECUTRIX.

Mere insanity of a woman, even if known, does not make an act of intercourse with her rape, but, to have that effect, the insanity must totally destroy the capacity to consent.

[Ed. Note.—For other cases, see Rape, Cent. Dig. § 11; Dec. Dig. § 12.*]

8. RAPE (§ 12*) — ELEMENTS — INCAPACITY OF PROSECUTRIX.

To make an act of intercourse with a woman having no capacity to consent thereto rape, it is not sufficient that her insanity was of such a character as to be readily recognized by a person of ordinary intelligence in conversation with her, but the defendant must have known of her incapacity.

[Ed. Note.—For other cases, see Rape, Cent. Dig. § 11; Dec. Dig. § 12.*]

Appeal from Circuit Court, Newton County; F. C. Johnston, Judge.

H. J. Warren was convicted of rape, and he appeals. Reversed and remanded.

Geo. R. Clay and R. H. Davis, for appellant. E. W. Major, Atty. Gen., and John M. Dawson, Asst. Atty. Gen., for the State.

FERRISS, J. The defendant was convicted in the circuit court of Newton county of the crime of rape, committed November 7, 1909, upon the person of Narcissa Foster, a married woman, and his punishment fixed at six years in the penitentiary. The trial proceeded upon the following information: "Now comes Albert D. Bennett, prosecuting attorney within and for the county of Newton, in the state of Missouri, under his oath of office, and upon his information and belief informs the court, and presents and charges to the court, that H. J. Warren, on the 7th day of November, A. D. 1909, at the county of Newton and state of Missouri, in and upon one Narcissa Isabella Foster, a female, unlawfully, violently and feloniously did make an assault, and her, the said Narcissa Isabella Foster, then and there unlawfully, forcibly and against her will, feloniously did ravish and carnally know, contrary to the form of the statute in such case made and provided, and against the peace and dignity of the state."

The evidence for the state preserved in the record shows that at the time of the trial, in March, 1910, the prosecutrix was 19 years old, had been married over 2 years, had been in an insane asylum once before she was married and once afterwards, three or four months at a time, the last time being six or eight months prior to the alleged rape. Her mind, according to her husband's testimony, "has been fairly well since we were married." The maternal grandmother and one maternal aunt were in the asylum at the time of the trial, and had been there 12 years. The following question was asked of her father: "I will ask you what has been her mental condition?" A. "Well, it has been bad. I believe this is the third time she has been this way." Also, Q. "And she was discharged as cured by the asylum authorities?" A. "I suppose so." Prosecutrix had had no children. On November 3, 1909, prosecutrix paid a visit to the home of her parents, whom she had not seen for a year and a half, going there by train, alone. When she left her husband on this occasion there was nothing unusual in her condition. She was talking a good deal about going home. She stayed at her father's house Thursday, Friday, and Saturday, and was in a normal condition during this time, save that on Saturday, when she left to meet her husband, as she claimed, at Neosho, "she seemed a little bit restless." During this visit she seemed to be in average health. There had not been anything unusual in the letters which she frequently wrote home, ex-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

cept that her last letters showed nervousness in the handwriting. On the last night of her visit she seemed a little restless, and wanted to sit up and talk, but there was nothing unusual in her manner of conversation. Her father and mother drove her to the railway station in a buggy on Saturday, November 6th, bought her a ticket to Neosho; and put her on the train which left the station at 5 p. m., and she made the journey alone. On November 3d the husband left his wife at home, and went to Mosely Mines, it being then understood that she was to visit at her father's until the Saturday following. The train was due at Neosho about 12:30 Sunday morning, November 7th. Whether the train was late does not appear. At about 2 o'clock that morning the prosecutrix appeared at the Central Hotel, in Neosho, with the defendant, who registered his own name. The proprietor, J. B. Loher, asked him, "Is this your wife?" He answered, "Yes." Then, at Loher's request, defendant added to his name the words "and wife." Upon it being stated that he registered from Springfield, the woman said, "I am not from there," or something of that kind. The defendant told her, "That is all right." The following testimony, in addition to the above, was given by Loher: "Q. What was her actions at that time? A. Well, she was talking pretty loud when she came in; kept talking loud along. I was rather under the impression she was full of dope of some kind, cocaine, or something of that kind, the way she was talking. Q. Did the defendant talk much? A. No; he didn't have much to say. Q. How did she talk, as to whether she was talking loud or low? A. She talked loud. Q. State whether or not she was talking rapidly or slowly? A. She was talking pretty rapidly. Q. Then, what did you do after they registered? A. I took them to room No. 8. Q. State whether or not they both went in the room? A. Yes, sir. Q. How many beds in that room? A. Just one. Q. You may state to the jury what happened, if anything that you knew about, whether or not as to the noise? A. I was downstairs, and I could hear them talking, especially her. I could not hear him very much. Once in a while I could hear him say something, but could not distinguish what they were saying. They kept it up all the time; and about 6 o'clock in the morning, they kept it up so, I was upstairs, and I didn't know that she had gone out of the room, but she came running upstairs. She had got out, and went downstairs, and I think went to a drug store. She came back and went to the room. I followed them right to the room, and opened the door, and he was in bed. I told him I wanted him to get up and pay his bill, and get out of there; that he was creating too much disturbance. He said he would get up after a bit. I said, 'You will get up right now; I will stay right here until you get up and pay your bill and get out of here.'

So he got up. Q. Was there any bed made down, or anything? A. No, sir." At the time they left the hotel, Loher says, "she was talking wild all the time. I can't remember what she did say; she was talking loud." There was no other material testimony in chief of eyewitnesses introduced by the state as to the conduct or conversation of prosecutrix prior to 6 o'clock, Sunday morning, November 7th.

The state's testimony in chief showed, further, that on Sunday, the 7th, at 8 or 9 o'clock, the prosecutrix was found wandering on the streets of Neosho in a state of mental aberration. The sheriff testified that she told him of being robbed on the train, and that he thought her crazy; that he sent for the city marshal, and, upon what she and others said, arrested defendant and put him in jail; that she talked wildly, saying her husband was a fugitive from justice and a deserter from the army, and that his brother killed a man. He could not remember all she said.

John Williams testified that he met her on the street. She was walking along, talking or making some kind of a noise, and stated to him that she was hunting for something to eat. She said she had money, and showed him a quarter, and then said, "I don't want to talk to you at all. I have already laid my case before the detectives, and the detectives are working on it." The witness thought she was crazy.

B. J. Perriman, city marshal, testified he saw prosecutrix on the street, and a crowd there laughing and amusing themselves at her talk. She was "talking kind of 'bughousy,' I would call it." She denied to this witness that the defendant had had intercourse with her.

A. J. Thomas, deputy sheriff, testified as follows: "Q. I will ask you if you saw Mrs. Foster? A. The first time I seen her was that Sunday, down at a house on the corner of Kohler and Mill street. Q. What was she doing? A. She was laying down the first time I seen her. Q. Where was she lying? A. On the little porch. Q. Was any one living there? A. Yes, sir; some people lived there at that time. Q. What time of day was that? A. I am not sure, but I think in the morning—just a while before noon. Q. Did you talk any with her? A. Yes, sir. Q. While she was lying there? A. Yes, sir. Q. State what her attitude was—her condition, so far as you can describe it? A. She seemed to be in a very distressing condition mentally and physically, both. She said she had been robbed. Somebody had taken—her statement was—over four dollars from her. And I asked her who it was done it, and she said she didn't know, but she said she thought it was the Parker boys. I said, 'Where are the Parker boys?' She says, 'They live out in the country somewhere.' Then she said somebody gave her some money. She said her father gave her

some money. I asked her how much he gave her, and she said \$4.50, I believe it was. I asked her if they taken it all, and she said, I think, they taken \$3.50; and I talked with her quite a while, and went to a lady's house and brung her some water. She complained about being thirsty, and I rather thought at the time that she had taken dope, cocaine, or something of that kind; and I told one or two parties there at the time I thought that was what was the matter with her; and I asked her if there was any arrangements made to get her out to where she wanted to go. She told me she wanted to go out to her brother-in-law's, George Brand."

The prosecutrix was examined by two physicians on Sunday and Monday. Each testified that in his opinion, judging from her talk and appearance, she was crazy. One doctor who examined her on Sunday, called it, according to the transcript, "maniacal or delusive" insanity. He said that she had fever, which he suspected was typhoid, and that such disease is sometimes accompanied by mental derangement. In his opinion, prosecutrix did not have sufficient intelligence to comprehend and consent to sexual intercourse. This question was asked him: "From the condition you observed on Sunday, and from your experience as a physician, and in your opinion, what would you say as to her condition on Saturday prior to that?" Answer: "In my opinion it was not materially different from the condition Sunday or Monday." He further testified that he thought her condition would impress an average layman, who talked with her, with the idea that she was insane. Q. "You are not prepared to say that, 24 hours previous, or 10 or 12 hours previous, her condition was of the kind you have described?" A. "No, sir; I could not say it was."

Doctor Roseberry, county physician, who examined the prosecutrix on Monday, November 8th, testified that she was insane at that time, and was apparently suffering from "the maniacal form of delusional insanity, where all the mental activities are excited." He testified that she talked about being robbed, and said that her husband was a fugitive from justice. Witness thought she might consent to sexual intercourse, but he did not think she would realize what she was doing, or have a conception of the moral wrong. He knew nothing of her condition on Saturday save by inference. (The witness did not state what the inference would be.)

The prosecutrix, after submitting to the examinations above referred to, was removed to an insane asylum, and did not testify in this case.

Several witnesses for the state testified that the defendant admitted that he had intercourse with the prosecutrix at the hotel, but that he also said at the same time that he did not think she was crazy. One of the state's witnesses testified that the defendant, in this conversation, denied having had

intercourse with the prosecutrix. The evidence shows that this unfortunate woman was a church member, and possessed an unblemished character. At the close of the case for the state the defendant asked the court to instruct the jury that under the law and the evidence they should find the defendant not guilty. The request was refused, defendant excepting to the court's ruling.

For the defense, Ivey Ritchey, a girl employed in the hotel, testified the following: "Q. What room of that hotel did you occupy? A. No. 12. Q. Is No. 12 and No. 8 adjoining rooms? A. No; my room was across the hall. Q. Was you in a position that night that you could know or hear, and know the actions of this defendant, Warren, and Mrs. Foster? A. No; I could not see them, but I could hear them. Q. Did you see them at any time? A. Yes, sir. Q. Tell the jury how you saw them? A. I was passing the door as I went down to work, and the door was open and I saw them. Q. What were the positions of those parties on that night? A. He was sitting on the side of the bed, and she was standing before the mirror. Q. Later on did you see her again? A. Yes, sir; about 6 o'clock in the morning I saw her. Q. What was her position at that time? A. She was in the office, wanting to know the way to a drug store. Q. Did you see her at any time when she was in room No. 8 that evening, with a pillow, lying on the floor? A. No; she was standing before the mirror. Q. What, if anything, do you know, either from their conversation or their actions, about the defendant having intercourse with Mrs. Foster that night? A. In my opinion, she would not let him. Q. Did you hear a conversation there? A. Yes, sir. Q. Tell the jury what that conversation was? A. She wanted him to go to Springfield, and they would get married. She was a married lady, I heard, and she wanted him to go to Springfield, and she would get a divorce and be married in a short time, and he, of course, said he didn't want to, and said that he didn't have means to support a wife, and he didn't want to get married then any way; and she said she would help him if he would go with her to Springfield, but he said he would not go; and that is about all, of course, that I heard." This witness, on re-examination, testified: "Q. You saw this woman there in the office? A. Yes, sir. Q. And saw her in her room? A. Yes, sir. Q. And heard her conversation there? A. Yes, sir. Q. I will ask you if you saw anything that indicated that she was insane? A. No."

When the prosecutrix reached Neosho, Sunday morning, according to the testimony for defendant, she met at the station the defendant, who up to that time was an entire stranger to her; also some other men. One of these, Fred Huddleston, testified for defendant as follows: "Q. Are you acquainted with Mr. Warren? A. Yes, sir. Q. Was you acquainted with him on the 6th day of

November, 1909? A. Yes, sir. Q. What business was he engaged in at that time? A. He wasn't doing anything then. Q. What had he been engaged in? A. He had been operator at the Frisco. Q. Do you remember the occasion of this Mrs. Foster coming in on the train? A. Yes, sir. Q. You saw her that night? A. Yes, sir. Q. And saw Warren? A. Yes, sir. Q. State to the jury whether there was anything in the demeanor of Mrs. Foster over there at the station, or elsewhere, that indicated to you that she was insane? A. No, sir; there was not." On cross-examination, the witness testified: "Q. Now, then, you remember her coming in? A. Yes, sir. Q. Did she ride on the bus? A. No, sir. Q. What did she do? A. Went into the depot. Q. Did you talk with this woman any? A. A little; yes, sir. I asked her if she wanted to ride up town. She said, 'No'; she wanted to go to the Mosely mines. Q. That is all the conversation you had or heard her say? A. Yes, sir."

Henry McKnight, another witness for defendant, testified: "Q. I will ask you if you met this Mrs. Foster on Saturday night, November the 6th? A. Yes, sir. Q. I will ask you if you talked with her? A. Yes, sir; I did. Q. I will ask you to state to the jury if you saw anything in her conduct or in her conversation that would indicate to you that she was crazy? A. There was not. Q. Tell what she said and did. A. She asked me if I knew where Mosely mines were. I told her I did, and she wanted to go out to Mosely mines, and wanted to know how far it was out there. I don't remember just what all she did say now. She never said anything that I would take her to be insane, or anything like that. Q. Didn't she want you to take her out to Mosely? A. Yes, sir. Q. I will ask you if you didn't get a rig for that purpose? A. No, sir. Q. I will ask you if you didn't make arrangements to take her out there? A. I did make arrangements. Q. That was at her request? A. Yes, sir." On cross-examination, the witness thus testified: "Q. That was done at the station there? A. Yes, sir. Q. Was you one of the two boys there that the conductor told you to let her alone, that she was crazy? A. No, sir. Q. Did you see her when she first got off? A. No, sir. Q. You are not in the livery business? A. No, sir. Q. And you was going to take her out—hire a livery rig and take her out? A. Yes, sir. Q. Why didn't you take her? A. The other fellows beat us to it. Q. Who was going to help you? A. A fellow named Smith was going with me. Q. Is that the Smith that just got off the stand here? A. I don't know. Q. A dark complexioned fellow? A. A fellow that works on the train—cooks; he was at that time cooking on a dining car. Q. He was going to help you take her out, and still neither of you were in the livery business? You can stand aside."

Another witness, Clarence Smith, who

came in on the same train with the prosecutrix, testified for defendant: "Q. What was her mental condition at that time—did you observe anything that would indicate to you that she was insane? A. She seemed like a very sensible woman to me. She didn't seem crazy to me. Q. There was nothing in her demeanor or conduct that would indicate that she was insane? A. No, sir." On cross-examination, he thus testified: "Q. Isn't it a fact she was talking very loudly and buying a lapful of oranges? A. I came to notice her; it was between Granby and Neosho, and she had a basket, and I was walking back through the car, and sat down. Q. By her? A. No, sir. And she began to say that somebody had stole her stuff what she had to eat. Q. Did you think somebody had? A. I didn't know. Q. So she was saying right on the train, where there was a good many people, that somebody was stealing what she had to eat, and you think she was sane? A. That is all I heard her say. Q. You are basing your opinion on what she said right there on the train where all these people was, and on that you are basing your opinion that she was sane? A. Yes, sir."

The defendant testified that he never saw the woman before that night at the station, and that he took her to the hotel at her request "to take her up there to a room." He admitted that he stayed with her in the room from 2:30 a. m., to 6 a. m., but denied having intercourse with her.

J. B. Lohr, called in rebuttal, testified: "Q. Was there anything to indicate to you in her appearance that she was insane at the time she entered that room? A. Well, I didn't have any thought of her being insane. The way she was talking and acting I thought she had taken some kind of dope. Q. She didn't impress you as an insane person? A. I didn't give that a thought. Q. She didn't act rational? A. No, sir; she was talking very loud and fast. Q. And at the time you drove them out she still was not acting rational? A. I couldn't keep her still at all."

The following instructions, among others, were given by the court:

"No. 1. The court instructs the jury that if you find and believe from the evidence in this case, beyond a reasonable doubt, that the defendant, H. J. Warren, at the county of Newton, state of Missouri, on or about the 7th day of November, 1909, did willfully and feloniously have sexual intercourse with one Narcissa Isabella Foster, and if you further believe and find from the evidence that at the time of such intercourse, if you believe it was had, the said Narcissa Isabella Foster was a person of unsound mind, and of such weak intellect and intelligence, that she could not and did not know or comprehend the nature and consequence of such an act, and could not understand right from wrong, you will find the defendant guilty of rape, and assess his punishment at death

or imprisonment in the penitentiary for a term of not less than five years."

"No. 8. You are further instructed that before you will be warranted in finding the defendant guilty of rape as charged in the information, you must believe from the evidence, beyond a reasonable doubt, that the defendant had sexual intercourse with Mrs. Foster; that at the time of such intercourse Mrs. Foster was insane, and that her insanity was of such a character as to be readily recognized by a person of ordinary intelligence in conversation with her, and unless you so believe from the evidence the state has proven these facts, you must acquit the defendant."

On this record the defendant complains (1) that the complaint is defective in that it fails to allege all the substantive facts which the state is required to prove; (2) that the demurrer to the evidence should have been sustained; (3) that the court erred in giving instructions Nos. 1 and 8, asked by the state. It will be unnecessary to notice other errors assigned.

First. We think the information sufficient in form and substance.

Second. The claim that the evidence for the state is insufficient to support the verdict demands serious consideration by reason of the importance of the questions involved. In view of the testimony as to the prior good character of the prosecutrix, and the testimony concerning her condition on the day following the morning of November 7th, as well as that of her former mental condition and family history, there was ample evidence to support a finding that at the time of the alleged act of intercourse with defendant, Mrs. Foster was so mentally deranged as to be incapable of understanding the moral nature of the act, or of giving assent thereto. To sustain the conviction, however, the state must go further, and give some evidence tending to show that the defendant knew of and took advantage of this mental infirmity of the prosecutrix, or that he intended to have carnal knowledge of her body by force, if necessary, and regardless of her consent. As to the latter proposition, there is no evidence that such was his intent. All that the defendant did was with her apparent assent and approval. Whether there is any testimony from which knowledge of her incapacity to consent could be imputed to the defendant is a question not free from difficulty. Reason and authority suggest the following principles as guides in the solution of this question: (1) Carnal intercourse with a woman, incapable from mental infirmity of giving consent, is rape, unless the man is ignorant of her infirmity and its extent, believes he has her consent, and has no intention to have intercourse without her consent. (2) Where the woman in point of fact yields an apparent assent to the act, the burden is on the state to prove that at the time of the

act she was incapable, because of mental disease, of assenting to or dissenting from the act, and that the defendant knew of such incapacity. (3) The following citations from the authorities support and illustrate the principles announced above: "Carnal intercourse with a woman incapable, from mental disease (whether that disease be idiocy or mania), of giving consent is rape. But the question as to whether the mental disease is such as to incapacitate the patient from assenting is one to be examined with great care. There are many persons laboring under mitigated insanity who are incapable of making contracts, but who in a modified degree are responsible for crime. For a man knowingly to have intercourse with a woman of intellect thus impaired is no doubt peculiarly wrongful; yet if she be capable of consenting, and does consent, it is not rape. And a fortiori is this the case when the man has no knowledge that the woman's intellect is disturbed. Hence, in such cases, if there be consent, a prosecution for rape cannot be sustained." 1 Whart. Crim. Law, § 560. Mr. Bishop, in volume 2, § 1121, of his work on Criminal Law, says: "Where the idiocy is so profound as absolutely to incapacitate her to consent or dissent, the man who penetrates her, not supposing he has her consent, commits the crime."

In the case of *State v. Tarr*, 28 Iowa, 397, the facts showed that the girl in the case was of weak mind; could not talk so as to be understood; was not capable of taking care of or even dressing herself, and had been idiotic since birth. The court held that, although there was no proof that the defendant had prior knowledge of her condition, yet if she was so idiotic as not to be able to talk intelligibly, and if the defendant talked with her a while before the assault, the jury might infer knowledge on his part of her mental irresponsibility. In this same case the court lays down a rule as applicable to cases of this character, as follows: "The case before us falls rather within another class, where it is held, as we believe, without dissent, that if the man, knowing the woman to be insane (or idiotic), should take advantage of that fact to have knowledge of her person, while her mental powers were so impaired that she was unconscious of the nature of the act, or was not a willing participator, the act would be rape, though distinct proof of opposition might be wanting."

In *State v. Cunningham*, 100 Mo. 382, loc. cit. 394, 12 S. W. 376, 379, this court says: "To constitute rape, the act must be intended to be done with force and without the woman's consent, and if done with these intentional elements, it can make no difference that the woman was insane and that the accused did not know she was incapable of giving her consent. Unless this is so, an insane woman or an idiot is at a great disadvantage in the hands of a ravisher. But if the man does

not know that the woman is non compos, and from her conduct is led to believe he has her consent, we do not see how the act can be rape."

In the case of *Regina v. Connolly*, 28 U. C. Q. B. 317, the following charge was given to the jury: "That if upon the evidence they were satisfied that the woman was of unsound mind, that she had no moral perceptions of right or wrong, that her acts were not controlled by the will, were in fact involuntary, she could not be said to be capable of giving consent, because by reason of her state of mind incapable of judgment and discretion; and the yielding on her part to force ought not, in view of such impotence of her will (and knowledge of her state by defendant), to be taken as an act done with her will." In the case last cited the court states the mental condition of the woman thus: "She was a married woman, with children, and was found to have acted at various times in such a strange manner as to furnish strong evidence of hallucination and delusion, warranting the jury in finding her, in popular language, insane."

Under the facts stated above, there is no evidence (aside from the question of insanity) that the defendant intended to commit the act by force and without the consent of the prosecutrix. Therefore, in order to make a case, the record must show substantial evidence on the part of the state tending to prove that the prosecutrix was at the time incapable, by reason of insanity, of giving assent, and, further, that defendant at the time knew of such incapacity. It would not be enough to show merely that she was weak-minded, and that the defendant knew that she was so. "The mere fact that a woman is weak-minded does not disable her from consenting to the act. * * * So long as the woman is capable of consenting, and does consent, the act is not rape, and this is true though the man may know that she is of weak intellect." *State v. Cunningham*, supra, 100 Mo., loc. cit. 393, 12 S. W. 379.

The real question is, assuming that the prosecutrix was so mentally infirm as to be incapable of giving assent, did the defendant, at the time, know of such incapacity? In answering this question, we are confined to the facts as they were apparent to the defendant at the time the act was committed. The testimony showing the family history of the prosecutrix, her virtuous character, and her condition on Sunday, after 9 o'clock, might well satisfy the jury that the prosecutrix did not at the time of the act comprehend its moral nature, and could not give her assent. None of the facts shown by such testimony were known to defendant when the act was committed. He could only judge from the manner and conversation of the prosecutrix at the time of the act.

The state introduced no testimony, save

that of one eyewitness, J. B. Loher, showing her apparent condition when prosecutrix retired to room 8. We are of the opinion that there is nothing in the testimony of Loher, the hotel proprietor, tending to prove that the prosecutrix was at that time so mentally disturbed as to be incapable of consenting to the sexual act. She certainly did not produce that impression upon him. Upon his re-examination in rebuttal, he was asked this direct question: "Was there anything to indicate to you in her appearance that she was insane at the time she entered that room?" He answered: "Well, I didn't have any thought of her being insane. The way she was talking and acting I thought she had taken some kind of dope." The only peculiarity in her manner noticed by him was that "she was talking very loud and fast." As to any inferences that may be drawn from the evidence of her prior and subsequent condition, such inferences, if considered at all as bearing upon defendant's knowledge of her condition at the time in question, are, if anything, favorable to the defendant.

It is clear that at 5 o'clock, on November 6th, when prosecutrix boarded the train, her condition was apparently normal. There was nothing in her manner at the time to suggest to her parents that she was not fit to travel alone. In view of the undoubted fact that her condition was apparently normal on Saturday, the opinion expressed by the physician who examined her Sunday night, that her condition on Saturday "was not materially different from the condition on Sunday and Monday," cannot have any force, especially as that opinion was much weakened in force on cross-examination. The testimony of the physicians introduced by the state affords no basis upon which it can be fairly said that a nonexpert observer in the position of defendant could know that the prosecutrix was insane to the degree of total incapacity. We feel constrained to hold that the trial court erred in not giving an instruction to acquit at the close of the state's case.

Third. It is obvious from the foregoing discussion that instruction No. 8 was erroneous in that it told the jury that mere insanity of a character to be recognized by a person of ordinary intelligence was enough to convict. There are two objections to this instruction: (1) Mere insanity, even if known, does not make the act rape. The insanity must totally destroy the capacity to consent. *State v. Cunningham*, supra. (2) The defendant must know that there is no capacity to consent. This knowledge may be inferred from facts and circumstances in evidence, but the jury must find as an ultimate fact that the defendant did know.

It follows from what has been said above that instruction No. 1 should have been qualified by including, as an element of the

crime, knowledge by the defendant of the mental condition of the prosecutrix defined in the instruction.

For the errors indicated, the judgment is reversed and the cause remanded.

KENNISH, P. J., and BROWN, J., concur.

STATE v. TRAINER.

(Supreme Court of Missouri, Division No. 2.
Feb. 7, 1911.)

1. BIGAMY (§ 2*)—DEFENSES.

Under Rev. St. 1909, §§ 4720, 4721, making every person having a husband or wife living who shall marry another guilty of bigamy, except where the former marriage has been annulled by divorce, etc., a mere belief of a man charged with bigamy that his former wife had been divorced, based solely on an order of publication in a newspaper of a suit by the wife for divorce, is not a defense.

[Ed. Note.—For other cases, see Bigamy, Cent. Dig. §§ 16-18; Dec. Dig. § 2.*]

2. BIGAMY (§ 8*)—EVIDENCE—ADMISSIBILITY.

The belief of a man charged with bigamy that his former wife had been divorced in a suit brought by her may be shown to aid the jury in fixing the punishment.

[Ed. Note.—For other cases, see Bigamy, Dec. Dig. § 8.*]

Appeal from St. Louis Circuit Court; Daniel D. Fisher, Judge.

Charles C. Trainer was convicted of bigamy, and he appeals. Affirmed.

E. W. Major, Atty. Gen., and John M. Dawson, Asst. Atty. Gen., for the State.

FERRISS, J. The defendant was convicted in the circuit court of the city of St. Louis of bigamy, and sentenced to two years in the penitentiary. The evidence for the state established the fact of the second marriage, and the further fact that at the time of such marriage defendant had a former wife living, undivorced. The defense gave evidence tending to prove that the defendant had received a copy of a newspaper about September 1, 1908, which contained a notice of publication of a divorce suit instituted by his former wife, and which notified him to appear on the 5th day of October following to plead to the bill of divorce, and that if he failed to do so the allegations of the bill would be taken as confessed, and judgment would be rendered against him as prayed for in the bill of complaint. The defendant testified that he did not appear to answer in said suit; that, without further inquiry, he assumed and honestly believed that the decree of divorce was granted to his wife on said October 5th, and that, so believing, he married the second time on October 7, 1908.

The court gave instructions appropriate to the case. Among them was the following: "No. 2. The court further instructs you that the fact, if you find it to be a fact, that the defendant, at the time he married said

Jeanette Flaven (if you find that he did marry her), believed that a divorce had been granted to his said wife, Altie M. K. Trainer, is no defense in his behalf in this case, unless you find that on or before that date, to wit, the 7th day of October, 1908, such divorce had actually been granted. The pendency of a suit for divorce in court is not sufficient, nor is the fact that the defendant believed such divorce had been granted, even if you find he did so believe, unless a decree of divorce had actually been granted."

The record shows the following exceptions by defendant: "The defendant excepts to the instructions as not fully declaring the law in the case, and the defendant excepts to the court's not giving an instruction declaring that if there was no criminal intent in this case shown by the evidence, then the jury should acquit the defendant." There was no brief filed, nor appearance in this court, for defendant. The motion for a new trial set out various objections to the rulings of the court on the admission of evidence; to the instructions given; to the failure to instruct upon all the law of the case, and failure to admonish the circuit attorney for certain alleged prejudicial remarks to the jury.

An inspection of the record satisfies us that there is only one point in the motion for a new trial worthy of serious consideration, and that is the propriety of instruction No. 2, set out above. The other objections are without merit.

The one point to be considered involves the question whether the honest belief of defendant, based upon the newspaper clipping that his former wife was divorced on October 5th, two days prior to his second marriage, was a defense. If it was, then the question whether he had such belief should have been submitted to the jury. If it was not a good defense, then the instruction complained of was not prejudicial. The authorities are not entirely harmonious on this point. The following decisions present both sides of the proposition: *Squire v. State*, 46 Ind. 459; *State v. Armington*, 25 Minn. 29; *Davis v. Com.*, 76 Ky. 318; *Commonwealth v. Hayden*, 163 Mass. 453, 40 N. E. 846, 28 L. R. A. 318, 47 Am. St. Rep. 468; *Watson v. State*, 13 Tex. App. 76; *Reg. v. Turner*, 9 Cox, C. C. 145; *Dotson v. State*, 62 Ala. 141, 34 Am. Rep. 2. The Missouri statute (section 4720, Rev. St. 1909) provides: "Every person having a husband or wife living, who shall marry another person, whether married or single, except in the cases specified in the next section, shall, on conviction, be adjudged guilty of bigamy." The exceptions in the next section are (1) absence for seven years; (2) a divorce by competent authority; (3) former marriage declared void by competent authority; (4) where former marriage was contracted while under the age of legal con-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

sent; (5) when former husband or wife shall have been sentenced to the penitentiary for life.

None of these exceptions cover the case at bar. In view of the provisions of our statute, we feel constrained to hold that mere belief on the part of a defendant, charged with bigamy, that his former wife had been divorced, when in fact she was still his wife, at the time of his second marriage, is not a defense. This is in harmony with what we regard as the best authority, and is in line with sound principles of public policy. We have found no American case which justifies a defense based solely upon mere belief by defendant that a divorce had been granted to his former wife, his only evidence being an order of publication which he found in a newspaper, and without any effort on his part to ascertain whether in fact the decree had been granted. The instruction given by the trial court, applied to the facts in evidence, is in harmony with the views herein expressed.

We will add that the evidence of belief was properly admitted for the consideration of the jury in fixing the measure of punishment.

There being no prejudicial error in the record, the judgment is affirmed.

KENNISH, P. J., and BROWN, J., concur.

STATE v. BRANDENBERG.

(Supreme Court of Missouri, Division No. 2.
Feb. 14, 1911.)

KIDNAPPING (§ 1*)—ENTICING CHILDREN—EVIDENCE.

The fact that accused, in enticing away a child from its father, acted as agent for the mother, the parents living apart, did not prevent his conviction, under Rev. St. 1909, § 4489, punishing by imprisonment every one who maliciously, forcibly, or fraudulently entices away a child under 12 years of age, with intent to detain it from its parents, having lawful charge thereof.

[Ed. Note.—For other cases, see Kidnapping, Cent. Dig. § 1; Dec. Dig. § 1.*]

Appeal from St. Louis Circuit Court; J. Hugo Grimm, Judge.

Broughton Brandenburg was convicted of enticing a child from its father in violation of statute, and he appeals. Affirmed.

Simon S. Bass and Vital W. Garesche, for appellant. E. W. Major, Atty. Gen., and Jas. T. Blair, Asst. Atty. Gen., for the State.

BROWN, J. The defendant was convicted in the circuit court of St. Louis city on an indictment charging him with maliciously, forcibly, and fraudulently enticing and decoying away one James Sheppard Cabanne, Jr., a child of seven, with intent to detain and conceal said child from his father, James Sheppard Cabanne, Sr., in violation of section 4489, Rev. St. 1909.

The record in this case is rather volumi-

nous, made so by injecting into same the history of the marital infelicitities of James Sheppard Cabanne, Sr., and his wife, the parents of the child whom defendant is charged with feloniously enticing away. The mother of this child, Minnie Leonard Cabanne, deserted her husband on July 13, 1906, and took the child with her to New York, and for several months concealed its whereabouts from the father. She claims to have obtained a divorce from her husband (Cabanne) in the British West Indies in December, 1906, and shortly thereafter married the defendant, who is a newspaper reporter, and appears to have a good standing among the members of that profession. She lived with defendant as his wife in New York until the month of December, 1908, when, the defendant being either in jail or a fugitive from justice, she was greatly distressed financially, and applied to the father to come and get his child and take care of it. Cabanne, Sr., went to New York, secured possession of his child, and placed it in the home of his mother, Julia C. Cabanne, of St. Louis, where he was living. The mother of the child claims that he promised to return it to her in the following spring, if she had a home and was able to take care of it; that he would keep her informed of the child's health and condition; that he would read to it such letters as she might write, and not commit it into the sole custody of Julia C. Cabanne, the child's grandmother. Cabanne, Sr., the father, denies these promises; but his testimony on that point is so evasive as to leave the impression that he made the promises, and the fact that he failed to write her about the child, and in January, 1909, instituted a suit for divorce against the mother, praying to be awarded the sole custody of the child, indicates that he did not intend to keep his promises. The mother received notice of the suit, but the action did not culminate in a divorce to Cabanne, Sr., and award to him of the custody of the child until May 3, 1909 (after the alleged crime was committed). On April 16, 1909, the defendant, at the request of the mother of James Sheppard Cabanne, Jr., came to St. Louis and decoyed the child away from its father, who was away from home, by telling it that he was going to take it to its mother; but, instead of doing so, he took it to San Francisco, Cal., where he claims its mother agreed to meet him later. He was arrested there on the charge in this case, and brought back to St. Louis for trial. The evidence does not indicate that the mother demanded the return to her of the child before she directed defendant to take it away. There was some evidence that the child was allowed by its grandmother to play upon the streets in a filthy condition. This was also denied. The trial resulted in the conviction of defendant, and the imposition of a fine of

\$500, from which, after the overruling of timely motions for new trial and in arrest, he brings the case up here by appeal.

The defendant objected, and saved exceptions, to many points in the evidence introduced by the state, and also complains in his motion for a new trial of many of the instructions; but in his brief herein filed seems to stand upon the sole proposition that section 4489, Rev. St. 1909, does not apply to the taking or decoying away of a child by a parent, nor by the agent of one of the parents, and that, as he was acting as the agent of his wife, the mother of the child, he did not violate this statute in decoying the child away from the home of its father and taking it to California. Whether or not the defendant's wife, who was the mother of Cabanne, Jr., would have violated the law, had she taken the child away from its father, into whose custody it had been voluntarily committed by her, we need not decide. Defendant claims he was the husband of the child's mother; but, even if this were true, he would not, as a stepfather, have any rights to its custody under the facts in this case. Woerner's American Law of Guardianship, § 13; Browne on Domestic Relations (2d Ed.) p. 72.

If it be conceded that defendant's wife, after surrendering possession of her child, still retained the right to decoy it away from the father, it by no means follows that she could confer that right upon the defendant as her agent. The parental affection flowing from both father and mother to a child of tender years would be a protection to such child as long as it remained in the actual and immediate custody of either of them, and the filial love of the child would in most cases enable either parent to properly control its conduct; but these safeguards to the child would not exist between it and a mere agent, like the defendant in this case, who was not bound to it by any tie of consanguinity. It is apparent that one of the objects of the statute under consideration was to protect parents against the mental anguish which necessarily follows the decoying away and retaining of their children, and if a child be taken or decoyed away from one parent by another parent, the mental anxiety of the parent who thus loses the child would not be nearly so great as in the case at bar, where the child passed into the hands of one who was under no obligation, and perhaps no inclination, to properly care for it.

We are of the opinion that the right of one parent to invade the possession of another parent, to take or decoy away their mutual offspring, if such a right exists, cannot be delegated to an agent, as the mother attempted to do in this case. Any other construction of the statute would result in untold confusion, litigation, and probably in

assaults and other breaches of the law. To rule otherwise would be to hold that when the parents are living apart, and a child is stolen or decoyed away from one of such parents, he or she must first ascertain whether the party who took or decoyed the child away is an agent of the other parent, or a mere kidnapper, before having such culprit arrested. The letter and spirit of the law we are now construing, and also the welfare of those unfortunate children whose parents are living apart, and who are denied the soothing atmosphere and benignant influences of homes where conjugal love reigns supreme, forbid us from subscribing to any such construction of the statute as the defendant contends for.

In this case the father was not only in the lawful charge, but the legal custody, of his child, and, whatever rights the mother may have had, the defendant violated the law when he invaded the father's possession and took the child away. He was accorded a fair trial, and we affirm the judgment.

KENNISH, P. J., and FERRISS, J., concur.

STATE v. RAWLINGS.

(Supreme Court of Missouri, Division No. 2.
Feb. 14, 1911.)

1. STATUTES (§ 114*)—TITLE—SUFFICIENCY.

Under Const. art. 4, § 28 (Ann. St. 1906, p. 185), providing that no bill shall contain more than one subject, which shall be expressed in the title, the title of Laws 1907, p. 231, entitled "An act to prohibit persons running order houses from delivering intoxicating liquors to persons having no license to deal in the same," etc., is not sufficient to include a provision making it unlawful for any person not a licensed dramshop keeper or a wholesaler to order for, receive, store, keep, or deliver, as agent or otherwise of another, intoxicating liquors; the title specifying particular persons and acts to which the act applies, while the provision relates to different persons and acts.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. §§ 145-149; Dec. Dig. § 114.*]

2. CRIMINAL LAW (§ 304*)—JUDICIAL NOTICE—FACTS OF COMMON KNOWLEDGE.

The court will take judicial notice of the fact that the Legislature relies in a large measure on the titles of the several laws enacted by it.

[Ed. Note.—For other cases, see Criminal Law, Dec. Dig. § 304.*]

3. STATUTES (§ 114*)—TITLE—SUFFICIENCY.

The title of Laws 1907, p. 231, entitled "An act to prohibit the keeping, storing or delivering to another person intoxicating liquors in local option counties," is sufficient within Const. art. 4, § 28 (Ann. St. 1906, p. 185), to support a provision prohibiting any person from keeping, storing, or delivering for or to another, in a local option county, any intoxicating liquors.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. §§ 145-149; Dec. Dig. § 114.*]

4. STATUTES (§ 5*)—ENACTMENT—LEGISLATIVE POWER.

Under Const. art. 4, § 55 (Ann. St. 1906, p. 204), authorizing the Legislature in extra

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

session to act on subjects other than those specifically designated in the proclamation calling it, the Legislature in extra session may enact any laws which the Governor may by special message recommend after the Legislature has met, though article 5, § 9 (page 207), requires the Governor in his message to state specifically each matter on which he deems it necessary for the Legislature to act.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. § 4; Dec. Dig. § 5.*]

5. CONSTITUTIONAL LAW (§ 208*)—CLASS LEGISLATION.

Rev. St. 1909, § 7227, prohibiting any person from keeping, storing, or delivering for or to another in any local option county any intoxicating liquors, is not class legislation in violation of Const. art. 4, § 53 (Ann. St. 1908, p. 197), because it places all counties which have adopted local option in one class, since any county may become a member of that class.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. §§ 649-677; Dec. Dig. § 208.*]

6. INTOXICATING LIQUORS (§ 205*)—INFORMATION—SURPLUSAGE.

Under Rev. St. 1909, § 5115, providing that no information shall be invalid for surplage, an information alleging that accused while the local option law was in force did unlawfully "order for, receive," keep, store, and deliver intoxicating liquors to a person named, charges a violation of section 7227, prohibiting any person from keeping, storing, or delivering for or to another person in a local option county any intoxicating liquors; the quoted words being surplage.

[Ed. Note.—For other cases, see Intoxicating Liquors, Cent. Dig. § 225; Dec. Dig. § 205.*]

7. INTOXICATING LIQUORS (§ 205*)—OFFENSES—INDICTMENT—VIOLATION OF LOCAL OPTION LAW.

Where an indictment charges that the local option law was adopted in a certain city, and subsequently was adopted in the county outside of the city, and then charges a violation of Rev. St. 1909, § 7227, in the county, and the evidence shows the offense not to have been committed in the city, it is immaterial whether the city had or had not lawfully adopted the local option law.

[Ed. Note.—For other cases, see Intoxicating Liquors, Cent. Dig. § 225; Dec. Dig. § 205.*]

8. INTOXICATING LIQUORS (§ 223*)—OFFENSES—EVIDENCE.

Where an information charges that an offense in violation of Rev. St. 1909, § 7227, was committed in a local option county, it is sufficient to prove that the offense was committed at any place in the county where the local option law was in force, and proof that the offense was committed in a city of 2,500 inhabitants is no defense if the evidence shows that the city had adopted the law.

[Ed. Note.—For other cases, see Intoxicating Liquors, Cent. Dig. §§ 263-274; Dec. Dig. § 223.*]

9. INTOXICATING LIQUORS (§ 139*)—OFFENSES—EVIDENCE.

A possession of liquor lasting only five minutes is not a storing of liquor in violation of Rev. St. 1909, § 7227.

[Ed. Note.—For other cases, see Intoxicating Liquors, Dec. Dig. § 139.*]

10. INTOXICATING LIQUORS (§ 238*)—OFFENSES—EVIDENCE.

Accused asked witness for the address of a dealer in whisky, but he could not give one. Accused obtained an address from another and informed witness, who requested accused to

include in the order a half a gallon of whisky for him. Accused ordered the whisky and within five minutes after it reached his shop witness went there and took away his whisky. Accused received no profit or commission on the transaction. *Held* to justify the submission to the jury of the issue whether accused kept or delivered intoxicating liquors in violation of Rev. St. 1909, § 7227.

[Ed. Note.—For other cases, see Intoxicating Liquors, Cent. Dig. §§ 324-330; Dec. Dig. § 238.*]

11. INTOXICATING LIQUORS (§ 139*)—OFFENSES—EVIDENCE.

A violation of Rev. St. 1909, § 7227, prohibiting any person from keeping, storing, or delivering for or to another in a local option county any intoxicating liquor, is not sustained by proof that accused ordered or received liquor for another, but the proof must show that accused kept, stored, or delivered liquor.

[Ed. Note.—For other cases, see Intoxicating Liquors, Cent. Dig. § 149; Dec. Dig. § 139.*]

12. INTOXICATING LIQUORS (§ 230*)—LOCAL OPTION LAW—EVIDENCE—ADMISSIBILITY.

The state on a trial for keeping, storing, or delivering intoxicating liquors in violation of Rev. St. 1909, § 7227, may show that accused ordered or received intoxicating liquors for prosecutor, to prove that he also kept, stored, or delivered the same to prosecutor.

[Ed. Note.—For other cases, see Intoxicating Liquors, Cent. Dig. § 290; Dec. Dig. § 230.*]

Appeal from Circuit Court, Lawrence County; W. N. Evans, Special Judge.

Victor L. Rawlings was convicted of crime, and he appeals. Reversed and remanded.

James A. Potter, for appellant. E. W. Major, Atty. Gen., and Chas. G. Revelle, Asst. Atty. Gen., for the State.

BROWN, J. The defendant prosecutes this appeal from a judgment imposing upon him a fine of \$300 for violating Laws 1907, p. 231 (now sections 7226-7229, Rev. St. 1909), regulating the keeping, storing, and delivery of intoxicating liquors in counties having adopted the local option law.

The evidence shows that the defendant was running a tailor shop in the city of Mt. Vernon, in Lawrence county, on the 1st day of December, 1909, and, desiring some intoxicating liquor, went to a butcher shop where one Will Williams was employed and asked Williams for the address of certain persons in Springfield, Mo., who dealt in whisky. Williams could not furnish the desired address, whereupon the defendant obtained it from another party, went back to the butcher shop, and informed Williams that he had procured the address and was going to make the order. Williams then requested defendant to include in the order a half gallon of whisky for him. Defendant ordered the whisky, which was in a few days delivered at his tailor shop by the expressman. Within a few minutes after the liquor reached defendant's shop, Williams went there, and, apparently without communicating with defendant, picked up and carried away his half gallon of whis-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

ky. Defendant received no commission or profit from the transaction.

The defendant makes a vigorous assault upon the constitutionality of the law, the sufficiency of the information, on the instructions given by the court, and its rulings upon the evidence introduced by the state.

For a proper understanding of the constitutional questions involved and the sufficiency of the information, we insert below the full title of this act and the first two sections of the act itself.

"An act to prohibit persons running order houses from delivering intoxicating liquors to persons having no license to deal in same, and to prohibit the keeping, storing for, or delivering to another person intoxicating liquors in local option counties, and providing penalties for the violations thereof.

"Section 1. It shall be unlawful for any person or persons not a licensed dramshop keeper or by law authorized to sell liquor as a wholesaler, to order for, receive, store, keep or deliver as the agent or otherwise, of any other person, intoxicating liquors of any kind.

"Sec. 2. No person shall keep, store or deliver for or to another person, in any county that has adopted or may hereafter adopt the local option law, any intoxicating liquors of any kind whatsoever."

The information, omitting caption and affidavit, is as follows: "Comes now Archie L. Hilpirt, prosecuting attorney within and for Lawrence county, Mo., and acting herein under his oath of office and upon knowledge, information, and belief, informs the court that on or about the 11th day of November, 1907, the act of the Legislature of the state of Missouri approved April 5, 1887, known as the local option law, was duly adopted in the city of Aurora, Lawrence county, Mo., said city of Aurora being then and there a city of more than 2,500 inhabitants; that thereafter, to wit, on or about the 13th day of February, 1909, the said act of the Legislature of the state of Missouri, approved April 5, 1887, known as the local option law, was duly adopted in Lawrence county, Mo., outside of the corporate limits of said city of Aurora, Mo., said city of Aurora, Mo., being then and there a city of more than 2,500 inhabitants; that at all the times hereinafter referred to said law was in full force and effect in Lawrence county, Mo.; that thereafter, to wit, on or about the 1st day of December, 1909, while said law was in full force and effect in said county, one Victor L. Rawlings in the said county of Lawrence in the state of Missouri, did then and there willfully and unlawfully order or receive, keep, store, and deliver distilled, fermented, and intoxicating liquors, to wit, one-half gallon of whisky, for one Will Williams, the said Victor L. Rawlings not being then and

there a licensed dramshop keeper or by law authorized to sell liquors as a wholesaler, and the said whisky not being for the use of the said Victor L. Rawlings or for the use of his family, against the peace and dignity of the state. Archie L. Hilpirt."

A comparison of the foregoing information with the law clearly demonstrates that the information is bottomed on section 2, *supra*, because it alleges that the crime was committed in a county which had adopted local option. However, the information goes further and charges the defendant with ordering and receiving intoxicating liquor for the witness Will Williams, and as the acts last mentioned are only prohibited by section 1, *supra*, we are brought first to the consideration of the defendant's contention that said section 1 is unconstitutional because the title of the act does not clearly express the matters contained in said section, as required by section 28, art. 4, of our Constitution (Ann. St. 1906, p. 185). That part of the title which was intended to cover section 1, *supra*, is as follows: "An act to prohibit persons running order houses from delivering intoxicating liquors to persons having no license to deal in the same." Section 1 contains no recital whatever about order houses or parties who may be running same, but does purport to prohibit certain persons from ordering or receiving liquors for another.

It is clear to our minds that the subject of delivering intoxicating liquors is germane to the subject of ordering and receiving such liquors; but this is not the only test which we are required to apply to the law under consideration. Is the subject of ordering and receiving liquors by an individual clearly expressed in a title which only purports to prohibit persons running order houses from delivering such liquors? Is not this title misleading? Will a title which purports to prohibit a certain act by a certain class of persons support and carry validity to a law which embraces additional acts committed by persons not within the class mentioned in such title?

We have examined the authorities cited by the learned Attorney General, but they embrace only cases wherein laws were attacked because their titles were alleged to be too general. They are not applicable to the facts in this case. If the title to the act under consideration had been general, for example, if it had simply read "An act concerning intoxicating liquors," then it would have supported most any kind of a law affecting the purchase, sale, ordering, or delivery of such liquors; but, in this case, the title descends into details and attempts to point out a particular class of persons to which that law is intended to apply and the particular acts prohibited, and therefore cannot support a law which is leveled against a wholly different class of persons and prohibits acts not mentioned

in such title. *State v. Great Western Coffee & Tea Company*, 171 Mo. 634, 71 S. W. 1011, 94 Am. St. Rep. 802; *State v. Fulks*, 207 Mo. 28, 105 S. W. 733, 15 L. R. A. (N. S.) 430; *City of St. Louis v. Wortman*, 213 Mo. 181, 112 S. W. 520; *State v. Persinger*, 76 Mo. 346. In the case of *State v. Great Western Coffee & Tea Company*, supra, it was held that the title to an act which was leveled only against the manufacturers of certain kinds of baking powder would not support a statute which also prohibited persons from selling such baking powder. In the case of *City of St. Louis v. Wortman*, supra, the title of a bill only purported to "create the office of state dairy commissioner, and to define his term of office, duties and powers," and it was held this title could not carry validity to a section of the same bill which attempted to prohibit individuals from selling impure dairy products. The doctrine herein announced is supported by a great number of cases, in our own state as well as other jurisdictions; but we will not incur this opinion with all of them.

We have examined the original bill as it was introduced in the General Assembly, and find that section 1 appeared therein as follows: "It shall be unlawful for any person to keep an order house where orders for intoxicating liquors are given or received from persons who have no license to deal in such liquors." This section by an amendment during its passage through the General Assembly became an entirely different law from what its author intended it should be, and, instead of reaching order houses, was made to apply only to individuals who are not dealing in liquors. We take judicial notice of the fact that the members of the General Assembly, on account of the great number of bills which they are called upon to consider and the short space of time in which they must perform their important duties, are forced to rely in a large measure upon the titles to the several laws which they enact, and where the title to a law like the one we are now considering is clearly misleading, we are forced to declare it unconstitutional.

The doctrine of *expressio unius, exclusio alterius*, to a limited extent, applies to the titles to legislative acts when, as in this case, they descend into details and attempt to prohibit particular acts by a particular class of persons, and we therefore hold that section 1, supra, is unconstitutional, because it attempts to reach all classes of persons except dealers in intoxicating liquors, while its title purports only to affect persons running order houses. We are aware that in the case of *State v. Price*, 229 Mo. 670, 129 S. W. 650, this court intimated that section 1 of the act of 1907 (now under consideration) was constitutional, but the indictment in that case was bottomed on section 2 of that act, and charged the defendant only

with keeping, storing, and delivering intoxicating liquor, and the constitutionality of section 1 was not necessarily involved in the decision of that case.

However, while defendant's objection to the title of the bill must be sustained as to section 1 of the act (now section 7226, Rev. St. 1909), said objection is wholly untenable when applied to section 2 of the same act (now section 7227, Rev. St. 1909), because the language of said section 2 follows precisely the second subdivision of the title to the bill, and is safely anchored in both the letter and spirit of section 28, art. 4, of the Constitution.

Defendant's second assault on the constitutionality of the law under consideration is based upon the fact that said law was passed at an extra session of the Legislature in the year 1907, and that the Governor's message convening the General Assembly in extraordinary session in that year does not embrace the subject of keeping, storing, and delivering intoxicating liquors in local option counties; hence the act violates section 9, art. 5, of the Constitution, requiring the Governor in his message to state specifically each matter upon which he deems it necessary for such General Assembly to take action. This point might be very important if section 9, art. 5, of our Constitution (Ann. St. 1906, p. 207) stood alone; but we find it very materially modified by section 55, art. 4 (page 204), which contains the further provision: "The General Assembly shall have no power when convened in extra session by the Governor to act upon subjects other than those specifically designated in the proclamation by which the session is called, or recommended by special message to its consideration by the Governor, after it shall have been convened." By this last-named section of our organic law, undoubted power is conferred to enact any laws which the Governor may by special message recommend to the General Assembly after it has been convened in extraordinary session. By referring to the Senate and House Journal of the extra session in 1907, at page 11, we find that the Governor in his first message to that body, recommended that "effective local option laws for counties, towns and cities should be enacted." The foregoing clause of the Governor's message afforded ample warrant to the General Assembly at said extra session to enact section 2, supra, for the purpose of strengthening and making more effective what is known as the local option law, adopted in many counties of this state, to prohibit the sale of intoxicating liquors. *Wells v. Missouri-Pacific Ry. Company*, 110 Mo., loc. cit. 296, 297, 19 S. W. 530, 15 L. R. A. 847. Therefore defendant's second assault on the constitutionality of the law under consideration must be overruled.

Defendant's third assault upon the constitutionality of section 2 of the act of

1907, *supra*, is that it is class legislation, in that it divides the counties of the state into artificial classes, to wit, those which have adopted local option and those which have not, and is therefore violative of section 53, art. 4, of the Constitution (Ann. St. 1906, p. 197), prohibiting the enactment of special laws "regulating the affairs of counties, cities, townships, wards or school districts."

We are aware that the Legislature cannot arbitrarily divide any natural class of persons or municipal bodies into artificial classes and enact laws which apply to only one of such artificial classes. For instance, the Legislature could not enact a law which would make it possible for all counties having 25,000 inhabitants or more, on the north side of the Missouri river, to adopt township organization, and prohibit counties with the same population on the south side of said river from enjoying the same privilege. But we are convinced that, when the law permits the citizens of any locality to convert themselves into an artificial class by adopting laws not in force over the whole state, then they may be legislated for or against by a general law which will only apply to the artificial class to which they have voluntarily assigned themselves. *Rutherford v. Heddens*, 82 Mo. 388; *Kansas City v. Stegmiller*, 151 Mo. 189, 52 S. W. 723. For instance, our general law permits all cities and towns having 500 and less than 3,000 inhabitants to organize themselves into cities of the fourth class; but such towns or cities are not bound to avail themselves of this privilege, and it is a well-known fact that there are many towns in this state with more than 500 inhabitants which have not been incorporated in any manner. Yet it is perfectly competent for the General Assembly to enact laws which will apply only to cities of the fourth class; and it would not be seriously contended that such a law would apply to any town which possessed the necessary population to become a city of the fourth class, but which had neglected to incorporate itself as such. We therefore conclude that, without regard to the population which a county may possess, it may legally convert itself into an artificial class by adopting the local option law; and thereafter it is entirely competent for the Legislature by a general law to regulate the conduct of its citizens by an act which will not apply to those parts of the state where dramshops are permitted. Hence we must overrule defendant's third and last point of attack on the constitutionality of section 2 of the act of 1907 now under consideration.

Defendant complains that this information is clearly bottomed on section 2 of the act of 1907, but charges the defendant with committing certain acts not covered by that section, to wit, the ordering and receiving of intoxicating liquors. In this contention

defendant is correct; but, conceding that the information should not have contained the words "order for" or "receive," it may yet be valid through the saving grace of our criminal statute of jeofails (section 5115, Rev. St. 1909). This section provides that no information shall be deemed invalid "for any surplusage or repugnant allegation." Hence we can treat the words "order for" and "receive" in the information as surplusage, and it will still be sufficient. *State v. Meyers*, 99 Mo. 107, 12 S. W. 516; *State v. Currier*, 225 Mo., loc. cit. 650, 125 S. W. 461.

Another assault is made on this information because it charges that the local option law was adopted in the city of Aurora, in Lawrence county; whereas, it is alleged that said law was not lawfully adopted in that city. Be that as it may, the information does not charge that the offense was committed in the city of Aurora, neither does the evidence show it to have been committed in that city; consequently whether or not the local option law has been duly adopted in Aurora, a city of 2,500 inhabitants, has no bearing on the guilt or innocence of the defendant.

In our opinion, where an information—as in this case—charges that the offense was committed in a county which had adopted local option, it is sufficient for the state to prove that the offense was committed at any place in that county where the local option law was in force; and proof that the offense was committed in a city of 2,500 inhabitants would be no defense, if the evidence discloses that such city had adopted the local option law.

The evidence in this record would not warrant a conviction for storing intoxicating liquors. A possession lasting only five minutes would not sustain the charge of storing, but the evidence would justify the court in submitting to the jury the question of whether or not the defendant kept or delivered intoxicating liquors to the witness Will Williams.

Defendant's resourceful attorney attacks the information on other minor details which it is not necessary to discuss in this opinion; but, as we have decided to reverse the judgment, if the state desires to retry the case, we suggest that the information be amended so as to make it conform to the provisions of section 2, *supra*, charging the defendant only with the acts of keeping, storing for, and delivering to the witness Will Williams, etc.

The defendant also complains that the trial court committed error in giving to the jury of its own motion instruction numbered 1, which authorized a conviction if the jury found that the defendant had ordered for or received intoxicating liquor as the agent of the witness Will Williams. We find that this assignment of error is well founded. The state having instituted this prosecution

under the provisions of section 2, supra, which do not contain the words, "order for or receive," was not entitled to a conviction on proving that those acts were committed; but, if convicted in this case, defendant must be convicted of keeping, storing, or delivering intoxicating liquors.

The defendant also complains that the trial court committed error in admitting, over his objection, evidence that he ordered the liquor which he is charged with delivering. To this objection we will say that, if the state elects to amend its information in conformity to the law as herein announced, upon a retrial of the cause it should be allowed to introduce any competent evidence it may have to prove that defendant ordered or received the intoxicating liquor for the witness Will Williams, as tending to prove that he also kept, stored for, or delivered the same to said witness, as prohibited by law.

For the error of the trial court in giving to the jury an instruction which authorized a conviction for the acts of receiving and ordering intoxicating liquors, its judgment is reversed, and the cause remanded.

KENNISH, P. J., and FERRISS, J., concur.

STATE v. HARRIS.

(Supreme Court of Missouri, Division No. 2
Feb. 7, 1911.)

1. CRIMINAL LAW (§ 824*)—INSTRUCTIONS—REQUESTS.

Under Rev. St. 1909, § 5231, making it the duty of a trial court, "whether requested or not," to "instruct the jury in writing upon all questions of law arising in the case" upon which information is necessary in giving their verdict, it is not error to fail to instruct on collateral questions, in the absence of a request by the defendant.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1906-2004; Dec. Dig. § 824.*]

2. CRIMINAL LAW (§ 769*)—INSTRUCTIONS—SUFFICIENCY—COVERING WHOLE OF PROPOSITION.

Whenever the court in a criminal case undertakes to give instructions upon questions of law as required by Rev. St. 1909, § 5231, the instructions, whether given by the court of its own motion or by request, must cover the questions fully.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1806-1806; Dec. Dig. § 769.*]

3. CRIMINAL LAW (§ 815*)—INSTRUCTIONS—FLIGHT—EXPLANATION.

Where the evidence as to defendant's guilt was conflicting, and no clear motive for the crime was shown, an instruction that flight by defendant was a circumstance to be considered against him, but which left out of view defendant's explanation of such flight, was erroneous.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1922, 1936; Dec. Dig. § 815.*]

Appeal from Criminal Court, Jackson County; E. E. Porterfield, Judge.

Thomas Harris was convicted of murder

in the first degree, and he appeals. Reversed and remanded.

Moore & Handy and H. S. Kimbrell, for appellant. E. W. Major, Atty. Gen., and Jno. M. Dawson, Asst. Atty. Gen., for the State.

FERRISS, J. The defendant was convicted in the criminal court of Jackson county of murder in the first degree, and received a life sentence in the penitentiary. He appeals to this court to reverse the judgment because of alleged error committed by the trial court in instructing the jury on the question of flight.

The facts material to a proper consideration of the question raised are as follows: On the 5th day of September, 1908, at 9:30 p. m., one Frank Smith was shot to death on Eighteenth street, Kansas City. The deceased had joined a crowd which had gathered on the scene of an affray which involved the serious beating of a negro boy, driver of an express wagon. In the midst of the excitement, the deceased, who had no part in the affray, was shot. Eyewitnesses for the state testified that defendant did the shooting. Eyewitnesses for the defense, including the defendant, testified that defendant did not shoot the deceased. Shortly after the shooting, the defendant went to Argentine, Kan., from thence to Junction City, Kan., and in about two weeks returned to Kansas City and gave himself up to the authorities. Defendant introduced evidence to the effect that he fled because he had good reason to fear mob violence, which, there is evidence to show, had been incited against him on account of this killing; also, that he had business in Argentine, and was advised there that it would be unsafe to return at that time.

If the testimony for defendant is believed, an explanation of the flight, consistent with innocence, is given. If this evidence is not believed, the flight stands unexplained. On this point the court gave the following instruction: "Flight of the defendant is a circumstance to be taken into consideration in connection with all the other facts and circumstances in evidence, and if the jury find and believe from the evidence that the defendant, after the commission of the homicide alleged in the information, fled from his usual place of abode for the purpose of avoiding arrest and trial for said offense, they may take this fact into consideration in determining his guilt or innocence." The defendant contends that this instruction is erroneous because it fails to "give the defendant the benefit of his explanation or his reasons for leaving the state." The state contends: (1) That the instruction is proper; (2) that the defendant is precluded from now objecting that the instruction is improper and incomplete, by reason of the fact that

he did not ask any instruction on this point.

We have, then, two propositions presented: First. Can the defendant complain in this court of the above instruction, which he concedes is correct as far as it goes; he having failed to ask a further instruction in the court below? Second. If this question shall be answered in the affirmative, is there reversible error in the instruction as given?

As to the first proposition: The statute imposes upon the trial court the duty, "whether requested or not," to "instruct the jury in writing upon all questions of law arising in the case which are necessary for their information in giving their verdict." Rev. St. 1909, § 5231. Numerous decisions of this court hold that, in the absence of a request from the defendant, it is not reversible error to fail to instruct on collateral questions. Whether the question of flight is collateral we are not called upon to decide in this case. The defendant rests his contention upon the proposition that when the court, either of its own motion, or on request from the state, instructs upon a question of law, such instruction must fully cover the proposition; and that, inasmuch as the court in this case undertook to instruct upon the question of flight, the defendant, without request upon his part, is entitled to as full and complete an instruction as he could properly have claimed had he requested it. We think this proposition is sound. If an instruction offered by the defendant is refused because defective in form or phraseology, it then becomes the duty of the court to give a proper instruction covering the point. *State v. Kilgore*, 70 Mo. 546; *State v. Reed*, 154 Mo. 129, 55 S. W. 278. If the defendant requests it, clearly the court must instruct in a proper case, and must fully cover the point. On principle, whenever the court in a criminal case undertakes to instruct on a question of law for the guidance of the jury "in giving their verdict," the instruction should guide them fairly, should present both sides of a proposition if it has two sides, and this is so whether the attention of the court is drawn to the matter by a request from either the state or the defendant, or whether the court proceeds upon the matter of its own motion. *State v. Branstetter*, 65 Mo. 149. We have not overlooked the dictum in *State v. Sublett*, 191 Mo. 163, 90 S. W. 374. In that case, as here, it was contended that the instruction failed to give the defendant the benefit of his explanations. The court said: "In answer to this contention, it may be said there was no evidence adduced by defendant upon which to base his contention." This was a complete answer, and nothing further was necessary; but the court proceeded to say: "Nor, even if there had been, would the instruction be erroneous, though it did not embody it because the defendant had a right to ask an instruction upon the question of his own motion, and

that he did not do so was his own fault." With this last statement, which was beyond the decision of the case, we do not agree.

Proceeding now to the question whether the instruction as given was erroneous because it failed to guide the attention of the jury to the defendant's side of the proposition, we are of the opinion that the instruction is erroneous because of such failure. Upon the evidence in this case it became a matter of prime importance to guide the jury correctly on this question of flight. The evidence upon the question whether defendant fired the fatal shot was in serious conflict. There was a crowd of excited people. The state's witnesses said the defendant had long mustaches. The defendant said he had worn no mustache for a year. It was so dark that witnesses could not give the color of his clothing. Defendant was a reputable negro, a builder and contractor who had lived many years in Kansas City, and who had, as stated in the brief for the state, "accumulated some little property worthy of note, especially for a black man." He owned buildings and had tenants. He was a stranger to deceased. No possible motive is shown unless, as suggested by the brief of the Attorney General, he desired to avenge a brutal attack on one of his race. In view of the conflict in the evidence on the question of identity, the subsequent actions of the defendant were entitled to, and doubtless received from the jury, serious consideration. The testimony adduced by defendant supports his claim that his flight was consistent with innocence. *State v. Sublett*, supra. Upon principle fully supported by the rulings of this court the defendant was entitled to an instruction presenting his theory of the flight.

In the case of *State v. King*, 78 Mo. 555, this court, speaking of an instruction which ignored explanatory circumstances, said: "Where the testimony discloses circumstances explaining or excusing the flight, which consist with the innocence of the defendant in the crime, the jury should be directed to consider the same in connection with the presumption arising from flight, and determine how far they tend to rebut such presumption." *State v. Mallon*, 75 Mo. 355; *Wharton*, Crim. Ev. § 750. There were facts in this case explaining the defendant's flight to which the attention of the jury might have very properly been called, leaving the weight to be attached to the same, of course, to the jury." The instruction in that case was condemned, as we construe the decision, because it failed to take into consideration the explanatory evidence.

In the case of *State v. Walker*, 98 Mo. 95, loc. cit. 106, 9 S. W. 646, 651, the court instructed the jury that flight raises a presumption of guilt, and if, after Green was killed, defendant fled "for the purpose of avoiding arrest, trial, or conviction for the

killing of Green, then you will consider his flight in connection with the other evidence in arriving at your verdict." This instruction is substantially like the one under consideration. It was sustained because there was no explanatory evidence; but Judge Black, speaking for the court, says: "Where there is evidence explaining the flight and tending to show that it was not from a consciousness of guilt, further instructions should be given. *State v. King*, 78 Mo. 555. If the jury should find that the defendant did not leave the country for the purpose of avoiding arrest or trial, then the leaving raises no presumption of guilt, and the jury should be so directed. But we conclude there was no error in failing to give such further instruction in this case, because there is no evidence tending to explain the flight."

In *State v. Fairlamb*, 121 Mo. 137, loc. cit. 147, 25 S. W. 895, 898, the court instructed the jury that, if they believed from the evidence that the defendant fled to avoid arrest, it raised a presumption of his guilt. There was evidence which tended to explain the flight favorable to the defendant, and the court comments upon the instruction as follows: "Under the facts as disclosed, the instruction should have directed the jury, in passing upon defendant's purpose in leaving the place of the homicide, whether or not to avoid arrest, to take into consideration the fact that he made no effort at concealment, and the sending for the officers to come and arrest him. It is not every going away from the place of the homicide that raises the presumption of the guilt of the accused, and, when the facts tend to show that the purpose of going away was not to avoid arrest, the instruction should be so framed as to include all the circumstances, that the defendant may have the benefit of such explanatory facts. *State v. Mallon*, 75 Mo. 355; *State v. King*, 78 Mo. 555; *State v. Ma Foo*, 110 Mo. 7 [19 S. W. 222, 33 Am. St. Rep. 414]."

It follows from the foregoing that, for error in not making the instruction on flight broad enough to include defendant's explanation, the case must be reversed and remanded, and it is so ordered.

KENNISH, P. J., and BROWN, J., concur.

STATE v. CLINKENBEARD.

(Supreme Court of Missouri, Division No. 2.
Feb. 14, 1911.)

1. COURTS (§ 231*)—APPELLATE JURISDICTION—CASE CERTIFIED TO SUPREME COURT.

Under Const. Amend. 1884, § 6 (Ann. St. 1906, p. 244), when a case is certified to the Supreme Court for the reason that it is deemed to be in conflict with a former decision of this court, or of another court of appeals, the court must rehear and determine the same "as in

case of jurisdiction obtained by ordinary appeal process."

[Ed. Note.—For other cases, see Courts, Cent. Dig. § 647; Dec. Dig. § 231.*]

2. CRIMINAL LAW (§ 1063*)—APPEAL AND ERROR—MOTIONS FOR NEW TRIAL AND IN ARREST—MOTIONS AFTER SENTENCE—EFFECT.

Where defendant's motions for new trial and in arrest are filed after entry of judgment against him, without objection thereto or motion to set it aside, the motions are not filed in time, and do not preserve for review matters of exception appearing at the trial and saved in a purported bill of exceptions, and only the record proper is presented on appeal.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2676-2684; Dec. Dig. § 1063.*]

3. CRIMINAL LAW (§ 989*)—TRIAL—JUDGMENT—NECESSITY FOR ALLOCUTION—MISDEMEANORS.

Rev. St. 1909, § 5263, entitles the defendant to be heard and to show cause before sentence why judgment should not be pronounced against him, and section 5264 provides that in cases of misdemeanors the requirement of section 5263 is directory, and that the omission to comply with it shall not invalidate the judgment. *Held*, that a sentence in a case of selling intoxicating liquors without a prescription (a misdemeanor) was not affected by the failure of the record to show an allocution.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2512, 2513; Dec. Dig. § 989.*]

Appeal from Circuit Court, Barton County; Argus Cox, Judge.

Joseph Clinkenbeard was convicted of selling intoxicating liquors without a prescription, and he appealed. Conviction affirmed by the Springfield Court of Appeals (142 Mo. App. 146, 125 S. W. 827), and cause certified to this court for its decision. Affirmed.

Cole, Burnett & Moore, for appellant. E. W. Major, Atty. Gen., and Jas. T. Blair, Asst. Atty. Gen., for the State.

KENNISH, P. J. The defendant was convicted in the circuit court of Barton county upon the first count of an information which charged a sale of intoxicating liquors in violation of section 5781, Revised Statutes of 1909, of the law relating to druggists and pharmacists. His punishment was assessed at a fine of \$225, and from the judgment he appealed to the Springfield Court of Appeals. In the latter court, at the October term, 1909, the judgment of the trial court was affirmed. 142 Mo. App. 146, 125 S. W. 827. In due time appellant filed a motion for a rehearing, which was overruled. Two of the judges deeming the decision rendered in said cause contrary to a previous decision of the St. Louis Court of Appeals, the court, of its own motion, at the same term, ordered the cause and the original transcript therein, certified and transferred to this court, in accordance with the provisions of section 6 of the amendment of 1884 of the Constitution of this state (Ann. St. 1906, p. 244), and the case thus comes before us for decision

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

When a case is thus certified to this court for the reason that it is deemed in conflict with a former decision of this court or of another Court of Appeals, it is not an open question in this court as to whether such conflict does in fact exist, but this court must rehear and determine the same "as in the case of jurisdiction obtained by ordinary appellate process." Section 6, amendment of 1884 to article 6, Const. Mo.; *Clark v. M., K. & T. Ry. Co.*, 179 Mo. 68, 77 S. W. 882; *State ex rel. v. Rombauer*, 140 Mo. 121, 40 S. W. 763; *Rodgers v. Insurance Co.*, 186 Mo. 248, 85 S. W. 369.

It is contended by the Attorney General that only the record proper is in judgment before this court. If this contention is well founded, then we are precluded from a review of such alleged errors as consist of matters of exception taken at the trial and sought to be preserved in the purported bill of exceptions.

It is disclosed by the record that the motions for a new trial and in arrest were filed after the court had entered judgment against the defendant. It does not appear that any objection was interposed to the action of the court in pronouncing judgment before the defendant filed his motions for new trial and in arrest of judgment, nor that the defendant thereafter moved the court to set aside its judgment in order that such motions might be filed within the time allowed by law.

Upon the foregoing state of the record, the motions for a new trial and in arrest of judgment were filed out of time, and were unavailing to preserve for review on appeal matters of exception occurring at the trial. *State v. Pritchett*, 219 Mo. 696, 119 S. W. 386; *State v. Frazer*, 220 Mo. 34, 119 S. W. 389; *State v. Kile (Mo.)* 132 S. W. 230; *State v. Carson (Mo.)* 132 S. W. 587.

Appellant has called our attention to the fact that a proper allocation is not shown in the record, in that the defendant was not asked to show cause, if any he had, why judgment should not be pronounced against him, and he contends that by reason of that fact this case does not fall within the doctrine of the *Pritchett* Case, *supra*, in which the defendant was asked to show cause before judgment.

The *Pritchett* Case was an appeal from a conviction for a felony. This case is an appeal from a conviction for a misdemeanor, and the mandatory or directory character of the statute (section 5263, Rev. St. 1909), entitling the defendant to be heard before sentence, depends upon whether the crime charged is a felony or a misdemeanor.

Section 5264 provides: "If the defendant has been heard on a motion for a new trial, or in arrest of judgment, and in all cases of misdemeanor, the requirements of the next preceding section shall be deemed directory,

and the omission to comply with it shall not invalidate the judgment or sentence of the court."

Under the foregoing statutes, as construed in the decisions cited, this court is limited to a review of the record proper in this case.

The first count of the information, upon which the defendant was convicted, charges the defendant, as a druggist and pharmacist, with having sold intoxicating liquor in violation of section 5781 of the Revised Statutes of 1909, and sufficiently charges the offense; the defendant was properly arraigned; the verdict is responsive to the charge; the judgment is regular; and as no error appears in the record, the judgment is affirmed.

FERRISS and BROWN, JJ., concur.

**STATE ex rel. ST. LOUIS DRESSED BEEF
& PROVISION CO. v. NIXON**
et al., Judges.

(Supreme Court of Missouri. Feb. 9, 1911.)

**1. COURTS (§ 485*)—TRANSFER OF CAUSE—
COURT OF APPEALS—JURISDICTION.**

Under Const. art. 6 (Ann. St. 1908, p. 212), providing that the jurisdiction of the St. Louis and Kansas City Courts of Appeals shall be co-extensive with the counties assigned to each court, and Rev. St. 1909, § 3926, providing that the jurisdiction of the Springfield Court of Appeals shall be co-extensive with enumerated counties, each Court of Appeals has exclusive jurisdiction of appeals arising within its territorial limits, but no jurisdiction of appeals arising without such limits, and section 3939, authorizing the transfer of cases from one court to another, is void.

[Ed. Note.—For other cases, see *Courts*, Cent. Dig. § 1292; Dec. Dig. § 485.*]

**2. APPEARANCE (§ 19*)—JURISDICTION AC-
QUIRED.**

Where the court has jurisdiction of the subject-matter, want of jurisdiction of the person is cured by appearance.

[Ed. Note.—For other cases, see *Appearance*, Cent. Dig. § 79; Dec. Dig. § 19.*]

**3. APPEAL AND ERROR (§ 21*)—CONSENT TO
JURISDICTION—COURT OF APPEALS.**

The Springfield Court of Appeals is not a court of general inherent jurisdiction, but it has only appellate jurisdiction of cases arising within its territorial limits, and the parties to a case arising outside of such limits may not, by consent, confer jurisdiction on it.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 88-97; Dec. Dig. § 21.*]

**4. APPEAL AND ERROR (§ 21*)—CONSENT TO
JURISDICTION—JURISDICTION.**

The jurisdiction of an appellate court limited by law to appeals arising within fixed territorial limits cannot be enlarged by consent of parties, so as to draw within it a case arising outside of such limits, though within such limits the court has jurisdiction of appeals involving the subject-matter of the appeal.

[Ed. Note.—For other cases, see *Appeal and Error*, Dec. Dig. § 21.*]

**5. COURTS (§ 17*)—"JURISDICTION"—SUB-
JECT-MATTER.**

The subject-matter presented to a Court of Appeals is the action of the trial court as

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

shown by its rulings and judgment as preserved in the record, and where it has no power to review the action of the trial court of a county outside of its territorial limits, it has no jurisdiction of the subject-matter of the appeal; "jurisdiction" being the power which one has to do justice in cases brought before him.

[Ed. Note.—For other cases, see Courts, Cent. Dig. § 46; Dec. Dig. § 17.*

For other definitions, see Words and Phrases, vol. 4, pp. 3876-3885; vol. 8, pp. 7697, 7698.]

Valliant, C. J., and Lamm, J., dissenting.

In banc. Prohibition by the State, on the relation of the St. Louis Dressed Beef & Provision Company against J. P. Nixon and others, Judges of the Springfield Court of Appeals, and a Judge of the St. Louis Circuit Court. Writ awarded.

This is an application for a writ of prohibition against the judges of the Springfield Court of Appeals and a judge of the St. Louis circuit court, to prevent further action in this case, which was transferred to the Springfield Court of Appeals from the St. Louis Court of Appeals. The application is based upon the following facts: At the October term, 1906, of the circuit court of the city of St. Louis, one William Moudy, as plaintiff, obtained a judgment against the St. Louis Dressed Beef & Provision Company, a corporation, for personal injuries, in the sum of \$5,000. The case was appealed to this court, and was later transferred from this court to the St. Louis Court of Appeals. Subsequently to this, and while the case was pending in the St. Louis Court of Appeals, it was transferred to the Springfield Court of Appeals by virtue of the provisions of section 3939, Rev. St. 1909, authorizing such transfers. Thereafter the case was docketed in the Springfield Court of Appeals, and the original defendant, petitioner in this case, appeared by counsel and orally argued the same. The Springfield Court of Appeals affirmed the judgment of the circuit court of the city of St. Louis, and has sent its mandate to the last-named court. Relator contends that, notwithstanding its appearance in the Springfield Court of Appeals, that court had no jurisdiction to decide the case, and that consequently its judgment and mandate are void.

W. B. & Ford W. Thompson, Fred Armstrong, Jr., and Ralph Crews, for relator.

FERRISS, J. (after stating the facts as above). Article 6 of the Constitution (Ann. St. 1906, p. 212) provides that the jurisdiction of the St. Louis Court of Appeals and the Kansas City Court of Appeals shall be "co-extensive" with the counties assigned to each court, respectively. A similar provision is made by the act (section 3926, Rev. St. 1909) creating the Springfield Court of Appeals. In the recent case of *State ex rel. Dunham v. Nixon et al.*, 133 S. W. 336, this

court, referring to said article 6, said: "When jurisdiction of a certain character is by that article conferred on a particular court, the jurisdiction so conferred is exclusive." It follows from this that each Court of Appeals has exclusive jurisdiction of appeals arising within its territorial limits, and, necessarily, no jurisdiction of appeals arising within the territorial limits of either of the other Courts of Appeals. This court said further, in the above case, that "unless expressly authorized to do so, a court is without authority to transfer a case from it to another court"; that "the conferring of jurisdiction belongs to the law-making power of the state." This court held that the above act (section 3939) was unconstitutional and void, and therefore concluded, that, inasmuch as the act was void, the act of the St. Louis Court of Appeals in attempting to transfer the cause to the Springfield Court of Appeals was void, and that such attempt to transfer was without force or effect, and failed to confer jurisdiction on the Springfield Court of Appeals. It follows from the decision of this court in the above case that the case at bar is still pending in the St. Louis Court of Appeals, unless it has been removed to the Springfield court by consent of the parties.

It is urged that, inasmuch as the Springfield Court of Appeals has jurisdiction of causes of a similar nature to the one at bar, i. e., of causes arising from personal injuries, it therefore had jurisdiction of the subject-matter of the action, and that objections to the jurisdiction of the persons were waived by appearance. This proposition is based on the well-known rule that want of jurisdiction of the person is cured by appearance, where the court has jurisdiction of the subject-matter. In the light of this rule, however, we get but a superficial view of the matter. The real question lies deeper. It is this: Can the parties, by consent, invest a court with power not authorized by law or conferred upon it by the Constitution?

The Springfield Court of Appeals possesses limited powers. It is not a court of general inherent jurisdiction. In cases of the class to which belongs the case at bar, it has appellate jurisdiction only. Under the law as construed by this court, the Springfield court has no jurisdiction or power to review cases arising outside its present territorial limits. Such power has not been conferred by the Constitution. The Legislature has not given, and cannot give, such power, nor can such jurisdiction be acquired by transfer from another appellate court. The only method by which the Legislature can invest that court with jurisdiction of causes arising outside its present territorial limits is by changing and enlarging such limits. *State ex rel. Dunham v. Nixon*, supra. There is, then, an absolute want of jurisdiction, either

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

general or special, in the Springfield court to hear this appeal from the St. Louis circuit court. Can the parties by consent bring in to being that which is without existence? To hold that parties may by consent select an appellate court of their choice, and confer on such court a power not granted by the Constitution—a power which the Legislature cannot grant—would be a startling innovation upon the course of constitutional and orderly legal procedure. In view of the importance of the question under consideration, we will refer to the following cases.

The law of Tennessee provided that appeals and writs of error should lie from inferior courts within each of three divisions of the state to the Supreme Court of that division. A case, by consent of the parties, was appealed from one division to the Supreme Court of another division. The Supreme Court of each division had jurisdiction of the subject-matter of causes—using that term in its ordinary sense—but by statute had jurisdiction only of appeals arising within its district. The Supreme Court of Tennessee held that the case should be stricken from the docket, because the appeal arose outside the territorial limits of the division. *Memphis Freight Co. v. Mayor of Memphis*, 3 Cold. (Tenn.) 249.

The Constitution of Connecticut, art. 5, § 1, provides: "The judicial power of the state shall be vested in a Supreme Court of Errors, a superior court, and such inferior courts as the General Assembly shall, from time to time, ordain and establish; the powers and jurisdiction of which courts shall be defined by law." The Legislature of that state enacted that "writs of error for errors in matters of law only may be brought from the judgments and decrees of the superior court, court of common pleas, and any city court, to the Supreme Court of Errors, in the judicial district or county where the judgments are rendered." Section 1145, Gen. St. Conn. 1888. A writ of error from the judgment of the superior court in New Haven county was brought to the Supreme Court of Errors in the First judicial district, and was heard there by consent of the parties. The Supreme Court of Errors of Connecticut ruled as follows: "The case must be erased from the docket. The Supreme Court of Errors in the First judicial district has no jurisdiction to hear a writ of error from a judgment of the superior court in New Haven county, that county being in the Third judicial district." The court further said: "One court never has the power to pronounce the judgment of any other court to be erroneous, except it is authorized so to do by some express law to that effect," and further, that "when a court has no jurisdiction of the cause, it is not in the power of the parties to confer jurisdiction by waiving all objections." *Chipman v. City of Waterbury*, 59 Conn. 496, 22 Atl. 289.

The Iowa Code provides as follows: "On written contracts stipulating for payment at a particular place, action may be brought in the township where the payment was agreed to be made." Section 4481, Code Iowa, 1897. A suit was brought before a justice of the peace in a township other than the one in which the contract was payable. The Supreme Court of Iowa held that the justice had no jurisdiction, and, further, that the defendant's appearance before the justice, and his failure to raise the question there, did not give the district court, to which the case was appealed, jurisdiction. The court said: "The contract sued upon must, by its terms, provide for payment at a particular place, before a justice at that place may take jurisdiction of an action against a resident of another county." The court further said: "There was no plea of estoppel; but even if there had been, such plea was properly disregarded, for the reason that jurisdiction cannot be conferred on the district court on appeal by estoppel. The parties could not, it seems, confer such jurisdiction by consent." *Bally v. Birkhofer*, 123 Iowa, 59, 98 N. W. 594.

The Supreme Court of Colorado says: "Appeals are creatures of the statute; neither joinder in error nor the consent of parties can confer jurisdiction upon this court by appeal." *Gordon v. Gray*, 19 Colo. 167, 34 Pac. 840.

In the case of *Descalso v. San Francisco*, 60 Cal. 296, there was an appeal from the judgment of the justice's court to the county court. Under the law, the county court could transfer cases to the municipal court of appeals, which had jurisdiction to hear and determine such cases as should be transferred to it from the county court, and none other. The defendant appeared in the municipal court of appeals, and submitted to its jurisdiction, but afterwards objected to the jurisdiction, on the ground that the case had never been transferred from the county court. This contention was upheld by the Supreme Court, which said: "But the municipal court of appeals could not acquire jurisdiction of the person of the defendant or the subject of the action, except by a transfer from the county court; and the law did not provide that the voluntary appearance of a defendant in the municipal court of appeals should be equivalent to a transfer of the case to it from the county court."

In the case of *St. Louis v. Gunning Co.*, 138 Mo. 347, 355, 39 S. W. 788, 789, the defendant was convicted in the police court for violation of a city ordinance regulating the erection of signs. An appeal was taken to the St. Louis court of criminal correction. It appeared that the appeal was not taken in time, and that, consequently, the court of criminal correction had no jurisdiction of the appeal. It was held that the appearance before the St. Louis court of criminal cor-

rection conferred no jurisdiction of the subject-matter of that case, and that the action of the latter court was null and void. Judge Gantt says: "It is a familiar principle in the law of this state that it is essential to the jurisdiction of an appellate court that an appeal to it has been taken within the time and in the mode prescribed by the law governing such appeal. Said Judge Bliss, in *Robinson v. Walker*, 45 Mo. 117: 'A literal compliance with the statute in this respect is always held to be essential. It is the only way in which the appellate court can acquire jurisdiction of the subject-matter of the former trial. It is *res adjudicata*, and if reopened it must be according to law, and the law is too plain to admit of construction.' It was further held that the appearance of both parties in the appellate court would not give jurisdiction in such a case, as the court had no jurisdiction of the subject-matter of that case." In the case of *Robinson v. Walker*, cited above, the court speaking by Judge Bliss, further says: "But the circuit court has no jurisdiction of a matter already decided on in another court, and especially in actions of forcible entry and detainer, exclusively cognizable before a justice of the peace, unless it is brought into court under the statute and according to its provisions; and when it has no such jurisdiction the consent of the parties cannot give it." To the same effect is *Sidwell v. Jett*, 213 Mo. 601, 112 S. W. 56.

In *Dennis v. Bailey*, 104 Mo. App. 638, 78 S. W. 669, the court held, where an action in replevin was brought before a justice of the peace in Sullivan county, where the property was located, but both plaintiff and defendant were residents of Grundy county, that in such case the suit in replevin should be brought in some court of record in the county where the property should be found, and that the justice had no jurisdiction. The court says: "This action was accordingly brought in the wrong court; a court that was without jurisdiction of it. The lack of jurisdiction was inherent. If this was so, it is plain that the mere fact that the defendant appeared to the action and proceeded to the trial on the merits could not have the effect to waive the lack of jurisdiction. * * * The numerous cases relating to jurisdiction and waiver cited and relied on by the plaintiff are without application to a case of this kind, where the lack of jurisdiction in the court is inherent." In the case last cited the justice had jurisdiction of the subject-matter, that is, the action of replevin, but under the statute he had no jurisdiction of such actions, where both parties were nonresidents of the county.

In *Dodson, Adm'r, v. Scroggs*, 47 Mo., loc. cit. 287, the court said: "The exclusive jurisdiction given to the probate court of Dade, by implication prohibits all other courts from

acting. * * * The authorities cited by counsel for plaintiff abundantly show, and only show, that the right to jurisdiction over the person may be waived; but the law alone, and not consent of parties, must decide what matters each particular court may hear and determine."

Bailey on Jurisdiction, § 50, says: "Where an appellate court has no jurisdiction to review, by appeal or otherwise, the judgment of an inferior court, jurisdiction cannot be conferred on such court by consent of parties." In section 52 of the same volume, the author says: "The jurisdiction of appellate courts * * * is conferred ordinarily by statute and made dependent upon certain prescribed acts and conditions. If these are wanting, the court obtains no jurisdiction, although there may have been a general appearance on the part of the appellant and appellee."

The Supreme Court of the United States, in *Kelsey v. Forsyth*, 21 How. 85, 16 L. Ed. 32, says: "It is sufficient to say that the agreement of parties cannot authorize this court to revise a judgment of an inferior court in any other mode of proceeding than that which the law prescribes."

These citations support the proposition that, where the jurisdiction of an appellate court is limited by law to appeals arising within fixed territorial limits, such jurisdiction cannot be enlarged by consent of the parties, so as to draw within it a case arising outside such limits, even though it may be true that within such limits the court has jurisdiction of appeals involving the subject-matter of the same class. The rules applicable to courts of general inherent jurisdiction, such as our circuit courts, do not apply in cases such as this.

The same conclusion must be reached if we regard the question as one to be determined by merely considering whether the Springfield court had jurisdiction of the subject-matter. Jurisdiction has been said to be "the power which a man hath to do justice in causes of complaint brought before him." *Am. & Eng. Ency. Law.*, vol. 17, p. 1041, note 1. The subject-matter or cause of complaint presented to the Springfield court in this case was not personal injuries (the subject of complaint below), but it was the appeal. The cause of complaint was the action of the trial court as shown by its rulings and its judgment, as preserved in the record. Inasmuch as the Springfield court had no power to review the action of the circuit court of St. Louis, it had no jurisdiction of the subject-matter of the appeal.

In the case of *Wood v. Bank of the State of Georgia*, 1 Fla. 381, the Supreme Court of that state said: "The proper office of this court is not to repair mere omissions and irregularities of the parties or their counsel in the court below, but errors committed by

the latter in decisions made upon points submitted to it, or refusal to decide any questions so submitted."

The Supreme Court of Arkansas says: "The essential criterion of appellate jurisdiction is that it revises and corrects the proceedings in a cause already instituted, but does not create that cause. *Marbury v. Madison*, 1 Cranch, 137 [2 L. Ed. 60]." *Allis, Ex parte*, 12 Ark., loc. cit. 105.

The *Dunham Case*, supra, was decided December 17, 1910. On the same day this court handed down a decision in the case of *State ex rel. Furstenfeld v. Nixon*, 133 S. W. 340, which case was substantially similar to the one at bar, denying the writ on the ground that the appearance of relator in the Springfield court was a waiver of the defective jurisdiction. This latter case was under submission at the same time with the *Dunham Case*, and was argued and briefed mainly upon the same point, viz., the validity of the act authorizing the transfer of causes. The point discussed in the present opinion was not brought to the attention of the court in such a manner as to advise the court of its full import. We are now satisfied that the conclusion reached in the *Furstenfeld Case* was erroneous, and that decision is necessarily overruled.

We hold that the Springfield Court of Appeals had no jurisdiction of this case, and that its judgment herein is null and void. The writ of prohibition will, therefore, be awarded as prayed, at cost of relator.

WOODSON, GRAVES, KENNISH, and BROWN, JJ., concur. VALLIANT, C. J., and LAMM, J., dissent.

STATE ex rel. RAINES v. NOLTE et al.
(Supreme Court of Missouri. Feb. 9, 1911.)

In Banc. Prohibition by the State, on the relation of O. C. Raines, against Louis Nolte and others. Writ awarded.

Barclay, Fauntleroy & Cullen, for relator. Joseph F. Coyle and Morrow & Kelley, for respondent.

FERRISS, J. The question in this case is the same as that presented and decided in *State ex rel. St. Louis Dressed Beef & Provision Company v. J. P. Nixon et al.* (No. 16,119), 134 S. W. 638, and will therefore be governed by the ruling in the latter case.

The writ of prohibition will be awarded as prayed.

STATE v. BOYER.

(Supreme Court of Missouri, Division No. 2. Feb. 7, 1911.)

1. HOMICIDE (§ 325*)—APPEAL—SUFFICIENCY OF OBJECTION BELOW.

Testimony that prior to the homicide defendant flourished a pistol in the face of another was not objected to, so as to allow review of the propriety of its admission, where the

only objection was to a subsequent question asking for his reason for so flourishing it.

[Ed. Note.—For other cases, see *Homicide*, Cent. Dig. § 693; Dec. Dig. § 325.*]

2. HOMICIDE (§ 169*)—EVIDENCE.

For the purpose of throwing light on the reason of defendant for firing the shot at R. which struck deceased, this being as a dance, promoted by defendant, was breaking up, and while R. was standing at the door making a disturbance, evidence that defendant, an hour and a half before, when he ejected R. from the hall, flourished a pistol in the face of C., cannot be said to be incompetent.

[Ed. Note.—For other cases, see *Homicide*, Cent. Dig. §§ 841-850; Dec. Dig. § 169.*]

3. CRIMINAL LAW (§ 786*)—INSTRUCTIONS AS TO CREDIBILITY OF DEFENDANT.

Instructing that, in determining what weight and credibility the jury shall give defendant's testimony, they may consider as affecting his credibility his interest in the result, together with the fact that he is the accused on trial, testifying in his own behalf, is not error.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. §§ 1895-1901; Dec. Dig. § 786.*]

4. HOMICIDE (§ 232*) — DELIBERATION AND PREMEDITATION—EVIDENCE.

Though R., at whom defendant fired, when he shot deceased, testified that he and defendant were good friends, and on friendly terms at the time, and had never had any trouble, evidence that R., having been standing outside a door, talking loudly and defying N. to come out, defendant came out pistol in hand, stepped up to R., and saying, "Will you behave?" snapped the pistol twice at R., and, on R. running, fired at him again, hitting deceased, who was standing in the line of R.'s flight, whereon defendant exclaimed, "I have killed the wrong man," shows deliberation and premeditation, authorizing conviction of murder in the first degree.

[Ed. Note.—For other cases, see *Homicide*, Cent. Dig. § 480; Dec. Dig. § 232.*]

5. CRIMINAL LAW (§ 655*) — REMARKS OF COURT—VOIR DIRE EXAMINATION OF JURY.

For the court, on the examination of the jury on their voir dire, explaining at length the law in regard to the right of the jury to determine whether defendant should receive the death penalty in case of conviction, or be sentenced to the penitentiary for life, to state that, as the death penalty might be regarded as the proper punishment in case of conviction, jurors should qualify on the question as to whether or not they had conscientious scruples against capital punishment, cannot be considered to have a tendency to prejudice the jury against defendant.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. § 1521; Dec. Dig. § 655.*]

6. CRIMINAL LAW (§ 639*) — TRIAL — STATEMENT OF CASE TO JURY BY SPECIAL COUNSEL FOR THE STATE.

The stating of the case to the jury by special counsel for the state, instead of by the regular prosecuting attorney, is not error.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. § 1494; Dec. Dig. § 639.*]

Appeal from Circuit Court, Washington County; Jos. J. Williams, Judge.

Henry Boyer was convicted of murder, and appeals. Affirmed.

E. W. Major, Atty. Gen., and Jas. T. Blair, Asst. Atty. Gen., for the State.

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

FERRISS, J. Defendant was convicted in the circuit court of Washington county of murder in the first degree, and sentenced to the penitentiary for life.

The homicide was committed on the 4th day of October, 1907, upon one Thomas Trokey. The evidence on the part of the state tended to show that on the night of October 4, 1907, a dance was held at Cadet, Washington county, which was attended by some 30 or 40 persons, including defendant and deceased. There was music, dancing, drinking, and quarreling. The defendant and one Ralls promoted and were in charge of the dance. Deceased was one of the musicians, and in no way participated in any disorder. After the ball was over, about 11:30 or 12 o'clock at night, one Wilfred Roussan was standing outside the door, defying one Frank Nephew to come outside and be whipped. Defendant stepped out of the door, took hold of Roussan, and pointed his pistol at him, snapping it twice; the cartridges missing fire. At this juncture Roussan turned and ran between defendant and the deceased. Defendant pulled the trigger the third time, and this time the cartridge exploded; the ball striking deceased in the temple, killing him instantly. After the killing defendant fled, and was not apprehended until in January, 1910, when he was found in the state of Louisiana. The evidence further showed that, about an hour and a half or two hours prior to the shooting, defendant had ejected Wilfred Roussan from the hall, but the evidence fails to show anything further in connection with this incident; that is, whether there was any quarreling or fighting, or any words exchanged between the parties on that occasion.

The evidence on the part of the defense tended to show that the shot which killed the deceased was accidentally fired during a scuffle between defendant and others who were engaged in an effort to wrest the weapon from defendant's grasp. Defendant also introduced evidence tending to show that his reputation was good. Any further evidence necessary to an understanding of the case will appear in connection with the opinion.

The court gave instructions such as are ordinarily and properly given under the charge of murder in the first degree, and also the following instructions, complained of by defendant:

"(2) You are further instructed that if you believe and find from the evidence that defendant and another person, mentioned in the evidence, at any time before the filing of the information in this case, that is to say, at any time before the 15th day of February, 1910, in Washington county, and state of Missouri, gave a dancing party, at which Wilfred Roussan and Boss Courtols and other persons were present, and if you believe and find from the evidence that Thomas Trokey, being present at said dancing party,

was then and there shot and killed by the defendant, and if you further believe and find from the evidence that during the progress of said dancing party, and shortly before said Thomas Trokey was so shot and killed, the defendant had some altercation with the said Boss Courtols in the room in which said dance was given, and that he then and there menaced said Boss Courtols with a pistol, then you are instructed that such altercation and menacing of said Boss Courtols with a pistol by the defendant is not a matter for your consideration in the trial of this case, and you should not consider it in making up your verdict as to the guilt or innocence of the defendant, except in so far as you may from the evidence believe and find that said incident may throw light upon the reason of the defendant for the firing of the shot which resulted in the death of said Thomas Trokey, if you in fact believe and find from the evidence that said incident, if it took place, throws any light on the reason for the firing of said shot."

"(6) You are further instructed that the defendant is a competent witness in this case, and that you must consider his testimony in arriving at your verdict; but you, in determining what weight and credibility you should give his testimony in making up your verdict, may take into consideration, as affecting his credibility, his interest in the result of the case, together with the fact that he is the accused party on trial, testifying in his own behalf."

Defendant's grounds for a new trial, as set forth in the motion, are as follows: "(1) Because the court erred in admitting illegal and incompetent evidence, offered by the state, and over the objections of the defendant. (2) Because the court erred in excluding legal and competent testimony offered by the defendant, and over the objections of the defendant. (3) Because the court erred in giving, of its own motion, instructions numbered 1, 2, 3, 4, 6, and 8, and over the objections of the defendant. (4) Because the court erred in refusing and failing to declare all the law applicable to this case, and necessary in aiding the jury to arrive at a proper verdict in this case. (5) Because the court erred in that the court commented upon the evidence in this case in instructions 2 and 6, over the objections of the defendant. (6) Because the verdict is contrary to the evidence and the law of this case. (7) Because the court erred in refusing to permit M. E. Rhodes, one of the attorneys for the defendant, to make legitimate and proper argument to the jury on behalf of this defendant in the trial of this cause. (8) Because the court erred in lecturing the panel of jurors summoned in this cause, at the time said jurors were being examined as to their qualifications to sit on the trial of this cause, in such manner and to such extent as to prejudice the minds of the jurors against this.

defendant. (9) Because the court erred in failing to require the prosecuting attorney to state the case to the jury before the offering and taking of evidence in support of the prosecution in this cause, and by permitting S. G. Nipper, who was not at the time the legally elected, qualified, and acting prosecuting attorney, to state the case to the jury, nor had he been appointed by the court to prosecute this defendant in the trial of this cause, over the objections of this defendant. (10) Because the court erred in that the court misdirected the jury as to material matters of law in the trial of this cause."

Defendant's motion in arrest of judgment, omitting caption, is as follows: "(1) Because the prosecuting attorney had no right or authority in law to file the information in this cause except upon the preferment and finding of a true bill by a legally constituted grand jury, summoned from the body of Washington county, state of Missouri. (2) Because the facts stated in said information do not constitute a public offense. (3) Because the facts stated in said information do not constitute the charge for which defendant was convicted, that of murder in the first degree. (4) Because the verdict of the jury is insufficient to sustain a judgment."

In the brief filed on behalf of the defendant but two points are presented. One, which the brief states is "appellant's chief contention," is to the effect that the court admitted illegal evidence, going to show that the defendant "waived a pistol over the head of Boss Courtols an hour and a half before the killing of Thomas Trokey, over the objections of appellant, and the effort of the trial court to withdraw the same from the jury after having improperly admitted it, in instruction No. 2." The only other point urged by defendant in his brief is that "the state has failed to prove a willful, felonious, deliberate, premeditated, malicious attempt to kill Wilfred Roussan, Boss Courtols, or any other person." We will, however, take up the various points urged in the motion for a new trial and the motion in arrest, and dispose of them in order.

First. The first point urged by the defendant, and the one upon which he chiefly relies, is that the court erred in admitting the testimony of the witnesses for the state to the effect that an hour and a half or so prior to the shooting the defendant flourished a pistol in the face of one Boss Courtols in the dance hall. This evidence was not objected to by the defendant. Several witnesses—three at least—testified that the defendant flourished his pistol in the face of Boss Courtols, and the latter testified to the same thing; all without objection. At the close of the examination of this last witness by the state, the following occurred: "Q. (by the prosecuting attorney). How did he (defendant) come to draw a gun on you? A. I couldn't tell you. Judge Dearing (counsel

for the defendant): We object to this as incompetent, irrelevant, and immaterial; not charged with an assault on this man at all. The Court: Hasn't any connection with this other case, has it? Judge Dearing: No, sir; it hasn't. Mr. Nipper, Attorney for the State: That's all." It will be perceived that this objection did not go to testimony as to the facts, but simply to the reason. No other objection appears in the record. On the contrary, we may gather from the record that counsel for defendant regarded the Boss Courtols episode as having a favorable bearing on his theory of accidental shooting. He developed the same proof from his own witnesses, presumably on the theory that it tended to show that defendant was displaying a pistol without any criminal intent. Were we to treat this evidence as having been properly objected to, we could not say that it was incompetent. This case is unlike the case of *State v. Brown*, 188 Mo. 451, 87 S. W. 519, on which defendant relies. In that case the former act was not related to the act of killing either in point of time or association. In view of the foregoing, the objections to instruction No. 2 are not well founded.

Second. Our attention has not been called to any evidence offered by defendant which was excluded by the court, nor do we find any such in the record.

Third. No objection is made in the brief of defendant to the remaining instructions, and they are beyond criticism, with the possible exception of instruction No. 6. This instruction has been uniformly given in criminal cases, and has met the approval of this court. The writer, speaking for himself, thinks this instruction ought not to have been given. He is of the opinion that the usual instruction given, and which was given in this case, advising the jury that they are the sole judges of the credibility of witnesses and of the weight and value to be given their testimony, etc., is sufficient, and that in such case the particular instruction to the jury as to the testimony of the defendant is unnecessary and improper; but in view of the fact that this instruction has been uniformly given, and has been approved by this court (*State v. Dilts*, 191 Mo. 665, 90 S. W. 782, and cases cited), the court is not now prepared to reverse the case because of this instruction.

Fourth. Points 4 and 5, in the motion for a new trial, are fully covered by what has already been said.

Fifth. The evidence supports the verdict. The defendant argues that the state has failed to prove murder in the first degree, because of the testimony of Roussan "that he and defendant were good friends, were on friendly terms at the time, and had never had any trouble." This contention can have no force in the light of the facts attending the shooting. Roussan was standing outside

the door, talking loud, and defying one Nephew to come out. Defendant came out through the door with pistol in hand, stepped up to Roussan, said, "Will you behave?" and snapped the pistol at Roussan twice. Then Roussan ran. Defendant fired at him the third time. This time the cartridge exploded, and the bullet struck Trokey, who was standing in the line of Roussan's flight. When Trokey fell, defendant exclaimed, "I have killed the wrong man." The evidence shows both deliberation and premeditation. The case was tried by both sides on the theory that the killing was either murder in the first degree or accident.

Sixth. We do not find in the record any refusal by the court to permit the attorney for defendant to make legitimate and proper argument to the jury.

Seventh. Upon the examination of the jury upon their voir dire, the court explained at considerable length the law in regard to the right of the jury to determine whether the defendant should receive the death penalty in case of conviction, or be sentenced to the penitentiary for life, and that, as the death penalty might be regarded as the proper punishment in case of conviction, jurors should qualify upon the question as to whether or not they had conscientious scruples against capital punishment. We do not see anything in this explanation which would tend in any degree to prejudice the jury against the defendant.

Eighth. The objection that the case was stated to the jury by special counsel for the state, and not by the regular prosecuting attorney, cannot be sustained. *State v. Taylor*, 98 Mo., loc. cit. 243, 11 S. W. 570; *State v. Coleman*, 199 Mo., loc. cit. 120, 97 S. W. 574.

The motion in arrest of judgment was properly overruled. The information was sufficient. Defendant does not refer to it in his brief.

The case was thoroughly tried. The instructions presented the issues fairly to the jury. The verdict is amply sustained by the evidence.

There being no reversible error, the judgment is affirmed.

KENNISH, P. J., and BROWN, J., concur.

STATE v. McDONOUGH.

(Supreme Court of Missouri, Division No. 2.
Feb. 7, 1911.)

1. INDICTMENT AND INFORMATION (§ 86*)—REQUISITES—STATING VENUE.

By express provision of Rev. St. 1909, § 5107, the body of an indictment need not allege any venue, but the venue stated in the margin is sufficient; and by section 5115 want

of a proper or perfect venue does not invalidate the indictment.

[Ed. Note.—For other cases, see Indictment and Information, Cent. Dig. §§ 230-243; Dec. Dig. § 86.*]

2. CRIMINAL LAW (§ 884*)—VERDICT AND JUDGMENT—PUNISHMENT.

Whether or not the words "assess the punishment at three years," in a verdict, finding defendant guilty, sufficiently declare the punishment, the verdict will support the judgment of conviction with imprisonment in the penitentiary for three years; Rev. St. 1909, § 5254, providing that where the jury find a verdict of guilty, and fail thereby to declare the punishment, the court shall assess and declare it, and render judgment accordingly.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 2107; Dec. Dig. § 884.*]

3. CRIMINAL LAW (§ 785*)—INSTRUCTIONS—CREDIBILITY OF DEFENDANT AND WIFE.

Giving an instruction authorizing the jury to take into consideration the interest of defendant and his wife in the result of the trial, and their marital relation, in passing on the credibility of their testimony, is not error.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1776-1781; Dec. Dig. § 785.*]

4. CRIMINAL LAW (§ 671*)—TRIAL—HEARING AS TO COMPETENCY OF WITNESS AND EVIDENCE—EXCLUSION OF JURY.

During the hearing of testimony on the competency of a witness or of evidence offered, in a case where the testimony may have an influence on the minds of the jury on the issues in the case, it is the better practice to have the jury retire.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1591, 1592; Dec. Dig. § 671.*]

5. WITNESSES (§ 287*)—EVIDENCE—CONVERSATIONS BETWEEN THIRD PERSONS.

A conversation between the mother of prosecutrix in rape and the wife of defendant, in the absence of defendant, being hearsay, and inadmissible except in the case of impeachment, the bringing out, on cross-examination of said mother, of part of such of a conversation, did not authorize her, no foundation for her impeachment being laid, to give, on the redirect, the rest of the conversation, not needed to present the situation fairly, under the rule that where part of a conversation is drawn out in evidence the adversary is entitled to the whole utterance.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 1000-1002; Dec. Dig. § 287.*]

6. WITNESSES (§ 53*)—CROSS-EXAMINATION—WIFE OF ACCUSED.

As Rev. St. 1909, § 5242, confers on one on trial immunity from cross-examination beyond the scope of his direct examination, so it exempts his wife from cross-examination beyond the scope of her direct examination.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 137-141; Dec. Dig. § 53.*]

7. CRIMINAL LAW (§ 380*)—EVIDENCE—CHARACTER OF DEFENDANT.

The character of defendant cannot be assailed by the state by proof of his specific acts of wrongdoing.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 843, 845; Dec. Dig. § 380.*]

Appeal from St. Louis Circuit Court;
Geo. H. Shields, Judge.

Thomas McDonough appeals from a con-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

viction. Reversed and remanded for new trial.

Thos. B. Harvey (Mat Holland, of counsel), for appellant. E. W. Major, Atty. Gen., and Jas. T. Blair, Asst. Atty. Gen., for the State.

KENNISH, P. J. The defendant was indicted in the city of St. Louis, charged with the crime of rape upon Virginia Mansfield, a female child under the age of 14 years. Upon a plea of not guilty, he was tried and convicted of the offense of assault with intent to ravish, and his punishment assessed at imprisonment in the penitentiary for three years. Judgment was pronounced in accordance with the verdict, and, after taking the proper steps, he appealed to this court.

The evidence for the state tended to prove the following facts: At the time of the offense charged, the defendant, a married man with a family consisting of a wife and two small children, was engaged in the business of keeping a small grocery store and a saloon in the city of St. Louis. He resided across the street from the store. Mrs. Mansfield, mother of the prosecutrix; her mother, Mrs. Stanton; the prosecutrix; and her sister—resided near the store and residence of the defendant. The prosecutrix was six years of age and her sister about two years older. The Mansfield children and the two small children of the defendant played together. On the day of the alleged crime, the defendant, as was his custom, went to his residence in the middle of the afternoon to take a nap, leaving the store in charge of his wife, so that he could return and keep his place open until late at night. About 5:30 o'clock in the afternoon of June 25, 1908, the children were playing on the defendant's porch, and he called the prosecutrix and his own four year old girl into his room. The prosecutrix testified that the defendant laid her on the bed alongside of him, took down her panties, placed his hand on her private parts, and hurt her. The defendant's little girl was in the room at the time. The prosecutrix then went with the defendant's daughter to get a bucket of ice cream, and, being called by her sister, went home to her supper. Mrs. Mansfield testified that the prosecutrix was sobbing and crying when she came home, and that, upon being asked to tell what was the matter, related her mistreatment by the defendant. Mrs. Mansfield immediately examined her daughter and found her private parts contused and swollen and found some traces of blood. About two or three hours thereafter, Mrs. Mansfield and her mother went to the defendant's store, and, in the presence of his wife, accused him of mistreating the little girl. He denied any knowledge of the alleged misconduct, and, after his accusers had left, sent his wife to the Mansfield home to learn the facts as to the charges made. Two days thereafter Mrs. Mansfield, accompanied by a midwife, took the

prosecutrix to a physician, who found the parts somewhat bruised and inflamed on the inside. The physician and the midwife testified as to the child's injuries.

The defendant and his wife testified in his behalf and denied the incriminating facts testified to by the witnesses for the state. Other witnesses for the defendant testified to statements made by Mrs. Mansfield, soon after the date of the alleged crime, in conflict with her testimony at the trial. The defendant introduced evidence of good character, and, although questions were asked his character witnesses on cross-examination, indicating that defendant was not of good character, no evidence was offered by the state upon that issue. Other facts in evidence will be referred to in the opinion.

1. Omitting formal parts, the indictment is as follows: "The grand jurors of the state of Missouri, within and for the body of the city of St. Louis, now here in court, duly impaneled, sworn, and charged, upon their oaths present: That Thomas McDonough on the 25th day of June, 1908, at the city of St. Louis aforesaid, in and upon Virginia Mansfield, a female child under the age of 14 years, to wit, of the age of 6 years, unlawfully and feloniously did make an assault, and her, the said Virginia Mansfield, unlawfully and feloniously did carnally know and abuse; contrary to the form of the statutes in such cases made and provided and against the peace and dignity of the state." Appellant assails the indictment as insufficient on the ground that, while the venue of the assault is properly laid and is also stated in the margin, there is no venue laid as to the averment of carnal knowledge.

It is provided by section 5107, Rev. St. 1909, that: "It shall not be necessary to state any venue in the body of any indictment or information; but the county or other jurisdiction named in the margin thereof shall be taken to be the venue for all the facts stated in the body of the same." And section 5115 provides: "No indictment or information shall be deemed invalid, nor shall the trial, judgment or other proceedings thereon be stayed, arrested or in any manner affected; * * * for want of a proper or perfect venue; nor for want of any venue at all." Under these statutes, as construed in the following decisions, we hold the indictment sufficient against the attack made upon it, and that this point in appellant's brief is without merit: *State v. Simon*, 50 Mo. 370; *State v. Dawson*, 90 Mo. 149, 1 S. W. 827; *State v. Brown*, 159 Mo. 646, 60 S. W. 1064; *State v. Hughes*, 82 Mo. 86.

2. Appellant contends that the verdict is insufficient to support the judgment. It is as follows: "We, the jury in the above-entitled cause, find the defendant guilty of assault with intent to ravish, and assess the punishment at three years. F. Westman, Foreman."

Section 5254, Rev. St. 1909, provides:

"Where the jury find a verdict of guilty, and fail to agree on the punishment to be inflicted, or do not declare such punishment by their verdict, or assess a punishment not authorized by law, and in all cases of judgment by confession, the court shall assess and declare the punishment, and render judgment accordingly." It is apparent that, if the verdict in this case failed to declare the punishment, it fell within the provisions of the foregoing statute, and the punishment was properly fixed by the judgment of the court. On the other hand, if it sufficiently declared the punishment, it is not open to the objection made.

3. Instruction numbered 11 is in the usual form and authorized the jury to take into consideration the interest of the defendant and his wife in the result of the trial, and their marital relation, in passing on the credibility of their testimony. Appellant vigorously assails this instruction as wrong in principle and urges that it should no longer receive the approval of this court. This instruction has been given in criminal cases in the courts of this state for over 30 years. It has been considered and approved by this court in many cases, and we are unwilling to hold that the trial court committed reversible error in giving it in this case. *State v. Maguire*, 69 Mo. 197; *State v. Boyer* (decided at the present term of this court, but not yet officially reported) 134 S. W. 542; *State v. Dilts*, 191 Mo. 665, 90 S. W. 782, and cases cited.

4. After Mrs. Mansfield and her mother had returned from defendant's store to their home, Mrs. McDonough, the wife of the defendant, went to the Mansfield home, at her husband's suggestion, to learn the facts about the trouble. Mrs. Mansfield testified that she sent for Mrs. McDonough, and that the latter came to her house in response to the request. When Mrs. Mansfield was on the witness stand as a witness for the state, and while the state was making its case in chief, she was asked, on cross-examination, if Mrs. McDonough came to her home that night, and she answered in the affirmative. After explaining where her children were when Mrs. McDonough arrived, she was asked: "Let me ask you and refresh your memory possibly in this way: Don't you remember Mrs. McDonough asked you to let her see the little child, and you said you would and called her in?" To which the witness answered: "No, sir. She didn't ask me to examine her. We wanted her to tell the story, but Virginia refused and would not do it. I asked her and pleaded with her to tell Mrs. Donough, but she said she would not do it."

Invoking the principle of law that when a part of a conversation is drawn out in evidence the adversary is entitled to the whole utterance, the prosecuting attorney, on redirect examination, asked the witness to, "Tell the jury all the conversation you had with Mrs. McDonough when you sent for her and

she came over to your house." The witness answered: "Yes, sir. Well, she came over, and she was crying, and I told her, I said, 'Mrs. McDonough, I want to warn you. You have two little girls there yourself—'" Objection was here made by counsel for the defendant to the testimony of the witness, which objection was argued to the court at length, and the court ruled that the question was competent. The witness then continued: "I said, 'Mrs. McDonough, I want to warn you.' I said: 'You have two little girls of your own over there. You never trust them under his hands.' I said, 'Because when he has done that to my little girl he will do it to yours.' She said she knew he was low, but she never thought he would do like that. She said: 'If I had been a woman of the half world, he couldn't have treated me worse than he did with disrespect and with every abuse in the world. Many a night I have had to sit out on the front steps for fear he would shoot me.'" Upon objection by the defendant, the court ruled: "Conversation with regard to this offense is competent. Conversation with regard to other matters is not." Counsel for defendant then objected that "the conversation, as it turned out, was altogether about other matters." To which the court replied and ruled as follows: "No, it was not. It was about her warning her against McDonough doing the same thing to her little girl, and referred to the fact of his having treated her little girl this way. That part of the conversation is about this matter. What she said about matters that took place between herself and her husband before that is not competent. I so rule and instruct the jury to disregard that part of the conversation." The defendant saved his exceptions.

If the foregoing ruling of the court is the law, then the state, in a criminal case, even in a capital case, may have repeated to the jury, as evidence in support of the charge, the talk of two women, out of court and not in the presence of the defendant, in which they agree in advance of the jury that the defendant is guilty of the offense charged, as well as of many other offenses in no manner connected with the case on trial. While the court told the jury, after this evidence was in, that they should not consider the conversation as to the other offenses of the defendant, testified to by Mrs. Mansfield, it is questionable whether the effect of such an instruction is not of theoretical rather than of practical efficacy.

Before taking up the main question involved in the ruling now under consideration, reference should be made in passing to the practice, not uncommon in the courts, of hearing in the presence of the jury the evidence upon the competency of a witness or of testimony offered, in cases, as the one in hand, where the testimony may have an influence upon the minds of the jury, and, if found incompetent, attempting to withdraw

its effect by an instruction or direction to the jury. In the trial of a criminal case, and especially in a case involving such moral turpitude and of such revolting character as that for which defendant was on trial, the jurors come into the case with very decided views upon the subjects necessarily discussed in the testimony of the witnesses, and, when statements are made by the witnesses which are harmful and incompetent under the rules of evidence, it is extremely doubtful if the impressions made upon the minds of the jury can be neutralized by an instruction or direction of the court. There is no difficulty in obviating any danger of injustice to the accused by settling such matters in the absence of the jury. This course may require a little additional time, but the predominant importance of vouchsafing to the accused a fair trial, upon competent testimony only, fully justifies the propriety of the course suggested, and which, in fact, is generally followed by the courts.

In the case of *State v. Witherspoon* (decided by this court, but not yet officially reported) 133 S. W. 323, this court said: "When, in the course of a trial, a question is raised as to the competency of a witness, and the circumstances of the case are such that the *voir dire* examination of the witness by the court may have an influence on the minds of the jury upon the issues before them, this court has commended it as a wise and judicious course of procedure that the jury be retired from the courtroom pending such examination. *Stetzler v. Metropolitan Street Ry. Co.*, 210 Mo., loc. cit. 709 [109 S. W. 686]."

Was the whole utterance, the entire conversation of Mrs. Mansfield and Mrs. McDonough, admissible in evidence against the defendant? Neither of these persons engaged in the conversation was a party to the cause, and, under the well-recognized general rules of evidence, any statement made by either out of court and in the absence of the defendant was hearsay and not admissible except in the case of impeachment. It seems to be conceded by appellant upon this point that the state was entitled to the whole conversation between the two women to the extent and so far as it dealt with the particular matter brought out on cross-examination by the defendant. But upon what theory was the principle invoked by the state applicable in this case? Mrs. Mansfield was merely a witness, and her statements out of court were hearsay. No ground was laid for her impeachment. It was clearly competent for the defense to impeach her by proving prior statements in conflict with her testimony, and in such case it would have been competent for the state to have offered evidence of former statements in harmony with her testimony; but that is not this case.

The rule of law under consideration, as applied to conversations, is limited to admissions and declarations of parties to the cause,

and only in exceptional cases has it ever been applied to third parties. The principle is stated in *Wigmore on Evidence*, vol. 3, § 2115, as follows: "The general phrasing of the principle, then, is that, when any part of an oral statement has been put in evidence by one party, the opponent may afterwards, on cross-examination or re-examination, put in the remainder of what was said on the same subject at the same time. This phrasing leaves something to be desired in definiteness; but it is practically applied without much difficulty and with little or no quibbling. Its most common application is to conversations in general, including the admissions of an opponent, and to inconsistent statements of a witness used in impeachment; here, it may be noted that a conversation in a party's presence is in effect merely one form of an admission, because statements in a party's presence are usually equivalent to admissions by him."

There is a striking analogy, in the facts and questions of law presented, between the case of *People v. Flaherty*, 162 N. Y. 532, loc. cit. 544, 57 N. E. 78, 77, and the case at bar. In that case the defendant was convicted of the crime of having sexual intercourse with a female under the age of 16 years. The prosecutrix was Marie Sweeney. She first told the Skillen family of her trouble. Jennie Skillen was a witness for the people. The court, through Parker, C. J., discussing the questions raised upon her testimony, said: "Now, the district attorney having brought out the fact that the accusation against the defendant by Marie Sweeney was first made to the Skillen family, the defendant sought to show on cross-examination that Jennie Skillen had first suggested the name of Father Flaherty to Marie Sweeney as the author of her misfortune. Counsel said: 'Didn't you say to her, "Wasn't it Father Flaherty?"' And she said, "Yea." A. No, sir; I did not. Q. How did you say that? A. As near as I can remember, I asked her who she had been with. She didn't answer. I said, "Marie, you know and I know you have been with some one, and I want you to tell me who the author of your trouble is." She wouldn't tell me. Q. I only ask you for the question and the answer, the time when the name of Father Flaherty was used; what did you say, and what did she say? A. I said, "Who was it?" * * * She then said it was Father Flaherty. Q. And that was the first mention she made of the name of Father Flaherty in the matter? A. Yes, sir.' This was all of the cross-examination on that subject. The counsel for the people then put the question which, after referring to the statement of Marie Sweeney that Father Flaherty was responsible for her condition, concluded as follows: 'Did she give you any reason why she had intercourse with him?' These reasons were not competent as evidence prior to the cross-examination of the witness, nor were they made el-

ther necessary or competent by that cross-examination. This was not a case where, a part of a conversation being given, the rest was needed in order to present the situation fairly; nor did the question call for the rest of the conversation, but, instead, it asked for the reasons only, and they were not competent as evidence for any purpose; nor is there even excuse for suggesting that they were made so by the fact that the hearsay declarations of the complainant as to the name of the person responsible for her condition was perhaps drawn out by the defendant instead of the people."

We are of opinion that the court committed reversible error in permitting Mrs. Mansfield, over the objections of the defendant, to give in evidence to the jury the alleged conversation with the defendant's wife.

5. On the cross-examination of the defendant's wife, she was asked by counsel for the state: "How many times have you and Mr. McDonough been separated during that time?" No reference to her separation from her husband was made in her examination in chief. Upon objection that the cross-examination was improper because that matter was not referred to in chief, the court ruled that only the defendant was protected in so limiting the cross-examination, and that the evidence was competent on the issue of good character. This ruling of the court was clearly erroneous, and cannot be sustained upon either of the reasons assigned. The first reason given is wrong because the statute confers upon the wife the same immunity from cross-examination beyond the scope of her direct examination, as in the case of the husband on trial. Section 5242, Rev. St. 1909.

The ruling cannot be sustained on the second ground for the reason that the character of the defendant on trial cannot be assailed by the state by the proof of specific acts of wrongdoing. *State v. Bulla*, 89 Mo. 595, 1 S. W. 764; *State v. Lockett*, 168 Mo. 480, 68 S. W. 563; *Kelley's Crim. Law & Prac.* § 252.

There are other alleged errors presented in appellant's brief; but, because of the disposition to be made of this case, we do not deem it necessary to pass upon them.

We are of the opinion that prejudicial error was committed against the defendant.

The cause is therefore reversed and remanded for a new trial.

FERRISS and BROWN, JJ., concur.

STATE v. GLASSCOCK.

(Supreme Court of Missouri, Division No. 2.
Feb. 7, 1911.)

1. INDICTMENT AND INFORMATION (§ 147*) — DEMURRER TO INDICTMENT.

An indictment is not demurrable for matters not appearing on its face, such as irregu-

larities in the impaneling of the grand jury and in the qualification of its members.

[Ed. Note.—For other cases, see *Indictment and Information*, Cent. Dig. §§ 490-494; Dec. Dig. § 147.*]

2. INDICTMENT AND INFORMATION (§ 10*) — GRAND JURY—IMPANELING AND QUALIFICATION.

An indictment is not assailable because of statutory requirements in the ordering and impaneling of the grand jury not being complied with, or because of failure of a member of the grand jury to properly qualify, these not being among the grounds of objections which Rev. St. 1909, § 5067, authorizes to be made to a grand juror before he is sworn; and challenge on a ground not authorized in such section, either to the array or to the polls, being expressly prohibited by section 5068.

[Ed. Note.—For other cases, see *Indictment and Information*, Cent. Dig. § 55; Dec. Dig. § 10.*]

3. CRIMINAL LAW (§ 1091*)—APPEAL—BILLS OF EXCEPTIONS.

Pleas in abatement and motions to quash the indictment, being matters of exception, must be preserved in the bill of exceptions, that the rulings thereon may be reviewed; it not being enough that they are in the record proper, and that the evidence in support thereof and the rulings thereon are in the bill of exceptions.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. § 2831; Dec. Dig. § 1091.*]

4. HOMICIDE (§ 174*)—EVIDENCE—CONDUCT OF DEFENDANT.

Evidence that, though defendant lived within a quarter of a mile of decedent's home, he did not go there, along with his neighbors, after he knew of the homicide, and did not attend the funeral, is competent as tending to prove a consciousness of guilt, notwithstanding the existence of ill will between defendant and deceased.

[Ed. Note.—For other cases, see *Homicide*, Cent. Dig. § 359; Dec. Dig. § 174.*]

5. HOMICIDE (§ 174*) — EVIDENCE — FALSE STATEMENTS OF DEFENDANT.

Though the state introduced evidence of defendant's presence at certain places shortly before the homicide, witnesses for it could testify to statements of defendant that he was not at such places at such times as proof of falsehoods relevant to a showing of consciousness of guilt.

[Ed. Note.—For other cases, see *Homicide*, Dec. Dig. § 174.*]

6. CRIMINAL LAW (§ 1036*) — APPEAL — ABSENCE OF OBJECTIONS BELOW.

Objection to the admission of testimony not having been made, the question of its admissibility is not before the appellate court for review.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. §§ 2639-2641; Dec. Dig. § 1036.*]

7. HOMICIDE (§ 166*)—EVIDENCE—THREATS.

Evidence of threats of an incriminatory character made by defendant against deceased shortly before the homicide, and of profane and vile epithets spoken by defendant of deceased, even after his death, is competent, and proof of motive.

[Ed. Note.—For other cases, see *Homicide*, Dec. Dig. § 166.*]

8. CRIMINAL LAW (§ 782*)—INSTRUCTION ON ALIBI.

The instruction that one of the defenses is alibi, and that, if the jury find that defend-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

ant was elsewhere than at the places of the alleged offense, they should acquit him, and that "defendant is not required to establish this defense, beyond a reasonable doubt, but, if from the whole evidence you have a reasonable doubt of defendant's presence at the commission of the alleged offense, you must give him the benefit of that doubt, and acquit him," is not erroneous because of the quoted part.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. § 1852; Dec. Dig. § 782.*]

9. CRIMINAL LAW (§ 814*)—ALIBI—EVIDENCE CALLING FOR INSTRUCTION.

An instruction on alibi is not required merely because the state, after showing that shortly before the homicide defendant was near the scene thereof, introduced evidence of statements of defendant that he was not there for the purpose of showing false statements by him.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. § 1833; Dec. Dig. § 814.*]

10. CRIMINAL LAW (§ 1137*)—APPEAL—INVITED ERROR.

Though the evidence did not call for an instruction on alibi, defendant, having asked for such an instruction, cannot complain of the giving of an unobjectionable instruction on the subject.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. §§ 3007-3010; Dec. Dig. § 1137.*]

11. HOMICIDE (§ 254*)—MURDER—SUFFICIENCY OF EVIDENCE.

Evidence in a homicide case held to support a conviction of murder in the second degree.

[Ed. Note.—For other cases, see *Homicide*, Cent. Dig. §§ 533-538; Dec. Dig. § 254.*]

Appeal from Circuit Court, Ray County; F. H. Trimble, Judge.

George Glasscock was convicted of murder in the second degree, and appeals. Affirmed.

On the 3d day of November, 1909, the grand jury of Ray county returned an indictment charging George Glasscock with the crime of murder in the first degree. The indictment was in three counts, in each of which, in slightly varying language, the defendant was charged with shooting with a rifle and killing Clyde Hatfield on the 13th day of June, 1909. A demurrer, plea in abatement, and motion to quash the indictment were each, in turn, filed and overruled. The state elected to prosecute for murder in the second degree. The accused was arraigned, entered his plea of not guilty, and was put upon his trial, which resulted in a verdict of guilty; the punishment assessed being a term of 15 years in the penitentiary. Timely motions for new trial and in arrest of judgment were filed and overruled, sentence was pronounced in conformity with the verdict, and an appeal was taken to this court.

The evidence for the state tended to show that during the summer of 1909 Clyde Hatfield was living upon and cultivating a portion of appellant's farm. Bad blood seems to have arisen between the two men. About 10 days before the killing appellant, explaining the purchase of a new rifle, said he wanted to get rid of Hatfield; that Hatfield had stolen about 40 of his chickens; that he got

the rifle to "shoot people off the place, and kill some stray dogs." To another witness, a few days before Hatfield was killed, appellant said that Hatfield and Vanbeber were stealing his chickens, and that Hatfield had to get off his place, or he would get him off. He added that he had a Winchester that would kill a man a half mile away, exhibited one pistol, and declared he had another concealed on his person. To another witness appellant said on June 9, 1909, that three of his steers had been shot, and he believed Hatfield did it; that he thought Hatfield had taken some of his chickens; that he had shot one Hatfield, and he died afterwards. On the next day he made like accusations against Hatfield, inquired for him, and said he was hunting him. On the same day appellant said to another witness: "I am on the track of my man and can get him. The thing I want to find out is who loaned the gun. There is a certain class of people in this neighborhood you can't reach by law. All the way you can reach them is with a gun from the brush and let them find it out. That's the way to do it." To another witness appellant said he thought he knew who shot his steers, and added: "I think he has gone to the Springs to see one of his aunts, the party that I think done it. I aim to get the s—n of a b—h when he comes back." It appeared from the testimony of other witnesses that Hatfield had been in Excelsior Springs that week.

The night before he was killed, Hatfield and his family, which included his wife and two small children, stayed at the home of his mother, Mrs. Ida Hatfield, about five miles from the house in which he was living on appellant's farm. He had arranged to move away from appellant's farm on the following Monday. About 9 o'clock on Sunday morning, June 13, 1909, Hatfield, his wife and children, his sister, a Mrs. Kauffman, and Dave Petty, started from Mrs. Ida Hatfield's home to the home of the deceased on the Glasscock farm. In making the trip they passed appellant's house, which stands near the public road. From this point they went west, thence south, and thence east to the Hatfield home. The distance around the road from appellant's house to the Hatfield home is about three-quarters of a mile, but in a direct line through the field the distance is almost exactly a quarter of a mile. Petty having turned off and gone to his own home, the other members of the party reached the Hatfield home about 9:30 o'clock in the forenoon. Hatfield harnessed a horse for his sister, who proceeded to her own home. He then carried some wood into the house, kindled a fire, and shortly before 11 o'clock a. m. started to a guinea's nest southeast of the house, leaving his wife in the garden, where she busied herself with getting vegetables for dinner. In the meantime, a little

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

after 10 o'clock a. m., a neighbor named Fields went to his mail box which stood in the road west of appellant's residence, and in the field between the homes of appellant and Hatfield saw appellant some 350 yards away, walking southward toward the Wilkerson pasture, which lies south of and adjacent to the Hatfield cornfield and garden. Fields testified that appellant had something in his hand which looked like a gun. He said in his testimony that he would not swear that it was a gun, but "it looked to be a gun." Fields had also seen appellant a few minutes before at a point north of where he saw him the second time. Each time he was seen by Fields appellant was walking in a southerly direction. The second time the witness saw him appellant was "down in the hollow." After leaving his wife in the garden, as above stated, Hatfield went southeast into the Wilkerson pasture. Shortly thereafter, and at about 11 o'clock a. m., Mrs. Hatfield heard the report of a gun close at hand. She arose from the ground, where she was sitting beside a lettuce bed, and called her husband, but received no reply. He was not in sight, though he could have been seen by her if he had been standing. Thereupon she hastened to the Barnett home, about a quarter of a mile northwest of the Hatfield home. Barnett returned to the Hatfield home with her, and they went into the pasture which Hatfield had entered just before the firing of the shot. At a point in this pasture about 30 feet south of the garden fence and 200 feet from the house, they found the dead body of Clyde Hatfield, lying face downward in a pool of blood. The head was to the southwest.

An examination of the body indicated, according to the witnesses for the state, that a bullet had entered the body on the left side of the breast, near the shoulder or arm-pit, and had passed out on the right side of the breast, inflicting a wound that caused instant death. The clothing was driven into the wound on the left side. There was no evidence of a struggle, and no tracks were found near the body, except those made by Barnett and Mrs. Hatfield after the shooting, nor was there any indication that robbery had been the motive for the killing. No weapon was found; neither was the bullet found, although search was made for it. The body was found in a "little open place which was surrounded by brush and timber." Behind a bush about 40 feet northeast of the point where the body was found several imprints of a portion of a man's foot were discovered. These imprints were found on the east side of the bush. The bush was between the imprints and the house, and the limbs of the bush, on the east side, were bruised and scorched. It further appeared that a man could make his way from the point where appellant was seen by Fields to the bush behind which the tracks were found without exposing himself to the view of

persons at the Hatfield house. Along the fence on the south side of the cornfield, footprints were found leading in the direction of the Hatfield home. These footprints were large, as were those near the bush. After the finding of the body, the whole countryside flocked to the Hatfield home. Appellant, though living but a quarter of a mile away, did not go to the Hatfield home until that night, when he went in obedience to a subpoena to attend the inquest. Many of the people who were at the Hatfield home in the afternoon must necessarily have passed appellant's house in going to the Hatfield home. It also appeared that appellant did not attend the funeral.

Appellant's sister-in-law, who was visiting at his home on the day of the killing, testified that she, appellant, and appellant's wife were the only persons at appellant's home on that day; that they had breakfast about 5 o'clock a. m., and that about 9 o'clock a. m. she retired to an upstairs room; that about 11 o'clock a. m., or a little later, appellant's wife came into the room; that after a short conversation with appellant's wife witness went downstairs and saw appellant there, dressed, except as to his coat and shoes. At about 12:15 o'clock p. m., other witnesses, driving through the field from appellant's place to Hatfield's, saw appellant in his field about 150 or 200 yards south of his house. In the afternoon, while appellant was riding east along the road which passed his house, he was asked by a witness if he had heard of the shooting of Clyde Hatfield. He replied that it was a surprise to him, and said that was the first he had heard of it. In the same conversation appellant said he had seen Hatfield that morning. To another witness appellant said he had first heard of Hatfield's death when he was getting ready to go to salt his cattle at the Ray farm. About a week after the killing, appellant stated to a witness that he went to bed about 8 o'clock on the morning Hatfield was killed and did not get up until 1:30 o'clock that afternoon. In August, 1909, appellant had a sale of his personal property.

In a conversation with a witness, in the latter part of August, 1909, appellant, commenting upon the testimony given by Mrs. Hatfield at the preliminary examination, said that she fell down when she said that the shot came from the north; that it did not come from that direction. In the same conversation appellant also stated that Clyde Hatfield had stolen chickens from him, and that Gus Vanbebbber had hauled them off; that Clyde Hatfield was a G—d d—d s—n of a b—h, and the community was better off without him; that, if he did kill him, they could not prove it. Speaking of Vanbebbber, he said he would get that other s—n of a b—h. To another witness, speaking of Sam Fields, who had testified at the preliminary examination, appellant said he thought Fields would run off; that Fields

knew he was under a death sentence if he testified to what he did at the other trial.

The evidence introduced on behalf of the appellant tended to show the following facts: That the entrance of the bullet was on the right side of Hatfield's body and the exit on the left side. That on the day Hatfield was killed there was no fence in the field south of the Glasscock house, at the point where Fields testified he saw Glasscock, as stated by Fields in his testimony. That there had previously been a fence there, but it had been removed before the date of the killing of Hatfield. That by reason of brush along the road, at the point from which Fields testified he observed appellant going south through the pasture, the view was so obstructed that it would have been difficult to have seen a man at the place designated by Fields. That at the Hatfield home, on the afternoon of the killing, a witness named Hyder, addressing several men in a general way, asked: "Did any one see George Glasscock to-day, coming here or going away from here?" That, in response to that inquiry, the witness Fields said: "If any one did, no one has heard of it." That the testimony given by Mrs. Hatfield at the trial, in which she testified that the report of the shot came from the south, was contradicted by her testimony given at the preliminary examination, where she testified that the report came from the north. That after Mrs. Hatfield had testified at the preliminary examination the prosecuting attorney, in his argument, in the presence and hearing of Mrs. Hatfield, stated that she had made a mistake as to the direction from which the sound of the shot came.

It was also shown that at the time the appellant was said by the witnesses for the state to have stated that Hatfield was at "The Springs," and that he would get him when he came back, appellant knew that Hatfield had returned from his visit at Excelsior Springs; that after Hatfield returned from Excelsior Springs, and only a day or two before the date of the alleged statement and threat, appellant, in company with several men, had seen Hatfield and had spoken to him at the town of Georgeville. Neither appellant nor his wife testified as witnesses in the case.

In rebuttal, the state introduced evidence in support of the reputation of the witness Fields for truth and veracity, also evidence contradicting that which had been introduced by the defendant to contradict Fields, and also some further testimony to show that the entrance of the bullet was on the left side of Hatfield's body. This was the substance of all the evidence.

Jas. L. Farris, Jr., J. D. Allen, and Lavelock & Kirkpatrick, for appellant. E. W. Major, Atty. Gen., Jas. T. Blair, Asst. Atty. Gen., and Maurice G. Roberts, Proa. Atty., for the State.

KENNISH, P. J. (after stating the facts as above). 1. Appellant first assigns as error the action of the court in overruling the demurrer to the indictment. The demurrer is general and alleges but the one ground that the indictment does not charge the commission of any offense under the laws of Missouri. The indictment contains three counts, and each count charges the offense in accordance with precedents which have received the approval of this court, and the demurrer was properly overruled. *State v. Hudspeth*, 150 Mo. 12, 51 S. W. 483; *State v. Gray*, 172 Mo. 430, 72 S. W. 698; *State v. Bailey*, 190 Mo. 257, 88 S. W. 733; *State v. Heath*, 221 Mo. 563, 121 S. W. 149; *Kelly*, *Crim. Law and Prac.* § 474. Indeed, as we understand appellant's assault upon the indictment, it is not because of defects appearing upon its face, and therefore properly raised by demurrer, but because of irregularities in the impaneling of the grand jury and in the qualifications of its members—questions which are raised in this record, if at all, by the plea in abatement, motion to quash, and the evidence introduced in support thereof.

2. The defendant filed a plea in abatement, also a motion to quash the indictment, both of which assail the indictment upon the same grounds, namely, because the statutory requirements in the ordering and impaneling of the grand jury were not complied with, and also because of the failure of one or more of the members thereof to properly qualify to serve on that body. This contention, so strongly urged by distinguished counsel for appellant, is wholly without merit. Challenges of a grand jury or of its members are of two kinds—to the array and to the polls. The law upon the subject of the right of challenge in the case of a grand jury is stated in *Bishop's New Criminal Procedure* (4th Ed.) § 876, as follows: "To the Array—To the Polls.—The challenge is either. The former is for some imperfection in the constitution of the panel; the latter, for some disqualification of a juror." Section 5067, Rev. St. 1909, provides: "Any person held to answer a criminal charge may object to the competency of any one summoned to serve as a grand juror, before he is sworn, on the ground that he is the prosecutor or complainant upon any charge against such person, or that he is a witness on the part of the prosecutor and has been summoned or bound in a recognizance as such, and if such objection be established, the person so challenged shall be set aside." Section 5068 provides: "No challenge to the array of grand jurors, or to any person summoned as a grand juror, shall be allowed in any other cases than such as are specified in the last section." It is disclosed by the plea in abatement, the motion to quash, and the evidence offered in support thereof that no objection was made to any member of the

panel before the jury was sworn upon either of the grounds enumerated in the first of the above sections, or upon any other ground, and a challenge upon a ground not authorized in the first section, either to the array or to the polls, is expressly prohibited by the second section.

Discussing the intention of the Legislature in the enactment of the foregoing statutes, this court more than 50 years ago, in the case of *State v. Bleekley*, 18 Mo., loc. cit. 431, said: "They supposed all objection to juries, either grand or petit, must, under the laws of the state, be made at the time when about to be sworn, and for the causes in the statute mentioned. * * * The defendant is not permitted to question the manner of summoning the grand jury. Such a cause on such a subject is not one of the statutory objections allowed to grand juries or to a grand juror in our courts, and none other can avail." See, also, *State v. Crane*, 202 Mo. 54, 100 S. W. 422; *State v. Sartino*, 216 Mo. 408, 115 S. W. 1015. But, even if the objections made against the grand jury and its members in the plea in abatement and the motion to quash were well founded and meritorious in the trial court, they could not be of avail to the defendant in this court for the reason that the plea and motion, which are matters of exception, are not preserved in the bill of exceptions, and therefore are not before this court for review. The plea in abatement and the motion to quash are found in the record proper, but are not included in the bill of exceptions. The evidence in support of each and the rulings of the court thereon are preserved in the bill of exceptions, but that is not enough, for the plea and motion have no place in the record proper, and it is as essential that they be incorporated in the bill of exceptions as in the case of motions for a new trial and in arrest of judgment. *State v. Little*, 228 Mo. 273, 128 S. W. 971; *State v. Earle*, 225 Mo. 537, 125 S. W. 467; *State v. Finley*, 193 Mo. 202, 91 S. W. 942; *State v. Hicks*, 160 Mo. 468, 61 S. W. 183; *State v. Wear*, 145 Mo. 162, 46 S. W. 1099.

3. The evidence for the state tended to show that Clyde Hatfield was murdered about 11 o'clock on Sunday morning. The news soon spread through the neighborhood, and within an hour a hundred people had assembled at the scene of the crime. They came on horseback and in vehicles, many of them passing on the public road near the defendant's home. The defendant did not go to the Hatfield home, although he lived but a quarter of a mile distant. In the afternoon he rode to his pasture in the other direction. He did not attend Hatfield's funeral, nor did he go near the home of the deceased until compelled to attend the inquest under subpoena. Appellant contends that the court committed error in admitting, over the defendant's objection, evidence tending to prove the foregoing facts. In support

of this alleged error, appellant calls attention to the fact that the state had offered evidence to show the existence of ill will between the appellant and the deceased, and appellant says: "Granting it to be true, then it would not be expected that, upon the death of Clyde Hatfield, Glasscock should go over there and pretend profound sorrow; to have done so would have been a badge of suspicion." The conduct of the accused after the crime, and his failure to go to the Hatfield home along with his neighbors even after he knew of the homicide, was competent evidence tending to prove a consciousness of guilt, and the court did not err in overruling the defendant's objections to such testimony. The theory upon which such evidence is admissible is that consciousness of guilt is generally indicated by the unnatural acts and conduct of the guilty after the commission of the crime; and while failing to go to the place of the crime, as the neighbors did, was unnatural and a circumstance tending to prove the guilt of the defendant, yet if he had been upon the ground promptly and, notwithstanding the pre-existing ill will, had "professed profound sorrow," his conduct might have been equally unnatural and entirely competent for the consideration of the jury in determining the question of his guilt or innocence. Regardless of the relations between the defendant and the deceased, while the latter was living, when it became known that the deceased had been murdered on the defendant's farm, in the daytime, leaving a widow and two young children, defendant's conduct, in the light of human experience, is not easily explained on the theory of the ill will which must have ended, at least so far as deceased was concerned, with his death. Neither is it probable that an innocent neighbor would under such tragic circumstances stop to speculate as to whether his conduct in going to the scene of the crime and rendering such assistance as was in his power in caring for the dead or in apprehending the criminal would be a "badge of suspicion." In any event, if the evidence of the ill will existing between the defendant and the deceased was a satisfactory explanation of the defendant's conduct, the latter was given the full benefit of it, and it was a question for the jury to consider with the other circumstances of the case.

Witnesses Fields and Swofford testified in behalf of the state as to where the defendant was at certain times on the morning of the day of the homicide. Another witness for the state testified as to statements made by the defendant to the effect that he was not at the places mentioned as testified to by the witnesses Fields and Swofford. Upon this state of facts appellant contends, as we understand it, that, as the state had located the defendant by the testimony of the witnesses named, it was not competent for the

state to prove statements and declarations made by the defendant contradictory of the testimony of said witnesses. Whether the testimony of the witnesses for the state furnished a sufficient basis for the defense of alibi or not, the state had the undoubted right to prove that the defendant made false statements as to his whereabouts at the time of the homicide as a circumstance in the case tending to prove consciousness of guilt. The principle of law applicable in such cases is stated as follows: "The fact of the utterance of falsehoods by the accused to exculpate himself, the falsehoods being satisfactorily proved, is relevant to show a consciousness of guilt." 12 Cyc. 398; *State v. White*, 189 Mo., loc. cit. 351, 87 S. W. 1188.

4. Eleven witnesses for the state testified to threats of the most incriminatory character made by the defendant against the deceased shortly before the murder, also evidence as to profane and vile epithets spoken by the defendant of the deceased, even after the latter's death. It is stated in appellant's brief that this evidence was admitted "over the objections of the defendant." We have examined the testimony of each of the witnesses named, and have failed to find that any objection was made to the admission of such testimony. Therefore the point now made as to the admissibility of such testimony is not before this court for review, and we shall not notice it further or the argument of the appellant thereon, except to state that we think this testimony was not only competent, but that it supplied the most cogent proof of the motive for the crime.

5. On the question of alibi, the court, of its own motion, gave the following instruction: "One of the defenses interposed by the defendant in this case is what is known as an alibi; that is, that defendant was not present at the time and place of the alleged offense, but was elsewhere. If you find from the evidence in the case that the defendant was elsewhere than at the place of the alleged offense, then you should find the defendant not guilty. The defendant is not required to establish this defense beyond a reasonable doubt, but, if from the whole evidence you have a reasonable doubt of the defendant's presence at the commission of the alleged offense, you must give him the benefit of that doubt and acquit him." Appellant complains of error in the giving of the foregoing instruction, not because an instruction on the subject of alibi was given by the court, for the defendant had requested such an instruction, but because the jury are instructed that "the defendant is not required to establish this defense beyond a reasonable doubt, but, if from the whole evidence you have a reasonable doubt of the defendant's presence at the commission of the alleged offense, you must give him the benefit of that doubt and acquit him." The instruction fairly and correctly states the law upon the defense of alibi, and does not materially dif-

fer from instruction N asked by the defendant upon the same subject. The language in the instruction as given by the court, of which complaint is made, and not included in instruction N requested by the defendant, is found in an instruction upon the subject of alibi recently approved by this court. *State v. Barton*, 214 Mo. 316, 113 S. W. 1111; *State v. Cushenberry*, 157 Mo. 168, 56 S. W. 737; *State v. Bryant*, 134 Mo. 252, 35 S. W. 597. The only basis for an instruction upon the subject of alibi was the evidence introduced by the state tending to prove that the defendant made false statements as to his whereabouts about the time of the commission of the crime; the evident purpose of such testimony being to show the consciousness of guilt of the accused as a circumstance in the case. No evidence was offered upon this defense by the defendant. Under this condition of the evidence, the law relative to the defense of alibi, as given by this court in the case of *State v. White*, 189 Mo., loc. cit. 351, 87 S. W. 1188, is peculiarly in point. The court said: "The defense of an alibi was not interposed in this cause, and no testimony was offered by the defendant on that subject. The testimony of the state could not have furnished the basis for an instruction upon the defense of alibi, for the reason that the statement of the defendant made to witnesses introduced in evidence that he was not present at the scene of the murder was for the sole purpose of showing its falsity, and upon the theory that such false statement was a circumstance for the consideration of the jury." However, as an instruction upon the defense of alibi was asked by the defendant and such an instruction, free from objection, was given by the court, it is obvious that appellant has no just ground of complaint, and the subject need not be further pursued.

6. Twenty-one instructions were given to the jury, eight of which were given at the request of the state, five at the request of the defendant, and eight by the court of its own motion. The only instruction given of which complaint is made in this court is the instruction upon the defense of alibi already considered. Therefore, so far as the instructions are concerned, it only remains to be considered whether the court erred in refusing instructions A to P, inclusive, asked by the defendant, and whether the court erred in not fully instructing the jury on the essential elements of the crime charged and the defense interposed thereto. Several of the refused instructions were given by the court in modified form, and were as favorable to the defendant as he was entitled to. Others were upon subjects which were fully covered by instructions given, and which declared the law in accordance with the decisions of this court. It is sufficient to say upon this point that we have carefully compared the refused instructions with the instructions given, and we are satisfied that

the court fully instructed the jury in accordance with the requirements of the law, and that there is no merit in defendant's complaint.

7. Upon the request of the defendant, the court reporter took down the entire closing address of the prosecuting attorney to the jury, and the same is set forth in extenso in the bill of exceptions. During the course of the argument of the prosecuting attorney, many objections were made by counsel for defendant, on the ground of improper conduct in the remarks made and the language used. Some of the objections thus interposed were sustained by the court, and the prosecuting attorney in such instances was properly rebuked and admonished. The remarks to which objections were made, but not sustained, are contained in the fifteenth, sixteenth, seventeenth, and eighteenth grounds of the motion for a new trial. Some of the remarks of which complaint is thus made were in response to statements and challenges made in the argument of counsel for defendant. The prosecuting attorney in some respects has an advantage over counsel for the accused in the presentation of the cause to the jury, and for that reason and because of the limits prescribed by the law courts jealously guard the rights of the defendant, and will not hesitate to grant a new trial on that ground alone when it is made to appear that the representative of the state, in his address to the jury, directly or indirectly, overstepped the bounds of legitimate argument, and by so doing deprived the accused of any right with which the law has clothed him. In this case the address of the prosecutor was an ingenious, strong, and most forceful appeal to the jury, and while at certain points, when objections were made but not sustained, a near approach was made to the limits of what was permissible in argument, yet, after a full consideration of the subject, we cannot say that he was guilty of misconduct prejudicial to the rights of the defendant.

8. It is finally contended that the verdict is not supported by substantial evidence. A full statement of the material facts upon which the state relies to sustain the verdict accompanies this opinion, and, without repeating them here, we shall dispose of this contention by stating our conclusion that the evidence is amply sufficient to support the verdict of the jury.

The case was ably tried and hotly contested in the trial court. It has been fully and ably presented to this court. The defendant has been accorded and has availed himself of every right guaranteed by the law to a person accused of crime, and, as the record is free from prejudicial error, the judgment should be affirmed. It is so ordered.

FERRISS and BROWN, JJ., concur.

STATE v. WHITSETT.

(Supreme Court of Missouri, Division No. 2.
Dec. 31, 1910. Rehearing Denied Feb.
14, 1911.)

1. HOMICIDE (§ 340*)—APPEAL—HARMLESS ERROR—INSTRUCTION.

Under Rev. St. 1899, § 2369 (Ann. St. 1906, p. 1457 [Rev. St. 1909, § 4903]), providing that any person found guilty of murder in the second degree shall be punished according to the verdict, though the evidence shows him guilty of a higher degree, and section 2535 (page 1509 [Rev. St. 1909, § 5115]), providing that no judgment of conviction shall be affected because the evidence shows that the defendant is guilty of a higher degree of the offense, a person found guilty of murder in the second degree under an indictment charging murder in the first degree cannot complain of an instruction on the lower grade of the offense, though the evidence tended to show him to be guilty of the higher degree.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 715-720; Dec. Dig. § 340.*]

2. CRIMINAL LAW (§ 938*) — NEW TRIAL — NEWLY DISCOVERED EVIDENCE—ELEMENTS.

To entitle accused to a new trial for newly discovered evidence, he must show that the evidence has come to his knowledge since the trial, that it was not owing to want of diligence that it did not come sooner, that it would probably produce a different result, that it is not cumulative only, that the affidavit of the witness himself should be produced or its absence accounted for, and that the object of the testimony is not merely to impeach the character or credit of a witness.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2306-2317; Dec. Dig. § 938.*]

3. CRIMINAL LAW (§ 942*) — NEW TRIAL — NEWLY DISCOVERED EVIDENCE—IMPEACHING EVIDENCE.

Newly discovered evidence that a witness for the state had been convicted of a felony and also of violating an ordinance, which convictions he denied on cross-examination, is not ground for a new trial, being merely impeaching evidence.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2331, 2332; Dec. Dig. § 942.*]

4. CRIMINAL LAW (§ 941*) — NEW TRIAL — NEWLY DISCOVERED EVIDENCE—CUMULATIVE EVIDENCE.

Where the testimony of a state witness was impeached by three witnesses for defendant, newly discovered evidence of former convictions of the witness was not ground for new trial, being merely cumulative.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2328-2330; Dec. Dig. § 941.*]

5. CRIMINAL LAW (§ 939*) — NEW TRIAL — NEWLY DISCOVERED EVIDENCE—DILIGENCE OF ACCUSED.

Newly discovered evidence of convictions of a witness for the state is not ground for new trial, where no diligence was shown by accused or his counsel in investigating the former life of the witness, though the fact that he would testify and the nature of his testimony were known long before the trial.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2318-2323; Dec. Dig. § 939.*]

6. CRIMINAL LAW (§ 628*)—TRIAL—PRELIMINARY PROCEEDINGS—INDORSEMENT OF WITNESSES ON INFORMATION.

The failure to indorse the name of a witness for the state on the information is not

ground for reversal, where the defendant knew before the trial that the witness was to appear.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1409-1419; Dec. Dig. § 628.*]

7. CRIMINAL LAW (§ 936*)—NEW TRIAL—SURPRISE.

Failure to move for a continuance on the ground of surprise, when a witness is called by the state whose name was not indorsed on the information, is a waiver of any right to complain of surprise.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2299-2305; Dec. Dig. § 936.*]

8. WITNESSES (§ 79*)—COMPETENCY—DETERMINATION.

Whether a witness is sane is a question going to his competency and is for the court and not for the jury.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 201-204; Dec. Dig. § 79.*]

9. WITNESSES (§ 79*)—COMPETENCY—DETERMINATION.

The contention that the testimony of a witness should have been excluded because he was of unsound mind, and that it was error to refuse to permit defendant to prove, after he had testified, that he was of unsound mind, cannot be sustained, where there was no request that the court examine the witness on his voir dire to discover his condition of mind nor to exclude the testimony, on the ground stated.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 201-204; Dec. Dig. § 79.*]

10. HOMICIDE (§§ 156, 158*)—EVIDENCE—MALICE.

In a prosecution for homicide, testimony that, three months after the killing, defendant said that he wanted to sell a brother of the deceased a monument for the grave, and testimony as to threats by defendant against deceased two years before the crime and as to a remark indicating malice toward the deceased, made by defendant in the graveyard, where, and some months after, deceased was buried, was admissible to show malice on the part of defendant.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 286, 287, 293-296; Dec. Dig. §§ 156, 158.*]

11. HOMICIDE (§ 158*)—EVIDENCE—THREATS—RE MOTENESS.

The competency of threats by defendant, as evidence in a prosecution for homicide, is not affected by their nearness or remoteness, which go only to the weight of the evidence.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 293-296; Dec. Dig. § 158.*]

12. CRIMINAL LAW (§ 1055*)—APPEAL—PRESENTATION OF QUESTIONS IN TRIAL COURT—ARGUMENTS OF COUNSEL.

Where defendant failed to except to the court's failure to rule on an objection to an argument of the prosecuting attorney, the point is not open for review.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2663, 2667; Dec. Dig. § 1055.*]

13. CRIMINAL LAW (§ 1129*)—APPEAL—RECORD—MATTERS PRESENTED FOR REVIEW.

The court on appeal will not search the record for errors in instructions and in the exclusion of testimony, where they are not specifically pointed out.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2954-2964; Dec. Dig. § 1129.*]

Appeal from Circuit Court, Ray County; Francis H. Trimble, Judge.

John Whitsett was convicted of murder in the second degree, and appeals. Affirmed.

Jas. L. Farris, Jr., for appellant. E. W. Major, Atty. Gen., and Jno. M. Atkinson, for the State.

BURGESS, J. At the October term, 1909, of the circuit court of Ray county, under an information charging him with murder in the first degree for the killing of Albert Albright, the defendant was convicted of murder in the second degree, and his punishment assessed by the jury at imprisonment in the penitentiary for 30 years. From the judgment of conviction defendant appeals to this court and assigns error.

Albert Albright, the deceased, was a farmer and school teacher living in the northwest part of Ray county. For some months prior to his death he had been teaching school at a place about four miles north of his home. On the 29th day of October, 1908, about 4 o'clock in the afternoon, he left his school, and, as was his custom, drove towards home in a buggy. About 6:30 that evening, he was traveling south along the public road, known as the "Slip-up" road, and when about 210 feet northwest of the residence of William Keene he was shot from ambush, and his body was found on the public roadside, pierced by five bullet wounds. There was no witness to the tragedy; but neighbors heard the report of the shotgun at the time, as well as the noise of a team running away. A little north of where the body was discovered were found the hat and whip of the deceased, and a short distance further north were found gun-wads scattered in the public road. There were some trees and underbrush on the east side of the road, near the scene of the killing, and, also, on the east side near and opposite the point where the gun-wads were found was a shallow ravine containing considerable undergrowth and deadwood.

Whitsett and the deceased lived on adjoining farms, about a mile and a half distant from the home of William Keene, and had some serious difficulty over a boundary fence about two years prior to the tragedy. They had an encounter, one using a rock and the other a rifle, and Albright shot out one of Whitsett's eyes. A few months thereafter Albright was tried in the circuit court of Ray county upon the charge of assault with intent to kill Whitsett, and was acquitted on the grounds of self-defense. The ill feeling engendered by the trouble and strife between the two men continued, the evidence shows, until the day of Albright's death, and the defendant made many threats against the deceased.

The defendant endeavored to prove an alibi. He did not testify at the trial; but he did testify at the preliminary hearing,

and a part of his testimony given at that time was introduced by the state as admissions against him, and the defendant introduced the remainder of such testimony. According to this testimony, defendant left his home on the morning of the day the killing occurred, and went to the house of James Gulley, a neighbor, and got his shotgun, which he loaned to Gulley some months before. He took his shotgun home, reaching there between 2 and 3 o'clock in the afternoon. He then left his home, with a pistol in his pocket, placed the shotgun in the smokehouse, and proceeded to the home of William Keene, where he was informed by Mrs. Keene that Mr. Keene and his grandson, Grafton Keene, had gone to Lawson. Defendant then went to the home of James Bassett, less than a quarter of a mile distant from the Keene home, and north thereof. Some time before sundown, the defendant, as he testified, parted with Mr. Bassett in a cornfield, where Bassett was gathering corn and throwing it into a wagon. This cornfield, as the evidence shows, lay between the Bassett and Keene homes, and the place where the men parted was less than an eighth of a mile from the scene of the killing. By actual experiment it was shown that the distance could be walked in five minutes. After parting with Mr. Bassett, the defendant proceeded south at an ordinary gait, to the southwest corner of the Keene house, where he turned east on the public highway, and had gone but a little distance in that direction when he heard the report of a shotgun. He turned back and went to the Keene house, where he stayed for about half an hour. While there, one Wick Bowen, a neighbor, came along and informed the people in the house that there was a man shot in the public road and that he thought he was dead. Whitsett did not go out with the others to see who the dead man was, but excused himself, saying that he could not see, and then left for his home. He further testified at the preliminary hearing that he did not know until the following morning who it was that was shot and killed, and then Grafton Keene was the person who gave him such information. On the way to the Keene residence that morning, he saw and had some conversation with one John S. Carey. The defendant's family, according to his testimony, stayed at the home of William Carey, a neighbor, the night of the tragedy.

The evidence on the part of the state showed that the deceased was wearing two overcoats at the time he was shot and killed, and that there were five bullet wounds in his body; the bullets entering the left side, and, according to the testimony of a physician, coming from a southeasterly direction.

Grafton Keene testified for the state that he was at the home of his grandfather, William Keene, on the evening of October 29, 1908. Between 6 and 7 o'clock that evening,

he heard the report of a shotgun, the sound coming from a northwesterly direction, and he then heard the noise made by a team running away. He went to the door and looked out, but saw no one. A few minutes later, the defendant came to the door and knocked. He was admitted by the witness. The defendant was invited to eat supper there, and he did so. After supper, one Wick Bowen came to the house and called for Grafton Keene and told him that there was a man lying in the road and that he thought he was dead. The witness told Whitsett what he had just heard, and asked him to go with him to investigate. Defendant replied: "I can't go. It's too dark. I can't see." Witness had a lamp ready at the time. The defendant, after prolonging his stay a few minutes, left for home. Keene and Bowen called on some neighbors to go with them to investigate, and when they found the body they recognized it as that of Albert Albright.

John S. Carey testified that as the defendant was going toward the Keene home, the morning after the shooting, he accosted him (witness) and said, "The man on the hill is dead." Upon being asked whom he meant, Whitsett replied, "Albert Albright." This testimony is very important for the reason of the fact that defendant testified at the preliminary hearing that Grafton Keene was the first person to tell him, next morning, the name of the person killed. At the time of the conversation with Carey, defendant was on his way to the Keene house, where, as he testified, he learned that Albright was the man who was shot down the evening before. Defendant on his way back from Keene's had another conversation with the witness about the killing, and then said that Grafton Keene told him that Albright was shot in the neck. This witness also testified that he was a witness at the preliminary examination, held at Elmira, and that while there he was asked by the defendant to change his testimony so as to make it appear that the conversation between them as to the killing of Albright was had the second time they met, as the defendant was returning from Keene's house, and not before.

James Gulley, a neighbor of the defendant, testified that he was at the defendant's house the first Sunday after the preliminary examination referred to, and that defendant stated to him that he was standing northwest of Keene's house when Albert Albright came down the road in a trot, and slacked up as he got even with defendant's position; that defendant then remarked to the witness, "That was a pretty good shot, for a blind man to put five bullets through a man out of six."

Elijah W. Colley testified that, before deceased was tried for assaulting Whitsett, the latter said to him that, "He would wait till after the court decided, and if the court didn't he would act."

John Greenlee, a witness for the state, testified that, some time after the first trouble between defendant and the deceased, the defendant remarked to him, "Its a long lane that has no turn, and I will get even with him some day."

John Burgess testified that about three years before the trial in this case he was at defendant's house, and that defendant asked him if he could "plan a way for him to get Mr. Albright over to his house so he could kill him." The witness further testified that he was attending the funeral of a friend who was interred in the same graveyard which contained the remains of the deceased, and that defendant there said to him, "Where is that devil buried at in this graveyard?"

Ed Bowen and Wick Bowen testified for the state that as they were travelling on the road, near the scene of the crime, the morning after the tragedy, they saw defendant standing at the north side of the ravine alluded to; that they stopped and told him that Albright was dead; that the defendant said, "Dead?" and they replied, "Yes, dead."

Thorton Gorham, constable, testified that he arrested the defendant and brought him before Justice Crowley. This witness was asked to state what Whitsett said when asked whether he was guilty or not guilty. Witness answered: "He didn't make any answer the first time he was asked, and the judge asked him again, and he said that they would have to prove it on him. And the judge told him that it would be necessary to state whether he was guilty or not guilty, but I hardly think he ever did answer the question properly. Q. Did he ever say either that he was not guilty? A. No, sir."

Will McCowen testified that he had a conversation with the defendant on a train in February, 1909, soon after this case was continued the first time. They were returning from Richmond at the time. Whitsett asked McCowen if Monroe Albright, a brother of the deceased, was on the train. McCowen asked him what he wanted to see Monroe Albright about. Whitsett, after showing McCowen a pamphlet containing a picture of a monument, said to him, "I want to sell Monroe a monument for his brother's grave."

Frank Allen, who was a prisoner in the county jail at the time defendant was incarcerated there, testified that Mrs. Whitsett came to see the defendant in the jail soon after his arrest, and that he overheard the conversation between them. Mrs. Whitsett, as the witness testified, informed the defendant that there was somebody around the house a night or two previously, and Whitsett asked her who it was. She told him she was afraid, and did not go out to see. Whitsett asked, "Has anybody been there to see about those guns?" She answered, "No," and then he said, "Well, when you go back, be sure as hell to take those loads out." He further said, "They'd better look out, for there is one fellow eating breakfast

in hell now, and there will be some one else to help him."

James Bassett, who was the last person to see Whitsett before the tragedy, testified for the state that Whitsett and he parted in a cornfield a short distance from the scene of the killing; that when Whitsett left he went in the direction of the Keene house; that they parted before sundown, or about 5 o'clock. According to Bassett's testimony, he then gathered a load of corn, took it home, unloaded it in a crib, drove to the barn, unharnessed and watered his horses, turned them loose in the pasture, walked back to his house, washed his face, and then, as he was getting ready to eat supper, he heard the report of a shotgun in a southerly direction. Just prior to that he heard the noise made by a vehicle passing by his house.

Henry W. Smith, another witness for the state, testified to certain admissions and statements made by the defendant at his home on the night after his preliminary examination, as follows: "Q. Were you at his home on the night after the preliminary hearing at Elmira? A. Yes, sir. Q. Did you stay there that night? A. Yes, sir. Q. Who else was there? A. Steve Mullins, Sherman Mullins, Charlie Dalton, and myself. Q. After supper, where did you go, and—where were you after you had supper? A. Why, we were sitting around there, and then went to bed. Q. In what room—sitting room? A. Well, I couldn't describe that, because I don't know whether you would call it a sitting room or not. Q. When you were talking, were the ladies present? A. No, sir. Q. State to the jury what John Whitsett said relative to Albert Albright, the man who is charged with the killing. A. Well, he says, 'The son of a bitch always wore two or three overcoats, so it takes a pretty good bullet to go through him.' Q. What else? A. Well, there was Steve and— Q. State whether or not he said that he had the bullet to go through him. A. Why, he said he got fooled, 'I got bullets to go through him.' Q. State what he said about the gun? A. Why, Steve had his gun there, and Sherman, and they were drying them out at the stove, because it rained that night, and he brought his gun out. Q. Who? A. Whitsett. Q. Go ahead? A. He brought the gun out, and says, 'Here's a gun—When I go after a man with it, I get him.' Steve says, 'I bet you do, too.' Q. What other statement did he make in the house that evening? A. They was talking about the evidence given in the preliminary hearing there at Elmira. Q. What did John Whitsett say? A. They was talking about the bullets, and about—Steve mentioned that the 'woman' was swearing there about the bullets being 'made,' and Steve said he couldn't tell whether they were made or manufactured, and it seemed like a woman swore they were made; and Whitsett said: 'Why, the damned bitch didn't see me making it; she wasn't there.' Q

What statement did he make relative to firing the gun, and not being seen, if anything? A. He said, 'I was slick enough so nobody seen me going or coming so they could swear to it.' Q. What did Steve say? A. Steve cautioned him to 'shut up.' Q. In the course of these conversations, what, if anything, did he say relative to shooting in the overcoat or neck? A. Why, he said, 'There is no use shooting in the overcoat as long as I can get him in the neck or head.' Q. What did Steve say? A. He says: 'That's right, too. Whenever you do anything, why, do it right.'"

Further than his own testimony as given at the preliminary examination, the defendant introduced no evidence at the trial except such as tended to impeach and discredit the testimony of witnesses Smith and Allen, who testified for the state.

1. Defendant's first contention is that under the evidence he should either have been convicted of murder in the first degree or acquitted, and that the court erred in giving an instruction on murder in the second degree. This contention is rendered nugatory by section 4903, Rev. St. 1909 (section 2369, Rev. St. 1899 [Ann. St. 1906, p. 1457]), which provides that "any person found guilty of murder in the second degree, or of any degree of manslaughter, shall be punished according to the verdict of the jury, although the evidence in the case shows him to be guilty of a higher degree of homicide." Since the enactment of this section in 1879 (section 1654, Rev. St. 1879), it has been uniformly ruled by this court that a person found guilty of murder in the second degree, under an indictment charging murder in the first degree, is in no position to complain of an instruction on the lower grade of the offense, although the evidence tended to show him to be guilty of the higher degree of murder. *State v. West*, 202 Mo. 128, 100 S. W. 478; *State v. Edwards*, 203 Mo. 528, 102 S. W. 520; *State v. Darling*, 199 Mo., loc. cit. 202, 97 S. W. 592; *State v. Todd*, 194 Mo., loc. cit. 395, 92 S. W. 674. Section 5115, Rev. St. 1909 (section 2535, Rev. St. 1899 [Ann. St. 1906, p. 1509]) provides that no judgment shall be arrested or in any manner affected because the evidence shows or tends to show the defendant "to be guilty of a higher degree of the offense than that of which he is convicted."

2. It is earnestly insisted by the defendant that the court erred in refusing to grant him a new trial on the ground of newly discovered evidence that Henry W. Smith, one of the state's witnesses, had been convicted of a felony in the territory of Oklahoma, and sentenced to the territorial penitentiary, at Lansing, Kan., and was also found guilty of violating an ordinance of Kansas City, Mo., and sent to the workhouse, although said Smith denied, on his cross-examination, that he had been convicted of any crime.

To entitle him to a new trial on the ground

of newly discovered evidence, it devolved upon the defendant to show: "First, that the evidence has come to his knowledge since the trial; second, that it was not owing to the want of due diligence that it did not come sooner; third, that it is so material that it would probably produce a different result if the new trial were granted; fourth, that it is not cumulative only; fifth, that the affidavit of the witness himself should be produced, or its absence accounted for; and, sixth, that the object of the testimony is not merely to impeach the character or credit of a witness." *State v. Estes*, 209 Mo. 288, 107 S. W. 1059; *State v. Church*, 199 Mo. 605, 98 S. W. 16; *State v. Speritus*, 191 Mo. 24, 90 S. W. 459; *State v. McKensie*, 177 Mo. 699, 76 S. W. 1015. In support of his motion for new trial on the ground stated, defendant filed various affidavits.

It is very apparent that the sole object of the newly discovered evidence on which defendant bases his motion is to impeach the character and credit of witness Smith. Further, it would be cumulative, for the testimony of said witness was impeached by Steve Mullin, Charlie Dalton, and Laura Whitsett, witnesses for the defendant. One of the affidavits was made and signed by Mrs. Rosa M. Mullin. In it she says that Smith was arrested in Kansas City, Kan., in 1905, charged with stealing coal from railroad cars; that he was convicted of said offense; that she was a witness at the trial of the case; that in a conversation with Smith, about four years before the trial of this case, she told him that she had heard that he was in the Kansas penitentiary; and that Smith said to her: "I don't care if I have. I am as good as anybody." The record shows that Mrs. Mullin was subpoenaed as a witness for defendant on the 16th day of October, 1909, and it is shown by the affidavit of Sheriff Sanders, preserved in the record, that Mrs. Mullin was present in the courtroom during the trial of the cause. Yet she was not called on to testify. While she states in her affidavit that she had not previously communicated to defendant's attorney the facts stated therein, the inference is inevitable that either the defendant or his attorneys had some knowledge of such facts. For what purpose was she subpoenaed, if not to testify in behalf of the defense? Being in the courtroom during the trial, why was she not called on to testify? The record shows that several letters received by Mrs. Mullin from Smith were filed as exhibits in the case, but they are not preserved in the bill of exceptions. In support of his motion for a new trial, the defendant filed several affidavits to the effect that Smith's character was bad; but the state filed about as many counter affidavits of citizens of Kansas City, Kan., stating that Smith's reputation for truth, veracity, morality, peace, and quietude was good. The state also filed a counter affidavit of one Lizzie Patterson,

stating that the reputation of Mrs. Mullin for truth, veracity, and morality was bad in Kansas City, where she lived for five years prior to her marriage to Sherman Mullin and moving to Ray county. Again, the evidence shows that the witness Smith lived with the families of Steve Mullin and Sherman Mullin, in Ray county, for about a year prior to the killing of Albright. He, together with other witnesses for the state, at the May term, 1909, of the Ray county circuit court, in the presence of defendant and his counsel, was recognized to appear at the following October term as a witness for the state in this case. That the defendant was not ignorant of the nature of Smith's testimony, before Smith was called on to testify, is quite evident from the fact that defendant had as his witnesses at the trial all of the parties mentioned by Smith in his testimony as being present at the time defendant, according to Smith's testimony, made the statements and admissions above set forth. No diligence whatever is shown on the part of the defendant and his counsel in the matter of investigating the former life of the witness Smith, and his convictions, if any, of offenses committed in this and other states. He denied, upon his cross-examination, that he had ever been convicted of crime, while the affidavits filed by defendant show that he had been convicted of two or three crimes, one of which was a felony. Had the defendant and his counsel been as diligent before the trial as they were after its termination, there is no reason to doubt that they could have discovered the facts as to Smith's career, and presented the same at the trial for the purpose of impeaching Smith and weakening the force of his testimony. The defendant is not within the rule applicable to new trials upon newly discovered evidence. He has not shown that it was not owing to the want of due diligence that the evidence did not occur sooner. The newly discovered evidence is cumulative, and simply goes to the impeachment of witness Smith. Therefore we are of opinion that the court did not err in refusing to grant defendant a new trial on the ground stated.

3. It is further contended by defendant that a new trial should have been granted him because said Smith's name was not indorsed on the information. The affidavit of the prosecuting attorney shows that he did not know that Smith was to be a witness for the state at the time he filed the information, and that for that reason his name was not indorsed thereon. The only object of indorsing the name of a witness on an indictment or information is to give the defendant an opportunity to come prepared to meet the evidence of such witness at the trial, and obviate surprise. Defendant knew full well, before the trial, that Smith was to be used as a witness for the state, for, as stated, he had subpoenaed every person present at the time Smith said defendant made

the admissions testified to; and the sheriff makes affidavit that Smith was present at both the February and May terms of said court before the trial of this cause, at the following October term. Furthermore, counsel for defendant should have moved the court for a continuance on the ground of surprise, when the state called said Smith as a witness. Failure to do so amounts to a waiver of any right to complain by reason of surprise. *State v. Wilson*, 223 Mo., loc. cit. 187, 122 S. W. 671; *State v. Bailey*, 190 Mo., loc. cit. 278, 88 S. W. 733; *State v. Barrington*, 198 Mo., loc. cit. 66, 95 S. W. 235; *State v. Henderson*, 186 Mo. 473, 85 S. W. 576; *State v. Ray*, 83 Mo. 268.

4. A further contention is that the court erred in admitting the testimony of John Burgess, a witness for the state, for the reason, as defendant states, that said witness was of unsound mind, and that the court also erred in refusing to permit defendant to prove, after the witness had testified, that he was a person of unsound mind.

Defendant made no objection to the testimony of this witness on the ground that he was of unsound mind, nor did he request the court to examine said witness on his voir dire. This witness was thoroughly cross-examined by defendant's counsel, and his answers were as clear and pointed as were the questions propounded. "Whether or not a witness is sane is a question going to his incompetency, and therefore is for the court, and not for the jury. The usual mode of determining competency is by examination of witnesses, or a personal examination by the court, or by counsel, or by all these methods." 30 Am. & Eng. Ency. Law (2d Ed.) pp. 394, 395. Wigmore on Ev. vol. 1, § 497, says: "The ways in which the insanity may appear are four: (1) The general behavior of the person, while in court and before taking the stand, may be such as to exhibit the derangement to the judge; (2) the person may be questioned on the voir dire, so that his condition appears at once; (3) other witnesses to the derangement may be offered before the person's testimony is begun; (4) the examination or cross-examination may disclose clearly the incapacity, in which case the preceding part of testimony may be struck out, or may disclose grounds of doubt, in which case a voir dire or other witnesses may be resorted to. The preliminary determination of capacity is for the judge, not for the jury (ante, § 487; post, § 2550); and it is therefore an improper practice for the judge to leave the testimony provisionally to the jury, to be rejected by them if found ineligible to legal standards, the jury having nothing to do with preliminary questions of admissibility."

The record discloses that witness Burgess had never been in an insane asylum, and it is not shown that his sanity had ever been inquired into in any legal manner whatever. His testimony is as clear, coherent, and con-

sistent as that of any other witness in the case. Defendant neither requested the court to examine the witness on his voir dire to discover his condition of mind, nor moved the court to exclude his testimony on the ground that he was of unsound mind. We think the assignment wholly without merit, and the point must be ruled against the defendant.

5. The next contention is that the court erred in permitting witness McCowen to testify that, some three months after the killing of deceased, defendant said in his presence that he wanted to sell Monroe Albright, brother of the deceased, a monument for his brother's grave, and that the court further erred in admitting the testimony of witness Burgess as to threats made by defendant against the deceased about two years before the crime was committed, and also as to a remark, indicating malice towards the deceased, made by the defendant to said witness in the graveyard where, and some months after, the deceased was buried. The objection is that said threats and remarks were too remote to be admissible.

The evidence objected to was clearly admissible as tending to show malice on the part of the defendant against the deceased at the time the deceased was killed. The rule governing the admission of such testimony is thus stated by Wigmore: "Where an emotion of hostility at a specific time is to be shown, the existence in the same person of the same emotion at another time is in general plainly admissible. What that limit of time should be must depend largely on the circumstances of each case, and ought always to be left to the discretion of the trial court." Wigmore on Evidence, vol. 1, § 396. "Subsequent statements of the accused showing that his hatred of the deceased was so intense that it pursued him beyond the grave are admissible on the issue of express malice." 21 Cyc. p. 898. In the case of *State v. Bailey*, 190 Mo., loc. cit. 284, 88 S. W. 733, Judge Gantt, speaking for the court, said: "The statement of the defendant on the same day of the homicide and subsequent thereto, in the presence of the witness Cooper, when one of the judges had stated that the hack drivers could never expect to win a strike by shooting people, to the effect that, 'That was the only way to win, and they all ought to be killed,' was not improperly admitted. It was a voluntary statement of the defendant, and, taken in connection with the other facts already noted, tended to establish the motive and intent which actuated him at the time of the homicide."

On the question of remoteness it has often been held by this court that the competency of threats as evidence against the defendant and declarant is not affected by their nearness and remoteness, which only goes to the weight of the evidence. *State v. Wright*, 141 Mo. 333, 42 S. W. 934; *State*

v. Glahn, 97 Mo. 679, 11 S. W. 200; *State v. Adams*, 76 Mo. 357; *State v. Grant*, 79 Mo. 137, 49 Am. Rep. 218; *State v. McNally*, 87 Mo. 650.

6. Defendant complains of the closing argument of the state's counsel as being "fiery, impetuous, and denunciatory," and very prejudicial to defendant's rights. We have read said argument as set out in the record, and we think it undeserving of such characterization. In the course of his argument the prosecuting attorney said: "Men, will you to-day declare murder to be a crime in this county? You have the power to do it." To this defendant's counsel objected, and said, "We all admit murder is a crime anywhere in Missouri, and we object to the remark." No ruling was made by the court, and no exception was saved to the failure of the court to rule. At the close of the said argument, we find the following, "To each and every statement so made the defendant then and there and at the time objected, as above shown." But we do not find that defendant made any objection save that above noted. Defendant having failed to except to the court's failure to rule, the point is not now open for review. *State v. Court*, 225 Mo., loc. cit. 616, 125 S. W. 451.

Other points were made by counsel for defendant in his oral argument and are repeated in his printed brief, and we have considered the same; but, in our opinion, neither singly nor collectively do they constitute reversible error.

While complaint is made that the court gave improper instructions, and excluded proper and relevant testimony for the defense, the errors, if any, are not specifically pointed out, nor do we find any. This court will not hunt through the record for such errors. *State v. Holden*, 203 Mo. 581, 102 S. W. 490.

The record in this case teems with evidence tending to show defendant's guilt. He attempted to prove an alibi, but wholly failed to do so. The evidence shows that between the time he parted with witness Bassett in the cornfield and the time he entered the Keene home that evening an hour or more had transpired—ample time within which to commit the crime. The place where he parted from Bassett and the place in the road where he turned back to enter Keene's house were but a short distance apart, to travel which distance the defendant declared in his testimony at the preliminary examination would not take more than 20 minutes. Where he was and what he did during the remaining 40 minutes of the hour he does not pretend to show. His peculiar conduct at the Keene home, after intelligence of the shooting was brought to him, in refusing to go with Grafton Keene and others to see who the dead man was; his communication to witness Carey, the morning after the killing, that Albert Albright was dead, and

his efforts to persuade the witness to change the trend of his testimony at the preliminary examination; his threats against the deceased, made at various times before the commission of the crime; and his subsequent statements and remarks evidencing his hatred of the deceased—these and many other facts and circumstances in evidence are all very significant and indicative of guilt. Though the testimony of witness Smith, to which defendant so strenuously objects, were wholly eliminated, there was still ample evidence to convict. There was not an iota of evidence tending to connect any other person than the defendant with the crime.

Defendant had a fair trial, he was represented by able and ingenious counsel, and was accorded every right guaranteed him by our Constitution.

Finding no reversible error in the record, the judgment is affirmed.

The foregoing opinion was prepared by Judge BURGESS prior to his death, and, as it expresses our views, we hereby adopt the same as the opinion of this court.

JAS. B. GANTT, J.
JOHN KENNISH, J.

STATE v. MUDD.

(Supreme Court of Missouri, Division No. 2
Feb. 14, 1911.)

1. BAIL (§ 58*)—CRIMINAL PROSECUTIONS—RECOGNIZANCE—DESCRIPTION OF OFFENSE.

Under Rev. St. 1899, § 2800 (Ann. St. 1906, p. 1619 [Rev. St. 1909, § 5019]), providing that a proceeding on a recognizance in a criminal case shall not be defeated on account of any defect of form or any other irregularity, so long as it appears from the whole record that the defendant was legally in custody charged with a criminal offense, that he was discharged therefrom by reason of the giving of the recognizance, and that it can be ascertained that the sureties undertook that defendant should appear at a term or time specified for trial, the fact that the information charged larceny from a dwelling house while the recognizance was conditioned that defendant appear to answer an information charging burglary does not affect the validity of the recognizance.

[Ed. Note.—For other cases, see Bail, Cent. Dig. §§ 263-277; Dec. Dig. § 58.*]

2. BAIL (§ 89*)—CRIMINAL PROSECUTIONS—SCIRE FACIAS ON RECOGNIZANCE—PLEADING.

In scire facias on a recognizance in a criminal proceeding, a surety is precluded from raising the question of variance between the information and recognizance by his answer admitting that he entered into the recognizance for the appearance of the defendant as alleged in the scire facias.

[Ed. Note.—For other cases, see Bail, Dec. Dig. § 89.*]

3. BAIL (§ 80*)—CRIMINAL PROSECUTIONS—RELEASE FROM LIABILITY—SURRENDER OF PRINCIPAL.

Though Rev. St. 1909, § 5130, provides that, when a bail desires to surrender his principal, he may procure a copy of the recog-

nizance from the clerk, by virtue of which the bail or any person authorized by him may take the principal, and section 5132 provides that the bail must deliver a certified copy of the recognizance to the sheriff with the principal, and the sheriff must accept the surrender of the principal, and acknowledge such acceptance in writing, where the bail actually surrenders the principal to the sheriff, who then held him in custody till he escaped, the fact that the bail failed to deliver a certified copy of the recognizance to the sheriff or to procure a written acceptance of the surrender does not prevent him from setting up the surrender as a defense to liability on the recognizance; the statutory provision as to mode of surrender being directory merely.

[Ed. Note.—For other cases, see Bail, Cent. Dig. §§ 323-334; Dec. Dig. § 80.*]

Appeal from Circuit Court, Monroe County; David H. Eby, Judge.

Scire facias by the State against H. B. Mudd. From a judgment for the State, defendant appeals. Reversed.

Ragland & McAllister, for appellant. E. W. Major, Atty. Gen., and Jas. T. Blair, Asst. Atty. Gen., for the State.

KENNISH, P. J. This is an appeal from a final judgment upon a forfeited recognizance.

At the December term, 1906, of the Monroe county circuit court, the prosecuting attorney of said county filed in said circuit court an information charging one Harry Lee with larceny from a dwelling house, and at the same term said Lee entered into a recognizance in the sum of \$500, with appellant as surety, conditioned that he would be and appear in said court "on the 29th day of December, 1908, and on each and every day of said term thereafter, and upon each and every day of each succeeding term of this court until this cause is finally disposed of, to answer an information charging him with the crime of burglary, filed against him in this court, * * * and not depart without leave," etc. At the April term, 1909, of said court, the cause coming on for trial, defendant Lee failed to appear, whereupon the recognizance upon application of the prosecuting attorney was declared forfeited, and scire facias issued. The scire facias recited, among other things, that the information charged larceny from a dwelling house, and that the recognizance had been entered into by the appellant as surety "for the appearance of the said Harry Lee on the first day of the (then) next term of said court, and then and there answer and abide the order and judgment of said court touching the matter of said information for larceny from a dwelling house," etc. For answer to the scire facias appellant "admits that he entered into the recognizance for the appearance of defendant, Harry Lee, in this court, as alleged in said scire facias, but defendant denies each and every other statement and allegation in said scire facias made and contained." The answer further sets up that

appellant prior to the forfeiture surrendered Lee to the sheriff of Monroe county, and that the sheriff "accepted such surrender and took the person of the said Harry Lee into his possession and custody, under the charge and information in this cause and referred to in said *scire facias*." The state, through its counsel, filed reply denying each and every allegation in the answer contained.

It appears from the evidence that on or about January 1, 1909, the appellant, H. B. Mudd, who lived at Monroe City, telephoned to the sheriff of Monroe county, at Paris, the county seat, stating that he was afraid Harry Lee was going to run away, and requesting the sheriff to come to Monroe City and get Lee. He further stated to the sheriff that he would pay the expense of the trip, also that he wanted to get off Lee's bail bond. The sheriff promised to come as requested, and did so. In the meantime the appellant caused Lee to be arrested by the marshal of Monroe City, and the marshal delivered him to the sheriff upon the latter's arrival from Paris. Lee was taken to Paris by the sheriff and placed in the county jail, whence he afterwards, on March 27, 1909, made his escape, and failed to appear in court when the cause wherein he was charged by information with larceny from a dwelling house was regularly called for trial. Appellant did not secure a certified copy of the recognizance and deliver the same to the sheriff at the time he delivered the person of defendant Lee into his custody, nor did he take a written receipt from the sheriff evidencing such surrender, but the sheriff understood that the appellant delivered the person of the defendant to him as and for a surrender by him as bail. The court rendered judgment for the state, from which judgment, after timely motions for new trial and in arrest had been filed and overruled, an appeal was taken to this court.

The first contention of the appellant is that as the information charged Harry Lee with larceny from a dwelling house, while his recognizance was conditioned that he appear to answer an information charging burglary, this variance between the information and the recognizance was material and fatal, the surety was not bound, and the motion in arrest of judgment should have been sustained. Section 2800, Rev. St. 1899 (page 1619, Ann. St. 1906 [section 5019, Rev. St. 1909]), forbids that the proceeding upon this recognizance shall be defeated, or the judgment prevented or arrested, on account of any defect of form, omission of recital, condition of undertaking therein, or of any other irregularity, so long as it is made to appear from the whole record or proceeding that the defendant was legally in custody, charged with a criminal offense, that he was discharged therefrom by reason of the giving of the recognizance, and that it can be ascertained from the recognizance that the sure-

ties undertook that the defendant should appear before a court or magistrate at a term or time specified for trial. An examination of this broad statute makes it quite clear that the variance between the information and the recognizance as to the crime charged is immaterial in this proceeding, and avails nothing to the appellant. The variance can well be regarded as an irregularity, and counts for nothing; it being "made to appear from the whole record or proceeding that the defendant was legally in custody, charged with a criminal offense, that he was discharged therefrom by reason of the giving of the recognizance," from which recognizance it is ascertainable "that the surety undertook that the defendant should appear before a court * * * at a term or time specified for trial."

In *State v. Randolph*, 22 Mo. 474, Judge Leonard announced the rule, which has since obtained in this state, to be that, "although a recognizance can only be taken to secure the performance of some act that the law allows to be secured in that way, we do not deem it essential to the validity of the recognizance that it should specify on its face the specific charge that the party is to answer to." In *State v. Millsaps*, 69 Mo. 359, it was held that, where the recognizance named the offense as larceny and the *scire facias* as petit larceny, this was no substantial variance. Although the offense charged in the information was not the same as that named in the recognizance, this did not entitle the defendant, Harry Lee, to his discharge as a matter of course, or excuse the surety on his recognizance for his nonappearance, the condition of the recognizance being such that it not only required the appearance of the accused to answer the information, but also "not to depart without leave of court." *State v. Poston*, 63 Mo. 521; *State v. Boehm*, 184 Mo. 201, 83 S. W. 477. As said by Judge Gantt in *State v. Epstein*, 186 Mo., loc. cit. 101, 84 S. W. 1123: "These bail bonds are allowed in the interest of defendants that they may be free until they are tried and either convicted or acquitted. It is not the purpose to permit defendants to enter into them to escape trial and punishment, and then allow the sureties to defeat their solemn obligations after the defendants have escaped."

We further think that the appellant's answer to the *scire facias* precludes him from raising the question of variance in this court. In his answer he "admits that he entered into the recognizance for the appearance of the defendant, Harry Lee, in this court, as alleged in said *scire facias*," and the *scire facias* recites that appellant entered into the recognizance as surety "for the appearance of the said Harry Lee on the first day of the (then) next term of said court, and then and there answer and abide the order and judgment of said court touching the matter of

said information for larceny from a dwelling house." In *State v. Morgan*, 124 Mo., loc. cit. 475, 28 S. W. 19, this court said: "While the proceeding on a *scire facias* on a proceeding of this kind is a mere continuance of an existing proceeding to enforce the collection of a debt confessed, it partakes largely of the nature of a civil proceeding under our Code, and should be governed by the same rules of procedure." One of these rules is that a party cannot make one case by his answer, try it below, and then secure a reversal by advancing a new theory in this court. In a proceeding of this kind "it is a general rule that the court will not on appeal consider for the first time objections, defenses, or questions which should have been raised below." 55 Cyc. 155, and cases cited under note 55.

A further contention of appellant is that as he had surrendered his principal to the sheriff, and the latter had received him into his custody, and imprisoned him in the county jail where he remained for a period of about three months and until his escape therefrom, appellant was thereby discharged from further liability on the bond. On the other hand, the state, while admitting the facts, contends that as the surety did not deliver a certified copy of the recognizance to the sheriff with the principal, and as the sheriff did not acknowledge the receipt of the principal in writing, as prescribed by the statute, the alleged surrender constituted no defense to the *scire facias*. Upon the propositions thus advanced, the decisions of the courts are not in accord, and numerous authorities have been cited in the briefs of counsel as supporting their respective contentions. The statutes providing for the surrender of the principal by the surety and bearing upon the facts of this case are sections 5130 and 5132 of the Revised Statutes of 1909. They are as follows:

"Sec. 5130. Surrender of Principal, How Made.—When a bail desires to surrender his principal, he may procure a copy of the recognizance from the clerk, by virtue of which the bail, or any person authorized by him, may take the principal in any county within this state."

"Sec. 5132. What Deemed a Surrender.—The bail must deliver a certified copy of the recognizance to the sheriff with the principal and the sheriff must accept the surrender of the principal, and acknowledge such acceptance in writing."

Do the foregoing statutes preclude as a valid defense to this forfeiture proceeding such a surrender by the surety and such an acceptance by the sheriff as are shown by the facts of this case? It is evident that the Legislature in these statutory provisions had in view the purpose of enabling the surety to surrender the principal whenever he should deem it advisable so to do in order to protect himself against further liability on the bond, and to this end it is made obligatory

upon the sheriff, in the case of a surrender in accordance with the statute, to accept the principal, and to furnish the surety written evidence of that fact. In the absence of these statutes, the liability of the surety would become fixed when he entered into the obligation, and he would be left the alternative of either producing the prisoner, as provided in the bond, or paying the penalty. While the primary purpose of the statute was the protection of the surety, yet in prescribing the conditions upon which the surety may thus relieve himself from further responsibility the law provides that the surety must deliver a certified copy of the recognizance to the sheriff with the principal, and the sheriff must accept the surrender and acknowledge such acceptance in writing. Because of the language thus used, the state maintains that the statute is mandatory, both as to what is required of the surety and also of the sheriff, and that a legal surrender of the principal could arise only upon the performance of both conditions and in the manner prescribed.

So far as the sheriff is concerned, this position seems unreasonable and at variance with the purpose of the law, for, if the surety has complied with all of the requirements of the statute upon his part, the failure or refusal of the officer to acknowledge in writing the acceptance of the principal should not be held to deprive the surety of the benefit of the law solely because of the default of the representative of the state over whose actions he had no control. We think a reasonable construction of this statute does not lead to such an inequitable result. In the case of *State v. Meyers*, 61 Mo. 414, loc. cit. 415, this court had before it the question of the sufficiency of an answer to a *scire facias* in a forfeiture proceeding, "which, in substance, alleged that long before the judgment of forfeiture had been taken upon the recognizance, the defendant, as the surety of McGuire, had obtained a certified copy of such recognizance, which, together with the body of McGuire, he had delivered to the sheriff of Jasper county, who thereupon accepted the surrender thus made, and took, held and detained McGuire in his custody, by virtue of the copy of the recognizance." A demurrer to this answer was sustained in the trial court and the forfeiture made absolute. It will be observed that the answer did not plead an acknowledgment in writing of the acceptance of the prisoner by the sheriff, and in discussing the sufficiency of the answer upon that point this court said: "Nor was it necessary to his discharge that the defendant should allege therein that the sheriff acknowledged in writing the acceptance of the principal. This acknowledgment it is clearly the duty of the sheriff to make when the surrender of the principal occurs; but it is equally clear that, after the bail has complied with the provisions of law on his part, he is entitled to be exonerated

from further liability, and that the failure or refusal of the officer to do his duty in the premises should not debar the surety from his discharge."

It remains to be considered whether the court correctly construed the law in holding that the surety, because of his failure to deliver a copy of the recognizance to the sheriff with the prisoner, was precluded from successfully pleading and proving a surrender under the statute. It is admitted that the surety did, in fact, surrender his principal to the sheriff, and that the latter had held him as a prisoner in the county jail until he made his escape therefrom, but it is insisted that the requirement that a copy of the recognizance be delivered to the sheriff with the prisoner is mandatory, and that a manual delivery of the prisoner to the officer without such copy falls short of a legal surrender, and therefore constitutes no defense to a proceeding to recover the penalty of the bond. If the delivery of a copy of the recognizance with the prisoner, as provided by statute, is mandatory, then it must be conceded that the alleged surrender of the principal in this case was void and that the judgment of the trial court should be affirmed, but, if such requirement is not of the essence of the act to be done in effecting a surrender, then that provision of the law is only directory, and a failure to comply therewith would not have the effect of rendering invalid the substantial part of the act done. 36 Cyc. 1157. It is apparent that the actual surrender of the principal by the surety and the acceptance thereof by the sheriff are the substantial and essential elements of the statutory provisions under consideration, and that the manner in which the surrender should be made and the evidence thereof are incidental to the main purpose of the law. In the case of *City of Cape Girardeau v. Riley et al.*, 52 Mo., loc. cit. 427, 14 Am. Rep. 427, discussing the subject of directory and mandatory laws, this court said: "And, where the language used does not import that it is of the substance, the clauses of a law directing its observance are regarded as directory simply, for that is directory which is not of the essence of the thing to be done." And in the same case the court quotes with approval from an earlier decision of this court as follows: "The course required to be observed in the performance of an act is not always of its essence or vitality. When an act is directed to be done in a particular way, the direction may be merely directory—that is, it is not of the essence of the act, but the act may stand in law notwithstanding the direction was not strictly observed." In the case of *State v. Murmann*, 124 Mo. 502, loc. cit. 508, 509, 28 S. W. 2, 4, it is disclosed that the surety

was present in the court room at the trial of the principal; that the jury returned a verdict of guilty; that thereupon and before any other proceedings in the case the sheriff in the presence of the court laid his hands upon the principal and led him away to the lockup. The principal made his escape, and upon an appeal from a judgment of forfeiture against the surety this court said: "When the verdict of guilty was rendered, it was the duty of the court to order the prisoner into the custody of the sheriff, and, when the sheriff did in fact take charge of the principal by an unequivocal assertion of authority, and without which his act would have been an unwarranted trespass, and started with him to the court prison, the surety was discharged. This manual caption of the prisoner by the sheriff in the presence of the court abated and dispensed with the necessity for a formal surrender of the prisoner by his bail. He had complied with his obligation."

While in the foregoing excerpt this court said it was the duty of the trial court to have ordered the prisoner into the custody of the sheriff upon the return of the verdict, it does not place the right of the surety to his discharge upon that ground alone, but also upon the further ground of the manual caption of the prisoner by the officer and the actual transfer of the custody of the prisoner from the surety to the sheriff. The bond in that case was doubtless conditioned upon the appearance of the principal for trial and judgment as provided in the statute. If the obligation of the surety had ended with the return of the verdict, the manual caption of the prisoner by the sheriff, upon which fact emphasis is laid in the opinion, would have been of no importance upon the issue of the surety's liability. We consider the holding of this court in that case persuasive authority that appellant's defense upon the point in hand in this case was meritorious.

As said by this court in the *Murmann* Case, *supra*, we are not to be understood as countenancing a loose practice in the matter of the surrender of a principal by the surety, but where the uncontradicted evidence shows that the surety acted in good faith, and did in fact deliver the principal to the sheriff who accepted him unconditionally as a prisoner and placed him in the jail where he remained in the exclusive custody of the sheriff until the time of his escape, we are of opinion that such facts entitled the surety to his discharge and constituted a sufficient answer to the *scire facias*.

Entertaining the foregoing views, it follows that the judgment should be reversed. It is so ordered.

FERRISS and BROWN, JJ., concur.

RYAN v. KANSAS CITY et al.

(Supreme Court of Missouri. Feb. 9, 1911.)

1. MUNICIPAL CORPORATIONS (§ 806*)—SIDEWALKS—INJURIES—CONTRIBUTORY NEGLIGENCE.

In an action against a city and one contracting with it for repairing sidewalks for injuries caused by falling into an excavation in the sidewalk, an instruction that, if there were lights burning along the street on the night plaintiff was injured, which were sufficient to light the excavation, so that plaintiff, by the exercise of ordinary care and the use of her senses, should have known of the excavation, if any, and should, by the exercise of ordinary care, have avoided it, she could not recover against the city was correct.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. §§ 1678, 1682; Dec. Dig. § 806.*]

2. MUNICIPAL CORPORATIONS (§ 735*)—SIDEWALKS—INJURIES—NEGLIGENCE—PERMITTING IMPROPER USE.

In an action against a city and one contracting with it to repair sidewalks for injuries resulting from falling into an excavation, because of alleged failure to have lights and barriers placed around it as required by ordinance, an instruction that the ordinances relating to lights and barriers of themselves created no liability against the city, so that its failure to enforce such ordinances was not of itself negligence by the city, and could only be considered against it in connection with the other facts and circumstances in determining whether the city was negligent, was correct.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. § 1551; Dec. Dig. § 735.*]

Woodson and Kennish, JJ., dissenting.

In Banc. Appeal from Circuit Court, Jackson County; Hermann Brumback, Judge.

Action by Ellen Ryan against Kansas City, Missouri, and another. From a judgment for defendants, plaintiff appeals. Affirmed.

The following is the opinion of Graves, J., as delivered in Division No. 1:

GRAVES, J. Plaintiff sues for personal injuries in the sum of \$10,000. Verdict having been returned against her by a jury in the court below, she has appealed to this court. Complaint is chiefly lodged against some of the instructions given for the defendant. In fact the assignments of error go to the giving of six instructions nisi for defendants, and the overruling of the motion for new trial. The motion for new trial preserved these matters raised in the assignment of errors. This assignment requires, however, an outline of the pleadings and proof. As to the several given instructions, the proof can best be discussed with the points made. In her petition the plaintiff makes charges which can, perhaps, be somewhat summarized. To so do, pleading and proof can well be considered together to a certain extent.

Defendant E. I. Harris was a contractor under defendant Kansas City. His business

cognomen was the Missouri Sidewalk Company. The alleged accident to plaintiff occurred on the west side of Main street between Thirty-Ninth street and Westport avenue. Such street was admittedly under the control of the city, one of the defendants herein, and was a public thoroughfare of said city. It is admitted that under contract with the city, defendant Harris, contracting under the cognomen aforesaid, excavated on the west side of Main street in said city, and between Thirty-Ninth street and Westport avenue, for the purpose of putting in a new sidewalk, a place about 5 feet wide, 75 feet long, and 1½ feet deep. This is charged to have been unsafe, but, of course, not admitted. As the gravamen of her charge against both defendants, the plaintiff, with proof of a dark and rainy night, plants herself upon sections 861 and 862 of article 6 of chapter 14 of the revised ordinances of said city, which read:

"Lights and Barriers. Every person who shall for any purpose, make or cause to be made, any excavation in, upon, under or near or adjoining any street, avenue, sidewalk, alley or other public place, and shall leave any part or portion thereof open, or shall leave any part or portion thereof obstructed, with rubbish, building or other material, during the nighttime, shall cause the same to be inclosed with good, substantial and sufficient barriers not less than three feet high and shall also place a red light at each end thereof in such a position as to shed its light upon such excavation or obstruction, and shall keep such lights burning from sunset to sunrise."

"Every person who shall in any manner render or cause to be dangerous any street, avenue, sidewalk, alley or other public place, shall from sunset to sunrise provide and properly place such barriers and lights around such dangerous place as are in the preceding section required."

After specifically charging in her petition a violation of these two sections of the ordinances, and that such violation constituted negligence she then proceeds: "Plaintiff further states that on or about the 30th day of September, 1905, at about 8:30 p. m. it was very dark and raining very hard, and plaintiff at said time, in the exercise of ordinary care and diligence, at about the hour of 8:30 p. m., between sunset and sunrise, was walking along the sidewalk on the west side of Main street and at a point on said sidewalk where the said excavation began and, on the north end of said excavation, stepped off said sidewalk into said excavation in said sidewalk, which was then partially filled with water, and was thrown violently down into said excavation, and plaintiff thereby sustained severe injuries to her back, spine, and womb; that plaintiff's womb was displaced and plaintiff suffered concus-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

sion of the spine and spinal column, injuring the nerves of the spine, spinal cord, and brain, causing curvature of the spine, spraining her back, and causing her nervous system to become severely shocked and prostrated, injuring plaintiff's brain and eyesight, all of said injuries being permanent." After charging that all such injuries were due to the negligence of the two defendants she asked for damages in the sum of \$10,000, as aforesaid.

Defendant Kansas City answered thus: (1) It admitted that it was a municipal corporation, and denied all other matters, and (2) set up a plea of contributory negligence. Defendant Harris answered (1) by a plea of general denial, and (2) by a plea of contributory negligence. Replies to both answers were general denials. Thus stand some of the admitted facts and the pleadings. The disputed facts, if any, can best be discussed in connection with the questions raised upon the instructions which are challenged. It should be said at this point that it is not seriously questioned that the two defendants occupied the position of contractor and contractee. Nor was it seriously questioned that plaintiff was a servant girl, earning some \$5 per week prior to her alleged injury.

The alleged accident occurred at or about 8:30 p. m. on September 30, 1905. It was raining at the time and the depression made by the excavation was filled with water. It is not denied that the lights and barriers required by the ordinance were not there at the time of the alleged injury. For defendants it was shown that there were numerous other lights in the neighborhood by which plaintiff, in the exercise of ordinary care, could have seen the unprotected place where she fell, but plaintiff, in person, says that at the time it was raining very hard and was very dark, and that there was "no light of any kind at the excavation; neither was there any barrier, and I did not see that an excavation had been made where the sidewalk should have been." There are a great number of witnesses for defendants who testify to the lighted condition of the place from other lights. One of the chief contests seems to have been upon the question of plaintiff's injury, if any. The diverse testimony upon this question need not now be considered. Further facts bearing upon the questioned instructions will be discussed in the course of the opinion. This sufficiently states the case.

1. Of the instructions complained of, five of them possess the same alleged fault. Instruction 4d will serve to illustrate, and reads: "The court instructs the jury that, if you believe from the evidence that there were lights along the street burning on the night in question, and the light cast from them was sufficient to light the place where plaintiff claims to have fallen, so that plaintiff, by the exercise of ordinary care and the

use of her eyes and other senses, ought to have known of the excavation, if any, in the sidewalk, and ought, by the exercise of ordinary care, to have avoided the same, then the plaintiff cannot recover, and your verdict must be for defendant Kansas City." It will be observed that this instruction requires of the plaintiff the use of ordinary care to discover defects in the sidewalk upon which she was traveling, and the use of ordinary care to avoid danger, if she discovered defects. To the first requirement plaintiff objects. She contends that, unless she knew that there was a defect in the sidewalk, she had a right to assume that the city had performed its duty, and such sidewalk was in a reasonably safe condition for travel, and thus this instruction placed upon her a burden she did not have to carry. Among other cases, the plaintiff plants herself behind the doctrine of *Heberling v. Warrensburg*, 204 Mo. 604, 103 S. W. 36. The rule announced in the *Heberling* Case to our mind sustains her contention. In that case the plaintiff was defeated before a jury, but the trial court set aside the verdict, because it was impressed with the idea that error had been committed against plaintiff in giving an instruction thus worded: "The court instructs the jury that, if you find and believe from the evidence that the plaintiff knew, or by the exercise of ordinary care could have known, of the rut or depression in the street at the place where plaintiff claims to have been injured, and by the exercise of ordinary care could have avoided it, then your verdict will be for the defendant." This instruction was condemned by our Brothers in Division 2, and the trial court sustained in granting the plaintiff a new trial.

There is an attempt to harmonize the *Heberling* Case with the previous case of *Coffey v. Carthage*, 186 Mo. 573, 85 S. W. 532, but to my mind they do not harmonize. In the *Coffey* Case, *supra*, Fox, J., said: "If, by the exercise of a reasonable degree of care and caution, she could have discovered the defect or hole in the sidewalk, and avoided the injury, it was incumbent upon her to do so, and if she failed to comply with this duty that every citizen owes the city, and proceeded carelessly and without paying any attention to where she was walking, then there can be no recovery. *Wheat v. St. Louis*, 179 Mo. 572, 78 S. W. 790, 64 L. R. A. 292, and cases cited; *Phelps v. City of Salisbury*, 161 Mo. 1, 61 S. W. 582; *Jackson v. Kansas City*, 106 Mo. App. 52, 79 S. W. 1174; *Churchman v. Kansas City*, 44 Mo. App. 665. In *Wheat v. St. Louis*, *supra*, after a careful, thorough, and exhaustive review of all the authorities, the rule was thus very aptly and tersely stated: 'While the city owes the citizen the duty to keep the highways reasonably safe for persons to pass over, the citizen owes the city the duty to use his God-given senses, and not to run into ob-

structions that he is familiar with, or which, by the exercise of ordinary care, he could discover and easily avoid.'"

It is clear that Judge Fox was following the case of *Wheat v. St. Louis*, 179 Mo. 572, 78 S. W. 790, 64 L. R. A. 292. In the *Wheat Case*, Marshall, J., speaking for Division 1 of this court, said: "In short, the rule is supported not only by the almost universal trend of authority, both English and American, but also by the plainest principles of right and justice. While the city owes the citizen the duty to keep the highways reasonably safe for persons to pass over, the citizen owes the city the duty to use his God-given senses, and not to run into obstructions that he is familiar with, *or which, by the exercise of ordinary care, he could discover and easily avoid.* And while the city may be negligent in the discharge of its duty, the citizen may also be negligent in the discharge of his duty. And if both are negligent and their negligence contributes to the injury, there can be no recovery." The italics in this quotation are ours. It may be that there was no necessity in that case for the use of all the language used, inasmuch as the evidence in the *Wheat Case* showed that the plaintiff in fact did have knowledge of the defect, but to our mind it was purposely used by the court.

In *Woodson v. Met. St. Ry. Co.*, 224 Mo. 685, 123 S. W. 820, the writer was confronted with this exact question, and, reviewing the authorities, said this:

"In the case of *Wheat v. St. Louis*, 179 Mo., loc. cit. 581, 582, 78 S. W. 792, 793 [64 L. R. A. 292], this court said: 'In short, the rule is supported not only by the almost universal trend of authority, both English and American, but also by the plainest principles of right and justice. While the city owes the citizen the duty to keep the highways reasonably safe for persons to pass over, the citizen owes the city the duty to use his God-given senses, and not to run into obstructions that he is familiar with, *or which, by the exercise of ordinary care, he could discover and easily avoid.* And while the city may be negligent in the discharge of its duty, the citizen may also be negligent in the discharge of his duty, and if both are negligent and their negligence contributes to the injury, there can be no recovery. And if the plaintiff's negligence necessarily contributes to the happening of the injury, there can be no recovery.'

"To a like effect is *Kaiser v. St. Louis*, 185 Mo., loc. cit. 374, 84 S. W. 21: 'Moreover, the plaintiff had driven along that particular part of the street every day for at least 10 days, and he therefore knew, *or could have known by the exercise of ordinary care*, that the pile of earth was there, and as it was no larger than a bucket, he could have easily avoided it, if he had used his senses and the degree of care that is required of one who drives a wagon on a public highway.' The italics in the foregoing

quotations are ours. We simply desire to impress that it is the duty of a traveler to exercise ordinary care in traveling upon the public highways.

"Again, in *Coffey v. City of Carthage*, 196 Mo., loc. cit. 585, 85 S. W. 535, the rules of conduct of a traveler upon the highway or sidewalk (in that case a sidewalk) are thus stated: "The law upon this proposition may thus be briefly stated: If plaintiff had no knowledge of the defect or hole in the sidewalk, then she had the right to assume that the sidewalk was in a reasonably safe condition. But while she was entitled to act upon this assumption, still she must exercise that degree of care and caution in walking on said sidewalk which a prudent person ordinarily employs under similar circumstances. If, by the exercise of a reasonable degree of care and caution, she could have discovered the defect or hole in the sidewalk, and avoided the injury, it was incumbent upon her to do so, and if she failed to comply with this duty that every citizen owes the city, and proceeded carelessly and without paying any attention to where she was walking, then there can be no recovery.'

"In *Cohn v. City of Kansas*, 108 Mo., loc. cit. 393, 18 S. W. 974, Judge Black said: 'While in general it is for the jury to say whether the plaintiff used ordinary care, and this question they are to determine from all the circumstances, still it often occurs that the court may declare the plaintiff wanting in due care on given facts. One who attempts to cross over a sidewalk as part of a road, known to him to be dangerous, when the dangerous place could have been easily avoided, as by passing around it, or taking another side of the road, is wanting in due care, and the court may so say as a matter of law.'

"The Iowa court puts the rule thus, in the case of *Yahn v. City of Ottumwa*, 60 Iowa, loc. cit. 433, 15 N. W. 259: 'It was not claimed that the husband's attention was in any manner diverted from properly driving the team after he took his seat in the wagon. The accident happened in broad daylight. Now, if the stone was in full view of the husband when he started the team, it was his plain duty to have seen and avoided it. The defendant requested the court to instruct the jury "that it was the duty of the plaintiff's husband to use care in driving and to look where he was driving, and to avoid all obstacles which were dangerous in their character and which were plainly visible and not obscured, and if he failed to do so, and the plaintiff was thereby injured, then she cannot recover." This instruction was refused. We think this, or some other explicit instruction applicable to this view of the facts of the case, should have been given. Where an obstruction is in the street in plain view of the driver of a vehicle, and his attention is in no manner diverted so as to

excuse him for not seeing the obstruction, and he drives against it or into it, he is clearly guilty of contributing proximately to any injury which may result.'

"It is not worth while going to other states for authority. The rule could not be more clearly stated than in the Coffey Case, *supra*, as to the duty of travelers to exercise ordinary care in walking over sidewalks. Now plaintiff's testimony shows that these rails were easily seen, and that deceased was leaving the usual pathway to go upon that part of the space not especially prepared for travel, although deceased had the right to travel it. We are satisfied that, if deceased was at himself at the time, the exercise of ordinary care upon his part would have avoided the accident. The cases, *supra*, are the latest utterances of this court upon the question, and it would serve no good purpose to further review the case law of the state, or of other states. To the mind of the writer it would appear that these last expressions of the court lose sight of the idea that a pedestrian can assume, whilst walking over a sidewalk, that the city has performed its duty and that the sidewalk is reasonably safe for travel. But both divisions of the court have concurred in the doctrine of these late cases, and we feel that they should be followed."

We did not have before us at that time the Heberling Case. It was not cited in the briefs, and our investigation did not bring it to our consideration. It will be observed that we expressed some doubt as to the rule announced in the Wheat and Coffey Cases. The last few lines of the quotation would so indicate. Whether that doubt is or was well founded is immaterial here. If the Wheat Case and those following it announced the law, then there is a conflict between our own opinions. The Heberling Case is not in line. Under the Heberling Case these several instructions in the case at bar are erroneous. Under the other cases they are not erroneous. Upon more mature reflection I am of the opinion that the rule announced in the Wheat Case and its successors is correct. The city is not an insurer of its sidewalks, nor of the safety of pedestrians. The law only imposes the duty of having sidewalks reasonably safe for travel. The law does not say they must be safe, and thus insure the pedestrian. To say that the city must keep its sidewalks reasonably safe, and that the pedestrian may assume that such duty has been performed, does not mean that the pedestrian may walk thereon studying the stars, or blinded as a bat. "Reasonably safe" means that such walks can be used by a person in the exercise of ordinary and usual care. It means that, whilst they are not absolutely safe, yet the pedestrian can use them with safety to himself, if he uses ordinary and usual care for his own safety. As stated above, the pedestrian cannot be engaged in the study of astronomy and blindly fall into a ditch when the light of day, or

its substitute, arc lights at night, would show the danger, if such there was. Nor does it mean that the pedestrian must keep his eyes riveted upon the sidewalk at each step of his progress. Ordinarily prudent and careful persons do neither. Such persons are not star gazing, nor are they guarding each individual step they take. They do, however, use their senses to see that they do not encounter danger, and this without considering that they may assume that the city has fully performed its duty.

We are of the opinion that these several instructions properly declare the law upon this point, but believe that the case should be certified to the court in banc, to the end that there may be no question as to the rule of law announced by this court. The present status of our opinions on the point cannot be satisfactory to either bench or bar.

2. The next contention is that there was error in giving instruction No. 3d, which reads: "The court instructs the jury that the ordinances of Kansas City relating to lights and barriers, read in evidence, of themselves create no liability in favor of persons injured by their violations as against defendant, Kansas City, and that therefore the failure, if any, on the part of Kansas City, to enforce the ordinances requiring red lights and good and sufficient barriers not less than three feet high to be placed at night upon the excavation in the sidewalk space at the time and place in question was not in itself negligence on the part of the defendant Kansas City, and that you must only consider the same against the defendant Kansas City in conjunction with all the other facts and circumstances in making up your verdict." This instruction was given on behalf of the defendant city. It does not include the individual defendant. These ordinances are but police regulations adopted by the city for the purpose of protecting its citizens. A city may be liable for negligence, but is not liable for the mere failure to enforce its own police regulations.

In *Moran v. Pullman Palace Car Co.*, 134 Mo., loc. cit. 651, 38 S. W. 661 (33 L. R. A. 755, 56 Am. St. Rep. 543), *Sherwood, J.*, said: "In the third place, a city is not liable for damages resulting from a failure to enforce such police regulations as are the ordinances in question. 15 Am. & Eng. Encyclopedia of Law, 1154, and note 3, and cases cited." One section of the ordinance discussed in the *Moran* Case is substantially the ordinance involved here. The doctrine of the *Moran* Case is approved in the following more recent cases: *Harman v. St. Louis*, 137 Mo. 494, 38 S. W. 1102; *Loth v. Columbia Theater Co.*, 197 Mo., loc. cit. 358, 94 S. W. 847; *Mehan v. St. Louis*, 217 Mo. 35, 116 S. W. 514.

None of these cases are exact parallels of the one at bar, however. In the case at bar, under the testimony of the defendant Harris, which is the only testimony upon the

subject, the relationship of contractor and contractee exists. In other words, the city in this case had contracted with Harris to do this work. This, however, we hardly think should change the rule. The ordinances within themselves do not appear to include the city. They appear to be pure police regulations enacted by the city for the guidance of the conduct of the citizen, rather than the conduct of the city itself. The city, having authorized and directed the work, may be liable for the failure to have barriers and danger signals, but this would be upon the theory that to fail to have such would be negligence, and would depend upon proof of the question, rather than upon the ordinance. As to defendant Harris, proof of the ordinances and proof of a failure to comply therewith make out a prima facie case of negligence. This instruction does nothing more than to say that, as against the city, the ordinances themselves do not make a prima facie case, but may be considered with other facts in determining the question of negligence or no negligence upon the part of the city. This contention of plaintiff should be disallowed upon the law.

But there is another matter which forces the disallowance of plaintiff's contention. Plaintiff below adopted the theory of the law just above announced. She, by her instruction 1p, tells the jury that, if there was a failure to comply with these ordinances, and the plaintiff was injured by reason of such failure, the same would be negligence as to defendant Harris, and he would be liable. By her instruction 2p the case is put to the jury upon the theory that, if there was a failure to put up barriers and lights, and that an ordinarily careful and prudent person would have used such precautions, then both defendants were negligent, and if plaintiff's injury was due to such negligence, she could recover as against both defendants. From this it appears that she adopted this theory of the law below, and the instruction given for defendant city, last above set out, is in line with the theory that plaintiff had in the trial nisi. Plaintiff cannot shift positions in this court. It is true that the motion for new trial suggests that the court erred in modifying the two instructions of the plaintiff above mentioned, but the record elsewhere fails to so show. The record simply says, "and thereupon the following instructions were given for the plaintiff." Following this are the two instructions discussed, and a third one, which relates solely to the measure of damages. So that upon this theory we would not be in position to condemn the lower court for giving an instruction for the defendant, which accorded with the theory of the case pressed upon the court by the plaintiff.

The question discussed in paragraph 1, and the one herein discussed, are the only ones seriously urged by counsel. If we are right in the conclusions reached in paragraph

1, and we think we are, this case should be affirmed. Yet we are of opinion that there is a conflict between our own cases upon the question discussed in paragraph 1, and for that reason this cause should be certified to the court in banc for final determination.

It is therefore ordered that the cause be certified to the court in banc.

All concur upon the question that this cause should be certified to the court in banc.

M. A. Fyke and E. W. Shannon, for appellant. Francis M. Hayward and Jas. W. Garner, for respondents.

GRAVES, J. The foregoing opinion in Division 1 is adopted as the opinion of the court in banc.

FERRISS, J., concurs. LAMM, J., concurs in separate opinion filed. BROWN, J., concurs in result. WOODSON, and KENNISH, JJ., dissent in opinion to be filed.¹ VALLIANT, C. J., absent.

LAMM, J. In voting to affirm, I concur with the result, but not to all my learned Brother GRAVES says arguendo.

I put concurrence on the following grounds: Plaintiff asked no instruction covering her right to act upon the presumption that the sidewalk was reasonably safe. There is a presumption of that kind that may go to the jury. But, if plaintiff desired such instruction, her counsel should have asked it. Nondirection in a civil case is not misdirection. While a footman may presume a city has done its duty in keeping its sidewalks in a reasonably safe condition for travel by pedestrians, by night as well as by day, yet that presumption runs with a condition. It goes hand in hand with another vital proposition, viz., that a footman must use ordinary, that is, due, care to avoid injuring himself. Such care is the care of an ordinary person under like circumstances. Such care is broad enough to create the duty to look and see where one is going, as well as the duty to avoid danger when actually discovered. That does not mean a pedestrian is an inspector of sidewalks, or cannot take a step without looking down to see that his feet do not carry him into a pit; nor does it mean that an ordinarily prudent person might not be deceived into taking an excavation full of water as part of the sidewalk at night, in the glimmer of electric lights or during a storm. He need not be watching at every footfall for defects, but he should act like a prudent person, who makes reasonable use of his eyes while walking. He cannot shut his eyes, or blindfold himself, or walk backward, or not look about him at all, or, under the assumption that no defects exist walk heedlessly into obvious ones.

Defendant's instructions announce good doctrine in that respect. Due care allows a reasonable person to act on the presump-

¹ For dissenting opinion, see 134 S. W. 935.

tion of safety so long as (and no longer than) he uses due care to avoid his own injury. To rule that a plaintiff could be cast only when he actually knows of the defect, and thereafter acts negligently, is a dangerous doctrine I cannot subscribe to. He must use due care to discover, in order to avoid. The jury take the presumption along with the proposition of due care in making up their estimate of liability, when plaintiff sees to it they get the presumption along with defendant's instruction on due care.

As the Heberling Case is questioned, I may as well say that I think that case goes too far in some of its general language. But the case was soundly ruled, considering the facts. Plaintiff was driving, not walking. The real defect was concealed. The mere presence of the surface water and mud threw no duty on plaintiff to avoid the place in a muddy time. The defect was caused by the depth of the hole or rut and sprung from the negligence of the town. The depth was concealed by the surface mud and water. Taking the facts of that particular case and construing the law discussed with the facts, as we must, the result reached was well enough. No reasonable care would have avoided the concealed and hidden danger in the Heberling Case.

STATE v. THOMAS.

(Supreme Court of Missouri, Division No. 2.
Feb. 7, 1911.)

CRIMINAL LAW (§ 951*)—NEW TRIAL—TIME TO MOVE.

Rev. St. 1909, § 5285 (Rev. St. 1899, § 2689 [Ann. St. 1906, p. 1587]), requiring motions for new trial to be filed before judgment and within four days after verdict, is mandatory; and where sentence was pronounced at once on return of the verdict, without objection or exception by defendant, a motion for new trial made three days thereafter was too late.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2349-2358; Dec. Dig. § 951.*]

Appeal from Circuit Court, Platte County; Alonzo D. Burnes, Judge.

Wilbur Thomas was convicted of assault with intent to kill, and he appeals. Affirmed.

Allen, Gabbert & Mitchell, for appellant.
E. W. Major, Atty. Gen., and Jno. M. Dawson, Asst. Atty. Gen., for the State.

FERRISS, J. At the March term, 1909, of the circuit court of Platte county, defendant was convicted of a felonious assault with intent to kill, and appeals from the judgment of conviction.

It appears from the record that the verdict was returned and judgment thereon rendered on March 17, 1909, three days prior to the filing of defendant's motion for a new trial. Section 5285, Rev. St. 1909 (section

2689, Rev. St. 1899 [Ann. St. 1906, p. 1587]), provides that the motion for new trial shall be "filed before judgment and within four days after the return of the verdict," and it has been frequently held by this court that said statutory provision is mandatory. *State v. Fraser*, 220 Mo. 34, 119 S. W. 389; *State v. Pritchett*, 219 Mo., loc. cit. 704, 119 S. W. 386; *State v. Maddox*, 153 Mo., loc. cit. 473, 55 S. W. 72; *State v. Brooks*, 92 Mo., loc. cit. 596, 5 S. W. 257, 330. In the recent case of *State v. Carson* (No. 15,445, not yet officially reported) 132 S. W. 587, Judge Gantt held that where the court pronounced judgment immediately after a finding of guilty, and before a motion for new trial was filed, and where at the time the defendant excepted to the action of the court in so pronouncing judgment and gave notice that he would file his motion for a new trial, there was no waiver by defendant, because he could not have acted more promptly. In the case at bar there was no objection or exception to the action of the court. The motion was filed too late, and we must hold that there is nothing before us save the record proper.

The indictment properly charges the offense of which defendant was convicted, the verdict and the judgment thereon are in due form, and the record in all respects free from error.

The judgment, therefore, is affirmed.

KENNISH, P. J., and BROWN, J., concur.

GANTT v. BROWN. TIMMONDS v. KENNISH. GASS v. EVANS.

(Supreme Court of Missouri. Jan. 11, 1911.)

In Banc. Election contests by James B. Gantt, contestant, against John C. Brown, contestee, by Henry C. Timmonds, contestant, against John Kennish, contestee, and by Howard A. Gass, contestant, against William P. Evans, contestee. Dissenting opinion on order appointing special commissioner.

W. M. Williams and W. C. Marshall, for contestants. Selden P. Spencer and Jones, Jones, Hocker & Davis, for contestees.

LAMM, J. I dissent from the appointment of Judge Culver, not in one, but in all three, election contest cases, not because of any objection personal to him as a lawyer or as a citizen, but because:

The three cases are the first political election contests brought before the Supreme Court as original proceedings. Therefore we are making precedents. In such case, the maxim is: The chief thing is the beginning. It is too plain for controversy that to select one commissioner for all three cases necessarily results in the commissioner belonging to one political party, unless our commissioner affiliated with no party, and this appointment is not of that character. This has a tendency to give a party cast or color to the inquest at the outset, and, while conscious of our own judicial independence and exalted duty, yet we can with profit heed Paul's admonition: Abstain from all appearance of evil. To that end we should make two

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

groups of cases, but one case in one and two in another. Then, to balance the power, we should select two high-minded commissioners of opposite political faith, one for one group and one for another, consolidate the cases for the purpose of hearing testimony, and order our commissioners to sit together and hear the evidence. If possible, they can make a joint report, or, if they cannot agree, separate reports. If it be said they would or could not agree, then the question is, Why? But, at worst, if they disagree on the facts, it would not hinder us in our ultimate judgment, and, besides that, they would be amenable to our interlocutory orders and directions in the admissibility of evidence. In such way, we would pull down no blind on any window through which needed light, however dim, may come to aid us in the performance of an admittedly delicate task. I think it the most likely road to arrive at an impartial, and therefore a just, conclusion in the end.

I should not consent to the appointment of one Republican commissioner in all these cases, precisely as I do not consent to the appointment of one Democratic commissioner, and for the same reason. Jurisprudence, says the wise Latin, is the science of the good and just; hence what is fair and good (i. e., in accord with those equities that have their seat in the human breast) cannot be bad law.

Therefore, because the majority of my sitting Brethren do not agree with me in this behalf, but rule in favor of one commissioner, and for no other reason, I dissent.

FERRISS, J., joins in this dissent.

HEATH v. TUCKER.

(Springfield Court of Appeals. Missouri. Feb. 6, 1911.)

1. TRUSTS (§ 283*) — DEALINGS BETWEEN TRUSTEE AND CESTUI QUE TRUST—VALIDITY.

While the law exacts from the trustee the utmost good faith in dealings with the beneficiary, and commands him to make full, fair, and open disclosures of all facts in his possession, mere suggestion of the relationship of the parties by the beneficiary does not invalidate the trustee's dealings with the trust funds in a court of law.

[Ed. Note.—For other cases, see Trusts, Cent. Dig. § 403; Dec. Dig. § 283.*]

2. TRUSTS (§ 283*)—TRUSTEE—DEALINGS WITH CESTUI—BURDEN OF PROOF.

There is no difference in the law concerning dealings between a trustee and cestui que trust and with strangers, except with reference to the burden of proof when the dealings are assailed in a proper proceeding charging the trustee or fiduciary with unfairness or fraud, when the burden is on the trustee or fiduciary to show that the transaction was open, fair, honest, and free from fraud on his part; whereas, in other cases the burden of proving fraud is on the party alleging it.

[Ed. Note.—For other cases, see Trusts, Cent. Dig. § 403; Dec. Dig. § 283.*]

3. APPEAL AND ERROR (§ 1009*)—FINDINGS—EQUITY CASE—REVIEW.

While the Court of Appeals will give full credit to findings of fact of the trial court in equity cases, it will not be bound thereby, especially where they appear to be erroneous.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3970; Dec. Dig. § 1009.*]

4. ASSIGNMENTS (§ 64*)—FRAUD—EVIDENCE.

Where plaintiff, after having made an assignment for the benefit of creditors, transferred his equity to his assignee, evidence held insufficient to justify a finding that plaintiff's mental condition at the time was such that he could easily be imposed upon, or that he was imposed upon in any way by such assignee.

[Ed. Note.—For other cases, see Assignments, Cent. Dig. § 125; Dec. Dig. § 64.*]

5. ASSIGNMENTS (§ 68*)—RESCISSION.

Where plaintiff, after making an assignment of his assets to an assignee for the benefit of creditors, transferred his equity in the goods to defendant, his assignee, and, on later making an objection to the transfer, defendant offered to rescind, but plaintiff refused to do so, and to put defendant in statu quo, but demanded that defendant make a new contract and buy the property at a higher price, plaintiff could not thereafter obtain a rescission of the contract.

[Ed. Note.—For other cases, see Assignments, Cent. Dig. § 127; Dec. Dig. § 68.*]

Appeal from Circuit Court, Hickory County; C. H. Skinker, Judge.

Suit by Thomas S. Heath against B. F. Tucker. Judgment for plaintiff, and defendant appeals. Reversed, with directions to dismiss.

J. W. Montgomery and Rechow & Pufahl, for appellant. W. S. Jackson, Henry P. Lay, and W. A. Dollarhide, for respondent.

GRAY, J. The plaintiff, on the 20th day of February, 1907, was, and for a long time prior thereto had been, engaged in the general merchandise business at the town of Weaubleau, in Hickory county, this state. He had become worried about his business affairs, and on said day conveyed his property to the defendant herein as assignee for the benefit of creditors. The property consisted largely of merchandise, and amounted to about \$14,000, as shown by an inventory taken by the defendant as assignee, and was appraised at the value of \$9,629.96, a sum largely in excess of the plaintiff's debts. After making the assignment, he formed the resolution of selling his equity in the property, and approached the defendant with the view of selling the same to him. After the plaintiff had made several propositions, they finally entered into an agreement, by the terms of which the defendant agreed to pay plaintiff for his equity \$2,200, which agreement was carried out by defendant paying \$500 in cash and executing his note for \$1,700 for the balance, and plaintiff conveyed his equity to him. After this transaction, the defendant continued in charge of the estate as assignee under the deed of assignment from plaintiff to him, and made his final settlement with the court under the statute, as though he had not purchased the plaintiff's equity. Shortly after the purchase of the equity, the defendant transferred one-third of the stock to one George W. Lindsey, and one-third to a Mr. Whitaker. The transfer was made by each of the parties paying

to the defendant one-third of the \$500 cash payment he had made to plaintiff, and by assuming and subsequently paying one-third of the \$1,700 note defendant had given to plaintiff for the purchase of his equity. When the defendant made his settlement, the plaintiff appeared and filed exceptions thereto, on the theory that the transfer of his equity to the defendant was void. The circuit court sustained the exceptions, and defendant appealed to the Kansas City Court of Appeals. The opinion of the Court of Appeals in the case will be found in 136 Mo. App. 347, 117 S. W. 125. The court reversed the judgment on the ground that the circuit court was without jurisdiction in the assignment proceedings to set aside the transfer of the equity. The court held the proceedings in the assignment matter were purely statutory and not equitable, and that on exceptions to the final report of the assignee only such matters as pertained to his administration of the estate in his hands were matters for investigation. The court reversed and remanded the cause with directions to the assignee to make final settlement in accordance with the views expressed in the opinion. The court further held that the validity of the transfer could only be attacked for fraud in its procurement in a proceeding in a court of equity. After the cause had been remanded, the defendant made his final settlement in the circuit court. In that settlement he was charged with the sum of \$10,021.31. The value of the assets which came to his hands by virtue of the assignment was \$9,629.95. The assignee had purchased claims of certain creditors at a discount of \$391.36, which, added to the value of the assets, made the said sum of \$10,021.31. The assignee was allowed the following credits: \$133.74 expenses of taking inventory and appraising the stock; the sum of \$500 allowed to the assignee for services in making his bond and for attorney's fees up to and including the time of the purchase of the equity; the sum of \$5,249.80 on account of sums paid to creditors; the sum of \$59.21 on account of certain duebills; the sum of \$2,200, being the amount paid the plaintiff fees and expenses in defending in the circuit court and on appeal against the exceptions filed by the plaintiff; and other small amounts aggregating \$11.40, and leaving the amount due of \$1,167.16.

In the May term, 1909, of the circuit court of Hickory county, the present proceeding was instituted to set aside the transfer by plaintiff to the defendant of his equity in the assigned estate. The petition alleged: That on the 26th day of February, 1907, the plaintiff was the owner of certain real estate and a stock of general merchandise and store fixtures in Weaubleau, then of the reasonable cash market value of \$14,500. That at said date, and for some time prior thereto, the plaintiff was engaged in business as a general merchant in said city, doing business

under the style of T. S. Heath & Son, his son being only a nominal partner and having no actual interest in the business, and, in conducting said business, the plaintiff had become indebted to creditors in the sum of \$5,162.40. That, for a considerable time prior to said date, the plaintiff's health had been poor by reason of which, and of his business affairs, his mind became greatly perturbed and distressed, and he was wholly incapable of intelligently managing his affairs. That although he was wholly solvent, and his business in a flourishing condition and very valuable, the plaintiff became possessed of the insane delusion that he was about to fail in business, and, as a result thereof, he was likely to be imprisoned, etc. That realizing his impaired mental condition, and feeling the need of advice and assistance, he went to the defendant, who was a man of property, business ability, and experience, and told him the situation of his affairs, and requested the defendant's advice and assistance, and in so doing relied upon the warm and confidential friendship which he believed existed between him and the defendant. That plaintiff desired and requested the defendant to become his agent and trustee for the purpose of taking charge of the business and of managing the same until plaintiff had recovered his usual health of body and mind.

The petition further alleged: That the defendant consented to take charge of said business, but, after consulting his attorney, advised the plaintiff to make an assignment to him of all of his property, although there was nothing in the condition of plaintiff's affairs which justified such action, yet, by reason of plaintiff's distressed condition of mind and his confidence in the defendant, he consented to and did make the assignment to the defendant. That the defendant at once took charge and possession of the property and of the business, and proceeded to make an inventory, which he completed on or about the 12th day of March, 1907, and found from said inventory the reasonable value of the property covered by said assignment was \$14,566.51, and that the liabilities of the plaintiff amounted to \$5,162.40, and that the net value of the property was \$9,404.11. That, "the defendant desiring and intending to make an unlawful and unconscionable profit for himself, and wholly disregarding his duties as trustee and as imposed by the confidential relationship between himself and the plaintiff, and seeking to take advantage of the derangement of plaintiff's mind, the defendant entered into negotiations with the plaintiff for the purchase of plaintiff's 'equity' in the assigned estate. That at the time the plaintiff was temporarily insane and was wholly unable to deal with the defendant upon an equal footing, and had an entirely erroneous idea of the value of his property, all of which was known to the defendant and of which

he sought to take advantage. That as the result of said negotiations and of fraudulent misrepresentations made by the defendant to the plaintiff as to the value of said property and of the condition of said business, and of the confidential relations existing between the plaintiff and defendant, the plaintiff was induced by the defendant to execute an instrument purporting to be a transfer and assignment of all of plaintiff's 'equity' in the property aforesaid. That by reason of said false representations made by the defendant to the plaintiff, the mental condition of the plaintiff, the position of trust occupied by the defendant, and the confidential relationship between the plaintiff and defendant, the said instrument and pretended transfer is, and should be, held void and should be set aside. Wherefore plaintiff prays that the said assignment and also the said pretended transfer of plaintiff's 'equity' in said property be set aside and for naught held. But it appearing from the premises that the rights of third parties have intervened, and that, by reason of the manner in which the defendant has conducted said business, it will now be impossible to place the parties in statu quo by ordering the return of said property, it is therefore further prayed that the title to said property be vested in the defendant; that he be required to account for the value thereof," etc.

The defendant answered admitting, the making of the deed of assignment, the transfer of the equity, the incurring of the expenses, and making the payments set out in the previous part of this statement and as shown by his settlement as assignee. The defendant further alleged that, if the stock of merchandise had been sold at assignee's sale in due course of administration, the same would not have brought 50 per cent. of the invoiced price. He further denied that the plaintiff was not able to take care of himself when the assignment and transfer of the equity were made, or that he took any advantage of the plaintiff, and expressly alleged that the plaintiff well knew, at the time of the transfer of the equity, the appraised value of the property, as well as the inventory value and the amount of the indebtedness against the same; that, about the time the inventory was completed, the plaintiff commenced importuning the defendant to buy his equity in the assigned property; that for some time the defendant refused to deal with the plaintiff, and continued to refuse to buy his equity until after the completion of the inventory and appraisement, and not until the plaintiff was well aware of the value of the property and the indebtedness against the same.

The trial court did not find that the plaintiff, at the time the assignment was made, was unable to take care of or manage his business affairs, but did find that, at the time the equity was transferred, the mind of the plaintiff was in a greatly perturbed condition

by reason of which, and of the fiduciary relation existing between the parties, plaintiff was unable to deal with the defendant on a fair and equal basis, and for that reason the transfer of the equity to defendant should be set aside. The court charged the defendant with the same amount he was charged with in his final settlement as assignee, and held he was entitled to credit for sums paid to plaintiff, and to others for plaintiff's benefit, aggregating \$8,054.15, leaving a balance of \$1,987.16, for which the defendant should account to the plaintiff, and rendered judgment against defendant therefor. From that judgment the defendant appealed to this court.

There are several charges in the plaintiff's petition wholly unsupported by the evidence. The plaintiff's business was not in a flourishing condition. He owed about \$5,000, then due, and the assignment was made at the very dullest season of the year. Realizing the situation, the plaintiff had been for some time trying to induce others to go in with him and form a corporation to handle his business. He had some time prior to the making of the assignment made a trip to Oklahoma with the view of changing his location and quitting the mercantile business in Missouri. About two months previous to the assignment, he had transferred and delivered to his son-in-law clothing out of the stock amounting to about \$1,500, for which the son-in-law gave notes payable to the plaintiff's wife. It is not claimed in the testimony that the clothing was the property of the wife or that the notes were given to her for any indebtedness of the husband, and the same were not included in the assignment. Some time previous to February 26, 1907, a new store had opened across the street from plaintiff's, and there is testimony tending to prove that a share of the previous business of the plaintiff was being done by the new competitor.

There is no testimony in the case to support the allegation of the petition that the defendant induced or requested the plaintiff to make the assignment, or that the plaintiff had any special confidence in the defendant. Prior to the making of the assignment and prior to the time he first met or talked with the defendant about the same, he had consulted with others in regard to the matter, and with the view of having some one take charge of his business and pay his debts. He approached defendant and requested him to become his agent for that purpose. The defendant did not consent to do so at first, but finally agreed to do so if matters could be fixed legally. The plaintiff and the defendant then went to the county seat, and the plaintiff employed Mr. Montgomery, an attorney at law, and consulted him in and out of the presence of the defendant relating to his financial condition. As a result of the interview between the parties hereto and the attorney, the attorney advised an assignment.

and prepared the conveyance therefor. At the time the assignment was made, the plaintiff was in consultation with his son-in-law and his said son, and they both admit in their testimony that they advised him to make the assignment.

There is no testimony in the case that the defendant in any wise requested or induced the plaintiff to sell him his equity in the stock. The only evidence as to the matter comes from the defendant and his witnesses. They agree that the plaintiff, shortly after the deed of assignment had been made, was anxious to sell his equity, and offered the same to the defendant for the sum of \$500; that the defendant refused to buy it and advised him it was worth more; that he then offered to take \$1,000, and the defendant refused to buy at that price. Finally he offered his equity for \$2,000, and the defendant agreed to take the same at that price, and prepared a contract by the terms of which the defendant agreed to pay \$2,000 for the equity, and to assume certain debts amounting to about \$4,500 and supposed to be all the debts owed by the plaintiff. The plaintiff did not accept the instrument as prepared by the defendant, but wrote another himself, by the terms of which the defendant was to pay him \$2,200 for his equity and to assume and pay all the debts of whatsoever kind of Heath & Son, or of the plaintiff individually.

After the parties had verbally agreed to the purchase of the equity at \$2,000 and the payment of all debts, the plaintiff learned the defendant had made arrangements for discounts from certain of the creditors, and thereupon he demanded that defendant pay him the additional sum of \$200 as his proper part of such discount. In addition to the \$2,200, the defendant also agreed to buy a stove for the plaintiff's wife, not to exceed the sum of \$50. The evidence further shows that after the assignment had been made, and while the inventory was being taken, representatives of certain creditors called to look after their accounts, and in the presence of the plaintiff, stated that the plaintiff's assets were largely in excess of his liabilities, and that he was not in such bad shape financially. The evidence further shows that, some time after the purchase of the equity by the defendant, the plaintiff became dissatisfied and called to see the defendant, and the persons who had purchased an interest with him, relating to the transfer, and requested that the defendant pay premiums which would come due in the future, on life insurance policies carried by the plaintiff. The defendant and his associates refused to make any further payment, and thereupon notified the plaintiff that, if he was dissatisfied with the transfer of his equity, he could have the property turned back to him if he would redeliver to the defendant the note defendant had made him, and repay the \$500 he had received. The plaintiff refused to do so, and said he did not

want the property back. There is no testimony in the case supporting the charge of false representations made by the defendant to the plaintiff to induce him to make the assignment or to execute the instrument transferring his equity. No testimony was offered tending to prove that defendant at any time made any undue statement or false representation to the plaintiff, and, if the transfer is to be set aside, it must be on the ground that plaintiff's mind was in such condition that he was unable to contract, considered with the fact that a fiduciary relation existed between him and the defendant.

The evidence offered by plaintiff tends to prove that, about the time of the execution of the deed of assignment, the plaintiff became much worried about his financial matters. He had been a merchant for many years, and had enjoyed the reputation of being one of the good and substantial citizens of his community. Suddenly he found himself confronted with an indebtedness of over \$5,000, then due, and no money to meet it. He also realized that his only way to get money to pay his debts was from the sale of his goods, and that such sales must be made in the very dullest season of the year. He had transferred to his son-in-law a part of his stock of goods, and the notes in payment therefor had been executed to and delivered to his wife. His situation greatly wounded his pride and worried him until he had become nervous and changed in his usual habits and appearance. He was in poor health, and realized that he was well in the afternoon of life, and perhaps would be unable to remove the financial clouds hanging over him. He was not insane, and no advantage was taken of him by the defendant in procuring the assignment of the equity in the estate.

There is nothing in the record to justify a court in holding the original deed of assignment invalid, and, if the assignment of the equity is held invalid, it must be solely upon the ground that the condition of the health and mind of plaintiff at the time it was made was such as to invalidate the transaction when scrutinized by the very suspicious view which courts take of transactions between trustee and cestui que trust. It is the language of all the authorities that such a transaction is always scrutinized in a court of equity with a watchful eye, and will not be sustained to the disadvantage of the cestui que trust, except upon the most complete and satisfactory evidence of good faith and fair dealing on the part of the trustee. In passing on the issues, we are not to deal with evidence showing any intentional wrong on the part of the trustee, or of any failure on his part to fully disclose to the beneficiary all information he had relating to the trust estate. There was no intentional concealment, no misrepresentation, no actual fraud. The issues to be determined arise from the very conception and existence of a fiduciary

relation. It may also be observed that the issues in this case are not to be confused by the law relating to dealings by the trustee wherein he, as trustee, conveyed the property to himself.

"While the law exacts of a trustee the utmost good faith in all his dealings with the beneficiary regarding the trust funds in his hands, and commands him, on account of the fiduciary relation, to make full, fair, and open disclosures of all facts in his possession, it has never yet been announced that all dealings in regard to the trust fund are void and to be held for naught, in a court of law, at the mere suggestion of the relationship of the parties by the beneficiary. The office of trustee is no mere pitfall into which any scheming, exacting, or traitorous beneficiary may throw the trustee at pleasure. There is no difference in the treatment of dealings between trustee and the cestui que trust, or the fiduciary with his beneficiary, than with strangers, except in the manner and burden of proof when the dealing is assailed in a proper proceeding charging to the trustee or fiduciary unfairness or fraud. Under these circumstances, the burden is upon the trustee or fiduciary to show that the transaction was open, fair, honest, and free from fraud on his part; whereas, in all other cases he who alleges and charges unfairness or fraud must prove it." *State ex rel. v. Jones*, 131 Mo., loc. cit. 210, 33 S. W. 23.

In *Sallee v. Chandler*, 26 Mo., loc. cit. 120, Scott, Judge, speaking for the Supreme Court of this state, said: "However, a purchase by the trustee from his cestui que trust is at all times a transaction of great nicety, and one which the courts will watch with the utmost diligence. A trustee may purchase from the cestui que trust, provided there is a distinct and clear contract, ascertained to be such after a jealous and scrupulous examination of all the circumstances, that the cestui que trust intended the trustee should buy, and there is no fraud, no concealment, no advantage taken by the trustee of information acquired by him in the character of trustee. It will rest with the trustee to establish in evidence that there was such a bona fide contract between them, as, according to the rule just referred to, will sustain the purchase in a court of equity. The court, if satisfied as to this evidence, will support the transaction; but, if any unfair advantage has been taken by the trustee by withholding information or other fraudulent dealing, the purchase will at once be set aside; and mere inadequacy of price will go a great way in the mind of the court to constitute such fraud, though the purchase will not necessarily be set aside on that account alone."

This court has always given full credit to the finding of facts of the trial court in equity cases. In this case, however, there is but little dispute between the witnesses as to the material facts in the case. The

fact that plaintiff was greatly worried over his financial situation, and to the extent that his health had become impaired, and he was very nervous and could not sleep, has been determined by two trial courts. And it is only from the fact that this issue has been found in favor of the plaintiff by two trial courts that we refuse to make a contrary finding. The plaintiff was dissatisfied with the terms of the agreement that defendant had prepared to evidence the transfer of the equity, and prepared one himself, which is contained in the pleadings in this case, and an examination thereof will show that it was prepared by a man able to take care of himself. In addition to the business intelligence disclosed in the preparation of this instrument, the plaintiff, when he learned that defendant had contracted for certain discounts on debts due merchants, demanded and required defendant to pay him an additional price for his equity on account thereof. He even found fault with the rate of interest he was to receive from defendant on the deferred payments, and demanded the highest rate of interest allowed by the laws of this state. When he executed the assignment paper, the inventory was about completed, and he knew as well as the defendant the inventory value of his estate. He was surrounded by his son, who was his partner in the business, and by his son-in-law, who had also been connected with the stock of goods and had a general knowledge of the value thereof. His health was poor, and he was willing, perhaps, to take less than the actual value of the property in order to get away from the embarrassing surroundings and from the worry of his unfortunate financial condition. He turned to the defendant and urged him to buy the stock, which the defendant first refused to do. The plaintiff was also advised by the representatives of the wholesale houses to whom he was indebted that his stock was largely in excess of the payment of his debts.

The plaintiff has never testified in any of the courts relating to the transaction. And there is no showing that his testimony could not have been procured. He has refused, at all times, to advance any money to pay the expenses of the litigation with the trustee, but has required of his attorneys the payment thereof. Two trial judges, however, have held that his condition was such that, regardless of any improper conduct on the part of the trustee, the transfer should be set aside, and, while we have some doubt in the matter, we do not feel justified in overruling the trial courts thereon, unless the subsequent conduct of plaintiff requires such action.

The defendant in his answer alleged that after the relation had ceased, and the plaintiff was acquainted with all the facts and circumstances, and while defendant was in possession and control of all of the assigned estate, the plaintiff expressed his dissatis-

faction with the transfer and demanded some additional consideration therefor, but defendant refused to pay the additional consideration, and notified plaintiff that he could have his option to return the \$500 in cash he had received and redeliver the note he had received for the transfer of his equity, and all the property would be returned to him. But plaintiff, with such knowledge, refused to repay the money or deliver the note, but kept and retained the same and collected the note and the interest thereon.

The allegation of the answer is sustained by the uncontradicted testimony in the case. The evidence shows not only that the defendant made the offer above set forth under the above conditions, but also that plaintiff afterwards went to the person to whom defendant had transferred one-third of the property, who made the same offer, and it was rejected by plaintiff. When such offers were made, there was no fiduciary relation existing between the plaintiff and the defendant. The plaintiff then had full knowledge of every detail of the situation and acted independently of any confidential relation, and was dealing with the defendant and his associate as strangers.

While it is true, where relation which presupposes a confidence or controlling influence by one party on the mind of another has existed, the influence acquired by such relation may extend more or less after the period of its termination, and, when such is the case, the transaction will be scrutinized with the same jealousy as if the relation continued, yet it is only where the evidence shows that such influence extended after the period of the confidential relation that the principle applies.

In deciding this issue, the doubt entertained by the court of the right to set aside the transfer of the equity on account of the circumstances under which it was made has substantial weight. If the plaintiff had been wronged in the original transaction, he was fully aware of it at the time the defendant offered to rescind. The fiduciary relation no longer existed, and there is nothing in the record to show that it once existed had any influence at the time defendant offered to rescind. The plaintiff was then holding fast to all he had received and refusing to put the defendant in statu quo, but was demanding the defendant to make a new contract with him and buy his property at a higher price.

The plaintiff instituted this suit in equity to rescind the contract at a time when he knew it was impossible to restore things to the situation they were in at the time the contract was made. The evidence shows that, while it was possible so to do, he at all times maintained that he did not want a restoration. It is well settled that a litigant coming into a court of equity must come with clean hands, and the rule is applicable to the facts of this case. The defendant act-

ed in good faith in the transaction, and made a contract at the request of the plaintiff. Afterward, and at a time when the defendant was in a position to restore to plaintiff what he received under the contract, plaintiff expressed a dissatisfaction therewith, whereupon the defendant offered to rescind the contract and restore to plaintiff all he had parted with, to wit, the stock of merchandise. To that offer the plaintiff replied: "I don't want it. It would be only the tail end of a big stock of goods, and I would not fool with it." This reply was made to the following statement of the defendant: "If you are dissatisfied with this trade, you give me back my \$500 and give me back my note, and you can have the whole thing back, Mr. Heath. You can have whatever it brings, or you can let me pay out what is owing and you can have the remainder of the goods." And to this day no word of testimony has ever come from the plaintiff that he ever desired to rescind the contract or wanted the stock of goods returned to him.

A fair interpretation of the evidence leads to the irresistible conclusion that plaintiff never wanted the possession of the stock after the transfer of his equity, and there was no time when he was willing to give up the \$500 cash paid him and the \$1,700 note drawing 8 per cent. interest for his equity in the stock.

It does not seem to us that it would be fair or equitable to permit the plaintiff to sustain this action. When he became dissatisfied with the trade, and the defendant offered to rescind and return to him the property, he should have accepted the proposition. He had no right to remain silent, and if, for any reason, defendant lost money on the transaction, to stand by the contract, but, if defendant made money out of the transaction, repudiate it. To hold that he can recover under such circumstances is declaring an unjust and unfair rule, and especially so under the facts of this case.

The contract was not void, but only voidable at the election of the cestui que trust, and if, at a time when the elements which made the contract voidable had been removed, plaintiff refused the offer of the defendant to rescind and really did not want to rescind, he certainly can have no standing in a court of equity to compel the defendant to rescind when he has ascertained it will be more profitable to him to do so than to stand by the contract.

"When one comes into a court of equity to rescind a contract, he must be able to show, as a primary condition to his right, that he has been diligent, and that he has been prompt in disavowing the obligation into which he alleges he had been fraudulently led. Negotiations or dealings with the defrauder, respecting the subject-matter of the fraud after discovery, are fatal to the right of repudiation. The party alleging he was defrauded is not at liberty to hesitate and

delay, and wait for a future view of his own convenience or the market value of the property.'" *Landon v. Tucker*, 130 Mo. App. 704, 107 S. W. 1037.

The premises considered, we are of the opinion that, when all the evidence is considered, the plaintiff is not entitled to recover in this action, and the judgment should be reversed, with directions to the circuit court to dismiss plaintiff's bill. It is so ordered.

NIXON, P. J., concurs. COX, J., not sitting.

GOULD v. ST. JOHN et al.
(Kansas City Court of Appeals. Missouri.
Jan. 16, 1911. Rehearing Denied Feb. 13, 1911.)

1. BROKERS (§ 88*)—COMPENSATION—QUESTION FOR JURY.

In an action to recover commissions alleged to be due for effecting the sale of land, held, that whether the plaintiff was the procuring cause of the sale was a question for the jury.

[Ed. Note.—For other cases, see *Brokers*, Cent. Dig. §§ 128, 129; Dec. Dig. § 88.*]

2. TRIAL (§ 260*)—INSTRUCTIONS—REQUESTS—INSTRUCTIONS ALREADY GIVEN.

Where a party's case has been clearly presented by the instructions given, the refusal of an instruction making selection of special features of the case is proper.

[Ed. Note.—For other cases, see *Trial*, Cent. Dig. §§ 651-659; Dec. Dig. § 260.*]

Appeal from Circuit Court, Morgan County; Wm. H. Martin, Judge.

Action by Fred J. Gould against John P. St. John and others. Judgment for plaintiff, and defendants appeal. Affirmed.

Hazell, Edwards & Lay, for appellants. Scott J. Miller, for respondent.

ELLISON, J. Plaintiff's action was brought to recover commission on the sale of real estate. He alleges that defendants were agents engaged extensively in the sale of real estate and that they, desiring the assistance of plaintiff, entered into the following contract with him, viz.: "Fred J. Gould, Versailles, Mo.—Dear Sir: We will give you one-half of all the gross profits made by us in the sale of any real estate to customers brought or sent us by you. When the party is sent us, you must give them a letter of introduction, or otherwise notify us, before such sale is made that such buyer is your customer. We will pay you your share in each sale as soon as the same is completed. You to transact this class of business in this county solely through our firm. You to bear your own expenses; we to bear ours; this arrangement to be terminated at the will of either of us, but such termination not to interfere with any deal on hand, or otherwise made. Very truly

yours, St. John & Noyes. I hereby accept the above conditions and will use my best efforts for the success of the undertaking. Fred J. Gould." There was a judgment for plaintiff in the trial court.

This is the second appeal of the case. At a former trial the verdict and judgment was for plaintiff and it was set aside and a new trial granted. From the order granting the new trial plaintiff appealed to the Supreme Court, where the order was affirmed. The cause was then again tried and this appeal taken. It was appealed to this court on account of the recent increase of jurisdiction bringing it within the pecuniary limit of cases appealable to this court. Both trials of the case took a wide range in matters of evidence, and the opinion of the Supreme Court (207 Mo. 619, 106 S. W. 23) contains a complete statement of the claims of the respective parties, as well as a detailed recitation of the evidence bearing upon these claims. We need not again set them out, but refer to the report of the case just cited for its complete history. In the second trial of the case there was additional testimony in plaintiff's behalf which, in the opinion of the trial court, relieved his case of the embarrassment of not having a preponderance of evidence in his favor, which that court and the Supreme Court thought it lacked at the first trial. We have gone over the evidence in connection with the oral and written arguments of counsel, and have concluded that the plaintiff made a case which entitled him to the opinion of a jury as to his right to recover.

The particular claim made by him is that he discovered to defendants the parties who finally bought a tract of land of several thousand acres, with coal underlying much of it. That defendants were authorized to sell what were known as the Halderman tract, the Hubbard & More tract and the Bailey tract. That he brought parties to Morgan county to examine the latter tract, with a view of buying it, and while there for that purpose, not succeeding in selling it to them, he called their attention to the Halderman tract and in that way caused them to purchase it of defendants. In a general way, the trial court instructed the jury in behalf of plaintiff that if they believed this to be the fact, plaintiff was entitled to one-half of commissions defendants may have made out of the sale. We think there can be no doubt that the jury, under these instructions, in connection with those for defendants, must have believed that plaintiff, within the rule stated in *Ramsey v. West*, 31 Mo. App. 676, and *Crowley v. Somerville*, 70 Mo. App. 376, was the procuring cause of the sale by producing the parties who afterwards purchased.

We do not consider that defendants have any substantial ground of complaint as to

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

the instructions. As a series they certainly left no room for misunderstanding on the part of the jury. Those for the defendants covered every point of legitimate defense and the objections made as to those refused are in greater part technical. Of the latter, No. 6 is the subject of principal complaint. It stated that if plaintiff was introduced to C. W. Waldeck as the partner of defendants when he was not, and that plaintiff permitted such deception by his actions and otherwise, and if by such deception he obtained the name of Magenheimer as a possible or probable purchaser of the land and telegraphed to him, then such telegram and the answer thereto should be disregarded in making a verdict, "unless you further believe that said Gould procured and induced or caused to be procured the purchaser for said lands fairly." We find it difficult to understand the instruction. It is subject to the criticism made by plaintiff's counsel. Notwithstanding what it terms a fraudulent assumption of partnership between plaintiff and defendants whereby he obtained the name of a prospective purchaser who bought the land, yet it is a concession that the purchaser may have been procured "fairly." At any rate, the effect of the instruction, as offered, was to select a special circumstance claimed by defendants, and thus give it prominence with the jury. We think that defendants' case had been clearly enough set forth in other instructions, and that they were not entitled to this one, making special selection of a certain feature of it. We find no cause of complaint as to the admission of evidence.

The sum of the whole matter is that the case was one depending upon the solution of a great amount of contradictory testimony, much of which was subject to inferences of a nature favorable or unfavorable to either party, depending upon the point of view from which they were considered. It is a case, therefore, particularly for the determination of a jury. There has been no error that can be considered of substance, and with the result we have no right to interfere. The judgment will be affirmed. All concur.

BLADES et al. v. BILLINGS MERCANTILE CO.

(Springfield Court of Appeals. Missouri.
Feb. 6, 1911.)

1. CORPORATIONS (§ 553*)—DISSOLUTION—RECEIVER—GROUNDS—ALLEGATIONS.

A complaint by a stockholder which alleges merely that a resolution was passed at a stockholder's meeting for the dissolution of the corporation, and for the appointment of an agent to collect and distribute the assets, and that the agent is paying out the assets to unauthorized persons, alleges no ground for the appointment of a receiver for the corporation, the improper acts charged being merely that the agent

is acting in excess of his authority, presumably without the consent of the corporation and its directors.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. § 2206; Dec. Dig. § 553.*]

2. RECEIVERS (§ 1*)—APPOINTMENT.

The power to appoint a receiver is a delicate one, especially when invoked upon an ex parte application, and should be exercised with extreme caution, and only under circumstances requiring summary relief, or where the court is satisfied that there is imminent danger of loss, and should never be exercised in a doubtful case.

[Ed. Note.—For other cases, see Receivers, Cent. Dig. § 1; Dec. Dig. § 1.*]

3. RECEIVERS (§ 6*)—APPOINTMENT—EXISTENCE OF OTHER REMEDY.

One of the grounds upon which a receiver may be appointed is that there is no other adequate remedy, and an appointment will never be made where there is another safe or expedient remedy, or where the court can find another and less stringent means for protecting the rights of the parties.

[Ed. Note.—For other cases, see Receivers, Cent. Dig. § 12; Dec. Dig. § 6.*]

4. CORPORATIONS (§ 553*)—DISSOLUTION—RECEIVER—APPOINTMENT—RIGHTS OF STOCKHOLDER.

Before a court of equity will hear a single stockholder in a controversy over the management of the corporation, he must show that he has no remedy within the corporation itself, and hence where a corporation has voted to dissolve and has appointed an agent to collect and distribute the assets, a single stockholder cannot have a receiver appointed on the ground that the agent is wasting the assets by payments to unauthorized persons, until he has exhausted his remedy by application to the directors, and, if there is time, to the stockholders, to remedy the wrong.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. § 2206; Dec. Dig. § 553.*]

Appeal from Circuit Court, Christian County; John T. Moore, Judge.

Action by S. B. Blades and others against the Billings Mercantile Company, a corporation. From an order appointing a receiver, defendant appeals. Reversed and remanded, with directions.

J. T. White, W. T. Lamkin, and W. H. Horine, for appellant. G. A. Watson and W. P. Sullivan, for respondents.

NIXON, P. J. This appeal is from an order overruling a motion of the defendant, Billings Mercantile Company, to vacate an order appointing a receiver to take charge of the said defendant's property, said order having been made in vacation by the judge of the circuit court of Christian county on the 8th day of October, 1910, the day the petition was filed. The petition upon which said order was made is as follows (caption omitted):

"Plaintiffs state that the Billings Mercantile Company is a corporation, duly organized under the laws of the state of Missouri, and until about the 1st day of August, 1910, was engaged in the mercantile business, at Billings, in Christian county, Mo.; that re-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

cently before said last-mentioned date, at a meeting of the stockholders of said corporation, at which there were present stockholders holding more than two-thirds in value of all the stock of said corporation, there was introduced and passed by said stockholders a resolution favoring a dissolution of said Billings Mercantile Company; that immediately thereafter the directors of said corporation, assuming to act for and in behalf of its stockholders, proceeded to sell and dispose of its stock of merchandise, furniture, and fixtures, at retail and in bulk, and to close up the business of said corporation; that pursuant to the purposes aforesaid the directors of said corporation appointed and selected Joseph Meyer as the manager and agent of said corporation to collect the debts and accounts due and owing to it and to pay out and disburse the moneys of said corporation; that the said Joseph Meyer is proceeding to collect the assets of said corporation and is paying out such assets to persons wholly unauthorized to receive the same, by reason whereof the assets of said corporation are rapidly becoming depleted, squandered and wasted.

"Plaintiffs further state that in his lifetime R. D. Blades was the owner of twenty shares of the capital stock of said corporation, of the par value of one hundred dollars per share; that the said R. D. Blades shortly before his death and during his last sickness, while mentally irresponsible on account of the infirmities of extreme age and from the influence of strong opiates administered at frequent intervals for weeks prior thereto, one Joseph Meyer, the then manager and principal stockholder in the defendant company, without solicitation, or invitation so to do, from any person interested therein, secretly and fraudulently wrote out and caused to be signed, by mark, the name of R. D. Blades, the owner thereof, on the back of the certificates of stock of the quantity and value aforesaid, transferring to his then wife, Mary E. Blades, the earnings of said stock during her natural life; that the said Joseph Meyer after procuring the signature of said R. D. Blades in the manner aforesaid kept and carried away and retained said certificates of stock until after the death of the said R. D. Blades after which he delivered them to the said Mary E. Blades, the defendant. Plaintiffs say that said pretended transfer of the earnings of said stock as aforesaid was fraudulent, invalid, and conveys to the transferee, Mary E. Blades, no interest whatsoever, for the reason that the said R. D. Blades was at the time of the alleged assignment of the earnings of said stock to the said Mary E. Blades wholly incapacitated by reason of his age, sickness, and opiates to him administered and under the influence of which he was at the time, and on account of his being at the time of unsound mind and entirely unable to com-

prehend or know the kind or nature of his acts or to comprehend in the slightest degree the simplest kind of a contract or business transaction.

"Plaintiffs further state that they are the heirs at law of R. D. Blades, who died intestate about December —, 1901; that the estate of the said R. D. Blades has been fully administered and that there are no debts outstanding against his said estate; that they are the owners of the said shares of stock and earnings of same; that so far as plaintiffs are informed and believe the present value of the said stock aggregates the sum of \$3,700.

"Plaintiffs further state that they are informed and believe that the said Joseph Meyer has paid to the said Mary E. Blades the sum of \$700 of the money of said corporation without right or warrant of law, and is threatening to pay out all the assets of said corporation in violation of law, and in total disregard of the rights and interests of the plaintiffs herein; that no application for a dissolution of said corporation has been made in accordance with the provisions of section 978, Rev. St. 1899 [Ann. St. 1906, p. 868], nor has any judgment of dissolution been had in this court, nor any authority conferred upon the president, directors or manager of said corporation to take charge of its assets and administer them as now provided by section 978, Rev. St. 1899 [Ann. St. 1906, p. 867].

"Plaintiffs further state that by reason of the fraudulent, invalid, and void transfer of the earnings of said stock of plaintiffs, the defendant corporation has knowingly and wrongfully paid the defendant, Mary E. Blades, the sum of \$2,380 of the moneys of these plaintiffs.

"Wherefore, plaintiffs pray judgment against the defendant corporation and the defendant, Mary E. Blades, in the sum of \$2,380 with interest thereon as allowed by law. Plaintiffs further pray that the court appoint a receiver to take charge of the business, property and effects of said corporation and to collect, sue for and recover the debts and demands that may be due and the property that may belong to said corporation, and to take charge of, lease, and rent all real estate belonging to said corporation, collect rents therefor and make such disposition thereof from time to time as may be ordered by the court. Plaintiffs further pray for such other and further orders, decrees, and judgments touching the premises herein as to the court may seem meet and proper, and for such further relief as plaintiff may be entitled to in equity and good conscience."

The order appointing a receiver was made on the allegations of the petition alone, without affidavits in its support, except the verification of the petition by one of plaintiffs' attorneys, and the order was made without notice having been given to the appellant.

The appellant's motion to vacate said order charges (1) that said receiver was appointed without authority of law; (2) that the court had no jurisdiction to appoint such receiver; (3) that said receiver was appointed without notice to the defendants, on an *ex parte* presentation of the plaintiffs; and (4) that said appointment of said receiver was made *ex parte*, on an alleged petition which states no grounds or reasons for such appointment with or without notice, and states no cause of action against this defendant. This motion was overruled and the appeal to this court was duly perfected.

Appellant's principal contention is that the petition filed in the circuit court wholly fails to allege that respondents sought or were refused redress for their grievances within the corporation itself, or that its officers and managers were given any opportunity to make matters right, or that they failed or refused to recover the sums alleged to have been misappropriated, or to grant respondents all their rights.

The petition alleges that the stockholders passed a resolution favoring a dissolution of the corporation, but that no formal dissolution was had; that they proceeded (a) to sell and dispose of the stock of merchandise, fixtures, and furniture and to close up the business, and (b) to appoint one Joseph Meyer as manager and agent to collect the debts and disburse the moneys of the corporation. Thus far, nothing unlawful is alleged. But the petition recites: "And the said Joseph Meyer is proceeding to collect the assets of said corporation, and is paying out such assets to persons wholly unauthorized to receive the same, by reason whereof the assets of said corporation are rapidly becoming depleted, squandered, and wasted. Plaintiffs further state that they are informed that the said Joseph Meyer has paid to the said Mary E. Blades the sum of \$700 of the money of said corporation without right or warrant of law and is threatening to pay out all the assets of said corporation in violation of law, and in total disregard of the rights and interests of the plaintiffs herein." It is apparent that if Joseph Meyer was paying money to unauthorized persons, the presumption is that he was doing it contrary to the wishes of the managers and directors. They certainly did not appoint him for that purpose, but appointed him to collect the accounts and disburse the money. The allegations are to the effect that Joseph Meyer is exceeding his authority as agent by paying out the assets unlawfully. This is distinctly the act of Joseph Meyer, with no allegation that he is acting with the knowledge or consent of the defendant. There is nothing in the petition to negative the perfect good faith of the corporation and its directors and officers. The unlawful acts complained of—the squandering of the assets—affected other stockholders as well as the respondents.

The power to appoint a receiver is a delicate one, especially when invoked upon interlocutory *ex parte* applications, and should be exercised with extreme caution, and only under circumstances requiring summary relief or where the court is satisfied that there is imminent danger of loss, lest the injury thereby caused be far greater than the injury sought to be averted. It should never be exercised in a doubtful case. One of the grounds upon which a receiver may be appointed is that there is no other adequate remedy; the appointment will never be made where there is another safe or expedient remedy, or where the court can find another and less stringent means of protecting the rights of the parties, and this in some cases has seemed to be a part of or corollary to the rule that in the exercise of judicial discretion upon the application for the appointment of a receiver, the appointment will not be made except in the case of imperative necessity. 34 Cyc. 21-25. Judge Lamm in discussing this question in the case of *State ex rel. v. People's United States Bank*, 197 Mo., loc. cit. 598, 94 S. W. 959, quoting from another case, said: "'And the appointment of a receiver and a sequestration of the corporate property would suspend the functions of the corporation, and virtually operate as an annihilation of corporate rights. These are persuasive reasons why courts should act with great caution, and not take the management of the concerns of corporations out of the hands of directors and managers, to whom the law has intrusted it, except in cases of urgent necessity'—a necessity characterized elsewhere as 'extreme.'"

The plaintiffs' petition in this case should have alleged that an effort was made to obtain redress within the corporation itself. In theory, of courts of equity, the directors of a corporation are its trustees. *Albers v. Merchants' Exchange*, 45 Mo. App., loc. cit. 218. In the case just cited, the court said: "It is, therefore, a settled principle of equity jurisprudence, that before a court of equity will open its doors to a single stockholder, although he comes, as he must, not only on behalf of himself, but also in behalf of all the other stockholders, to an inquiry into grievances of this kind, he must show that there is no other road to redress; and he does not show this unless he shows that all remedies within the corporation itself have been exhausted. * * * But a request to the directors to bring the appropriate action is not the only mode by which the shareholder may obtain redress through the appropriate corporate action. In many cases it will not be enough for him to show that he has made such a request and that it has been refused; but he must exhibit a state of facts, from which the court can conclude that he has exhausted all reasonable efforts to induce redress through an action in the corporation itself. * * * Moreover, when he

brings a suit in equity to redress grievances which ordinarily can be redressed alone in an action brought by the corporation, his bill must set forth in detail the efforts made by him to secure on the part of the corporation the desired action, or it will be dismissed." In the case of *Loomis v. Mo. Pac. Ry. Co.*, 135 Mo., loc. cit. 489, 65 S. W. 967, the following language of Mr. Justice Miller in *Hawes v. Oakland*, 104 U. S. 450, 26 L. Ed. 827, is approvingly quoted: "But, in addition to the existence of grievances which call for this kind of relief, it is equally important that, before the shareholder is permitted, in his own name, to institute and conduct a litigation which usually belongs to the corporation, he should show to the satisfaction of the court, that he has exhausted all the means within his reach to obtain, within the corporation itself, the redress of his grievances, or action in conformity to his wishes. He must make an earnest, not a simulated, effort with the managing body of the corporation, to induce remedial action on their part, and this must be made apparent to the court. If time permits, or has permitted, he must show, if he fails with the directors, that he has made an honest effort to obtain action by the stockholders, as a body, in the matter of which he complains. And he must show a case, if this is not done, where it could not be done, or it was not reasonable to require it. The efforts to induce such action as complainant desires on the part of the directors, and of the shareholders when that is necessary, and the cause of failure in these efforts should be stated with particularity."

It seems to us, under these authorities, there can be no doubt as to the duty of this court upon the showing made. The order of the trial court, refusing to vacate its order appointing the receiver, is reversed and the cause is remanded, with directions to the trial court to set aside its order appointing the receiver. All concur.

TOMLINSON et al. v. TIMMONS.

(Kansas City Court of Appeals. Missouri. Jan. 30, 1911.)

1. APPEAL AND ERROR (§ 633*)—FAILURE TO SERVE PRINTED ABSTRACT AND BRIEFS—PENALTY.

The penalty for the failure of appellant to serve a copy of his printed abstract and brief in the time prescribed by Court of Appeals Rule 15 (67 S. W. vi) is a dismissal of the appeal, and not an affirmance of the judgment.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2772-2774; Dec. Dig. § 633.*]

2. APPEAL AND ERROR (§ 644*)—SERVICE OF ABSTRACT AND BRIEFS—WAIVER.

Where respondent agreed to waive strict compliance with Court of Appeals Rule 15 (67 S. W. vi), relating to the abstract of the record

and briefs and service of a copy thereof, and appellant complied substantially with the agreement, the appeal could not be dismissed for the failure to comply with the rule, as respondent may waive such provision.

[Ed. Note.—For other cases, see Appeal and Error, Dec. Dig. § 644.*]

Appeal from Circuit Court, Jackson County; John G. Park, Judge.

Action by C. P. Tomlinson and another against C. A. Timmons. From a judgment for plaintiffs, defendant appeals. Motion to affirm judgment denied.

Meservey & German, for appellant. John C. Nipp and Jno. L. Wheeler, for respondents.

PER CURIAM. This cause was docketed for hearing on December 10, 1910, and on that day respondent filed a motion to affirm the judgment on the ground that appellant had failed to serve respondents with a copy of his printed abstract of the record and briefs in the time prescribed by rule 15 (67 S. W. vi). The penalty for a failure of the appellant to comply with this rule is a dismissal of the appeal, and respondents' motion should have been for a dismissal instead of an affirmance of the judgment. But, treating it as a motion to dismiss, we think it should be overruled for the reason that the affidavits filed in support of and in opposition to the motion show that respondents agreed to waive strict compliance with this rule, and that appellant complied substantially with the terms of the agreement. The provision in the rule requiring an appellant to serve his abstract of the record and brief on the respondent, being for the benefit of the latter may be waived by him.

The motion is overruled, and respondents are given 20 days in which to file their counter abstract and brief. All concur.

McNEILL v. CITY OF CAPE GIRARDEAU.

(Springfield Court of Appeals. Missouri. Feb. 6, 1911.)

1. DAMAGES (§ 38*)—MEASURE—PERSONAL INJURIES—CAPACITY TO LABOR.

The impairment of ability to perform labor resulting from personal injuries is a proper element of damages, though the person injured was not then employed so as to have any actual earning capacity.

[Ed. Note.—For other cases, see Damages, Cent. Dig. §§ 237-241; Dec. Dig. § 38.*]

2. DAMAGES (§ 216*)—INSTRUCTIONS—EARNING CAPACITY.

It is error to submit the question of loss of earning capacity as an element of damages where there is no evidence that the person injured was engaged in any employment or business, though the impairment of his capacity to labor may be considered as an element of damages without proof of earning capacity.

[Ed. Note.—For other cases, see Damages, Cent. Dig. §§ 548-555; Dec. Dig. § 216.*]

3. MUNICIPAL CORPORATIONS (§ 818*) — STREETS — INJURIES — ACTIONS — ADMISSION OF EVIDENCE—CONDITION OF SIDEWALK.

In an action against a city for personal injuries from a defective sidewalk, evidence was only admissible as to the condition of the walk in the immediate vicinity of the injury.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. § 1734; Dec. Dig. § 818.*]

4. MUNICIPAL CORPORATIONS (§ 818*) — STREETS — INJURIES — ACTIONS — ADMISSION OF EVIDENCE—OTHER INJURIES.

In an action against the city for injuries from a defective sidewalk by tripping on loose boards, testimony that others had fallen by tripping on such boards was improperly admitted, though such witnesses could testify as to the condition of the walk at or near the place of injury, and state that boards had tipped up there in passing over them.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. § 1735; Dec. Dig. § 818.*]

Appeal from Cape Girardeau Court of Common Pleas; Robert G. Ranney, Judge.

Action by Nannie McNeill against the city of Cape Girardeau. From a judgment for plaintiff, defendant appeals. Reversed and remanded.

Frank Kelly, for appellant. A. P. Stewart and John O'Connor, for respondent.

COX, J. Action for damages caused by a fall upon the sidewalk on the east side of Lorimer street in defendant city. Judgment for plaintiff for \$2,000, and defendant has appealed.

The allegation of the petition is that plaintiff was tripped and caused to fall by a loose board in the walk as a result of which her left arm was broken, and alleged damages resulting from said injuries as follows: "She has suffered great pain of body and anguish of mind, and will continue to suffer pain in the future, and that the fracture of the bones of her said left arm has caused said arm to be permanently disfigured and injured, which has greatly and permanently impaired and lessened her capacity to perform labor, and thereby will permanently impair her earning capacity, and cause her to suffer great personal inconvenience, all to her great damage in the sum of ten thousand dollars (\$10,000.00)."

The evidence on the part of plaintiff discloses that the plaintiff and her husband were walking upon the sidewalk on the east side of Lorimer street in the city of Cape Girardeau, and that when some distance south of Independence street her husband stepped upon a loose board in the sidewalk, when the board tilted, she tripped upon it, fell, and broke her arm. The evidence also tended to show that the walk had been out of repair for from six weeks to two months, and it is conceded in this court that the plaintiff made a prima facie case, but it is insisted that error was committed in the giv-

ing of instructions and in the admission of testimony.

The instruction complained of was one relating to the measure of damages in which the jury are told that in estimating plaintiff's damages they should assess, together with other elements of damages, the following: "A reasonable compensation for any permanent impairment of her earning capacity or capacity to perform labor through her said injury to her said arm."

There was no evidence to show that plaintiff was at the time of the injury, or prior thereto had been, earning anything. There was no evidence that she was engaged in any kind of employment. The only testimony relating to that matter shows that she and her husband were boarding and at the time she fell she was returning from the place where she was taking her meals to her home. It is now insisted by appellant that it was error to permit the jury to take into consideration impairment to plaintiff's earning capacity without having first proven what her earning capacity was. It will be noticed that the quotation from the instruction above given couples together the earning capacity and the capacity to perform labor. It was entirely proper to tell the jury that they might take into consideration, in estimating the damages of plaintiff, any impairment of her earning capacity to perform labor. To impair one's ability to perform labor is an injury to a personal right, and by reason of that fact, is a proper element of damages whether the ability to perform labor is being used by the injured party or not. Hence, in order to permit the jury to consider this as an element of damages it is not necessary to offer proof of what the injured party's earnings were at the time. *Perrigo v. St. Louis*, 186 Mo. 274, 84 S. W. 30; *Cullar v. Railroad*, 84 Mo. App. 340; *McRae v. Metropolitan Street Ry. Co.*, 125 Mo. App. 562, 102 S. W. 1032.

An impairment of earning capacity, however, is a very different thing, and stands upon an entirely different basis. The capacity to perform labor and earning capacity are not one and the same thing. A person's physical ability to perform labor might be entirely destroyed without his earning capacity being to any extent lessened. The earning capacity of a man depends upon the business in which he is engaged or the salary which may be paid him, and to permit the submission of loss of earning capacity to the jury as an element of damages there must be testimony to show what the earning capacity of the injured party was, and to what extent it has been impaired by the injury received. *Davidson v. Transit Co.*, 211 Mo. 320, 109 S. W. 583; *Slaughter v. Metropolitan St. Ry. Co.*, 116 Mo. 269, 23 S. W. 760; *O'Brien v. Loomis*, 43 Mo. App. 29; *Stoetzle v. Sweringen*, 96 Mo. App. 592, 70 S. W. 911;

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

Boyce v. C. & A. Ry. Co., 120 Mo. App. 168, 96 S. W. 670; Grout v. Central Electric Ry., 131 S. W. 891. The instruction, therefore, in so far as it permitted the jury to take into consideration impairment of plaintiff's earning capacity was erroneous by reason of the fact that there was no testimony upon which to base it.

It is contended that error was committed in the admission of testimony. Witnesses were permitted to testify on behalf of plaintiff as to the condition of the walk along the east side of Lorimer street all the way between Independence and Meriwether streets—a distance of one block. Plaintiff, in her testimony, located the place of the injury a short distance south of Independence street. To show the condition of the walk at the place of the injury the plaintiff should not be restricted to the particular board which caused her to fall, but the testimony should have been restricted to the condition of the walk in the immediate vicinity of the injury, and we think that to show the condition of the walk along the entire block was extending the limit too far. Witnesses were also permitted to testify that in passing over this walk they had tripped on loose boards and some of them had fallen by reason thereof. We think this erroneous as tending to prejudice the jury against the defendant. It was competent for witnesses to testify as to the condition of the walk at or near the place of the injury, and, in explaining how they knew it to have been out of condition, we think it proper to have permitted them to state that the boards had tipped up when they were passing over the walk, for that might be the means of their knowledge that the boards were loose, but there is no reason why they should be permitted to say that they had fallen by reason of the loose boards. Such testimony could not assist plaintiff's case, and might prejudice defendant's case, and therefore should have been excluded.

For the errors noted, the judgment will be reversed and the cause remanded. All concur.

BRINKMAN v. GOTTENSTROETER.

(Springfield Court of Appeals. Missouri.
Feb. 6, 1911.)

1. DEATH (§ 103*)—ACTION FOR WRONGFUL DEATH—JURY QUESTION.

Where a defendant sued for wrongful death admitted the killing, but justified upon grounds of self-defense, the sufficiency of his evidence to sustain that contention was for the jury.

[Ed. Note.—For other cases, see Death, Cent. Dig. § 141; Dec. Dig. § 103.*]

2. TRIAL (§ 29*)—REMARKS BY JUDGE.

Where the court improperly excluded testimony impeaching a witness, by showing that his reputation for truth and veracity was bad, but later reversed his ruling, saying that he had

been mistaken and that the evidence was admissible, and that the way the impeaching witness acquired his knowledge was a question for the jury, there was nothing improper in the remark, as it simply stated that the evidence, being competent, should be weighed by the jury.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 80-84; Dec. Dig. § 29.*]

3. DEATH (§ 69*)—DAMAGES—MINOR CHILDREN.

In an action by a wife for damages for wrongfully killing her husband, the jury may consider that the deceased left minor children for her to support.

[Ed. Note.—For other cases, see Death, Cent. Dig. §§ 86, 87; Dec. Dig. § 69.*]

4. TRIAL (§ 131*)—PRESENTATION OF GROUNDS—ARGUMENT OF COUNSEL—SPECIFIC OBJECTIONS.

Where an argument is proper, if directed to the question of damages, but otherwise might tend to inflame the jury, a general objection to it as improper is not sufficient to make a ruling which permitted it erroneous; but the opposing party should request the court to limit the scope of the argument.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 312-314; Dec. Dig. § 131.*]

5. TRIAL (§ 106*)—APPEAL AND ERROR (§ 972*)—ARGUMENT OF COUNSEL—DISCRETION OF TRIAL COURT—REVIEW.

The propriety of the arguments and conduct of counsel rests in the discretion of the trial court, and will not be reviewed save when such discretion is abused.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 267; Dec. Dig. § 106; Appeal and Error, Cent. Dig. § 3847; Dec. Dig. § 972.*]

6. TRIAL (§ 252*)—INSTRUCTION—APPLICABILITY TO EVIDENCE.

Where there is no evidence to support a phase of a case, the trial court properly ignores it in the instructions.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 596-612; Dec. Dig. § 252.*]

Appeal from Circuit Court, Franklin County; R. S. Ryers, Judge.

Action by August Brinkman against F. W. Gottenstroeter. From a judgment for plaintiff, defendant appeals. Affirmed.

Jesse H. Schaper and John W. Booth, for appellant. J. C. Kiskaddon, R. L. Shackelford and A. H. Kiskaddon, for respondent.

GRAY, J. This is an action by the widow of August F. Brinkman against the defendant, to recover damages for the death of her husband. The petition alleged that the defendant, on the 9th day of March, 1908, unlawfully and wrongfully shot and killed the plaintiff's husband, to her damage in the sum of \$10,000. The answer admitted defendant shot and killed the deceased, but alleged affirmatively that the act was done in self-defense. The cause was tried during the July term, 1908, of the circuit court of said county, and the jury returned a verdict in favor of plaintiff in the sum of \$5,400. The defendant appealed to the Supreme Court, and that court transferred the cause to the St. Louis Court of Appeals, and the St. Louis court transferred the cause to this court. Both parties have appeared in this

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

court, and no question of jurisdiction is involved.

The defendant contends that the verdict is not sustained by any substantial evidence. He admitted that he killed plaintiff's husband, and justified on the ground of self-defense. Whether his evidence was sufficient to sustain his plea of justification was for the jury. *Morgan v. Mulhall*, 214 Mo., loc. cit. 459, 114 S. W. 4; *Pierce Loan Co. v. Killian*, 132 S. W. 280; *Orscheln v. Scott*, 90 Mo. App. 353; *State v. Evans*, 124 Mo. 397, 28 S. W. 8; *Seehorn v. Bank*, 148 Mo. 256, 49 S. W. 886.

One Edw. Kunelmeyer gave important testimony in behalf of plaintiff. The defense offered several witnesses to prove that Kunelmeyer's general reputation for truth and veracity was bad. This list included one Dr. Fitzgerald, who testified that his knowledge of the reputation of Kunelmeyer had been obtained since the death of plaintiff's husband. Whereupon the court refused to permit him to testify to the witness' reputation. Later in the trial the court changed its ruling, and permitted the witness to testify. In changing its ruling the court said, in the presence of the jury: "Having studied over this matter, I find it necessary to change my ruling. Applying the rule, where a witness has testified that reputation is bad, and upon cross-examination it discloses the fact that he has formed the opinion, and it has become permanent, I think it is something for the jury to determine, and is not rendered inadmissible. The court thinks such evidence is admissible, and the manner in which he acquired his knowledge is a question to be determined by the jury." We fail to see anything improper in the remarks of the court. The court had erred in rejecting the testimony when it was first offered, and in correcting its error it simply stated that the testimony was competent, and the weight of it was for the jury.

In his argument before the jury, counsel for plaintiff said: "The jury has a right, in determining the issues in this case, to take into consideration the fact that plaintiff is the mother of five little minor children, and the age and condition of each of said minor children." Counsel for the defendant objected to the remarks, and the court overruled his objection. It is now claimed the remarks were improper and prejudicial. In determining the amount of the damages, the jury had the right to take into consideration the evidence that deceased had left minor children for the plaintiff to support. *Fisher v. Central Lead Co.*, 156 Mo. 479, 56 S. W. 1107; *Tetherow v. Railroad Co.*, 98 Mo. 74, 11 S. W. 310, 14 Am. St. Rep. 617. The defendant admits the argument was proper, if limited to the question of damages, but says it was not so limited, and that plaintiff's counsel intended thereby to procure the sympathy of

the jury, and thus get a finding in his client's favor on the main issue. It seems to us the rule governing such matters should be the same as the one relating to the introduction of testimony. If testimony is admissible for any purpose, a general objection to it as improper is not sufficient. The party should ask to have the testimony limited to its proper purpose. And if an argument is proper as to a particular issue in the case, and improper as to the others, then the opposing party should ask the court to limit the effect of the argument to the proper issue, and a general objection will not do. In this case, no such request was made, and the trial court did not see fit to sustain the objection or to grant a new trial on account of any improper conduct of plaintiff's counsel. Such questions must largely be left to the sound discretion of the trial court, and it is only when an abuse of such discretion is shown that the appellate courts are justified in interfering.

The appellant contends that the court's instructions ignore the fact that defendant was an officer, and his rights in the premises as such. There was no evidence that the defendant was acting in his official capacity, or that he pretended to act as such at the time.

We have disposed of all the errors assigned, and, having determined them in favor of the respondent, the judgment of the circuit court should be affirmed, and the same is accordingly done. All concur.

SLIGO FURNACE CO. v. HOBART-LEE TIE CO.

(Springfield Court of Appeals, Missouri, Feb. 6, 1911. On Appellant's Motion to Modify Judgment, Feb. 20, 1911.)

1. TRESPASS (§ 52*)—CUTTING AND REMOVING TIMBER—MEASURE OF DAMAGES.

The measure of damages for cutting and taking a person's timber under an honest mistake is the value of the timber before it was cut, but where the cutting and taking was by a willful trespasser, the measure of damages is the value of the timber in its improved condition without reduction for labor bestowed or expenses incurred by the trespasser.

[Ed. Note.—For other cases, see *Trespass*, Cent. Dig. §§ 137, 138; Dec. Dig. § 52.*]

2. ACCESSION (§ 2*)—RIGHT TO RETAKE PROPERTY IN HANDS OF TRESPASSER.

An owner may follow and retake property in the hands of a willful trespasser, though it has been largely increased in value by the labor of the trespasser.

[Ed. Note.—For other cases, see *Accession*, Cent. Dig. §§ 11-14; Dec. Dig. § 2.*]

3. TRESPASS (§ 46*)—HONEST MISTAKE—WILLFULNESS.

In an action for cutting and removing timber, evidence held to show a willful trespass by defendant and not an act in good faith under an honest mistake.

[Ed. Note.—For other cases, see *Trespass*, Cent. Dig. §§ 123-127; Dec. Dig. § 46.*]

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

4. TRESPASS (§ 40*)—WILLFULNESS—PLEADING.

An allegation that one "unlawfully and without right" trespassed on land and cut and removed timber thereon does not charge willfulness.

[Ed. Note.—For other cases, see Trespas, Cent. Dig. §§ 80-88; Dec. Dig. § 40.*]

Appeal from Circuit Court, Dent County; L. B. Woodside, Judge.

Action by the Silgo Furnace Company against the Hobart-Lee Tie Company. From a judgment granting partial relief, plaintiff appeals. Reversed and remanded.

Wm. P. Elmer, A. H. Harrison, G. E. Woodside, and G. C. Dalton, for appellant. Harry Olymer and Frank H. Farris, for respondent.

COX, J. Action for conversion of railroad cross-ties; trial by court; judgment for plaintiff for \$476 as value of the property, and \$57.12 interest; and plaintiff has appealed.

The petition alleged plaintiff to be the owner of certain timber lands in Dent county, and that defendant unlawfully and without right trespassed thereon and cut the timber and made it into railroad cross-ties, and converted the ties to its own use. The answer was a general denial. A specific finding of facts was asked, and the court found that the agents of defendant were not willful trespassers, but had cut the timber by mistake, believing it to be located on land from which they had bought the timber and for that reason the court assessed the value of the ties at their value as they stood in the trees.

Appellant insists, first, that the measure of damages was the value of the ties regardless of the question of good faith in cutting them from plaintiff's land; second, that if the court adopted the correct measure of damages, his finding that the timber was cut by honest mistake is not supported by the testimony.

In our judgment the true rule for fixing the measure of damages is that if the timber was taken by honest mistake, then the value of the timber before being cut is the measure of damages, but if the party taking the timber knew he had no right to it, and thus became a willful trespasser in the first instance, then in a suit against him the measure of damages is the value of the timber in its improved condition without reduction for labor bestowed, or expense incurred by the wrongdoer. *U. S. v. Ute Coal & Coke Co.*, 158 Fed. 20, 85 C. C. A. 302; *Ayers v. Hobbs*, 41 Ind. App. 576, 84 N. E. 554; *Central Coal Co. v. John Henry Shoe Co.*, 69 Ark. 302, 63 S. W. 49; *Everson v. Seller*, 105 Ind. 268, 4 N. E. 854; *Wittliff v. Spreen*, 51 Tex. Civ. App. 544, 112 S. W. 98; *Kentucky Stave Co. v. Page (Ky.)* 125 S. W. 170; *Young v. Pine Ridge Lumber Co. (Tex. Civ. App.)* 100 S. W. 784; *Thompson v. Carter*, 6 Ga. App. 604,

65 S. E. 599; *E. E. Bolles Woodenware Co. v. United States*, 106 U. S. 432, 1 Sup. Ct. 398, 27 L. Ed. 230. In the Bolles Case last cited, after stating the rule as above outlined, it is said that "This is now the generally accepted rule both in England and in this country." The law is not only careful to compensate the owner for the loss of his property, but it is also careful to see that a willful wrongdoer shall not profit by his own wrong, and by requiring him to respond in damages for the value of the property in its improved state both these purposes are accomplished. To fix the measure of damages at the value of the property in its improved condition when the party had taken it by honest mistake would be as harsh as to fix it at the value in the tree when taken by a willful trespasser would be unjust. In the former case the owner would be profiting by the labor of an honest man mistakenly bestowed upon his property, and in the latter case a willful trespasser would be profiting by his own wrong. The rule adopted in the cases above cited, and which was followed by the trial court in this case is just and fair to both parties, and, therefore, right.

We do not find that this precise question has been heretofore passed upon in this state, but we do think that the principle involved has been recognized. Thus in *Gray v. Parker et al.*, 38 Mo. 160, an action in replevin, the court, in discussing the general question of the rights of the parties, uses this language: "If property is taken from the rightful owner by a willful trespasser and manufactured or converted by him into a different article, nevertheless, the title to the property will not be changed, and it will still belong to the owner of the original material if he can identify it. But this is not the law when the chattel is converted by the innocent holder or purchaser into a different specific article. The law makes a distinction in acquiring title to property by accession between a willful trespasser and an involuntary wrongdoer. As the law will not permit any man to take advantage of his own wrong, so the former never can acquire any title however great the change wrought in the original article may be; while the latter may." See, also, *Hendricks v. Evans*, 46 Mo. App. 318; *Blackmer v. Railroad*, 101 Mo. App. 557, 73 S. W. 913; *Austin v. Coal Co.*, 72 Mo. 535, 37 Am. Rep. 446. We find no case in this state controverting this doctrine. In *Land & Lumber Co. v. Moss Tie Co.*, 87 Mo. App. 167, the issues depended upon the title to the land, and no question was raised as to good faith. In *Hosli v. Yokel*, 57 Mo. App. 622, an action for conversion of hay, the court held that, under the facts in that case, the measure of damages was the value of the standing grass before being cut. The statement of the case, however, shows the hay to have been cut by the lessor from the

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

leased premises, and he claimed he had the right to the hay, so the question of whether or not he was a willful trespasser was not involved in that case. Many of the cases in this state, as in *Spencer v. Vance*, 57 Mo. 427, use this language: "In conversion the measure of damages is the value of the property at the time of conversion." But the question of the right of the owner to sue for and collect the value of property after being enhanced in value by the labor of the wrongdoer was not involved, and the distinction between the rights of a plaintiff against a willful trespasser and an innocent wrongdoer is not discussed; hence, none of these cases are controlling in this case.

It is conceded by all the authorities that in the case of a willful trespasser the owner may follow and retake the property in his hands notwithstanding it may have been largely increased in value by the labor of the trespasser, and, to our mind, it would be illogical to hold that if the owner of the property should see fit to retake the property he could take it in its improved condition, but if he should elect to sue for its conversion he could not recover for its increased value by reason of its improved condition. Our conclusion is that the court adopted the correct rule as to the measure of damages in this case, and that point must be ruled against appellant. This brings us to the question of whether the finding of the court that defendant's agents acted in good faith is sustained by the testimony.

The plaintiff proved, and the court found, that defendant's agents cut the plaintiff's timber. The land upon which the timber was cut was the N. $\frac{1}{2}$ S. E. $\frac{1}{4}$ section 5, township 34, range 2, and S. $\frac{1}{2}$ section 8, and S. $\frac{1}{2}$ N. E. section 8, township 34, range 2. As to the land in section 5, it appears that land adjoining it, both north and south, belonged to parties in Illinois, and they sold the timber thereon to one O. S. Durham, and Durham sold to defendant. In the contract from Durham to defendant, the N. $\frac{1}{2}$ S. E. section 5, which it is now conceded is the property of plaintiff, was included. This contract was dictated to a stenographer by Mr. Lunsford, the representative of defendant, and at the time he did so he had the contract from the owners to Durham before him and used it to secure the description of the land. Lunsford did not testify, and whether he inserted the N. $\frac{1}{2}$ S. E. section 5 by mistake, or did so intentionally, there is no testimony, and defendant offered no explanation as to how this land got into the contract; neither does it in any way appear why Lunsford was not offered as a witness to explain it, if it could be explained. The evidence further shows that the timber contract from Durham to defendant was executed January 11, 1907, and in April, 1907, Mr. Robinson, who was manager for defendant in having the timber

cut and made into ties, stated to A. N. and J. W. White that this 80 did not belong to defendant. The evidence also shows that the ties were all cut from land both north and south of this 80 before any were cut upon this 80. Giving this testimony the most favorable construction to defendant possible, and it forces us to the conclusion that when defendant secured this contract from Durham it understood that this 80 was not included, and acting upon that belief the timber was cut from land on both sides of it, and the timber upon this 80 left untouched. The contract from the owners to Durham was turned over to defendant's agents with the contract from Durham to it, and had Robinson looked at these papers he would have at once discovered that Durham could not sell the timber on this 80, and since he did understand, as he stated to the two Mr. Whites, that defendant did not own the timber on this 80, we must assume that he had read these contracts, and knew their contents, and this, coupled with the fact that timber was cut on both sides of this 80 before this 80 was touched, leads to but one conclusion, and that is that the cutting of the timber on this 80 was willfully done. As to the timber cut on land in section 8, it is sufficient to say that the evidence shows that defendant bought the timber on 15 acres adjoining this land, and in cutting the timber from the 15 acres the agents of defendant got over the line a half mile. This is the only evidence bearing on the question of good faith as to the timber cut in section 8, and it, instead of showing good faith, shows a wanton disregard of plaintiff's rights. We find nothing in this record from which a finding that defendant's agents acted in good faith can be sustained.

Upon a retrial the plaintiff should amend its petition by making a direct charge of willfulness. The terms "unlawful and without right" are not synonymous with willful. *State v. Hussey*, 60 Me. 410, 11 Am. Rep. 209; *State v. Massey*, 97 N. C. 465, 2 S. E. 445.

The judgment will be reversed and the cause remanded. All concur.

C. & A. J. MATTHEWS v. PHOENIX INS. CO. OF HARTFORD.

(Springfield Court of Appeals. Missouri.
Feb. 6, 1911.)

APPEAL AND ERROR (§ 753*)—DISMISSAL—STATEMENT—NECESSITY.

An appeal will be dismissed for lack of assignment of errors.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3086-3089; Dec. Dig. § 753.*]

Appeal from Circuit Court, Scott County; Henry O. Riley, Judge.

Action by C. & A. J. Matthews against

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

the Phoenix Insurance Company of Hartford. From a judgment for plaintiffs, defendant appeals. Appeal dismissed.

Oliver & Oliver and Barclay, Fauntleroy & Cullen, for appellant. J. H. Hale and Frank Kelly, for respondents.

GRAY, J. This cause is in this court on a transfer from the St. Louis Court of Appeals. Both parties have appeared generally in this court. The suit originated before a justice of the peace, and is based on an insurance policy issued by the appellant March 6, 1906. The plaintiffs were successful in the justice court. On trial in the circuit court, the plaintiffs were again successful, and the defendant appealed.

The appellant has filed in this court a printed abstract in lieu of full transcript, but nothing more. No statement or assignment of errors, as required by the statute or our rules, has been filed. The result of such failure is the dismissal of the appeal. *Wade v. Bankers' Life Ins. Assn.*, 145 Mo. App. 172, 129 S. W. 1004; *Disse v. Frank*, 52 Mo. 551; *Snyder v. Free*, 102 Mo. 325, 14 S. W. 875; *Halstead v. Stone*, 147 Mo. 649, 49 S. W. 850.

The appeal is dismissed. All concur.

STATE v. SNIDER.

(Springfield Court of Appeals. Missouri. Feb. 6, 1911.)

1. INTOXICATING LIQUORS (§§ 36, 224*)—LOCAL OPTION LAW—PUBLICATION—RECORD.

Under Rev. St. 1899, § 3031 (Ann. St. 1906, p. 1737), providing for publication of notice of the result of local option election favorable to the local option and putting the law in force in the county, the record of the county court need not show a return of the publication of the result where it shows that publication was ordered, the burden being on defendant in a prosecution for violating the local option law to show a failure of such publication.

[Ed. Note.—For other cases, see *Intoxicating Liquors*, Dec. Dig. §§ 36, 224.*]

2. INTOXICATING LIQUORS (§ 36*)—LOCAL OPTION—RESULT OF ELECTION—PUBLICATION—SUFFICIENCY.

Rev. St. 1899, § 3031 (Ann. St. 1906, p. 1737), provides that if a majority of the votes cast at a local option election are against the sale of liquors, the county court ordering the election shall publish the result once a week for four consecutive weeks, in the same newspaper in which the notice of election was published, etc. After ascertaining a favorable result of such an election the county court ordered the same spread on the records and that the result of the election should take effect from and after publication of notice for five insertions or four consecutive weeks, which last publication should be on July 12, 1905. On August 12, 1905, the court entered a finding that the notice had been published for four consecutive weeks, in the Christian County Republican, being the same paper in which the notice of local option election was published and also for two weeks in the Billings Times being the same paper in which notice of local option election

was published. *Held*, the record sufficiently showed publication of the notice in compliance with the statute.

[Ed. Note.—For other cases, see *Intoxicating Liquors*, Dec. Dig. § 36.*]

Appeal from Circuit Court, Christian County; John T. Moore, Judge.

J. A. Snider was convicted of violating the local option law, and he appeals. *Affirmed*.

G. W. Thornberry, G. Purd Hays, and C. A. McCafferty, for appellant. Fred. W. Barrett, for the State.

NIXON, P. J. The defendant was tried in the circuit court of Christian county upon an information charging the offense of selling intoxicating liquor in violation of the local option law, and he has appealed. No statement of points relied on for reversal or briefs have been filed. The information is the same, word for word, as that in the case of *State of Missouri v. J. A. Snider* (decided by this court December 5, 1910) 132 S. W. 290, except the sale in that case took place on August 5, 1909, and the sale in this case was on August 4, 1909, the cases being against the same defendant and tried in the same court and before the same judge. In that case, we held the information sufficient, Gray, J., writing the opinion.

The first error assigned in the motion for new trial is that there was no such publication of the result of the local option election in Christian county as the law requires, and that therefore the local option law was not in force in said county. Section 3031, Rev. St. 1899 (section 1737, Ann. St. 1906), provides that "if a majority of the votes cast at such election be against the sale of intoxicating liquors, the county court or municipal body ordering such election shall publish the result of such election once a week for four consecutive weeks, in the same newspaper in which the notice of election was published; and the provisions of this article shall take effect and be in force from and after the date of the last insertion of the publication last above referred to."

The Christian county court, after ascertaining and declaring the result of the election, ordered the same to be spread upon the records and then caused the following entry to be made: "That the result of said election will take effect and be in force from and after publication for five insertions or four consecutive weeks, which last insertion will be July 12th, 1905." Afterwards, on August 12, 1905, the following entry appears of record: "Now at this day the court finds in the matter of the publication of the result of the local option election that the same was published for four (4) consecutive weeks in the Christian County Republican, being the same paper in which the notice of local option election was published; also the court finds that the result of said election was pub-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

lished two weeks in the Billings Times, being the same paper in which the notice of local option election was published."

It has been held under said section 3031 that "the record of the county court need not show a return of the publication of the result where it shows the publication was ordered, and the burden to show a failure of such publication is upon the defendant." *State v. Oliphant*, 128 Mo. App. 252, 107 S. W. 32; *State v. Bush*, 136 Mo. App. 608, 118 S. W. 670; *State v. Kennett*, 132 S. W. 286. But in the present case, the state did introduce the records of the county court showing that the notice of the result of the election was published for four consecutive weeks in the same newspaper in which the notice of the election was published. If the county court had assumed to act in accordance with the holding in the above cases, and had not designated in its order the newspaper in which the notice of the result of the election should be published and no order had been entered proving the fact of publication, we would have a different question. It seems to us it cannot be seriously contended that the statute has not been fully complied with in this case. The statute simply requires the county court to "publish the result of such election in the same newspaper in which the notice of election was published." This certainly was complied with in this case.

Only five instructions were given, the first three being the usual charges as to credibility of witnesses, competency of defendant as a witness in his own behalf, and reasonable doubt. Instruction No. 5 told the jury the local option law was in force in Christian county at the time of the alleged sale. Instruction No. 4 told the jury if they found that defendant at the time and place mentioned in the information did unlawfully sell intoxicating liquors, to wit, whisky, in any quantity, they would find him guilty. These are the thumb-worn instructions appearing in every record in this class of cases, and we find that the trial court committed no error in giving them.

We have carefully examined the entire record and find no error committed justifying a reversal of the judgment, and it is accordingly affirmed. All concur.

**SHOOK et al. v. RETAIL HARDWARE
MUT. FIRE INS. CO. OF MIN-
NESOTA.**

(Springfield Court of Appeals. Missouri. Feb. 6, 1911. Motion to Certify to Supreme Court Denied Feb. 20, 1911.)

**1. INSURANCE (§ 663*)—FIRE INSURANCE—AC-
TIONS—JURY QUESTIONS—WAIVER.**

In an action on a fire policy, held a jury question whether defendant's soliciting agent waived the iron-safe clause in the policy.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 1732-1770; Dec. Dig. § 663.*]

**2. INSURANCE (§ 90*)—AGENTS—LIMITATION
OF AUTHORITY.**

Limitations upon the authority of an insurance agent do not bind insured if he has no notice thereof, so that limitations in the policy are not notice to insured of the agent's want of power before the delivery of the policy.

[Ed. Note.—For other cases, see Insurance, Dec. Dig. § 90.*]

3. INSURANCE (§ 87*)—AGENTS—AUTHORITY.

The authority of an insurance agent is prima facie coextensive with the requirements of the business intrusted to him, and the company is bound by his acts within the apparent scope of his authority.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 116, 121; Dec. Dig. § 87.*]

**4. INSURANCE (§§ 77, 375*)—AGENTS—AU-
THORITY.**

A fire insurance company, by issuing a policy upon an application taken by one purporting to act as its agent, and accepting the premiums, is estopped from denying the agency, and became bound by the agent's misrepresentations when acting within the scope of his apparent authority, so that it was bound by a parol contract made by the agent with insured when the policy was issued, by which the iron-safe clause was eliminated from the policy.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 102, 948-951; Dec. Dig. §§ 77, 375.*]

**5. INSURANCE (§ 142*)—FIRE INSURANCE—
AGENTS—RATIFICATION OF UNAUTHORIZED
ACTS—RATIFICATION IN TOTO.**

An insurance company could not accept the part of an unauthorized contract made by an agent which was favorable to it and reject the rest, but must ratify it as a whole.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 264; Dec. Dig. § 142.*]

**6. EVIDENCE (§ 441*)—PAROL EVIDENCE—
VARYING CONTRACTS—INSURANCE POLICY.**

Parol evidence is admissible in an action on an insurance policy to show that facts relied on by the company to establish a forfeiture arose from fraud or mistake of the agent in preparing the application or policy, so that, in an action on a fire policy, evidence was admissible as to conversations between insured and defendant's agent tending to show an agreement before the issuance of the policy that the inventory and iron-safe clauses therein should not bind insured.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 2046; Dec. Dig. § 441.*]

**7. INSURANCE (§ 376*)—FIRE INSURANCE—AU-
THORITY OF AGENT.**

Insurance agents vested with the authority to insure property may waive stipulations in the policy purporting to be essential to the validity of the contract, though the policy provides a particular method by which its provisions may be waived or designates particular persons as having the sole power to waive the provisions thereof.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 952-955; Dec. Dig. § 376.*]

**8. APPEAL AND ERROR (§ 1001*)—FINDINGS—
CONCLUSIVENESS.**

A verdict for plaintiff is binding on appeal where there was evidence to support plaintiff's contention.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3923; Dec. Dig. § 1001.*]

**9. INSURANCE (§ 576*)—FIRE INSURANCE—AP-
PRaisal—WAIVER.**

Failure to appraise the goods after loss is only available as a defense where the parties disagree as to the amount of the loss, and the

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes.

company waives an appraisalment if it wholly denies liability or refuses to pay on grounds inconsistent with the purpose to insist on an appraisalment.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 1436-1438; Dec. Dig. § 576.*]

10. INSURANCE (§ 576*)—FIRE INSURANCE—APPRAISEMENT—WAIVER.

Where insured and the company did not disagree as to the amount of insured's loss after the fire, but the company offered to pay on the same basis as other insurance companies who had settled at less than the face value of their policies, the company waived the provision of the policy requiring an appraisalment; the offer being an admission of the amount of insured's loss.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 1436-1438; Dec. Dig. § 576.*]

11. TRIAL (§ 252*)—INSTRUCTIONS—APPLICABILITY TO EVIDENCE.

Where there was no evidence, in an action on a fire policy, tending to show waiver of certain conditions thereof after the loss, it was error to submit that issue to the jury.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 596-612; Dec. Dig. § 252.*]

12. APPEAL AND ERROR (§ 1062*)—HARMLESS ERROR—SUBMITTING FALSE ISSUE.

Where the insurance agent taking the policy waived certain provisions thereof by parol before the policy was issued, so that the question of waiver after loss was immaterial, error in submitting the issue of waiver after loss, of which there was no evidence, was harmless to the company.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4212-4218; Dec. Dig. § 1062.*]

Appeal from Circuit Court, Greene County; James T. Neville, Judge.

Action by W. E. Shook and another, co-partners doing business as Shook & Farmer, against the Retail Hardware Mutual Fire Insurance Company of Minnesota. From a judgment for plaintiffs, defendant appeals. Affirmed.

Fyke & Snider and Mann, Johnson & Todd, for appellant. Hamlin & Seawell, for respondents.

NIXON, P. J. This action is based on a policy of fire insurance issued to plaintiffs, insuring their fixtures and stock of general merchandise in the town of Willard in Greene county for \$2,600. In the trial the plaintiffs obtained a verdict for \$2,600, and defendant perfected its appeal to this court. The policy contained the following provision: "It is a condition of this policy, if at the time of loss the assured shall hold any policy of this or any other company, on the property hereby insured, subject to conditions of coinsurance, percentage of value, or average, or inventory and iron-safe clause, this company's liability herein shall be limited thereby to the same extent as though such clause were contained in this policy." The evidence showed that plaintiffs did have coinsurance in five other companies, amounting to \$4,650, and that in the policy issued to plaintiffs by the Aetna Insurance Company—one of the

five—was contained the following provision: "Books and Inventory to be Kept or Insurance Void.—It is a part of the consideration for this insurance, and it is expressly warranted, that the assured above named shall take an inventory of the stock above described at least once a year, and shall also keep correct books of account in detail showing all purchases and sales of the same, and shall keep all inventories and books in a fire-proof safe, or other place secure from fire in said store during the hours said store is closed for business, or this policy shall be void."

The evidence showed that one of the plaintiffs met the man who represented himself to be the agent of the defendant at a meeting of retail hardware merchants in Springfield, Mo., and that a few days thereafter this agent called on plaintiffs, who were partners in the general merchandise business at Willard, and sought to sell them a policy in his company. He arrived about 9 o'clock in the morning and remained all day. Mr. Shook testified: "Q. State the conversation of the agent with reference to the question of complying with the iron-safe clause, and also whether or not he had any knowledge of the other policies, and whether or not you were complying with the provisions of the other policies with reference to the iron-safe clause? A. He asked me if we had other insurance and how much. I told him, and he asked to see the policies, and I told him we had no safe, that we kept our books in the desk, but we had our policies over at the bank, and I would get the policies. I got them and gave them to him, and he went over them. We were waiting on the trade. When I told him we had no safe he said, 'That is all right; our company is not technical like those Eastern companies.' He had been telling me about their company, some of the good things about them, and said, 'Our company doesn't deal in technicalities like these Eastern companies.' He said, 'We had a loss at some town where other companies were represented, and I happened to be there the same day.' He said he was sent there to adjust the loss 'and the other companies went through a lot of 'red tape,' and had the insured to get a lot of duplicate invoices,' which took him weeks to produce. 'and they went to every other business man in town and asked them what they thought about the situation, but I waited until they got through, and I took the man off to one side and talked to him and settled the loss and went on.' Q. Did he look over your stock? A. Yes, sir. Q. Did he ask you about what you had—the amount? A. He did, and went on to say we needed more insurance. I told him our stock would invoice \$10,000; that we knew nothing about the mutual insurance business, and he talked there for

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

some time, spent the whole day looking through the stock, and stated that \$2,600 more wouldn't be extravagant insurance, and we told him we didn't want to pay insurance on more than we would be able to collect if we had a loss." The evidence shows that plaintiffs finally agreed to take a policy for \$2,600, and executed one of the applications the agent carried in his grip (the terms of which do not appear) and gave a check for \$48 for the premium and delivered same to the agent. To whom this check was payable does not appear, and plaintiffs did not remember, but they said the agent told them how to make it. In a few days the policy was received through the mail and placed in the bank with the other policies. Plaintiffs did not know whether the agent signed the policy or not, and there is nothing in the abstract to enlighten the court on this question; nor does it appear who mailed the policy or from whence it came. As to the negotiations for the insurance, Mr. Farmer testified: "Q. What was said about the safe and where you kept the policies? A. Shook says, 'We haven't any safe, and the policies are kept in the bank across the street.' He said, 'All right,' and then went ahead and told us a story about not being particular in making these settlements. We showed him where we had the books in the desk. Q. Did you make any inventory at all of the stock? Did you have an inventory? A. Yes, sir; it was taken in January, 1909; that was an inventory of the entire stock. Q. Did you keep books of account? A. Yes, sir; showing our purchases and indebtedness and credits and everything of that kind. Those books and inventory and everything were destroyed the night of the fire."

J. E. Leonard, a witness for the plaintiffs, testified that he was in the hardware business at Springfield, and was secretary of the Retail Hardware Association; that he thought the name of the agent who solicited this insurance was H. V. Mercer; that this agent made an address at the convention in Springfield in the interest of his company on the subject of mutual insurance.

On December 28, 1909, at about 2 o'clock in the morning, plaintiffs suffered a total loss, and at once wired defendant, notifying it of the loss, and also wrote defendant two or three letters, receiving an answer, dated January 3, 1910, stating that the matter had been placed in the hands of the Western Adjustment Company, of Kansas City, for adjustment. An adjuster, representing this adjustment company, soon arrived at Willard and asked plaintiffs where their books were and they told him the books were destroyed by fire; he inquired if the other policies had been settled, and, upon being informed they had, said "that was all they could do that day, the rest could be settled by mail," and went away.

The evidence showed that plaintiffs set-

tled with the other five companies as follows:

Company.	Insured.	Paid.
Ætna	\$1,000	\$ 452 32
National	500	195 73
Hartford	1,150	541 46
Hanover	1,000	391 46
Phoenix	1,000	391 46
	\$4,650	\$1,972 43

At this rate, the appellant—its policy being for \$2,600—would be entitled to settle for \$1,017.80.

Some time after the adjuster left, plaintiffs received an offer of \$1,017.80 as appellant's proportional part of the loss (though the terms of this offer do not appear in the record) to which plaintiffs replied: "This amount is not satisfactory with us. We took out this \$2,600 policy to cover an addition we made to our business during the summer, and the adjusters of the other companies took our invoices of January 1, 1909, not taking into consideration the addition we made after this invoice was taken. We have duplicate invoices showing that we had \$12,000 worth of goods on hand at the time of the fire, after deducting our sales for that year. There is no justice in our settling with the H. M. Co. for anything like that. The H. M. Co. knew all about all the insurance we had, for they examined every policy, and looked over our stock, and suggested this amount themselves. We paid them their premium in full and we claim the full amount of the policy. We feel that we did not get fair treatment by the other companies, but that is no reason why we should not have fair treatment by the H. M. Co. If you want to settle with us please forward to us proofs of loss to be executed in proper form and we will do so on a basis of \$2,600, the amount of the policy, that the Hardware Mutual Ins. Co. owes us."

At the close of plaintiffs' evidence the defendant offered and the court refused to give an instruction in the nature of a demurrer to the evidence, and it is of this that defendant now complains. If the defendant offered any evidence at the trial it is not preserved for our consideration.

It will be seen from the foregoing that there was evidence for the jury on the issue of waiver by the agent who solicited the insurance of the iron-safe clause appearing in the Ætna policy. This agent was not placed on the stand, and nothing whatever appears as to the extent of his authority. Plaintiffs testified they never saw him again. He may have been a high official in the company or an agent with very limited powers. There was no evidence that he was merely a soliciting agent. As is well known, in conducting the insurance business, the insurance company acts through general or special agents. There may be agents who have authority only to solicit insurance and submit applications to the company and who have

no authority to make any contracts in its behalf not relating to the taking of the policy, or agents with full power to bind it. While in certain cases, the authority of an insurance agent may be limited by notice brought home to the insured, as, for instance, by an express limitation in the policy, restrictions and limitations of which the insured had no notice are not binding on him, but such a limitation is not notice to the insured of the agent's want of power to bind his principal as to transactions before delivery of the policy. 22 Cyc. 1430. The power of the agent whether general or special is determined by the nature of the business intrusted to him, and is *prima facie* coextensive with its requirements, and the company is therefore bound by the acts of the agent within the apparent scope of his authority. 22 Cyc. 1433; *Herndon v. Triple Alliance*, 45 Mo. App. 426; *Harrison v. Railroad*, 50 Mo. App. 332. In this case the insurance company received the premium and issued its policy to the plaintiffs, and, by accepting the benefits of an act of an assumed agent, the company became bound by his acts as fully as though he had authority, and by accepting the premium and issuing a policy upon an application purporting to be taken by a person acting as its agent the company estops itself from denying such agency. The company, having retained the premium and issued the policy, it is chargeable with any fraud or mistake of its agent, and is bound by any of his wrongful acts or misrepresentations while acting within the scope of his authority. 22 Cyc. 1435; *Greer v. Lafayette County Bank*, 128 Mo. 559, 30 S. W. 319.

The evidence shows that plaintiffs acted in the utmost good faith, concealing nothing. They gave the agent to understand they were not complying with the iron-safe clause in the *Ætna* policy and did not intend to, and he gave them every assurance that it was not required by his company and accepted the premium with that understanding. Whether the application which plaintiffs executed contained any provision on the subject we cannot say because it is not before us. No evidence as to its contents is set forth in the abstract, although, presumably, in the possession of the defendant. Nor does it appear by whom the policy was issued or delivered, or whether it was countersigned by the soliciting agent. Only certain clauses of the policy are inserted in the abstract, and we have no way of knowing whether the policy was issued by Mercer, the agent, or whether it was countersigned by him, or whether he was the writing agent for the defendant company.

The facts of this case distinguish it clearly from those cases where the insured deals with the insurer through an agent with only special or restricted powers brought home to the insured at the time of the making of the contract. The respondents dealt with

the agent, Mercer, as to the iron-safe clause, upon his apparent authority to bind or loose the company, and so far as the transaction was concerned the agent became to all intents and purposes the alter ego of the company. The appellant, by accepting the premium procured by its agent from the respondents, became bound by all the agreements and representations made by its agent to procure it. It could not receive the part favorable to it and reject the balance, but its ratification must cover the transaction in its totality—either “all in all or not at all.” So far as legal liability of the appellant is concerned, its subsequent ratification was equivalent to a previous authorization of its agent to make the agreements and representations that were made to the respondents as to waiving the iron-safe clause, and, having lain by till after the loss, the law will not then tolerate the repudiation of the contract. In this connection we quote the language of Mr. Justice Miller in the case of *Insurance Co. v. Wilkinson*, 13 Wall. 222, 20 L. Ed. 617: “The agents are stimulated by letters and instructions to activity in procuring contracts and the party who is in this manner induced to take out a policy, rarely sees or knows anything about the company or its officers by whom it is issued, but looks to and relies upon the agent who has persuaded him to effect the insurance as the full and complete representative of the company, in all that is said or done in making the contract. Has he not a right to so regard him? It is quite true that the reports of judicial decisions are filled with the efforts of these companies, by their counsel, to establish the doctrine that they can do all this and yet limit their responsibility for the acts of these agents to the simple receipt of the premium and delivery of the policy, the argument being that, as to all other acts of the agent, he is the agent of the assured. * * * But to apply such a doctrine, in its full force to the system of selling policies through agents, which we have described, would be a snare and a delusion, leading, as it has done in numerous instances, to the grossest frauds, of which the insurance corporations receive the benefits, and the parties supposing themselves insured are the victims. The tendency of the modern decisions in this country is steadily in the opposite direction. The powers of the agent are, *prima facie*, coextensive with the business intrusted to his care, and will not be narrowed by limitations not communicated to the person with whom he deals. * * * An insurance company, establishing a local agency, must be held responsible to the parties with whom they transact business for the acts and declarations of the agent, within the scope of his employment, as if they proceed from the principal.”

Defendant in this case objected to all testimony regarding conversations between

plaintiffs and Mercer, the defendant's agent, tending to show any agreement made by them anterior to the issuance of the policy that the inventory and iron-safe clause in the Aetna policy should not be obligatory. Agents of insurance companies, vested with authority to make contracts and to insure property, stand in the place of the company in dealing with applicants for policies, and may waive stipulations which purport to be essential to the validity of the contract. *Rudd v. Fire Ins. Co.*, 120 Mo. App. loc. cit. 11, 96 S. W. 237, and cases cited; *Riley v. Insurance Co.*, 117 Mo. App. 229, 92 S. W. 1147. According to these authorities, this rule prevails over a restriction in the policy prescribing a particular mode in which its terms may be waived or designating particular persons who alone have power to waive a term. *Rudd v. Fire Ins. Co.*, supra; *United Zinc Companies v. General Accident Assurance Corporation*, 144 Mo. App. 380, 128 S. W. 836. Whatever the condition of the law may be in other jurisdictions, the questions involved in this record and vital to the determination of the rights of the litigants under the decisions of this state have reached a stage of advanced crystallization. The law as to the liability of the insurance company for the contract made by the soliciting agent with the insured as to the determining of risk is that the insurance company is bound by the acts of such agents, no matter what conditions and limitations may thereafter be inserted in the policy of insurance which is subsequently issued and received and retained by the insured. One of the reasons given for the relaxation of the parol evidence rule in cases of forfeiture is that the insured should be allowed to show that the facts relied on to establish the forfeiture resulted from the fraud or mistake of the agent in the preparation of the application or policy. In other words, the company should not profit by its own wrong. In the case of *Aetna Live Stock Ins. Co. v. Olmstead*, 21 Mich. 246, 4 Am. Rep. 483, the court said that it did not view the rights of the parties in any different light than if the agent were the insurer himself. The insurance business was done through agents almost exclusively, and the maxim "*Qui facit per alium facit per se*" applied with special force to their acts. These agents assumed to have and generally did have, much more intimate knowledge of the business than those with whom they dealt. They might also be presumed to fairly understand the requirements of their principals, and how properly and legally to fill up the blank applications and other papers with which their principals intrusted them. The community in general did not assume to be familiar with these matters, and would not venture in any case to set up their own view of what was or was not the proper form of an application against the positive assertion of an expert. In *Rissler v. Ins. Co.*, 150 Mo. 366, 51 S. W. 755, the

court said that the agent of an insurance company is presumed to be more intimately acquainted with the business of insurance than those whom he solicited. The average man relied upon the knowledge and skill of the agent properly to prepare the application, and upon the authority which the agent assumed. He rightly considered that, when the agent was told the facts, he knew which were material and which were not. Also, in the case of *Franklin v. Ins. Co.*, 42 Mo. 456, it was held that parties dealing with insurance agents were induced to rely upon them as having competent authority for the transaction of the whole business which they undertook. If the agent abused the confidence reposed in him by his employers, they must look to the agent. The law would protect the companies against frauds, misrepresentations, and breaches of warranty, but it would not lend its aid to support defenses founded upon their own errors or omissions, when they had received the premium, delivered a complete and valid policy, and lain by without objection until a loss had happened; it would not help them to accomplish a fraud upon the insured. In the case of *Bergeron v. Ins. Co.*, 111 N. C. 45, 15 S. E. 883, it was held that the company was bound by the knowledge of its agent of facts relied upon to forfeit a policy, and that this ruling rested upon the principle that to permit the insurer to gather into its coffers premiums collected by one of its agents, and to continue to recognize the validity of the contract made through him until it became apparent that a loss had occurred, and then for the first time to repudiate the agency, would be to lend the sanction of law to a palpable fraud. Having accepted a premium to take the risk of indemnifying the insured against loss, it is incompatible for the insurer to attach to the policy a condition that will from the beginning relieve him from the risk.

If the soliciting agent has the authority to make a parol contract with the insured at the time such contract is made and premium paid, and does make such a contract to eliminate from the policy the so-called iron-safe clause, such agreement is binding upon the insurance company. If such agent, having made such a contract, has abused the confidence of his employer or violated his instructions, the insurance company must look to the agent for redress for any damages it has suffered and not to the insured. The evidence in this case authorized the court to submit the questions involved to the jury. There was evidence to sustain the plaintiffs' claim, and the finding of the jury in their favor is binding upon an appellate court.

The policy in this case contains the provision that in the event of a loss, if the insurer and insured differed as to the amount of the loss sustained, the amount should be ascertained by appraisers. This being a total loss, and the adjustment company offering to

pay the sum of \$1,017.80 as appellant's proportional amount, no appraisal was necessary. The appellant and respondents did not disagree as to the amount of the loss. The five other companies had settled the claims against them for considerably less than the face of their policies, and appellant, in making this offer (the terms of which do not appear in this record) simply claimed the benefit of the settlement made by the other insurance companies. The law is well established that failure to appraise is only available as a defense when the parties disagree as to the amount of the loss. If the company wholly denied liability, or put its refusal to pay on other grounds which were inconsistent with the purpose to insist on an appraisal, such conduct would waive the appraisal. *Gragg v. Insurance Co.*, 132 Mo. App. 405, 111 S. W. 1184; *Ball v. Insurance Co.*, 129 Mo. App. 34, 107 S. W. 1097. We think under the evidence the appellant waived the clause as to appraisal, the offer being a virtual admission of the amount of plaintiffs' loss, but a claim that appellant was entitled to the benefit of the settlement which the insured had made with the other companies, and it accordingly offered the sum of \$1,017.80 as its pro rata share. Plaintiffs replied, "This amount is not satisfactory with us." There is an entire absence of any evidence tending to show a disagreement as to the amount of loss plaintiffs had sustained.

Instruction No. 1 given by the trial court for the plaintiffs is as follows: "If you find and believe from a preponderance or greater weight of the evidence that the property described in the policy of insurance was destroyed by fire on the 28th day of December, 1909, at Willard, Greene county, Missouri, and that said property so destroyed was at the time contained in the building mentioned in said policy of insurance, and if you further find that plaintiffs, W. E. Shook and Karl Farmer, were partners and the owners of said property at the time of the delivery of said policy and loss of said goods, and if you find that at the time of the application for said policy the duly authorized soliciting agent of defendant knew that there was other insurance on said property, and that he examined the other policies of said insurance and knew at the time the plaintiffs were not complying with the iron-safe clause mentioned in said other policies, and knew that plaintiffs were keeping their books of account and inventories in said store in a drawer of a desk therein, and if you find that said agent knew that plaintiffs had not and did not intend to comply with the provisions of said iron-safe clause mentioned in said other policies, and with such knowledge

agreed that said provision would not be required by defendant, then you will find said provision was waived by the defendant and its duly authorized agent. And if you find that plaintiffs kept books of account in detail showing all purchases and sales of the stock of goods described in said policy, and that an inventory of said stock by plaintiffs was taken within a year prior to the delivery of said policy, and that said books of account and inventory were destroyed by fire, *and if you further find that after said loss the duly appointed adjusting agent of defendant visited the scene of said fire, and with a full knowledge of all the facts and circumstances surrounding the alleged insurance and loss of said goods agreed that the loss would be settled, and if you further find that the defendant thereafter agreed that the said loss would be satisfactorily and equitably settled, and if you further find that no disagreement arose between the said parties, plaintiffs and defendant, as to the amount of said loss, and that no request for an appraisal thereof was requested by defendant, and if you further find that the defendant was notified within the time required in said policy of said loss and failed to furnish blank form for said proof of loss to plaintiffs, then you will find the issues for the plaintiff.*"

The clause in the above instruction which we have written in italics is objected to by the appellant on the ground that there was no evidence authorizing its submission to the jury. We find that the adjuster in fact made no such agreement or statement, but that prior to his arrival the appellant wrote respondents a letter advising them that the matter had been placed in the hands of the Western Adjustment Company "who will call on you at once and we trust they will fix you up to your satisfaction." The manifest object of the clause in the instruction referred to was to show the facts under which the jury would be authorized to infer a waiver. Under the view we have taken, the question of waiver after the loss is wholly immaterial to any issue in this case; and while this clause in the instruction, not being based upon the evidence in the case, undoubtedly is subject to criticism, it is wholly immaterial, and, following the injunction of the statute in such case, is not such error as to work a reversal of the judgment.

From a full examination of the evidence and instructions in this case, we are satisfied that the finding of the jury was for the right party and that their verdict represents justice and right. We find no material error in the record and the judgment is accordingly affirmed. All concur.

WILKERSON v. MCGHEE.

(Springfield Court of Appeals. Missouri.
Feb. 6, 1911.)

1. APPEARANCE (§ 18*)—GENERAL APPEARANCE—SUPREME COURT—JURISDICTION ACQUIRED.

Where a defendant appeared generally in the Supreme Court, the question of jurisdiction to determine a cause which defendant claimed should be heard by the St. Louis Court of Appeals is thereby waived.

[Ed. Note.—For other cases, see Appearance, Cent. Dig. §§ 76-78; Dec. Dig. § 18.*]

2. MALICIOUS PROSECUTION (§ 49*)—NECESSARY ALLEGATION—PROBABLE CAUSE.

In an action for malicious prosecution, a general averment of want of probable cause is sufficient, and it is not necessary to allege facts tending to the proof thereof.

[Ed. Note.—For other cases, see Malicious Prosecution, Cent. Dig. §§ 94-96; Dec. Dig. § 49.*]

3. MALICIOUS PROSECUTION (§ 49*)—PROBABLE CAUSE—NECESSARY ALLEGATIONS.

In an action for malicious prosecution, where the defendant maliciously and without probable cause appeared before the grand jury and charged plaintiff with a crime, and caused witnesses to be subpoenaed and an indictment to be returned, it was not necessary for plaintiff to allege that witnesses before the grand jury testified falsely.

[Ed. Note.—For other cases, see Malicious Prosecution, Dec. Dig. § 49.*]

4. MALICIOUS PROSECUTION (§ 20*)—"PROBABLE CAUSE"—BELIEF OF GUILT.

"Probable cause" which will relieve a prosecutor from liability is a belief by him in the guilt of the accused, based on circumstances sufficiently strong to induce such belief in the mind of a reasonable and cautious man.

[Ed. Note.—For other cases, see Malicious Prosecution, Cent. Dig. §§ 26-28; Dec. Dig. § 20.*]

For other definitions, see Words and Phrases, vol. 6, pp. 5618-5620; vol. 8, p. 7765.]

5. MALICIOUS PROSECUTION (§ 24*)—PROBABLE CAUSE.

Though a finding by a grand jury in an indictment is prima facie evidence of probable cause, a defendant in an action for malicious prosecution may still be liable though the indictment is quashed without a trial on the merits.

[Ed. Note.—For other cases, see Malicious Prosecution, Cent. Dig. § 55; Dec. Dig. § 24.*]

6. MALICIOUS PROSECUTION (§ 24*)—PROBABLE CAUSE.

Where a defendant in malicious prosecution maliciously appeared before the grand jury and charged plaintiff with a misdemeanor when he knew there was no probable cause for such charge, that the grand jury returned an indictment without witnesses testifying falsely to procure the same does not relieve the defendant of responsibility.

[Ed. Note.—For other cases, see Malicious Prosecution, Dec. Dig. § 24.*]

Appeal from Cape Girardeau Court of Common Pleas; Robert G. Ranney, Judge.

Action by Mary E. Wilkerson against Andrew J. McGhee. From a judgment sustaining a demurrer to the petition, plaintiff appeals. Reversed and remanded.

Oliver & Oliver, for appellant. T. D. Hines, for respondent.

GRAY, J. This is an action for malicious prosecution. The court sustained a demurrer to the petition, and the plaintiff appealed.

The cause is in this court on a transfer from the St. Louis Court of Appeals. The defendant insists that the cause be transferred to the St. Louis Court of Appeals, for the reason that this court is without jurisdiction, and the St. Louis Court of Appeals was without authority to transfer the cause here. In answering this contention, it is sufficient to say that the defendant appeared generally, in this court, and the question of jurisdiction was thereby waived.

The petition alleged in general words that the defendant, in the prosecution of plaintiff, acted maliciously and without probable cause. The defendant insists the petition does not state a cause of action, because it does not state the facts which show or tend to show the want of probable cause, and that the general statement that the prosecution was without probable cause is only a conclusion of law. A general averment of want of probable cause is ordinarily sufficient, and it is not necessary to allege the facts which prove or tend to prove the averment. Enc. Pleading and Practice, vol. 13, p. 459; Hilbrant v. Donaldson, 69 Mo. App. 92; Eagleton v. Kabrich et al., 86 Mo. App. 231; Benson v. Bacon, 99 Ind. 156; Sutor v. Wood, 76 Tex. 403, 13 S. W. 321; O'Neill v. Johnson, 53 Minn. 439, 55 N. W. 601, 39 Am. St. Rep. 615; Stainer v. San Luis Valley Land & Mining Co., 166 Fed. 220, 92 C. C. A. 128.

In Hilbrant v. Donaldson, the court said: "The first error complained of in this court is that the petition does not state a cause of action. This point is not well taken. The petition alleges that the prosecution was malicious and without probable cause, and that it was ended. This constitutes a sufficient statement of a cause of action."

In Stainer v. San Luis Valley & Mining Co., supra, the federal court said: "It seems to us that an allegation of want of probable cause is an allegation of an ultimate fact, a condensed expression which by practice and established usage, is made to signify that defendant did not have reasonable ground to believe that plaintiff was guilty. Accordingly, we conclude that a complaint which, by clear averment, charges that defendant maliciously, and without any probable cause whatever, caused plaintiff to be prosecuted states a good cause of action." Respondent admits the general rule to be as above stated, but claims that the Supreme Court of this state, in Brown v. Cape Girardeau, 80 Mo. 380, 2 S. W. 302, 59 Am. Rep. 28, has declared otherwise, and it is the duty of this court to follow the decision of the Supreme Court of this state. It is true language was found in the Brown Case supporting respondent's contention, but the same was merely dictum, and not a decision of the Supreme

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

Court that we are required to follow. *Williams v. Railroad*, 106 Mo. App. 61, 79 S. W. 1167. Our conclusion is that it is not necessary to allege the facts which prove or tend to prove want of probable cause, and that it is sufficient to allege, generally, that the prosecution was without probable cause.

It is next claimed the petition does not allege that plaintiff was innocent of the charge, or that any false testimony was given before the grand jury, or that the indictment was based on false testimony, and as the petition shows an indictment was returned, it shows on its face a prima facie case of probable cause.

The petition does allege that the "defendant maliciously intending to injure the plaintiff in her good name and reputation, and without reasonable or probable cause therefor, appeared before the grand jury, and did then and there make complaint of and charge this plaintiff with having committed a misdemeanor; and that the defendant was instrumental in instigating, instituting, pressing, and continuing this charge against her before said grand jury, and that he maliciously, wantonly, and without probable or reasonable cause therefor produced and furnished the names of witnesses that came before the grand jury, and that it was upon the testimony so furnished and produced by him that the indictment was returned." "Probable cause" which will relieve a prosecutor from liability is a belief by him in the guilt of the accused, based on circumstances sufficiently strong to induce such belief in the mind of a reasonable and cautious man. *Vansickle v. Brown*, 68 Mo. 627. If the defendant maliciously and without probable cause appeared before the grand jury and charged the plaintiff with a crime, and caused witnesses to be subpoenaed and an indictment to be returned, it was not necessary for plaintiff to allege that the witnesses before the grand jury testified falsely. *Sharpe v. Johnston*, 76 Mo. 680; *Staley v. Turner*, 21 Mo. App. 244; *Firer v. Lowery*, 59 Mo. App. 92.

The respondent claims the action of the grand jury in finding a bill of indictment was prima facie evidence of probable cause, and the petition contained no allegation destroying the prima facie case of probable cause shown by the petition. It is true the action of a grand jury in finding an indictment, is prima facie evidence of probable cause. *Sharpe v. Johnson*, supra. But it is only a prima facie case, and a defendant may still be liable although an indictment was returned and the same was quashed without a trial on the merits. If the defendant acted maliciously and without any probable cause appeared before the grand jury and charged that the plaintiff was guilty of a misdemeanor when he knew at the time there was no probable cause for such charge, then the fact

that the grand jury returned an indictment without witnesses testifying falsely to procure the same, will not relieve the defendant of responsibility.

In *Sharpe v. Johnson*, the court said: "When an indictment has been found by the grand jury, or the defendant has been committed by the examining magistrate, this prima facie evidence of probable cause may be rebutted or overthrown by evidence showing that such indictment, or commitment, was obtained by false or fraudulent testimony, or other improper means, or by evidence showing that the prosecutor, notwithstanding the action of the grand jury, or the committing magistrate, did not himself believe the defendant to be guilty." In that case the Supreme Court declares the rule that it is not necessary that the indictment was obtained by false or fraudulent testimony, but if it was obtained by any other improper means, or if the evidence shows that the prosecutor, notwithstanding the action of the grand jury, did not himself believe the defendant to be guilty, but acted maliciously in making the charge, then he is liable.

The petition in this case charged in general language that the defendant maliciously intending to injure the plaintiff, and without any probable cause, appeared before the grand jury and charged that the plaintiff had committed a misdemeanor, and gave to the grand jury the names of the witnesses to be summoned before it in order that an indictment against plaintiff might be returned. If in so doing he acted maliciously and without any probable cause, he is liable to the plaintiff for damages she sustained.

We are of the opinion that the court erred in sustaining the demurrer to the petition, and on account thereof the judgment must be reversed and the cause remanded, and it is so ordered. All concur.

WIEGAND et al. v. WOERNER et al.
(St. Louis Court of Appeals. Missouri.
Jan. 24, 1911.)

1. TRUSTS (§ 219*)—RIGHTS OF BENEFICIARY—INTEREST.

Where a will created a trust, the income of which was to be paid to testator's wife who was made executrix, she could not claim interest on the fund while she held it and before it came into the hands of the trustees.

[Ed. Note.—For other cases, see *Trusts*, Cent. Dig. §§ 314-317; Dec. Dig. § 219.*]

2. ANNUITIES (§ 4*)—APPORTIONMENT—RULE AT COMMON LAW.

While, at common law, the right of apportionment of an annuity did not exist, and the rule has not been changed by statute, two exceptions have been ingrafted thereupon by application of equitable principles whereby annuities for maintenance of the donor's widow without other means or for married women living apart from their husbands, or infants, are apportionable on the ground of necessity.

[Ed. Note.—For other cases, see *Annuities*, Cent. Dig. §§ 13, 14; Dec. Dig. § 4.*]

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

3. COMMON LAW (§ 11*)—ADOPTION.

The common law, where not changed by statute, is in force in Missouri.

[Ed. Note.—For other cases, see Common Law, Cent. Dig. §§ 9, 12; Dec. Dig. § 11.*]

4. WILLS (§ 457*)—RULES OF CONSTRUCTION—TECHNICAL WORD.

While testator's intent should be sought out and given effect both at common law and under Rev. St. 1909, § 583, providing that due regard should be given to testator's intent, yet, when technical words are used in a will, they must be interpreted in their established legal sense, unless a contrary meaning is plainly shown by the context.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 975; Dec. Dig. § 457.*]

5. ANNUITIES (§ 1*)—DEFINITION.

An "annuity" is a yearly sum stipulated to be paid to another in fee or for life or years.

[Ed. Note.—For other cases, see Annuities, Cent. Dig. §§ 1-6; Dec. Dig. § 1.*]

For other definitions, see Words and Phrases, vol. 1, pp. 404, 405; vol. 8, p. 7575.]

6. WILLS (§ 619*) — CONSTRUCTION—ANNUITIES.

A will gave trustees a fund to be held and invested, and the income paid to testator's widow annually during her life to the extent of \$5,000, such sum to be made up from the principal if the income was not sufficient, so that in any event she should, as long as she lived, receive an annuity of that amount, and that if the net income should exceed \$5,000 each year, the excess to be added to the capital fund, and provided that upon the widow's death the capital fund should be paid to testator's children. *Held*, that it was the intent to create an annuity.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 1437; Dec. Dig. § 619.*]

7. WILLS (§ 733*) — ANNUITIES — TIME FOR PAYMENT.

No time for the annual payment being fixed, it was payable at the anniversary of testator's death.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 1836; Dec. Dig. § 733.*]

8. ANNUITIES (§ 4*)—CONSTRUCTION—APPORTIONMENT.

Where the intent of testator was that an annuity should be paid annually, there could be no anticipation thereof, especially where it appeared that there was no necessity for such anticipation to provide support for the widow, and where she died before the annual date of payment her executor could not recover any part of such annuity.

[Ed. Note.—For other cases, see Annuities, Cent. Dig. §§ 13, 14; Dec. Dig. § 4.*]

9. APPEAL AND ERROR (§ 1057*)—HARMLESS ERROR—EXCLUSION OF EVIDENCE.

In a suit involving a right to apportion an annuity to the widow, the erroneous exclusion of the inventory of testator's estate, offered to show that the amount which the widow received as residuary legatee was so large that an apportionment of the annuity was not necessary to her support, was harmless where the order of distribution made on petition of the widow afforded ample evidence of no necessity for anticipation of payment of the annuity to provide for her support.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4194-4199; Dec. Dig. § 1057.*]

10. TRUSTS (§ 815*)—COMPENSATION OF TRUSTEES.

Where the trustees of a fund to be held for payment of annuities, received it on July 8th, in the form of interest paying bonds and certificates of deposit in an absolutely safe bank, were not required to give and gave no bonds, and after the death of the annuitant were asked to turn over the fund on the following August 3d or 5th, the fund amounting to \$100,000, \$500 was a reasonable compensation, and an allowance of \$1,500 was excessive.

[Ed. Note.—For other cases, see Trusts, Cent. Dig. § 443; Dec. Dig. § 815.*]

11. TRUSTS (§ 227*) — ACTIONS — RIGHT OF TRUSTEE TO ATTORNEY'S FEE.

Where the trustees of a fund were made defendants in a suit involving part of the income of the trust fund, and were necessary parties, and bound to make their appearance, and the case was appealed to the Supreme Court, and reversed and remanded for further proceedings as to credits and allowances, the amount actually in controversy being \$2,138.85, the trustees are entitled to a reasonable counsel fee of \$250.

[Ed. Note.—For other cases, see Trusts, Cent. Dig. § 324; Dec. Dig. § 227.*]

12. TRUSTS (§ 226*)—CREDIT FOR TAXES PAID BY TRUSTEES.

Trustees of a fund are entitled to credit for taxes on the fund while in their hands for which they are liable.

[Ed. Note.—For other cases, see Trusts, Cent. Dig. § 323; Dec. Dig. § 226.*]

13. TRUSTS (§ 163*)—TRUSTEES—COMPETENCY.

That one was attorney for testator, had written his will, and also represented testator's wife, who was the attorney's cousin, in a contest over the will and in a settlement effected by the wife and the adverse parties, had acted as attorney for the wife and had been appointed executor of her will, did not render it improper for him to act as trustee under testator's will of a trust fund of which testator's wife was the beneficiary.

[Ed. Note.—For other cases, see Trusts, Cent. Dig. § 214; Dec. Dig. § 163.*]

14. TRUSTS (§ 163*)—INCONSISTENT POSITIONS OF TRUSTEE.

Where one was trustee under a will of a fund, the income of which was to be paid to testator's widow during her life, with remainder to testator's children, and was also executor of the widow, it was his duty, when a controversy arose over apportionment of an annuity from the fund which was not payable at the widow's death, between the executor of the widow's will and testator's children, to step aside and have the adverse claimants determine the question, or, upon failing in their action, to bring the fund into court requiring the parties to interplead, and it was improper for him to use his position as trustee to enforce his demand as executor as to the method of settling the dispute, but he should have surrendered either his office of executor or of trustee.

[Ed. Note.—For other cases, see Trusts, Cent. Dig. § 214; Dec. Dig. § 163.*]

15. TRUSTS (§ 166*)—REMOVAL OF TRUSTEE—GROUNDS.

To justify removing a trustee, there must be a clear necessity for such action to save the trust property and such misconduct as to show want of capacity or of fidelity, putting the trust in jeopardy, and a mere error, or even breach of trust, may not be sufficient.

[Ed. Note.—For other cases, see Trusts, Cent. Dig. §§ 217, 218; Dec. Dig. § 166.*]

16. TRUSTS (§ 268*)—ACTION AGAINST TRUSTEE—COSTS.

Where one of two trustees of a fund for the benefit of a cestui que trust during her life was also her executor, and insisted, solely in the interest of the estate, that the yearly income, the time for payment of which had not arrived at the beneficiary's death, should be apportioned before distribution of the fund was made, which insistence brought on a litigation tying up the entire funds, and his cotrustee had agreed to his contention, his attitude being improper and in violation of his duty as trustee, the cost of the litigation should be taxed against him as executor.

[Ed. Note.—For other cases, see Trusts, Cent. Dig. § 377; Dec. Dig. § 268.*]

17. TRUSTS (§ 318*)—COMPENSATION OF TRUSTEE.

The rule that, where one of two or more trustees acts in harmony with his cotrustee in connection with an adverse claim of such cotrustee, neither of them are entitled to compensation need not be enforced where the trustees acted in apparent good faith.

[Ed. Note.—For other cases, see Trusts, Cent. Dig. § 461; Dec. Dig. § 318.*]

Appeal from St. Louis Circuit Court; Wm. M. Kinsey, Judge.

Action by Charles Wiegand and others against William F. Woerner and others. From the decree, plaintiffs appeal. Reversed and remanded, with directions.

This is a suit in equity instituted by appellants Charles and George Wiegand, Jr., as plaintiffs. The defendants are William F. Woerner, as trustee under the will of George Wiegand, deceased, and as executor of the estate of Rosalie Wiegand, deceased, the St. Louis Union Trust Company, as trustee under that will, and Anna Rubelmann, co-beneficiary with plaintiffs under the trust herein-after to be referred to, and also residuary legatee under the will of her mother, Rosalie Wiegand, deceased. The petition, so far as we deem it material to state it, sets out that plaintiffs are the children of George Wiegand, deceased, born of a former marriage of George Wiegand, and that defendant Anna Rubelmann is the child of George Wiegand, born of his second marriage, which was with the aforementioned Rosalie Wiegand; that Rosalie Wiegand died testate on the 24th of July, 1908; that defendant Woerner, by the last will of Rosalie Wiegand, was appointed executor of her estate and duly qualified as such, her will having been duly probated; that the aforementioned George Wiegand, the father, died testate, a copy of the will being attached as an exhibit to the petition and read in evidence. We summarize it here. By the first clause provision for the payment of the debts, funeral expenses, and expenses of administration is made. The second clause devised to his wife, Rosalie, the family homestead and appurtenances in St. Louis, during her life, the remainder at her death to his daughter, Anna Rubelmann. The third clause "devised" to his wife all of the stock in the Standard Stamping Company

(the stock averred in the petition to be worth \$355,800 par), owned by testator at his death, she to hold the legal title thereto during her life, collecting dividends thereon, retaining for herself one-fourth of the net income derived from such stock, paying the remaining three-fourths of the income or dividends to the three children—that is, Charles and George Wiegand, Jr., and the daughter, Anna—in equal proportion, directing that no part of this stock should be sold prior to the death of his wife without the written consent of his wife, and each of his said three children, and that if all should consent his wife could sell the whole or any part thereof, and hold the proceeds free from any trust and divide them equally (that is to say, one-fourth to herself, and one-fourth to each of the three children); on the death of his wife the stock then held by her as trustee to vest in and be divided equally among the three children—one-third to each.

The fourth clause is set out in full both in the petition and answer. It is as follows: "Fourth. Out of my property not above disposed of I direct that a capital fund be raised amounting to one hundred thousand dollars (\$100,000), which I hereby give and bequeath unto William F. Woerner and the St. Louis Union Trust Company, as trustees, to hold in trust for the following uses and purposes, to-wit: to have, hold, invest, reinvest, manage and dispose of in such manner as they in their discretion may deem most judicious for the purpose of this trust (with the recommendation that care be taken that investments be safe from loss, rather than large in income); and out of the net profits, interest and income of said fund, I direct them to pay annually to my wife, Rosalie, for and during her lifetime, the sum of five thousand dollars; and if the net profits, interest and income be insufficient to pay that sum, then I direct my said trustees to take from the capital of such fund enough to make up such sum of \$5,000, so that in any event she shall, so long as she shall live, receive an annuity of that amount independently of any other provisions made for her in this will; but if such net profits, interest and income exceed the amount of five thousand dollars each year herein directed to be paid her, such excess shall be added to and form part of the capital fund. And upon the death of my said wife this said trust shall cease, and the capital fund in its then condition shall be paid to and vest in my three children in equal shares. I direct that neither of said trustees be required to give bond and that in the case of the death, refusal or inability of either of them to act as trustee, the other shall become sole trustee with like powers and authority herein given to both were both acting; and in case of death, inability or refusal of both, the Circuit Court of the City of St. Louis shall appoint a

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trustee, who shall have the like powers, such trustee to be preferably one recommended by my wife."

The fifth clause constituted his wife, Rosalie, residuary devisee, and the sixth clause constituted her executrix without bond.

It is further averred in the petition that at the time of the death of George Wiegand, his estate, aside from the homestead, consisted entirely of personal property of the value of about \$600,000, including the \$355,800 stock heretofore referred to, which it avers was, under the terms of the third clause of the will and prior to the death of Rosalie Wiegand, distributed among plaintiffs, the defendant Anna Rubelmann and Mrs. Rosalie Wiegand; that the balance of the personal property belonging to the estate of George Wiegand, other than this stock, amounted to about \$240,000, all of which, with the exception of \$15,000 or \$20,000 cash in bank, consisted of stocks and bonds bearing interest and earning dividends on the par value thereof at the rate of from 4 to 7 per cent. per annum.

Before continuing the synopsis of the petition, it is as well to state that a wrong date is given in it as the date of turning over the trust fund to the trustees, the date given in the petition being the 18th of July, 1908, when it should be July 8, 1908, the mistake having occurred through a typographical error in a statement furnished plaintiffs by the trustees August 5, 1909. Instead of following the petition therefore in giving the date there set out as that on which the fund was turned over to the trustees, we will use the correct date—July 8, 1908.

Continuing the synopsis of the petition, it further avers that on or about the 8th of July, 1908, Rosalie Wiegand, acting under the advice of the defendant Woerner, who was her attorney, delivered to said Woerner and to the St. Louis Union Trust Company, as trustees, under the fourth clause of the will of George Wiegand, the sum of \$100,000, consisting of cash to the amount of \$59,600, and two certificates of deposit amounting to \$40,000, and that on July 8th Woerner and the St. Louis Union Trust Company, the latter hereafter referred to as the Trust Company, as trustees, invested about \$10,000 of the trust fund in the purchase of certain street railroad bonds, and that on the 5th of August, 1908 (the date of the aforementioned statement), there remained in the hands of the trustees as of the trust fund so created, in addition to the St. Louis Railroad Company bonds, the sum of \$90,022.19, practically cash—something like \$5,000 of it in the hands of the trustees, the balance in bank; that from the date of the death of George Wiegand until July 8, 1908, Rosalie Wiegand, as residuary legatee of George Wiegand, held, possessed, and enjoyed the income and interest from all of the estate of George Wiegand, with the exception of the stock in the Standard Stamping Company

heretofore referred to as having been distributed, and held, possessed, and enjoyed the income from that portion of the estate so delivered as aforesaid by her to Woerner and the Trust Company on the 8th of July, 1908; that Woerner, as the executor of the estate of Rosalie Wiegand, now claims that he is entitled out of the trust fund as belonging to the estate of Rosalie Wiegand, the sum of \$2,188.85, and as such executor is claiming that sum from himself and the Trust Company, as trustees; that plaintiffs, disputing this claim, assert that by the death of Rosalie Wiegand, on the 24th of July, 1908, the trust terminated, and the beneficiaries thereof were entitled immediately thereafter to a distribution of the fund. It is averred that the trustees were not required to and did not give any bond; they did no other work in connection with the administration of the trust than to receive it and hold it during a period of six days (so it is averred, but 16 days is the correct period), and to purchase for investment the 10 bonds of the railroad company, and that they claim for compensation for the services so rendered the sum of \$3,000, which plaintiffs aver is grossly unreasonable. There are charges in the petition reflecting on the motives of Mr. Woerner, in connection with the transfer of the trust fund from Mrs. Wiegand to the trustees. It is, however, averred that Mr. Woerner, by acting as attorney for Mrs. Wiegand and as the executor of her estate under her will, is occupying an antagonistic position to his duties as trustee. The prayer of the petition is that William F. Woerner be decreed to be disqualified to act as trustee; that he be removed as such; and that the Trust Company, as trustee, be ordered to distribute and pay to each of the plaintiffs one-third of the trust fund, with interest from the date of demand, to wit, August 3, 1908, less such reasonable compensation justly and equitably chargeable to the shares of the fund belonging to the plaintiffs, and less also such reasonable expenses as it may have incurred in the administration of the trust fund and for general relief.

The joint answer of the two trustees and of the executor Woerner, as summarized by counsel for defendants, "admits the relationship; the death and testacy of George and Rosalie Wiegand; admits the executorships and the absence of debts of estate of George Wiegand deceased; sets forth the trust clause (before specifically set out); admits distribution of certain stock of George Wiegand's estate amongst the parties; specifically denies in detail the charges against Woerner; avers the making up of the trust fund on July 8, 1908, pursuant to order of the probate court; sets forth the services rendered and the course of the administration of the trust; investment of the funds; sets forth the receipts and expenditures; denies any antagonistic relation of Woerner; prays the court for affirmative relief to construe

the trust clause in the will to determine whether the legacy of \$5,000 is apportionable; denies any ground to remove Woerner as trustee; alleges that the trustees made all attempts to have an adjustment with plaintiffs as to a reasonable compensation, but that plaintiffs refuse to allow anything; asks the court to make a reasonable allowance jointly to trustees, as well as for counsel fees; requests the court to determine the respective amounts to which the parties are entitled, and to decree payment in conformity therewith," etc.

Anna Rubelmann, in a separate answer, sets up her claim as residuary legatee of her mother, Rosalie Wiegand, and avers that the annuity provision of \$5,000 to the widow, Rosalie Wiegand, is apportionable, and demands that the pro rata thereof earned before the widow's death be paid to Woerner as the executor of the widow. As a further answer she adopts as for her own the answer of the trustees and of Woerner as executor of Mrs. Wiegand's will. Plaintiffs filed a general denial by way of reply to both answers. There was little conflict in the evidence. We follow it as far and fully as we consider material to bring out the points upon which our decision is placed.

George Wiegand, an elderly gentleman of means, died in St. Louis, on February 20, 1908, leaving surviving him his wife, Rosalie Wiegand, two sons, Charles Wiegand and George Wiegand, Jr., by a former marriage, and one daughter, Anna Rubelmann, wife of George Rubelmann, by his second wife, Rosalie. He left the will heretofore referred to, dated April 13, 1906, and upon his death his widow took out letters testamentary, and was proceeding with the administration when the two sons, plaintiffs here, commenced a contest against that will. The matters between the parties having been settled on compromise, the will was by agreement established in due form about the 22d or 23d of June, 1908. Under the agreement of settlement the Standard Stamping Company stock owned by the estate and amounting in value to \$355,800 was, on the 24th of June, 1908, by consent of all parties, distributed between the parties by the executrix, as averred in the petition. On July 6, 1908, Rosalie Wiegand, as executrix, presented her petition in the probate court in which, setting up the fourth clause of the will, she averred that among the assets of the estate were two certain certificates of deposit, one due six months thereafter for \$20,400, and the other due on 30 days' notice, dated January 22, 1908, for \$20,000, and praying for an order authorizing her to transfer the said two certificates, together with sufficient other funds of the estate to trustees named in the fourth clause of the will, to make up the sum of \$100,000, the trust fund, and the court on that day ordered that she be authorized to turn over and transfer to the trustees, naming them, the two certificates of deposit, "together with

sufficient other funds in her hands, as such executrix, belonging to said estate, to make up said \$100,000 trust fund as prayed for in said petition." On the 8th of July, 1908, the executrix delivered this \$100,000, made up as above, to the trustees, the item outside of the two certificates above referred to being a check for cash in the sum of \$59,600. It appears that the two certificates were subsequently cashed when due, and deposited to the order of the trustees as of date when cashed; according to the statement embodied in the decree of the circuit court in this case that was done July 30, 1908, both having been received by the trustees July 8th. Rosalie Wiegand, the widow, died on July 24, 1908, testate, making her daughter residuary legatee and appointing William F. Woerner as executor, the latter qualifying as provided by law.

It should be noted that at the trial plaintiffs offered in evidence the inventory of the estate of George Wiegand, deceased. On counsel for defendants asking what the object of the introduction of the inventory was, counsel for plaintiffs stated that it was for the purpose of showing the estate that Mrs. Wiegand acquired as residuary legatee; that they considered it relevant to the issue as submitted in this case, it having been alleged that Mrs. Rosalie Wiegand had acquired all of the estate and of what it consisted, and that as residuary legatee she was supplied with a large estate; that the will makes her residuary legatee, and the inventory shows the amount of the estate and of what it consisted. Counsel for defendants stated that he supposed that what counsel for plaintiffs had in mind was that they could show the amount of assets that came into Mrs. Wiegand's possession, and that the annuity is not apportionable because she did not need the money; that that is the only theory on which they can be offering it, that it cannot be admitted under any other theory, and if that is the theory of plaintiffs, defendants, by counsel, object to it as wholly irrelevant and immaterial. The court sustained the objection, plaintiffs duly excepting. The inventory is not in the transcript or abstract, but it does appear by the orders of the probate court in evidence, the orders made on July 6, 1908, when the petition of Mrs. Rosalie Wiegand for authority to turn over the \$100,000 trust fund was presented, and the order above referred to made thereon, that she also presented to the probate court a petition, verified by affidavit, for an order of distribution of the residue of the estate, as executrix, and that in her petition Mrs. Wiegand had set out, among other things that she was the residuary legatee under the will of her husband; that she had heretofore passed as such executrix in her own right and personal capacity as such residuary legatee certain stocks in the said petition described, belonging to said estate, and which then stood upon the books of the

respective companies in the name of George Wiegand, deceased, and she prayed for an order authorizing her, as such executrix, to transfer said stock to herself as such residuary legatee. The court, on hearing and considering the petition and the evidence, ordered that she, as executrix, be and is authorized and empowered to transfer to herself in her own right, as the residuary legatee under the will of her deceased husband, the stock described, namely, 250 shares of the Missouri Pacific Railway Company; 200 shares United Railways Company 5 per cent. preferred stock; 100 shares of the American Car & Foundry Company 7 per cent. preferred stock; 300 shares United States Steel Corporation 7 per cent. preferred stock; 200 shares of stock of the National Bank of Commerce of St. Louis; 100 shares stock of the St. Louis Union Trust Company; and 100 shares of stock of the American Pneumatic Service Company—all of the above, a total of 1,250 shares, being entered as of the par value of \$100 per share. There was no evidence introduced as to the market value of any of this stock. Beyond this the evidence related to the value of the trustees' services and to the connection of Mr. Woerner with the matter. We will notice that hereafter.

At the conclusion of the hearing, the court, by its decree of date June 8, 1900, found, among other things, that the defendant trustees are entitled to retain out of the fund money for the payment of taxes upon the trust estate, and the sum of \$1,500 allowed as a reasonable compensation for their services as such trustees; to \$250 for counsel fee in the circuit court in this case; to a credit of \$135.56 accrued interest and premium on bonds purchased, and for \$10 paid one C. F. A. Mueller for examination and appraisal of certain real estate submitted for a loan. It further found that the allegations in the petition reflecting on the defendant Woerner, to the effect that he had advised and procured payment by Rosalie Wiegand, as executrix, to himself and the St. Louis Union Trust Company, as trustees, of the trust fund for the purpose of enabling the trustees to at once begin the administration of the trust fund, and set up a claim for fees for the administration of the same at the expense of plaintiffs, as charged in the petition, "are not sustained by the evidence, and that said allegations are untrue." We will pause here in our statement to say that we entirely concur with this finding as to Mr. Woerner. No testimony sustains the charge. The court further found as a matter of law that the annuity to be paid Rosalie Wiegand under clause 4 of the will is apportionable, and that Mr. Woerner, as executor of the will of Rosalie Wiegand, is entitled to receive the apportionate part of that annuity accruing between the death of George Wiegand and the death of Rosalie Wiegand, amounting to \$2,188.85. The decree then providing for payment or retention of these

and payment of costs, and distribution of the remainder of the trust fund among the three beneficiaries equally, ordered that upon the trustees making the distribution aforesaid and filing the proper statement, with vouchers showing the distribution of balance in their hands as above, should stand discharged.

Filing motion for new trial in due time and excepting to its being overruled, plaintiffs below have duly perfected appeal to this court.

J. L. Minnis, Perry Post Taylor, and Emil Mayer, for appellants. Chas. W. Bates and A. C. Stewart, for respondent executor and trustees. E. E. Schnepf, for respondent Rubelmann.

REYNOLDS, P. J. (after stating the facts as above). First. Although counsel for the respective parties, with the exception of the learned counsel representing Mrs. Anna Rubelmann, have devoted most of their very elaborate briefs and arguments to the consideration of the question of allowance to the trustees of commission, and as to whether Mr. Woerner, by reason of occupying the position of executor of the will of Mrs. Rosalie Wiegand, in claiming this fund from himself and his cotrustee, has forfeited his right as trustee and should be removed as such, the material and underlying question in the case arises over the proper construction of the fourth clause or item of the will of George Wiegand. Two questions arise on this: First. How much are the trustees appointed under that clause entitled to deduct from the capital to pay the amount claimed to fall due between the death of George Wiegand and the death of his wife Rosalie, assuming that the annuity created by the trust is apportionable? Second. Is the annuity apportionable at all?

Taking up the first proposition, it is clear from the evidence in the case that down to the 8th day of July, 1908, the fund was in the hands, not of the trustees, but of Mrs. Rosalie Wiegand herself, as executrix of her husband's will. The only period that the fund had been in the hands of the trustees during the lifetime of Mrs. Wiegand was between the 8th and the 24th of July, a period of 16 days. It is a very singular line of argument that holds the trustees, as such, liable to the estate of Mrs. Wiegand for interest on the trust fund when in her hands and before it came into their possession. Their title to it may revert back to the date of the death of the testator who created the fund; their responsibility for its investment and safe-keeping could only attach from the time they received it. As the annuitant may die before the payment falls due and so lose it, she takes no vested interest in it; all she takes is the right to enforce payment of the annuity when it falls due, with the right to hold the trustees to their trust. *Kearney v. Cruikshank*, 117 N. Y. 95, 22 N. E. 580. If

Mrs. Wiegand, as executrix, had not chosen to turn over the fund until a year after the issue of her letters testamentary, it may have been within her right under the law so to have chosen. But she could then have been compelled to turn over certainly the capital fund. We do not consider or pass upon this. On the theory of the trustees and of the executor of Mrs. Wiegand, if she had held out the fund from the trustees for the year, immediately at the end of the year turning it over to them, they would have been forced to have turned back to her \$5,000, with the result that they would only in fact have received as of the trust fund \$95,000, instead of the whole \$100,000. In this case as it actually is, during the period intervening between the death of her husband and this 8th day of July, 1908, the trust as an entity was not in being; it existed only on paper. The fund itself, part of George Wiegand's estate which was to be separated from his general estate and turned into—converted into—a trust fund, was in Mrs. Wiegand's own hands, possession, and control as part of the estate in her hands as executor. If she did not make it yield interest, it was surely not for the trustees to allow her to deduct \$5,000 from it, nor is it equitable that her neglect should make the other beneficiaries of the trust fund suffer by a diminution of the capital—of the trust fund itself. If, when Mrs. Wiegand turned over the capital fund to the trustees, she had also turned over any interest accruing on it during the period the fund was in her hands, the case might present another aspect. She did not do this, and there is no such element presented for decision. We express no opinion whatever on this view of it. On this branch of the case, therefore, and under the facts peculiar to this case, we hold that the executor of Mrs. Wiegand, as such had no right whatever to assert, as against the trust fund in the hands of the trustees, a claim for interest or an accounting for interest on the fund while she held it and before that fund came into the hands and under the control of the trustees, as such. Following this a little further, if it could be supposed that these trustees, failing to account for the interest at the end of a year from the time of the death of George Wiegand, had been sued by Mrs. Rosalie Wiegand for the \$5,000, is it possible that they would not have been allowed to set up in answer to this claim for the \$5,000, that the trust fund had never been in their hands during the year, but during all that period had been in the possession of Mrs. Wiegand herself? Is it possible that any court of law or of equity would have mulcted them for the interest, or held them guilty of violation of their trust by not having the fund earn interest while it was not in their hands? Least of all should Mrs. Wiegand's executor be permitted to take that interest out of the principal fund, a fund which, under the will, was to stand for the benefit of

all of the parties ultimately interested in the fund. The foregoing remarks are expressly limited to the facts in this case.

The second proposition covering the law as to the right of apportionment of an annuity, while, so far as we know, touched on by but one decision of the appellate courts of this state—that of *Lynch v. Houston*, *infra*—is a proposition settled by authority and a long line of decisions by courts of other jurisdictions. That at common law the right of apportionment did not exist admits of no argument; that the common law, unless changed by statute, is in force in our state, is beyond doubt; that we have no statute changing the common law on this is equally beyond question. It is, however, universally conceded that, while at common law the right of apportionment of an annuity did not exist, two exceptions have been, by the application to them of principles of equity, ingrafted upon that law. Judge Woerner, in his work on the *American Law of Administration* (2d Ed.) vol. 1, § 301, *p. 638, after announcing the rule of the common law that there is no apportionment of rent between successive owners, announces that the same rule with reference to apportionment applies to annuities. "They are not," says that learned author, "in their nature apportionable either in law or equity, except annuities for the maintenance of the widow, or married women living apart from their husbands, or infants, in which case they are apportionable on the ground of necessity." But the cases which bring the widow within the exception, and which support Judge Woerner in extending the exception are cases in which the widow was without other means. That is undoubtedly what the learned author had in mind when referring to the widow; that is, the case of a widow not provided for by dower or otherwise. Judge Ellison, in *Lynch v. Houston*, to be hereafter referred to, notes the same exception.

In *Manning v. Randolph*, 4 N. J. Law, 144, 145, it is said that no principle is better settled than that if a bond be for the payment of an annuity at a date certain, and the annuitant die before the day, the annuity of that year is lost, and that in the case before the court, as in the case at bar before us, the deceased could not herself have recovered the annuity before its anniversary, if she had been living; that the day of payment had not then come, "and surely," says the court, "her administrators can have no greater right than she herself would have had."

In *Tracy v. Strong*, 2 Conn. 659, loc. cit. 684, referring to the exception to the common-law rule, it is said that it "was introduced by courts of equity, and obtains only where an annuity is payable, by way of maintenance, to an infant or feme covert—who, by reason of their legal disabilities, might be unable to procure credit for necessities, if payment for them depended upon

their living till the annuity should, by the common rule, become payable." In this same case it is stated that the principle which underlies this rule of the common law is the same underlying that by which the common law holds that the payment of a debt must be on the day it falls due, so that neither a tender nor a demand of payment before that date is available.

In *Irving v. Rankine*, 18 Hun, 147, 149, the rule is stated in the same way; that at common law there can be no apportionment of annuities, citing among other authorities in support of this *Williams on Executors*, 109; 3 *Redfield on Wills*, 184, § 13; 1 *Story's Eq. Jur.* § 410. Repeating the rule, and noting that there are but two exceptions to it recognized by the English authorities, one being the case of an annuity for the support and maintenance of infants, the other for the support of a wife living separate and apart from her husband, the court says: "These exceptions have been allowed from the necessities of the case, as otherwise the infants in the one case, or the wife living upon a separate maintenance in the other, could not procure credit for necessaries from the time when one installment became due to the next, unless the creditor should choose to take the risk of the annuitant surviving until the next installment became due. These, however, are noticed as remarkable exceptions to the general rule; and it has been held that they were not applicable to the case of a married woman living with and supported by her husband; and we do not find that they have ever been extended beyond the two cases referred to." In this case of *Irving v. Rankine*, it was claimed by the executor of the widow, the latter having died and her executor suing as in the case at bar, "that a provision in lieu of dower falls within the same principle; but, in this case at least," says the court, "there cannot be the same ground of necessity, for, besides a large and valuable property given to her in fee (the widow), had other valuable property, viz., the two farms which she took by survivorship." The decision in *Irving v. Rankine* was affirmed by the Court of Appeals of New York (79 N. Y. 636), no opinion being filed. It is to be noted with reference to this case also that the court called attention to the fact that by chapter 75, Laws 1875, the state of New York had abrogated this rule, but that as the case in decision arose in 1858, when the testator died, the law of 1875 did not apply.

In *Kearney v. Cruikshank*, supra, a case arising before the adoption of the law of 1875 by the state of New York, after announcing the common-law rule that an annuity payable yearly or for the year, was not apportionable, the New York Court of Appeals, speaking through Judge Andrews, said (117 N. Y., loc. cit. 97, 22 N. E. 581): "We are not at liberty to decide the question in this case upon our notions of natural

equity and justice, provided the settled rule of law fixes the rights of the respective parties, and determines the question presented." Stating the rule at common law, that annuities were not apportionable, subject only to the two exceptions of where the annuity was given by a parent to an infant child or by a husband to his wife living separate and apart from him, the Court of Appeals says (117 N. Y., loc. cit. 98, 22 N. E. 581): "But with these exceptions, it was the uniform and unbending rule of the common law, recognized both by courts of law and equity, that annuities, whether created inter vivos or by will, were not apportionable in respect of time. This rule, it has been said, 'proceeds upon the interpretation of the contract by which the grantor binds himself to pay a certain sum at fixed days during the life of the annuitant, and when the latter dies, such day not having arrived, the former is discharged from his obligation.' *Lumley on Annuities*, 291. It resulted from the general rule that, if the annuitant died before, or even on the day of payment, his representatives could claim no portion of the annuity for the current year." Many authorities are cited by the court in support of this proposition, both from the courts and the text-writers, and continuing the discussion of the subject, Judge Andrews, who delivered the opinion of the court gives (117 N. Y., loc. cit. 101, 22 N. E. 580) as one reason why in the case before the court the annuity could not be either apportioned or its payment anticipated, that it would not be known whether the income would be sufficient to pay the annuity until the end of the year.

In *Chase v. Darby*, 110 Mich. 314, 68 N. W. 159, 64 Am. St. Rep. 347, it is said that the word "annuity," which must be given its technical meaning unless something is found in the contract that indicates a different meaning was intended, carries with it the idea of an annual payment and that unless the rule of the common law is changed by statute, annuities are not apportionable.

In *Wiggin, Adm'r, v. Swett*, 6 Metc. (Mass.) 194, loc. cit. 201, 39 Am. Dec. 716, Chief Justice Shaw announces the general rule, both at law and in equity to be, "that where an annuity is payable on fixed days during life, and the annuitant dies before the day, the personal representative is not entitled to a proportionate part of the annuity," and that where no day is named for the commencement of the year and by the will the annuity given was payable quarterly, that the beginning of each year was the date of the death of the testator, and that the annuity, if payable annually, fell due on each recurring anniversary of that date and not before. In that case the annuity was payable in quarterly installments, one quarterly installment due the 25th of May, the next falling due the 25th of the succeeding August. The beneficiary, however, died on the 22d of that

August. Chief Justice Shaw held that in that event it fell within the general rule previously stated and not within the exceptions to the rule and that there could be no payment or apportionment of it to the executor of the beneficiary for the period elapsing between the 25th of May and the 22d of August of the same year.

In *Dexter v. Phillips*, 121 Mass. 178, 23 Am. Rep. 261, Mr. Justice Gray, then Chief Justice, has collated the authorities very fully, and treating of the general rule of the common law followed by chancery, that sums of money payable periodically at fixed times are not apportionable during the intervening period, and calling attention to the difference in the application of this rule as to rents and legacies and annuities and agreements for interest or coupons on public securities on the one hand, and the rule applicable to interest upon promissory notes of individuals on the other, holds that in the former case the rule of apportionment does not lie, while in the latter it does.

In *Heizer v. Heizer*, 71 Ind. 528, 38 Am. Rep. 202, where a son, for a valuable consideration, agreed to pay his father during his life a certain sum annually on a certain day of each year, the father died 20 days prior to the day on which the sum was payable. On suit being brought by his administrator to recover the proportionate part of such sum due at the time of his death, the Supreme Court of Indiana held, on a review of the authorities, that the sum thus contracted to be paid was an annuity; that at common law there can be no apportionment of an annuity, that the common-law rule had not been changed by statute in Indiana, and that the administratrix could not recover.

In our own state the case of *Lynch v. Houston*, reported 138 Mo. App. 167, 119 S. W. 994, the decision by the Kansas City Court of Appeals, the opinion written by Judge Ellison, the case heretofore referred to, is the only one in our appellate courts to which our attention has been called or which we have found, discussing the question of an annuity. That learned judge holds that the general rule of common law, recognized also by the courts of equity, that an annuity is not apportionable in respect to time, is in force in this state. He cites (138 Mo. App., loc. cit. 171, 119 S. W. 994) *Nehls v. Sauer*, 119 Iowa, loc. cit. 441, 93 N. W. 846, and quoting from that, to the effect that the practically universal holding of the courts is that an annuity will not be apportioned and that if the annuitant dies during the year, even though it be on the last day before the payment falls due, the right to demand the annuity dies with him and his executor can recover no part of it. Judge Ellison notes as an exception, that where the annuity is to be paid to the widow in lieu of her life-dower estate, or to minor children for support, it may be apportioned so that

she or they will receive a proportionate amount for the year in which either may die. "But the rule itself," says Judge Ellison, "as stated in *Nehls v. Sauer*, supra, is approved and emphasized in what appears to be an unbroken line of cases." The only authority the learned judge cites for extending the exception to the widow is *Blight v. Blight*, 51 Pa. 420; *Gheen v. Osborn*, 17 Serg. & R. (Pa.) 171; *Sweigart v. Frey*, 8 Serg. & R. (Pa.) 299; and *Lackawanna Iron Co.'s Case*, 87 N. J. Eq. 26. As to this latter case, Judge Ellison notes it as an exception ingrafted onto the rule to meet the particular facts. That is our view of the *Lackawanna Case*. The Pennsylvania cases cited by Judge Ellison are among those relied on by counsel for respondents. We do not think they meet the point in issue here, nor do we think them, so far as they do touch on that issue, exactly in line with the great weight of authority. Nor does Judge Ellison seem to consider them as controlling the case before him. We are not to be understood as dissenting from what the Kansas City Court of Appeals held in this case. The distinction we draw as between that and the one at bar rests on the differences found in the instrument construed there and that here under construction. The rule was not applied by the court in *Lynch v. Houston*, for the reason that a consideration of the whole will showed that it was in contemplation of the testator that by providing that the payments should cease at the death of the beneficiary, he intended that they should continue up to the death. "The effect of the law," says Judge Ellison (138 Mo. App., loc. cit. 175, 119 S. W. 997), considering a motion for rehearing in the case, "as to an unapportionable annuity is not that payments shall cease at death, but, in reality, that they shall cease at the last annual payment next before death—that is, before a death occurring prior to the day for the next payment; and when words are used showing that not to be the intention, they should be allowed their natural force and meaning." After holding that intention may be shown in a great many ways, he holds as the conclusion of the court that the parties intended that if the death of the beneficiary occurred before the day when the annual payment would have been due, the amount of that payment should be apportioned and payment be made of the proportionate part thereof up to his death.

We are referred to the decision of the Kansas City Court of Appeals in the case of *In re Estate of Catron*, 82 Mo. App. 416. We dismiss that from consideration here as we do not think that it has any application whatever to the case at bar. It did not concern the question of the apportionment of a legacy, and was a case in which the executor in charge of the estate, having the whole of the estate in his possession, was called on to account for interest, the interest being

the legacy. We had occasion to consider, and, as far as applicable, follow the decision of the Kansas City Court of Appeals in this Catron Case in the case of Good Samaritan Hospital v. Mississippi Valley Trust Co., 137 Mo. App. 179, 117 S. W. 637. No such issues arise here.

These are the cases illustrating the law on this matter. Several of them are of very recent date, the Lynch Case decided May 17, 1909, so that it can hardly be said that in modern times the rule has met with disfavor. It is suggested that we have a rule in our state, to the effect that all deeds, wills, or other instruments in writing whereby an estate or other benefit is conferred by one to another, must be construed so as to effectuate the intent and purpose of a grantor or testator, and that this rule has, in effect, abrogated the common-law rule against apportionment of an annuity. We are unable to appreciate the force of this, or to agree that one rule abolishes the other. Both can and do prevail, and all courts have so held. If it is necessary, to carry out and effectuate the intent of the grantor or testator, that the annuity is to be apportioned, no court has ever failed to recognize the right of apportionment. That the Kansas City Court of Appeals illustrated and enforced in the Lynch Case, supra, at the same time recognizing and not attempting to overthrow the common-law rule.

A cardinal rule to be observed in the construction of wills is that the intention of the testator is to be sought out, and, when ascertained, that intention given effect. *Tisdale v. Prather*, 210 Mo. 402, loc. cit. 407, 109 S. W. 41. This is also a statutory requirement. Rev. St. 1909, § 583. When, however, technical words are used in a will, they are to be interpreted in their established legal sense, and so the testator is presumed to employ them, unless a contrary meaning is plainly intended by the context of the will. *Drake v. Crane*, 127 Mo. 85, loc. cit. 103, 29 S. W. 990, 27 L. R. A. 653; *Cross v. Hoch*, 149 Mo. 325, loc. cit. 338, 50 S. W. 786.

The word "annuity" carries with it, in itself, the idea of a sum payable annually. An annuity, says Black, Law Dictionary, is "a yearly sum stipulated to be paid to another in fee, or for life, or years"; citing *Coke-Littleton*. Chancellor Kent, Lect. III, par. v, "p. 471, states that the principle underlying the rule that an annuity, like a rent charge, cannot be apportioned, is that it is an entire contract. So that treating of rent charge, which differs only from an annuity, in that it is a charge upon lands, while the annuity is a personal charge alone, if the tenant for life gave a lease for years, rendering a yearly rent, and died in the course of the year, the rent could not be apportioned, and the tenant would go free of rent for the first of the year. While a technical word, it has a commonly accepted—a popu-

lar—meaning. Thus in section 11,519, Rev. St. 1909, in the chapter concerning taxation and revenue, in defining the word "credit," as used in that chapter, we find this: "The term 'credit,' whenever used in this chapter, shall be held to mean and include * * * every annuity or sum of money receivable at stated periods," thus making the word "annuity" synonymous with the words "a sum of money receivable at stated periods." That is, if nothing to the contrary appears, and the word "annuity" alone is used, it is to be construed as meaning a sum payable annually at the end of each year after it attached, for life, or as otherwise limited.

Turning from the law to the facts, and contrasting the facts in the Lynch Case with those in the case at bar, no such intention as found to exist in the Lynch Case, to make the charge on the trust anything other than an annuity, can be found in or gathered from a consideration of the fourth clause of this will now under consideration. It is clearly and unmistakably an annuity. It has all the attributes of an annuity, by the force of which term, and by law, the first payment thereof became due on the first anniversary of the death of the testator; not before then. It is idle to claim in the case at bar, that this provision creating this trust was necessary to the support of the widow, or that it was so intended. Mr. Woerner himself testified that there was no reason why the trust fund should not have been turned over at the time it was, because, he said, the estate was entirely solvent; that the outstanding debts were very insignificant, and whatever debts existed could be paid out of the residue of the estate. While the learned trial judge, incorrectly, as we hold, ruled out the inventory of the estate, its omission happens to work no particular harm, as we have before us, in the order of distribution, which was made on the petition of Mrs. Wiegand, ample evidence that there was no necessity whatever for the anticipation of the payment of this annuity before the arrival of its anniversary, to provide support for the widow. Even if we close our eyes to knowledge we may have of current events, accepting the statement that the securities there referred to are worth only par, the testimony shows they drew from three to seven per cent., so that the income from them was certainly ample to support the widow, particularly in view of the fact that she was given the homestead with all its appurtenances, and that she had a right, under the law, even outside of this annuity, to have claimed the \$400 as the absolute amount allowed her as the widow, as well as to an allowance for the support of her family for one year. *Whiteman v. Swem*, 71 Ind. 530. We can gather no meaning from the fourth clause of this will, other than that it was intended to be an annuity. Such being so, and no time for the annual payments

being fixed, then, as said by Chief Justice Shaw, in *Wiggin, Adm'r, v. Swett*, supra, the time for payment is the anniversary of the death of the party creating the trust, in this case, the testator, George Wiegand, Sr. This clause directs the trustees to pay *annually* to his wife Rosalie for and during her lifetime the sum of \$5,000. If the net profits, interest, and income be insufficient to pay that sum, the testator directs his trustees to take from the capital of that fund enough to make up the sum of \$5,000, so that in any event his wife, so long as she shall live, shall "receive an *annuity* of that amount independently of any other provisions made for her in this will." There is no mistaking this language. When the testator gave the direction that his wife is to receive an *annuity*, the presumption is that he knew what that term "annuity" meant, which is to say, a sum payable annually, unless by the terms of the will itself the annuity was payable in installments, of which there is no intimation of any such intention in this will. How would it be possible for the trustees to determine, until the expiration of the year, how much they should take from the capital fund to make up the \$5,000? If they took any part of the \$5,000 out of the capital in advance, or quarterly even, anticipating the income before the expiration of the year, the fund itself would be diminished, the capital on which interest was to be earned for the year, and hence the interest or the income itself on the remainder of that capital would be diminished just so much. If they could anticipate the payment of any part of this annuity, they could anticipate all of it, justifying themselves on the assumption that they would pay it back, if the interest earned on the fund amounted to \$5,000, and that if the interest did not amount to \$5,000, it would be perfectly right to have taken it out of the principal. This would have amounted practically to waste of the fund itself, for every dollar taken out of the capital diminished the capital on which interest was to be earned. It was distinctly provided in this clause of the will that if the net profits, interest, and income exceed the amount of \$5,000 "*each year herein directed to be paid her,*" then the excess shall be added to and form part of the capital fund. Clearly this is the expressed intention that the \$5,000 is to be paid, not in installments, not anticipated, but each year. This clause further provides that upon the death of his wife, the trust shall cease "and the capital fund *in its then condition* shall be paid to and vest in my three children in equal shares." What does this term, "in its then condition," mean but the principal and the then accrued interest, provided the principal has not, at a preceding anniversary of payment, been diminished by having been drawn on to make up the annuity? It covers the fund, principal and accrued interest, as then existent. It is expressly provided

that interest earned over the annuity shall go into the principal. That interest and the principal constitute the fund to be distributed at its then condition on the day of distribution. There is nothing whatever in this clause, or, for that matter, in any other clause of the will, to indicate the slightest intention present in the mind of the testator, to make this other than an annuity in the sense in which the term "annuity" is used at law. It is no argument against this to say that the common mind is not acquainted with the fact that an annuity cannot be anticipated, but can only be payable on each anniversary of its payment, unless another period of payment is designated. This is the law, and every one is presumed to know the law. Holding up the instrument by its four corners, construing it by every rule applicable, it appears to us futile for a court to say, in the face of its provisions, that this fourth clause is to be read other than in its literal language, as that language is interpreted by law, and that it creates an annuity, payable at the anniversary of the death of the testator, and not apportionable. It is not for a court to attempt to make a will for a man which he did not intend, in contemplation of law, to himself make. There is this also to be said: Mrs. Wiegand, during her life, does not appear to have drawn on the trust fund; she turned it over in full to the trustees. There are two inferences that may be drawn from this; either she had it invested and drew the interest, or she did not need the income. It is not claimed that the income is needed to pay off any debts contracted by Mrs. Wiegand. What is demanded is, that it shall go into her general estate for the benefit of her residuary legatee. Surely the testator in establishing the trust fund, had no such intention in mind. He had provided for that legatee by making her an equal participator with her two brothers, in the whole fund, less such part thereof as might, under this fourth clause, have been paid over to her mother. We therefore hold, construing this fourth clause, that there could be no apportionment whatever of this annuity, but that the beneficiary in the trust, the widow, dying before the anniversary, her executor is not entitled to recover even for the time that the trust fund was in the hands of these trustees.

Second. This brings us to a consideration of the question of credits and allowances. We are compelled to say that we think that the allowance of \$1,500 to these trustees, considering the time they held the trust fund until demand was made on them to turn it over (that is to say, from the 8th of July to the 3d or 5th of August, 1908); considering the shape in which that fund came into their hands (that is to say, interest paying bonds and a certificate of deposit, in an absolutely safe bank); considering the fact that the trustees were not required to give and gave

no bond, and were therefore saved the trouble, cost, and expenses giving a bond might have entailed; and considering the acts of these trustees which made this suit necessary—we hold that they are not entitled to the amount allowed, \$1,500, certainly not to the amount claimed, which was \$3,000. On consideration of all the facts in the case, we hold that a proper allowance to the trustees for their services down to final settlement and discharge will be one-half of 1 per cent. on the fund; that is to say, \$500.

We also think and hold that the trustees are entitled to a reasonable counsel fee. They were brought into court and made defendants, as trustees, and were necessary parties. While it was no part of their business to defend for the executor of Mrs. Wiegand, they were bound to make their appearance in court. We think that as covering services of counsel heretofore rendered and hereafter to be rendered in the circuit court, in connection with carrying out the order we will make herein, as well as for their services in this court, \$250 is a reasonable allowance. When it is borne in mind that the amount actually in controversy here is only \$2,138.85, we think \$250 a very liberal allowance for counsel.

The allowance of a credit of \$10 for the services of C. F. A. Mueller, in connection with looking after property offered as security, and of \$103.56 for interest accrued and \$25 for premium on certain bonds, is also proper and should be allowed.

Credit for taxes for the years the trustees are liable for taxes on the funds while in their hands should be allowed on presentation of proper vouchers showing payment by them. These are all the allowances which should be made against the fund. Deducting these, whatever remains of the trust fund with its interest and earnings while in the hands of the trustees, should be ordered distributed to the parties plaintiff and to Mrs. Rubelmann, in equal amounts—one-third each.

Third. This disposes of all matters except as to costs, and those are largely determinable on consideration of the attitude of Mr. Woerner in the case and as one of the trustees. Referring to the connection of Mr. Woerner with the case, it appears that he was the attorney for George Wiegand, deceased, and had written his will, and also represented Mrs. Rosalie Wiegand in the contest over that will, and in the settlement which was effected between Mrs. Wiegand and the plaintiffs herein, the result of which was the dismissal of the contest and the confirmation of the will. He acted as attorney for Mrs. Wiegand in all her matters. He was also appointed executor of the will of Mrs. Rosalie Wiegand, who was his cousin. There was nothing whatever in these professional or blood relations of Mr. Woerner to debar him from being trustee; to the contrary, it was entirely fit that he should be

appointed as such. Nor had anything occurred that rendered his position as trustee under George Wiegand's will and as executor of Mrs. Wiegand's will antagonistic, until between the 8d and 7th of August, 1908. Being approached by one of the attorneys for plaintiffs with a request for a distribution of the fund held in trust, Mrs. Rosalie Wiegand being dead, the question was sprung as to the apportionment of the annuity, not exactly in that shape, possibly, but over that. Mr. Woerner, as executor, claimed the right of apportionment. The attorney for plaintiffs suggested a partial distribution of the trust fund then, leaving in the fund a sufficient sum to cover items which might be in dispute. Mr. Woerner rejected the proposition, replying that he would not consent to a partial distribution, but wanted the whole matter disposed of together and by one act. It appears that Mr. Woerner was sustained in this position by his associate trustee, the Trust Company. This could only mean that Mr. Woerner used his position as trustee to enforce his demand as executor. This he had no right to do, no matter how honest may have been his motives. The trustees, as such, could have no possible interest in that fund beyond that of a mere stakeholder. It was their duty, as trustees, when such a situation arose, to stand aside, and have the adverse claimants determine it between themselves, by agreement or in court. Failing action by these, the trustees could have brought the fund into court and required the parties to interplead. It is no answer to this to say that, by precipitate action of plaintiffs, the trustees were cut off from this. What we are here seeking to enforce is the duty of the trustees to stand aloof. The controversy over that question of apportionment was clearly one between the estate of Rosalie Wiegand on the one side and these plaintiffs and Mrs. Rubelmann on the other, they being the parties interested in the trust fund as opposed to this right of apportionment. Mrs. Rubelmann, in point of fact, however, was interested as against these plaintiffs, in the apportionment being made as claimed by the executor of Mrs. Wiegand's will, Mr. Woerner. If the apportionment was made and the amount claimed was taken out of the trust fund, Mrs. Rubelmann would, as one interested in the trust fund, be required to contribute one-third of it, but the apportionment being allowed, and the fund turned over to Mr. Woerner as executor, she not only recovered back as residuary legatee under her mother's will, this third, but would receive the two-thirds which her brothers would have lost from the trust fund. In point of fact the interest of Mrs. Rubelmann and that of Mr. Woerner were identical. From that time on and when that situation arose Mr. Woerner should have surrendered his office of executor or of trustee. He could not, consistent with the rigid rules applicable to the duties of a trustee, which required him to be an

entirely disinterested party, hold on to both positions. The result of his action as trustee and executor combined, was to tie up the whole fund and prevent distribution thereof until protracted litigation, which Mr. Woerner ought to have known would be the inevitable result of the action on his part, could be terminated. It appears that after this demand of August 3d, the matter of distribution was left in abeyance until the 5th of September, when the officer of the Trust Company, on being called on by counsel for plaintiffs with reference to this question of apportionment of the annuity, told counsel for plaintiffs that any action taken by the trustees would have to be taken by both of them, that one could not act without the other, and that the Trust Company would have to act with Mr. Woerner, and he referred him to Mr. Woerner. Hence it very clearly appears that the position of Mr. Woerner as trustee, standing by his claims as executor, was the direct cause of the refusal of this cotrustee, and resulted in tying up the whole fund. That this was a position which no trustee had a right to occupy is too clear for argument.

According to the testimony of Mr. Orr, the trust officer of the Trust Company, in a conversation he had had with one of the counsel for plaintiffs, along about the 1st of August, 1908, Mr. Orr suggested to that counsel that if no agreement could be reached on the construction of the will over this matter of apportionment, that there could be a partial distribution, and that the trustees could come into court and ask for a construction, it appearing that the point in the mind of this trust officer at the time and which he suggested to one of the plaintiffs, was not whether the annuity was payable at all, but whether it dated from the date of the testator's death or from the date of the trustees receiving the fund. At all events it is very clear from the testimony of Mr. Orr, and the statement of Mr. Woerner to one of the counsel for plaintiffs, that Mr. Woerner insisted on keeping the whole fund intact until this question in which he, as executor of the estate of Mrs. Wiegand, was interested was settled. This witness, Mr. Orr, further testified that in the discussion between himself and Mr. Woerner over the matter of the annuity, they both agreed that it should date from the date of Mr. Wiegand's death, rather than the date of the receipt of the capital fund by the trustees. This course was so obviously in the interest of the estate which Mr. Woerner represented as executor, that it is very clear that Mr. Woerner should not have participated as trustee in any decision of this question by his cotrustee. It further appears from the testimony of Mr. Orr, that when he, representing the Trust Company, and Mr. Woerner, as trustees, were considering the permanent investment of the capital fund in real estate, it appearing that

such investment could be had for the whole fund at 5 per cent. on security which the committee of the Trust Company had approved, that Mr. Woerner raised the question that within five or seven months the trustees would have to pay \$5,000 of that fund at or near that time. Whereupon they decided to put the \$10,000 in bonds which would be readily convertible so as to be able to make this payment as and when required without sacrificing the securities. The trustees took no outside legal advice, acting on their own view of the law. The action of Mr. Woerner as cotrustee was so evidently governed by his interest as executor that it was highly improper for him to have acted in the dual capacity.

As we have said, the association of Mr. Woerner with the parties did not, in itself, disqualify him as trustee, but he could not be both trustee and executor when the duties of the two conflicted as here. It is not a question of right action; the action in each character may have been entirely proper. The real core of the matter lies in the rule that no one individual, no matter how pure his motives or how high his character or exalted his ability, can be allowed to hold two positions, the respective duties of which are, or may become, antagonistic.

We are asked to remove Mr. Woerner as trustee. To remove one as trustee there must be a clear necessity for such act—a clear necessity for it in order to save the trust property. "Mere error, or even breach of trust, may not be sufficient; there must be such misconduct as to show want of capacity or of fidelity putting the trust in jeopardy." 1 Perry on Trusts (6th Ed.) § 276, foot page 478. We find no necessity for such action to save this trust fund, in the first place; and, in the second place, we do not find any such conduct on his part as to show either want of capacity or of fidelity, putting the trust fund in jeopardy. Our criticism of Mr. Woerner's action is on the sole ground that he occupied an incompatible position here when called on to act as trustee and as executor. We decline, by silence, to admit that one can properly do that.

We notice this now as it concerns the question of compensation and of costs. This litigation arose over a desire to add to the estate of Mrs. Rosalie Wiegand. Mr. Woerner, as executor, insisted on the apportionment before distribution. His cotrustee agreed to this. That insistence brought on this litigation. It was solely in the interests of the estate, of which Mr. Woerner was executor. The estate and the residuary legatee therein are the real parties to be benefited by the maintenance of the claim to the apportionment. Accordingly we direct that all the costs of this cause in the circuit court, as well as in this court and in the circuit court on it again reaching that court,

be taxed against Wm. F. Woerner, as executor of the last will of Mrs. Rosalie Wiegand, deceased.

We will add that we are asked to disallow the claim of the Trust Company and of Mr. Woerner, as trustees, for any allowance for their services as trustees or for counsel fee in this case. The rule is that a trustee who breaks the trust should be denied compensation for his services. *Newton v. Rebenack*, 90 Mo. App. 650, loc. cit. 676. We find no such breach here, but it is beyond question that where one of two or more trustees acts in harmony with his cotrustee in connection with an adverse claim of the latter, neither of them are entitled to compensation. Without denying this rule, we do not think it proper to enforce it in this case, as the trustees acted in apparent good faith. We have placed the allowance to be made to them by the circuit court at \$500, which, under the facts in this case, is all we think they should be allowed.

The judgment and decree of the circuit court of the city of St. Louis is reversed and set aside, and the cause remanded, with directions to the court that the cause be proceeded with as herein directed.

NORTON and CAULFIELD, JJ., concur.

DE GLOPPER v. NASHVILLE RY. & LIGHT CO.

(Supreme Court of Tennessee. Feb. 4, 1911.)

1. NEGLIGENCE (§ 1*)—CAUSE OF ACTION—ELEMENTS.

One suing for an injury negligently inflicted by another must show, by a preponderance of the testimony, a duty which the latter owes him, a negligent breach thereof, and injuries resulting proximately from such breach of duty.

[Ed. Note.—For other cases, see *Negligence*, Cent. Dig. § 1; Dec. Dig. § 1.*]

2. NEGLIGENCE (§ 121*)—BURDEN OF PROOF.

Where a plaintiff, suing for a negligent personal injury, avers that the duty which defendant owed him arose out of a particular relationship, or that the breach of duty consisted of a particular act or omission, he must prove his case as alleged, either by direct testimony, or by proof of indirect, but related, facts from which the duty owing him, the injury, the negligence of defendant, and its proximate connection with the injury may be inferred.

[Ed. Note.—For other cases, see *Negligence*, Cent. Dig. §§ 224-228; Dec. Dig. § 121.*]

3. NEGLIGENCE (§ 121*)—EVIDENCE—PRESUMPTIONS.

The mere fact of injury never raises a presumption of negligence, but the act causing the injury and defendant's negligence must be also shown; but when a thing which has caused an injury is shown to be under the management of defendant, and the accident is such as in the ordinary course of things does not happen if those having the management use proper care, the accident affords reasonable evidence, in the absence of explanation, that it arose from want of proper care.

[Ed. Note.—For other cases, see *Negligence*, Cent. Dig. §§ 224-228; Dec. Dig. § 121.*]

4. NEGLIGENCE (§ 121*)—EVIDENCE—PRESUMPTIONS.

Where an act which caused an injury was shown by direct evidence, and all of the circumstances of the accident were proved, and the only reasonable explanation of the accident gave rise to an inference of negligence, the rule of *res ipsa loquitur* applies; but that rule does not apply where both the act which caused the injury and the negligence of defendant in relation thereto must be inferred from the accident itself.

[Ed. Note.—For other cases, see *Negligence*, Cent. Dig. §§ 224-228; Dec. Dig. § 121.*]

5. STREET RAILROADS (§ 93*)—OPERATION OF CARS—NEGLIGENCE.

That a street railway company permitted so large a number of passengers to occupy a car as to heavily load it while on a sharp ascent in the street did not show actionable negligence to a traveler on the street.

[Ed. Note.—For other cases, see *Street Railroads*, Cent. Dig. §§ 195-200; Dec. Dig. § 93.*]

6. CARRIERS (§ 236*)—PASSENGERS—OBLIGATION OF CARRIER.

A tender to a street railway company of the requisite fare and the ability of a passenger to find a place of safety on the car impose an obligation on the company to receive and transport the passenger.

[Ed. Note.—For other cases, see *Carriers*, Cent. Dig. §§ 968-972; Dec. Dig. § 236.*]

7. STREET RAILROADS (§ 93*)—OPERATION OF CARS—INJURIES TO TRAVELER—NEGLIGENCE.

A person, while passing near a heavily loaded street car stalled on an upgrade, was struck in the eye with force by a hard substance coming from under the car while its wheels were revolving rapidly in the same place on the track. An expert testified that the probable effect of such revolution of the wheels would be to throw out slivers of steel from the rail or wheel, or both. The track was examined at the place of the accident soon after it occurred, and particles of sand were found on it; but it did not appear that the car men had used any sand. It was customary to place sand on the track, when needed to prevent the slipping of the wheels. There was no evidence that either the machinery or the wheels of the car or the rails were defective. *Held*, as a matter of law, that actionable negligence of the street railway company was not shown.

[Ed. Note.—For other cases, see *Street Railroads*, Cent. Dig. §§ 195-200; Dec. Dig. § 93.*]

Error to Circuit Court, Davidson County; M. H. Meeks, Judge.

Action by William De Glopper, by next friend, against the Nashville Railway & Light Company. There was a judgment of the Court of Civil Appeals, reversing a judgment for plaintiff and dismissing the action, and plaintiff brings certiorari and assigns errors. Judgment of the Court of Civil Appeals affirmed.

W. H. Washington and Thomas M. Andrews, for plaintiff in error. R. F. Jackson, for defendant in error.

LANSDEN, J. This action was commenced in the circuit court of Davidson county to recover damages for personal injuries received by William De Glopper, a boy 14 years of age, and there was a trial before the circuit judge and jury, and a verdict and judgment

for plaintiff below in the sum of \$4,000. An appeal was taken to the Court of Civil Appeals, and this judgment reversed, and the suit dismissed, to review which action of the Court of Civil Appeals a petition for certiorari is filed in this court and errors assigned.

The plaintiff below states his cause of action in substance as follows: In the first count it is thus stated:

"At the time of said injuries, to wit, on the 27th day of October, 1906, the defendant was running a car towards the east on Church street, at and near its intersection with Ninth Avenue North, on its West Nashville line. Said car was in charge of a motorman of defendant, and had underneath it the electrical machinery which moved and controlled it. At the time of said injuries, said electrical machinery was defective and out of repair, and the wheels of said car were defective, so that, when revolving rapidly up grade, they would throw off slivers or pieces of iron or steel with great force."

"At said place there exists a heavy up-grade east on Church street, and on the day and year aforesaid, whilst said car with said defective electrical machinery and defective wheels was ascending said steep grade, the plaintiff, seated in a buggy, was driving upon the street, and was in the exercise of ordinary care, and when near the side of said car the motorman negligently managed, manipulated, and handled the electrical and propelling power of said car, which together with the defective electrical machinery caused the wheels of said car to revolve at a furious, excessive, and dangerous velocity at the same place upon the rails, without giving the car any perceptible movement forward. Said unusual, extraordinary, and dangerous velocity of the wheels, together with the defects in the material of which they were composed, caused pieces of silver or material to be broken therefrom and from the rails of the track of defendant, which were defective, and to be thrown off at a tangent, with tremendous force, one of which struck plaintiff in the eye, and cut, tore, and lacerated it so badly that it was necessary to take it out, which was accordingly thereafter done. The said injury and cut in plaintiff's eye was the direct and proximate result of the said negligence of defendant, and was directly due to the negligence of the motorman in failing to properly apply the electrical current, and to the negligence of defendant in having electrical machinery so defective as to cause the wheels to run away, get beyond control, and revolve at such excessive and tremendous velocity as to break and wear away the wheels of said car, as well as the rails of the track at that point, which, by the negligence of defendant, were defective and wholly unfit to bear the excessively rapid revolutions of the wheels at the same place, and said injuries were thus directly and proxi-

mately due to the grinding and wearing of the metal upon metal, and to the friction upon the tracks, all directly brought about by the said negligence of defendant and its agent and servant, the motorman in charge of said car. The defective condition of said electrical machinery, wheels, and rails was known to defendant, or could have been known by ordinary care, and was unknown to plaintiff."

In the second count it is thus stated:

"At the time of said injuries, to wit, on the 27th day of October, 1906, whilst plaintiff was driving along Church street at and near Ninth Avenue North, in Nashville, the defendant had negligently allowed and permitted its track at said point to become defective and dangerous, on account of the accumulation thereon of rock, gravel, debris, and other hard, sharp material, and on the day and year aforesaid, whilst plaintiff was driving along said street, seated in a buggy, a car of defendant was in such defective condition, and so negligently managed by the motorman of defendant in charge of it, that the wheels were thereby caused and permitted to run away and revolve in practically the same place at such excessive and dangerous velocity, in endeavoring to ascend a heavy grade at said point, as to grind up, take up, and throw off at a tangent said rock, gravel, debris, and other hard, sharp material and substance, and hurl it against and into the eye of plaintiff, whereby it was put out, and had to be cut out, thereby disfiguring and disabling him for life."

"From said injuries plaintiff suffered and still continues to suffer great pain and agony of body and mind, and was permanently injured, and lost much time, and expended considerable sums in nursing and doctor's bills."

"Before the happening of said injuries, defendant knew of the defects in the machinery of said car, which caused the wheels to revolve so rapidly at the same place upon the rails, as well as the defective condition of the surface of its track at said place, or might have known it by ordinary care, and it was unknown to plaintiff; and the said injuries were directly and proximately due to the said negligence of defendant, and the negligence of its motorman, in carelessly and negligently handling said car."

In the third count it is thus stated:

"At the time of the injuries set out in the counts of the original and amended declaration, to which reference is made herein and which are made a part hereof, the said car was negligently overloaded for the place and grade, and this fact, to wit, because there was more load upon the car than it could safely carry at that place, was the direct and proximate cause of the stalling of the car, and the extremely rapid revolutions of the wheels, which caused said sliver of metal or hard substances to be thrown off with great force, and which struck plaintiff in the

eye, inflicting the injuries described and set out in said amended declaration."

The facts of the case are as follows:

On the 28th of October, 1906, William De Gloppe, with two boy companions, was driving west on Church street, near Ninth avenue, and they met a car of the defendant in error coming east on the same street. There is a sharp ascent in the grade of the street at this point, and the car of the defendant in error stalled. It was heavily loaded, and the motorman applied the power in such a way that the wheels of the car revolved very rapidly without moving the car, except that the car would lurch forward a few inches or a few feet, and would again stop, and the wheels would continue to revolve rapidly in the same place. The plaintiff in error was in a small buggy drawn by a pony, and was on the left-hand side of the buggy next to the car, and when his position was somewhat in front of the rear trucks, and west of the center of the car, he suddenly threw his hand to his eye and cried: "Stop! Something flew from under that car and hit my eye."

The plaintiff in error was struck in the lower left-hand corner of the eye with a triangular substance with a rough edge, which penetrated the eye and destroyed it. On the following day his eye was removed. There was no one on the street west, east, or south of plaintiff in error who could have thrown the substance inflicting the injury in a manner in which it was done, and the windows of the car, as well as the vestibules, were all closed in such a way that no one upon the car could have done so. The car was 28 feet long and 12 feet high, and thus it made it impossible for the injury to have been inflicted by a person to the south of plaintiff in error. The wind was not blowing.

A witness was introduced as an expert, who says that the probable effect of revolving the steel wheels of the car rapidly in the same place upon the steel rails of the track when the car is heavily loaded is to throw out slivers of steel, either from the rail or wheel, or both, with considerable force. This witness stated that he has seen this occur on different occasions, and that it results from the nature of the wheel and the track, when subjected to the great friction that would be created by the rapid revolution of the wheels while the car is heavily loaded and stationary.

The track of defendant was examined at the place of the accident soon after it occurred, and particles of sand were found upon it; but the witness could not say that the servants of defendant in error were using sand just before or at the time of the accident. It is a custom of defendant in error to place sand on its track wherever needed to prevent the slipping of the wheels.

When the eye of plaintiff in error was examined soon after the accident, as well as when it was removed, no foreign substance

was found in it. It was seen, however, that the cornea had been penetrated by a hard, rough, triangular shaped substance of sufficient weight to fall out of the eye. There is no other proof tending to show that either the machinery or the wheels of the car, or rails of the track, were defective. There is no proof tending to show that defendant in error had notice, or should have had notice by the exercise of due care, of any of the alleged facts. There is no proof of the negligent operation of the car, other than the facts stated—that it was heavily loaded, and stalled at the ascent in the street, and the motorman, in applying the power to propel the car, caused the wheels to revolve very rapidly at the same place. The plaintiff in error was rightfully upon the street and in the exercise of due care.

The foregoing facts appear entirely from the testimony of the plaintiff in error. The defendant in error, at the conclusion of the testimony of plaintiff, moved the court to direct a verdict in its behalf, which was overruled, and the case was given to the jury without any further proof being offered.

In every action for damages resulting from injuries to the plaintiff, alleged to have been inflicted by the negligence of the defendant, it is incumbent upon the plaintiff to establish by a preponderance of the testimony, three propositions:

(1) A duty which the defendant owes to him.

(2) A negligent breach of that duty.

(3) Injuries received thereby, resulting proximately from the breach of that duty.

If he aver that the duty which the defendant owes him arises out of a particular relationship, or that the negligence constituting its breach consists of a particular act, omission, or thing, he must prove his case substantially as averred. This may be done, either by direct testimony of witnesses who know the facts, or by direct proof of indirect, but correlated, facts from which the duty owing him, the injury done him, the negligence of defendant, and its proximate causal connection with the injury may be reasonably inferred. When such method of establishing liability is resorted to, negligence is never inferred from the mere fact of the injury; but the act which produced it, and defendant's negligence, and the injury must all be shown, and the nexus between them must appear in the relationship of cause and effect. This indirect method of arriving at the negligence of defendant is generally expressed by the maxim "*res ipsa loquitur*." Literally translated, it means "the thing speaks for itself," and is merely a short way of saying that the circumstances attendant upon the accident are themselves of such a character as to justify a jury in inferring negligence as the cause of the injury. It in no wise modifies the general doctrine that negligence will not be presumed.

The mere fact of any injury never raises

a presumption of negligence. *Benedict v. Potts*, 88 Md. 52, 40 Atl. 1067, 41 L. R. A. 478; *Chicago Union Traction Co. v. Gleese*, 229 Ill. 263, 82 N. E. 232; *Snyder v. Wheeling Electric Co.*, 43 W. Va. 661, 28 S. E. 733, 39 L. R. A. 499, 64 Am. St. Rep. 922.

The general meaning of the maxim is well expressed by the Supreme Court of Illinois in *Chicago Union Traction Company v. Gleese*, supra, as follows:

"When a thing which has caused an injury is shown to be under the management of the party charged with negligence, and the accident is such as in the ordinary course of things does not happen if those who have the management use proper care, the accident itself affords reasonable evidence, in the absence of an explanation by the party charged, that it arose from the want of proper care."

This rule finds its most common application in cases where one in passing along the street is hurt by a barrel falling from a door above, or by a brick falling from a wall or scaffold, or by a falling shutter or wall, or the like. The mere occurrences in themselves import negligence.

In *Snyder v. Wheeling Electric Company*, 43 W. Va. 668, 28 S. E. 735, 39 L. R. A. 499, 64 Am. St. Rep. 922, supra, it is said that:

"Where things of great danger are used in public highways, where multitudes constantly and lawfully pass, their very nature requires the highest degree of care; and if one is killed by their being out of place or defective, why may we not logically and fairly assume negligence, unless other plausible explanation appears?"

The limitations upon this doctrine are well defined and well understood, and are fully illustrated and fully expressed by this court in *Railroad v. Lindamood*, 111 Tenn. 457, 78 S. W. 99, where the court quoted the following from the Supreme Court of California with approval:

"Unless facts are shown from which negligence may be reasonably inferred, a jury should never be permitted to infer arbitrarily and without evidence that there was negligence. When a fact is established, some other fact may be justly inferred therefrom; but when a plaintiff instead of presenting a fact or facts from which the negligence of the defendant may be reasonably inferred, gives to the jury only a presumption drawn from other facts, the jury are not to be allowed to infer negligence from such presumption. The inference cannot be drawn from a presumption, but must be founded upon some fact legally established."

Applying these principles to the present case, we find that plaintiff in error was passing the car mentioned when his face was about six feet from the car, with his left side to the car, when he was struck in the left eye with force by a hard substance coming from under the car, while the wheels of

the car were revolving rapidly in the same place under a heavy load. The fact that the substance which struck plaintiff in error in the eye came from under the car is a fact which may reasonably be drawn from the whole circumstances of the accident by a fair inference from the situation of the parties at the time. It is not directly proven, and is arrived at by inference only. There is no direct, open, and visible connection between this inferred fact and the rapid turning of the wheels of the car at the same place. Whatever of connection there may be between the turning of the wheels and the striking of plaintiff in error arises only upon inference, and in order to make this connection between the operation of the car and the injury of plaintiff in error it must be inferred that the substance which struck plaintiff in error came from under the car, and from that fact it must be further inferred that it was thrown from under the car by the rapidly turning wheels, and there still must be superadded to these two inferences the further inference that the motorman was negligent in the operation of the car at the time, or that the wheels of the car were defective, or that the track was defective at the place of the accident, and that defendant in error had notice of the defects, or by the exercise of due care should have known of them.

If the act which caused the injury was shown by direct evidence, and all of the circumstances of the accident were shown in the proof, and if the only reasonable explanation of the accident should give rise to an inference of negligence, then the rule of "res ipsa loquitur" would apply; but there can be no foundation for the application of this maxim where both the act which caused the injury and the negligence of defendant in relation to the act must be inferred from the accident itself. You cannot well say that an act is negligent, unless you know what it is. It is said in one case that the maxim under consideration can have no application where the injured person and the alleged negligent person were both in the exercise of an equal right and were each chargeable with the same degree of care. *Sauer v. Eagle Brewing Co.*, 3 Cal. App. 127, 84 Pac. 425.

The only fact that is directly proven, from which it is possible that negligence might be inferred, is the fact that the car was heavily loaded upon a steep ascent in defendant's track, so much so that it stalled and the application of the power to its machinery caused the wheels to slip and revolve rapidly. Nothing else appears than the facts stated. It is not proven that the car was overloaded, or carelessly loaded, or that the power was negligently or improperly applied. It is a matter of common knowledge that the wheels of a street car may turn rapidly at the same place upon the rails of the track, when both the wheels and the rails are in perfect con-

dition and the motorman is in the exercise of due care.

Street cars are run for the accommodation of the public, as well as profit to the company, and the courts cannot say that the fact that the company permits a large number of passengers to occupy the car sufficient to load it heavily is an act of negligence. To so hold would work very great inconvenience to the traveling public and impair the efficiency of the car service.

One of the requirements of modern city life is rapid transit, and the public has demanded that the street cars at certain hours of the day be loaded to their utmost capacity. It is doubtful if the company could refuse to receive a passenger upon its car as long as there was room in the car for him. A tender to the company of the requisite fare and the ability of a passenger to find a place of safety upon the car would impose an obligation upon the company to receive and transport the passenger. Thus it appears that the jury could not infer negligence from the single statement that the car was heavily loaded and that there was a sharp ascent in the street. Cases illustrating the general doctrine stated in this opinion are the following: *Wood v. W. C. Ry.*, 5 Pennewill (Del.) 373, 64 Atl. 246; *Foulke v. W. C. Ry.*, 5 Pennewill (Del.) 368, 60 Atl. 793; *Railroad Co. v. Anderson*, 20 Am. St. Rep. 493; *Railway Co. v. Locke*, 112 Ind. 404, 14 N. E. 391, 2 Am. St. Rep. 187; *Hayes v. Railroad Co.*, 111 U. S. 228, 4 Sup. Ct. 369, 28 L. Ed. 410; authorities cited in *Lindamood's Case*, supra.

The negligence averred in the declaration as the proximate cause of the injury is:

First. That the electrical machinery and wheels of the car were defective.

Second. That the rails were worn and out of repair.

Third. That the motorman was negligent and careless in the management and operation of the car.

Fourth. That rocks and debris and other hard substances had been allowed to accumulate on the track.

Fifth. That the car was overloaded.

There is no testimony in the record tending to establish either of the alleged acts of negligence, and from the facts proven, if it were permissible to infer the act which caused the injury, no inference points directly to one of the acts of negligence rather than any of the others. What caused the injury, and the defendant's negligent connection with it, are left entirely at large by the proof, and are matters of pure conjecture. Under all the cases cited, this is not sufficient.

It results that there is no error in the judgment of the Court of Civil Appeals, and the petition is disallowed.

AMERICAN LEAD PENCIL CO. v. NASHVILLE, C. & ST. L. RY.

(Supreme Court of Tennessee. Feb. 4, 1911.)

1. CONTRACTS (§ 1*)—ELEMENTS.

While a contract may be either express or implied, or written or oral, it must result from a meeting of the minds of the parties in mutual assent to the terms, must be based upon a sufficient consideration, mutual, free from fraud or undue influence, not against public policy, and sufficiently definite to be enforced.

[Ed. Note.—For other cases, see *Contracts*, Cent. Dig. § 1; Dec. Dig. § 1.*]

For other definitions, see *Words and Phrases*, vol. 2, pp. 1513-1534; vol. 8, pp. 7615, 7616.]

2. CUSTOMS AND USAGES (§ 1*)—NATURE—"CUSTOM"—"USAGE."

"Usage" is a repetition of acts, and differs from "custom" in that the latter is the law or general rule which arises from such repetition; and while there may be usage without custom there cannot be a custom without a usage accompanying or preceding it.

[Ed. Note.—For other cases, see *Customs and Usages*, Cent. Dig. § 1; Dec. Dig. § 1.*]

For other definitions, see *Words and Phrases*, vol. 2, pp. 1801-1805; vol. 8, pp. 7223-7226.]

3. CUSTOMS AND USAGES (§§ 15, 17*)—OPERATION.

Where a contract is indistinct or uncertain in its terms, the custom or usage will be admitted to explain the uncertainty, but not to vary or contradict the written contract, either expressly or impliedly.

[Ed. Note.—For other cases, see *Customs and Usages*, Cent. Dig. §§ 30-34; Dec. Dig. §§ 15, 17; Evidence, Cent. Dig. §§ 1945-1952.]

4. CUSTOMS AND USAGES (§ 11*)—OPERATION.

A usage cannot be resorted to to make a contract, in absence of one made by the parties, nor prevent the effect of settled rules of law.

[Ed. Note.—For other cases, see *Customs and Usages*, Cent. Dig. § 22; Dec. Dig. § 11.*]

5. PLEADING (§ 387*)—PROOF—VARIANCE.

The proof must correspond with the allegations in the pleadings.

[Ed. Note.—For other cases, see *Pleading*, Cent. Dig. §§ 1300-1304; Dec. Dig. § 387.*]

6. CUSTOMS AND USAGES (§ 18*)—PLEADING—PROOF—VARIANCE.

The complaint, in an action against a railroad company for the destruction of freight by fire while the car was standing on complainant's industrial switch, alleged that under the contract between complainant and defendant, whenever complainant applied for an empty car, defendant was bound to furnish it as soon as possible, and, upon receipt of notice that the car was loaded and ready for shipment, it was bound to forthwith remove it from the switch; but defendant failed to remove the car in question from the siding promptly after receiving notice that it was loaded, but allowed several freight trains to pass while it was standing on the siding. The evidence did not show a contract between the parties whereby defendant was bound to move the car immediately upon notice, but merely a usage to that effect, adopted by the inferior employees of both parties for their mutual convenience. *Held*, that a bill which grounds the right to recover upon breach of a contract cannot be sustained by proof of usage or custom, instead of a contract, so that proof of the usage was insufficient to support the allegations of the bill.

[Ed. Note.—For other cases, see *Customs and Usages*, Cent. Dig. § 40; Dec. Dig. § 18.*]

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

7. CARRIERS (§ 113*)—FREIGHT—COMMENCEMENT OF LIABILITY.

A common carrier's risk begins on delivery and acceptance of the goods by it, and if something remains to be done by the shipper after the goods are delivered to the carrier's agent, before they are ready to be transported, the carrier does not become liable until they are ready for shipment.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 608-620; Dec. Dig. § 113.*]

8. CARRIERS (§ 113*)—FREIGHT—LIABILITY—DELIVERY—SIGNING BILL OF LADING—NECESSITY.

Where, though a car was loaded and standing at the shipper's warehouse on a siding constructed for its convenience, the shipper had not made out a bill of lading and presented it to the carrier's agent to be signed, though ample time had elapsed after the car was loaded for the shipper to do so, there was no constructive delivery of the car to the carrier, so as to make it liable for the goods on its destruction by fire.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 608-620; Dec. Dig. § 113.*]

9. CARRIERS (§ 123*)—FREIGHT—ACTIONS—DESTRUCTION OF FREIGHT—CAUSE OF LOSS.

Where the car load of freight, when burned, was standing on an industrial switch leading to the shipper's warehouse, and the fire was started by a coal oil stove in the office of the warehouse being turned over by one of the shipper's employes, firing the warehouse, from which the flames spread to the car, destroying its contents, the act of the shipper's employe in starting the fire was the proximate cause of the loss of the car; it then being in the possession of the shipper, and not of the carrier.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 539-548; Dec. Dig. § 123.*]

10. CARRIERS (§ 121*)—FREIGHT—DESTRUCTION OF GOODS—DESTRUCTION BY SHIPPER.

A common carrier is not liable for the loss of goods caused by the shipper's act, whether it be one of negligence or accident.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 531-536; Dec. Dig. § 121.*]

Appeal from Chancery Court, Davidson County; John Allison, Chancellor.

Action by the American Lead Pencil Company against the Nashville, Chattanooga & St. Louis Railway. From a decree dismissing the bill, plaintiff appeals. Affirmed.

Smithson & Armstrong and Vertrees & Vertrees, for appellant. Frank Slemmons and Claude Waller, for appellee.

BUCHANAN, J. The American Lead Pencil Company filed its original bill in the chancery court of Davidson county against the Nashville, Chattanooga & St. Louis Railway. This bill was based on the alleged breach of a contract, and the alleged loss to complainant of a car load of pencil and penholder material, the value of which is set out in the bill to be \$2,900; but the proof shows the value of the contents of the car to have been \$2,451.97.

This car load of material was destroyed by fire on October 24, 1904, while it was standing on a siding near the warehouse of complainant in the town of Lewisburg, Tenn. The car had been placed on the siding by defendant at complainant's request, in order

that the material might be loaded into the car. The loading was finished on October 22, 1904, near the hour of noon.

Complainant's contention, averred in the bill, was that, whensoever complainant should apply for an empty car in which to ship his products, defendant was bound to furnish the car under the contract forthwith and as soon as it could be done, and that, upon receipt of notice from complainant that said car was loaded and ready for shipment, the defendant was bound forthwith to remove the car from the spur track, or siding, and start the same toward its destination promptly.

Complainant averred in its bill that, when the car load of material in controversy was loaded and ready to be moved from the siding, it (the complainant) gave to the defendant immediate notice thereof, but that the defendant failed to promptly move the car from the siding, and allowed several of its freight trains to pass and leave the car standing on the siding, and that this default on the part of defendant was the proximate cause of the loss of the car by fire.

The fire which consumed the car and its contents originated in the warehouse office of complainant, as the result of the accidental overturning of a coal oil heating stove. This stove was overturned by one of the employes of the complainant.

The defendant answered the bill, and denied the existence of the contract sued on, and denied all of the material averments of the bill, and further set up, by way of defense, the statute of limitations of three years; but this defense of the statute of limitations was abandoned on the filing of an amended and supplemental bill by the complainant showing matter in avoidance of the statute.

Proof was taken on both sides, and on final hearing the chancellor dismissed the bill, and made a memorandum of his opinion a part of the record in the cause.

The complainant appealed to this court.

After a very careful review of all the evidence in this cause, we are unable to reach the conclusion that any contract of like tenor and effect to that averred in the bill was ever in existence between these parties. No one of the witnesses who testified in the cause had ever seen such a contract, or had any knowledge of its existence. A usage, or course of dealing, of like character to that which the bill avers was required by the contract, undoubtedly did exist between the parties, as shown by the proof, and there was much evidence that this usage was a custom between the parties, and this usage seems now to be relied on by the complainant as constituting the contract set out in the bill.

We cannot bring ourselves to the conclusion that a bill, which bases the complainant's right to recover upon the breach of a

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

contract, can be sustained by proof of a usage and no proof of a contract, or by proof of a custom and no proof of a contract. A contract is created by act of the parties. It may be either expressed or implied. It may be either written or oral. It must result from a meeting of the minds of the parties in mutual assent to its terms. It must be founded on a sufficient consideration. It must be mutual, free from fraud or undue influence, not against public policy, and sufficiently definite. See *Oyc. vol. 9, 241, 242*, and note 1, p. 141.

Usage and custom, on the other hand, in legal contemplation, differ radically in many respects from a contract. Usage is a repetition of acts, and is distinguished from custom in that usage is a fact, while custom is a law. There may be usage without custom, but there can be no custom without usage to accompany or precede it. Usage consists in the repetition of acts, and custom arises out of this repetition. *Esrliche Dict. Jurisprudence*, quoted in *Cutter v. Waddingham*, 22 Mo. 206-248, and cited in *Cyc. vol. 12, p. 1080*, note 1.

Usage, then, as we have seen above, is the germ, which, by constant repetition, and general use, and great antiquity, develops into custom; and custom, when fully developed, is a law. The distinction thus drawn between contract and usage or custom is quite apparent. Where a contract between parties is shown to have existed, and is indistinct or ambiguous, or uncertain in its terms, usage or custom on the particular point will be accepted, like the general law, not in contradiction of the stipulations of the contract, but in explanation of what is indistinct in it, and as furnishing the rule where it is silent. See *Charles v. Carter*, 96 Tenn. 614, 36 S. W. 396. Usage ought never to be allowed to vary or contradict the written instrument, either expressly or by implication. See *Bedford v. Flowers*, 11 Humph. 242. "But usage cannot make a contract where there is no contract, nor prevent the effect of the settled rules of law. See *Charles v. Carter*, 96 Tenn. 614, 36 S. W. 396.

It follows from the foregoing that to permit the complainant to maintain its bill based upon the breach of a contract by proof of the breach of a usage is to permit complainant to profit by a variance between its bill and its proof. The proof does not connect the defendant with the loss, if the contract was in fact nonexistent, and if there was no contract there was no breach, and so, on the proof, the defendant would stand wholly disconnected from the loss of the property.

It is a fundamental principle that the proof must correspond with the allegations in the pleadings. *East Tenn., etc., R. Co. v. Collins*, 85 Tenn. 227, 1 S. W. 883; *East Tenn. Coal Co. v. Daniel*, 100 Tenn. 65, 42 S. W. 1062; *East Tenn., etc., R. Co. v. Lindamood*, 111 Tenn. 457, 78 S. W. 99; *Foster v. Jackson*, 8 Baxt. 484.

In the last-named case, the court said:

"While technical forms in pleadings are not now required, still the parties should be confined to the case made in the pleadings; the proof should correspond with the allegations; the parties ought not to be allowed to charge one case in their pleadings and prove a case substantially different; and we think a charge that an attorney collected the money on a debt due his client and failed to pay it over is substantially different from proof that he did not collect the money, but might have done so with due diligence."

Now, reverting to the case at bar, we think there is quite a substantial difference between the averment in the bill of a loss occasioned by breach of a contract, and proof of a loss not occurring as a breach of contract at all, but of a loss occurring, as the complainant claims under its proof, by breach of a usage, which is a wholly different and distinct thing in its legal essence from a contract. We do not mean to be understood in this opinion as saying that circumstances might not arise where the courts would hold parties to a usage or to a custom—to have created by their course of dealing an implied contract; but under the facts of this case it is clear that there was no contract between the parties to this suit, either express or implied.

The parties to this suit are respectively corporations—one a manufacturing corporation, and the other a railroad corporation. It is not shown by the evidence in this record that the usage, shown to have existed by the proof, was ever brought to the attention of any officer of either of these corporations clothed with authority to make a contract, such as is set out in the bill. The usage in this case, adopted by the inferior employes of these corporations for the convenience and mutual accommodation of the employes in handling shipments, cannot be held to have the force and effect and dignity in law of a solemn contract, either express or implied, between these corporations.

It follows from these views that there was a fatal variance between the averments of the complainant's bill and its proof, on account of which variance there could be no recovery by the complainant in the court below.

There is another view of the case, however, upon which we are equally clear that the complainant was not entitled to a recovery on the proof in this cause, leaving out of view altogether the question of contract.

The risk of a common carrier begins on delivery and acceptance of the goods. *Chitty, Con. 73-78*; *Mathew Watson v. Memphis & Charleston Ry. Co.*, 9 Heisk. 255; *Stewart, Ralph & Co. v. Gracy & Bro.*, 93 Tenn. 315, 27 S. W. 664.

If something remains to be done by the shipper after the goods are put into the hands of the agent of the carrier before they are to be transported, the carrier does not

become liable as carrier until the goods are ready for shipment.

See Cyc. vol. 6, p. 414, and authorities cited in note 60; *Basnight v. Atlanta & N. O. R. R. Co.*, 111 N. C. 592, 16 S. E. 323; 2 Am. & Eng. Encyc. of Law, 808; *O'Neill v. Railroad Co.*, 60 N. Y. 138; *Wells v. Railroad Co.*, 51 N. C. 47, 72 Am. Dec. 556.

Was the delivery to the defendant, as a common carrier ever completed?

Under the proof in the cause, it appears that the warehouse of complainant was located about 400 feet from the main line of the defendant, and for the convenience of complainant in 1896 a spur track was built by the defendant from the main line to the warehouse, and alongside of the same, so that defendant could switch cars alongside the warehouse, thereby enabling complainant to make convenient loading of the car. When complainant had sufficient material to load a car, it would notify defendant's agent by telephone or in writing, and a car would be delivered alongside the warehouse and there loaded by complainant, who would then notify defendant's agent that the car was ready to be pulled out, and after that, at convenient time before the car would leave Lewisburg, complainant would make out a bill of lading in writing in triplicate, and take it to the depot and have it signed. This signing of the bill of lading was usually done after the car was pulled out on the main line, and always before the car left Lewisburg; the defendant insisting on this, and refusing to pull the car out of Lewisburg until the bill of lading was signed. The complainant had scales and weighed each car, and these weights were required to be inserted in the bill of lading. No bill of lading was ever made out by the complainant for the car in controversy in this suit. There was ample time on Saturday, the 22d, after the car was loaded, there was ample time on Sunday, the 23d, there was ample time on Monday, the 24th, before the car burned, for the complainant to have made out this bill of lading, and to have had it signed by the agent of the defendant; but this was not done, and it is admitted by the manager of the complainant, in charge at the time of the fire, that it was not done. He also admits that the defendant company always refused to move a car from Lewisburg until the bill of lading had been signed; but he claims that the defendant should have moved the car out onto the main line on Saturday or Monday, and complainant's contention is that, if this had been done, the car would not have been destroyed by the fire which consumed complainant's warehouse.

It will be noted that two things remained to be done in order to complete the relationship of shipper and carrier as to the car in controversy. One of these things was to be done by the shipper; that is, the preparation and presentation for signature of the bill of lading. This was never done by it.

One thing also remained to be done by the carrier to complete the relation, to wit, the taking of the car into possession. This could have been done by the carrier in two ways, if it had signed the bill of lading, which act would have amounted to constructive possession, inasmuch as the material was already loaded into the car, and the car was standing on the siding accessible to the main track. Or, if the carrier had taken actual possession of the car by pulling it out onto the main track, this would be taking of possession by the carrier; but inasmuch as one thing remained to be done by the shipper, and one thing remained to be done by the carrier, in order to complete the relation of carrier and shipper, the conclusion appears that this relationship did not exist between the parties to this suit as to the car in controversy. Until these two things were done, necessary to create the relationship, the possession of the material in the car and the possession of the car was with the complainant. It was at his warehouse on a siding constructed for his convenience, and most assuredly not in possession of the carrier until the carrier did either one of the two things necessary, as above shown, to transfer the possession or charge it with the possession of the car under the law.

Manifestly, on these facts, the complainant could not base a claim against the defendant under the common carrier liability as an insurer of the goods. The controversy then narrows to this point. The complainant insists that the defendant caused the loss by not moving the car promptly when notified. The defendant answers that it was under no contract obligation to move the car, either express or implied, and that the suit is on contract. The complainant then says that, under the usage, "you are bound to move it promptly." The defendant replies: "You did not sue on the usage. Violation of the usage is not the basis of your suit."

On each of these contentions it seems to us that the defendant has the best of the argument, and when the point is reached where we can say on this evidence that the relation of carrier and shipper did not exist between complainant and defendant as to this car, the complainant is deprived of the benefit of all the authorities on which it bases its contention as to the liability of the defendant; for it is believed that no one of the authorities upon which it relies was based on a state of facts where the relationship of common carrier and shipper did not exist. Assuming, then, that this relationship did not exist, how does the case stand as to the proximate cause of the loss? The proof is without controversy on this point. One of the complainant's employes overturned a coal oil heating stove in the office of complainant's warehouse. The fire from the stove ignited the oil. The flames enveloped the complainant's warehouse, from which they caught and ultimately destroyed the car

load of material in controversy in this suit.

At the time of the fire, as we have seen, the car was in the possession of the plaintiff, and not in the possession of the defendant. The loss occurred before the relationship of carrier and shipper existed. The loss is traceable directly to the act of one of the complainant's employes, and the complainant's act is therefore the act which wrought the destruction of its property. Its act was the proximate cause of the injury. *State of Tenn. v. Ward & Briggs*, 9 Heisk. 105; *Lamont & Co. v. N. C. & St. L. Ry. Co.*, 9 Heisk. 60; *Edgar v. Rio Grande & W. Ry. Co.*, 32 Utah, 330, 90 Pac. 745, 11 L. R. A. (N. S.) 738, 125 Am. St. Rep. 867; *Cooley on Torts* (2d Ed.) 73-76; *Ætna Fire Ins. Co. v. Boon*, 95 U. S. 130, 24 L. Ed. 398; *Milwaukee & St. P. R. R. Co. v. Kellogg*, 94 U. S. 469, 24 L. Ed. 256; *Goodlander Mill Co. v. Standard Oil Co.*, 63 Fed. 400, 11 C. C. A. 253, 27 L. R. A. 587; *Railroad Co. v. Haynes*, 112 Tenn. 712, 81 S. W. 374; *Memphis St. Ry. Co. v. Wilson*, 108 Tenn. 618, 69 S. W. 265; *Nashville St. Ry. Co. v. Norman*, 108 Tenn. 331, 67 S. W. 479; *Saunders v. Railroad Co.*, 99 Tenn. 135, 41 S. W. 1081; *Barr v. Railway Co.*, 105 Tenn. 547, 58 S. W. 849.

In the case of *Lamont & Co. v. N. C. & St. L. Ry. Co.*, 9 Heisk. 59, this court said:

"None of the cases cited in support of this conclusion go to the extent of holding that the delay to ship or start goods to their destination within a reasonable time, after left for transportation, will amount to such neglect as of itself to make the carrier liable for the loss occasioned proximately by the act of God.

"On the contrary, all the cases cited are cases in which the assumed negligence, or want of due diligence and care, occurred at the time of the loss, and while the goods were in transitu."

If mere delay to ship or start goods to their destination within a reasonable time after they are left for transportation does not amount to such neglect as will make the carrier liable for the loss of goods occasioned proximately by the act of God, it is difficult to see how we could hold that mere delay on the part of this defendant company to remove this car as promptly as it might have done, when the car was not in its possession, not in transitu, not covered by a bill of lading, and when the complainant had not surrendered possession of it, will amount to an act of negligence by defendant which we can say was the proximate cause of the loss of the car by the fire.

Even in cases where the relationship of common carrier does exist, the common carrier is not liable where the loss is caused by the shipper's act, whether that act be one of negligence, or misadventure, or misfortune.

See *Hutchinson on Carriers* (1st Ed.) §§

265-328; *Elliott on Railroads*, § 1454; *St. Louis, I. M. & S. Ry. v. Law*, 68 Ark. 218, 57 S. W. 258; *Hart v. Chicago & N. W. Ry. Co.*, 69 Iowa, 485, 29 N. W. 597; *Coweta County v. Central of Ga. Ry. Co.*, 4 Ga. App. 94, 60 S. E. 1018; *Cyc.* vol. 6, p. 379; *Thompson on Neg.* vol. 5, § 6464.

The decree of the chancellor will be affirmed, with costs.

O'LEARY v. BRENT.

(Supreme Court of Arkansas. Jan. 16, 1911.)

APPEAL AND ERROR (§ 790*)—DISMISSAL—ACTION AGAINST RECEIVER.

Under Kirby's Dig. §§ 1227, 1228, which provide that, where an appellant's right of further prosecuting an appeal has ceased, the appellee may move the court to dismiss the appeal, an appeal by the plaintiff in an action for personal injuries against the defendant as the receiver of a street railway will be dismissed, where the receiver has made his report of the sale of the property under orders of the court, and the court has approved the report and discharged the receiver.

[Ed. Note.—For other cases, see *Appeal and Error*, Dec. Dig. § 790.*]

Appeal from Circuit Court, Carroll County; Jas. S. Maples, Judge.

Action by J. C. O'Leary against Henry C. Brent, receiver. On motion to dismiss the plaintiff's appeal, made by the receiver after his discharge. Appeal dismissed.

Jno. P. Leahy and F. O. Butt, for appellant. Chas. D. James and C. A. Fuller, for appellee.

PER CURIAM. H. C. Brent was appointed by the chancery court of Carroll county, Western district, as receiver of the Citizens' Electric Company, a corporation engaged in operating a street railway in the city of Eureka Springs, Ark. While said receiver was operating the street railway under orders of the chancery court, appellant, J. C. O'Leary, instituted an action in the circuit court of Carroll county against him to recover compensation for personal injuries resulting from alleged negligent acts of his servants, and a trial of the action before a jury resulted in a verdict and judgment in his favor. An appeal was prosecuted to this court. Since the appeal was taken, the receiver made his report to the chancellor of the sale of the property of said corporation under orders of the court and the final distribution of the funds in his hands, and the chancery court approved the report and finally discharged the receiver. He now moves the court to dismiss the appeal.

The rule which seems to be supported by the adjudged cases is stated in 34 Cyc. p. 480, as follows: "The effect of a discharge of a receiver is to terminate his duties and authority, and if there is a surrender of jurisdiction over the trust, without any reserva-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

tion as to existing claims, the effect is to release, not only the receiver, but also the property, from further liability." A text-writer on this subject says: "Where the receiver is discharged pending an action against him, it is a bar to the further prosecution of the suit, and should be pleaded by the receiver as such bar; and it seems that the defense does not depend upon notice of the application for a discharge being served upon plaintiff." Smith on Receiverships, § 413. See, also, McGhee v. Willis, 134 Ala. 281, 32 South. 301; Bond v. State, 68 Miss. 648, 9 South. 353; N. Y. & W. U. Tel. Co. v. Jewett, 115 N. Y. 166, 21 N. E. 1036; Archambeau v. Platt, 173 Mass. 249, 53 N. E. 816; Gray v. Grand Trunk Western Ry. Co., 156 Fed. 736, 84 C. C. A. 392.

The statutes of this state provide that, where an appellant's right of further prosecuting an appeal has ceased, the appellee may move the court to dismiss the appeal, or may by answer plead any fact which destroys the appellant's right of further prosecuting the appeal. Kirby's Dig. §§ 1227, 1228.

The appeal is therefore dismissed.

ALEXANDER et al. v. BOARD OF DIRECTORS OF CRAWFORD COUNTY LEEVE DIST.

(Supreme Court of Arkansas. Jan. 23, 1911.)

1. LEEVES (§ 5*)—CREATION OF DISTRICT—ASSESSMENT OF PROPERTY OWNERS—VALIDITY OF STATUTE.

Act March 15, 1909 (Laws 1909, p. 163, § 4), as amended by Act April 23, 1909 (Laws 1909, p. 472), creating the Crawford county levee district, is not invalid as beyond the legislative power for creating a district for local improvements, outside of a city or town, to be paid for by special assessment, without providing a method for obtaining the consent of the property owners within the district; the constitutional requirement of consent of owners being limited to cities and towns not prohibiting such an act, and the Legislature having power, in the absence of constitutional prohibition, to determine for itself the desire of owners in any particular locality, and to create the improvement district and levy assessments for improvements.

[Ed. Note.—For other cases, see Levees, Cent. Dig. § 15; Dec. Dig. § 5.*]

2. LEEVES (§ 22*)—ASSESSMENTS ON VALUATION—VALIDITY OF STATUTE.

Act April 23, 1909 (Laws 1909, p. 472, § 1), amending Act March 15, 1909 (Laws 1909, p. 163, § 4), creating the Crawford county levee district, provides as amended, that the board of directors of such district shall annually levy a tax upon the valuation of the real estate in the district, including the increased value estimated to accrue from protection given by the levee, and that the assessment shall show the estimated value of the land as increased by levee protection. *Held*, that the statute as amended was void for authorizing assessments based on valuations as increased by the levee improvements; assessments for local improvements being required to be based on special

benefits accruing therefrom, and to be in substantial proportion to such benefits.

[Ed. Note.—For other cases, see Levees, Dec. Dig. § 22.*]

3. LEEVES (§ 2*)—STATUTES (§ 168*)—REPEAL—INVALIDITY OF REPEALING ACT.

Act March 15, 1909 (Laws 1909, p. 159), created the Crawford county levee district, and by section 4, provided that to maintain the levee and effect the act the board of directors of the district should levy annually a tax upon the valuation appearing each year upon the realty assessment book upon all lands in the district, and authorized the survey of any tract to ascertain the lands subject to taxation under the act. Section 4 was amended by Acts April 23, 1909 (Laws 1909, p. 472, § 1), so as to authorize the board of directors to annually levy a tax upon the valuation of the realty, including the increased value estimated to accrue from the levee protection and upon all realty within the district, provided for entering the lands upon judgment book, and for notice to landowners aggrieved to enable them to have erroneous assessments corrected, and for the hearing of complaints by landowners and the adjustment thereof, and repealed all acts or parts of acts in conflict therewith. The amending act was void for authorizing assessments based on valuation of the land as increased by the levee improvement. *Held* that, since the original act contained complete authority for the assessment of land, the district could make assessments thereunder, notwithstanding the invalidity of the amending act.

[Ed. Note.—For other cases, see Levees, Dec. Dig. § 2; Statutes, Cent. Dig. § 244; Dec. Dig. § 168.*]

4. LEEVES (§ 23*)—ASSESSMENT—PROPERTY ASSESSABLE—RAILROAD PROPERTY.

Act March 15, 1909 (Laws 1909, p. 163, § 4), provides that to construct and maintain the Crawford county levee district, created by the act, the board of directors of the district shall annually levy a tax upon the valuation appearing each year upon the realty assessment book of the county of all lands within the district. *Held*, that while the act would be valid, even if it did not authorize the assessment of railroad property, it did in fact authorize the assessment of such property; the assessment of such property being certified to the county assessor and listed by him on the county assessment books as other realty.

[Ed. Note.—For other cases, see Levees, Dec. Dig. § 23.*]

Appeal from Crawford Chancery Court; Chas. E. Warner, Special Chancellor.

Action by J. D. Alexander and others against the Board of Directors of Crawford County Levee District. From a decree dismissing the complaint on demurrer, plaintiffs appeal. Reversed, with directions to overrule demurrer as to part of the complaint, and sustain it as to another part.

Hill, Brizzolara & Fitzhugh, Jesse Turner, and S. R. Chew, for appellants. E. L. Matlock and Rose, Hemingway, Cantrell & Loughborough, for appellee.

McCULLOCH, C. J. This action involves an attack by landowners on the validity of an act and an amendatory act of the General Assembly of 1909 creating Levee District No. 1 of Crawford county, Ark., the name and style of the organization being stated

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

in the act as "Board of Directors of the Crawford County Levee District." The original act, approved March 15, 1909, contains the following section relating to assessments to defray the cost of building and maintaining the levee: "That for the purpose of building, repairing and maintaining the levee aforesaid, and for the purpose of paying such sums as may be necessary for the condemnation of property as hereinbefore provided and for carrying into effect the objects and purposes of this act, the board of directors of Crawford county levee district shall have power, and it is hereby made their duty, to assess and levy, annually, a tax upon the valuation as it shall appear each year upon the real estate assessment book of Crawford county, Arkansas; upon all lands and real estate within said district; provided, further, that no error in the names of (or) residence of the owner of the land or real estate, or the description thereof, shall invalidate said assessment and levy of taxes, if a sufficient description is given to ascertain where the lands or real estate is situated. Whenever the board of directors may deem it advisable, they may employ one or more competent surveyors whose duty it shall be to survey any or all of the lands of the district, as they may be directed by the board, for the purpose of ascertaining the lands subject to taxation hereunder." Section 4, p. 163, Acts 1909. The act approved April 23, 1909, amended section 4 of the original act as follows: "That for the purpose of building, acquiring, repairing and maintaining the levee aforesaid and for the purpose of paying such sums as may be necessary for the condemnation of property as hereinbefore and hereinafter provided, and for carrying into effect the objects and purposes of this act, the board of directors of the Crawford county levee district shall have power, and it is hereby made their duty to assess and levy annually a tax upon the valuation of the real estate, including the increased value or betterments estimated to accrue from protection given against floods from the Arkansas river by said levee; and upon all lands and real estate within said levee district as the same shall be assessed by a board of assessors as is hereinafter provided * * * and such board of assessors shall make an assessment of all the lands in said district in a book or books provided by the board for that purpose. The said lands shall be entered upon said book or books in convenient subdivisions as surveyed by the United States government, in appropriate columns showing the names of the owners of said lands, a description of said lands, showing the number of acres in cultivation and in woods as nearly as said assessors can ascertain without measurement, the value thereof as estimated increased by levee protection. * * * That the assessors shall make their assessment at such times as they

may be directed to do so by the board of directors and shall place in the hands of the president of the board of directors their report of said assessment; thereupon the president of the board of directors shall cause a notice to be published * * * calling on the landowners aggrieved by reason of the assessment to appear on the day therein named before the board of assessors at a place of meeting to be named in said notice, for the purpose of having any wrongful or erroneous assessments corrected; that after said notice shall have been given, the assessors shall meet at the place named in said notice on the day mentioned therein, and shall hear any complaint of landowners and persons interested and adjust any errors or wrongful assessments, and their assessments as adjusted shall be the assessment of said levee district until the next assessment shall be ordered by the board of directors." Laws 1909, p. 472. The chancellor sustained a demurrer to the complaint, and the plaintiffs, after declining to amend and suffering a decree to be entered dismissing the complaint for want of equity, appealed to this court.

The whole statute, as originally enacted and as amended, is assailed on the ground that the Legislature exceeded its powers in attempting to create by direct legislation a district for local improvements outside of a city or town, to be paid for out of special assessments, without providing some method of obtaining the consent of the property owners within the district to be affected. That question has never been expressly decided by this court. *Craig v. Russellville Waterworks Improvement Dist.*, 84 Ark. 390, 105 S. W. 867, involved that question as to improvement districts in cities and towns, and the court held that such a statute was void by reason of its failure to provide for obtaining the consent of the property owners. The court based its conclusion entirely on the provision of the Constitution relating to improvement districts in cities and towns. The court in disposing of that case said: "It (the constitutional provision referred to) created a vested property right in owners of real estate in cities and towns. It is a guaranty to them that their property shall not be taxed for local improvements except upon an ad valorem basis, and upon the consent of a majority in value of those to be affected by such improvement. Having this constitutional guaranty that their property shall not be subject to assessment except in this manner, then, until it is assessed in this manner, they have a right to object to any taxation upon it for the purpose of local improvements. * * * It is not the province of the Legislature to determine whether such consent has been obtained as a basis for the improvement. Its province is to create a procedure for obtaining such consent and a forum to determine whether such consent is

obtained." The Constitution is silent as to improvement districts outside of cities and towns, and of this the court in the *Craig Case*, supra, spoke as follows: "This restriction only reaches to local improvements in cities and towns, and leaves the General Assembly free to exercise its sovereign will in this respect elsewhere in the state. The power to create districts for local improvements and to provide a method for taxation therein, and the breadth of that power, and the narrow scope of judicial inquiry into it, have been considered by this court in recent cases." This, of course, must be treated as dictum, so far as it attempted to decide the question now before us, though it was pertinent in the discussion of the questions then before the court. Undoubtedly this court has in many cases treated the question as settled that the Legislature may create improvement districts outside of cities and towns without providing for obtaining the consent of the property owners. *Althelmer v. Plum Bayou Levee Dist.*, 79 Ark. 229, 95 S. W. 140; *St. L. S. W. R. Co. v. Red River Dist.*, 81 Ark. 562, 99 S. W. 843; *Coffman v. Drainage Dist.*, 83 Ark. 54, 103 S. W. 179; *Sudberry v. Graves*, 83 Ark. 344, 103 S. W. 723. The general statute of this state authorizing the formation of drainage districts by order of the county court contains no provision for ascertaining the will of the property owners, and does not make the authority of the county court depend on a petition signed by a majority of such owners; yet the court has repeatedly sustained assessments levied pursuant to the terms of this statute. *Cribbs v. Benedict*, 64 Ark. 555, 44 S. W. 707; *Brown v. Henderson*, 66 Ark. 302, 50 S. W. 501; *Driver v. Moore*, 81 Ark. 80, 98 S. W. 734; *Sudberry v. Graves*, supra; *Ritter v. Drainage Dist.*, 78 Ark. 581, 94 S. W. 711; *Chapman & Dowe Land Co. v. Wilson*, 91 Ark. 30, 120 S. W. 391.

An examination of the opinions in those cases will disclose the fact that almost every conceivable objection was raised to the validity of the statute and proceedings, but this point was never suggested nor expressly decided. It is true the power of the court in the drainage statute is made dependent upon a finding that the improvement will be conducive to the public health or welfare, or that it will be a public utility or benefit, and for this reason the power may be referable to the police power. But still the formation of the district is authorized without the consent of a majority of the property owners where the improvement will be of public benefit. In *Sudberry v. Graves*, supra, we followed the Supreme Court of the United States, holding that it is within the power of the Legislature to ascertain directly the amount of benefits and to levy assessments without delegating the power to do those things to a subordinate agency. We conceive the question now before us to fall within that principle. There being no constitu-

tional hindrance, the Legislature may, in the exercise of the sovereign power, ascertain in its own way the will of the property owners to be affected by the local improvement, and create the district and levy assessments for the construction of an improvement. This falls within the legislative power to legislate for the benefit of the whole state or for the special benefit of any given locality thereof. We find many expressions in the authorities, so ably and interestingly discussed by counsel for defendants, which sustain their contention, that assessments for local improvements must be based on the consent of a majority of those who are to be taxed; but on a careful consideration we are of the opinion that the views we have announced are sound and are in accord with our previous decisions. The validity of the amendatory act of April 23, 1909, is challenged on the ground that it authorizes assessments based on valuation as increased by the improvement. The act clearly states that the assessment shall be levied on "the valuation of the real estate, including the increased value or betterments estimated to accrue from protection given against floods." The assessors are authorized to ascertain the value of said lands "as estimated increased by levee protection," and "the assessments as adjusted shall be the assessment of said levee district until the next assessment shall be ordered by the board of directors." It is, we think, well settled by authority that assessments for local improvements must be based on special benefits to accrue therefrom, and must be laid in substantial proportion to such benefits, and not in excess thereof. This principle is nowhere better expressed than by Special Justice Cockrill in delivering the opinion of the court in *Kirst v. Imp. Dist.*, 86 Ark. 1, 109 S. W. 526, as follows: "Special assessments for local improvements find their only justification in the peculiar and special benefits which such improvements bestow upon the particular property assessed. Any exaction in excess of the special benefit is, to the extent of such excess, a taking of property without compensation. Notwithstanding those principles so firmly settled, and in spite of *Norwood v. Baker*, 172 U. S. 270 [19 Sup. Ct. 187, 43 L. Ed. 443], it has been repeatedly held by the Supreme Court of the United States and this court that an act of the Legislature providing for the assessment of the cost of a local improvement according to the value of the property itself is not arbitrary, and is not in conflict with the federal Constitution. These decisions are based on the principle that it must be assumed that the Legislature in adopting such a method has determined that the amount of benefits will accrue in proportion to the value of the property itself, and thus the assessment is still according to benefits, within the meaning of the law." Judge Riddick, speaking for the majority of the court in *Ahern v. Bd. Imp.*

Dist., 69 Ark. 68, 61 S. W. 575, said: "It has often been decided that the only sound principle upon which assessments for local improvements can stand is that the property assessed is specially and peculiarly benefited by the improvement. If this be the basis upon which such assessments rest, then the most equitable method of apportioning the burden among the property holders of the district is by assessment in proportion to benefits." The opinions in many other cases express the same idea. It has also been held in many of the cases that local assessments may be based on valuation of the property to be benefited, but it is always explained that this is on the theory that the Legislature has determined that the benefits will accrue in proportion to the value of the land, and that the courts should respect that determination. Judge Riddick explained that in the *Ahern Case*, supra, and in the case of *St. Louis S. W. R. Co. v. Board of Directors*, 81 Ark. 562, 99 S. W. 843, we said: "The fact that the assessment is made upon the whole value of the property does not imply that it is not also according to the benefits to accrue from the improvement, for it is not an arbitrary or unreasonable method of ascertaining the amount of the benefits to assume that they will accrue in proportion to the actual value of the whole property. The Legislature acted upon this assumption in providing that the assessments should be fixed according to value, and we cannot say that it is arbitrary or unreasonable."

We have never held, nor are we aware that any other court has ever held, that assessments for local improvements may be assessed according to value as such, but such assessments are always sustained distinctly upon the assumption that the benefits will accrue in proportion to such value, and that, after all, this is only a method of assessing the benefits. Our general statute as to local improvements in cities and towns, as originally enacted, provided for assessments according to valuation fixed from year to year for county taxation. The valuation so fixed, of course, included the increase from year to year. Nevertheless, the assumption is that the benefits will continue to increase from year to year in the same proportion, and that is the theory upon which the assessments were sustained.

But here we have a statute which authorizes assessments on valuation and benefits. It would be a contradiction of terms to say that this was intended as an assessment of benefits on the assumption that the benefits will accrue in proportion to the value of the land; for, if that be true, why include the estimated benefits in the assessment of values? This method of assessment necessarily excludes the idea that the assessment of valuation was intended as a method of assessing the benefits. The injustice of this method of assessment was very aptly illustrated in the argument of counsel for defendant.

Let us suppose the original value of one tract of land in the district to be \$50 per acre, and the estimated benefits to be \$5 per acre, making the total increased value by reason of the improvement \$55 per acre. Another tract may be valued at \$5 per acre, and the estimated benefit \$50 per acre, making the increased valuation \$55 per acre, the same as the other tract. Now, under this method, both tracts are taxed precisely the same amount, whereas one has received tenfold the benefits that the other has received. Is this in accord with the rule fixed by all courts that the assessments must be in proportion to benefits? A method of assessment which could result in this way was expressly condemned by this court in *Kirst v. Imp. Dist.*, supra, as violative of the uniformity clause of the Constitution.

It is earnestly insisted that the language of this statute is substantially the same as that used by the general statute authorizing the formation of levee districts by order of the county court, and that that statute passed in review before this court in *Overstreet v. Levee District*, 80 Ark. 462, 97 S. W. 676, without condemnation. In that case the method of assessment was not called to our attention, and no objection was made to it on the ground that the statute provided an improper basis of assessment. The question now before us was not raised, and that case cannot be treated as a precedent. Besides, the language of the statute involved in the *Overstreet Case* is not precisely the same as the language of the statute we are now reviewing, and we are not called upon to determine whether an assessment made pursuant to that statute would be valid. We are therefore of the opinion that the amendatory act is void. It does not necessarily follow, however, that the district is without power to proceed to perform its functions and to levy assessments. The original act contains complete authority, and is not repealed by the void amendatory act. *Union Sawmill Co. v. Felsenthal*, 85 Ark. 346, 108 S. W. 217; *Beasley v. Gravette*, 86 Ark. 346, 110 S. W. 1053. The original act is assailed on the alleged ground that it omits assessments of railroad property, and is void because such omission destroys the equality and uniformity of the taxation. The statute might be sustained, if held not to authorize assessments of railroads on the assumption of a legislative determination that the railroad in the district will not be benefited, and that it was included in the district out of considerations of convenience. *Stiewel v. Fencing Dist.*, 71 Ark. 17, 70 S. W. 308, 71 S. W. 247. But we are clearly of the opinion that the railroad in the district is subject to assessment. This is settled by the decision of this court in *K., C. P. & G. R. Co. v. Imp. Dist.*, 68 Ark. 376, 59 S. W. 248. The assessment of railroad property is certified down to the county assessor, and by him listed on the county assessment

books like other real property. The board of directors of the levee district are empowered to ascertain the extent of the railroad property in the district, and to cause it to be extended for special taxation in accordance with the assessment for county purposes. This accomplishes the will of the lawmakers in determining that the railroad property, like other real property, will receive benefits in proportion to its assessed valuation.

It follows from what we have said that the court erred, and the decree is reversed, with directions to overrule the demurrer to the complaint, so far as it seeks to prevent the enforcement of assessments under the amendatory act of April 23, 1909, but to sustain the demurrer in so far as an attack is made upon the right to levy assessments under the original act of March 15, 1909, and to make sale of bonds authorized by the statute.

CALDWELL v. NICHOL.

(Supreme Court of Arkansas. Jan. 30, 1911.)

1. EVIDENCE (§ 123*)—RES GESTÆ—STATEMENT AFTER EVENT.

A statement by a night watchman of a livery stable, made the next morning, as to an accident to a horse during the night, was not a part of the res gestæ.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 351-368; Dec. Dig. § 123.*]

2. EVIDENCE (§ 242*)—ADMISSIONS BY AGENT—SCOPE OF AUTHORITY.

Evidence of a statement by a night watchman of a livery stable that he found the gate of an injured horse's stall upon the animal was not competent against the livery man as an admission of his agent, not being within the scope of the watchman's authority.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 896-907; Dec. Dig. § 242.*]

3. LIVERY STABLE KEEPERS (§ 7*)—CARE OF HORSES AND VEHICLES—"ORDINARY CARE."

A livery man is liable for injuries to horses in his care only when caused by his lack of ordinary care, which is that care an ordinary man would exercise over his own similar property under like conditions.

[Ed. Note.—For other cases, see Livery Stable Keepers, Cent. Dig. § 6; Dec. Dig. § 7.*]

For other definitions, see Words and Phrases, vol. 6, pp. 5029-5042; vol. 8, pp. 7739, 7740.]

4. TRIAL (§ 252*)—INSTRUCTIONS—APPLICABILITY TO EVIDENCE.

An instruction based on facts not shown by the evidence was properly refused.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 596-612; Dec. Dig. § 252.*]

5. LIVERY STABLE KEEPERS (§ 7*)—CARE OF HORSES—OWNER'S KNOWLEDGE OF DEFECTIVE STALL—ESTOPPEL.

The knowledge of the owner of a horse injured in a livery stable that for a long time it had been kept in a certain stall did not estop him from asserting the negligence of the livery man in keeping him in a defective one.

[Ed. Note.—For other cases, see Livery Stable Keepers, Cent. Dig. § 6; Dec. Dig. § 7.*]

6. LIVERY STABLE KEEPERS (§ 7*)—CARE OF HORSES—OWNER'S KNOWLEDGE OF DEFECTIVE STALL—ASSUMPTION OF RISK.

Where a horse kept in a livery stable was injured through an alleged defective stall, the owner did not assume the risk of injury by his knowledge of the stall's condition, for the liveryman was bound to use ordinary care in providing a reasonably safe one.

[Ed. Note.—For other cases, see Livery Stable Keepers, Cent. Dig. § 6; Dec. Dig. § 7.*]

Appeal from Circuit Court, Jefferson County; Antonio B. Grace, Judge.

Action by C. M. Nichol against D. A. Caldwell. From a judgment for plaintiff, defendant appeals. Reversed and remanded.

Crawford & Hooker, for appellant. White & Alexander, for appellee.

MCCULLOCH, C. J. The defendant, D. A. Caldwell, is the keeper of a livery stable in the city of Pine Bluff, and stabled the plaintiff's horse for hire. The horse had been kept in the same stable and in the same stall before defendant purchased the stable. Early one morning, before day-break, the horse was found with a broken leg, and had to be killed, as the veterinarians, who were called in, decided that the fractured limb could not be successfully treated.

The plaintiff sues to recover the value of the horse, alleging that the injury occurred by reason of negligence on the part of defendant in failing to keep the horse in a suitable stall. The stall was provided with a lattice gate about four feet high, being about 12 or 15 inches above the floor; the lattices being several inches apart so that a horse's foot could go through the spaces between, and it is alleged in the complaint that the negligence of the defendant consisted of having a gate of that kind swung above the ground in the manner indicated, and that, by reason of such improper construction of the gate and the distance from the ground, the horse got his foot under the gate or through the opening between the lattices, and, in trying to free himself, broke his leg. The defendant answered, denying the charge of negligence in the construction of the gate, and denying that the horse was injured by getting his foot hung under the gate or through the openings therein. A jury trial resulted in a verdict for the plaintiff, and defendant has appealed.

No witness who testified in the case saw the horse in the position the horse was in when first discovered with the fractured limb. A negro named Tom Morrow, who was night watchman in the stable, first discovered the horse's condition, and reported it by telephone to Dr. Smith, a veterinary, and the latter reported the matter to the plaintiff and defendant. Dr. Smith was the first to get to the stable, and he found the horse standing outside of the stall and in another part of the stable. The leg was

broken above the hock—a compound fracture. There were no scratches nor bruises on the horse except the broken skin where the bone protruded, and there appeared to be no hair rubbed off at any place. It was largely a matter of speculation among the witnesses as to the precise manner in which the leg came to be broken. The theory of the plaintiff was that the horse got his foot or leg through one of the spaces between the lattices, and, in trying to free himself, fell and broke his leg. The plaintiff disclaimed any contention that the horse got his leg hung under the gate. The theory of the defendant was that the horse in some manner fell on his leg in getting up, and broke it, and then fell on the gate and broke that. The testimony adduced by defendant tended to show that the gate was mashed down, the upper hinge having been entirely broken off, appearing to have been mashed downward, and the gate was swinging on the lower hinge, which was also to some extent bent downward.

The plaintiff was permitted, over defendant's objection, to testify that, when he got to the stable that morning, he asked Tom, the watchman, "How did you find that gate?" and that the latter replied, "I found that gate on top of the horse." This is assigned as error. The statement was prejudicial to defendant, for it tended to establish plaintiff's theory of the case, and to refute the defendant's theory that the horse fell on the gate and broke it down in trying to get out of the stall after his leg was fractured. The statement was inadmissible as a part of the *res gestæ*, and it was not competent as an admission of defendant's agent, not being made in the scope of his authority. *Stecher Cooperage Works v. Steadman*, 78 Ark. 381, 94 S. W. 41. The law applicable to this case has been announced by this court in *Bigger v. Acree*, 87 Ark. 318, 112 S. W. 879, 23 L. R. A. (N. S.) 187, as follows: "A livery stable keeper for hire is required to use ordinary care of the animals committed to his charge. And he is liable for the injuries to horses placed in his charge when, and only when, such injuries are occasioned by negligence on his part. 'The ordinary care required, according to the familiar definition, is that degree of care which a person of ordinary prudence would take of the property, under the same circumstances, if it were his own.'" We are of the opinion that the circuit court submitted this case to the jury upon instructions in harmony with the above announcement of the law, and that the evidence was sufficient to justify a submission to the jury of the question whether or not the defendant was guilty of negligence in failing to exercise ordinary care in providing a reasonably safe stall in which to keep the horse. The following instruction asked by defendant

was, we think, properly refused: "If you find from the evidence that the plaintiff selected the stall in which the horse was kept, or that he had been having the horse kept in the same stall, or in one of the same kind with the same kind of gate, while the stable was run by a former stable keeper, then the plaintiff cannot recover, even if the horse did get his leg broken by getting it through or under the gate." There was no evidence that the plaintiff selected the stall. It was the duty of the defendant, under his contract as bailee, not the plaintiff, to select and provide the place in which the horse was to be kept and to exercise ordinary care in providing a reasonably safe place, and the fact that the horse had been kept for a long time in the stable where he was injured did not estop him to assert negligence on the part of defendant, and his knowledge as to the kind of stall did not put him in the attitude of assuming the risk of the danger. He was not called on to determine whether or not the place was safe, for that was the business of defendant. If he had actually selected the stall with that kind of a door, he might be estopped by his own choice of the particular place where his horse was to be kept, but, as already stated, there is no evidence of his having made the selection. On the contrary, he testified that he made complaint to defendant concerning the stall.

For the error, however, in admitting improper testimony, the judgment is reversed, and the cause is remanded for a new trial.

WILSON v. STATE.

(Supreme Court of Arkansas. Jan. 30, 1911.)
LARCENY (§ 22*)—STEALING AND BRINGING PROPERTY INTO THE STATE.

Kirby's Dig. § 2100, providing that one who "shall steal or obtain by robbery" property without the state, and bring it into the state, may be tried and punished for larceny, does not cover the case of one merely receiving stolen property out of the state and bringing it into the state.

[Ed. Note.—For other cases, see Larceny, Cent. Dig. § 49; Dec. Dig. § 22.*]

Appeal from Circuit Court, Craighead County; Frank Smith, Judge.

Joe Wilson appeals from a conviction. Reversed and remanded for new trial.

Going & Brinkerhoff, for appellant. Hal L. Norwood, Atty. Gen., and Wm. H. Rector, Asst. Atty. Gen., for the State.

HART, J. Appellant was convicted of the crime of bringing stolen property into this state, and, to reverse the judgment of conviction, has duly prosecuted an appeal to this court.

The testimony on the part of the state tended to show that the property was stolen

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

by appellant in the state of Tennessee, and was brought by him into this state. The testimony on the part of appellant tends to show that he did not steal the property, but purchased it, and that, if in fact it had been stolen, he did not know it when he bought it. Appellant was indicted under section 2100 of Kirby's Digest, which reads as follows: "Every person who shall steal or obtain by robbery the property of another, in any other state or country, whether the same be within the jurisdictional limits of the United States or not, and shall bring the same within this state, may be indicted, tried and punished for larceny in the same manner as if such property had been feloniously stolen or taken within this state; and in any such case the larceny may have been charged to have been committed in any county into or through which such stolen property may have been taken."

"The statute which authorizes the prosecution of a thief in any county in this state where he may be found with property stolen in another state is not abrogated by the provisions of the Constitution of 1874, which secures to parties a trial in the county in which the crime was committed." *State v. Johnson*, 38 Ark. 568. The Attorney General, however, confesses error in this case because the court told the jury that it was not essential that the proof should show that appellant himself stole the goods in the state of Tennessee, but that the requirement of the law would be met if the evidence showed beyond a reasonable doubt that the appellant himself stole the goods, or that he was an accessory either before or after the fact to the theft there. The confession will be sustained. It will be noticed that the statute is directed against the person who steals the property, and proceeds upon the theory that, where the property was stolen in the first place, the act of removal by the thief into this state constitutes a new taking here, and this gives jurisdiction in Craighead county, where the property was carried. It is well settled, however, that the laws of the state of Arkansas have no extraterritorial effect. If the appellant had no connection with the original stealing of the goods, and was only guilty of the crime of receiving stolen goods, that crime was committed in the state of Tennessee, and appellant cannot be punished for it here under section 2100, Kirby's Digest. In order to convict under the statute, it must be shown that the person who committed the larceny in the first instance brought the property into this state, and in this way show a continuous felonious intent, which is necessary to give the courts of this state jurisdiction. If appellant had no connection with the original stealing, and his only connection with the crime was that of receiving the goods after they were stolen,

he committed no crime under the statute in question. 1 Blash. Crim. Law, §§ 137, 142; 1 McClain's Crim. Law, §§ 552, 553; *Campbell v. People*, 109 Ill. 565, 50 Am. Rep. 621; *West v. State*, 28 Tex. App. 1, 11 S. W. 635; *Rapalje on Larceny*, § 63.

It follows that the court erred in giving the instructions complained of, and the confession of error of the Attorney General is sustained.

The judgment will be reversed, and the cause remanded for a new trial.

RUSSELLVILLE ANTHRACITE COAL MINING CO. v. OUITA COAL CO.

(Supreme Court of Arkansas. Jan. 30, 1911.)

1. CORPORATIONS (§ 432*)—SALE TO OFFICER—IDENTITY OF PURCHASER—EVIDENCE.

In an action for the price of goods sold, evidence held to require a finding that the goods were sold to defendant corporation, and not to its general manager as an individual.

[Ed. Note.—For other cases, see *Corporations*, Cent. Dig. § 1737; Dec. Dig. § 432.*]

2. CORPORATIONS (§ 521*)—SALE TO OFFICER—LIABILITY OF CORPORATION—INSTRUCTIONS.

In an action for the price of goods sold, plaintiff claimed that the sale was by plaintiff as a corporation through its manager to defendant another corporation, through its manager, and defendant claimed that the sale was to its manager as an individual. The court charged that, if the managers of the two corporations during the progress of the sale understood the transaction differently, then the court would instruct that there was no sale to either defendant company or its manager, and, in that event, plaintiff would be entitled to recover the value of the goods of the defendant company as proved by the evidence. Held, that such instruction should not be construed to mean that, if the parties did not understand the transaction, it would not be a sale, even though what was at the time said and done would have amounted in law to a sale, since the court, and not the parties, must determine the effect of the transaction, and whether or not it amounted in law to a sale.

[Ed. Note.—For other cases, see *Corporations*, Cent. Dig. § 2097; Dec. Dig. § 521.*]

3. APPEAL AND ERROR (§ 231*)—AMBIGUOUS INSTRUCTIONS—SPECIFIC OBJECTION.

Ambiguity in an instruction given cannot be taken advantage of on appeal unless a specific objection thereto was made at the trial.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 1299, 1352; Dec. Dig. § 231.* Trial, Cent. Dig. § 689.]

Appeal from Circuit Court, Pope County; Hugh Barham, Judge.

Action by the Ouita Coal Company against the Russellville Anthracite Coal Mining Company. Judgment for plaintiff, and defendant appeals. Affirmed.

Brooks, Hays & Martin, for appellant. R. B. Wilson, for appellee.

FRAUENTHAL, J. This was an action instituted by the Ouita Coal Company, the plaintiff below, to recover from the defendant, the Russellville Anthracite Coal Mining

Company, the balance due for the purchase price of a lot of machinery, rails, and other articles which it claims that it sold to defendant. There is no question made relative to the items claimed to have been sold, or as to the price thereof, or as to the amount of the payment made thereon. The defendant denies solely that it purchased any of the property, the purchase money of which is sued for, from the plaintiff. The defendant is a corporation and one H. W. Barrett is a large stockholder thereof and its general manager. The plaintiff is also a corporation and one J. P. Hoye is its manager. The testimony proves that the contract for the sale and purchase of the above property was made by and between the plaintiff's manager and said H. W. Barrett, and that all said property was finally actually received and used by the defendant. It is contended by the defendant, however, that the property was purchased by H. W. Barrett individually, and that he then sold same to defendant, who paid him therefor. The plaintiff contends that it sold the property to the defendant through its general manager, Barrett. The sole question involved in this case is whether or not the property was purchased by H. W. Barrett individually for himself, or whether the property was sold to him as the general manager of and for the defendant. This was a question of fact, and peculiarly within the province of a jury to determine. The court instructed the jury, in effect, that it devolved upon the plaintiff to prove by the preponderance of the testimony that it sold the property to the defendant before it could recover. Among other instructions it gave the following: "(3) If Mr. Barrett was there in his individual capacity and bought this property, and then sold it to this defendant company, * * * then the plaintiff cannot recover, and you will find for the defendant."

The jury returned a verdict in favor of the plaintiff, and we think that there was sufficient evidence to warrant them in returning the verdict they did. In fact, we are of the opinion that not only is the great preponderance of the evidence in favor of their finding, but that virtually the uncontradicted testimony supports it. It is conceded by H. W. Barrett in his testimony that he was the general manager of defendant's business, and that he had full authority to purchase this property for it. He claimed that he bought the property individually because he had a disputed claim for damages against some of the stockholders of plaintiff, or against the plaintiff itself, and that he desired to use that claim as a set-off against the purchase price of this property. But he made statements to witnesses, which he did not deny, that at the time he made the purchase of the property he did not intimate that he was purchasing it for himself individually, and was careful not to let the seller know this, for the reason that he knew

it would not sell to him individually on account of the disputed individual claim which he desired to use as a set-off against the purchase price. Mr. Hoye, the plaintiff's manager, testified, however, that he not only sold the property to Barrett acting in his capacity as defendant's general manager, but that at the time of and before the sale they spoke of the fact that the defendant needed the property in its mines and works, and that Barrett, before consummating the trade, made inquiry of some of defendant's employes to learn whether or not the pumps and other portions of the property purchased could be satisfactorily used by defendant at its mines. And this testimony we think was virtually undisputed. In addition to this, it appears that, while Barrett was interested as a stockholder in a number of companies which were operating mines and could have used this property, he individually did not own or operate a mine, and had no individual use for this property. He claims that he bought the property individually without making definite statement to that effect to the seller, and that he immediately resold it to the defendant, but he does not claim that either he or the defendant ever made a transaction of this character either before or since this purchase, or that he at the time intimated to the seller that this was the character or purpose of the purchase. The property was immediately shipped partly by wagon and partly by rail. The portion that was shipped by wagon was delivered directly to defendant at its mines, and the portion that was sent by rail was shipped to Russellville the nearest railroad station to defendant's mines, whence it was then delivered to defendant at its mines. The witness Barrett did not testify at what time he made the alleged sale of this property to defendant, or that its board of directors authorized any purchase of it from him, or that any of defendant's officers made a contract with him to purchase it from him. From the actual things that were done and said when the sale was made and from the facts attending the delivery of the property to defendant, we think that the undisputed testimony in effect shows that the sale of this property was made to the defendant, and not to Barrett individually. It is urged that the court erred in giving the following instruction to the jury: "(4) If you find, however, that Mr. Hoye and Mr. Barrett in the progress of the sale understood the transaction differently, then the court would instruct you that there is no sale to either Barrett or the defendant company, and, in that event, the plaintiff would be entitled to recover the value of the goods of the defendant company as proven by the evidence." The manifest purpose of this instruction was to tell the jury that, if the minds of the parties did not meet at the time, then there was no valid sale, and that in such event plaintiff could recover the value of the property from defendant, if it had

converted it to its own use. The court, we think, did not mean and the jury could not have understood it to mean by this instruction that, if the parties did not understand the transaction, it would not be a sale, even though what was at the time said and done would have amounted in law to a sale. The court, of course, and not the parties, must determine the effect of the transaction had, and whether or not such transaction amounted in law to a sale. But, if this instruction was open to the objection that it was ambiguous, it was the duty of defendant to make a specific objection thereto, so that the attention of the court could have been directed to such ambiguity in the language used and corrected it. This was not done, and the defendant cannot now complain of such an error. But we think, furthermore, that this instruction, if erroneous, was not prejudicial, because under the undisputed testimony the plaintiff was entitled to recover.

The judgment is affirmed.

HAYES et al. v. MARTIN et al.

(Supreme Court of Arkansas. Jan. 30, 1911.)

1. DEEDS (§§ 207, 208*) — EVIDENCE — EXECUTION AND DELIVERY.

Evidence in a suit involving the execution and delivery of a deed held to show both.

[Ed. Note.—For other cases, see Deeds, Dec. Dig. §§ 207, 208.*]

2. MORTGAGES (§ 587*) — FORECLOSURE — CONCLUSIVENESS — PERSONS CONCLUDED.

Where owners of land are not parties to a foreclosure suit against it, they are not concluded by the judgment.

[Ed. Note.—For other cases, see Mortgages, Cent. Dig. §§ 1685-1688; Dec. Dig. § 587.*]

3. DEEDS (§ 120*) — PROPERTY CONVEYED — SUBSEQUENT DEED.

A deed executed after a voluntary conveyance cannot defeat it or convey a greater estate than remains to the grantor.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. §§ 375-454; Dec. Dig. § 120.*]

4. APPEAL AND ERROR (§ 1009*) — REVIEW PENDING BY COURT — EQUITABLE ACTION.

A finding of a chancellor not against the preponderance of evidence will not be disturbed on appeal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3970-3978; Dec. Dig. § 1009.*]

Appeal from Desha Chancery Court; Zachariah T. Wood, Chancellor.

Action by Dollie Martin and another against Daniel Hayes and others, in which Anna Harris intervened. From a judgment for plaintiffs, Hayes and Anna Harris appeal. Affirmed.

This action involves the title to 60 acres of land, and was commenced in the chancery court on the 28th day of January, 1909, by Dollie Martin and Reed Ann Smith against W. R. Kirby, Lee Whitney, and Daniel Hayes.

Subsequently Anna Harris intervened, claiming title to the land.

The evidence on the part of the plaintiffs is substantially as follows: Daniel Hayes originally owned the land, and on June 17, 1889, conveyed the same by deed to Ailsey Ann Freeman, who was at the time only 10 years old. Dollie Martin is the stepdaughter of Daniel Hayes, and Ailsey Ann Freeman and Reed Ann Smith were both the daughters of Dollie Martin, but were half-sisters. Ailsey Ann Freeman died in 1899 without issue and owned the lands at the time of her death; and her father had died before her. Hence plaintiffs claim that the title to same at her death became vested in them subject to a life estate which had been reserved in Daniel Hayes by his deed to Ailsey Ann Freeman. Subsequently Daniel Hayes mortgaged the land to W. R. Kirby, and the latter instituted proceedings in the chancery court against Daniel Hayes to foreclose his mortgage. Lee Whitney purchased the land at the sale, and confirmation thereof was had on April 21, 1908. Whitney subsequently deeded the lands to Kirby. The latter is now in possession of same, claiming to have a fee-simple title therein, instead of an estate for the life of Daniel Hayes. On the part of Anna Harris there is testimony showing that she is the daughter of Daniel Hayes, and that on the 12th day of December, 1903, Daniel Hayes executed a deed to her to the lands in controversy in consideration that she support him for the remainder of his natural life. The chancellor found that the defendant Anna Harris had no title or interest in the lands, and that the life estate of Daniel Harris had been sold in the mortgage foreclosure suit brought against him by Kirby; and they have appealed from the decree entered against them. No appeal has been prosecuted by Kirby and Whitney. Additional facts will be stated in the opinion.

Bradshaw, Rhoton & Helm and Nelson H. Nichols, for appellants. Williamson & Williamson, for appellees.

HART, J. (after stating the facts as above). The decision of the chancellor was right. The draftsman of the deed from Daniel Hayes to Ailsey Ann Freeman testified that he was a notary public in 1889, and during that year, at the request of Daniel Hayes, he prepared a deed from him to Ailsey Ann Freeman, in which a life estate was reserved in Hayes; that after its execution Hayes requested him to have the deed recorded, and that he did so; that after the deed had been recorded he brought it back and delivered it to the girl; that he drew the deed and took the acknowledgment thereof at the request of Hayes, who told him that he wanted to deed the land to the girl, but to reserve a life estate in himself. His

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

testimony was corroborated by the plaintiff Dollie Martin. This testimony was sufficient to show the execution and delivery of the deed to Allsey Ann Freeman. *Graham v. Suddeth*, 133 S. W. 1033; *King v. Slater*, 133 S. W. 173. Allsey Ann Freeman owned the land subject to the life estate of Daniel Hayes at her death, and, having died without issue, her title to the land became vested in the plaintiff, her mother and sister.

The plaintiffs were not made parties to the foreclosure suit of Kirby, and hence are not affected by that action. Besides, Kirby has not prosecuted any appeal from the decision of the chancellor. The deed of Daniel Hayes to Anna Harris was made subsequent to his deed to Allsey Ann Freeman. Hence he conveyed nothing to Anna Harris except his life estate which had been reserved in the first deed. Kirby testified that he required Anna Harris to reconvey the land to Daniel Hayes before he mortgaged the land to him, and that this was done before the mortgage was executed to him. Anna Hayes denies this, but the finding of the chancellor is against her, and his finding, not being against the preponderance of the evidence, will not be disturbed.

It follows that the decree must be affirmed.

THORNTON v. FINDLEY et al.

(Supreme Court of Arkansas. Jan. 30, 1911.)

1. CHATTEL MORTGAGES (§ 255*)—FORECLOSURE—REMEDIES—EQUITY SUIT.

A chattel mortgagee may sue at law to recover the chattel or for its conversion, or he may sue in equity to foreclose the lien he has thereon by virtue of the mortgage.

[Ed. Note.—For other cases, see *Chattel Mortgages*, Cent. Dig. § 517; Dec. Dig. § 255.*]

2. SALES (§ 477*)—CONDITIONAL SALE—WAIVER.

Where a seller under a conditional contract of sale after payment of a part of the price, took a second note for the balance, secured by a chattel mortgage on the property without reservation of the title as further security, he thereby elected to consider the sale absolute, so as to vest the legal title in the buyer, subject to the lien of the mortgage.

[Ed. Note.—For other cases, see *Sales*, Cent. Dig. §§ 1411-1417; Dec. Dig. § 477.*]

3. CHATTEL MORTGAGES (§§ 17, 124, 140, 144, 194*)—INTEREST OF MORTGAGOR—PRIORITIES—RECORD.

Defendant sold a mare conditionally, receiving part of the price, and a week later the purchaser gave plaintiff a chattel mortgage on the mare, which was promptly recorded. Some months later, defendant took a chattel mortgage on the mare for the balance of the purchase price, not reserving title, and did not at once record the mortgage. *Held*, that the conditional sale to the purchaser passed a title which could be mortgaged, and that the mortgage would cover the title the purchaser then had or might later acquire, and, as the unconditional title vested in the purchaser when defendant took his mortgage, plaintiff's mortgage attached and was prior to defendant's, though for the purchase price, because of his failure to promptly record,

under Kirby's Dig. § 5396, making the record of a chattel mortgage essential to affect third persons.

[Ed. Note.—For other cases, see *Chattel Mortgages*, Cent. Dig. §§ 55-58, 203, 209, 237, 238, 241; Dec. Dig. §§ 17, 124, 140, 144, 194.*]

Appeal from Craighead Chancery Court; Edward D. Robertson, Chancellor.

Action by H. C. Thornton against James Findley and another to foreclose a mortgage. From a decree awarding Findley a superior lien on the property, plaintiff appeals. Reversed and remanded, with directions.

Basil Baker, for appellant. Lamb & Caraway, for appellees.

FRAUENTHAL, J. This was an action instituted in the chancery court by H. C. Thornton, the plaintiff below, to foreclose a mortgage executed by A. D. Henry to him on one surrey and one mare, to secure the payment of a note. The mare was at the time of the institution of the suit in the possession of J. H. Findley, who was also made a defendant. The defendant Henry made default, but the defendant Findley filed an answer in which he claimed a superior lien upon said mare for indebtedness due by said Henry to him. It appears from the testimony that Findley sold and delivered the mare to Henry on April 12, 1908, for \$150, a part of which purchase money was paid in cash, and for the balance thereof he executed a note to Findley, with one J. S. St. Clair as surety thereon, due eight months after date. At the time of the sale there was a verbal agreement between the parties that the title to the mare should remain in Findley until the payment of the note. On April 18, 1908, Henry purchased a surrey from the plaintiff, and, to secure the payment of a note given therefor and other indebtedness, he executed to him a mortgage on said surrey and said mare. This mortgage was duly acknowledged and recorded on April 18, 1908. Thereafter, from time to time, Henry made payments to Findley upon the note executed by him to Findley for the mare, amounting in the aggregate to \$43, and on December 31, 1908, executed a new note for the balance thereof, \$107, due one year after date, with the said St. Clair as surety thereon, and at the same time executed a mortgage on said mare to secure the payment of this last note. This mortgage to Findley was not recorded until August 27, 1909. At the time of the execution of the second note to Findley, the first note executed by Henry to him for the mare was thus paid; but at that time there was no agreement, either written or verbal, that the title to the mare was thereafter reserved in the vendor. In October, 1909, Henry turned the possession of the mare over to Findley, upon the note and mortgage executed by him to Findley. The chancellor entered a decree foreclosing both

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

mortgages, but declared that Findley was entitled to a superior lien upon the mare under the mortgage executed by Henry to him. From that portion of the decree giving to Findley a superior lien upon the mare, the plaintiff has appealed to this court.

The plaintiff had the right to institute suit in the chancery court for the foreclosure of his chattel mortgage. This was one of the remedies which he had a right to pursue, and a court of equity possesses the jurisdiction to foreclose a chattel mortgage. A mortgagee of chattels may pursue any of the remedies to which he is entitled; he may sue at law for the recovery of the chattel or for its conversion, or he may sue in equity for the foreclosure of the lien which he has thereon by virtue of the mortgage.

In Jones on Chattel Mortgages (5th Ed.) § 758, it is said: "He has the same right that a mortgagee of real property has to pursue all his remedies. He may maintain a suit at law to recover the mortgage debt, and also a suit at law to recover possession of the mortgaged property, and at the same time proceed under a statute or in equity to foreclose the mortgage. In the absence of any controlling statute, the foreclosure of a chattel mortgage is inherently a matter of equity jurisprudence."

The sole question, then, involved in this case relates to the priority of the rights and liens of the plaintiff and the defendant Findley upon the mare. On April 12, 1908, Findley sold the mare to Henry, but at the time reserved the title thereto in the vendor. This was a conditional sale, whereby the full title did not pass to the vendee, but upon the maturity of the first note given therefor the vendor had the right to determine whether the sale should be conditional or absolute, and, until he did so elect to determine, the title still remained in him, in event the purchase money for the mare was not paid at or before the maturity thereof. But by the contract of sale, although conditional, Henry obtained an interest in the mare. He had paid a part of the purchase money at the time he bought the mare, and he had an interest therein which he could mortgage. *Sunny South Lumber Co. v. Neimeyer Lumber Co.*, 63 Ark. 268, 38 S. W. 902; *Snyder v. Slatton*, 92 Ark. 530, 123 S. W. 649.

Henry had therefore a right to execute a mortgage upon the mare to the plaintiff on April 18, 1908, before which time he had purchased, though conditionally, the mare and had the possession thereof; and by virtue of such mortgage the plaintiff became entitled to a lien on all the interest which Henry then owned in the mare, or which he might thereafter acquire. When the indebtedness due to Findley, the vendor, for the purchase money of the mare matured, and was not paid, he had the right to elect whether he would treat the contract for the sale at an end and thus cancel the debt, or whether he would insist on the existence and payment of

said indebtedness and thus affirm the sale and make it absolute. At the time when Findley took the second note from Henry for the mare, the indebtedness for the original purchase money had matured, and part thereof had been paid. At that time two courses were open to him to pursue: Either to treat the sale at an end and to reclaim the property, or to consider the condition waived and to seek payment of the price, either in cash or by note, or other property. And, as a general rule, if the vendor takes a mortgage or other security for the price without then reserving title, such act will be regarded as a waiver of the condition of the original sale and an election to consider the sale as absolute. In the case of *Edgewood Distilling Co. v. Shannon*, 60 Ark. 133, 29 S. W. 147, it was held that where a vendor of personal property, sold conditionally, sued to recover its possession and there was evidence tending to prove that after the sale the purchase money was paid partly in cash and by the execution of a new note, the vendee's title became absolute, unless there was an agreement for a reservation of title in the vendor at the time of the execution of the second note therefor. *Jones v. Daniel*, 67 Ark. 206, 53 S. W. 890; *Butler v. Dodson*, 78 Ark. 569, 94 S. W. 703; *Baker v. Brown Shoe Co.*, 78 Ark. 501, 95 S. W. 808; 35 Cyc. 675.

In the case at bar when Findley took the second note on December 31, 1908, for the balance due upon the purchase money of the mare, there was no agreement that he reserved title thereto until the payment of that note. On the contrary, he took a mortgage upon the mare in order to secure the payment of the note, and we think that he then waived any condition reserving title, and elected to consider the sale absolute. The absolute title to the mare then vested in Henry, and Findley had then and thereafter only a lien thereon by virtue of the mortgage executed to him. That mortgage was not recorded until August, 1909. Under our mortgage act (*Kirby's Dig.* § 5396) the filing or recording of a chattel mortgage is as essential to its validity as against third persons as any other element entering into the execution and making of a valid chattel mortgage. It is not a valid lien against other mortgagees, purchasers, or creditors acquiring liens thereon until it is filed in the recorder's office, as provided by statutory law. *Fry v. Martin*, 33 Ark. 203; *Dodd v. Parker*, 40 Ark. 536; *Turman v. Bell*, 54 Ark. 273, 15 S. W. 886, 26 Am. St. Rep. 35; *Ringo v. Wing*, 49 Ark. 457, 5 S. W. 787; *Smead v. Chandler*, 71 Ark. 505, 78 S. W. 1066, 85 L. R. A. 353. "As between conflicting mortgages, the one first filed for record will have priority." *Mitchell v. Badgett*, 33 Ark. 387.

But it is urged that the mortgage given to Findley was executed at the same time when the sale became absolute, and should therefore have precedence over a mortgage ex-

executed prior to that time. It is held that a mortgage given to a vendor of land for the purchase money thereof is superior to a lien acquired prior to the execution of the deed therefor, where the mortgage for the purchase money is given and recorded on the land at the same time that the deed is executed therefor. But this is held upon the principle that the execution of the deed and mortgage to the vendor and the record of such mortgage are simultaneous acts, and the title to the land does not for a single moment rest in the purchaser, but merely passes through his hands and vests in the mortgagee without stopping at all in the purchaser; and that during such instantaneous passage a lien acquired before such time by another cannot attach to the title. But in such case the passing of the title to the vendee, the mortgage back of the property by the vendee to the vendor, and the record of such mortgage must all be done simultaneously. For if the title rests even for a short time in the vendee, with no valid lien thereon in favor of the vendor, then a prior lien secured by another on such property will have precedence over a mortgage subsequently secured by the vendor. It is upon this principle that the cases of *Blevins v. Rogers*, 32 Ark. 258, and *Cohn v. Hoffman*, 50 Ark. 108, 6 S. W. 511, were decided. But in the case at bar the unconditional title to the property vested in the vendee Henry on December 31, 1908, and the mortgage executed for the purchase money was not filed for record until the following August. During all that time the title rested in Henry, and the mortgage given by him to Findley was not, during that time, valid as against third persons who secured or had secured liens thereon. It follows that as between the mortgagees, Thornton and Findley, the priority of their liens is determined by the priority in the time of the filing of their mortgages, and the mortgage of Thornton being filed first in time, it is first and prior in law.

The decree is reversed, and this cause is remanded, with directions to enter a decree in favor of the plaintiff.

JACKSON et al. v. BECKTOLD PRINTING & BOOK MFG. CO. et al.

(Supreme Court of Arkansas. Jan. 30, 1911.)

1. EQUITY (§ 447*)—REVIEW—NEWLY DISCOVERED EVIDENCE—DILIGENCE.

The discovering after decree of evidence which could with reasonable diligence have been discovered before its rendition does not entitle one to review.

[Ed. Note.—For other cases, see Equity, Cent. Dig. §§ 1091-1094; Dec. Dig. § 447.*]

2. EQUITY (§ 447*)—REVIEW—NEWLY DISCOVERED EVIDENCE—LACHES.

The granting of review being a matter of discretion, it is properly refused where a party, after discovering new evidence, while making

an effort to set aside on other grounds the decree sought to be reviewed, waits seven years before asking for the review on account of such evidence.

[Ed. Note.—For other cases, see Equity, Cent. Dig. §§ 1091-1094; Dec. Dig. § 447.*]

Appeal from Clay Chancery Court; Edward D. Robertson, Chancellor.

Bill of review by Josiah A. Jackson and others against the Becktold Printing & Book Manufacturing Company and others. Petition dismissed, and petitioners appeal. Affirmed.

W. W. Bandy, for appellants. La Fayette Hunter, for appellees.

MCCULLOCH, C. J. In the year 1895, Mrs. Fannie C. Jackson, the mother of appellants, owned certain lands in Clay county, Ark., and executed to W. S. Bryan a mortgage thereon to secure a debt said to be due him. In the same year Bryan assigned the debt and mortgage to appellee Becktold Printing & Book Manufacturing Company, a corporation of St. Louis, Mo., in payment or security of a debt of his to the latter. In 1896 said appellee instituted against Fannie C. Jackson an action in the circuit court of Clay county in chancery to foreclose said mortgage, and, on the death of said Fannie C. Jackson during the pendency of said action, the same was revived in the name of appellants as her heirs at law. Counsel was employed to defend for appellants, and the case was contested; the issue being whether or not there was any mortgage debt. The court in January, 1897, rendered a final decree foreclosing the mortgage for the sum of \$5,525 found to be due, and the lands were sold by the court's commissioner and purchased by said appellee. Bryan's deposition was taken by the plaintiff in that suit, and he testified to an indebtedness of Fannie C. Jackson to him in the sum of \$6,000; but he was not cross-examined, the defendants not being present at the examination either in person or by attorney, though having been duly notified. Bryan was present at the trial of the case before the chancellor in January, 1897, and testified orally, in addition to his said deposition being read. This time he was rigidly cross-examined by appellant's attorney. He again stated in this testimony that Fannie C. Jackson was indebted to him under the mortgage in about the sum named above, and in the course of his cross-examination it was developed that he kept an account in his book, which was then in St. Louis, showing the item of his account with Fannie C. Jackson. He promised to reduce his testimony to writing and file the same in the case, and to produce the book showing said account; but he failed to do either. The chancellor rendered his decree, without said oral testimony being reduced to writ-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

ing or said book being produced, and no objection thereto was made by appellant. No further steps were taken to require Bryan to produce his books. In August, 1902, appellants instituted proceedings in the chancery court of Clay county to set aside said foreclosure decree on the alleged ground that it was rendered in vacation. The chancery court refused to set aside the decree, and on appeal to this court affirmed the decision of the chancellor. 86 Ark. 591, 112 S. W. 161, 20 L. R. A. (N. S.) 454. In the progress of that proceeding, appellants took Bryan's deposition and caused him to produce his books, and they now claim and allege that Bryan swore falsely in the foreclosure suit, and that they can prove by his testimony and by said books that Fannie C. Jackson was not indebted to him when the mortgage was assigned to appellee. They filed a bill of review on March 25, 1909, on the ground of the alleged newly discovered evidence, asking that the foreclosure decree be reversed and set aside. The bill was filed in the office of the chancery clerk, without first obtaining leave of the court, and subsequently appellee appeared and objected by demurrer to the petition for leave to file the bill. The court sustained the demurrer and dismissed the petition.

The principles which must control in the determination of this case were fully stated in a recent opinion of this court as follows: "It is the policy of the law that a decree solemnly entered should not be set aside or modified except for cogent reasons. The issues that are presented in a suit should be fully developed by the testimony, and it is presumed, when a cause is finally submitted for determination and decree, that the parties have adduced all evidence of which they had knowledge or which they could have known by the exercise of diligence. Therefore it has been uniformly held that the new matter for which a bill of review will lie must be such as was not known to the petitioner or his attorney in time to be used in the suit, or could not have been known by the exercise of reasonable diligence." *Smith v. Rucker*, 129 S. W. 1079.

The court, in the case of *Bartlett v. Gregory*, 60 Ark. 453, 30 S. W. 1043, had this to say on the same subject: "Where a bill of review is for newly discovered matter, the rule now is that the matter must be such as could not have been discovered by the use of reasonable diligence, for, if there be any laches or negligence in this respect, that destroys the title to the relief."

The same ground is covered by the Supreme Court of Alabama in the case of *Adler v. Van Kirk Land & Construction Co.*, 114 Ala. 551, 21 South. 490, 62 Am. St. Rep. 133, as follows: "The doctrine is now too well settled to admit of controversy, and is upheld by a sound and conservative public policy, that, to maintain a bill of review

upon newly discovered evidence, the matter must not only be new—that is, ascertained or discovered after the court had passed its decree—but it must also affirmatively appear by approximate averments and by proof that the party complaining by the use of reasonable diligence could not have, prior to the decree, ascertained or discovered it. If such matter was known to him before decree entered, and he failed to avail himself of it, or if unknown, but by the exercise of proper diligence he could have known it, the court will not afford him relief. A wrong may have been inflicted rather than a right enforced by the decree; yet, according to the uniformly declared policy of the court, it is better that such wrong should go unredressed than that the solemn decree of the court should be set aside at the suit of the party who, having had his day in court, failed by reason of his own negligence or laches to timely present the matter of his defense for adjudication. Diligence in this respect is of the essence of the equity of the bill; laches or negligence is as fatal to relief as the actual absence of a matter of defense."

Now appellants base their right to a review of the former case on the ground that the witness Bryan testified falsely, and that the account book which he failed to produce according to his promise will sustain the contention of appellants that Mrs. Jackson owed nothing on the mortgage debt. They were represented by counsel in the former trial of the case and had opportunity and did on cross-examination of the witness fully test his knowledge and credibility. The fact alone that the witness may have testified falsely does not establish appellant's right to a review. They could have had produced the account book which they now say establishes their case, and, instead of insisting on the production of the book, they took chances on what the chancellor's decree might be without it, and they must abide the result. Litigants cannot be permitted to experiment with the courts in any such way, but must diligently follow out all of their opportunities before they can be heard again on newly discovered evidence. The discovery, after decree, of evidence which could by reasonable diligence have been discovered before its rendition, is not sufficient to justify a review.

Counsel for appellants also insist that no lapse of time should bar a review where there has been no other change in the situation of the parties to the decree. The authorities do not sustain that contention. Granting leave to file a bill of review is a matter resting in the sound discretion of the chancellor. *State Fair Association v. Terry*, 74 Ark. 149, 85 S. W. 87; 2 Beach, Mod. Equity Prac. § 867; *Story's Equity Pleadings*, § 417.

Lapse of time is very material when it comes to the exercise of discretion, and it is

only when the party has proceeded within a reasonable time after the discovery of new evidence that a court of equity in the exercise of its discretion should permit a review. That much is due to the solemnity of a decree which the parties have the right to treat as a final adjudication of the rights involved. In no other case is the rule more applicable that equity rewards only the diligent. The granting or permission being a matter of discretion, it should be refused when the party has failed to act within a reasonable time after discovery of the new matter. Story's Pleading, § 419; Trust Co. v. Locomotive Works, 135 U. S. 207, 10 Sup. Ct. 736, 34 L. Ed. 97.

In this case the parties have waited nearly seven years after they discovered the new evidence. They made the discovery, too, while prosecuting an effort to set aside the decree on other grounds.

We conclude that the chancellor was correct in refusing to hear the petition for review, and his decree is therefore affirmed.

FUSSELL v. MALLORY.

(Supreme Court of Arkansas. Feb. 6, 1911.)

1. COUNTIES (§ 191*)—LEVY—PURPOSES—APPROPRIATIONS.

Under Kirby's Dig. § 1500, providing that the quorum court shall specify the amount of appropriation for each purpose, and that the total amount of appropriations for all county purposes for any one year shall not exceed 90 per cent. of the taxes levied, a tax levy based on a general appropriation in excess of the amount derived from the tax levy is not invalid, where it is not shown that there is not other revenue in the treasury derived from licenses, fines, penalties, and forfeitures.

[Ed. Note.—For other cases, see Counties, Cent. Dig. § 305; Dec. Dig. § 191.*]

2. EVIDENCE (§ 23*)—JUDICIAL NOTICE—REVENUE.

The Supreme Court will take judicial notice that a county has other sources of revenue than its general tax levy.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 29, 30; Dec. Dig. § 23.*]

Appeal from St. Francis Chancery Court; Edward D. Robertson, Chancellor.

Action by James Fussell against G. B. Mallory. From an order sustaining a demurrer to the complaint, plaintiff appeals. Affirmed.

Walter Gorman, for appellant. R. J. Williams, Mann & Rollwage, and Norton & Hughes, for appellee.

KIRBY, J. This suit is by appellant, a taxpayer, to enjoin the collection of the five-mill tax for county general purposes levied by the quorum court of St. Francis county, at the regular annual meeting thereof on the first Monday in October, 1910. The order of the court making the appropriation for the year, and the 5-mill tax levy were set out

in the complaint, and it was alleged: "That the total assessed valuation of the property of St. Francis county for the year 1910 being \$8,088,820, as shown by said order, a tax of five mills on each dollar thereof will produce the sum of \$30,444.10, 99 per cent. of which is \$27,399.69. That the total amount of appropriations for all county purposes for the year 1910, as made by said quorum court, to wit, \$29,648, exceeded by \$2,248.31 the 90 per cent. to wit, \$27,399.69, of the taxes levied by said quorum court for said year 1910, and therefore said county general tax of five mills on each dollar of the assessed value of the property in St. Francis county for the year 1910 was not appropriated and levied by said quorum court in pursuance of law," etc. A general demurrer was interposed by appellee and sustained, and, appellant electing to stand on the complaint, it was dismissed for want of equity, and he appealed.

It is contended that the tax levy was illegal and void because the amount of the appropriations for all county purposes exceeded 90 per cent. of the taxes levied for the year.

Sections 1494 to 1509 of Kirby's Digest prescribe the duties of the quorum court in the levying of the county taxes and making appropriations for the expenses of the county. By section 1499 the county clerk is required to submit a full written report and statement of the financial condition of the county showing the amount of revenue received and the sources thereof during the 12 months next preceding the meeting of the court, the appropriations made at the previous term, the amount of each drawn, and any unexpended balance or deficit, the total value of the taxable property of the county, etc. The sheriff is required to make written report of the county revenue collected by him from all sources during said time, and the treasurer a statement of all funds received by him and on what account during said period of time. After these and all other reports specified are submitted, the court makes the appropriations for the expenses of the county, and the levy of the county taxes for the current year. Section 1500 provides: "The court shall specify the amount of appropriations for each purpose in dollars and cents, and the total amount of appropriations for all county purposes, for any one year, shall not exceed ninety per cent. of the taxes levied for that year."

In this case the court appropriated \$29,648 for all county purposes, and levied a five-mill tax on the assessed valuation of the real and personal property. Ninety per cent. of the taxes levied amounting to \$27,399.69, which the appropriations for the year exceeded by the sum of \$2,248.31, as alleged in the complaint and admitted by the demurrer. The appropriations were general and

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not limited to payment out of revenue derived from any particular source, and this section of the statute does not prevent the court from also appropriating the revenue accruing to the county from licenses, fines, penalties, and forfeitures as held in *Allis v. Jefferson County*, 34 Ark. 307.

In *Kerwin v. Caldwell*, 80 Ark. 282, 98 S. W. 1059, this court said: "The true construction of section 1500 was given by Mr. Justice Eakin in *Allis v. Jefferson County*, 34 Ark. 307. "The policy of the act seems to be to check extravagance in appropriations with reference to contracts, rather than to encourage the accumulation of funds in the county treasuries. The particular limitation of 90 per cent. was, obviously, to provide that the taxes collected might meet the appropriations, by allowing for 10 per cent. for loss or delinquency. It was not to retain 10 per cent. of each year's levy in the treasury as a sinking fund. * * * Nor does it seem that the Legislature had in view, in this section, the revenue to arise from fines, forfeitures, penalties, or licenses. * * * They belong to the county for county purposes, and it would be absurd in the Legislature to prevent the counties from using them, because the whole amount to be used would exceed 90 per cent. of the levied taxes. There is no tie between the subject-matter, nor any conceivable policy making one control the other. The statute, on this point, means simply to say that, of the taxes levied and to be extended on the tax books for county purposes, not more than 90 per cent. shall be appropriated for that year. A very wholesome provision, inasmuch as perchance, and very probably, not more than that might be collected. This does not prevent the county from using revenues undoubtedly her own, upon a proper appropriation by a full court." And continuing: "The statute is not an inhibition upon proper county appropriations of the available county funds on hand, and it is a mere limitation on using more than 90 per cent. of one class of the county funds, to wit, the amount receivable from the tax levy."

It is true that in the first case cited the quorum court only appropriated an amount equal to 90 per cent. of the taxes levied for the year, and on another day made other appropriations to be paid out of the revenue estimated to accrue from licenses, fines, penalties, and forfeitures, and in the latter that, although the appropriations were in excess of 90 per cent. of the taxes levied, the proof showed that there was cash in the county treasury subject to appropriation which, with the estimated revenue from liquor licenses, etc., and the taxes levied, greatly exceeded the appropriations, while here there is no showing of any cash on hand or estimated revenue from any other source.

These cases only challenged the appropriations,

and not the tax levy, and it is held in both that in making appropriations the cash on hand not appropriated and the revenue arising from other sources than the taxes levied may be taken into consideration, and, while the amount of this is not disclosed in the case at bar, it was all before the quorum court in the sworn report of the officers required to show the true financial condition of the county, and, since it was their duty, they are presumed to have made the appropriations having due regard to the necessary expenses of the county and its ability to pay from all its sources of income, and especially is this true in the absence of a showing to the contrary, upon collateral attack of their judgment.

We judicially know that the county has these other sources of revenue. However, we do not mean to hold that, even if such contrary showing were made, the tax levy would be invalid.

Since said section only limits the use to not more than 90 per cent. of the revenue derived from one source, the taxes levied, and is not an inhibition upon proper appropriations of the available revenues of the county, and since the amount thereof shows the necessity for the levy of the five-mill tax which was properly done, the levy is valid, and the court committed no error in dismissing the complaint.

The judgment is affirmed.

MILLSAPS v. BROGDON.

(Supreme Court of Arkansas. Feb. 6, 1911.)

1. NEGLIGENCE (§ 122*)—CONTRIBUTORY NEGLIGENCE—BURDEN OF PROOF.

Negligence and contributory negligence are matters to be proved, and the burden is on the one alleging injury to establish it, and upon the other alleging immunity because of contributory negligence to establish it, unless it is shown by the plaintiff's testimony.

[Ed. Note.—For other cases, see *Negligence*, Cent. Dig. §§ 226-234; Dec. Dig. § 122.*]

2. MUNICIPAL CORPORATIONS (§ 706*)—STREETS—INJURY BY AUTOMOBILE—PRESUMPTION.

There is no presumption of negligence from the fact that the driver of an automobile ran against a beggar on the street, and proof of such fact alone does not create a prima facie case of negligence.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. § 1518; Dec. Dig. § 706.*]

3. MUNICIPAL CORPORATIONS (§ 706*)—INJURY BY AUTOMOBILE—INSTRUCTIONS.

In an action for damages by being run into by an automobile, an instruction that the burden of proof is on the plaintiff to show by a preponderance of the evidence that he was injured by the negligence of defendant, and, unless plaintiff has shown by a preponderance of the evidence that the defendant omitted some duty he owed the plaintiff, the defendant was not liable, held proper.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. § 1518; Dec. Dig. § 706.*]

Appeal from Circuit Court, Garland County; H. W. Evans, Judge.

Action by W. L. Brogdon against R. L. Millsaps. From a judgment for plaintiff, defendant appeals. Reversed and remanded.

Greaves & Martin, for appellant. James E. Hogue, for appellee.

KIRBY, J. Appellee brought suit for damages for personal injuries alleged to have been caused by appellant's negligence in running him down with an automobile on the streets of the city of Hot Springs. Appellant denied that he was injured, or that he was struck by appellant's automobile or caused any suffering and damages, and alleged contributory negligence on the part of appellee. The testimony tended to show that appellee, a beggar upon his crutches, was walking "quartering" or diagonally across Central avenue in Hot Springs on the day of the injury, and after crossing the street car track in front of a car, which stopped to take on passengers, he stopped within about six feet of the curb on the west side for about a minute, trying to decide whether he should go up or down the street for dinner, it being about 1 o'clock; that he was looking down the street and heard an automobile horn in his rear, and was immediately struck and knocked down; that everything seemed to be clear when he crossed the street; that he did not see the automobile, and heard nothing to indicate its approach until the horn sounded, and he was struck before he could move; that appellant was going down Central avenue and was seen 50 or 60 feet away from the place of the injury in his car going about 20 miles an hour; that he apparently made no effort to stop; that there was not room between the place appellee was standing and the standing car for the automobile to pass without striking one or the other; that appellant had to run in ahead of the car there, the track running so close to the curb at that point. Appellant testified that he was going south on the avenue to his place of business, the street car to his left going down, and he slowed up before he got to the crossing, saw appellee turn off, having crossed just in front of the car, and was running slowly to give him a chance to get out of the way; that appellee was walking across the street and stopped when he got within eight or ten feet of him, too close to stop the automobile, and he turned it aside and tried to pass between him and the car; that he could not have gone further to the left without running into the car; that the injury occurred in a narrow part of the street, on a curve; that there was not room to go between appellee and the street car at the time appellee stopped, and the collision with him or the street car could not be avoided. Appellee was injured by the collision, his hand and head cut and bruised, and he testified that since the injury he has suf-

fered from headache, which he never had before, and that he was unable to lie on his right side; that he worried a great deal over his condition, and was about hopeless as to ever recovering since the injury. There was other testimony as to the extent of his injury, which the doctor to whom appellant sent him for treatment testified was slight and not serious, and for the treatment of which he only charged appellant \$4.90. The evidence showed that appellee had been a cripple for five years, that he was farming when he became ill, and that he had no means of support and could do no work except to sell shoe strings and pick up bottles and junk for a living. The court gave several instructions at the request of appellee, including No. 11, as follows: "The court instructs the jury that if you find that the defendant ran against the plaintiff with his automobile, upon the public street, and injured him, a prima facie case of negligence against the defendant is thereby established, and in that case the law presumes that the defendant was negligent, and it devolves upon the defendant to prove that he was not negligent, and, unless he does so, your verdict should be for the plaintiff, unless you find that the plaintiff was guilty of negligence which contributed to his injury." The court refused appellant's requested instruction No. 6, as follows: "The burden of proof is upon the plaintiff in this case to show by a preponderance of the evidence, not only that he was injured by the defendant, but that the defendant was guilty of negligence which caused the injury. Negligence is a fact and must be proved, and unless the plaintiff has shown by a preponderance of the evidence that the defendant omitted some duty he owed the plaintiff, and that the plaintiff was thereby injured, your verdict should be for the defendant." The jury returned a verdict against appellant for \$150 damages, and he appealed.

The beggar on his crutches has the same right to the use of the streets of the city as has the man in his automobile. Each is bound to the exercise of ordinary care for his own safety and the prevention of injury to others in the use thereof. *Hot Springs Street Railroad Co. v. Hildreth*, 72 Ark. 573, 82 S. W. 245; *Hannigan v. Wright*, 5 Pennewill (Del.) 537, 63 Atl. 234; *Simeone v. Lindsay*, 6 Pennewill (Del.) 224, 65 Atl. 778.

Negligence and contributory negligence are matters to be proved, and the burden is on the one alleging injury from negligence to establish it, and upon the other alleging immunity because of contributory negligence to establish it, unless it is shown by the plaintiff's testimony. *H. S. Street R. R. Co. v. Hildreth*, supra.

This case seems to have been tried upon a wrong theory of the law, that a pedestrian, in crossing the street, would be held to the same care in looking and listening for approaching automobiles as would a traveler

on a highway crossing a railroad, to look out for the approach of trains. There was no presumption of negligence arising from the fact that appellant ran against appellee with his automobile on a public street and injured him, and proof of such fact alone did not create a prima facie case of negligence, as the jury were told in said instruction No. 11 given on appellee's part, which was erroneous and prejudicial.

Appellant's requested instruction No. 6, refused, was a correct statement of the law and should have been given.

Since the case must be reversed for these errors, we have not found it necessary to examine the other instructions with a view to approving or disapproving them. We deem it unnecessary also to discuss the conduct of appellee's attorney in making the statements objected to in the closing argument, for the reason that such statements will probably not be repeated on the trial anew.

For the errors indicated, the judgment is reversed, and the cause remanded for a new trial.

SMITH v. TAYLOR.

(Supreme Court of Arkansas. Jan. 30, 1911.)

JUSTICES OF THE PEACE (§ 43*)—JURISDICTION—AMOUNT IN CONTROVERSY—"MATTERS OF CONTRACT."

Const. art. 7, § 40, declares justices of the peace shall have jurisdiction exclusive of the circuit court in all matters of contract, where the amount in controversy does not exceed \$100. *Held*, that "matters of contract" embrace an action for unliquidated damages founded on a contract, and the circuit court had no jurisdiction of an action to recover \$100 as damages for breach of a contract employing plaintiff to sell land.

[Ed. Note.—For other cases, see Justices of the Peace, Cent. Dig. §§ 149-156; Dec. Dig. § 43.*]

For other definitions, see Words and Phrases, vol. 3, p. 4417.]

Appeal from Circuit Court, Sharp County; John W. Meeks, Judge.

Action by John M. Taylor against L. A. Smith. Judgment for plaintiff, and defendant appeals. Reversed and dismissed.

David L. King, for appellant.

McCULLOCH, C. J. This is an action instituted by appellee against appellant in the circuit court of Sharp county, Northern district, to recover the sum of \$100 alleged to be due as damages resulting from the alleged breach by appellant of his contract with appellee, employing the latter as his agent to sell a certain tract of land. Appellee recovered judgment below for \$25.

The Constitution (article 7, § 40) provides that justices of the peace shall have original jurisdiction "exclusive of the circuit court in all matters of contract where the amount

in controversy does not exceed the sum of one hundred dollars, excluding interest." It has been held by this court that the term "matters of contract" embraces an action for unliquidated damages when the action is founded upon a contract. *Stanley v. Bracht*, 42 Ark. 210; *Koch v. Kimberling*, 55 Ark. 547, 18 S. W. 1040. It follows that the circuit court had no jurisdiction of the cause of action set forth in the complaint.

Therefore the judgment is reversed, and the cause dismissed.

OZARK COAL CO. et al. v. PENNSYLVANIA ANTHRACITE R. CO.

(Supreme Court of Arkansas. Feb. 6, 1911.)

1. EMINENT DOMAIN (§ 61*)—TAKING FOR PRIVATE USE.

The right of eminent domain cannot be delegated or exercised for the purpose of acquiring property for private use.

[Ed. Note.—For other cases, see Eminent Domain, Cent. Dig. § 61; Dec. Dig. § 61.*]

2. EMINENT DOMAIN (§ 66*)—LEGISLATIVE AND JUDICIAL POWERS.

Whether a particular use for which private property is to be taken under legislative sanction is a public one is a judicial question.

[Ed. Note.—For other cases, see Eminent Domain, Cent. Dig. §§ 165-167; Dec. Dig. § 66.*]

3. EMINENT DOMAIN (§ 20*)—RAILROADS—COMMON CARRIERS.

Laws 1905, p. 408, § 1, authorizes coal and other mining corporations to construct and operate short connecting lines of railway necessary to the successful operation of their mines. Section 2 grants for that purpose the right to exercise the power of eminent domain. Sections 3 and 4 provide that, when so constructed, such lines shall be entitled to the rights and privileges of common carriers and to the same rights and privileges in respect to connections and crossings as other railroads. Section 5 provides that any such line less than six miles long shall not be required to maintain passenger equipment except at its own option but, if it elects to carry passengers, it shall be liable to the regulations governing other carriers. Plaintiff was incorporated under such act and the evidence showed that its road was to be used principally in developing and operating a coal mine owned by it, though that was not its sole use. *Held*, that the acquisition of land for such road was for a public purpose, and hence such statute was valid, and plaintiff was entitled to maintain condemnation proceedings.

[Ed. Note.—For other cases, see Eminent Domain, Cent. Dig. §§ 59-67; Dec. Dig. § 20.*]

Appeal from Johnson Chancery Court; Jeremiah G. Wallace, Chancellor.

Condemnation proceedings by the Pennsylvania Anthracite Railroad Company against the Ozark Coal Company and others. From a judgment for plaintiff, defendants appeal. Affirmed.

Geo. O. Patterson, for appellants. Moore, Smith & Moore, for appellee.

McCULLOCH, O. J. The General Assembly of 1905 passed an act entitled "An act to authorize coal and other mining corpora-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

tions in the state of Arkansas to construct, own, and operate short connecting lines of railway or tramway, and granting to them the right of eminent domain in condemnation suits." Laws 1905, p. 407.

The act reads as follows:

"Section 1. That all persons, owning or controlling by lease or purchase, any copper, lead, zinc, iron, marble, coal or other mineral lands in this state shall have the same right to incorporate, own, construct, and operate such short lines of railway, or tramway, as may be necessary to the successful mining and marketing of said coal, marble, and minerals.

"Sec. 2. All incorporations herein provided for shall be governed by the laws governing railway incorporations in this state; and shall have the same right to acquire right of way over, under, or through any private or public lands, and shall have and exercise the same right of eminent domain in acquiring such right of way; and shall have the same authority to construct, own, lease, operate, or sell such lines of railway, or tramway, as may be necessary to the successful mining and marketing of such coal and other minerals, owned or controlled by said mining corporations, as is now by law granted to railroad corporations of this state.

"Sec. 3. That when so incorporated and constructed, such short lines of railway and tramway, shall be, and are hereby entitled to all the rights, powers and privileges of a common carrier.

"Sec. 4. All such short lines of railway, or tramway, shall have the same rights and privileges of connections, crossings, sidings, switches, and transfer, without prejudice or discrimination, as are extended by custom or granted by law to railroad corporations in this state.

"Sec. 5. That all such short lines of railway, or tramway, not exceeding six miles in length, shall not be required to maintain passenger equipment, but if, at their option, they carry passengers, they shall be subject to the laws governing passenger traffic on railroads in this state."

Pursuant to the authority of said act, and in accordance with the procedure prescribed by the general statutes of the state for incorporating railroad companies, appellee was duly incorporated as a railroad company for the purpose of constructing and operating a short line of railroad from the coal mine of the Pennsylvania Anthracite Coal Company to the line of the St. Louis, Iron Mountain & Southern Railway Company. The stockholders in appellee company are the same as those of the above-named mining company. Appellee then leased to the St. Louis, Iron Mountain & Southern Railway Company for a term of 30 years its said line of railroad to be constructed and said lessee agreed in the contract to operate and keep in public use the said railroad, with such locomotives, cars, rolling stock, etc., as it shall deem to

be necessary, reasonable, or proper for the accommodation of the business of the railroad so as to comply with the laws of the state of Arkansas. The contract requires appellee, as lessor, to maintain the railroad in good condition and repair, and gives the lessee the right to control the operation of the road, to regulate the rate of tolls to be charged for transportation of freight, and to charge and collect the same. The contract contains other provisions unnecessary to mention. Appellee filed in the circuit court of Johnson county its petition for the condemnation of a right of way across lands owned by appellants. Appellants answered, denying the right of appellee to condemn upon the ground that the said road was purely a private enterprise; that it was not to be built for the use of the public; that the incorporators of the railroad company were the owners of the coal company; that their only object and purpose was to build a spur or switch track to their mines; that they were seeking to take and appropriate the private property of the appellants for a purely private purpose; and, further, that the act of the Legislature approved April 13, 1905, granting the right of eminent domain to coal companies, is unconstitutional, and praying that the cause be transferred to the chancery court. The circuit court made an order transferring to the chancery court, and in the order transferring to the chancery court made an order temporarily restraining appellee from building upon the lands of appellants until such time as the appellants could apply to the chancery court for an order restraining them from entering into or upon the lands of appellants until the matters could be tried finally. Subsequently appellants petitioned the chancery court for an injunction, which was refused, an order made permitting the appellee, upon the payment of the sum of \$150, to enter into and upon the lands of appellants and proceed with the construction of the railroad. From an adverse final decree appellants brought the case here for review.

In the outset the general principle declared by our Constitution may be stated that the right of eminent domain cannot be exercised for the purpose of acquiring property for private use, and that the Legislature cannot exercise the power of eminent domain nor delegate its exercise except for public purposes. It is, too, a judicial question for the courts to determine whether a particular use for which private property is about to be taken under legislative sanction is in fact a public use. *Mountain Park Terminal Co. v. Field*, 76 Ark. 239, 88 S. W. 897. It will be observed that the act of 1905 does not attempt to limit the use to which the railroad may be put, though it authorizes the construction and operation of such short line of railway or tramway "as may be necessary to the successful mining and marketing of said coal, marble and minerals." On the contrary, it is

clear from the terms of this statute that, when so incorporated, such lines of road become public carriers subject to the general statutes of the state governing railroads. The evidence in the case shows that the road is constructed and is to be used principally in developing and operating the coal mine of the Pennsylvania Anthracite Coal Company; yet that is not the sole use. The coal mine of appellants is on the line of the road, and the owners thereof can, under the law, have the use of the railroad as a common carrier for the transportation of coal and other commodities. The evidence also shows that a townsite is being laid out, and a town is to be established at one terminus of the railroad, and that the road can be used for shipping purposes by those who may have business there. Other coal mines in that belt may use the road. The law gives all the right to use it on equal terms.

In *Railway Co. v. Petty*, 57 Ark. 359, 21 S. W. 884, 20 L. R. A. 434, Chief Justice Cockrill, speaking for the court, said: "If it is an aid in facilitating the business for which the public agency is authorized to exercise the power to condemn, or if the public may enjoy the use of it not by permission, but by right, its character is public. When once the character of the use is found to be public, the court's inquiry ends and the legislative policy is left supreme, although it appears that private ends will be advanced by the public user. * * * There are numerous cases holding that a railway built for the purpose of reaching a coal mine or a manufacturing establishment is a public enterprise entitled to exercise the power of eminent domain, provided the public has the right to use it. That right makes the use public." In the case of *Phillips v. Watson*, 63 Iowa, 28, 18 N. W. 659, the court construed a statute of that state authorizing the owner of any lands having thereon coal, etc., to condemn land for a public way to any highway or railroad, and said: "We ought not to declare any act of the Legislature void if a construction can fairly be put upon it under which it can be sustained. In the title as well as the body of the act the ways for the establishment of which it provides are described as public ways, in the ordinary sense in which that term is used; that is, that the public should have the right to use, occupy, and enjoy them as ways or roads. It is not material that the rights and privileges of the public with reference to them are not specially defined in the act, for the rights and privileges of the people generally with reference to the public ways are defined in the general statutes on the subject. * * * And we think that it makes no difference that the mineowner may be the only member of the public who may have occasion to use the way after it has been

established. The character of the way, whether it is public or private, is determined by the extent of the right to use it, and not by the extent to which that right is exercised. If all the people have the right to use it, it is a public way, although the number who have occasion to exercise the right is very small. And, where the use to which the property is appropriated is a public use, the Legislature is the judge of the expediency of making the appropriation, and its action in making the appropriation cannot be questioned in the courts."

There are many other cases to the same effect. *K. & T. Coal Co. v. Northwestern Coal & Mining Co.*, 161 Mo. 288, 61 S. W. 684, 51 L. R. A. 936, 84 Am. St. Rep. 717; *Dietrich v. Murdock*, 42 Mo. 279; *De Camp v. Hibernia R. R. Co.*, 47 N. J. Law, 43; *New Central Coal Co. et al. v. George's Creek Coal & Iron Co.*, 37 Md. 537; *Butte A. & P. R. R. Co. v. Montana Union R. R. Co.*, 16 Mont. 523, 41 Pac. 232, 31 L. R. A. 298, 50 Am. St. Rep. 508. We do not have to go as far in this case as some of the courts have done, holding that the operation of a coal mine or manufacturing plant constitutes a public necessity or enterprise is of itself a public use which may justify the exercise of the right of eminent domain. *Butte A. & P. R. R. Co. v. Montana Union R. R. Co.*, supra; *Olmstead v. Camp*, 33 Conn. 552, 89 Am. Dec. 221; *Talbot v. Hudson*, 16 Gray (Mass.) 426; *Amoskeag Co. v. Head*, 56 N. H. 386; *Dayton Mining Co. v. Seawell*, 11 Nev. 408; *Gold Mining Co. v. Parker*, 59 Ga. 419; *Highland Boy Mining Co. v. Strickley*, 28 Utah, 215, 78 Pac. 296, 1 L. R. A. (N. S.) 976, 107 Am. St. Rep. 711; *Miocene Ditch Co. v. Jacobsen*, 146 Fed. 680, 77 C. O. A. 106.

Without invoking the doctrine of those cases, we think that the act in question authorizes the incorporation of a railroad for public use, that the public has a right to its use, and that the evidence in this case shows that appellee's railroad is intended for public use within the meaning of the law.

The decree is therefore affirmed.

CHICAGO, R. I. & P. RY. CO. v. GRUBBS.
(Supreme Court of Arkansas. Feb. 6, 1911.)

1. APPEAL AND ERROR (§ 930*)—EVIDENCE—REVIEW.

The court on appeal, in determining whether there is any evidence warranting the verdict, will consider the testimony in its most favorable aspect to the successful party.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3755-3761; Dec. Dig. § 930.*]

2. MASTER AND SERVANT (§ 217*)—INJURY TO SERVANT—ASSUMPTION OF RISK.

A servant assumes the ordinary and usual risks incident to the employment and the risks which he knows or which by the exercise of reasonable care he may know, and, where a mas-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

ter and servant possess equal knowledge of a danger, the servant of sufficient maturity to appreciate the danger assumes the risk.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 574-600; Dec. Dig. § 217.*]

3. MASTER AND SERVANT (§ 155*)—DUTY TO WARN SERVANT.

A master need not warn an experienced servant as to obvious dangers, where the master and servant possess equal knowledge of the dangers.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 310; Dec. Dig. § 155.*]

4. MASTER AND SERVANT (§ 219*)—INJURY TO SERVANT—ASSUMPTION OF RISK.

A servant employed to straighten creosoted ties on a car knew that such ties were liable to slip when any weight was applied to them. He climbed on the drawhead of the car and caught hold of a tie with his hand and attempted to pull himself up. The tie slipped, and he lost his hold and fell to the ground and was injured. *Held*, that he assumed the risk of injury, as a matter of law, though the master negligently failed to provide a safe means of mounting the car to rearrange the ties.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 610-624; Dec. Dig. § 219.*]

5. MASTER AND SERVANT (§ 217*)—INJURY TO SERVANT—ASSUMPTION OF RISK.

A servant, who knows the methods adopted in the work and the place in which the work is to be done, and who continues in the employment, assumes the risks of the dangers resulting therefrom.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 574-600; Dec. Dig. § 217.*]

6. MASTER AND SERVANT (§ 217*)—INJURY TO SERVANT—ASSUMPTION OF RISK.

Where the place or work itself was unsafe, a servant voluntarily engaging therein, with knowledge of the danger, assumed the risks.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 574-600; Dec. Dig. § 217.*]

Appeal from Circuit Court, Lonoke County; Eugene Lankford, Judge.

Action by C. W. Grubbs against the Chicago, Rock Island & Pacific Railway Company. From a judgment for plaintiff, defendant appeals. Reversed, and case dismissed.

Thos. S. Bugbee and John T. Hicks, for appellants. J. B. Reed and Carmichael, Brooks & Powers, for appellee.

FRAUENTHAL, J. This was an action instituted by C. W. Grubbs, the plaintiff below, to recover damages for a personal injury which he sustained while in defendant's employment and which he alleged was caused by defendant's negligence. The defendant denied the allegations of negligence set out in the complaint and pleaded as a bar to a recovery by plaintiff his alleged contributory negligence and his assumption of the risk of the injury. The jury returned a verdict in favor of the plaintiff, and from the judgment rendered thereon the defendant has appealed to this court.

Upon the trial of the case, the defendant

asked for a peremptory instruction in its favor, and now contends that under the uncontroverted testimony in the case the injury which the plaintiff received was due to the risk which was ordinarily incident to the employment in which he was engaged, and which therefore he assumed; and, also, that plaintiff himself was guilty of negligence which contributed to cause the injury. In determining whether or not there was any evidence adduced upon the trial of the case that was legally sufficient to warrant the verdict, this court will consider the testimony in its most favorable aspect to plaintiff and make every legitimate inference in his favor that is deducible therefrom. Viewed in this manner, the case is substantially this: The plaintiff was employed by the defendant as a section hand and had been engaged in that service for about 18 months prior to the time he received the injury complained of. Two cars of creosoted ties had been placed upon the side track at the town of Lonoke. These ties were loaded on flat cars and had become disarranged while being transported. They were placed upon the side track for the purpose of having them rearranged or straightened out, and it was one of the duties of the section hands to do this. The foreman of the section crew directed a number of his hands, amongst whom was plaintiff, to straighten out these ties upon the cars. The ties were loaded upon the cars to a height of about 12 or 14 feet from the ground, and they had become so disarranged that their ends protruded over the cars. The men first attempted to rearrange the ties by the use of a scantling while standing on the ground; but, this method proving unsuccessful, the foreman directed the men to go upon the ties in order to straighten them out. Four of the men got upon the ties safely. The plaintiff went to the end of the flat car, and, climbing upon the drawhead of the car, caught hold of a protruding cross-tie with his hand and attempted to pull himself up. The tie slipped, and the plaintiff, loosening his hold, fell to the ground and was painfully and severely injured. The plaintiff had worked with ties which had been treated with creosote and knew that they were made slick by reason of this treatment; and the section crew to which he belonged had handled a great number of creosoted ties prior to the time of this injury and had straightened the ties on probably one or two cars. The foreman did not direct the section hands, and did not direct the plaintiff, as to the manner in which they should get upon the ties, nor did he warn them of any danger in so doing. He left the manner of mounting the cars to their own discretion and did not see or know of plaintiff's attempt to get on the car until after the injury.

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

In accepting and continuing in the employment in which he is engaged, a servant assumes the ordinary and usual risks and perils that are incident thereto. He assumes all the obvious risks of the work in which he is engaged, and also the risks which he knows to exist, as well as those which by the exercise of reasonable care he may know to exist. By the contract of service he agrees to bear the risk of all such dangers, and he therefore cannot recover for the injuries resulting therefrom. As is said in the case of *Fordyce v. Stafford*, 57 Ark. 503, 22 S. W. 161: "The employé assumes all risks naturally and reasonably incident to the service in which he engages, where the hazards of the service are obvious and within the apprehension of a person of his experience and understanding." *St. Louis, I. M. & S. R. Co. v. Touhey*, 67 Ark. 209, 54 S. W. 577, 77 Am. St. Rep. 109; *Archer-Foster Construction Co. v. Vaughn*, 79 Ark. 20, 94 S. W. 717; *C. O. & G. Ry. Co. v. Thompson*, 82 Ark. 11, 100 S. W. 83; *Graham v. Thrall & Shea*, 129 S. W. 532; 1 *Labatt on Master & Servant*, § 259.

In the case at bar the plaintiff knew that the effect of the treatment of creosote upon cross-ties was to make them slick, and therefore liable to slip. The ties had on this account become disarranged upon the cars, and it was for this reason that plaintiff was directed to do the work of straightening them out. Their condition was patent to him, and the manner in which they were disarranged upon the car was also patent. It was obvious, therefore, that these ties were liable to slip whenever any force or weight was applied to them. The risk of injury which might result by reason of the ties slipping or moving was obvious, and, when plaintiff undertook the service of straightening them out, he assumed that risk. The plaintiff knew that these ties had been treated with creosote, and he testified that the effect of such treatment made them slick. He observed that on account of this slick condition these ties had become dislodged and disarranged, and therefore the danger incident to applying force to them, and thereby causing them to easily move, was obvious and known to the plaintiff. A master is not bound to warn the servant as to dangers which are obvious and patent to him. And, where the master and servant are possessed of equal knowledge of the danger, then it is not incumbent upon the master to warn a servant of sufficient maturity and experience to appreciate the same. In such case the servant assumes the risk. In the case of *L. & A. Ry. Co. v. Miles*, 82 Ark. 534, 103 S. W. 158, 11 L. R. A. (N. S.) 720, the court, quoting from *Labatt on Master & Servant*, states the doctrine as follows: "The master is not required to point out the dangers which are readily ascertainable by the servant himself, if he makes an ordinary careful use of such

knowledge, experience, and judgment as he possesses. The failure to give instructions, therefore, is not culpable where the servant might by the exercise of ordinary care and attention have known of the danger, or, as the rule is also expressed, where he had all the means necessary for ascertaining the conditions, and there was no danger which could not be discovered."

But it is urged by counsel for plaintiff that, while the servant assumes the ordinary risks incident to the employment, he does not assume the risk of danger caused by the negligence of the master. It is contended that it is incumbent upon the master to furnish the servant with a safe place in which to do the work, and in failing to perform that duty the master is guilty of negligence. It is claimed in this case that it was the duty of the defendant to have provided the plaintiff with a safe means of mounting the car in order to rearrange the ties, and that it failed to furnish same. But, even if the failure to furnish such special appliance or means of mounting the car should be considered an act of negligence on the part of the defendant, still the plaintiff was fully aware of the manner in which the work was being done and the way in which the car was mounted. In the case of *Emma Cotton Seed Oil Co. v. Hale*, 56 Ark. 232, 19 S. W. 600, it is said: "If, having sufficient intelligence and knowledge to enable him to see and appreciate the dangers to which he will be exposed, he knowingly assents to occupy a place set apart for him by the master, and he does so, he thereby assumes the risks incident thereto and dispenses with the obligation of the master to furnish him a better place. It is then no longer a question of whether such place could not with reasonable care and diligence be made safe. Having voluntarily accepted the place occupied by him, he cannot hold the master liable for injuries received by him because the place was not safe." Where the servant knows the methods that are adopted in doing the work and the place furnished in which the work is done, and accepts or continues in the employment under such conditions, he assumes the risks of the dangers which may result therefrom. *Railway v. Kelton*, 55 Ark. 483, 18 S. W. 933; *Patterson Coal Co. v. Poe*, 81 Ark. 343, 99 S. W. 538; *Graham v. Thrall & Shea*, *supra*.

But, in addition to this, in the case at bar the plaintiff was engaged in the work of straightening out the ties, which, on account of their peculiar slick condition, had become disarranged. If the place or the work itself was unsafe, it was a part of the very service which the plaintiff voluntarily engaged in with full knowledge of the unsafety of the place and the dangers of the work. The rule is that under such circumstances the servant assumes the risks of the dangers incident to such duty he has thus en-

gaged to perform. In speaking of the risk which in such a case is assumed by the servant, this court, in the case of *Marshall v. St. Louis, I. M. & S. R. Co.*, 78 Ark. 213, 94 S. W. 56, 115 Am. St. Rep. 27, quoted the following with approval from Judge Lurton: "It is not a case where dangerous or defective instrumentalities are supplied by the master to be used in his work and where notice of such danger should be given, but a case where the instrumentalities to be handled and worked with or upon are understood to involve peril and to demand unusual care. In such cases the risk is assumed by the servant as within the terms of his contract and compensated by his wages."

In the case at bar the plaintiff was engaged in rearranging the ties which he knew had become dislodged and displaced on account of their slick condition. He understood the manner in which the work was to be done, and whatever danger was incident to mounting the car and going on and over these ties was obvious to any one with the experience and understanding possessed by plaintiff. The danger of these ties slipping, and the peril arising therefrom, was one of the ordinary incidents of the work in which he was engaged. This risk of injury therefrom was therefore assumed by him. *Grayson-McLeod Lumber Co. v. Carter*, 76 Ark. 69, 88 S. W. 597; *C. R. I. & Pac. Ry. Co. v. Murray*, 85 Ark. 600, 109 S. W. 549, 16 L. R. A. (N. S.) 984; *St. Louis, I. M. & S. R. Co. v. Goins*, 90 Ark. 387, 119 S. W. 277.

Considering the testimony adduced upon the trial of this case most favorably to the cause of the plaintiff, we are of opinion that the injury which he sustained occurred by reason of a risk which under the law he assumed.

The judgment must, accordingly, be reversed, and the case dismissed. It is so ordered.

GAY OIL CO. v. MUSKOGEE OIL REFINING CO.

(Supreme Court of Arkansas. Feb. 6, 1911.)

1. APPEAL AND ERROR (§ 1010*)—REVIEW—FINDINGS BY COURT—CONCLUSIVENESS.

A finding by the trial court will not be disturbed, if the evidence is legally sufficient to support it.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 3979-3982; Dec. Dig. § 1010.*]

2. BROKERS (§ 11*)—BREACH OF CONTRACT OF EMPLOYMENT—BURDEN OF PROOF.

Where a counterclaim set up damages arising from a breach of contract for the exclusive agency of selling oil, the burden of proof was upon the party counterclaiming.

[Ed. Note.—For other cases, see *Brokers*, Cent. Dig. § 58; Dec. Dig. § 11.*]

3. CONTRACTS (§ 350*)—BREACH—EVIDENCE—SUFFICIENCY.

Evidence held to support a finding denying damages for a breach of contract.

[Ed. Note.—For other cases, see *Contracts*, Cent. Dig. §§ 1819-1823 Dec. Dig. § 350.*]

4. APPEAL AND ERROR (§ 995*)—REVIEW—WEIGHT OF EVIDENCE—SPECULATIVE CHARACTER.

The weight of evidence of a speculative character, as to damages arising from a breach of contract, is a question for the trial court sitting as a jury.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. § 3907; Dec. Dig. § 995.*]

5. BROKERS (§ 11*)—BREACH—EXCLUSIVE AGENCY FOR SALES.

Where a contract between a principal and agent gave the agent the exclusive right to sell oil in a certain territory, sales by the principal at its place of business, which was without the agent's territory, and a subsequent shipment of the oil into agent's territory, at the request of the purchasers, in the absence of a purpose to evade the contract, did not constitute a breach.

[Ed. Note.—For other cases, see *Brokers*, Cent. Dig. § 58; Dec. Dig. § 11.*]

Appeal from Circuit Court, Sebastian County; Daniel Hon, Judge.

Action by the Muskogee Oil Refining Company against the Gay Oil Company, which set up a counterclaim. From a judgment for plaintiff, defendant appealed. Affirmed.

Hill, Brizzolara & Fitzhugh, for appellant. Kimpel & Dally, for appellee.

MCCULLOCH, C. J. This is an action instituted by the Muskogee Oil Refining Company against the Gay Oil Company, both corporations, to recover upon an open account for \$3,016.30 for oil products sold and delivered by plaintiff to defendant. Defendant pleaded a counterclaim against plaintiff for damages resulting from an alleged breach of contract, whereby the plaintiff appointed defendant sole distributor of its oils in the state of Arkansas and the cities of Kansas City and St. Louis, Mo., and Memphis, Tenn., for a term of two years, and also damages for violation of an alleged agreement to establish an oil station at Ft. Smith, Ark. The case was tried before the court sitting as a jury, and the court found the amount of plaintiff's account to be \$3,189.35; that the defendant was entitled to a credit of \$484.22 for money expended in completion of the oil station at Ft. Smith; and that the defendant was also entitled to a credit of \$230 for damages on account of sales made by plaintiff to the Texarkana Grocery Company, in violation of its contract with defendant; and further found "that of any other sales made in the territory covered by the contract, there was no damage to defendant shown from the evidence, and that a number of other sales claimed by the defendant to have been made in said territory covered by the contract were not made in said territory, but were made in Oklahoma, and afterwards, on order of the purchaser, shipped as directed by purchaser."

The court, after deducting said credits, found in favor of plaintiff for \$2,475.16, and rendered judgment against defendant accordingly. Defendant appealed.

The clause of the contract which bears on the controversy reads as follows: "In consideration of said party having agreed to handle exclusively, in the territory above mentioned, goods as or may be made by said first party, subject to provisions of article iv, he is hereby appointed sole distributor of said goods in the territory specified in article i, it being well understood and agreed that the names and brands in use and the property of said first party shall at all times appear on their packages marked and used by said second party, he agreeing to carry on all his stationery an announcement that he is sole distributor of the said oils of the Muskogee Oil Refining Company. It being further agreed that the stencil of the said second party shall appear on each barrel or package used by him."

It is insisted that the court erred in finding that the defendant sustained no damage by reason of the other sales in the territory mentioned, and that it did not constitute a breach of the contract on plaintiff's part to make sales in Oklahoma of oil products, which were subsequently shipped to purchasers in the territory mentioned. The finding of the trial court has the same binding force as the verdict of a jury, and, under well-settled rules, if the evidence is legally sufficient to sustain the finding, this court will not disturb it.

The only testimony tending to show damages which the court failed to allow is the testimony of Mr. Gay, who, in answer to the hypothetical question, assuming that \$10,000 worth of oil was sold in the territory during the period named, what would have been the profit to the plaintiff upon those sales, answered that there would be a profit of \$5,000, less an expense amounting to about 20 per cent. Now the evidence tends to show that Gay's only source of information as to the amount of sales made by plaintiff was the plaintiff's accounts and books, which were

introduced in evidence, and that from these books and accounts it was impossible to determine the quality of the products sold or the prices, and that therefore it was impossible to tell from the books or accounts the amount of profit made. The burden was upon defendant to prove the amount of the alleged damage, and in the present state of the proof, as abstracted, we cannot say that the undisputed evidence establishes any amount of damage. If it be conceded that the preponderance of the evidence establishes the fact that the defendant suffered some damage yet the latter has not proved his case by showing the amount of damages which he should recover. We cannot say, therefore, that the finding of the court was without evidence to sustain it. The evidence adduced by defendant was, to say the least, of a very speculative character, and its weight was a question within the province of the trial court.

We are also of the opinion that we ought not to overturn the finding of the court that there was no breach of the contract in the sale of oil, which was afterwards shipped to points within the territory mentioned in defendant's contract. If the plaintiff consummated sales and deliveries of oil in the state of Oklahoma, which was outside of the territory mentioned in defendant's contract, the subsequent shipment of the oil at the request of the purchasers did not render these sales breaches of the contract. 'Of course, sales made by plaintiff in Oklahoma, for the purpose of evading the contract, would not defeat the defendant of his right to recover profits which he would have earned on the sales; but it cannot be said that the undisputed evidence in this case shows that the terms of the contract were evaded. On the contrary, there is nothing in the evidence, as abstracted, to show that the sales were not made in perfect good faith, without any intent to evade the contract.

Upon the whole we are convinced that the case was fairly tried, and that the evidence is sufficient to sustain the finding; so the judgment is affirmed.

HARDING v. MISSOURI PAC. RY. CO.

(Supreme Court of Missouri. Feb. 9, 1911.)

1. APPEAL AND ERROR (§ 215*) — PRESENTATION BELOW — INSTRUCTIONS — OBJECTION — NECESSITY.

While there must be an objection to an offer of evidence and an exception to the court's ruling thereon in order to preserve the ruling for review, an exception only is necessary to preserve for review the giving or refusing of an instruction; that being an action of the court, and not of the parties, so that no objection is necessary.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1309-1314; Dec. Dig. § 215.*]

2. WORDS AND PHRASES — "EXCEPTIONS" — "OBJECTIONS."

Cases on appeal are tried from a bill of "exceptions," not a bill of "objections." It is true that the word "object" in certain connections may have the same meaning as "except." In the course of a trial on objection is made to the end that a ruling of the court may be had. This ruling is not upon what the court itself has done, but upon what the parties are doing or offering to do. The objection goes to the act of persons other than the court and is made to get action from the court. When the court acts, the error is preserved by an exception to the ruling. Thus the origin of the term "bill of exceptions."

[Ed. Note.—For other definitions, see Words and Phrases, vol. 3, pp. 2533-2544; vol. 8, p. 7656; vol. 6, p. 4877.]

Woodson, J., dissenting.

In Banc. Action by Luta M. Harding against the Missouri Pacific Railway Company, in which defendant appealed from an adverse judgment. On motion to transfer the case to the St. Louis Court of Appeals. Overruled.

R. T. Ralley and Jas. F. Green, for appellant. Glendy B. Arnold, for respondent.

GRAVES, J. This is a second motion for a transfer of this case from this court to the St. Louis Court of Appeals. The first motion was overruled before this term began on the ground that there was a constitutional question involved as indicated by the record. The present motion was filed because, as counsel suggest therein, since said ruling on their previous motion, Division 2 of this court has handed down an opinion in the case of *Sheets et al. v. Iowa State Insurance Co.*, 226 Mo. 613, 126 S. W. 413, which it is charged takes out of the case the alleged constitutional question. This second motion to transfer we have but recently overruled, but it was thought best to follow such ruling with an opinion, and therefore this opinion in pursuance of an assignment for that purpose. The constitutional question appears by reason of the giving of an instruction. In the present motion counsel for the respondent says: "The appeal in this case was taken to this court on the theory that a constitutional question was involved in the record. This alleged constitutional question appears

for the first time on the record in the twelfth, thirteenth, fourteenth, and fifteenth grounds of appellant's motion for a new trial, and is predicated exclusively, as I understand it, upon the giving of one instruction in behalf of the plaintiff, which was the only instruction given for the plaintiff. It is contended that that instruction violates the provisions of the Constitution mentioned in the motion for a new trial. This alleged constitutional question is not before this court for review: (1) Because the abstract of the record shows that no such objection was made by the appellant when the instruction was given by the court. *Sheets et al. v. Iowa State Ins. Co.*, 226 Mo. 613, 619, 126 S. W. 413. (2) Because the abstract of the record fails to show that any objection, either general or specific, was made to the giving of such instruction. *Sheets et al. v. Iowa State Ins. Co.*, supra." The bill of exceptions, now printed and on file in the case, sets out the instruction complained of, and is followed by this language: "To which action of the court in giving said instruction to the jury defendant then and there excepted at the time."

Counsel contend that under the ruling in the *Sheets Case*, supra, this language is not sufficient to preserve the instruction for review here, and that, if such instruction is not here for review, then the alleged constitutional question is not in the case. Under the language of the *Sheets Case*, the contention is well founded, but to our mind that case is wrong, and should be overruled upon this point. The effect of the *Sheets Case* is this: A party must first object to the giving of the instruction, and then the court overrules such objection, and the party then excepts to the action of the court in overruling the objection. In other words, the course of proceeding to save the point as to an instruction must be the same as that of saving the point as to the introduction of evidence. This has never been understood as the rule in this state, and has never in recent years been announced as the rule until the *Sheets Case*, supra. We have always held that, to preserve the point for review as to the admission of evidence, counsel must object to the introduction of the evidence. This objection calls for the ruling of the court, and counsel must then except to the ruling of the court if such ruling be adverse to him. In the same way we preserve the point as to improper remarks of counsel. *Eppstein v. Railway Co.*, 197 Mo., loc. cit. 738, 94 S. W. 967. In each case the objection is directed to a thing done by one other than the judge or court. The exception, however, goes to the action or ruling of the court. And herein lies the fallacy of the *Sheets Case*. Instructions both given and refused are actions of the court. If instructions are asked by counsel, they simply

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes 134 S.W.—41

amount to a request to so instruct. If the request is refused, the party excepts to the action of the court in refusing such declaration of law. In such cases counsel do not object to the court refusing the instruction, and then except to the court's action in overruling the objection. And, on the other hand, if the court grants the request of one counsel and gives a declaration of law, such instruction is the action of the court, and counsel upon the other side have only to except to the action of the court in giving the same. So, too, as to the motions for new trial and in arrest of judgment. When the court acts upon such motions, the party simply excepts to the action of the court thereon. As to an instruction, the bill of exceptions should show an exception to the action of the court in giving or refusing it. As to the evidence, it should show that the party objected to its introduction (thus calling for a ruling of the court), and then further show an exception to the action of the court. No book was more consistently followed in Missouri in the early days than Whittlesey's Missouri Practice. In this work at page 481 is given a form for a bill of exceptions. I dare say that this form has been practically if not literally followed from that day to this. Upon the question of instructions this form puts it thus: "Whereupon the plaintiff prayed the court to instruct the jury as follows: (Here insert the same.) * * * Which instructions the court gave the jury, to the giving of which instructions in behalf of the plaintiff the defendant by his counsel then and there excepted at the time. The defendant upon his part prayed the court to instruct the jury as follows: (Here insert the same.) * * * Which instructions the court refused, to which refusal of the instructions thus prayed the defendant by his counsel then and there excepted at the time." At page 487 the author again speaks of the matter in language as follows: "It should be sufficient to say, 'to which ruling of the court in admitting said evidence against the objection of the party or in giving or refusing such instructions the party excepted.' A bill of exceptions concluding thus, 'To which decisions of the court the defendant excepted at the moment,' shows that exceptions were properly taken to the giving and refusing of instructions. *Steamboat Raritan v. Smith*, 10 Mo. 527. See *Ranneys' Adm'r v. Thomas*, 45 Mo. 111." The italics in the foregoing are ours. The author only uses the word "objection" in connection with evidence. He does not use it in the clause relating to instructions. No lawyer within recent years has not substantially followed the old form in Whittlesey in preparing his bill of exceptions, and I dare say that the ruling in the Sheets Case reaches practically every case upon appeal here and in the several Courts of Appeals. Within the writer's experience at the bar and upon the bench, that case is

the first to challenge the sufficiency of the bill of exceptions in so far as instructions are concerned, when the exceptions were saved in language as quoted in the Sheets Case. There is a case in 8 Mo. (*Vaulx v. Campbell*, 8 Mo. 224) where it is said that there must be an objection and an exception as to refused or given instructions, but this case relies for authority on *Shelton v. Ford et al.*, 7 Mo. 211, and, when the latter case is examined, it will be found that the rule stated was with reference to evidence, and not instructions. In fact, it furnished no basis for the ruling in the Vaulx Case. And be it further said that upon this point the Vaulx Case has not been cited from that day to this. The Shelton Case, considering the point ruled, was well enough, and in accordance with our present rule.

In the later case of *Elsner v. Supreme Lodge*, 98 Mo., loc. cit. 644, 11 S. W. 992, the court practically settled the question now under consideration. There we had an erroneous instruction, and the point made was that the exception had not been sufficiently preserved. The language of the exception is quoted and approved. We then said: "Plaintiff's counsel, to destroy the force of this error, contend that no exception to it was saved. On this point the recital in the bill of exceptions is this, 'to which action of the court, in giving said instructions, defendant then and there objected.' Here the objection was made immediately after the ruling, and evidently for the purpose of review. Although the word 'excepted' in that connection would more fully meet the requirements of technical nicety, we are not prepared to say that it is essential. The law dictionaries of Bouvier and Burrill mention an 'objection' made to the decision of a judge in the course of a trial as one of the definitions of the word 'exception,' and in Webster's dictionary the latter word is given as a synonym for objection. Our duty is to so construe the Code of Practice as to distinguish between substance and form (Rev. St. 1879, § 3586). We think we do so in declaring that the word 'objected' as above quoted from the record before us should be regarded as of the same significance as 'excepted.' Here we hold that the word "objected," if used after the ruling of the court is made, is equivalent to the word "excepted" and preserves the instructions for review. To the same effect is *Meyberg v. Jacobs*, 40 Mo. App., loc. cit. 137, whereat *Ellison, J.*, says: "On the original consideration of this cause, we did not pass upon interpleader's objections to instructions given for plaintiff, for the reason that we did not consider that exceptions had been saved by the action of the trial court. We are now satisfied that the bill of exceptions as set forth in appellant's printed abstract sufficiently stated an exception to the action of the trial court. *Elsner v. Supreme Lodge*, 98 Mo. 640, 11 S. W. 991. It shows the objections to the instructions were made

after they had been passed upon, and was not a mere objection, in the first instance, to them being given." In the early case of *Steamboat Raritan v. Smith*, 10 Mo. 527, Judge Scott, at the March term, 1847, of this court, had to deal with this question. In that case the exception as to the instructions was in this language: "To which several decisions of the court the defendant by his counsel excepted at the moment." Judge Scott in his usual terse and lawyer-like way thus disposes of an objection to the sufficiency of this exception: "We do not think that the bill of exceptions sustains the objection that no exceptions were taken to the giving and refusing of instructions."

We might go further, but we deem this sufficient. We try cases upon appeal from a bill of "exemptions," not a bill of "objections." True it is that the word "object" in certain connections may have the same meaning as "except." In the course of a trial an objection is made to the end that a ruling of the court may be had. This ruling is not upon what the court itself has done, but upon what the parties are doing or offering to do. The objection goes to the act of persons other than the court, and is made to get action from the court. When the court acts, the error is preserved by an exception to the ruling. Thus the origin of the term "bill of exceptions." Nor will it do to say that trial courts are imposed upon by reason of the rule existing in this state from the opinion of Scott, J., in 1847 to this date, as indicated in the *Sheets Case*, supra. Counsel do not give or refuse instructions. They simply request the same. The court gives instructions, and frequently tells the jury that the declarations of law given are the instructions of the court. At common law the instructions were orally given, and no previous objection could be made. An exception to the action of the court was all that could be done. When, under our law, the court acts, either upon request of counsel or upon its own motion in the matter of instructions, counsel only have to except to such ruling. They are not required to object to the instruction, and have their objection overruled, and then except to the action of the court in overruling the objection, rather than to the action of the court in giving the instruction. The *Sheets Case*, supra, is at variance with the heretofore well-recognized rule in this state. It establishes a new departure, and one not founded in reason. If counsel "at the time" excepts to the action of the court in giving or refusing an instruction, the trial court is apprised that error is to be charged thereon. Before reading the same to the jury, such court can, if desired, be fully informed as to the ground of exception. But we need not go further. Upon the question at issue the *Sheets Case* is wrong, and should be and is overruled.

Another reason might be assigned for the overruling of this second motion, but the

question herein discussed was the one calling for an opinion upon a motion (a thing not unusual), and, having discussed it, we conclude by saying that the motion was rightfully overruled.

VALLIANT, C. J., and KENNISH, FERRISS, and BROWN, JJ., concur. LAMM, J., concurs in separate opinion. WOODSON, J., dissents in opinion filed.

LAMM, J. I concur fully with my Brother GRAVES' opinion. I do not understand that opinion to hold that counsel might not sometimes be shown an instruction and specifically asked by the trial court if he objected to it. I do not understand that opinion to hold that counsel, to deal fairly with the trial court, could refuse to answer that request, or, having answered he had no objection, could thereafter save an exception, and make that exception effective on appeal. If counsel stood mute when inquired of by the court in that behalf, or if he answered, "No," he might estop himself to afterwards speak here, or say, "Yes." We can deal with such a case when we have it. When a court refuses to counsel the right to examine instructions, and exception is taken to that course, we can deal with that case when here. The case at bar is one merely raising the question whether an exception to an instruction is effective to have the instruction reviewed on appeal, nothing more appearing. The principal opinion, on reason and authority, returns to a rule of practice in vogue in Missouri appellate courts for generations up to the *Sheets Case*. We are but going back to the beaten way. The doctrine of the *Sheets Case*, then, is a somewhat virgin doctrine in this jurisdiction. Being new, the maxim applies: Novelty benefits not so much by its utility, as it disturbs by its novelty. Doubtless two-thirds of the cases now pending in appellate courts would ride off on the *Sheets Case* if it be followed as soundly ruled—an alarming result.

WOODSON, J. I am unable to concur with the opinion of my learned associates written in this case, and will proceed to give the reasons for the faith that is within me.

The opinion concedes that, in order to properly bring before this court for review the ruling of the trial court as to the admission and rejection of evidence, counsel must first object to its introduction, and then except to the ruling of the court in that regard. But, independent of that concession, it is elementary that, before this court will review the action of the trial court in admitting and rejecting evidence, an objection must not only be first made thereto, but the objection must specify the particular grounds upon which it is predicated; and, after court overrules the objection, counsel making the same must save his exceptions. *Parsons v. Railway Co.*, 94 Mo. 286, 6 S. W. 464; *Wayne*

County v. Railroad, 66 Mo. 77; Huhn v. Railroad Co., 92 Mo. 440, 4 S. W. 937; State v. Lett, 85 Mo. 52; Board of Trustees v. Westminster, 161 Mo. 270, 61 S. W. 811. The object of that rule is that the court may have counsel's theory of the evidence as well as their views and learning thereon, who, as a rule, having investigated the question before going into the trial, presumably know more about the competency of the evidence than the court does, who, perhaps, never heard of the case before it was called for trial. But my learned associates hold that this wise rule of practice, nor the reasons therefor, apply to the giving and refusing instructions; and therefore no objection need be made to the giving and rejection of instructions, and that all that is necessary to be done in order to have this court review the action of the trial court in that regard is to simply except to the court's rulings.

The reason assigned by the majority opinion as to why the rule applicable to the admission and rejection of evidence should not apply to the giving and refusal of instructions is anomalous to me. They say that the instructions given are the instructions of the court, and counsel have no opportunity of knowing what they will contain until after they are given, and therefore they are in no position to make an intelligent objection thereto before they are given, and consequently the only remaining thing to be done in the premises is to preserve their rights by excepting to the action of the court in that regard. Is that true? Has it come to the pass, where counsel, sworn officers of the court and the representatives of litigants therein, where their lives, liberty, and property are involved, dare not ask the trial court the privilege of seeing and reading the instructions before they are given? I think not. I know of no such judge, and, if there is such, then the sooner he is impeached or defeated for re-election the better it will be for the people of his circuit. Besides that, while it is true the instructions are the instructions of the court, yet it is equally true that practically the universal practice is that counsel for the respective parties prepare the instructions and request the court to give them as thus prepared, and there is ample opportunity for each to read and object to the other's instructions before they are passed upon by the court. In fact, in most, if not in all, the circuits with which I am familiar, the court has a regular rule requiring counsel to prepare their instructions, as far as it is practicable, before the close of the evidence in the cause. This is for the express purpose of enabling counsel to read each other's instructions and to make such objections thereto as they may deem proper without delay to the court, while they are being drawn and considered by counsel. So it must follow that there is no possible injury which can befall either party if this

rule is observed and enforced. It simply requires promptness and vigilance on the part of counsel in the trial of causes; and to that they should not object, for the reason that that is the very purpose for which they are employed.

I do not mean to convey the idea that in making objections to instructions when they are asked that counsel should frame such objections with that degree of nicety with which they are stated and discussed in this court on appeal or writ of error, but the objections should be sufficiently specific to intelligently call to the mind of the trial court the error counsel contend the instructions contain.

Not only is that argument of the majority fallacious in my opinion, but it is not predicated upon facts. The uniform practice which prevails throughout this state and elsewhere, wherever the law requires the instructions to be in writing, counsel for the respective parties prepare the instructions for their clients, and request the court to give them. Especially is this true where the legal propositions involved are difficult of solution. Nor have I ever heard of a court refusing counsel the privilege of seeing the instructions asked by the counsel for the opposite party prior to the court's ruling thereon; but, upon the other hand, my experience and observation has been that courts invariably request counsel for the respective parties to exchange instructions prepared by them in order that they may assist the court in arriving correctly as to the law of the case by pointing out any error they may contain, and thereby enable the court to avoid error in declaring the law. It is here where counsel can best serve their clients' interests, and better aid the court in the proper administration of the law than anywhere else. Without this assistance of counsel, the court, in all probability, knows nothing more about the law of the case than counsel did when the case first came into his office. But, after days, weeks, and perhaps months of investigation and study, counsel should learn something about the law of the case, and thereby be enabled to render valuable assistance in aiding the court to arrive at correct legal conclusions.

The very purpose and functions of lawyers are that by reason of their ability, skill, and learning, they are enabled to properly advise and skillfully prepare cases for trial, and so present them to the courts of the country that speedy and substantial justice may be done litigants without requiring the courts to take the time to investigate the law and facts after the case is called for trial. By this valuable assistance of counsel the labors of the courts are greatly minimized, and justice is speedily and substantially administered. Every litigant of this state has a constitutional right to be heard, either in person or by counsel, upon both the

law and facts of his case, and that means a real hearing, not merely a hearing in name. But according to the holding of the majority opinion each and every trial judge in this state is given the absolute power to say to every litigant: "I will not hear you upon the legal questions involved in your case. I will decide those questions without your assistance, hearing, or counsel." Instead of encouraging such practice and usurpation of power, if it exists, this court should in unmistakable terms place its seal of condemnation thereon, and require the trial courts to give counsel a respectful hearing upon the law of the case, and furnish them reasonable opportunities to see and read the instructions before they are given, in order that they may point out any error they may contain and make intelligent objections thereto, just as is done in passing upon the evidence of the case. It seems to me that any court which desires to do justice would gladly avail itself of the advice of counsel regarding the legal propositions involved, especially where they have investigated them previous to the day of trial, which is usually the case, as we know from observation and experience, and not turn a deaf ear and refuse to permit counsel to see the instructions previous to the time they are given. The opinion in this case assumes and justifies the trial court in doing those things. That assumption, however, I am glad to say is not well founded, for I have been unable to find but one case where the trial court undertook to do anything which smacks of such tyranny and oppression. That in a degree was undertaken in the case of *Molt v. Hoover* (Ind. App.) 81 N. E., loc. cit. 222, as will appear from the following extract therefrom: "The ninth reason in said motion is that at the beginning of the argument plaintiff's attorney demanded of the court that he be allowed an inspection of the instructions before the beginning of said argument, and that he demanded of the court an intimation of the instructions as would be given by the court, to which demand the court announced to said attorney at said time that he would not give said instructions in writing, and that he would not furnish the substance of said instructions to said attorney, nor would he furnish them to him in writing for said purpose, and the court did not furnish the substance of said instructions, nor make the same known to said attorney before the beginning of the argument. The bill of exceptions shows that just before the defendant had rested in putting in the evidence of the defense, and before the beginning of the argument in said cause, plaintiff asked the court that he be allowed an inspection of the instructions before the beginning of said argument; that the judge replied that he had had no opportunity to reduce the instructions to writing, and he expected to instruct the jury orally; that he did not want to delay the trial to prepare written instruc-

tions. Whereupon counsel for plaintiff said he would like to know the substance of the instructions which the court would give. Nothing more was said relative to instructions at that time, and no objection was made, and no exceptions taken' at the time by the plaintiff during the same term, but, after the jury had returned their verdict and had been discharged, excepted to said action of the court. The exception is thus shown not to have been timely taken." I am unable to see any reason, except the oppressiveness of a tyrannical judge, why counsel should not be permitted to point out the errors, if any, contained in the instructions, and object to them on that account, in the same manner that evidence is objected to. If counsel has not this right, then I am unable to see what possible assistance or benefit he can be to the court or client in the administration of justice. Such practice ignores counsel at the place where he is more capable of rendering more valuable assistance to the court than at any other place, and induces the courts to declare the law without investigation or proper knowledge thereof, and consequently leads to many erroneous rulings, causes appeals, and delay in the administration of the law.

The majority opinion has cited no adjudication of this state or elsewhere which supports the conclusions there stated, and I venture the assertion that there are none, for I have made quite an exhaustive research of the question and have found none. The case of *Steamboat v. Smith*, 10 Mo. 527, cited therein, falls far short of being an authority therefor. I will quote every word of that case bearing upon the question now under consideration, in order to show that my learned associate totally misunderstood that case. On page 530, 10 Mo., Judge Scott says: "The bill of exceptions concludes with the following words: 'To which several decisions of the court the defendant by his counsel excepted at the moment.'" Upon that showing in the record counsel for appellant contended in that case that the giving and refusal of instructions were not properly excepted to in the following language: "The giving and refusal of instructions were not properly excepted to, and the error of the court in that respect, if any, cannot be taken notice of on motion for a new trial." In discussing that question Judge Scott, on page 531, 10 Mo., said: "We do not think that the bill of exceptions sustains the objection that no exceptions were taken to the giving and refusing of instructions." The foregoing embraces all the court and counsel said upon this subject, and by reading the same it will be seen that Judge Scott at the very outset states that "the bill of exceptions concludes with the following words." Then follow the words first before quoted. He does not undertake to state what preceded the closing clause of the bill of exceptions, nor does he state whether or

not the instructions had previously been objected to; but he and counsel were dealing solely with the question of exceptions, and not objections, as shown by all his language, as before quoted.

In *Vaulx v. Campbell*, 8 Mo. 224, the exact point now under consideration was presented to this court, and on page 227 Judge Tompkins, in speaking for the court, said: "To this instruction the plaintiff objected, but he did not except to the opinion of the court overruling his objection; and in *Shelton v. Ford et al.*, 7 Mo. 211, it is decided by this court that 'it is not sufficient to say that he objects. He must save his objection on the record by excepting to the opinion of the court in overruling his objection.'" My learned associates seem to lay much stress upon the fact that Judge Scott wrote the opinion in the case of *Steamboat v. Smith*, supra. If that fact adds much weight to that case, then the case of *Vaulx v. Campbell*, supra, should not be devoid of all weight, for the reason that Judge Scott concurred in the opinion written therein by Judge Tompkins. But it is said the latter case has never been cited since its rendition. That is a mistake. It has been referred to many times, but not that portion of the opinion bearing upon the question in hand. Neither has the *Steamboat-Smith* Case been cited in so far as the question here involved is concerned. So, if we are to gauge the weight of these cases by origin, history, and collateral bearing, I respectfully submit that *Vaulx v. Campbell* is entitled to as much, if not greater, weight than is the case of *Steamboat v. Smith*, especially when the latter has no earthly application to the case at bar.

The case of *Sheets v. Iowa State Insurance Co.*, 226 Mo. 613, 617, 126 S. W. 413, is directly in point here, and, if adhered to, this cause should be transferred to the St. Louis Court of Appeals, because the constitutional question was not timely raised. In so far as it is material, it reads as follows: "The only objection made by counsel for appellant to the action of the court in giving said instruction numbered 3 is contained in the following language: 'Which said instructions numbered 1, 2, 3, 4, 5, 6, 7, 8, and 9 asked by plaintiff, and each of them, the defendant then and there excepted and still excepts.' While the foregoing language saves appellant's exceptions to the action of the court in giving said instruction numbered 3, yet the record nowhere shows that counsel for appellant made any objection whatever to the same, or to the action of the court in giving it. It is elementary that, before one can legally except to the action of the court in giving or refusing instructions, he must first request the court to give same or object thereto, as the case may be, before his exceptions will be availing. This alone, if it was all that is disclosed by the record, would show that appellant, not only failed

to raise the constitutionality of the section of the statute mentioned, but also that appellant failed to object to the giving of the instruction itself in any manner, as before stated. But that is not the entire disclosure made by this record. It shows that the constitutionality of said statute was not questioned until the motion for a new trial was filed. That question was first mentioned in said motion."

In the case of *Robinson v. Helena Light & R. Co.*, 38 Mont. 222, 99 Pac. 837, this same question was before the Supreme Court of Montana. While Montana has a statute bearing upon the question, yet it will be seen from the language presently quoted that the decision was not based upon the statute, but was based upon the general procedure in force throughout the country. The language of the Supreme Court of Montana is as follows: "It is insisted by counsel for plaintiff that the error assigned upon this instruction is not properly before the court for examination, because it does not appear from the record that a formal exception to the giving of the instruction was reserved in the trial court after the objection had been overruled. Under section 6746, Rev. Codes, at the settlement of the instructions as therein provided, counsel must state his objection to the particular instruction, and, if the objection is overruled, reserve his exception. The language of the section confuses the meaning, to some extent, of the terms 'objection' and 'exception'; but orderly procedure requires an exception after the objection has been disposed of, in order to enable counsel to urge the action of the court thereon on motion for a new trial, or on appeal, as in case of all other rulings that are regarded as objectionable, and to which objection must be taken. Technically, therefore, counsel for defendant have no right to have this court review the action of the trial court in this particular. Since, however, the question presented is of some importance, and a new trial must be ordered for the reason already stated, we shall venture to indicate briefly our views." To the same effect is the case of *Yergy v. Helena Light & R. Co.*, 39 Mont. 213, 102 Pac. 310. I have not this case before me, but, judging from a note thereof, the opinion was based upon a statute. To the same effect is *Ross v. Taylor*, 39 Mont. 559, 104 Pac. 864. Recently, within the last three or four months, this identical case came before this court in banc on a motion filed in a cause, the style of which I now disremember, as there was no written opinion delivered. In that case the plaintiff recovered a judgment below, and defendant appealed to this court. In due time respondent filed a motion in banc, asking that the cause be transferred to the Court of Appeals, for the reason that the amount involved was for a less sum than \$7,500, and that no constitutional question was involved. There was an act of the Leg-

islature governing, at least partially governing, plaintiff's cause of action.

Appellant in his suggestions in opposition to the motion to transfer to the Court of Appeals showed by the record that said act of the Legislature was not mentioned in the pleadings, evidence, or instructions. However, the instructions for respondent were drawn in harmony with the legislative act. There were no objections made to the instructions, save as was shown by the bill of exceptions, that appellant duly excepted, etc. In due time appellant filed his motion for a new trial, and among other reasons assigned therefor assailed the constitutionality of said act of the Legislature, referring to it in terms, and specifically stated what sections of the Constitution it violated, together with the reasons therefor. Upon that state of the record, counsel for respondent insisted that the constitutional question mentioned in the motion for a new trial was not timely raised, that the question should have been raised by specific objections made against respondent's instructions when they were asked, and that, not having done so, the constitutional question was waived. In opposition to that contention, counsel for appellant cited and relied upon an opinion written by Judge Lamm in the case of *Lohmeyer v. Cordage Co.*, 214 Mo., loc. cit. 686, 113 S. W. 1108, holding that in certain cases the motion for a new trial was the first door opened through which a constitutional question could be raised. During the discussion of that opinion, the writer called the court's attention to the *Sheets-Campbell Case* (which the majority opinion now overrules), and stated that it was directly in point, and that it clearly distinguished the question in hand from that involved in the *Lohmeyer-Cordage Co. Case*. It was there unanimously agreed that the *Lohmeyer Case* was not applicable, and that the *Sheets-Campbell Case* was controlling therein, and, in consequence thereof, the court in banc unanimously held that the constitutional question had not been raised in time, and was therefore waived, and the cause was transferred to the Court of Appeals. The express grounds upon which the order of transfer in that case was based was that plaintiff should have raised the constitutional question by specific objection made to respondent's instructions on that ground when and at the time they were asked, and that he could not stand idly by until after verdict, and then for the first time, by the motion for a new trial, interject a constitutional question which was never presented to the court for decision, and which in all probability the court never heard of during the progress of the trial, and certainly it is, as shown by the record, the court never passed upon that question until it did so in passing upon the motion for a new trial. Judge Gantt and myself, and probably others of the judges went further, at the suggestion of Judge Gantt, thought it

would have been better practice if counsel for appellant in that case had at the time when respondent asked his instructions, not only specifically objected to them because the act upon which they were predicated was unconstitutional, but also he should have asked a counter instruction, requesting the circuit court in express terms to declare and hold said act unconstitutional, mentioning the sections of the Constitution it violated and specifying the reasons therefor.

There can be no question but what that is the proper practice, otherwise the trial court might be convicted of error in deciding a question which it never heard of, much less passed upon. The purpose of the motion for a new trial, as I always understood it, is to call the trial court's attention to its previous rulings made during the course of the trial, and thereby give it an opportunity to correct any erroneous ruling it may have committed during that time; but, if the doctrine announced in the majority opinion is to become the practice, then the motion for a new trial becomes the means through which objections to the rulings of the court are to be made, and that too after the ruling has been made and the trial has been concluded, and not, as we have all along supposed it to be, a statement of the errors alleged to have been committed by the court during the progress of the trial, and a request that it correct the same. Also see *Gronan v. Kukkuck*, 59 Iowa, 18, 12 N. W. 748. To the same effect is *Baltimore & Ohio R. R. Co. v. Lee*, 106 Va., loc. cit. 34, 55 S. E. 2. There the court in discussing this question said: "The language of this addendum appears, also, at the foot of instruction No. 13, which was given by the court, and does not appear to have been objected to in that connection: 'It is contended that inasmuch as the defendant failed to make objection to instruction No. 13, which was given by the court, it cannot now object to the addendum to instructions 7, 8, 9, and 12, which were asked by the defendant. In support of this contention the rule announced in the case of *Va., etc., Co. v. Bailey*, 103 Va. 205, 49 S. E. 33, and other cases, is invoked. This rule is that, although exception to the testimony of a witness may be well taken, if the same fact is subsequently proved by other witnesses, without objection, the error will be deemed harmless.' This rule has no application to the question under consideration. The defendant has already objected to the addendum four times, and had made that objection the subject of a bill of exceptions each time. This was entirely sufficient to save the question, and make it the subject of review by this court. The defendant was not called upon to repeat indefinitely the same objection, or to continue to protest against the use of language by the court in framing instructions which the court had already passed upon and held to be proper. It was the law that was complained of, not the number of times the court repeated the

proposition to the jury. If the defendant was prejudiced by the first statement of the erroneous proposition of law, and the question was then properly saved, he has the right to have the error reviewed, although it may have been subsequently repeated without objection being taken. It would have been an idle ceremony to have enrolled and sealed a bill of exceptions to set out an error that was already embodied in the record four times. The failure, therefore, to embody instruction No. 13 in a bill of exceptions, cannot impair the right of the defendant to rely in this court upon its exception duly taken to instructions 7, 8, 9, and 12, as modified by the circuit court." There is another large class of cases in this and in our sister states which show that the universal practice is that the instructions must be objected to before an exception of the ruling of the court thereon can be properly saved, namely, that multitude of cases hold that when an instruction is faulty because of the omission of some element therefrom, and not for misdirection, then the aggrieved party must supply the omission by asking a supplementary instruction supplying the omission, where it can be done without injury to him; but, where it cannot be done without such injury, then he must call the court's attention to the omission by an objection to the instruction, and request the court to correct the same in that regard. He cannot stand idly by until the conclusion of the trial and then for the first time raise the question by simply excepting. *Morgan v. Mulhall*, 216 Mo., loc. cit. 462-464, 114 S. W. 4.

In *Taggart v. McKinsey*, 85 Ind., loc. cit. 396, the Supreme Court of Indiana said: "Counsel do not complain of what the instruction states, but of what it omits to state. The proper remedy for such an omission is, not an exception to the instruction given, but a request to the court to give an instruction supplying or covering the omission. Then, if the court refuse to give the instruction asked for, and the proper exception is saved, the error, if it be an error, will be presented by the record. But in such case the party cannot by merely saving an exception to the instruction given get an available error into the record. *Jones v. Hathaway*, 77 Ind. 14." In *Raymond v. Nye*, 5 Metc. (Mass.) loc. cit. 154, the Supreme Court of Massachusetts said: "The appropriate remedy, when the counsel seriously apprehend that the charge may be misunderstood, or is not sufficiently direct and explicit in matter of law, is to suggest the same before the case is committed to the jury. *Lathrop v. Inhabitants of Sharon*, 12 Pick. (Mass.) 172." See, also, *Middlebrook v. Slocum*, 152 Mich., loc. cit. 290, 116 N. W. 422, and *Block v. Great Northern Ry. Co.*, 106 Minn. 285, 118 N. W. 1019. It is useless to carry the latter thought further, as it was intended simply to illustrate how fallacious is the contention that

it is not the proper practice to object to instructions when asked, as well as to except to the ruling of the court thereon at the time. The majority opinion seems to lay some stress upon the fact that Webster and certain other lexicographers have defined the words "object" and "except" in certain instances to mean one and the same thing. To my mind, it does not take much of a lexicographer or a man of a very high degree of common sense to understand and know that there is a broad distinction between the word "object" when addressed by counsel to the court in opposition to an instruction asked by counsel upon the other side and the word "except," when made by the latter and addressed to the court in opposition to its ruling made upon the instruction asked. The former refers to the instruction and the latter to the action of the court. The former in the very nature of things is made before the court makes its ruling, and the latter after it is made.

But, finally, let us look at this question from the ordinary common-sense view as it is presented to us every day in our courts of justice; and in doing so let us not forget that the court is not a tyrant, nor are the lawyers of the state sphinxlike in character, as some of the argument advanced in favor of the majority opinion might lead one to believe who is not familiar with the situation, but are men of blood, flesh, and bone, possessing action and motion, endowed with intelligence and courage, knowing their rights, and not afraid or backward in asserting them. Upon entering the courtroom we see the court presided over by an intelligent judge, learned in the law, desirous of meting out justice according to law. The jury is in the box, listening to the evidence and the rulings of the court. The witnesses appear one by one and tell what they know of the case. The litigants are there, earnest and grave in appearance, watching every moment and listening to every word of the court, jury, and counsel. The latter, inspired with the responsibility of his position and fired with ambition of success, is spurred on to his best. His mind is bright and active; perception keen; discrimination quick; eyes alert and ever acute. In those presences, at the close of the testimony, the instructions are handed up to the court. No power or authority can, rather has, ever prevented counsel from seeing those instructions before they are given or refused. The same may be said of those written by the court and given of its own motion. I dare say there is not one case in 10,000 where the court ever refused counsel the right and privilege of seeing the instructions when requested, or denied him the right to suggest, point out, and object to any error that he may believe to exist therein. If such denial should be made by a court in the trial of a case, counsel could and doubtless would object to such action of the court and lodge it in the bill of exceptions,

and bring it here for review. In fact, I never saw or heard of a case where those rights were denied counsel, except in the Indiana case previously mentioned; but, upon the other hand, my long experience and observation has been that the courts are only too glad to have the valuable assistance of counsel in settling the instructions and law of the case, and it may be said to the credit of the trial courts of this state that I have never seen or heard of a case where the assistance of counsel was ever declined.

So much for general and preliminary observations. We will now come to the question in hand, and see what the practical result would be if we should adopt the practice announced in the majority opinion.

First. If instructions were handed to the court with the request that they be given, then, under the rule announced, opposite counsel could respectfully decline, upon the request of the court, to point out any objections, if any, he may have to the same, and quietly await the action of the court in passing upon the instructions, and then simply except in general terms, and after verdict and judgment file a formal motion for a new trial, also general in its terms, stating no specific objection to any instruction, save that they are erroneous, illegal, etc., appeal the case to this court, and here for the first time develop his points, and present to this court questions for determination and reversal of the judgment which the trial court never heard of or dreamed about, much less ever having passed upon them. Such masked batteries are more becoming hostile armies on the field of battle than they are to courts of justice in the administration of the law in a civilized and enlightened country; and, if it were not for the seriousness of the situation, the approval of such practice, and mock justice by the highest court of the land, it would be grotesque in the extreme.

Second. Not only could counsel decline to object and point out errors in opposite party's instructions when requested to do so by the court, as previously suggested, but he could also tacitly mislead the court into giving erroneous instructions by not objecting to them when he had the opportunity to do so, and simply except to the ruling of the court after they had been given. Then counsel could file his motion for a new trial, assail the instructions as being illegal and improper in general terms, appeal to this court, and, again, for the first time, present to this court the errors contained in the instructions given by the trial court, and perhaps again reverse the circuit court for an error that was never presented to it for decision, and which was never in fact decided by it, and which in all probability it never heard

of. If counsel should be guilty of such negligent conduct regarding the introduction of evidence when offered by the opposite party, he would not thereafter be heard to say that he at the time excepted to the action of the court in admitting the evidence. He cannot sit idly by and witness the introduction of evidence, and, after its admission, accept it as legitimate testimony in the cause, if it proves favorable to his side of the cause, or, upon the other hand, object to the same and have it stricken out, if in his judgment such evidence is detrimental to him. He will not thus be permitted to blow hot and cold with the court. If he neglects to timely object, then the door to a future hearing is forever closed against him. That being unquestionably the law when applied to the evidence, then how much stronger is the reason for requiring counsel to object to instructions when asked by the opposite party, or when given by the court of its own motion. Where is the trial judge or active practitioner in this state who has not experienced just such results as I have before suggested, and that, too, in spite of the stringent rules of practice which have heretofore prevailed in this state? A number of cases have been appealed to this court and to the Court of Appeals from judgments rendered in causes by the court over which I had the honor of presiding, and reversed for some alleged error which I never heard of and which was never presented to the court for adjudication; and I dare say that there are but few, if any, circuit judges in the state but who have had the same experience. In the light of that experience, are we to go further and throw down the bars and abolish all rules which require specific objections to be made to the introduction of testimony and to the giving of instructions, which will be done if the majority opinion is to become the rule? Under such a rule of procedure, the practice of law in this state will become a hidden art, conducted not by an open and wisely guided hand, but by a shrewd and hidden hand. Such a course, if pursued, will result in additional delays in the administration of justice, encourage appeals, increase costs of litigation, and result in hollow and mock justice. I might go on infinitum, giving instance after instance where such a rule of practice would and most certainly will lead to bringing just reproach upon the courts, if not upon law itself; but, since no good can flow therefrom, I will press that matter no further. The instances mentioned fully illustrate the evil results of such a rule.

I am therefore of the opinion that the cause should be transferred to the St. Louis Court of Appeals.

HALL v. CITY OF SEDALIA et al.

(Supreme Court of Missouri. Feb. 9, 1911.)

1. STATUTES (§ 77*)—SPECIAL LEGISLATION—LOCAL OPTION LAWS.

Sess. Laws 1895, p. 58, authorizing cities of the third class to provide for drains and sewers on a two-thirds vote of the qualified electors does not violate Const. art. 9, § 7 (Ann. St. 1906, p. 260) requiring the powers of each class of cities to be defined by general laws in that it permits cities voting affirmatively to obtain a privilege which other cities are denied.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. § 80; Dec. Dig. § 77.*]

2. STATUTES (§ 220*)—LEGISLATIVE CONSTRUCTION—CONCLUSIVENESS.

Courts are not bound by the legislature's erroneous construction of a statute.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. § 298; Dec. Dig. § 220.*]

3. MUNICIPAL CORPORATIONS (§ 270*)—SEWAGE DISPOSAL PLANTS—POWER TO CONSTRUCT.

Sess. Laws 1895, p. 58, authorizing certain cities to construct sewers, connections therewith, appurtenances, etc., authorizes construction of a sewage disposal plant.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 725; Dec. Dig. § 270.*]

4. MUNICIPAL CORPORATIONS (§ 75*)—SEWER IMPROVEMENT—STATUTORY PROVISIONS—ADOPTION.

By adopting Laws 1895, p. 58, providing a plan of sewer construction for certain cities, a city subjected itself to the general law then in force and subsequent amendments of the act including that enacted in 1909 (Laws 1909, p. 293), authorizing construction of sewage disposal plants.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 179, 180; Dec. Dig. § 75.*]

Woodson, J., dissenting in part.

In Banc. Appeal from Circuit Court, Pettis County; Louis Hoffman, Judge.

Action by William F. Hall against the City of Sedalia and others. Judgment for plaintiff, and defendants appeal. Reversed and remanded, with instructions.

This case comes here by appeal from the circuit court of Pettis county, where judgment was rendered in favor of respondent on May 21, 1910. The case arises upon the following facts: The respondent, plaintiff below, entered into a written contract in March, 1910, with the city of Sedalia for the construction of a sewage disposal plant, and for the construction of sewer mains to be connected therewith, at a total cost of \$36,000, and, as security for the performance of such contract, plaintiff gave bond to the city in the sum of \$8,000. Before work was begun plaintiff was advised by counsel that the act of the Legislature under which the city was proceeding to erect this disposal plant was unconstitutional and void, and that the special tax bills that should be issued to the plaintiff in payment for the work done under his contract would not constitute a valid

lien on the property in the district, and could not be collected by law; whereupon plaintiff filed his bill in equity praying the court to cancel, annul, and declare wholly null and void plaintiff's aforesaid contract and bond. Issues were made up, the case was tried by the court, and judgment rendered for plaintiff granting the relief prayed for. Due proceedings were had, and the case comes here by appeal.

Two questions arise upon the record: (1) It is contended by the plaintiff that the act of the Legislature passed in 1895 (Sess. Acts 1895, p. 58), providing a scheme of sewer construction for all cities of the third class which should, by a vote of the people, adopt the provisions of such act, is unconstitutional in that (1) it violates section 7, art. 9, of the Constitution (Ann. St. 1906, p. 260) which provides that the powers of each class shall be defined by general laws, "so that all such municipal corporations of the same class shall possess the same powers and be subject to the same restrictions," in that it permits certain cities, voting affirmatively, to acquire powers which are not common to all cities of the third class; and that (2) it violates section 53 of article 4 (Ann. St. 1906, p. 197) which forbids the General Assembly to pass any local or special law. This contention is based upon the case of *Owen v. Baer*, 154 Mo. 434, 55 S. W. 644. (2) It is also contended that even if the act of 1895 is held to be constitutional, yet the contract in question is invalid because the power granted to the city to erect a disposal plant was not in the original act as voted upon by the people, but was granted by an amendment to that act made by the Legislature in 1909 (Laws 1909, p. 293) which amendment had never been submitted to or voted upon by the people, and that therefore the enlarged powers given to the city by such amendment were not in force and effect, and could not be made effective without an affirmative vote by the people.

W. W. Blain, for appellants. W. E. Owen, for respondent.

FERRISS, J. (after stating the facts as above). 1. Upon the threshold of this case arises the question whether a court of equity will entertain a bill to construe a contract, or to declare a contract invalid, before any performance or attempt to perform is shown. If a man makes a contract, and afterwards, before beginning a performance, doubts its validity, he has his legal remedy. He may decide either to perform or refuse to perform, and take his chances in a court as to results. If this were a contest between individuals over a matter of private interest only, it would be a serious question whether the court would entertain the case at all. In view, however, of the public character of

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

the contract in question, and in further view of the fact that the law invoked in this case cannot be regarded as being satisfactorily settled by the former decisions of this court, we have decided to pronounce judgment upon the questions involved; our action, however, not to be regarded as a precedent for suits of this character.

2. Constitutional questions of the character of those involved in the present case have been frequently before this court. They received a full discussion in *Owen v. Baer*, 154 Mo. 434, 55 S. W. 644. That case arose upon the act of 1893 (Sess. Acts 1893, p. 101), which provided that, "In every city in this state * * * of either the third or fourth class, the acting municipal authorities thereof upon a vote by ballot of two-thirds of the qualified voters," etc., "in favor of adopting the provisions of this act, shall have power by ordinance to provide drains and sewers for the same," etc. The aforesaid act is similar to the act of 1895 in question, so far as the questions raised are concerned. Westport, a city of the fourth class, proceeded under said act to construct a sewer system, and issued tax bills in payment thereof, and *Owen v. Baer*, supra, was a suit to cancel certain of these tax bills upon the ground that the act was in violation of section 7 of article 9 and section 53 of article 4 of the Constitution, presenting questions similar to those in the case at bar. Three judges in banc, Gantt, C. J., and Robinson and Valliant, JJ., held the act of 1893 to be in violation of section 7 of article 9, upon the ground that this act enabled some cities of the fourth class to acquire powers not possessed by other cities of that class; that it created, in the language of Judge Gantt, who wrote the opinion, "a dissimilarity in the powers of cities of the fourth class." Judge Sherwood, in a separate opinion, Judge Burgess concurring, held that the act was unconstitutional because it was not within those specific provisions of the Constitution which Judge Sherwood said provided "just when and where a vote of the people may be taken." Judge Marshall, in a separate opinion, held that the act was a valid one, violating no provision of the Constitution, and that the bill of plaintiff should be dismissed. Judge Brace concurred with Judge Marshall upon the proposition that the act did not violate section 7 of article 9. Five of the judges concurred in holding the act invalid; three upon one ground, two upon another and different ground, and one upon a ground which does not appear. The decision in *Owen v. Baer* settled that case, but it did not establish the judgment of this court upon the main proposition involved in the case at bar; that is, that the act violates section 7 of article 9 of the Constitution.

The respondent contends, first, that the act of 1895 (Laws 1895, p. 58), now sections 9281 to 9298, inclusive, Rev. St. 1909, violates sec-

tion 53 of article 4 of the Constitution, in that it is a local or special law; second, that it violates section 7 of article 9, in that it enables some cities of the fourth class to acquire powers not possessed by all the cities of that class. These two propositions were presented in the *Owen-Baer* Case. Upon the first proposition the separate opinion of Judge Gantt accepted the holding of Judge Marshall. Hence, a majority of the court agreed that the act did not violate section 53 of article 4. That proposition may be regarded as settled.

As the second proposition received the approval of only three members of the court, it remained open so far as the case of *Owen v. Baer* goes, and so far as we are advised, is still an open question in this state.

The act in question provides: "In every city of the third class in this state the acting municipal authorities thereof, upon a vote by ballot of two-thirds of the qualified voters," etc., "shall have power by ordinance to provide for drains and sewers," etc.

Does this act violate section 7 of article 9 of the Constitution, which provides that "the power of each class (of cities) shall be defined by general laws, so that all such municipal corporations of the same class shall possess the same powers and be subject to the same restrictions"? The act in question is complete in itself, and is uniform in its application to cities of the third class, and comprehends all cities of that class. Whether the law shall come into operation in any particular city depends upon a contingency, namely, an affirmative vote of the people of such city. But this applies to each and every city in the class. The law extends the same right, the same privilege, to each city in the class, and is therefore uniform. It is, in the language of the Constitution, a "general" law, and under it all the cities of the same class, as required by the Constitution, "possess the same powers" and are "subject to the same restrictions."

In passing upon the constitutionality of this law, we must look at it as it leaves the Legislature. Is it complete, effective, and universal in its application to cities of the third class? Does it give a privilege or power to one which it denies to another? Does it impose restrictions upon any that do not apply to all? That the law does not take effect in any particular city until the people vote a desire for its application does not, in our opinion, affect the character of the law itself, provided that it may take effect in the same way and under the same conditions in every other city of the same class. As was said by Wagner, J., in *State ex rel. v. Wilcox*, 45 Mo. 458: "The proposition cannot be successfully controverted that a law may be passed to take effect on the happening of a future event or contingency. The future event—the happening of the contingency, or the fulfillment of a condition—affords no additional efficacy to the law, but

simply furnishes the occasion for the exercise of the power." To the same effect is the reasoning of this court in the case of the Township Organization Law, 55 Mo. 295. The court had under consideration an act which provided: "This act shall apply to and be in force in all counties adopting the act to provide for township organization, and takes effect from and after its passage," and held it to be constitutional. The court said: "It is a general law made for the whole state, and by the terms of the act itself took effect from and after its passage. Every county in the state may avail itself of the privileges afforded by this law by a majority vote of the people. * * * If a majority vote for it, such vote does not create the law, but places the county so voting within its provisions."

Certainly, the validity of the law cannot depend upon whether one or all the cities choose to exercise the power which the act confers upon all. This act gives the same power to all the cities of the class. It does not confer one sewer system upon some of the cities and another system upon others; but all the cities have the same power to adopt the same sewer system. The possession of the power does not depend upon its exercise; it depends upon the general law, which is in force equally upon all cities of the class, whether or not it is invoked. An admirable review and discussion of the decisions of this court, as well as of the law elsewhere, pertaining to this question, is found in the exhaustive opinion of Judge Marshall in the Owen-Baer Case, *supra*. That opinion may be resorted to for the learning on this subject. It is the judgment of this court that the act in question is constitutional and valid.

2. A further question is presented in this record, one not hitherto before the court. It arises concerning an amendment made in 1909 (Laws 1909, p. 293) to the aforesaid act of 1895. The situation is this: On April 1, 1902, the people of Sedalia, by an affirmative vote sufficiently large, adopted the provisions of the act of 1895. At that time the act, in its first section, authorized the city, after the adoption of the act by the people, to provide "drains and sewers," and throughout the subsequent sections these words, "drains" and "sewers," are used with the additional words "connections" and "appurtenances." So the law stood when the people of Sedalia adopted its provisions. In 1909 the law was amended by inserting after the words "drains and sewers" the additional words "and all necessary plants for the disposal of sewage"; and so the law stood when, without further vote by the people adopting this amendment, this contract was entered into by respondent to construct a disposal plant for sewage and connecting mains therewith.

It is claimed by respondent that the amendment of 1909 did not confer upon

cities, which had theretofore voted to adopt the sewer scheme as set out in the law of 1895, the enlarged powers given by such amendment to erect disposal plants, and that such enlarged powers could be acquired only by an affirmative vote of the people accepting the amendment. It is argued that the people, while willing to adopt a sewage scheme involving drains and sewers only, might refuse to approve one involving the increased expenses of a disposal plant. In our opinion, the right of the city of Sedalia to construct a disposal plant does not depend on the amendment of 1909. Section 1 of the original act provides for "sewers and drains" and "connections therewith." Section 4 provides that "sewers may be constructed and maintained with inlets, laterals, branches and appurtenances." Section 15 provides that "any sewers heretofore or hereafter constructed may be changed, diminished, enlarged or extended, and shall have all the necessary laterals, inlets and other appurtenances which may be required."

The contract in question is based upon an ordinance of the city authorizing an enlargement and extension of the sewer system by adding thereto a disposal plant in the shape of a septic tank and mains connected therewith. A sewer system without a place to dispose of the contents would be useless. A septic plant for such disposition, with its connections, would be naturally appurtenant to, if not an integral part of, the system. The amendment of 1909, with its emergency clause, may be regarded as a legislative declaration that the original act was not broad enough to include disposal plants, and as such it is entitled to respectful consideration. We do not find that this amendment was occasioned by any ruling of this court holding the original act insufficient. The amendment was made, perhaps, to settle any question of doubt. However that may be, we are not bound by an erroneous construction of the law by the Legislature. (*State ex inf. v. Goffe*, 192 Mo., loc. cit. 688, 91 S. W. 486.) If, as a matter of law, the act of 1895 authorized the construction of the plant in question, the fact that the Legislature erroneously regarded the act as insufficient, or doubtful, would not make it so. Furthermore, we are of the opinion that when the city adopted the act of 1895 and the sewage plan thereby provided, it subjected itself to the general law then in force, and also to any amendments that the Legislature might thereafter enact.

In accordance with the foregoing views, the judgment is reversed and the cause remanded, with instructions to dismiss the bill. All concur but VALLIANT, C. J., who is absent, and WOODSON, J., who dissents.

WOODSON, J. I dissent from the first paragraph of this opinion, for the reason that there is no equity in the bill. The opin-

ion itself concedes this fact; but notwithstanding that fact this court entertains the appeal and adjudicates the cause upon its merits as though a court of equity had jurisdiction of the same. The only excuse offered for this anomalous proceeding is found in the bare statement of the opinion that it is not to be taken as a precedent. Notwithstanding that statement, it is a precedent, or rather it will become so just as soon as the opinion is handed down; and must be followed when a like case is presented, or it must be overruled. If overruled, which the opinion intimates will be done when another case of like character is presented, then this court will justly be charged with partiality and discrimination. If, upon the other hand, the opinion should be followed, then it violates all equitable procedure, and also violates that provision of the Constitution which guarantees the right of trial by jury simply by a court of equity assuming jurisdiction of an action at law. The latter is triable before a jury, while the former is triable before the court; but this opinion with one stroke of the pen strikes out the right to a trial by jury. While it is true that point was not raised by counsel, however it is in the case, and the court has raised the point itself only to brush it aside as so much chaff, and if adhered to must deny that valuable right to the next comer. This opinion, like many others found in the books, shows the greatest danger which threatens the perpetuity of all forms of government, namely, the seeming necessity for the lodgment of absolute and final power in some individual officer or officers, who assume and exercise powers not delegated to them by the law, and yet there is no remedy because of said final and absolute power. That excessive exercise of power is the rock upon which the ship of state of all nations have been or will be wrecked, and it will just as surely wreck those of the present and future nations as it has wrecked those of the past. The only salvation there is, if any, from wreck and ruin rests with a wise pilot who will steer the ship clear of the breakers by wisely exercising only the powers intrusted to him within the true spirit and meaning of his grant of power. A court has no more legal or moral right to exercise power in excess of its true jurisdiction simply because of its unrestrained physical power than an individual has to violate the laws of the land simply because he has the physical power to do so. The difference being the latter's conduct is subject to review, while the former's is not. In the long run, however, the disastrous results of the former will be more detrimental to society than that of the latter. The one wrecks governments, while the other ruins individuals.

This case within itself may be of little im-

portance, but when considered in connection with the jurisprudence of a great state it may at some future time cut an important figure. As was said by Napoleon in speaking of the Russian War, "No events are trifling with regard to nations and sovereigns, for their destinies are controlled by the most inconsiderable circumstances." He then went on to state what trivial things brought about that war, which ultimately involved all Europe, and finally resulted, if I remember correctly, in his downfall at Waterloo.

It is just such an opinion as this that upsets and keeps the law in an unsettled condition, and renders its administration difficult and uncertain, and lays the foundation for further usurpation.

I express no opinion as to the other paragraphs.

REED et al. v. BRIGHT et al.

(Supreme Court of Missouri. Feb. 9, 1911.)

1. JUDGMENT (§ 334*)—CORRECTION IN SAME COURT—WRITS OF ERROR CORAM NOBIS.

Circuit courts can entertain writs of error coram nobis, or motions in the nature of such writs.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 334.*]

2. JUDGMENT (§ 334*)—CORRECTION—WRIT OF ERROR CORAM NOBIS—DILIGENCE.

One may not have an order corrected on a motion in the nature of a writ of error coram nobis, where the fact on which the right is based—the absence of any motion—could with the exercise of any diligence have been known by him before the order, when it should have been brought to the court's attention.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 639; Dec. Dig. § 334.*]

3. JUDGMENT (§ 334*)—CORRECTION—WRIT OF ERROR CORAM NOBIS—SCOPE OF REMEDY.

The record and the verity thereof cannot be attacked by a motion in the nature of a writ of error coram nobis; but the error of fact charged must be consistent with the record.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 639; Dec. Dig. § 334.*]

4. JUDGMENT (§ 334*)—CORRECTION—WRIT OF ERROR CORAM NOBIS—SCOPE OF REMEDY.

As a general rule the writ of error coram nobis relates to facts which will destroy the judgment, and strikes at it on the merits, and not to pure matters of procedure and orders made thereon, occurring after the judgment on the merits.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 639; Dec. Dig. § 334.*]

5. APPEAL AND ERROR (§ 440*)—PROCEEDINGS IN TRIAL COURT PENDING APPEAL.

Pendency of an appeal deprives the trial court of jurisdiction, at least after the term at which it rendered the judgment appealed from, to uproot its judgment by trial on a writ of error coram nobis, and so divest the appellate court of jurisdiction.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2198-2201; Dec. Dig. § 440.*]

In Banc. Original action by Ollie M. Reed and others against Henry L. Bright and

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

others for prohibition. Judgment for petitioners.

J. B. McGilvray and R. A. Mooneyham, for relators. J. D. Harris, for respondents.

GRAVES, J. This is an original action in this court, the purpose of which is to prohibit the respondent, Henry L. Bright, as one of the judges of the Jasper county circuit court, from canceling certain orders in the case of Ollie M. Reed et al. v. Samuel Moss et al., defendants. To abbreviate, the pleadings show that in the case aforesaid judgment was entered for the defendants. The record of the court also shows that on the day such judgment was entered, the following entries of record were made in the court presided over by the said Bright, the respondent herein:

"Trial by court and decree for defendants as prayed and as per record entry.

"Motion for new trial filed.

"Motion for new trial overruled.

"Affidavit for appeal filed.

"Docket fee of \$10.00 deposited.

"Appeal granted to Supreme Court.

"Appeal bond in the sum of \$500 to be filed with and approved by clerk within ten days after adjournment of present term of court; leave to plaintiff to file bill of exceptions on or before the 3d day of February, 1910, term."

These records are from the clerk's minutes, but it is pleaded and therefore admitted, because respondent stands here upon a demurrer, that they were fully spread of record in the usual and customary form on the same day and before the court adjourned. The court adjourned for the term on the day this judgment was entered and the records perfecting the appeal were made. By proper order of court the time for filing the bill of exceptions was extended, so that the rights of the appellants were duly preserved, but for the threatened action of the respondent, which action, it is averred, was beyond his power at the time, under the facts pleaded.

Later the defendants, in the suit aforesaid, after the appeal was granted to this court and all the entries made as above set out, filed a motion in the nature of an application for an order for writ of error coram nobis. This application sets out all of the records written up from the minutes of the clerk hereinabove set out, and then thus concludes: "The defendants state that in truth and in fact no motion for new trial was filed by plaintiffs in said case on the 18th day of December, 1909, and that no such motion was filed during the said November, 1909, term of said circuit court; that no affidavit for appeal was filed on said 18th day of December, 1909, that no affidavit for appeal was filed during said November, 1909, term of said circuit court, and that no affidavit for appeal was filed at any time in said case, and that no bond for appeal was ever filed therein. Defendants further state that on

the 20th day of December, 1909, two days after the final adjournment of said November term of said court, R. A. Mooneyham, one of the attorneys for the plaintiffs, filed with the clerk of said circuit court an instrument purporting to be a motion for new trial in said cause, and that James Burke, deputy circuit clerk of said court, as such deputy clerk, dated back the time of the filing of said purported motion for new trial, so that the filing date indorsed on said purported motion for new trial showed that it had been filed on the 18th day of December, 1909, while in truth and in fact said purported motion for new trial was filed on the 20th day of December, 1909, and in vacation of said court. And that the record of the filing of a motion for new trial by plaintiffs on the said 18th day of December, 1909, the record of the court's action in overruling said motion on said day, the record of the filing of an affidavit for appeal, and the record of the court's action thereon in allowing an appeal to the Supreme Court on said date, the order allowing plaintiffs leave to file bill of exceptions in said cause on or before the 3d day of the next term of court thereafter, and the court's order fixing the amount of the appeal bond, and allowing same to be filed with and approved by the clerk of said court within 10 days after the final adjournment of court, were all ordered, made, and done in consequence of the errors of fact as hereinbefore set forth, but which do not appear on the record, so that in said proceedings there is manifest error prejudicial to the rights and interests of the defendants. Wherefore, the premises considered, the defendants pray that this honorable court vacate the said orders and entries of records showing the filing of said motion for new trial, the overruling of same, the filing of an affidavit for an appeal from said judgment, and the allowance of such appeal to the Supreme Court, the order for the appeal bond, with leave to file with the clerk as aforesaid, and the order granting to plaintiffs leave to file bill of exceptions in said case, and that all said records be vacated and for naught held, and for all and such other relief as to the court may seem meet and proper."

Relator's petition sets out all the facts and records in the case of Reed et al. v. Moss et al., and concludes by charging that the said Bright was threatening to assume jurisdiction and hear and determine said motion, and was threatening to sustain the same on September 3, 1910, and would sustain the same on that day, unless prohibited by this court. It is further averred that his threatened action was beyond the jurisdiction of said respondent in said cause.

Preliminary rule was granted in vacation by the late Chief Justice James D. Fox, and the respondent has filed return in the nature of a demurrer, and stands thereon. The facts are therefore admitted and we have

purely questions of law. This is a sufficient statement of the case as to facts.

1. It stands admitted by the return in the nature of a demurrer that the respondent is assuming to act on the motion filed by the defendants in the original suit, and not only so, but that he would have sustained the same on the date named, but for the intervention of our preliminary rule to show cause. If, therefore, under the facts stated, the respondent was without lawful authority or jurisdiction to act, the final writ should go. That circuit courts in this state can entertain writs of error coram nobis, or motions in the nature of the common-law writ of error coram nobis, is unquestioned. *State ex rel. v. Riley*, Judge, 219 Mo. 667, 118 S. W. 647, and the cases therein reviewed; *State v. Stanley*, 225 Mo. 525, 125 S. W. 475, and the cases therein reviewed. The rule in this state is the general rule. The status of the writ is firmly fixed in the modern practice, but of common-law origin. In 5 *Encyc. of Plead. and Prac.*, p. 30, it is said: "Notwithstanding occasional statements that the writ of coram nobis has 'fallen into desuetude,' and that 'redress obtained through its aid is now sought by motion,' it was a part of the common law received from the mother country, and, when not specially abrogated by statute, still remains a factor in modern practice." But the question we have here is whether or not, notwithstanding this general jurisdiction in circuit courts, the respondent in the present court was exceeding such jurisdiction in the present case. We are convinced that respondent was exceeding his jurisdiction in this case, and for the several reasons that we discuss next.

2. The writ of error coram nobis is a part of the common law to which we have fallen heir. No statute in this state undertakes to define this power of a court of general jurisdiction, nor do our laws prescribe the procedure. We must therefore look to the common law for the scope of the writ, as well as for the procedure. In this state, as will be seen from the cases cited, *supra*, the courts have treated certain motions as being in the nature of the common-law writ of error coram nobis. But the case law of this state and elsewhere precluded the respondent from so treating the motion in this case. The motion upon its face does not go to that class of error, in fact, which is reached by the writ of error coram nobis. The motion states the facts relied upon. It avers they were unknown to plaintiffs in the original case, but upon its face the motion further shows that the alleged unknown facts could have been known by the exercise of diligence upon the part of the parties. The parties in the original case were in court for all purposes from the beginning to the end. The files of the court were open to inspection. Such parties are presumed to have been in court when these several orders were made. A casual

examination of the files would have shown that there was no motion for new trial or affidavit of appeal filed. The objection to the several orders could have then been made. In discussing a very similar question, *Ellison, J.*, in *Marble v. Vanhorn*, 53 Mo. App., loc. cit. 364, said: "There is another important rule found in this branch of the law, viz.: That where the party complaining knew the fact, or might have known it, and failed to bring it to the attention of the court, he cannot afterwards do so." This language was quoted with approval by this court in the very recent case of *State v. Stanley*, 225 Mo., loc. cit. 532, 125 S. W. 475. After thus approving this language from one of our own courts, we in that case collated the authorities from other jurisdictions and quoted therefrom. We then said: "And this is rule in other jurisdictions. In *Asbell v. State*, 62 Kan., loc. cit. 214 [61 Pac. 692], the court said: 'It cannot reach any matter of fact known to the court, for such would be error of law, and might be remedied by writ of error. Nor can the writ reach matters of fact known, or which by the exercise of reasonable diligence could have been known, to or by the party making the application at the time of the court's error. Nor can the writ give a new trial on the grounds of evidence going to the merits, but undiscovered in time for use on the original trial, or newly discovered evidence.' In *Sanders v. State*, 85 Ind., loc. cit. 328, 44 Am. Rep. 29, Judge Elliott, speaking for the court, said: 'The writ of error coram nobis is not intended to authorize any court to review and revise its opinions; but only to enable it to recall some adjudication made while some fact existed which, if before the court, would have prevented the rendition of the judgment, and which, without any fault or negligence of the party, was not presented to the court.'" The general rule is thus summarized in 5 *Encyc. of Pl. and Pr.*, p. 29: "The writ will not lie where the party complaining knew the fact complained of at the time of or before trial, or by the exercise of reasonable diligence might have known it, or is otherwise guilty of personal negligence in the matter, or when proper advantage could have been taken of the alleged error at the trial." So, in the case at bar, every alleged unknown fact stated in the motion is one which should have been known and called to the attention of the court when these orders were made. The exercise of any diligence whatever would have disclosed the absence of these papers from the files.

3. There is yet a stronger reason why the motion filed in the case under consideration in this case cannot be entertained as a writ of error coram nobis. Said motion attacks the record and the verity thereof. This can never be done in writs of error coram nobis. In other words, the error of fact charged in the petition or motion for a writ of error

coram nobis must be consistent with the record in the case. It must not attack the verity of the record.

In 5 Encyc. of Pl. and Pr., p. 34, the general rule is thus stated: "The petition should not assign as error any fact adjudicated in the former suit, or any fact which contradicts the record." The record in this original case shows the filing of the motion for new trial and the affidavit for appeal. It is presumed the court satisfied itself as to the filing of these papers before making these orders, and passed judgment upon the sufficiency thereof in making the orders made. At any rate, the error of fact charged is one which contradicts the recital of the record itself, and is not an error of fact which can be reviewed upon writ of error coram nobis.

In the case of *Williams v. Edwards*, 34 N. C. 118, Ruffin, C. J., for the North Carolina court, has elaborately discussed the question. Among many other things therein, he said: "An averment of fact against the record cannot be heard in a case of this kind more than in others. *Bac. Abr. Error, K. 3*. Only such errors in fact can be assigned as are consistent with the record. When an infant, for example, is sued, there is nothing to enable the court to see that he is or is not an infant. The law considers that, as an infant, he has not discretion to choose an attorney, and therefore will not let him appear by attorney, but requires the court to appoint a fit person his guardian to make defense for him. As the court does not know the defendant's infancy, it is the part of the plaintiff to ascertain and make known the fact, so as not to allow the court to decide against a person under disability, for whom the full defense may not have been made, which the law intends. For that fault the plaintiff's judgment must necessarily be reversed, so as to let in the other party to defend with all the advantages to which the law entitled him; and therefore the defendant may aver the fact of his disability, which stands well with the record, in order that he may have the benefit of a legal defense. It is the same when a feme covert is sued without her husband."

So, too, says the Alabama Court, in the case of *Holford v. Alexander*, Assignee, 12 Ala., loc. cit. 286, 46 Am. Dec. 253: "It is said to be the general rule 'that nothing can be assigned for error that contradicts the record; for the records of the courts of justice, being things of the greatest credit, cannot be questioned but by matters of equal notoriety with themselves; wherefore, though the matter assigned for error should be proved by witnesses of the best credit, yet the judges would not admit of it.' Under the influence of this rule, it has been held, that on a writ of error to reverse a fine, the plaintiff cannot assign that the consor died before the teste of the dedimus, because that contradicted the record of the consueance taken by the commissioners; but the plaintiff

may say that after the consueance taken, and before the certificate thereof returned, the consor died, because this is consistent with the record. So, where the record of a judgment recites that it was rendered by a court at which a judge mentioned, eo nomine, presided, it cannot be assigned (though in fact the court was held before his deputy according to the King's patent) that that judge was not there; for such allegation is contrary to the record. Again, it has been decided, for the reason above stated, that it shall not be assigned for error that defendant filed his warrant to defend by A. B., his attorney, and that it appears on the judgment he appeared and defended by C. D., his attorney. 2 *Bac. Ab.*, title Error, letter K, 2. See, also, 4 *Dane's Ab.* ch. 127, art. 7, par. 6."

The Tennessee court in case of *Carney v. McDonald*, 10 *Heisk.*, loc. cit. 234, thus speaks: "There was no error in the dismissal of the petition for writ of error coram nobis. The statement that the cause was tried and judgment rendered in the absence of petitioner's attorney is insufficient for two reasons: First, the record recites that the cause was tried in the presence of the attorneys of the parties. It is not competent to contradict the record, as ground for a writ of error coram nobis." The same court, in *Crawford v. Williams*, 1 *Swan (Tenn.)* loc. cit. 346, said: "It is true that nothing can be assigned for error in fact which appeared and was adjudged in the former suit, or which contradicts the record of that suit. *Bacon, Ab. title Error*. And in *Birch v. Trist* it is said that the error in fact must be of such a nature as, if true, will destroy the plaintiff's right of action. 8 *East*, 415."

The motion in this case, which fulfills the office of a writ of error coram nobis in our practice, shows upon its face that its purpose is to contradict the solemn record of the court by parol testimony. It shows that the error in fact is not such as can be reached by the court in the exercise of its powers under the writ of error coram nobis. To undertake to reach and correct the errors of fact complained of here is an exercise of the power conferred by the ancient common-law writ, and therefore beyond the jurisdiction of the court which tried to exercise it. Over this court respondent was judge, and threatened to exceed the limited powers conferred in cases of this kind.

4. To our minds there are other and further reasons to restrain the threatened action of respondent. All of the errors of fact complained of go to pure matters of procedure and orders made thereon, occurring after the judgment on the merits. As a general rule, the writ of error coram nobis is one which strikes at the judgment upon the merits. It relates to facts which will destroy that judgment.

But further, in the case at bar, the original case, by an order of appeal duly made by

the respondent, is now pending in this court. Whilst it is true that the trial court so far retains jurisdiction of a case appealed as to be able to make nunc pro tunc entries, from written data, and certify them to this court as part of the record, we do not think that it has such jurisdiction left as to authorize the issuance of a writ of error coram nobis, and upon a trial had, uproot its own judgment, pending the appeal here. An appeal, except for limited purposes, divests the trial court of jurisdiction. In this case the term had ended. Under such circumstances the general rule is that the circuit court is divested of jurisdiction, and the jurisdiction as to the judgment and the cause is vested in the appellate court. *Brill v. Meek*, 20 Mo. 358; *Ladd v. Couzins*, 35 Mo. 513; *Burgess v. O'Donoghue*, 90 Mo. 299, 2 S. W. 303; *State ex rel. v. Gates*, 143 Mo. 63, 44 S. W. 739; *Donnell v. Wright*, 199 Mo. 304, 97 S. W. 928.

It can be safely said that the appeal at least robs the trial court of the right to so proceed after the end of its term, as would divest the appellate court of jurisdiction of the cause. The parties may have some form of remedy for the matter complained of, but the respondent exceeded his jurisdiction in attempting to have a hearing upon this motion.

The permanent writ of prohibition should go, and it is so ordered. Costs of this action to be taxed against relator. All concur, except VALLIANT, C. J., absent.

CITY OF ST. LOUIS v. RUECKING et al.
(Supreme Court of Missouri. Feb. 9, 1911.)

1. MUNICIPAL CORPORATIONS (§ 359*)—SEWER CONSTRUCTION CONTRACTS—SUBSTANTIAL PERFORMANCE.

The doctrine of substantial performance applies to municipal sewer construction contracts.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. § 891; Dec. Dig. § 359.*]

2. MUNICIPAL CORPORATIONS (§ 348*)—SEWER CONSTRUCTION CONTRACTS—SUBSTANTIAL PERFORMANCE—JURY QUESTION.

In an action on the bond of municipal contractors, whether substitution of loose earth for sand in laying sewer pipe under a municipal construction contract was substantial compliance with the contract *held*, under the evidence, a jury question.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. § 878; Dec. Dig. § 348.*]

3. MUNICIPAL CORPORATIONS (§ 348*)—SEWER CONSTRUCTION CONTRACTS—PERFORMANCE—INSTRUCTIONS.

Suit by a city on the bond of sewer contractors to recover the expense of repairing broken tile was sufficiently covered by instructions that use of fine earth, instead of sand, in laying pipe, would not entitle the city to recover unless the defective condition complained of

was caused by such substitution, and that no city officer could authorize the substitution.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. § 878; Dec. Dig. § 348.*]

4. MUNICIPAL CORPORATIONS (§ 348*)—SEWER CONSTRUCTION CONTRACTS—SUITS—BASIS.

As between two sections of a municipal sewer construction contract, giving the city remedies for defective work, a suit by the city on the contractors' bond to recover the expense of replacing defective tile will not be regarded as based on one of the sections which refers to an ordinance, concerning which there was no allegation or proof.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. § 878; Dec. Dig. § 348.*]

5. MUNICIPAL CORPORATIONS (§ 365*)—SEWER CONSTRUCTION CONTRACTS—DEFECTIVE PERFORMANCE—ESTOPPEL.

Under a provision requiring a municipal sewer contractor to correct imperfect work when discovered before final acceptance, there can be no recovery by the city for defects discovered after such acceptance, in the absence of fraud or collusion.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. § 808; Dec. Dig. § 365.*]

6. MUNICIPAL CORPORATIONS (§ 365*)—SEWER CONSTRUCTION CONTRACTS—MODIFICATION—RATIFICATION.

A city ratified its agents' unauthorized acts in permitting substitution of earth for sand in laying pipe under a sewer contract by accepting and paying for the work, in the absence of fraud or collusion by the agents.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. § 808; Dec. Dig. § 365.*]

7. MUNICIPAL CORPORATIONS (§ 167*)—ACTS OF AGENTS—EFFECT.

As to bona fide acts of honest agents, a city has knowledge through the knowledge of its agents.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. §§ 375, 379; Dec. Dig. § 167.*]

Valliant, C. J., and Woodson, J., dissenting.

In Banc. Appeal from St. Louis Circuit Court; Robert M. Foster, Judge.

Action by the City of St. Louis against Herman Ruecking and others. Judgment for defendants, and plaintiff appeals. Affirmed.

The following is the opinion of Graves, J., in Division No. 1:

"The city of St. Louis brought this action upon the bond of defendants, Ruecking & Elstrupp, copartners, and their surety, said bond being conditioned upon the faithful performance of a contract to construct a certain sewer for the city. The petition alleged: That on October 17, 1901, the appellant entered into a contract with Ruecking & Elstrupp, contractors, by the terms of which they agreed to build a certain sewer in a workmanlike manner, according to plans and specifications on file in the office of the sewer commissioner of the city of St. Louis. That by said plans and specifications defendants were required to use sewer pipe of the best quality of hard burned, salt glazed, vitri-

fied clay pipe. That the pipes should be joined by filling the sockets with a mortar made of one part of Portland cement and three parts sand, and with only water enough to give a proper consistency and to be used as soon as made. That great care should be taken to make the entire joint perfectly water-tight. That the space between the pipes when not laid in concrete and the sides of the excavation should be filled with sand, well rammed up to the middle of the pipe, and that from this point for at least 12 inches above the pipe the earth should be filled in so as not to disturb the pipe, and thoroughly rammed or soaked with water as might be directed. That during freezing weather laying of pipe sewers should as a rule be suspended, unless otherwise directed by the sewer commissioner.

"Plaintiff alleged as breaches the violation of all the above specifications, in the words of the petition, as follows: 'The said defendants Herman Ruecking and Frederick Elstrupp did fail, neglect, and refuse to comply with the specifications and stipulations of the said contract, in this, to wit: that in doing the work undertaken by them in the said contract they failed, neglected, and refused to do the same in a substantial and workmanlike manner; that certain 24-inch pipes laid by the said defendants in Grand avenue from Delor street northwardly to Itaska street, in said Fillmore street sewer district No. 2, were not of the best quality of hard burned, glazed, vitrified clay pipe, but the said pipes were insufficiently burned, were soft and porous in texture, were not vitrified and were not of the best quality; that in certain places where the said pipes were, or should have been, joined, the sockets were not filled with mortar as in the said contract required, and the said joints were not made perfectly water-tight as therein required; that at the places above mentioned the space between the pipes (when not laid in concrete) and the sides of the excavation were not filled with sand well rammed up to the middle of the pipe, nor was the earth filled in for at least 12 inches above the pipe so as not to disturb the pipe, nor was the same thoroughly rammed or soaked with water; that during the freezing weather the laying of pipe sewers was not suspended.' Plaintiff further alleged: That the work in said contract provided for was completed and accepted by plaintiff on or about 24th of October, 1903, and was fully paid for. That on or about the 8th of August, 1904, the plaintiff through its agents, the sewer commissioner and subordinates, discovered that certain 24-inch pipes laid by said defendants in Grand avenue from Delor street northward to Itaska street were broken and cracked. That defendants were notified to replace the same with new pipe, which they refused to do. That the city thereafter caused the broken and cracked pipes to be removed and replaced them with new pipes

at a cost of work and material of \$1,598.41 to the city. Then follows prayer for judgment.

"Defendants' answer, after formal admission as to the capacity of the parties and the execution of the contract and bond mentioned in the petition, contained a general denial of the other allegations of the petition, and further answered by alleging that defendants faithfully performed all work required by the terms of said contract and the plans and specifications prepared by the plaintiff; that whatever defects were discovered by plaintiff's agents were caused by the faulty plans and specifications which called for the best quality of 24-inch hard burned, soft salt glazed, vitrified clay pipe, which kind of pipe was too weak, insufficient, and inadequate for the purpose for which it was specified. They further aver an inspection and acceptance of the material and work as the construction progressed, as well as a final acceptance and payment for the work.

"The reply denied the new matter set up in the answer.

"At the beginning of the trial defendants demurred to the introduction of evidence, which demurrer was overruled. Plaintiff introduced in evidence a certified copy of the contract and specifications and plans as proof of the plans and specifications alleged to have been violated and disregarded by defendants. After evidence was heard upon both sides and the cause submitted to a jury, a verdict signed by nine jurors was returned in favor of the defendants. Judgment followed the verdict, and, after timely motions and other required steps being taken, the cause is here upon appeal of the city. Complaint is largely lodged against instructions, and these with the pertinent facts will be taken with the points made.

"(1) Among other things the following appear: There was proof on both sides as to the character of the tiling used. It stood admitted that the contractors had not used the sand in packing the tile, but had used loose dirt, but, on the other hand, there was proof that in damp ditches, such as the one in question, the loose earth was as good or better than the sand. Other matters might be mentioned, but these suffice to illustrate the point.

"Defendants asked and received this instruction: 'The court further instructs the jury that if you find and believe from the evidence that the best quality of 24-inch hard burned, salt glazed, vitrified clay pipe, laid in the manner prescribed in the contract between defendants Herman Ruecking and Frederick Elstrupp and the plaintiff, were insufficient, too weak or inadequate for the purposes for which the same were intended by the contract, and that the broken and cracked condition discovered by plaintiff or its agents on or about August 8, 1904, was due to the condition of said pipe so specified, and that said materials were furnished and the work done substantially as provided by

said contract, then your verdict must be for the defendants.' We have underscored the language to which plaintiff objects. Plaintiff asked a general instruction covering the case, which wound up by telling the jury that, if they should find the facts to be as rehearsed and set forth in such instructions, then they should find for plaintiff. To this instruction the court added the following clause: 'Unless you find and believe from the evidence that, notwithstanding the neglect and omission of any of the requirements mentioned above, the defendants did said work in substantial and workmanlike manner in substantial conformity with the plans and specifications on file for the same.' It will thus be seen that the battle nisi was waged on the question as to whether or not 'substantial performance' was a valid defense under a contract of this kind. The jury found that there was substantial performance. Two questions arise on the record: (1) Whether the doctrine 'substantial performance' as a matter of law has a place in a contest over a contract of this kind; and (2) whether or not, under the admitted fact that dirt had been used instead of sand, ought the court to have said under the evidence that there was no substantial performance as a matter of law, notwithstanding the doctrine of substantial performance should prevail. That the doctrine of 'substantial performance' as to contracts of this character prevails in this state we think there is no question. *Dillon, Municipal Corp.* § 812; *City of St. Joseph v. Anthony*, 30 Mo. 537; *Cole v. Skrainka*, 105 Mo. 303, 16 S. W. 491; *Steffen v. Fox*, 124 Mo. 630, 28 S. W. 70; *Johnson v. Duer*, 115 Mo. 363, 21 S. W. 800; *Asphalt Paving Co. v. Ullman*, 137 Mo., loc. cit. 570, 38 S. W. 458; *Whitworth v. Webb City*, 204 Mo. 579, 103 S. W. 86; *Porter v. Paving & Constr. Co.*, 214 Mo. 1, 112 S. W. 235.

"Speaking of the more liberal doctrine in Missouri in 2 *Dillon on Municipal Corporations*, at section 812, it is said: 'In Missouri, in actions to recover the amount charged against a lot for local improvements in front thereof, the liberal doctrine is adopted that a substantial compliance with the law is sufficient, and it is not necessary for the city to prove a strict compliance with directory ordinances on the subject, but the lot owner or defendant may show a neglect of duty by the authorities, and, if he was injured thereby, it will constitute a defense. If the work has been done in a manner satisfactory to the corporation, and has been accepted by it, a prima facie case is made out.' The present sewer is one paid for in tax bills, and its construction was supervised by the proper city authorities. According to the evidence, each joint of tile was inspected, and the unsound ones rejected. These details, however, we take up more fully under another question urged. But it should be here remembered that this action is by the city upon this con-

tract. It is not one by an adjoining property owner to cancel the tax bills, but it is by the city upon a contract made between itself and the construction company.

"In this court the matter was thus mentioned by Burgess, J., in the recent case of *Whitworth v. Webb City*, 204 Mo., loc. cit. 601, 103 S. W. 93: 'All cases relied upon by defendant were suits between the city and a third party to enforce a lien for improvements, under statutes which, because of their special character, are strictly construed, or actions against the city upon a contract which was invalid. In the case at bar the contract sued on was between parties capable of contracting with respect to the subject-matter thereof, and the same rule does not apply as that which obtains in cases for the enforcement of a special lien against property for street improvements. In this class of cases a substantial compliance with the ordinance, contract, and specifications is all that is required.' In the *Whitworth Case* the city was paying for the sewer without recourse to tax bills. Likewise in the very late case of *Porter v. Paving & Construction Co.*, 214 Mo., loc. cit. 19, 112 S. W. 240, Gantt, J., said: 'We think that the defendant is right in insisting that the test is whether the sewer was completed, and not whether some of the details of the work were not strictly in accord with the specifications and the contract. The city engineer accepted the work and the city issued the tax bills, and, while this does not estop the plaintiffs from complaining of the manner in which the work was done under the provisions of the Kansas City charter, we think that it falls far short of showing that the work was not completed within the meaning of the charter as to the issuance of the tax bills.' In the latter case it was urged that the sewer had not been completed. Among the contentions to this end a portion of the work was designated. On page 18 of 214 Mo., page 240 of 112 S. W., the insistence of the property owner is set out thus: 'The main insistence is that the contractor failed to carry out that particular provision of the contract which required that, where a sewer is built above the ground and any other foundation than embankment is used, there shall be a covering of earth of the construction and sewer built thereon to a height of one foot above the sewer with a width at the top of not less than the greatest external diameter of the sewer. It appeared that in this case, instead of laying the sewer pipe on top of a masonry wall, it was laid in the wall; the masonry extending above the top sewer pipe. The city engineer testified that the pipe was covered with masonry, and for that reason he did not require the earth embankment, as the masonry was much more lasting and much less liable to wash off. And it was also shown that the contractor had the express permission of the city engineer to substitute

the masonry over the sewer pipe in lieu of the loose dirt.' The tax bills were held valid, although there had been no strict compliance with the literal terms of the contract. So in the case at bar there was much evidence showing that the city authorities inspected the work sued for at every step of its construction; that they knew of the change from sand to loose earth. That evidence also shows that in a wet ditch as this was shown to be the loose earth was better than sand.

"Black, J., after reviewing our own case in *Cole v. Skrainka*, 105 Mo., loc. cit. 309, 16 S. W. 492, said: "These cases are sufficient to show that this court has never adopted the extreme view that, in order to recover for these local improvements, the plaintiff must show a literal compliance with all the provisions of the ordinances. Distinction must be made between those matters which affect the substantial rights of the parties and those which are formal or directory. Now in this case the proceedings leading up to the letting of the contract are regular and formal. The alleged fatal defect lies in the difference between the ordinance and the contract as respects the depth of the blocks. Is there any real difference?" It was held that there was no substantial failure where the contract said certain granite blocks should be eight inches in size and seven and eight inch blocks were furnished. The earlier cases which we first cited above are cited and quoted from by Judge Black in this *Skrainka* Case. In *Steffen v. Fox*, 124 Mo., loc. cit. 635, 28 S. W. 71, Macfarlane, J., uses this language: 'A strict and literal compliance with ordinances and contracts thereunder prescribing the manner in which public street improvements shall be made has never been required as a condition to the acceptance of the work by the city or to the validity of the tax bill for the cost thereof charged against the property of individuals.'

"We are cited to some language used by Judge Gantt in *McGrath v. St. Louis*, 215 Mo., loc. cit. 207, 114 S. W. 616, whereat he says: 'In short, we think the plaintiffs utterly failed to show any authority in *Ittel* to vary this contract, and he denies that he had any such, and denies that he ever attempted to exercise such functions, and denies the testimony of *McGrath*. To hold that these municipal contracts, which are so carefully provided for in the charter, can be changed by any officer or subordinate, would destroy the principle of competitive bidding, which is a prime feature of the charter.' Counsel for plaintiff place much stress upon this language, but they apparently fail to consider the nature of the case in which it is used. When the case is considered, there is nothing meant by this language which would tend to overthrow the trend of the law in this state toward a liberal construction of these contracts for public improvements. The opinion of the same judge in the

Porter Case, *supra*, would so indicate, if the entire different character of the *McGrath* Case did not so indicate. *McGrath* was not suing upon a contract, but in tort. We therefore conclude that 'substantial performance' may be pleaded and proven under contracts of this character, and, if so, there is no error in giving an instruction submitting the question if there is evidence to justify.

"Passing next to the failure to use sand. Taking the *Porter* Case, *supra*, as an example, it would hardly be called a substantial noncompliance with the contract when city officials are inspecting the work each day and know how it is being done, and when no fraud or collusion is charged to the parties, and when as in this case practically all the evidence shows that owing to the character of the ditch, the dirt was better. The ditch was a wet one, and the evidence tends strongly to show that the sand was wisely dispensed with in this case. Nor are the damages found to have been occasioned to the pipes shown to have resulted from this failure. We hardly think that as a matter of law the court should have held this failure to be fatal under the evidence, and therefore no error in submitting the whole case to the jury.

"(2) The latter question above discussed was presented to the jury by the following instruction given at the instance of the defendants: 'The court instructs the jury that even if you find and believe from the evidence that in laying the sewer referred to in this cause the defendants did not use sand, but, instead of sand, used fine earth, that fact alone will not entitle the plaintiff to recover in this case, unless you further find and believe from the evidence that the defective condition of said sewer which plaintiff claims to have discovered in August, 1904, and which it claims to have repaired, was directly occasioned by such failure on defendants' part to so use sand.' And by one of the plaintiff's instructions which the court modified, which, when modified, read: 'The court instructs the jury that neither the street commissioner, nor any of his agents, nor any other officer or servant of the plaintiff city, had any authority to change the provisions of the contract in evidence so as to permit or authorize the defendants *Ruecking & Elstrupp* to substitute for the best quality of hard burned, salt glazed, vitrified clay pipe any pipes which were of any other quality, nor so as to permit or authorize said defendants to perform the work of laying said pipes in any other way or manner than according to the provisions of the said contract, or in substantial compliance with the same.' The one requested by plaintiff of which the foregoing is a modification by the court omitted the doctrine of 'substantial compliance' discussed in our first paragraph. When it is considered that the action of the plaintiff is one to recover damages for having to remove and replace a part of the tiles which were found

broken, we think these instructions cover the law of the case. The absence of the sand was not shown to be a cause for the alleged damage. This covers the alleged errors as to instructions. The complaint as to the instructions is confined to the questions we have discussed in these paragraphs, and no further note need be taken of the instructions. In our judgment the case was properly submitted to the jury, and this opinion would end here but for an important question going to the whole case urged by the defendants, and one additional charge urged in the reply brief of the plaintiff. These we take next.

"(3) We take the contention of the plaintiff first. Defendants maintain in the briefs that the suit is bottomed upon paragraph 6 of the contract, which reads: 'The contractor, when directed by the sewer commissioner, shall remove, rebuild, and make good, at his own cost, any work which the latter decides to be defectively executed; and omission to condemn work at the time of its construction shall not be construed as an acceptance of defective work, and the contractor will be required to correct all imperfect work when discovered, before final acceptance of the work.' Plaintiff claims in the reply brief that it is based upon paragraph 11 of the contract, which reads: 'The sum of two hundred dollars which the party of the first part has paid into the treasury before executing this contract, in accordance with section 1871 of Revised Ordinance No. 19,991, approved April 3, 1900, shall be used as a special fund for making repairs in the manner hereinafter provided. If at any time within twelve months after the completion and acceptance of the work herein contracted for, the said work, or the surface of any street, alley or public place on the line thereof, shall (in the judgment of the street commissioner as to the street, alley or public place, and of the sewer commissioner as to the work) require repairs, the sewer commissioner shall notify the contractor to make the repairs required. If the contractor neglects to make such repairs within three days from the date of the service of such notice, the sewer commissioner shall cause the repairs to be made, in any manner as he deems best, and the whole cost thereof, both for labor and materials, shall be paid out of the special fund before mentioned. This fund shall be kept up to the full amount of two hundred dollars, and the remainder finally repaid in the manner set forth in the two following sections of the said Revised Ordinance.' The petition pleads two ordinances, but nowhere mentions Ordinance No. 19,991, which is mentioned in paragraph 11 of the contract, *supra*. Neither does the petition speak of a trust fund as spoken of in said paragraph. Not only is there no pleading of this ordinance, but there is no proof of it. It is therefore evident that this was not the section of the contract sued upon. We have taken the pains to examine

the said ordinance for our own satisfaction. This ordinance was the Revised Code for the city of St. Louis which was passed by way of Ordinance No. 19,991, and approved April 3, 1900. See preface of Eugene McQuillin, author of the Municipal Code of St. Louis for year 1901. Section 1871 reads: 'Before a contract awarded by the board of public improvements for any work which is to be paid for by special tax is executed, the bidder to whom the award has been made shall be required to pay into the treasury the sum of \$200, without regard to the number of his contracts, as a special fund to be used by the commissioner under whose charge the work is to be done to defray expenses of necessary repairs on the work, if said contractor shall be liable under his said contract or contracts, and which repairs said commissioner shall order made by reason of a failure of said contractor to make such repairs himself within the time specified by said commissioner.' This paragraph 11 of the contract also speaks of the two following sections of the said ordinance.

"These sections (1872 and 1873) read:

" 'Whenever the whole or part of said two hundred dollars shall have been expended for the purpose described in section one thousand eight hundred and seventy-one, the president of the board of public improvements shall notify said contractor to pay so much money into the treasury as will bring the fund again up to two hundred dollars; and until he shall have complied with said notice from the president of the said board, no new contracts for special tax work shall be awarded him, nor shall any special tax bills be delivered to him.'

" 'Whenever such contractor shall cease to be contractor for special tax work, or to be responsible under any of his contracts for repairs on special tax work done by him, the president of the board of public improvements shall certify this fact to the auditor, and, on presentation of such certificate, the auditor shall draw his warrant on the treasurer, in favor of said contractor, for the whole amount standing to the credit of the special fund created by the payment of said contractor in accordance with the provisions of sections eighteen hundred and seventy-one, and eighteen hundred and seventy-two, and shall take his receipt therefor, in full of all claims against the city on account of said payments.'

"It cannot be said that this action is based upon paragraph 11 of this contract. We have gone beyond the ordinary rule to go into ordinances not pleaded nor proven, but counsel were so persistent in their claims that a sufficient excuse is furnished therefor. There is therefore absolutely no merit in this contention of the plaintiff.

"(4) Defendants claim that the city, having accepted the work finally under paragraph 6 of the contract and having issued the tax bills, is estopped from bringing this ac-

tion. If the action is not based upon paragraph 11 of the contract, and we feel satisfied that it is not so based, then in our judgment this contention is true, unless collusion or fraud is alleged and shown as between the agents of the city and the contractor. These two paragraphs of the contract are the only ones we are cited to as controlling the situation, and the only ones we find directly in point. There are others which shed light thereon. Paragraph 3 reads: 'The contractor shall commence the work at such points as the sewer commissioner may direct and conform to his directions as to the order of time in which the different parts of the work shall be done, and to all his instructions as to the mode of doing the same.' Paragraph 4 reads: 'Whenever the contractor is not present on the work, orders will be given to the superintendents or overseers who may have immediate charge thereof, and shall by them be received and strictly obeyed. If any person employed on the work shall refuse or neglect to obey the directions of the sewer commissioner, or his duly authorized agents, in anything relating to the work, or shall appear to the said commissioner to be incompetent, disorderly or unfaithful, he shall, upon the request of the said commissioner, be at once discharged, and not again employed on any part of the work.' Paragraph 8 reads: 'To prevent all disputes and litigations, it is further agreed by the parties hereto that the sewer commissioner shall, in all cases, determine the amount or quality, or the classification of the several kinds of work or material which are to be paid for under this agreement, and that he shall decide all questions which may arise relative to the execution of this agreement, and his estimates and decisions shall be final and conclusive.' Paragraph 6 we have set out in full in a preceding paragraph of this opinion. Other portions of this long and complex contract might be quoted, but they all tend to show that the city retained and maintained a constant and thorough supervision of the work under contracts of this kind. By the evidence it was shown that the work was thoroughly inspected and supervised. By paragraph 4 it is provided that in giving the orders under paragraph 3, supra, if the contractor was not present, the city officials could give their directions to the party or parties in immediate control of the work for the contractor, and such orders 'shall by them be received and strictly obeyed.' Further in paragraph 4 it is further provided that if such person or persons refuse to obey the orders of the city officials, or if any person employed upon the work appear to the city agents to be incompetent, the contractor upon request must discharge such employé, and not thereafter use him upon such work. All these things tend to show the absolute control retained by the city over the work. Other provisions pro-

vide for the testing of materials by the city authorities in charge.

"Now, reverting a moment to paragraph 6 of the contract, it clearly refers to matters and things to be done 'before final acceptance of the work,' and not to happenings after the acceptance. The paragraph, as will be seen from a reading of it, supra, closes with the words last quoted. It is not disputed that there was a final acceptance of this work by the city, and it is not charged or intimated either by petition or proof that there was fraud or collusion as between the agents of the city and the contractor. To our mind, under paragraph 6 of the contract, the city is precluded of an action for things happening after the final acceptance. The acceptance is final as to the matters mentioned in clause 6 of the contract, supra, and this suit is not under paragraph or clause 11 thereof. The city ratified the acts of its agents in permitting the change from sand to dirt by accepting and paying for the work. Even though the slight change made was beyond the purview of the powers of the agents, yet, where the unauthorized act is along the line of a business fully authorized by law and statute, the acceptance, with knowledge, binds the corporation. On the bona fide acts of honest agents, the city has knowledge through the knowledge of its agents. In 1 Dillon on Municipal Corporations (4th Ed.) § 463, it is said: 'A municipal corporation may ratify the unauthorized acts and contracts of its agents or officers which are within the scope of the corporate powers, but not otherwise. Ratification may frequently be inferred from acquiescence after knowledge of all the material facts, or from acts inconsistent with any other supposition. The same principle is applicable to corporations as to individuals.' This doctrine was quoted and approved by this court in *Water Co. v. City of Aurora*, 129 Mo., loc. cit. 583, 81 S. W. 946.

"The city in this case should not be permitted to stand present through its agents and officers and permit and sanction such a change as this in a contract, and thereby occasion the expenditure of large sums of money, accept the work, and then afterward undertake to hold the defendants liable. Nor should the city have an inspector examine each tile and place the city's stamp of approval or disapproval upon it, and then afterward be permitted to say that it did not come up to contract. What is here said as to the tiling need not be said perhaps for the full disposition of the case, for the question was submitted, and the jury found that they did come up to the contract. Of course, had the petition charged fraud and collusion between the contractors and the city's agents, then such fraud would vitiate the acceptance and destroy its force and effect.

"We are fully satisfied that the city made

no case either in fact or law. The judgment nisi is affirmed."

Lambert E. Walther and Wm. E. Baird, for appellant. M. W. Feuerbacher and Kortjohn & Kortjohn, for respondents.

GRAVES, J. The foregoing opinion, written in Division 1 of this court, is adopted as the opinion of the court in banc.

KENNISH, FERRISS, and BROWN, JJ., concur. LAMM, J., concurs in result. VALLIANT, C. J., and WOODSON, J., dissent.

STATE v. SUTTON.

(Supreme Court of Missouri, Division No. 2, Feb. 7, 1911.)

1. CRIMINAL LAW (§ 1083*)—APPEAL—EFFECT OF TRANSFER OF CAUSE.

The defendant was convicted of a statutory offense, and his appeal was granted, but two days afterwards, and after his appeal bond had been approved, the circuit court of its own motion, in the absence of the defendant, and without notice to him, set aside its orders granting an appeal and overruling the motion for a new trial, and granted defendant a new trial, upon which he was convicted, and from which he took a second appeal. *Held*, that all the orders subsequent to the granting of the first appeal were illegal, and that the first appeal would be considered as though the court had not granted defendant a new trial.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 2732; Dec. Dig. § 1083.*]

2. RAPE (§ 52*)—EVIDENCE—FACT OF PROSECUTRIX BEING UNMARRIED—SUFFICIENCY.

In a prosecution under Rev. St. 1909, § 4472, for having carnal knowledge of an unmarried female between the ages of 14 and 18 years, evidence *held* sufficient to warrant the jury in finding that prosecutrix was unmarried.

[Ed. Note.—For other cases, see Rape, Cent. Dig. § 71; Dec. Dig. § 52.*]

3. CRIMINAL LAW (§ 1144*)—APPEAL AND ERROR—REVIEW—PRESUMPTIONS—VERDICT.

Where the verdict is general and refers to the count upon which defendant was tried, the presumption is that the jury considered all the elements of the charge and found all the issues against the defendant.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 3034; Dec. Dig. § 1144.*]

4. RAPE (§ 52*)—EVIDENCE—PREVIOUS CHASTE CHARACTER OF PROSECUTRIX.

In a prosecution for carnally knowing an unmarried female under the age of consent, a finding that prosecutrix was of previous chaste character *held* supported by substantial evidence.

[Ed. Note.—For other cases, see Rape, Cent. Dig. § 71; Dec. Dig. § 52.*]

Appeal from Circuit Court, Reynolds County; Jos. J. Williams, Judge.

Otho Sutton was convicted in the Circuit Court of carnally knowing an unmarried female between the ages of 14 and 18 years, of previous chaste character, and he appealed. Order granting appeal set aside by trial court, and defendant granted a new trial, and from a conviction therein he appeals

Conviction upon first trial affirmed, and conviction upon second trial reversed.

J. H. Raney and James Orchard, for appellant. E. W. Major, Atty. Gen., and John M. Dawson, Asst. Atty. Gen., for the State.

BROWN, J. The defendant was convicted in the circuit court of Reynolds county, on November 25, 1909, of violating section 4472, Rev. St. 1909, by having carnal knowledge of one Ida Speer, an unmarried female, between the ages of 14 and 18 years, of previous chaste character. His punishment was assessed at a fine of \$400, and after unavailing motions for a new trial and in arrest of judgment he appeals to this court.

The record proper shows that on February 27, 1909, two days after this appeal was granted, and after defendant's appeal bond had been approved, the trial court set aside its order granting the appeal, as well as its orders overruling the motions for new trial and in arrest, and granted defendant a new trial. A second trial also resulted in the conviction of defendant, from which he has filed a second appeal in this court.

It is contended by the defendant that the unusual action of the circuit court in setting aside his appeal and granting him a new trial was without notice to him and without his consent, and as these orders appear to have been made by the court of its own motion, and do not recite any appearance or notice, it is fair to presume that defendant was absent and did not consent to their entry.

While circuit courts have power to set aside or modify their orders and judgments during the term at which such orders or judgments are entered when the litigants are actually or constructively before the court, we believe it would be an unwarranted expansion of their discretion to permit them of their own motion to reopen cases in which their jurisdiction has been exhausted by granting appeals. *Ex parte McAnnally*, 199 Mo. 512, 97 S. W. 921; *State v. Biesemeyer*, 136 Mo. App. 668, 118 S. W. 1197.

This court has heretofore refused to sanction the practice of trial courts in changing or modifying final judgments, even during the same term at which they were entered, without notice to the litigants whose interests are affected, but who are no longer in court. *Ault v. Bradley*, 191 Mo. 709, 90 S. W. 775.

We therefore conclude that all the orders made in this cause subsequent to the granting of the appeal to this court on the 25th day of November, 1909, were illegal, and that this appeal should be considered as though defendant had not been granted a new trial.

The evidence of the prosecutrix, Ida Speer, is to the effect that defendant paid court to her at intervals from April until November, 1907; that, by promising to marry her and

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

protesting great affection on his part, he persuaded her to have sexual intercourse with him in June, 1907, and on several other occasions from that date until the month of November, 1907, when she became pregnant and nine months later was delivered of a child. A number of witnesses testified to the good reputation of the prosecutrix prior to the date she began going with defendant. Defendant Sutton denied the promise of marriage, but admitted the acts of sexual intercourse with the prosecutrix, and sought to prove that she was unchaste before he began having sexual intercourse with her. There was some evidence of improper conduct on her part with another man before defendant began keeping company with her.

Such additional evidence as is necessary to a full understanding of the case will be noted in connection with our decision on the assignments of error urged by defendant.

The first error assigned by defendant is that there was no evidence direct or circumstantial that the prosecutrix, Ida Speer, was unmarried at the time the alleged crime was committed. While there was no direct evidence that she was unmarried, we find upon a careful reading of the record that the mother of prosecutrix testifies that she was a daughter of William Speer and was therefore still known by his name. Witness Boyd referred to her as "a girl." Prosecutrix testified to a proposition and contract of marriage, and to the further fact that the defendant was the first man who had ever had sexual intercourse with her. The defendant himself refers to her as "Miss Ida Speer," whom he accompanied to church; so that we conclude there was abundance of indirect evidence to warrant the finding of the jury that she was unmarried, under the rulings of this court in the cases of *State v. Reed*, 153 Mo. 451, loc. cit. 453, 55 S. W. 74; and *State v. Pipkin*, 221 Mo. 453, loc. cit. 460, 120 S. W. 17.

Defendant also contends that the verdict of the jury is fatally defective, in that it contains no finding that the prosecutrix was of previous chaste character. The verdict of the jury is as follows: "We, the jury in the case of state of Missouri against Otho Sutton, find the defendant, Otho Sutton, guilty, as he is charged in the second count of the information, and we fix his punishment for the same at a fine of four hundred dollars. G. W. Hodges, Foreman."

We can clearly see that, if the jury had attempted to recite any of the substantial charges in the information, then it would have been necessary to have inserted in their verdict a finding in favor of the state on all the substantial elements of the offense, including the previous chaste character of the prosecutrix; but where, as in this case, the finding of the jury is general and refers to the count in the information upon which the

defendant was tried, the presumption will be indulged that the jury considered all the elements of the charge, and found all the issues against the defendant. *State v. Cronin*, 189 Mo. 663, loc. cit. 671, 88 S. W. 604; *State v. Grossman*, 214 Mo. 233, loc. cit. 243, 113 S. W. 1074; *State v. Stark*, 202 Mo. 210, loc. cit. 221, 100 S. W. 642.

The defendant proved by numerous witnesses that he possessed a good reputation prior to his arrest in this case, and attempted to prove that the prosecutrix was not of chaste character at the date of the alleged crime, and therefore not within the protection of the statute. The reputation of people is to some extent determined by the company they keep; and as defendant proved that his own reputation was good, and that prior to the commission of this crime he accompanied the prosecutrix in society on many occasions, he in a large measure was responsible for the opinions entertained by his neighbors that she likewise enjoyed a good reputation. The finding of the jury that prosecutrix was of chaste character prior to the time that she first had sexual intercourse with defendant was supported by substantial evidence.

Finding no reversible error in the case, the judgment of the trial court is affirmed.

KENNISH, P. J., and FERRISS, J., concur.

STATE v. SUTTON.

(Supreme Court of Missouri, Division No. 2, Feb. 7, 1911.)

CRIMINAL LAW (§ 1083*)—APPEAL—GRANT OF NEW TRIAL—SECOND CONVICTION.

On conviction of crime defendant appealed, and the trial court thereafter, after approval of the appeal bond without warrant of law, granted a new trial. Thereafter defendant was again convicted on the second trial. *Held*, that such trial was unauthorized, and judgment would be reversed.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 2732; Dec. Dig. § 1083.*]

Appeal from Circuit Court, Reynolds County.

Otho Sutton was convicted of crime, and appeals. Reversed.

James Orchard, for appellant. E. W. Major, Atty. Gen., and John M. Dawson, Asst. Atty. Gen., for the State.

BROWN, J. The defendant was convicted in the circuit court of Reynolds county on May 29, 1910, on an information charging him with having carnal knowledge of one Ida Speer, an unmarried female, between the ages of 14 and 18 years, of previous chaste character.

The record proper shows that this was the second conviction of the defendant in this case. The defendant filed a plea in bar, reciting a prior conviction herein on the 25th day of November, 1909, and an appeal from

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

the judgment on such conviction; and, while the plea in bar is not preserved in the bill of exceptions, it is alleged by the defendant and admitted by the Attorney General that this is the same case in which a judgment and conviction in the trial court, rendered on the 25th day of November, 1909, was affirmed by this court at its present term. 134 S. W. 663. As will be seen by our first opinion herein filed, we have found that the action of the trial court in awarding defendant a new trial of its own motion, after it had granted him an appeal to this court and had approved his appeal bond, was unauthorized and without warrant of law. We are of the opinion that all the proceedings in this cause had in the circuit court of Reynolds county after the granting of the first appeal on the 25th day of November, 1909, are illegal.

The judgment of the circuit court of Reynolds county, entered on the 31st day of May, 1910, adjudging the defendant guilty, and assessing his punishment at a fine of \$500, and three months' imprisonment in the county jail, is therefore reversed.

KENNISH, P. J., and FERRISS, J., concur.

OTRICH v. ST. LOUIS, I. M. & S. RY. CO.
et al.

(Springfield Court of Appeals. Missouri.
Feb. 6, 1911.)

1. TORTS (§ 26*)—JOINT TORT-FEASORS—LIABILITY.

An action based on a joint tort is not supported by proof of a cause of action founded on separate torts of the tort-feasors.

[Ed. Note.—For other cases, see Torts, Cent. Dig. § 33; Dec. Dig. § 26.*]

2. CARRIERS (§ 177*)—INITIAL AND CONNECTING CARRIERS—AGREEMENTS—LIABILITY.

Carriers on connecting routes forming associations and traffic arrangements to carry freight through the whole line are partners, and each is liable for any loss or injury happening on any part of the route.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. § 776; Dec. Dig. § 177.*]

3. CARRIERS (§ 177*)—INITIAL AND CONNECTING CARRIERS—AGREEMENTS—LIABILITY.

A carrier may contract to carry beyond its own line, and where several carriers form a continuous line and contract to carry goods through for an agreed price, which the shipper pays in one sum, and which the carriers divide among themselves, they are jointly and severally liable to the shipper for a loss taking place on any part of the line.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. § 776; Dec. Dig. § 177.*]

4. CARRIERS (§ 177*)—INTERSTATE SHIPMENTS—LIABILITY.

Under the interstate commerce act (Act Cong. Feb. 4, 1887, c. 104, § 20, 24 Stat. 396 [U. S. Comp. St. 1901, p. 3169], amended by Act Cong. June 29, 1906, c. 3591, § 7, 34 Stat. 595 [U. S. Comp. St. Supp. 1909, p. 1166]), making the initial carrier of an interstate shipment liable for any loss or injury caused by any car-

rier, the initial carrier of an interstate shipment is liable for damages occurring on the connecting carrier's line, and any damages occurring to the shipment by the negligence of the connecting carrier may be recovered from the initial and connecting carriers jointly; but the connecting carrier is not liable for any injury occurring on the line of the initial carrier.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 775-803; Dec. Dig. § 177.*]

5. CARRIERS (§ 215*)—CARRIAGE OF LIVE STOCK—SUFFICIENCY OF CARS—LIABILITY.

A shipper of live stock, who accepts a car furnished instead of waiting for a better car on the following day as promised by the carrier's agent, and who loads his stock into the car, may not hold the carrier liable for defects in the car.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. § 923; Dec. Dig. § 215.*]

6. CARRIERS (§ 213*)—CARRIAGE OF LIVE STOCK—DELAY—LIABILITY.

A carrier of live stock is not liable for delay in the transportation thereof, unless the delay was occasioned by its negligence, and a carrier acting in good faith and to protect the shipment is not negligent.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 920-922; Dec. Dig. § 213.*]

7. CARRIERS (§ 185*)—INITIAL AND CONNECTING CARRIERS—JOINT LIABILITY.

A shipper of an interstate shipment, to maintain a joint liability against the initial and connecting carriers, has the burden of showing that the damage to the shipment was caused by the connecting carrier.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. § 836; Dec. Dig. § 185.*]

8. PLEADING (§ 36*)—PETITION—CONCLUSIVENESS.

The allegations of the petition are conclusive on plaintiff, and he may not contradict them by evidence on the trial.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 81-86; Dec. Dig. § 36.*]

9. CARRIERS (§ 228*)—CARRIAGE OF LIVE STOCK—DELAY.

Evidence held not to show that a connecting carrier of live stock was guilty of negligent delay in transporting the same.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 957-960; Dec. Dig. § 228.*]

10. CARRIERS (§ 205*)—CARRIAGE OF LIVE STOCK—NEGLIGENCE.

A carrier handling a shipment of live stock in the usual and ordinary course of business complies with the law.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. § 918; Dec. Dig. § 205.*]

11. CARRIERS (§ 227*)—LIVE STOCK—INITIAL AND CONNECTING CARRIERS—LIABILITY.

A shipper of live stock over connecting roads, who alleges that he is unable to determine the exact amount of liability to be attached to each carrier because the carriers are so closely connected in business arrangements and because they employ the same agent and jointly use the same yards at the point where the greatest damage was discovered, is not thereby relieved from the duty of properly stating in his petition a cause of action and showing at the trial that the carriers are jointly responsible in order to recover from both.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. § 953; Dec. Dig. § 227.*]

12. PLEADING (§ 20*)—ALTERNATIVE ALLEGATIONS—STATUTES.

To bring an allegation within Rev. St. 1899, § 626 (Ann. St. 1906, p. 650), authorizing

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

either party to allege any fact alternatively, declaring his belief of one alternative or the other, and his ignorance of one or the other, a fact alternatively pleaded must be positively alleged, coupled with an averment of the pleader's belief of one or the other alternative so alleged.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. § 43; Dec. Dig. § 20.*]

Appeal from Circuit Court, Scott County; Henry C. Riley, Judge.

Action by T. M. Otrich against the St. Louis, Iron Mountain & Southern Railway Company and another. From a judgment for plaintiff, defendants appeal. Reversed and remanded.

J. F. Green and Robert A. Anthony, for St. Louis, I. M. & S. Ry. Co. S. H. West and Wammack & Welborn, for St. Louis Southwestern Ry. Co. J. R. Young, for respondent.

NIXON, P. J. This is an action for damages in which the plaintiff was a shipper of live stock and the defendants were common carriers of freight. The claim is for damages for injuries to plaintiff's stock by reason of the defendants' negligence. Plaintiff obtained judgment for \$400, and the defendants appealed to the St. Louis Court of Appeals. The case was transferred to this court, and the parties have appeared and waived defect of jurisdiction.

The petition is as follows (caption omitted):

"Plaintiff states that defendants are both railroad corporations, owning, leasing, and operating a line of railroad in and through Scott county, Mo., with offices in said county where said defendants may be found and served; that defendants operate a line of railroad from Illmo, Mo., to East St. Louis, Ill., and jointly use the same together with yards at Illmo, Mo.; that as such railroad corporations the defendants are common carriers.

"Plaintiff states that on the 15th day of January, 1908, defendant St. Louis, Iron Mountain & Southern Railway Company contracted with plaintiff to ship for plaintiff a lot of horses and mules from McClure, Ill., to Clarendon, Ark.; that said contract is evidenced by bill of lading hereto attached, marked, 'Exhibit A,' and made to constitute a part of this petition; that when defendant St. Louis, Iron Mountain & Southern Railway Company carried said consignment as far as Illmo, Mo., it delivered same to defendant St. Louis Southwestern Railway Company, and, by agreement between said defendants, said defendant St. Louis Southwestern Railway Company undertook to complete said contract to carry said consignment to Clarendon, Ark.; that in evidence of said contract, the defendant St. Louis Southwestern Railway Company delivered to plaintiff their certain bill of lading, duly executed and signed, which is hereto attached, mark-

ed 'Exhibit B,' and made to constitute a part of this petition. (The part in italics was stricken out by plaintiff at the close of the case.)

"Plaintiff states that defendants contracted to and were in duty bound as such common carriers to convey said consignment of live stock in safe and sound cars and in a safe and sound manner without unnecessary delay from said point, McClure, Ill., to said point of destination, Clarendon, Ark., and then and there deliver said consignment to plaintiff in a safe and sound condition except conditions that might arise from other causes than neglect on the part of defendants. But plaintiff states that defendants were wholly neglectful of their duties as common carriers in such behalf; that defendant St. Louis, Iron Mountain & Southern Railway Company carelessly and negligently loaded said consignment of live stock in an unsound, improper, and unfit car; that said consignment was shipped in such car; that defendant St. Louis Southwestern Railway Company received said consignment and permitted same to remain in said unsound, improper, and unfit car; that said consignment was negligently and carelessly switched around by defendants on way to said point, Illmo, Mo., and on yards at Illmo, and were knocked down, trampled upon, beaten, and bruised and mangled by the careless handling of these defendants, and when arrival was made at point of destination, Clarendon, Ark., said stock was in a badly damaged condition; that said consignment of live stock was unnecessarily detained at Illmo, Mo., from the afternoon of January 15, 1908, until between 10 and 11 o'clock of the following day, during which time said stock was compelled to remain in the open winter weather without any shelter and were greatly damaged in consequence of such exposure.

"Plaintiff states that he is unable to determine the exact amount of liability to be attached to each defendant on account of said defendants being so closely connected in their business arrangements and on account of them having the same agent and jointly using the same yards at said point, Illmo, Mo., where the greatest damage was discovered; that both defendants were guilty of gross negligence and misconduct in handling said consignment of live stock.

"Plaintiff states that the entire consignment of live stock was damaged in the sum of \$200 counting damage from exposure, from standing out in the winter weather all night, and time and additional expense in getting the stock partially back in condition, and which damage it would be difficult to more specifically itemize; that one large bay mule was cut, bruised, and mangled, and damaged in the sum of \$145; that one brown mule was hurt in the stifle joint and bruised in the

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

ankle and damaged in the sum of \$125; that one mare was bruised in the withers and damaged in the sum of \$100; that one brown mule was bruised and mangled and damaged in the sum of \$165; that one gray mule was bruised about body and sprained hock and damaged in the sum of \$100; that one bay pacing horse had eye knocked out and was damaged in the sum of \$100; that one gray mule had ankle bruised and was damaged in the sum of \$70; that one valuable stud horse was scratched and damaged in the sum of \$200; that all of said stock mentioned as being damaged was a part of said consignment and received the injuries aforesaid on account of said careless handling and misconduct of defendants in transporting same under the contract mentioned above and in violation of defendants' duties aforesaid; that plaintiff is damaged in the sum aggregate of \$1,200, and for which said sum plaintiff asks judgment and for costs."

The grounds of specific negligence set out in plaintiff's petition are as follows: "That defendant St. Louis, Iron Mountain & Southern Railway Company carelessly and negligently loaded said consignment of live stock in an unsound, improper, and unfit car; that said consignment was shipped in such car; that defendant St. Louis Southwestern Railway Company received said consignment and permitted same to remain in said unsound, improper, and unfit car; that said consignment was negligently and carelessly switched around by defendants on way to said point, Illmo, Mo., and on yards at Illmo, and were knocked down, trampled upon, beaten, and bruised and mangled by the careless handling of these defendants, and when arrival was made at point of destination, Clarendon, Ark., said stock was in a badly damaged condition; that said consignment of live stock was unnecessarily detained at Illmo, Mo., from the afternoon of January 15, 1908, until between 10 and 11 o'clock of the following day, during which time said stock was compelled to remain in open winter weather without any shelter and were greatly damaged in consequence of such exposure."

The defendants filed separate answers in which each denied liability, and the defendant the St. Louis Southwestern Railway Company set up as a defense the misjoinder of parties defendant as follows: "Defendant further alleges that there is an improper joinder of defendants herein, in that this defendant is joined in this action with the St. Louis, Iron Mountain & Southern Railway Company, for the reason that its contract with the said plaintiff is a separate and distinct contract to transport plaintiff's property from Illmo, Mo., to Clarendon, Ark., and it is in no way connected with the shipment of said plaintiff's stock from McClure, Ill., to Illmo, Mo.; that each of said companies entered into separate and distinct contracts with the said plaintiff relative to the shipment of said stock; that no through rate or

through bill of lading was issued to the said plaintiff; and that they cannot be held jointly liable for the damage occasioned to plaintiff's stock, if any."

On January 15, 1908, the plaintiff delivered to the defendant St. Louis, Iron Mountain & Southern Railway Company (hereinafter called "the Iron Mountain Railway") at McClure, Ill., a car load of live stock for shipment to Clarendon, Ark. The stock consisted of 14 head of mules and 6 head of horses. The plaintiff received a bill of lading and a live stock contract from the said defendant for the transportation of said car load of stock. This was an interstate shipment in which the initial carrier, as we have seen, was the Iron Mountain Railway. The stock was routed by this defendant from McClure, Ill., by way of Illmo, Mo., to Clarendon, Ark., and plaintiff accompanied his car load of stock.

The evidence is uncontradicted that, before the animals were loaded into the car at McClure, Mrs. Rockwell, the agent of the Iron Mountain Railway at that point, told plaintiff that the car in which he proposed to ship the stock was not a suitable one in which to make the shipment, and that if he would wait until the next day she would get him another car, but that plaintiff refused to wait and said he would repair the car and load into it, and did repair the car by nailing boards or slats on the inside of it. He bedded the car and loaded the stock himself. When the car containing plaintiff's stock arrived at Illmo, Mo., which was only six or eight miles from McClure, it was switched onto the line of the defendant St. Louis Southwestern Railway Company (hereinafter called "the Southwestern Railway"), which at that point operated a connecting line with a station and stockyards at Illmo. The car was in transit from McClure to Illmo some three hours and arrived about 8 o'clock on the night of the 15th, and when it did arrive at Illmo was delivered to the defendant, the Southwestern Railway, at its stockyards. In the usual operation of that railroad, the next train on which the car load of stock could have been sent out after arrival under the schedules upon which trains were run was 11 o'clock that night, and plaintiff requested that the stock be sent out on that train. After the stock had been switched around its yards by the defendant, the Southwestern Railway, the car was ready to be attached to the train that was to carry it south; but when the trainmen of said defendant were about to send the car out, it being then about 10:30 p. m. on the night of January 15th, and while they were attempting to couple the car, they discovered that plaintiff's stock in the car was in very bad condition. On making an examination, they found the stock badly injured, bruised, and beaten up, with injuries on different parts of the body, eyes injured, etc., and some of the wounds were bleeding. There-

upon the agents of said defendant unloaded the stock and removed it to their stockyards, where it remained about 12 hours, or until 10 o'clock the next morning, when the stock was loaded into a larger car and sent forward to Clarendon, Ark. The unloading and reloading of the stock was done by the defendant Southwestern Railway, on the plea that the stock was in such an injured and disabled condition that such transfer to a larger car became necessary to protect the plaintiff's property from further injuries. The transfer to the larger car and the delay it necessitated was not made with the plaintiff's knowledge; but, after it had been transferred, he made no objection to the arrangement. Plaintiff, although he went with his stock from McClure to Illmo, testified that, while the stock was damaged in the shipment, he did not know at what point it was damaged or on which line or by which defendant; and he further stated that his car load of stock did not receive any injuries of any kind after it left Illmo, or between Illmo and Clarendon.

It will be recalled that among the defenses set up by the defendant, the Southwestern Railway, was the misjoinder of parties defendant. The petition, as we have seen, alleges a joint liability, and the specific grounds of negligence charged against both defendants are: (1) That the Iron Mountain Railway "negligently and carelessly loaded said consignment of live stock in an unsound, improper, and unfit car, and that said consignment was shipped in such car, and that defendant St. Louis Southwestern Railway Company received said consignment and permitted same to remain in said unsound, improper, and unfit car;" (2) "that said consignment was negligently and carelessly switched around by defendants on way to said point, Illmo, Mo., and on yards at Illmo, and were knocked down, trampled upon, beaten, and bruised and mangled by the careless handling of these defendants;" (3) "that said consignment of live stock was unnecessarily detained at Illmo, Mo., from the afternoon of January 15, 1908, until between 10 and 11 o'clock of the following day, during which time said stock was compelled to remain in open winter weather without any shelter and were greatly damaged in consequence of such exposure."

This case, as is seen, is based on a joint tort, and the cause of action cannot be supported by proof of a cause of action founded on separate torts of the alleged joint tortfeasors; but it is indispensable, in order to sustain the joint action, that there must have been such concurrent action between the defendants as to create a joint liability. In such case the difference between the allegations and the proof is not to be regarded as a mere variance, which is cured by verdict under the statute, but is a total failure of proof when the defect is raised as provided by statute. Consequently, in order for

plaintiff to sustain his action against both defendants, it became necessary for him to show by evidence that he had a joint cause of action against the defendants. *Meyers v. Railway Co.*, 120 Mo. App., loc. cit. 292, 96 S. W. 737.

One of the defenses set up in the answer of the Southwestern Railway was that there was no joint action by the defendant companies; that each of said companies had entered into separate and distinct contracts with the plaintiff relative to the shipment of said stock; that no through rate or through bill of lading was issued to the plaintiff; and that defendants cannot be jointly liable for the damages occasioned to plaintiff's stock, if any.

The evidence tended to show that defendants maintained joint stockyards at Illmo, Mo., and they jointly used the same track from East St. Louis, Ill., to Illmo; that McClure was on the Illinois division of the Iron Mountain, and the Southwestern had no local station on those rails, but Illmo was a station on the line of the Iron Mountain; that the two defendants jointly used the same railroad track between East St. Louis and Illmo, but there was no evidence showing that they had any traffic contract with each other. Where carriers on connecting routes form associations and arrangements for the purpose of carrying goods or parcels through the whole line, they are, beyond question, partners, and each is responsible for any loss or injury to goods which may happen, in whatever part of the line it occurs. *Coates v. Express Co.*, 45 Mo. 238. A common carrier may contract to carry beyond the end of its own line, and where several common carriers, each having its own line, associate and form a continuous line, and contract to carry goods through for an agreed price, which the shipper pays in one sum, and which the carriers divide among themselves, they are jointly and severally liable to the shipper, with whom they have contracted, for a loss taking place on any part of the whole line. *White Live Stock Com. Co. v. Railroad*, 87 Mo. App. 330. The evidence in this case, however, fails to show any traffic arrangement between the defendant carriers as to the shipment of plaintiff's stock that would make them jointly and severally liable for any injuries during transportation.

As herein previously stated, this was an interstate shipment, from McClure, Ill., by way of Illmo, Mo., to Clarendon, Ark., in which the defendant Iron Mountain Railway was the initial carrier and the Southwestern Railway the connecting carrier. Under the interstate commerce act, the initial carrier was liable for any loss, damage, or injury to plaintiff's stock caused by it or by any common carrier, railroad, or transportation company to which such property was delivered or over whose lines such property might pass. Such interstate commerce act

provided: "That any common carrier, railroad or transportation company receiving property for transportation from a point in one state to a point in another state shall issue a receipt or bill of lading therefor and shall be liable to the lawful holder thereof for any loss, damage or injury to such property caused by it or by any common carrier, railroad or transportation company to which such property may be delivered or over whose line or lines such property may pass. * * * Act Cong. Feb. 4, 1887, c. 104, § 20, 24 Stat. 386 (U. S. Comp. St. 1901, p. 3169), amended by Act Cong. June 20, 1906, c. 3591, § 7, 34 Stat. 593 (U. S. Comp. St. Supp. 1909, p. 1163). Under the liabilities created by this act of Congress, the defendant Iron Mountain Railway, having received the stock for shipment, became liable not only for damages caused by its own negligence, but also for any damage to plaintiff's stock by the Southwestern Railway, it being a connecting line over which the stock passed; and any damages that should have occurred to plaintiff's stock by the negligence of the defendant Southwestern Railway, under this act, would render the defendants jointly liable to the plaintiff for such negligence. But neither by reason of the interstate commerce act, the common law, or the statute of Missouri was the defendant Southwestern Railway vicariously liable for any injury caused to plaintiff's stock that occurred upon the line or by the acts of the defendant Iron Mountain Railway before the stock came upon its line. So that the whole question as to the misjoinder of parties in this case is focused around the question whether the defendant Southwestern Railway was guilty of any negligence causing damage to plaintiff's stock after it received the same. If this action is to be maintained on account of the joint liability of the defendant, the evidence must show that the Southwestern Railway was guilty of negligence in the switching of the plaintiff's car load of stock at Illmo or unloading and re-loading the same and an unreasonable detention in its stockyards at Illmo. As we have seen, the charge of specific negligence in the petition is the improper switching of the car load of stock at Illmo, and that it was unnecessarily detained for some 12 hours, during which time it remained in open winter weather, causing great depreciation in value by reason thereof. We will now proceed to examine the evidence to ascertain whether either of these charges are sustained and as to whether the defendant Southwestern Railway was guilty of any negligence at Illmo, as charged in the petition, either in switching the car or improper detention of the stock.

The plaintiff himself makes the following statement as to what occurred in regard to the car at McClure: "Mrs. Rockwell, the agent of the Iron Mountain at McClure, called my attention to the fact that she

would communicate with the train dispatcher and suggested to me that the car in which I proposed to ship my stock was not a suitable car, and that she would get another one for me if I would wait until the next day. I decided to load my stock in that car as it was and did load it on that date. I am the man who nailed the boards on it. I saw the car before I put the stock in." The evidence further shows that this car was an unusually small car for the loading of stock; that it was only 32 feet 6 inches, inside measurement, in length, and 6 feet 10 inches in width, which is not standard and which is not large enough to handle ordinary shipments of stock. The evidence showed that the car would contain 20 head if the car was properly bedded and the stock was given the proper care by the shipper when he loaded the same. The car was also, in proportion, low in height and was not standard. The evidence for the defendants tended to show that on the bottom of the car was some 14 to 18 inches of bedding and also some saw dust; that the bedding was in excess of what it should be some 12 inches; that a car of this kind, bedded in this manner, would be likely to cause the stock to fall down; that the car had grain doors, that is, the doors to hold grain in a car, and they had been nailed from the inside against the sides of the car giving it the appearance of being a box car rather than a stock car, and these nails protruded in some places and projected on the inside as much as an inch, and the nails were left in such a condition in the car that if the stock moved against them they would be cut and torn and caused to bleed and tending to mangle their flesh. There was a feed trough in the car on the inside in addition to the 20 head of stock, and this trough ran along the entire width of the car and was lying at the bottom of the floor and fitted tightly to the end of the car. The evidence of the plaintiff, however, tended to show that there was no defective bedding, and that no nails were left projecting inside the car. The evidence of the defendants tended to show that the stock was examined at Illmo before removal from the car on which it was originally shipped. The joint agent of the defendants at Illmo testified that he examined the stock on the morning of January 16th before it had been removed from the car in which it was originally shipped, and found that the stock at that time was badly disabled, bruised, and wounded; that some of the horses had their eyes injured, and some of the mules had their ankles wounded, and their eyes were swollen and bleeding, and they were lame. For some unexplained reason, the plaintiff did not testify as to the condition of his stock at Illmo or as to it standing out in the weather. It will thus be seen that while plaintiff's petition alleges that his stock at McClure, Ill., was loaded by the defendant Iron Mountain Railway into an unsound, im-

proper, and unfit car, the evidence showed that he selected the car himself, and his evidence tended to show that the animals were not injured by reason of being in an unsafe car, and he maintained throughout the trial that the car was sufficient. By accepting the car furnished, rather than wait until a better one could be secured, he waived all right to complain of the injuries resulting from the kind of car which was furnished. He will certainly not be allowed to complain that he was not furnished a better car when another car was offered by defendant's agent and plaintiff would not permit such agent to procure another car for him. He chose the car in which the stock was shipped, repaired it, bedded it, and loaded his stock into it, and, if the car was insufficient, it was his own act, and he cannot hold the defendants responsible for the defects. *Picklin & Son v. Railroad*, 115 Mo. App. 633, 92 S. W. 347.

The allegation that the defendant Southwestern Railway received the stock in an unfit car and permitted the same to remain in it is not supported, but is entirely disproved, by the evidence. As soon as this company discovered the kind of car the animals were in, it proceeded to unload them and put them in a larger and more commodious car, and this was the cause of the delay of the stock at Illmo. It is not sufficient that the plaintiff show merely that there was a delay in order to render the defendants liable, but he must further show that the delay was occasioned by the carriers' negligence. *Ecton v. Railway Co.*, 125 Mo. App. 223, 102 S. W. 575; *McCrary v. Railroad*, 109 Mo. App. 567, 83 S. W. 82; *Wright v. Railroad*, 118 Mo. App., loc. cit. 396, 94 S. W. 555. And defendant Southwestern Railway cannot be convicted of negligence when it acted in good faith and protected plaintiff's property.

A further specific charge of negligence in the petition is that the defendants at Illmo negligently and carelessly switched the plaintiff's car load of stock in such a way as to cause them to be knocked down, bruised, and mangled. The only evidence of damages from negligent handling and switching of the car is the condition in which the stock was found on arrival at Illmo and delivery to the Southwestern Railway and after the car had been switched into the latter's stockyards. No evidence is offered by the plaintiff as to how the injuries occurred, or when, or where; but the evidence goes no further than to show that the stock was in good condition when loaded at McClure and was discovered badly injured and damaged while in the stockyards at Illmo. As to how or where or by whose negligence the injuries were inflicted the evidence gives no answer. The plaintiff himself, who was with the car load of stock, as we have stated, testified that he had no knowledge at what point or whereabouts along the road the stock was damaged; that he only knew the stock was dam-

aged during the shipment. So we are left entirely in the dark as to whether the injuries to the stock took place by switching on the Iron Mountain Railway or after the car load of stock had reached the stockyards of the Southwestern Railway, or whether the injuries were the result of the negligence of the defendants, or either of them, or whether they were occasioned by the natural propensities of the stock, or the unfit car in which the animals were loaded. If plaintiff's stock was damaged by reason of the negligence or the failure of the Iron Mountain Railway to safely transport the same from McClure to Illmo, as stated, the Southwestern Railway would be in no wise responsible for such injuries, for it entered into no contract with the plaintiff for such transportation between said points and cannot be held under the law for the negligence or omission of the Iron Mountain Railway on account of such negligent transportation of the stock; but, as stated, in order to maintain the joint liability of the defendants and sustain the verdict obtained by plaintiff for \$400 on the charge of negligence, the burden was on the plaintiff to show that any damages received from switching was caused by the defendant Southwestern Railway at Illmo; otherwise, there was no joint liability as alleged in his petition. A most careful examination of the testimony fails to disclose any negligence of the Southwestern Railway in handling or switching this car load of stock, and the charge in plaintiff's petition that this defendant was guilty of such negligence is wholly unsupported by the evidence.

The other charge, as we have stated, of specific negligence, is the detention of plaintiff's stock some 12 hours at Illmo, during which time, the petition claims, it was exposed to the winter weather without shelter and greatly damaged in consequence of such exposure. The plaintiff's evidence sustaining this charge is to the effect that he desired to keep his stock out of the weather in order to get the same to destination in good shape. He testified: "I was damaged when they were turned loose over there in an open stock pen and not taken care of. I think they were left out in the open about 12 hours; I am not sure. It was sleeting and windy weather." He further testified that by reason of the exposure the stock was damaged \$10 a head. As we have previously stated, the petition alleged that the plaintiff's stock at the time it was loaded at McClure was negligently and carelessly loaded in an unsound, improper, and unfit car. Under the rules of pleading and practice, this allegation of the petition is conclusive upon plaintiff so far as the trial of this case is concerned. A party will not be permitted on a trial to give evidence contradicting his pleadings; he must abide by the statements made in his own pleadings, and is absolutely concluded by the statements therein contained.

Weil v. Posten, 77 Mo. 284; Knoop v. Kelsey, 102 Mo. 291, 14 S. W. 110, 22 Am. St. Rep. 777; Davis v. Bond, 75 Mo. App. 32. The statements in the petition which are absolutely conclusive were substantiated by the testimony offered by the defendants. The evidence offered by the Southwestern Railway tended to show that the condition of the car and the condition of the stock was such when it came into its possession that it was necessary, to protect the stock and protect plaintiff's rights, that it should be unloaded from the car in which it was received at Illmo and reloaded into a larger car. The plaintiff, although he was at Illmo during this time, was silent on the witness stand as to the reason why his stock was reloaded at Illmo into a larger car. The testimony of the Southwestern Railway is uncontradicted that, after the injuries to plaintiff's stock were discovered, it became necessary to place the stock in a larger car; that the car in which the stock had been brought from McClure was not fit to put stock in, not suitable for it; that it would not have been possible for the Southwestern Railway to have shipped the stock through to Clarendon, Ark., in the car in which it arrived, without injuring the stock; that the stock at Illmo was in such a damaged condition that it became necessary, in order that it might not become further damaged, to unload it and reload it into another and larger car. Of course, it necessarily follows that, if this unloading and reloading at Illmo became necessary in order to protect plaintiff's stock from further injuries by reason of the defective car or by reason of the disabled condition the stock was in, such act would not be negligence on the part of the defendant Southwestern Railway. Further, the fact that it became necessary to unload the animals at Illmo, and if, in consequence, it was impossible to get them back on a car in time for them to leave on the next train, such act would not be negligence. If it handled the shipment in its customary trains in the usual and ordinary course of business, this would be all the law required. Being compelled to wait, there was no showing that the animals were not as well off in the pens as they would have been in the car; and there was no testimony showing that the animals were in any worse condition by reason of having stood in the pen from 10 to 12 hours except the opinion of the plaintiff. There was no showing that the cold weather or exposure caused the stock to shrink in weight or become diseased in any way thereby.

The plaintiff makes this further statement in his petition: "Plaintiff states that he is unable to determine the exact amount of liability to be attached to each defendant on account of said defendants being so closely connected in their business arrangements and

on account of them having the same agent and jointly using the same yards at said point, Illmo, Mo., where the greatest damage was discovered." This allegation was not sufficient to relieve the pleader of properly stating in his petition a cause of action, or to relieve him of the further burden of showing at the trial that the defendants were jointly responsible for the injuries to his stock in order to recover as to both defendants. And, as an attempted statement of a fact in the alternative, it came short of the requirements of alternative pleading. Section 626, Rev. St. 1899 (Ann. St. 1906, p. 650), provides: "Either party may allege any fact or title alternatively, declaring his belief of one alternative or the other, and his ignorance whether it be the one or the other." Under this section it is seen that a fact may be alleged in the alternative by either party; but, in order to bring such allegation within the statute, the fact alternatively pleaded must be positively alleged coupled with an averment of the pleader's belief of one or the other alternative so alleged. Nichols v. Hubert, 150 Mo. 620, 51 S. W. 1031; State ex rel. v. Walbridge, 69 Mo. App. 657. The petition wholly fails to comply with the requisites of alternative pleading as provided by the statute.

The evidence wholly fails to sustain the allegation of negligence on the part of the defendant Southwestern Railway, and the judgment as to said company is reversed. The judgment as to the defendant Iron Mountain Railway is reversed, and the cause remanded. All concur.

STATE ex rel. ZIMMERMAN v. SCHAPER et al.

(Springfield Court of Appeals. Missouri. Feb. 6, 1911. Rehearing Denied Feb. 6, 1911.)

1. SHERIFFS AND CONSTABLES (§ 157*)—LIABILITY ON BOND.

Rev. St. 1909, § 5325, provides that when property claimed to have been stolen or obtained by any of the modes specified in the article, relating to offenses against public and private property, comes into the custody of any constable, he shall hold it subject to the order of the officer authorized to dispose thereof. Held, that it was not the official duty of a constable to store dynamite, taken upon arresting certain persons for having dangerous explosives concealed in a dwelling house, where it was not claimed that such dynamite was stolen, etc., as provided by the statute, so that the sureties upon his bond, conditioned upon his discharge of the duties of constable according to law, were not liable for injuries caused by the explosion of such dynamite by the negligent storing of it by the constable.

[Ed. Note.—For other cases, see Sheriffs and Constables, Cent. Dig. § 361; Dec. Dig. § 157.*]

2. PRINCIPAL AND SURETY (§ 68*)—CONSTRUCTION OF BOND.

A surety's obligation cannot be extended to other subjects, persons, or periods of time than

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

those expressed or necessarily included in his contract.

[Ed. Note.—For other cases, see Principal and Surety, Cent. Dig. §§ 108-112; Dec. Dig. § 66.*]

3. SHERIFFS AND CONSTABLES (§ 157*)—LIABILITY ON BOND.

The sureties of a public officer are only responsible for his performance of the duties imposed on him by law.

[Ed. Note.—For other cases, see Sheriffs and Constables, Cent. Dig. §§ 354-371; Dec. Dig. § 157.*]

Appeal from Circuit Court, St. Louis County; John W. McElhinney, Judge.

Action by the State, on the relation of one Zimmerman, by Hubert H. Frank, against John F. Schaper and others. From a judgment of nonsuit, plaintiff appeals. Affirmed.

L. Frank Ottofy, for appellant. R. L. Johnson and R. L. Shackelford, for respondents.

GRAY, J. This is an action commenced on the 16th day of August, 1907, on the official bond of John F. Schaper, constable of Carondelet township, in St. Louis county, to recover \$5,000 for the death of Albert F. Zimmerman. The circuit court refused to submit plaintiff's case to the jury, and the cause is here on plaintiff's appeal.

The evidence tended to prove that some time prior to the death of the deceased, which occurred on the 28th day of April, 1907, the deputy constable had arrested some parties charged with the offense of having dangerous explosives concealed in a dwelling place or usual place of abode. When the officer arrested the parties, they had in their possession a quantity of dynamite. The officer took it from them and deposited it in a building in a locality which was thickly settled and inhabited by a large number of persons. On the 26th day of April, 1907, the justice discharged the parties, and no further proceedings were pending against them. On the 28th day of April, a fire broke out in the building adjoining the one in which the dynamite was stored. The deceased appeared at the place of the fire as a member of the fire department, for the purpose of assisting in extinguishing the fire. While the members of the fire department and others were trying to extinguish the fire, the dynamite exploded, on account of the fire, and Zimmerman received injuries from which he died.

The petition alleged that Christian Noerper was a justice of the peace, and that certain persons were brought before him charged with the crime of larceny, and that their trial was postponed, and that a large quantity of dynamite and dynamite caps, which were dangerous explosives, were required before the said justice as evidence of the said crime, and that the defendant, in the discharge of his duties as constable, took charge

of the said dynamite to hold the same as evidence against the persons suspected of having stolen the same, and it thereupon became the duty of the said defendant to safely keep the said dynamite. The evidence shows that the charge against the persons was not larceny, but was based on section 5343, Rev. St. 1900, wherein it is made a misdemeanor for a person to have in his possession dynamite under certain circumstances. Section 5325, Rev. St. 1900, reads as follows: "When property alleged to have been stolen, purloined, embezzled or obtained by false pretenses, or to have been obtained in any of the modes specified in the article concerning offenses against public and private property, shall come into the custody of any sheriff or constable, he shall hold the same subject to the order of the court or officer authorized to direct the disposition thereof."

It was evidently the intention of the plaintiff to base his right of action on a breach of this statutory duty by the defendant constable. As we have stated, the petition alleges that the parties taken before the justice were charged with the offense of larceny, in that they had stolen the dynamite, and that the same came into the possession of the constable to be held by him as such officer, and it was his duty to safely keep the same. The statute just quoted does not make it the official duty of the constable to keep all property which may come into his possession. It was not shown by the evidence that the property had been stolen or acquired in any of the manners specified in section 5325. It was therefore no part of the official duty of the constable to take possession of the property or to keep the same.

In determining the liability of the sureties, the conditions of the constable's bond must be considered. It reads as follows: "Now, if the said John F. Schaper will execute all process to him directed and deliver and pay over all moneys received by him by virtue of his office and discharge the duties of constable according to law, then this obligation shall be void." When he took charge of the dynamite, he was not performing any duty as constable of the township. It makes no difference that he thought he was. *State ex rel. v. Dierker*, 101 Mo. App. 636, 74 S. W. 153.

Where the rights of sureties are involved, courts will not extend the construction of an instrument beyond its plain and obvious meaning. The meaning of this rule is that the surety's obligation cannot be extended to other subjects, persons, or periods of time than those expressed or necessarily included in his contract. *Fisse v. Einstein*, 5 Mo. App. 78.

The sureties of a public officer are only responsible for his performance of the duties assigned to him by law. *Nolley v. Callaway*

*For other cases see same topic and section NUMBER in Dec. Dig. & Ann. Dig. Key No. Series & Rep'r Indexes

County, 11 Mo. 447; State ex rel. v. Cheaney, 52 Mo. App. 258; State ex rel. v. Davis, 88 Mo. 585; City of Harrisonville v. Porter, 76 Mo. 358; St. Louis v. Sickles, 52 Mo. 122; State, to Use, v. Johnson, 55 Mo. 80.

If the evidence showed that the parties in the criminal case before the justice had in their possession property alleged to have been stolen, and that the same was turned over to the constable for safe-keeping, as the statute authorizes, then another question would be presented, and it will not be necessary for us to determine whether the sureties would be liable on his bond if the dynamite turned over to the constable under such circumstances was by him stored in a place where it was liable to explode and injure persons. There was no statute authorizing or making it the duty of the constable to take charge of the dynamite, and in doing so he was acting as a private individual and was keeping it in order that it might be used as evidence against the parties charged on their trial. It was not taken in his possession in the discharge of any duty as constable, and therefore his sureties on his official bond are not liable.

The plaintiff in bringing his suit undoubtedly recognized the correctness of this position, as he charged in his petition that the property had been stolen, and that it was turned over to the constable, and it became his duty to safely keep the same. The evidence failed to support the allegation, and the trial court correctly held that plaintiff was not entitled to recover.

The judgment will be affirmed. All concur.

SCHOOL DIST. NO. 61. TP. 36 N., RANGE 5 E., ST. FRANCOIS COUNTY, v. McFARLAND et al.

(Springfield Court of Appeals. Missouri. Feb. 6, 1911.)

1. SCHOOLS AND SCHOOL DISTRICTS (§ 32*)—ORGANIZATION—CHANGING BOUNDARIES.

Rev. St. 1899, §§ 9739-9859 (Ann. St. 1906, pp. 4461-4518), provides for the organization of subschool districts, or so-called "country school districts." Section 9742 (Ann. St. 1906, p. 4463) provides that when it is deemed necessary to form a new district composed of two or more entire districts, or parts of two or more districts, or to divide one district to form two new districts, or to change the boundary lines of two or more districts, the district clerk of the district affected, upon receiving a petition for the change signed by 10 qualified voters, shall post a notice of the proposed change, and the voters shall decide thereon by majority vote. *Held*, that the section did not authorize a country school district to attach to itself part of a village school district organized under sections 9860-9879a (Ann. St. 1906, pp. 4519-4530), providing for the organization of village school districts; section 9742 applying only to common school districts.

[Ed. Note.—For other cases, see Schools and School Districts, Cent. Dig. §§ 52-54; Dec. Dig. § 32.*]

2. STATUTES (§ 205*)—CONSTRUCTION—INTRINSIC AIDS.

In order to correctly construe a statute, it is necessary to ascertain what its subject is.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. § 282; Dec. Dig. § 205.*]

3. INJUNCTION (§ 17*)—ADEQUACY OF LEGAL REMEDY.

Under Rev. St. 1899, § 3649 (Ann. St. 1906, p. 2055), authorizing relief by injunction to prevent the doing of any legal wrong whenever an adequate legal remedy cannot be afforded by an action for damages, an injunction may issue where an action for damages, as such, is not adequate, though there may be another adequate legal remedy; the section merely confirming the general rule of equity.

[Ed. Note.—For other cases, see Injunction, Cent. Dig. § 16; Dec. Dig. § 17.*]

4. SCHOOLS AND SCHOOL DISTRICTS (§ 39*)—CHANGE OF BOUNDARIES—INJUNCTION.

An injunction will issue under Rev. St. 1899, § 3649, to prevent a common school district from illegally detaching a part of a village school district and attaching such part to itself, since to permit such illegal act would work irreparable injury to the inhabitants of the detached part.

[Ed. Note.—For other cases, see Schools and School Districts, Cent. Dig. §§ 68, 69; Dec. Dig. § 39.*]

Appeal from Circuit Court, Jefferson County; Joseph J. Williams, Judge.

Action by School District No. 61, Township 36 North, Range 5 East, St. Francois County, Missouri, by its Board of Directors, composed of C. E. Norwine and others, against F. L. McFarland and others. From a judgment dissolving a temporary injunction, plaintiffs appeal to the St. Louis Court of Appeals. Transferred to this court, and jurisdiction waived. Reversed and remanded to set aside order and enter judgment for plaintiffs perpetuating the injunction.

This is an appeal from an order dissolving a temporary injunction which had been issued on June 10, 1907, upon the application of appellants as members of the board of directors of school district No. 61, alleged to be a village school district, organized under the provisions of article 2, c. 154, Rev. St. 1899 (Ann. St. 1906, pp. 4519-4530). The respondents J. E. Blankenship, George W. Howell, and Charles D. Carr constituted the board of directors of school district No. 7, a common school district, organized under the provisions of article 1, c. 154, Rev. St. 1899 (Ann. St. 1906, pp. 4459-4518), and respondent F. L. McFarland was the clerk of school district No. 7, and respondent J. A. Lawrence was clerk of the county court of St. Francois county (in which county this case originated, it having reached Jefferson county by change of venue).

The petition alleges that at the annual school meeting and election held on the first Tuesday in April, 1907, an attempt was made to detach a portion of the territory belonging to school district No. 61, which territory contained about 200 children of school age,

and which territory yielded school district No. 61 about \$1,000 annually in school taxes; that at said meeting and election a majority of the voters in district No. 61 voted against the proposition, and a majority of the voters in district No. 7 voted in favor of the proposition; that thereupon an appeal was taken to the commissioner, who appointed a board of arbitration, and a decision was rendered in favor of district No. 7, and in favor of the proposed change. The petition recites that J. A. Lawrence, the clerk of the county court of St. Francois county, is about to recognize as correct an enumeration list containing the names of school children in the portion of district No. 61 which was attempted to be detached; that the board of directors of school district No. 7 is about to make and file an estimate for the purpose of school taxation and is threatening to fix the rate of taxation on the theory that the territory attempted to be attached is a part of school district No. 7; that said J. A. Lawrence is threatening and is about to recognize said estimate upon the books and records of his office, and is threatening to extend the school taxes of said school district No. 7 according to the threatened estimates so as to make the school taxes, so extended, when collected, payable to school district No. 7, on the territory which was attempted to be detached and which plaintiff avers is and was part of plaintiff district; that unless relief is granted the said school children will be enumerated in district No. 7, where they do not belong, and property belonging to village school district No. 61 will be wrongfully taken from it, the rate of taxation in said district will be greatly increased, and the district will be greatly injured and deprived of revenue which rightly belongs to it; that there is no authority of law for school district No. 7, it being a common school district organized and existing under article 1, c. 154, Rev. St. 1899, to detach property from village school district No. 61, it being a village school district organized and existing under article 2, c. 154, Rev. St. 1899; that plaintiff has no adequate remedy at law, and unless relief is granted irreparable injury will be done plaintiff. The prayer of the petition is that defendants be enjoined from changing the boundary lines of plaintiff district by detaching said territory from said district and attaching it to school district No. 7; that they be enjoined from enumerating the children of school age residing in said territory as school children of district No. 7; that they be enjoined from striking from the enumeration list of plaintiff district the name of any person residing in said territory; that J. A. Lawrence be enjoined from extending on the tax books of the county taxes levied on property within said territory attempted to be detached so that said taxes will be collected for district No. 7, instead of plaintiff district; that de-

fendants be enjoined from in any manner recognizing the above-described territory as part of school district No. 7; and that they be required to treat as null and void the decision of the board of arbitrators and the county school commissioner; and for such other and further relief as to the court may seem just and proper. After hearing the evidence, the court, on April 24, 1908, rendered its judgment dissolving the temporary injunction.

The evidence tends to show that school district No. 61 was organized under article 2, c. 154, Rev. St. 1899, in 1901, and embraced the incorporated town of Flat River, and was recognized as a village school district. The other material allegations of fact in the petition are sustained by the evidence. It was shown that, after receiving notice of the decision of the commissioner's board, the county clerk received and filed an enumeration list made by order of the school board of district No. 7, which showed 444 school children in district No. 7, as it originally stood, and 215 school children in the newly acquired portion. The evidence shows that the county clerk at the time of the service of the temporary injunction was about to extend the taxes on the tax books in accordance with the decision of the commissioner's board.

Hensley & Revelle and Clyde Williams, for appellants. Jerry B. Burks, for respondents.

NIXON, P. J. (after stating the facts as above). Only two questions are made on this appeal, and they will be considered in their order. Appellants earnestly insist that the election was a nullity, for the reason that a common school district cannot detach a portion of a village school district; there being no statute conferring such right.

The organization of school districts in this state is provided for by chapter 154, Rev. St. 1899 (Ann. St. 1906, pp. 4459-4568). Article 1 of that chapter, in which section 9742 (Ann. St. 1906, p. 4463) is contained, in addition to some general provisions, provides for the organization of subdistricts, or what is generally known as country school districts. Article 2, for the organization of city, town, and village school districts. Article 3, for the organization of school districts in cities of more than 50,000 and less than 300,000 inhabitants. Article 4, for the organization of school districts in cities of 300,000 inhabitants or over. Section 9875, Rev. St. 1899 (Ann. St. 1906, p. 4527), provides that a country school district or part thereof adjacent to a village school district may be attached to the latter. No provision is made in this article for the attachment of a portion of a village school district to the territory of a country school district. Indeed, the election in question was held under section 9742, Rev. St. 1899, which appears in article 1, concerning country school

districts. Under the rules of statutory construction, this section was wholly inapplicable, and the election in question could not have been lawfully held under its provisions.

The reasoning in the case of *State ex rel. v. Fry*, 186 Mo. 198, 85 S. W. 328, is applicable here. In that case there was a village school district consisting of territory partly in Newton county and partly in McDonald county, and it was attempted, under section 9747, Rev. St. 1899 (Ann. St. 1906, p. 4468), to create a country school district out of the territory on the Newton county side of the line. It was contended that the general words "any school district," as used in section 9747, embraced a village school district as well as a country school district. The Supreme Court held that this contention could not be maintained, saying: "It is a canon of interpretation that 'all words, if they be general and not express and precise, are to be restricted to the fitness of the matter. They are to be construed as particular if the intention be particular; that is, they must be understood as used in reference to the subject-matter in the mind of the Legislature, and strictly limited to it.' Endlich, Int. of Stat. § 86. It is indispensable to a correct understanding of a statute to inquire what is the subject of it. 2 Lewis' Suth. on Stat. Con. (2d Ed.) § 347. * * * The subject of section 9747 of article 1 and of the sections preceding it is distinctly stated in section 9739 (Ann. St. 1906, p. 4461), the first section of that article, to be 'all subdistricts, as organized and bounded,' i. e., country school districts, and, under the canon of construction aforesaid, the words 'any school district' in section 9747 must be limited to country school districts, whose organization was alone provided for in article 1, and not to village school districts whose organization was provided for in article 2, unless it appears by other legislation that such was not the legislative intent."

So, in this case, section 9742 appears in the article concerning country school districts providing for the formation of "a new district, to be composed of two or more districts, or parts of two or more districts, or to divide one district to form two new districts from the same territory therein, or to change the boundary lines of two or more districts." In framing this statute, "the subject-matter in the mind of Legislature" was common school districts.

We have confined our discussion to the law as it appears in the Revised Statutes of 1899 and have not attempted a construction of the enactment of the Legislature in 1909 in which it completely rearranged chapter 154 as it appears in the revision of 1899. By Acts 1909, p. 770, article 1, c. 106, Rev. St. 1909, classifies public schools; article 2 contains laws "applicable to all classes of schools"; article 3, "laws applicable to common schools"; article 4, "laws applicable

to city, town and consolidated schools," etc. It will be seen that this arrangement is entirely different from that of the revision of 1899. We have held that section 9742, Rev. St. 1899, is inapplicable to the issue presented in this case because it appears in the article concerning country school districts. Now, in the revision of 1909, section 10,837, which appears among the "laws applicable to common schools," though differently worded, is designed to take the place of section 9742 of the revision of 1899. The Legislature enacted in 1909 an entirely new section, which appears as section '10,881, Rev. St. 1909, in the article denominated "Laws Applicable to City, Town and Consolidated Schools." It enacts that all provisions of section 10,837, relating to change of boundary lines of common school districts, shall apply to town, city, and consolidated districts. Whether this change in the law, if applied to a case like the present, would necessitate a different conclusion than the one we have reached, it is unnecessary to say.

2. The judgment of the trial court does not show why the injunction was dissolved. In appellants' brief it is stated that the injunction was dissolved because the court believed that appellants had an adequate remedy at law by an action in quo warranto, and that injunction was not the proper remedy. In considering whether injunctive relief can be granted under the facts in this record, it must be borne in mind that the legality of the village school district (No. 61) and the legality of the common school district (No. 7) is not assailed, but conceded under the pleadings, and the only issue raised by the pleadings is as to the validity of the proceedings detaching a portion of the village school district and attaching it to the country school district.

Our statute (section 3649, Rev. St. 1899 [Ann. St. 1906, p. 2055]) provides that a remedy by injunction exists to prevent the doing of "any legal wrong whatever, whenever in the opinion of the court an adequate remedy cannot be afforded by an action for damages." This section is merely the affirmation by the Legislature of a pre-existing rule of equity jurisprudence. *Williams v. Harrison*, 135 Mo. App. 152, 115 S. W. 1050. In construing this statute, our Supreme Court has said that "the action for injunction may be resorted to, notwithstanding there may be an adequate remedy at law for the injury, in the cases where an adequate remedy cannot be afforded by an action for damages as such." *Towne v. Bowers*, 81 Mo. 496; *Jones v. Williams*, 139 Mo. 37, 39 S. W. 486, 40 S. W. 353, 37 L. R. A. 682, 61 Am. St. Rep. 436.

This question has been decided in the case of *School District No. 4 v. Smith*, 90 Mo. App. 215, where an attempt had been made by one school district to detach a part of the territory belonging to an adjacent school

district. It was held that an action for an injunction was proper; the court saying: "One of the grounds of the demurrer is that injunction is not the proper remedy to prevent the wrongs complained of. The last clause of section 3849, Rev. St. 1899, provides that the remedy by injunction shall exist 'to prevent the doing of any legal wrong whatever, whenever in the opinion of the court an adequate remedy cannot be afforded by an action for damages.' Should the wrongs complained of be consummated, it would be a continuing one, and the children of school age in the disputed territory would be enumerated in a district in which they do not belong and be compelled to attend the public schools in this district or forego the benefit of any public school. The taxes in the disputed territory which should go to No. 4 would go to No. 8, and the burden of taxation on the remaining taxpayers of district No. 4 be thereby proportionately increased. In such circumstances it is evident that no rules for the measurement of damages can be formulated that would afford district No. 4 adequate relief. *Calvert v. Bates*, 44 Mo. App., loc. cit. 632. Injunctive relief under somewhat similar circumstances has heretofore been afforded by the courts of this state without question (*Perryman v. Bethune*, 89 Mo. 158 [1 S. W. 231]; *School District v. Wallace*, 75 Mo. App. 317), and we think our statute, which broadens the equity rule, warrants the remedy prayed for by the petition."

It is clear that the proceedings changing the boundary lines of the said school district are illegal and void, and that irreparable injury would ensue if the injunction should be dissolved. The judgment will, accordingly, be reversed, and the cause remanded, with directions to the trial court to set aside its order dissolving the temporary injunction, and find the issues for the plaintiffs and enter judgment for the plaintiffs making the injunction perpetual. All concur.

LEEKER et al. v. PRUDENTIAL INS. CO. OF AMERICA.

(Springfield Court of Appeals. Missouri. Jan. 3, 1911. Rehearing Denied Feb. 20, 1911.)

1. INSURANCE (§ 350*)—LIFE POLICIES—DEFAULT IN PREMIUM—NONFORFEITURE STATUTES.

Where a life insurance policy contains no provision for an unconditional surrender value equal to the net single premium as provided in Rev. St. 1899, § 7900 (Ann. St. 1906, p. 3755), section 7897 (page 3752), providing that after payment of three annual premiums a policy is not forfeited by subsequent default regardless of its terms, applies.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 892, 893; Dec. Dig. § 350.*]

2. EVIDENCE (§ 18*)—JUDICIAL NOTICE.

The rule that courts will take judicial notice of ordinary mathematical propositions and scientific facts has no application to the ascertainment of the present net value of a life insurance policy, depending partly on extraneous facts and partly on the accuracy of an intricate computation, and hence a beneficiary of a policy relying upon extended insurance computed upon the present value of a policy at the time of lapse failed to make out a case when that value was not shown by actuarial witnesses.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 22; Dec. Dig. § 18.*]

3. INSURANCE (§ 665*)—LIFE INSURANCE—DEFAULT.

In an action by the beneficiary of a life insurance policy whose case depended upon the amount of extended insurance computed upon net value of the policy at the time of lapse, evidence held to show that the net value was not sufficient to carry the extended insurance up to the time of the insured's death.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 1715; Dec. Dig. § 665.*]

4. INSURANCE (§ 367*)—LIFE INSURANCE—LOANS UPON POLICY AFTER PAYMENT OF PREMIUM.

The beneficiary of a life insurance policy which provided that the insured might borrow upon the policy cannot, in asserting the right to extended insurance after default, question the validity of a loan upon the policy for the purpose of paying a premium.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 935, 938; Dec. Dig. § 367.*]

Appeal from St. Louis Circuit Court; George H. Williams, Judge.

Action by Louis Leeker and Albert Leeker by his next friend, Annie Leeker, against the Prudential Insurance Company of America. From a judgment for defendant, plaintiffs appeal. Affirmed.

James J. O'Donohoe, for appellants. For-
dyce, Holliday & White, for respondent.

NIXON, P. J. This was an action upon a policy of life insurance issued by the respondent upon the life of Louis E. Leeker, of St. Louis, Mo., whereby said life was insured to the amount of \$500. The plaintiffs were the beneficiaries named in the policy. The case was tried by consent of parties before the circuit judge sitting as a jury, and judgment was rendered for the defendant company from which the plaintiffs appealed to the St. Louis Court of Appeals. The cause was thereupon transferred to this court, and an abstract and briefs were prepared and filed in this court by both parties. The appellants agreed that the case should be submitted on the brief they had filed, and the respondent argued the case, neither side in any manner questioning the jurisdiction of this court to hear and determine this cause.

As we have stated, the life of Louis E. Leeker was insured by a policy issued by the respondent company on January 19, 1901, the consideration being the payment on or before the 19th day of January, April, July, and October in each year, during the continuance of the policy, of the quarterly pre-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

mium of \$0.29. Among other "special privileges" to which the holder of the policy was entitled, as a part of the policy, was the following: "Grace in Payment of Premiums.—In the payment of any premium under this policy, except the first, a grace of one month will be allowed, during which time the policy will remain in force." The insured paid his quarterly premiums in cash until the payment of January 19, 1904, became due. At that time insured was a cab driver, but was on a strike and financially embarrassed, and on the 18th day of February, 1904, the same being the last day of grace allowed by the policy for the payment of the past-due premium, he called on the superintendent of the company for the purpose of borrowing money to pay the premium which had become due on the 19th of January, 1904. By the terms of the policy, a provision was made for loans, and under the head "Privileges" it was provided as follows: "Cash Loans.—If this policy be continued in force, the insured may borrow from the company the amount specified in the following table, by making written application for the loan and assigning the policy to the company as security in accordance with the terms of the company's loan certificate, provided five per cent. interest on the whole amount of the loan be paid annually in advance; but no loan will be made for less than twenty dollars, except to pay premiums on this policy." The table referred to, providing for cash loans, contains this provision: "The benefits stated in the following tables apply to the original sum insured only. Any indebtedness to the company placed on the policy will operate to reduce the benefits."

Under the "age of the insured" which applied to the case of Louis E. Leeker the table shows that by reason of the agreement he was entitled to borrow the sum of \$18 at the time he applied for the loan. When he applied for the loan, the superintendent of the company told him the policy had a loan value of less than \$20, and therefore, under its terms, the insured could borrow only for the purpose of paying premiums. Thereupon the insured executed to the company, under the terms of its policy, a loan certificate, containing, among others, the following provisions: "This is to certify that I, the undersigned Louis E. Leeker, the insured, * * * have this day borrowed from the said company the sum of \$12.58, and hereby assign, transfer and set over unto the said company, its successors and assigns, the said policy and all benefits now due or which may hereafter become due thereon, to secure the repayment of said loan and the interest thereon as herein provided. It is understood and agreed: First. That the sum borrowed shall bear interest at the rate of five per cent. per annum, payable in advance, and that said interest unless duly paid shall be added to the above loan and bear interest at the same rate and on the same conditions."

This loan certificate was sent to the home office of the company, and the loan was approved and the account of Louis E. Leeker was credited with the sum of \$8.29 for the unpaid premium of January 19, 1904, then past due, and for the quarterly payment that would become due on April 19, 1904. At the time the loan was made no money was paid to the insured, but the proceeds of the loan were credited in premium payments, as above stated. These credits covered the entire proceeds of the loan and paid in full the premiums due prior to July 19, 1904, but the quarterly payment due on that date was not paid, nor were any subsequent premiums paid on the policy by any person. The insured died on the 10th day of February, 1908, being indebted to the company in the sum of \$12.58 as evidenced by the loan certificate above referred to. It thus appears that insured died 3 years and 214 days after he had refused or neglected to pay his policy premium, and that his policy lapsed and became forfeited under its terms, by reason of the nonpayment of these premiums, after it had been in force three full years and after three annual payments had been made on the policy. It is therefore seen that this policy came within the express terms of section 7897, Rev. St. 1899 (page 3752, Ann. St. 1906), which is as follows: "No policies of insurance on life hereafter issued by any life insurance company authorized to do business in this state, * * * shall, after payment upon it of three annual premiums, be forfeited or become void, by reason of nonpayment of premiums thereof, but it shall be subject to the following rules of commutation, to wit: The net value of the policy, when the premium becomes due, and is not paid, shall be computed upon the actuaries' or combined experience table of mortality, with 4 per cent. interest per annum, and after deducting from three-fourths of such net value any notes or other evidence of indebtedness to the company, given on account of past premium payments on said policies, issued to the insured, which indebtedness shall then be canceled, the balance shall be taken as a net premium for temporary insurance for the full amount written in the policy; and the term for which said temporary insurance shall be in force shall be determined by the age of the person whose life is insured at the time of default of premium, and the assumption of mortality and interest aforesaid, * * *"

The policy of Louis E. Leeker contained no provision for "an unconditional surrender value" equal to the net single premium as provided in section 7900, Rev. St. 1899 (page 3755, Ann. St. 1906), and therefore section 7897 must apply according to the terms of said section 7900. *Cravens v. N. Y. Life Ins. Co.*, 148 Mo. 583, 50 S. W. 519, 53 L. R. A. 305, 71 Am. St. Rep. 628; *Smith v. Mut. Ben. Life Ins. Co.*, 173 Mo. 329, 72 S. W. 935; *Whittaker v. Mut. Life Ins. Co.*, 133

Mo. App. 664, 114 S. W. 53; *Nichols v. Mut. Life Ins. Co.*, 176 Mo., loc. cit. 382, 75 S. W. 664, 62 L. R. A. 657; *Burridge v. N. Y. Life Ins. Co.*, 211 Mo. 158, 109 S. W. 560.

If the extended insurance in this case is calculated according to the terms of section 7897, the policy would not be continued in force until February 10, 1908, the date when Louis E. Leeker died. The uncontradicted evidence of the expert actuary was to the effect that the calculation made under said section 7897 would lead to the following results: "The reserve on a whole life policy for \$500, issued at the age of 45, at the end of 3½ years, according to the combined experience table of mortality with 4 per cent. interest, was \$32.27. Taking three-fourths of this amount under said section would leave the sum of \$24.20. Deducting the indebtedness of \$6.29 from \$24.20, left a balance of \$17.91 with which to purchase term insurance for \$500. The net single premium for two years' term insurance would have been \$13.94, while the net single premium for three years' term insurance would have been \$20.94. Therefore, by proportion, the amount of the balance, namely, \$17.91, purchased term insurance for 2 years and 207 days. And after February 11, 1907, the policy under its provisions was no longer in force and the benefits thereunder ceased at that date."

The force of this evidence was so conclusive upon the plaintiffs' case as to lead their attorney to make certain admissions in the trial court to the effect that plaintiffs did not contend that they obtained an extension of term insurance by reason of the operation of said statute in this case, his admissions being in these words: "I think it may be conceded that under the nonforfeiture statutes of this state the three years' premiums would not carry this policy beyond the date of the death of the insured. I have taken an opinion from the actuaries and I admit that, because if I didn't admit it we would prove it. I have failed to prove it because it hasn't anything to do with the merits in this case. What I stand on is, among other things, first: That the policy itself, by its own terms, carries it; that there can be no loan put upon the policy which will defeat it, because the policy itself declares that the benefits stated in the tables apply to the original sum insured only." Counsel also states in his brief: "It was conceded in the trial court, and is still acknowledged by the plaintiffs, that calculating the extended insurance under the nonforfeiture statute of Missouri, the policy was not continued in force until the death of the insured." But the appellants contend they are not bound by the terms of the statute, and that there is no statute or decision in this state prohibiting the parties from entering into a contract of insurance which provides for extended insurance in excess of the statute. "If the provisions of a policy of life insurance, in case of a default in the payment of a pre-

mium after two full annual payments have been paid, entitle the insured to the unconditional commutation of the insurance effected by it into nonforfeitable insurance of a value equal to or greater than that prescribed by the statute in such case, that statute has no application." *Price v. Conn. Mut. Life Ins. Co.*, 48 Mo. App. 281.

Whether the appellants were entitled to an election between the provisions of the statute and the terms of the policy is not necessary to be determined in this case, as the sequel of this opinion will show, and we will proceed on the assumption that the rights of the parties to this litigation are measured by the provisions of the policy. Attention is therefore directed to the terms of the policy in order to determine these rights. The policy contains this provision as to extended insurance: "Paid-up Life Policy or Extended Insurance.—If this policy, after being in force three full years, shall lapse or become forfeited for the nonpayment of any premium or any note given for a premium or loan made in cash on such policy as security, or of any interest on such note or loan, it may be surrendered for a nonparticipating paid-up life policy as specified in the following table; provided the policy be legally surrendered to the company within three months after such lapse or forfeiture. If this policy, having lapsed or become forfeited as above, be not surrendered for a paid-up life policy, the company will write in lieu of this policy, and without any action on the part of the insured, a nonparticipating paid-up term policy for the full amount insured by this policy, and to continue in force for the term indicated by the table of extended insurance on the third page hereof; *provided, however*, that if there be any indebtedness to the company on account of this policy, the amount of such paid-up term policy shall be the face amount of this policy less the amount of such indebtedness, and the term for which such paid-up term policy shall run shall be changed to that term for which the full reserve value of this policy, computed by the American Experience Table of Mortality and three per cent. interest, after deducting such indebtedness, will carry the modified amount at the Single Premium Intermediate Term rates of the company."

It will be seen by this provision that the paid-up term policy is to be calculated for the full amount insured by the policy provided the premiums have been fully paid up to the time, and there is no indebtedness due from the insured to the company at the time he becomes entitled to such nonparticipating paid-up policy. In such case, the term for which such nonparticipating policy is to run is provided for by the table of extended insurance on the third page of the policy of insurance, which table contains the following heading: "Extended Insurance. Table showing the length of time the insurance under this policy will be carried by the company

from date of lapse without further payment of premiums, if application be not made for a paid-up life policy within three months from date of lapse, and provided the policy has been in force for three years." Under this table, the insured was entitled to extended insurance for 3 years and 249 days. But it will be perceived that such extension is conditioned on the fact that insured was not at the time of such extension indebted to the company for the nonpayment of any premium or any note given for a premium or loan made in cash on such policy as security. It is thus apparent that the right of extension would not be governed by the first part of the above provision quoted from the policy. But the clause in said provision, beginning "provided, however" (which words we have written in italics), is made especially to apply to cases of indebtedness of the insured.

As we have stated, on February 18, 1904, the insured borrowed on his policy by his loan certificate the sum of \$12.58, which amount was never repaid to the company. This, as we have seen, was an indebtedness incurred for two premium payments, and the loan certificate was given for the same, and, under the terms of the policy, was an indebtedness to the company which was to be deducted in ascertaining the period of time for which the paid-up term policy should run. There is no evidence of any calculation by any actuary or other person showing how long a term of extension the policy holder would be entitled to under the provision of this life policy in case of this particular amount of indebtedness, and the court cannot take judicial notice of such facts. The rule, that courts will take judicial notice of ordinary mathematical propositions, as well as of scientific facts which universal experience has rendered axiomatic, is not applicable to the ascertainment of the present net value of a life insurance policy, depending partly on extraneous facts and partly on the accuracy of an intricate computation. *Price v. Conn. Mut. Life Ins. Co.*, supra. But there is sufficient data in the record in this case to show that if extended insurance be calculated according to the terms of this policy, as contended for by appellants, such extended insurance would have expired prior to the death of the insured. As shown by the testimony of the expert actuary, the reserve on a whole life policy for \$500, issued at the age of 45 years, at the end of 3½ years, according to the combined experience table of mortality, with 4 per cent. interest, would be \$32.27. Deducting from this amount the amount of the loan certificate (\$12.58)—the indebtedness of the insured to the company—we have a balance of \$19.69 with which to purchase term insurance un-

der the terms of the policy. The actuary further testified that the net single premium for three years' term insurance would be \$20.94, a sum greater than \$19.69. Hence, the extension must have been less than three years. So that, giving the policy holder a calculation of 4 per cent. interest instead of 3 per cent. as provided by the policy, under the terms of the policy for extended insurance, such term insurance would have expired prior to July 19, 1907, whereas the insured died on February 10, 1908.

Another contention of appellants is that the company cannot deduct this indebtedness of \$12.58 in computing the extended insurance because the beneficiaries did not join in the application for a loan, and that the company will not be permitted to deprive them of their vested rights without their consent. The authorities cited by counsel to sustain this state the generally recognized proposition that neither the insured alone nor the insured and the company acting together will be permitted to change the beneficiary in the policy where a privilege of change is not expressly reserved. It is certainly difficult to see what bearing such authorities can have upon the case at bar. Granting that the appellants, as beneficiaries, had a vested right in the policy, their right was necessarily subject to the terms of the contract, since such right depended upon the contract. As already pointed out, by the terms of the policy the insured was permitted to obtain a loan on this policy, and the evidence shows that the provisions of the policy were followed in this case. The terms of the policy further permitted the company to deduct any indebtedness so occasioned from the reserve value of the policy in calculating the extended insurance. Does it lie in the mouths of the beneficiaries in this case to complain of a loan, the proceeds of which were applied in keeping alive the policy? The case cited by the appellants of *Webb v. Missouri State Life Ins. Co.*, 134 Mo. App. 576, 115 S. W. 481, defeats appellants' contention, since it holds that where the policy contained a provision authorizing the deduction of any indebtedness owing by the insured, this provision will be in force although the beneficiary in the policy is the wife, and although she in no way joined in the creation of the indebtedness, and in spite of section 7895, Rev. St. 1899 (page 3749, Ann. St. 1906), to the effect that policies of insurance expressed to be for the benefit of the wife of the insured should inure to her benefit independent of the creditors of the husband.

From these considerations, it necessarily follows that the judgment of the trial court was for the right party and it is hereby affirmed. All concur.

STATE ex rel. PROSECUTING ATTORNEY
OF SALINE COUNTY v. BUSSE et al.

(Kansas City Court of Appeals. Missouri.
Feb. 13, 1911.)

DEDICATION (§ 44*)—ACTS CONSTITUTING.

Where the owner of land through which a road was located threw it open for public use in 1870, and in 1873 or 1874 changed its location and built fences on each side, and the road was used as such from that time on until 1908, being worked by the road overseers during the early years, and, though the fences were decayed in most places, there remained enough of them to indicate where the original space was left for the road, it sufficiently appeared that the road was dedicated to public use and accepted, and was sufficiently located and continuously used, so that an obstruction thereof by adjoining owners could be enjoined as a nuisance.

[Ed. Note.—For other cases, see Dedication, Cent. Dig. §§ 85-87; Dec. Dig. § 44.*]

Appeal from Circuit Court, Saline County; Samuel Davis, Judge.

Action by the State, on the relation of the Prosecuting Attorney of Saline County, against George Busse and others. Judgment for relator, and defendants appeal. Affirmed.

A. F. Rector and D. D. Duggins, for appellants. Joshua Barbee and Robert M. Reynolds, for respondent.

BROADDUS, P. J. This is an Injunction suit by the state, at the relation of the prosecuting attorney of Saline county, to abate a nuisance upon a public road and to restrain defendants from maintaining the same. The road is described as follows: Beginning at the center of section 22, township 5, range 19, in said county, running thence west along the center line east and west of said section a distance of one-fourth of a mile more or less, to the northeast corner of the northwest corner of the southwest quarter of said section 22; thence along the east side of the said northwest quarter of the southwest quarter of said section; thence in a direct line west along the south side of said tract of 27 acres, and along the south side of said north 27 acres, more or less, of the northeast quarter of the southeast quarter of section 21, township 50, range 19, to the intersection of another public road running north and south through said section 21 at the southwest corner of said northeast quarter of said southeast quarter. The road was not laid out by the authority of the county court, but it is the contention of the state that it was dedicated as a public road by the owners of the land.

It appears from the evidence that in about the year 1870 the Thornton family, who owned the land through which the road is located, threw it open for the use of the public. In 1873 or 1874 its location was changed by the owners, and a fence built by them on each side, leaving a space for travel 30 feet in width. The testimony of a number of wit-

nesses, some of whom were the descendants of the Thorntons who fenced this space, was that the road was used as such continuously from that time on without interruption, until the 28th day of April, 1908, when it was closed up by the defendants. During the early years after it was so opened, it was worked by the road overseers, but has not been since the adjoining land came into the possession of the defendants, although some work was done on it by private individuals in about 1890. There is some evidence that defendants, at some time after they became the owners and took possession of the adjoining lands on each side, erected gates at both ends of the road, but that the public continued to use it for travel. In the course of time the fences decayed in most places, but there was still enough of them left to indicate where the original space of 30 feet in width was left for the road. In 1892 the defendants petitioned the county court to vacate it, but for some reason or other the petition was not granted. The evidence of defendants tends to show that, after they moved upon the surrounding lands, the traveled space narrowed down to such an extent that it did not conveniently admit of the passage of teams; but all of the testimony, including that of defendants, showed that the road was used for travel more or less by the public up to the day on which defendants closed it. The court rendered judgment abating the nuisance, and enjoined defendants from the further maintaining of the fences which obstructed the passage on said road. The defendants appealed.

The contention of the appellants is that the facts do not show a dedication of the road to public use. They rely, to sustain their position, upon the holding in *Vossen v. Dautel*, 116 Mo., loc. cit. 384, 22 S. W. 734; but, as the facts there showed that the proprietor opened out the way over his own uninclosed timber lands for his own convenience, the court held it was not a dedication for public use. The case has no bearing on the question here. Other cases cited by appellants are equally inapplicable.

The appellants invoke the protection of section 9694, Rev. St. 1899 (Ann. St. 1906, p. 4421); but said section refers to roads that have been opened by order of the county court, in which there were irregularities in the proceedings, and where there had been nonuser for 10 consecutive years. And section 9472 (page 4347) refers in part to roads established solely by dedication or public user, which provides that: "No lapse of time shall divest the owner of his title to his land, unless, in addition to the use of the road by the public for the period of ten consecutive years, there shall have been public money or labor expended thereon for such period." Neither of these sections has any particular bearing on the question, as it was sufficient-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

ly shown that labor was expended on the road in question. And the latter section would have no bearing on the question, as it was first enacted in 1887, at which time the road had been in use by the public previously for 10 consecutive years. *Sikes v. Railroad*, 127 Mo. App., loc. cit. 333, 105 S. W. 700.

The road is sufficiently located, and the evidence is overwhelming that it was dedicated to public use by the owners of the land, and accepted by the public as such, and has been in continuous use as such up to the time it was obstructed by defendants.

It is further contended that the description in the decree does not correspond to that given in the petition; but we hold that it is substantially the same.

Affirmed. All concur.

EDLING-ADCOCK REAL ESTATE CO. v. THOMPSON et al.

(Kansas City Court of Appeals. Missouri. Feb. 13, 1911.)

APPEAL AND ERROR (§ 1067*)—HARMLESS ERROR—INSTRUCTIONS TO JURY.

In an action on a note given to a broker for commissions in effecting an exchange of real estate, in which defendant claimed that plaintiff was improperly acting for both parties, without defendant's knowledge, the testimony as to whether defendant knew that plaintiff was so acting being conflicting, error in refusing an instruction that the burden was on the defendant to show lack of such knowledge cannot be treated as harmless error.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. § 4229; Dec. Dig. § 1067.*]

Appeal from Circuit Court, Jackson County; John G. Park, Judge.

Action by the Edling-Adcock Real Estate Company, a corporation, against C. A. Thompson and another. From a judgment for defendants, plaintiff appeals. Reversed and remanded.

C. A. Edling, for appellant. W. W. Calvin, for respondents.

BROADDUS, P. J. This is a suit to recover on a promissory note executed by defendants and payable to plaintiff, dated June 25, 1908, due in 30 days after date. The defendants resisted payment on the ground that it was without consideration.

The facts disclosed by the evidence are:

That plaintiff while engaged as a real estate broker acted as agent for the defendant C. A. Thompson in procuring an exchange of his property for that of a man by the name of Doty, and it is also admitted by plaintiff at the same time that he was the agent also of said Doty. After the exchange had been made, J. T. Edling, plaintiff's agent, according to the testimony of the defendant, said: "Now, Mr. Thompson, let us settle this commission business." That he said in reply that he did not understand he was to give any commission, as he supposed that plaintiff was handling the deal on the part of Mr. Doty. Edling said: "I expect a commission out of each." And that he finally said: "If you don't pay me a commission, I won't get anything." Not having the money, he gave the note in question. Doty testified that he paid Edling, the plaintiff's agent, as commission for his services in the matter \$250, and that he did not know during the time in which the negotiations were pending that plaintiff was acting for the defendant.

After the note was introduced in evidence, Edling was introduced, and, after testifying that the signatures to the note were those of defendants and that it had not been paid, he was cross-examined by the defendant. He admitted that he was as agent of plaintiff acting for both parties in the deal; and that he notified each that he was acting as agent for the other.

The plaintiff asked the court to instruct the jury, the practical effect of which was that the burden of proof was on defendants to show to the satisfaction of the jury by a preponderance of the evidence that defendant Thompson and Doty were not aware of the fact that plaintiff was acting as agent for both of them in the transaction. Other instructions were given, but we do not think they were objectionable. The jury returned a verdict for the defendants. Plaintiff appealed from the judgment.

The court committed error in the refusal of said instruction. Respondent insists, as a different result could not have been reasonably expected, the cause should be affirmed. It is not for us to say what the verdict of the jury would have been had they been properly instructed. The error was not merely technical, but of a most substantial character.

Reversed and remanded. All concur.

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

TEWKSBURY v. METROPOLITAN ST. RY. CO.

(Kansas City Court of Appeals. Missouri. Feb. 13, 1911.)

1. MASTER AND SERVANT (§ 286*)—STREET RAILWAYS—INJURY TO CONDUCTOR—JURY QUESTIONS—NEGLIGENCE.

Whether a street railway company was negligent in maintaining a pole near the track *held*, under the evidence, a jury question, in an action for injury to a conductor struck by the pole.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 1010-1050; Dec. Dig. § 286.*]

2. MASTER AND SERVANT (§ 289*)—STREET RAILWAYS—INJURY TO CONDUCTOR—JURY QUESTIONS—CONTRIBUTORY NEGLIGENCE.

Whether a street railway conductor, struck by a pole near the track while leaning out of the car, was negligent, *held* under the evidence, a jury question.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 1089-1132; Dec. Dig. § 289.*]

3. MASTER AND SERVANT (§ 288*)—STREET RAILWAYS—INJURY TO CONDUCTOR—JURY QUESTIONS—ASSUMPTION OF RISK.

Whether a street railway conductor assumed the risk of being struck by a pole near the track while performing a duty *held*, under the evidence, a jury question.

[Ed. Note.—For other cases, see Master and Servant, Dec. Dig. § 288.*]

4. TRIAL (§ 296*)—INSTRUCTIONS—CONSTRUCTION.

Particular instructions are not reversible error, where, on considering all the instructions, the jury could not have been misled.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 705-713, 715, 716, 718; Dec. Dig. § 296.*]

Appeal from Circuit Court, Jackson County; James H. Slover, Judge.

Action by Simeon Tewksbury against the Metropolitan Street Railway Company. Judgment for plaintiff, and defendant appeals. Affirmed.

John H. Lucas, Jos. S. Brooks, and Boyle & Howell, for appellant. Botsford, Deatherage & Creason, for respondent.

ELLISON, J. Plaintiff was an employé of the defendant as a conductor on one of its street railway cars. He was injured while in such service, and brought this action for damages. He recovered judgment in the trial court.

It appears that defendant's street railway is operated by electricity, and that what is called a trolley pole, extending to the overhead wire, has a rope reaching from the end of the pole to the rear vestibule, where it is tied to the car. This rope would sometimes get loose, or would hang so loosely that it would be blown by the wind around on the side of the vestibule, and get in the way of incoming or outgoing passengers, and it was the duty of conductors to go to the door or opening in the vestibule and throw it

around the end of the car, so that it would hang in the rear. The electric wires were supported by iron poles on each side of the track, and the charge of negligence is that, at the point where plaintiff was hurt, these were placed too close to the track—so close that it was unsafe and dangerous for one to lean out from the car while in motion.

The evidence showed that the distance of the iron pole from a passing car is 17 or 18 inches. It further showed that, while the car was running north on the east track, plaintiff observed that the rope had gotten around onto the east side of the vestibule, and he took hold of it, leaned out with his head and body, so as to be able to throw it around the end of the roof of the car to its proper position. While so engaged, being rapidly carried by the running car, his head and shoulder struck one of these upright iron poles with such force as to knock him from the car and inflict serious and permanent injury.

The defense may be said to be twofold: Contributory negligence, and assumption of risk. The evidence showed that plaintiff had been in defendant's service as a conductor for nearly a year. He had, of course, seen the poles and observed their position; but it had not occurred to him that they were in dangerous proximity. He was endeavoring to throw the rope around the end of the car in the way all of the conductors on the line did it. "It was the way I had always done it, and the way I was instructed by the man that learned me."

The trial court was right in concluding that the questions of defendant's negligence and plaintiff's contributory negligence and assumption of risk were for the determination of the jury. Neither appeared so clear and indisputable as to authorize a declaration as a matter of law. *Murphy v. Railway Co.*, 115 Mo. 111, 21 S. W. 862; *Young v. Oil Co.*, 135 Mo. 634, 84 S. W. 929; *Lee v. Railway Co.*, 195 Mo. 400, 92 S. W. 614. The first of these cases is much like the one under consideration. There an engineer got out of his cab onto the side of the tender and was attempting to tighten a nut, so as to stop a leak. As the train passed over a road crossing, he struck the end of a cattle guard fence and was knocked off. He knew the way the fences were built, but had not had his attention called to their danger. It was held that the question of negligence on the part of the railway company and contributory negligence and assumption of risk on the part of the engineer were for the jury.

The same view is taken in similar cases arising in the courts of other states. *Whipple v. Railway Co.*, 19 R. I. 587, 35 Atl. 305, 61 Am. St. Rep. 796; *Railway Co. v. Davis*, 92 Ala. 300, 9 South. 252, 25 Am. St. Rep. 47; *Railway Co. v. Mansell*, 138 Ala. 548, 36

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

South. 459; Nugent v. Railway Co., 80 Me. 62, 12 Atl. 797, 6 Am. St. Rep. 151; Kearns v. Railway Co., 66 Iowa, 599, 24 N. W. 231; Railway Co. v. Russell, 91 Ill. 298, 33 Am. Rep. 54; Railway Co. v. Thompson, 210 Ill. 228, 71 N. E. 328. These cases involve obstructions, such as telegraph poles and the like, so near the track as to cause injury to employes. They afford ample support to the ruling of the trial court.

Criticism is made of plaintiff's first and sixth instructions, but we think it not well founded. The first one does not assume things in issue; nor does the sixth. When the latter is read in connection with the seventh, it will be seen that the jury could not have been misinformed, misled, or confused. And, when all the instructions are considered, there is no room left for a supposition that the jury was not given a full understanding of the issues involved.

The judgment is affirmed. All concur.

SMITH v. WRIGHT et al.

(Kansas City Court of Appeals. Missouri.
Jan. 30, 1911. Rehearing Denied Feb.
13, 1911.)

1. ATTORNEY AND CLIENT (§ 177*)—LIEN OF ATTORNEY.

An attorney who brings an action as attorney of record and an attorney, employed by the attorney of record for the client and by his authority, to assist during the progress of the case, are both within the statute giving an attorney a lien for his fee.

[Ed. Note.—For other cases, see Attorney and Client, Cent. Dig. § 386; Dec. Dig. § 177.*]

2. ATTORNEY AND CLIENT (§ 177*)—LIEN OF ATTORNEY.

Where an attorney employed by a client to prosecute a suit for a contingent fee, employed for himself and not as agent of the client, another attorney to assist in the trial, the latter attorney had no lien for his fee under the statute.

[Ed. Note.—For other cases, see Attorney and Client, Cent. Dig. § 386; Dec. Dig. § 177.*]

3. ATTORNEY AND CLIENT (§ 158*)—COMPENSATION—NATURE OF REMEDY.

An attorney, employed by the attorney of record on his own behalf and not as agent of the client, who had agreed to pay the attorney of record only a contingent fee, may not sue in equity for his compensation, but must resort to an ordinary action at law against the attorney of record.

[Ed. Note.—For other cases, see Attorney and Client, Cent. Dig. § 361; Dec. Dig. § 158.*]

Appeal from Circuit Court, Jackson County; Herman Brumback, Judge.

Action by Richard J. Smith against George W. Wright and another. From a judgment sustaining a demurrer to the petition, plaintiff appeals. Affirmed.

E. S. Herider, for appellant. Sutton & Sutton, Geo. H. English, Jr., John H. Lucas, and Douglass & Watson, for respondents.

ELLISON, J. Anthanette Heinze was a minor. She was injured in Kansas City while a passenger on the Metropolitan Street Railway. She brought an action for damages through her "next friend." Defendant George W. Wright was employed as attorney by the next friend, to prosecute the suit, and a judgment of \$10,000 was recovered which was affirmed on appeal; the accumulated interest pending the appeal making the total judgment \$12,203.83. The contract between Wright and the next friend was in writing, and provided that he should receive a contingent fee of one-half of whatever sum was recovered from the street railway company. After the action was begun, and while it was pending in the trial court, Wright verbally employed the plaintiff to assist him in the case, agreeing to pay him for his services one-third of the fee he, Wright, was to receive, which would be one-third of one-half of the judgment if any was recovered. When the judgment was affirmed, the Metropolitan Street Railway paid all but \$1,200 of the amount, and the plaintiff, through her next friend, and with the approval of the probate court, accepted one-half of the total amount thereof as in full of her interest. Wright received the balance, except the \$1,200 just mentioned, as his fee under the contract, but refused to pay one-third thereof to this plaintiff alleged to amount to \$1,120. Plaintiff thereupon instituted this proceeding in equity, by petition in three counts, alleging, in substance, the foregoing facts, to restrain the street railway company from paying the \$1,200 to Wright, and seeking, in one count, to enforce an attorney's lien for his claim. In another count he asks to be declared "the equitable assignee of the attorney's lien possessed and enjoyed by defendant Wright." In the remaining count he asks to be made the equitable assignee of Wright's lien, and that he have "an equitable lien," and that the money yet in the hands of the street railway "be sequestered and appropriated to the payment of his fees." The names of other attorneys appear in plaintiff's bill, but without explanation of how or why; and there is likewise some discrepancy in the share stated to be agreed to be paid to Wright and to plaintiff and the amount received by the former and claimed by the latter; but this in no wise affects the question presented, and is therefore of no consequence. The street railway company, Anthanette Heinze, and her next friend, and one William B. Sutton, said to claim some interest somewhere in the matter, were joined as formal defendants with Wright. Defendant Wright demurred to the petition on the ground that it fails to state a cause of action. The trial court sustained the demurrer.

The question presented, upon which we

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

must place our decision, is this: A party employs an attorney to prosecute a suit for damages, agreeing to pay him for his services a certain contingent fee or per cent. of the amount recovered. That attorney for himself and not as agent for his client, employs another attorney to assist him, agreeing to pay him a certain part of his contingent fee. A judgment is recovered. Does the statute providing for attorneys' liens, authorize the assistant attorney to enforce a lien for his interest?

It has been said that only the attorney who brings the action as attorney of record can have a lien for his fee; but that cannot apply to ordinary conditions of the present day, and we are satisfied that an attorney, either at the beginning or during the progress of the case, is within the purpose and protection of the statute. *Jackson v. Clopton*, 66 Ala. 29; *Balsbaugh v. Frazer*, 19 Pa. 95, 99. And such assistant may enforce such lien under the statute, though he was employed by the principal attorney if the latter made the employment for the client and by his authority. Such were the cases of *Harwood v. La*

Grange, 137 N. Y. 538, 32 N. E. 1000; *People v. Pack*, 115 Mich. 669, 74 N. W. 185, and others. But neither of these instances is this case. Here, there is no pretense of employment by the client. The employment claimed was by the original attorney on his own account, the compensation to be paid by him. No case has been cited which affords any ground for the proposition that an attorney may employ assistant counsel in his own behalf with the result that the assistant will have a statutory lien on the principal attorney's fee. The statute does not contemplate such condition of case. The statute stands for a lien to secure a fee from a client who has a cause of action, and not one due from one attorney to another.

Referring again to the two other counts in plaintiff's petition, we cannot see any ground, in the way contemplated by those counts, for permitting a proceeding in equity to supplant the ordinary action at law for the ordinary legal claim which plaintiff has against Wright.

We are satisfied the judgment should be affirmed. All concur.

Ex parte McFARLANE.

(Court of Criminal Appeals of Texas. Feb. 8, 1911.)

HABEAS CORPUS (§ 113*)—APPEAL AND ERROR—FINAL JUDGMENT.

An order, amending an original order directing the issuance of a writ of habeas corpus, by directing the return of the writ to the district court of another county than the one specified in the original order, is not appealable, as the order is only an interlocutory one.

[Ed. Note.—For other cases, see Habeas Corpus, Dec. Dig. § 113.*]

Appeal from District Court, Galveston County; Clay S. Briggs, Judge.

Earl McFarlane was indicted for murder. A writ of habeas corpus was issued on his application, and from an order amending the original order for the writ, he appeals. Appeal dismissed.

See, also, 129 S. W. 610.

Marsene Johnson, for appellant. C. E. Lane, Asst. Atty. Gen., for the State.

HARPER, J. Relator was indicted in Harris county, Tex., charged with the offense of murder. Bail was refused on application filed. Subsequently, on relator's application for a change of venue, the case was transferred to Galveston county. At the first term of court in Galveston county the case was continued, on motion filed by the state. Relator then applied for a second writ of habeas corpus, which was granted and made returnable to the Tenth district court of Galveston county.

The state, by her district attorney, filed a contest, and requested the court to vacate or amend its order, making the writ returnable to the district court of Harris county, the county where the offense is alleged to have been committed, and the county in which the indictment was returned. The court, upon hearing the contest, entered judgment, ordering that so much of the previous order making said writ of habeas corpus returnable before the district court of the Tenth district of Galveston county be vacated, and the original order was amended by directing that the writ of habeas corpus issued in said cause should be made returnable before the criminal district court in Harris county, Tex., on January 23d, the court in which the indictment was returned.

From this order of the court, directing that the writ be made to the criminal district court of Harris county, this appeal is prosecuted, and motion is made by the Assistant Attorney General to dismiss the appeal, on the ground that no final judgment has been entered on said application; that the order made is only an interlocutory order.

In our opinion, the motion should be sustained, and the appeal is dismissed.

Ex parte EPPERSON.

(Court of Criminal Appeals of Texas. Feb. 15, 1911.)

MUNICIPAL CORPORATIONS (§ 703*)—POLICE REGULATIONS—PROHIBITORY ORDERS—OPERATION OF AUTOMOBILES.

Under Sayles' Ann. Civ. St. 1897, art. 430, authorizing a city to regulate hackmen, draymen, omnibus drivers, and drivers of baggage wagons, etc., a city has no power of prohibition, and therefore an ordinance making it unlawful for any person under the age of 16 years to operate any automobile or other motor vehicle upon the city streets is invalid.

[Ed. Note.—For other cases, see Municipal Corporations, Dec. Dig. § 703.*]

Application of Earl Epperson for a writ of habeas corpus. Applicant ordered discharged from custody.

Kennedy & Robbins, for appellant. C. E. Lane, Asst. Atty. Gen., for the State.

DAVIDSON, P. J. This is an original application for writ of habeas corpus. The city of Clarksville, organized under the general incorporation laws of Texas as a municipal corporation, passed the following ordinance: "It shall be unlawful for any person under the age of 16 years to operate any automobile or other motor vehicle upon the streets or ways of the city of Clarksville"—and in a subsequent ordinance prescribes a penalty of not less than \$5 nor more than \$100. There is an agreement in the statement of facts that the city of Clarksville had not by any ordinance prescribed any manner or means by which a person's ability to operate an automobile or other motor vehicle may be ascertained, and the qualifications of the driver of such vehicle are not specified nor prescribed by the ordinance. It is further agreed that the applicant is 15 years of age.

Two questions are presented to this court: "First, the age of the applicant; second, the constitutionality of the ordinance under which the applicant was arrested." Relator's contention is that the ordinance is invalid, first, because the city council of the city of Clarksville had no authority, express or implied, under the general laws of the state, under which the city is incorporated, to enact such legislation; second, that, even though the city council had authority to enact such legislation, it is nevertheless void, because it is an arbitrary exercise of power, is discriminatory, and in derogation of common rights; third, the ordinance is void, because it prohibits an occupation recognized by the state as lawful and conceded by the public as useful and remunerative; and, fourth, the ordinance is unconstitutional and void, because it deprives persons of their liberty—that is, the right to follow a lawful avocation for the support of life, as well as in pursuit of happiness and pleasure, without due process of law.

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

The city of Clarksville, being organized as a municipal corporation under the general laws of the state, must look to such law for its authority to act. Article 430, Sayles' Ann. Civ. St. 1897, is as follows: "To license, tax, and regulate hackmen, draymen, omnibus drivers and drivers of baggage wagons, porters, and all others pursuing like occupations, with or without vehicles, and prescribe their compensation, and provide for their protection, and make it a misdemeanor for any person to attempt to defraud them of any legal charge for services rendered, and to regulate, license and restrain runners for railroads, stages and public houses." It will be noticed from the reading of this article that the city is limited in regard to the matters specified to those of regulation. The statute nowhere grants power to a city council to prohibit any of the matters specified in said article. It is a familiar rule, and thoroughly settled, that municipal corporations have only such power as may be granted by the Legislature, unless otherwise provided in the Constitution; and wherever the question of grant of power is at issue, the grant will be taken more strongly in favor of the granting power and against the grantee, where an application of this principle is made to municipal corporations. Applying this rule to the statute quoted, it will be observed that the power of the municipal corporation, in regard to the control of matters therein stated, is only one of regulation, and not one of prohibition. Viewed from this standpoint of the law, the ordinance is invalid, and must be held void, and the applicant discharged from custody.

The applicant is ordered discharged from custody.

BAKER v. STATE.

(Court of Criminal Appeals of Texas. Feb. 8, 1911.)

WEAPONS (§ 17*)—UNLAWFULLY CARRYING—INSTRUCTIONS.

It was error to refuse to instruct that accused did not unlawfully carry a weapon, if he took it during an encounter between others, and retained it only to prevent a shooting.

[Ed. Note.—For other cases, see Weapons, Dec. Dig. § 17.*]

Appeal from District Court, Kerr County; R. H. Burney, Judge.

Will Baker was convicted of unlawfully carrying a pistol, and he appeals. Reversed and remanded.

Lee Wallace and Ben H. Kelly, for appellant. C. E. Lane, Asst. Atty. Gen., for the State.

PRENDERGAST, J. The defendant was indicted, under article 838 of the Penal Code of 1895, as amended by Acts 1905, p. 56, for unlawfully carrying a pistol on or about his

person. He was not indicted, under article 340 of the Penal Code, for going into an assembly and having or carrying about his person a pistol.

The evidence shows that there was a dance at the residence of J. S. Hope, in Kerr county, some time in March or April, 1910; that the defendant, who lived about a mile or mile and a half from Hope's, took his family to the dance in a hack; that there was considerable drinking, and some of the attendants were drunk, at the dance; that during the night a fight occurred between Will Hope, who lived at his father's, where the dance was, and Will Morgan, in the yard; that during the fight a pistol was fired two or three times; that the defendant ran out of the house to where Will Hope and Morgan were fighting, and saw a pistol on the ground, which they were trying to get; that he ran up and secured the pistol, took it in the house in his hand, and offered it to another party, Charles Crider, but Crider declined to take it. It seems that either a short time before this, or a short time afterwards, whether before or afterwards was controverted, Crider had had trouble with Morgan. The evidence further discloses that the defendant did not leave the pistol, or offer to leave it, with any of the Hope family, but carried it out from the house to where his hack was. Either then, or very soon afterwards, he hitched up his team, put his family and a companion in, and, hearing Will Morgan coming out, told his companion to drive on down towards him, he walking on ahead with the pistol still in his hand; that his hack soon caught up with him, and he got in and drove directly to his home, carrying the pistol with him; that the next morning he got on his horse and carried the pistol back to the Hopes, and delivered it to Will Hope, the owner. He also testified that, in taking the pistol in the house and offering it to Crider, he wanted to keep Will Morgan from getting it; that he was afraid he would take it away from him, as he knew he had it; that he carried the pistol home with him to prevent trouble, and with no other purpose, and had no intention to violate the law by carrying it as he did. Several witnesses testified that they saw him taking the pistol in his hand from where the fight occurred into the house and offering it to Crider, and from there taking it out to his hack.

The court gave a general charge to the jury to the effect that if they believed from the evidence beyond a reasonable doubt that the defendant, at about the time charged in the indictment, did carry on or about his person a pistol, then to find him guilty, etc. The defendant requested the following charge: "If the jury believe the pistol charged to have been carried by defendant was the property of Will Hope, and that defend-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes.

ant took the same from the said Hope during the fight or personal encounter between said Hope and one Will Morgan on the night in question at the home of said Hope, and did so for the purpose of preventing any person from getting shot or hurt with said pistol, and that for said purpose alone, and with no intent on defendant's part to violate the law, defendant took the pistol off the premises, and returned it to said Hope next day, they must acquit the defendant." The court refused to give this charge.

The appellant properly assigns this as error. The Assistant Attorney General has confessed that this was an error, and he joins the appellant in asking that the case be reversed and remanded. It is our opinion that it was error in the court below to refuse to give this charge, or some such apt charge as would present this question to the jury for their determination. *Schroeder v. State*, 50 Tex. Cr. R. 111, 99 S. W. 1003; *West v. State*, 21 Tex. App. 427, 2 S. W. 810; *Mangum v. State*, 15 Tex. App. 362.

Other errors are assigned. We deem it unnecessary to consider them. They will doubtless not occur upon another trial. We doubt if any of them, however, show reversible error.

For the error above pointed out, the case is reversed and remanded.

KING v. STATE

(Court of Criminal Appeals of Texas. Feb. 8, 1911.)

1. HOMICIDE (§ 310*) — PROSECUTION — INSTRUCTION.

Where, in a prosecution for assault to murder, defendant's testimony would only make him guilty of a simple assault, the court should have affirmatively submitted to the jury the question of simple assault.

[Ed. Note.—For other cases, see *Homicide*, Cent. Dig. § 658; Dec. Dig. § 310.*]

2. CRIMINAL LAW (§ 830*)—INSTRUCTIONS—REQUEST.

Where, in a prosecution for assault to murder, accused requested a special charge, on the rule that, if the jury had any doubt as to whether the assault was aggravated or simple, they should give accused the benefit thereof, the court should have given a proper charge on the subject, where the evidence required it, though the requested charge might not have been properly worded.

[Ed. Note.—For other cases, see *Criminal Law*, Dec. Dig. § 830.*]

Appeal from District Court, Shelby County; James P. Perkins, Judge.

Lovard King was convicted of aggravated assault, and he appeals. Reversed and remanded.

Tom C. Davis, for appellant. C. E. Lane, Asst. Atty. Gen., for the State.

HARPER, J. Appellant was indicted by the grand jury, charged with assault to mur-

der. On the trial of the case, the court gave in charge only the law applicable to aggravated assault, and the jury found the defendant guilty of aggravated assault, and assessed his punishment at a fine of \$25.

It appears from the record that appellant, prior to the date he was indicted, had pleaded guilty to simple assault, growing out of the same transaction, and paid his fine, and pleaded this in bar of this prosecution. We have carefully read the testimony in this case, with the view of seeing whether or not the issue of simple assault was raised. The state's witness, Jeff Owens, makes a clear case of aggravated assault, and under his testimony and that of the other witnesses the jury would have been authorized to find defendant guilty of that grade of offense. But the testimony of the defendant, in our opinion, if true, would only make him guilty of a simple assault, and he had the right to have the question submitted to the jury. *Pearce v. State*, 37 Tex. Cr. R. 643, 40 S. W. 806. The court in his charge did not present affirmatively defendant's right to be acquitted, if they found under the facts he was guilty only of simple assault.

The defendant asked a special charge, in substance that, defendant having been punished for a simple assault growing out of this transaction, then, if the jury found beyond a reasonable doubt that defendant was guilty of an assault, but had a reasonable doubt as to whether the assault was an aggravated assault, they would acquit. The special charge requested may not have been properly worded, yet it called the attention of the court to the law that, if the jury had any doubt as to the degree of assault, whether aggravated or simple assault, the defendant should be given the benefit of the doubt.

Because of the failure of the court to submit affirmatively defendant's theory of the case, this cause is reversed and remanded.

BIRD v. STATE.

(Court of Criminal Appeals of Texas. Feb. 8, 1911.)

CRIMINAL LAW (§ 1076*)—APPEAL—RECOGNIZANCE—SUFFICIENCY.

A recognizance on appeal, which does not name the court in which accused was convicted, nor the punishment imposed, as required by Code Cr. Proc. 1896, art. 887, does not confer jurisdiction on the Court of Criminal Appeals.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. §§ 2711-2713; Dec. Dig. § 1076.*]

Appeal from Potter County Court; W. M. Jeter, Judge.

Charley Bird was convicted of crime, and he appeals. Dismissed.

Reeder & Graham, for appellant. C. E. Lane, Asst. Atty. Gen., for the State.

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

HARPER, J. The Assistant Attorney General moves to dismiss this appeal, on the ground that the recognizance is not sufficient to confer jurisdiction upon this court, in that the same does not name the court in which appellant was convicted, nor does it state the amount of the punishment imposed by the verdict of the jury, as required by article 887 of the Code of Criminal Procedure of 1895, and decisions of this court construing this article.

An inspection of the recognizance shows that it is defective in this respect, wherefore the motion of the Assistant Attorney General to dismiss is sustained, and the appeal is accordingly dismissed.

NEWMAN v. STATE.

(Court of Criminal Appeals of Texas. Jan. 18, 1911. On Motion for Rehearing, March 1, 1911.)

1. PHYSICIANS AND SURGEONS (§ 6*)—PRACTICING WITHOUT AUTHORITY — CRIMINAL PROSECUTION.

On a prosecution for practicing medicine without having filed the required certificate, the defense was that accused was practicing as a masseur, and the court charged that if defendant did not charge for his services as a masseur, or for treatment by any method or system, and receive pay therefor, he should be acquitted, and that a masseur, in his particular sphere, is not required to secure a certificate. *Held*, that the charge fairly submitted the defense.

[Ed. Note.—For other cases, see Physicians and Surgeons, Dec. Dig. § 6.*]

On Motion for Rehearing.

2. PHYSICIANS AND SURGEONS (§ 6*)—PRACTICING WITHOUT AUTHORITY — CRIMINAL PROSECUTION.

On a prosecution for practicing medicine without having filed the required certificate, evidence *held* sufficient to sustain a finding that defendant was treating disease by some method and charging therefor.

[Ed. Note.—For other cases, see Physicians and Surgeons, Dec. Dig. § 6.*]

Appeal from Kendall County Court; H. Thels, Judge.

J. M. Newman was convicted of unlawfully engaging in the practice of medicine without having filed the required certificate, and he appeals. Affirmed.

W. F. Hays and George Powell, for appellant. John A. Mobley, Asst. Atty. Gen., for the State.

HARPER, J. In this case appellant was convicted in the county court of Kendall county of the offense of unlawfully engaging in the practice of medicine without first having registered and filed for record the certificate required, and his punishment assessed at a fine of \$100 and five days' imprisonment in the county jail.

1. Appellant's first assignment of error complains of the action of the court in overruling his motion to quash the indictment.

An indictment in terms exactly similar to this was passed on by this court in *Newman v. State*, 124 S. W. 956, and held to be a valid indictment.

2. In his second assignment of error appellant insists that one who practices as a "masseur" is not guilty of any offense under Acts 30th Leg. pp. 224 to 228, and that the facts are insufficient to sustain the judgment. Whether or not the facts are sufficient was submitted to the jury trying the cause under a proper charge, and the jury find against appellant's contention. The court, at the instance of appellant, gave the two following special charges:

(1) "If you find from the evidence that the defendant did not charge for his services as a masseur, or for treatment by any method or system, and receive pay for such treatment between the 27th day of May, 1909, and the 21st day of June, 1909, you will acquit him, and say by your verdict, 'We, the jury, find the defendant not guilty.'"

(2) "You are instructed that a masseur, in his particular sphere of labor, is not required to secure a certificate authorizing him to practice medicine, and if you believe from the evidence that defendant, as a masseur, practiced within the particular sphere of masseurs, you will acquit him."

These charges submit to the jury fairly the defense of appellant, and the case of *Newman v. State*, 124 S. W. 956, so fully presents and discusses the question of when one who uses the massage treatment for disease would become liable, we deem it unnecessary to enter into an extended discussion of the question, but merely refer to that decision.

The judgment is affirmed.

On Motion for Rehearing.

At a former day of this term of court this case was affirmed, and appellant has filed a motion for rehearing, earnestly insisting that the evidence is insufficient to support a judgment of conviction; this being the only ground for a rehearing.

We have carefully re-read the testimony. Mrs. Pfeiffer states that she was treated by defendant for "floating kidney." "He treated me 26 days for \$25, and then treated me another 26 days for \$25. This was prior to May 27th. I came to his office in Boerne and was treated. I made payments to him as I was able." Mr. Pfeiffer stated: "My wife did the paying. After two months the treatment was to be free. She came to his office for treatment." Mrs. Bergman: "I went to defendant's office and was treated by him between May 27th and June 21st. He did not charge for his services during that time, but I gave him \$10. He charged me for services prior to May 27th." Defendant ran an advertisement in the Boerne paper: "Come and take masseur treatment,

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

and learn to live without drugs." Under the construction of the medical practice act by this court in *Newman v. State*, 124 S. W. 956, these acts constituted a violation of the law.

Subdivision 2 of section 13 of chapter 123 of the Acts of the Thirtieth Legislature reads: "Any person shall be regarded as practicing medicine who shall treat or offer to treat any disease, or disorder, mental or physical, or any physical deformity, or injury by any system or method, or to effect cures thereof and charge therefor, directly or indirectly, money or other compensation." If the jury hearing the testimony arrived at the conclusion that appellant was treating and offering to treat disease by some method, and charged therefor, directly or indirectly, we cannot say that there was no testimony to support their finding.

Motion for rehearing is overruled.

FLORENCE v. STATE.

(Court of Criminal Appeals of Texas. Feb. 15, 1911.)

1. CRIMINAL LAW (§ 594*)—CONTINUANCE—DISCRETION OF TRIAL COURT.

Where the facts which defendant expected to prove by an absent witness are cumulative, and had been admitted by the state's witness, and the absent witness could have been produced at the trial, the denial of a continuance was not error.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1321-1341; Dec. Dig. § 594.*]

2. WITNESSES (§ 340*)—CREDIBILITY—CHARACTER—EXAMINATION OF IMPEACHING WITNESSES.

Where defendant's impeaching witnesses are permitted to testify that the reputation of certain persons for truth and veracity was bad, the defendant is not entitled to prove the reputation of such persons for "virtue and chastity."

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 1116-1121; Dec. Dig. § 340.*]

3. CRIMINAL LAW (§ 728*)—APPEAL AND ERROR—NECESSITY OF OBJECTIONS—CONDUCT OF COUNSEL.

Alleged objectionable remarks of the prosecuting attorney cannot be complained of on appeal, where defendant did not request any charge in respect to such remarks.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1689-1691; Dec. Dig. § 728.*]

4. CRIMINAL LAW (§ 1170½*)—APPEAL AND ERROR—HARMLESS ERROR—EXAMINATION OF WITNESS.

Where an objection to an improper question by the state's attorney is sustained, and the form of the question is then corrected, the asking of the original question is not reversible error.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3129-3135; Dec. Dig. § 1170½.*]

5. CRIMINAL LAW (§ 785*)—TRIAL—INSTRUCTIONS—CREDIBILITY OF WITNESS—IMPEACHING WITNESSES.

A charge as to the effect of the testimony of impeaching witnesses is proper.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1776-1781, 1889-1894; Dec. Dig. § 785.*]

6. HOMICIDE (§ 244*)—EVIDENCE—SUFFICIENCY—SELF-DEFENSE.

Evidence in a homicide case held insufficient to support a plea of self-defense.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 507-509; Dec. Dig. § 244.*]

Appeal from District Court, Rusk County; W. C. Buford, Judge.

Wallace Florence was convicted of murder in the second degree, and he appeals. Affirmed.

Futch & Tipps, for appellant. C. E. Lane, Asst. Atty. Gen., for the State.

HARPER, J. Appellant was indicted in the district court of Rusk county, Tex., charged with the murder of Pit Christian, and upon a trial was convicted of murder in the second degree, and his punishment assessed at five years' confinement in the penitentiary. The court submitted to the jury the issues of murder in the first and second degrees, manslaughter and self-defense, and there is no complaint in the motion for a new trial that the court did not properly instruct the jury in these respects.

1. The main question raised is that the court erred in overruling appellant's application for a continuance. One of the witnesses, Miss Bessie Woodward, upon whom the application for a continuance was based, appears by the record to have attended court and testified in the case. The only other witness named in the application is John Florence, a brother of the defendant, by whom it is stated that defendant expects to prove: (1) That Bud Woodward called his attention to the fact that there was a knife then sticking in defendant's back. Bud Woodward, a witness for the state, testified that he did call John Florence's attention to that fact, and it is nowhere disputed in the record. (2) That deceased, Pit Christian, struck his brother with a shotgun. This is not denied in the record. It appears from the record that Grover Bean and John Wooley had some words about who should dance the last set; that they went out doors, and were still quarreling over the matter, when defendant Florence came out of the house with the gun and threw it on Grover Bean, either in fun or in anger, and said he would make them all dance. Bean took the gun away from him, took out the cartridge, and threw the gun on the ground when defendant cut Bean with a knife, and was himself cut by an unknown party, probably Lee Gibson, who lived with deceased. Deceased, when Bean threw the gun down, picked it up, and struck defendant with it, while he was attacking or in the act of striking Bean. (3) That the last time the witness John Florence saw the gun deceased had it. No one disputes that, when Bean took the gun away from defendant, unloaded it, and threw it down, deceased picked it up, and the entire record

shows that deceased did not have the gun when he was shot.

A number of witnesses testify to all that defendant states he expected to prove by his brother, if he had testified to all that was stated in the application that it was expected to be proven by him. In fact, the material facts sought to be proven by the witness, as stated in the application, were not contested by the state's testimony, but admitted by the state's witnesses, and testified to by four or five of defendant's witnesses. In qualifying the bill, the court states: "This bill of exceptions is approved, with the qualification that wire was sent to the sheriff of Montgomery county (where the application claimed the witness could be found) to know why he had not returned the process for this witness, and why he had not brought this witness to court, to which the sheriff wired that he had received no process for said witness, had none, and that he knew where said witness was, and would bring him if wanted; that the witness was a brother of defendant, and the defendant could have produced him at the trial, if they had wanted to." Viewing the application in the light of the facts and the testimony on the trial, we do not think the court erred in overruling the application for a continuance.

2. There was no error in refusing to permit the defendant to prove the reputation of certain persons for "virtue and chastity." The court permitted the witnesses to testify that the reputation for truth and veracity was bad. This was as far as the defendant was entitled to inquire.

3. In bills of exceptions Nos. 4, 5, and 6 defendant complains of remarks of the district attorney. The court qualified these bills, and, as qualified, no error is presented. In addition, the appellant requested no charge in regard to these matters, and in the absence of a requested charge defendant cannot complain of objectionable remarks of the prosecuting attorney. *Bailey v. State*, 45 S. W. 708; *Garner v. State*, 24 S. W. 421; *Matthews v. State*, 41 Tex. Cr. R. 98, 51 S. W. 915; *Leggett v. State*, 65 S. W. 516.

4. In bill No. 3 appellant complains of a question asked by the state's attorney. The court states he sustained defendant's objection, and the state's counsel changed the form so it would not be objectionable. While the question was not proper, in view of the action of the court, it presents no reversible error.

5. There was no error in the court limiting in his charge the effect of the testimony of impeaching witnesses. It was proper he should do so.

6. The testimony in this case shows that, during the altercation between John Wooley and Grover Bean, deceased acted the part of peacemaker, while defendant's conduct added "fuel to the fire." Fifteen minutes after

this difficulty was over, deceased started home with his family, and, when he had gotten about 30 steps from defendant, defendant or some one in his crowd made insulting remarks. Some words then ensued, when defendant shot deceased; deceased not being armed at the time he was shot. If a witness is to be believed, defendant, when leaving the ground, said, "I shot the d—n s—n of a b—h, and I wish I had got that d—n Grover Bean," evidencing a spirit that was not in consonance with his plea of self-defense.

Finding no reversible error in the record, the judgment is affirmed.

BACON v. STATE.

(Court of Criminal Appeals of Texas. Feb. 8, 1911.)

1. CRIMINAL LAW (§ 1111*)—APPEAL—RECORD—CONFLICT IN RECORD.

Where an application for continuance states that it is the first application, but the judge, in approving the bill of exceptions to its refusal, states that it is the second application, the appellant, by accepting the bill of exceptions as allowed, is bound thereby.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2894-2896; Dec. Dig. § 1111.*]

2. CRIMINAL LAW (§ 614*)—CONTINUANCE—SUCCESSIVE APPLICATIONS.

Where a second application for continuance neither states that testimony can be procured from any other source known to the defendant nor that defendant has reasonable expectation of procuring it at the next term of the court, as required by Code-Cr. Proc. § 598, and the testimony of the absent witness is cumulative only, there is no error in overruling the application.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1312-1314; Dec. Dig. § 614.*]

3. LARCENY (§ 77*)—INSTRUCTIONS—APPLICABILITY TO EVIDENCE.

In a prosecution for theft, declarations of the defendant, introduced in evidence in explanation of his possession of the stolen property, were sufficient to authorize a charge on the law of explanation of the possession of recently stolen property.

[Ed. Note.—For other cases, see Larceny, Cent. Dig. §§ 199-204; Dec. Dig. § 77.*]

4. CRIMINAL LAW (§ 761*)—INSTRUCTIONS—WEIGHT OF EVIDENCE.

In a prosecution for theft, a charge that if the property had been stolen, and recently thereafter defendant was found in possession of it, and his explanation is reasonable, and probably true, and accounts for his possession in a manner consistent with his innocence, the jury should consider the explanation as true, and acquit the defendant, but that if the explanation was unreasonable, and did not account for defendant's possession in a manner consistent with his innocence, or if it was reasonable, and probably true, and did account for defendant's possession, but the state has shown the falsity thereof, the jury should take the possession of the defendant, together with his explanation, in connection with all the other facts and circumstances, if any, in evidence, and, if they believe the defendant guilty beyond a reasonable doubt, they should so find, otherwise they should ac-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Index.

quit the defendant, was not on the weight of evidence, in assuming that the property delivered by defendant to the injured party was stolen.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1754-1764; Dec. Dig. § 761.*]

5. LARCENY (§ 58*)—EVIDENCE—SUFFICIENCY.

In a prosecution for theft, evidence held to sustain the charge of the indictment that the property taken was lawful current money of the United States of America.

[Ed. Note.—For other cases, see Larceny, Dec. Dig. § 58.*]

6. CRIMINAL LAW (§ 957*)—NEW TRIAL—PROCEEDINGS TO PROCURE—AFFIDAVITS OF JURORS.

Code Cr. Proc. art. 817, naming as a ground for new trial in felony cases the misconduct of the jury, such that the court is of opinion that defendant has not received a fair trial, and providing that it shall be competent to prove such misconduct by the voluntary affidavit of a juror, does not authorize the filing or consideration of an affidavit of a juror that his consent to the verdict was procured by representation that the jury would be confined an unreasonable length of time in case of further disagreement.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2392-2395; Dec. Dig. § 957.*]

7. CRIMINAL LAW (§ 925*)—NEW TRIAL—CONDUCT OF JURY—COERCION.

An affidavit of a juror that, after the jury had been out from Thursday evening till Saturday afternoon, the jury were informed that the presiding judge was going home, and would not return till the following Tuesday, and would leave instructions that the jury should not be discharged till his return, unless they arrived at a verdict, whereupon the affiant gave his consent to the verdict, was not sufficient to authorize a new trial.

[Ed. Note.—For other cases, see Criminal Law, Dec. Dig. § 925.*]

Appeal from District Court, Leon County; S. W. Dean, Judge.

Lon Bacon was convicted of theft, and appeals. Affirmed.

C. E. Lane, Asst. Atty. Gen., for the State.

PRENDERGAST, J. The appellant was indicted for the theft of \$295 in money from H. Spruce. The jury found him guilty of theft of over the value of \$50, and assessed his punishment at two years' confinement in the penitentiary. The evidence in the case amply sustains the conviction.

1. The first ground of exception by appellant is the action of the lower court in overruling his motion for a continuance. The application states that it was the first application. The judge, in approving the bill, states that it was the second application, and contains only the requisites of the first. The appellant, having accepted this bill of exceptions as allowed, is bound thereby, and we hold that it is the second application. It contains neither of the requisites of a second application. Code Cr. Proc. art. 598. Besides this, the testimony of the absent witness seems to be cumulative only. There was no

error in the action of the court overruling this application for continuance.

2. The second complaint is of the fourth paragraph of the charge of the court, claiming that the same was a misdirection to the jury, in that the court charged on the law of explanation of the possession of recently stolen property, and that it was upon the weight of the testimony in assuming that the property delivered by defendant to the injured party was stolen, and because the question of the recent possession of stolen property and the defendant's explanation of such possession was not raised by the evidence. The question of the defendant's explanation of his possession of the recently stolen property was directly in issue by the testimony offered by the defendant himself. When his explanation was offered in evidence, the state objected because it was a self-serving declaration. The court overruled this, stating that he would permit him to prove explanation of his possession. Such declarations were proven by his own witnesses, Penn Hammett, Sam Stockner, and his wife.

The other ground of complaint against the charge on this subject is without merit. The charge, in substance, on that question was this: "If you believe from the evidence that the property described in the indictment had been stolen from H. Spruce, and that recently thereafter the defendant was found in the possession thereof, and when his possession was first questioned he made an explanation of how he came by it, and you believe that such explanation is reasonable and probably true, and accounts for defendant's possession in a manner consistent with his innocence, then you will consider such explanation as true, and you will acquit the defendant. If, on the other hand, you believe such explanation was unreasonable, and did not account for defendant's possession in a manner consistent with his innocence, or if such explanation was reasonable and probably true, and did account for defendant's possession in a manner consistent with his innocence, but the state has shown the falsity thereof, then you will take the possession of the defendant, together with his explanation, in connection with all the other facts and circumstances, if any, in evidence, and if you believe the defendant guilty beyond a reasonable doubt, you will so find; otherwise, you will acquit the defendant."

This charge, taken as a whole, was not on the weight of the testimony, and did not assume that the property was stolen, but submitted that question to the jury clearly and aptly. The issue in the case, as stated by appellant in his motion for a new trial, in substance, was whether or not defendant took the property from the possession of H. Spruce (if he took it) with intent to appropriate it to his use and benefit and to deprive the owner of the value thereof, or (if he took it)

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

whether he did so with the intent to return it to the owner. The main charge of the court on this subject, to which there is no complaint, clearly submits this question to the jury, with the appropriate definitions of theft and the intent with which the property was taken, if it was, by the defendant.

3. The next ground assigned is that the court erred in failing to charge the jury on the law of recent possession of alleged stolen property unexplained, claiming that the evidence shows that the appellant was in possession of said alleged recently stolen property, and that he did not assert a distinct claim of ownership thereto, but, on the contrary, asserted said ownership to be in the injured party. There was no error in the court's charge on this subject, because all of these matters were clearly and distinctly submitted to the jury. The appellant himself offered proof on this question, and his whole defense appeared to be on that alone. It was all aptly and appropriately submitted to the jury by the court, and found against the appellant.

4. The next ground is that the verdict of the jury is not supported by the evidence, in that the indictment charges the defendant with the theft of \$295 in money, then and there lawful current money of the United States of America, and the evidence fails to show that any of the property alleged to have been taken from the possession of Spruce was lawful current money of the United States, except \$1.25. The record shows that all of the testimony, both by the state and defendant, spoke of the property as money. The testimony of all the witnesses so described it. Besides, the witness Spruce himself stated: "That [money] was lawful current money of the United States of America. I suppose it was." The witness Barnes testified that the money was in greenbacks. The evidence was amply sufficient on this ground.

5. The next ground attacks the verdict of the jury as contrary to the law and the evidence, in that the evidence shows that defendant was drunk before he took said property, if he took it, from the possession of the injured party, and was still drunk when he exhibited it and declared it to be the property of Spruce, the alleged injured party, and that he intended to return it, and that he did not take it from the possession of Spruce, if he took it, with the intent to appropriate it to his own use and benefit, and with the intent to deprive Spruce of the value thereof. All these questions were aptly, as stated above, submitted to the jury by the charge of the court, and the verdict was against the appellant on the issue.

6. The last assignment is that the verdict of the jury was obtained by force, coercion, and undue and unlawful influence on the part of the court and the officer who had charge of the jury during the time they were considering of their verdict, specifying wherein this

consisted, as shown by the affidavit, attached to the motion, of one of the jurors, which was to this effect: That the case was submitted to the jury about 6 o'clock p. m. on August 25, 1910. The jury then retired, and upon the first ballot stood ten for conviction and two for acquittal. That thereafter the jury stood eleven for conviction and one for acquittal, the affiant being alone for acquittal. That during their deliberations, from August 25th to the afternoon of the 27th, the jury was informed by the officer who had them in charge that the presiding judge had informed him that he (the presiding judge) was going home on Saturday afternoon, August 27th, and would not return until Tuesday, August 30th, and would leave instructions that the jury should not be discharged until he returned, unless they arrived at a verdict. That about 2 o'clock p. m. on Saturday, August 27th, he saw a horse and buggy hitched to the courthouse fence, and was informed that it belonged to the presiding judge, that he was going home to Madisonville, and would not return until Tuesday. Thereupon he told the other jurors that they could go ahead and do as they pleased, but he would not sign the verdict as foreman; that he had doubts as to defendant's guilt, and would have nothing more to do with it. That he left home on the morning of the 22d of August. That his business at home needed his attention, and when he was informed and realized that he would be held as a juror and could not go home until the following Tuesday, unless he agreed to a verdict in said cause, he consented for the other jurors to do as they pleased without any interference on his part.

Article 817 of the Code of Criminal Procedure provides that new trials in felony cases shall be granted for the following causes, and for no other (subdivision 8): "Where from the misconduct of the jury, the court is of opinion that the defendant has not received a fair and impartial trial, and it shall be competent to prove such misconduct by the voluntary affidavit of a juror." The rule is well established that no affidavit, deposition, or other sworn statement of a juror will be received to impeach a verdict, or to explain it, or to show on what grounds it was rendered. *Weatherford v. State*, 31 Tex. Cr. R. 530, 21 S. W. 251, 37 Am. St. Rep. 828. In *Pilot v. State*, 38 Tex. Cr. R. 515, 43 S. W. 112, 1024, the court held it was not error to refuse to set aside a verdict upon the affidavit of a juror that he had been coerced through fear to assent to it. Nor will a verdict be set aside on account of the affidavit of a juror that he was induced to sign the verdict by a promise that the jury would recommend the defendant to executive clemency. *Henry v. State*, 43 S. W. 340; *Montgomery v. State*, 13 Tex. App. 74. In the case of *Johnson v. State*, 27 Tex. 758, the Supreme Court said: "No case has yet occurred in this state wherein courts have tolerated

such affidavits to impeach verdicts. If ever admissible, they can only be allowed in an extreme case, and under imperative necessity for the accomplishment of justice. The rule rests upon the obvious ground that, were it otherwise, few verdicts would escape attack from jurors under influences that would be brought to bear upon them after their discharge by the court." This was emphasized and reiterated by this court in the case of *McCane v. State*, 33 Tex. Cr. R. 476, 26 S. W. 1087; but the court in that case held that that case, where eight of the twelve jurors made an affidavit attacking their own verdict, and by praying the court for a new trial, presented an extreme case, and they considered that affidavit and reversed that case. In our opinion the lower court should not have permitted this affidavit to have been filed. It does not show an extreme case that would justify the court to permit it being filed or considered, and we are of opinion that, even though filed and considered, it does not show such coercion as would justify the lower court, and especially this court, in granting a new trial because thereof.

There being no error shown by this record, the judgment is affirmed.

HOLLAND v. STATE.

(Court of Criminal Appeals of Texas. Feb. 8, 1911.)

1. BURGLARY (§ 36*) — PROSECUTION — ADMISSION — EVIDENCE.

Accused and S. lived in D. about 30 miles from T. where the burglary was committed, while S.'s mother lived in T. The state's evidence was that accused and S. boarded the train at D. about 6 o'clock in the evening of the night of the burglary, saying that they were going to T., and they were seen in T. that night, accused being in the burglarized store that night. Between 3 and 5 o'clock the next morning, they were seen in D., and S. remarked, in accused's presence, upon being refused some money for which he asked another, that they would have plenty of money in the morning as "we have the goods." Freight trains passed between T. and D. between the hours accused and S. were seen in the two places, the trains going about five or six miles an hour through T. The morning after the burglary, S.'s mother went from T. to D. checking a trunk for D. and accused and S. met her at the train and S. gave an expressman a check for a trunk, and thereafter accused had the trunk taken to an alley and removed therefrom to a house where it was found with the clothes stolen from the burglarized store. One witness positively identified the trunk check by S.'s mother at T. as that in which the goods were found. Held, that evidence by the expressman that the trunk hauled by him looked like that found in the house and had the same kind of a rope around it, and that S.'s mother got off the train at D. the morning after the burglary about the time the trunk check was given to him, as well as evidence by the station agent that the trunk in which the goods were found looked like that checked by him, as well as the evidence as to S.'s statement about having plenty of money, and the freight trains passing through D. the night of the burglary, and that accused and S. were in T. on that night, was admissible; every cir-

cumstance, however slight, bearing on the commission of the offense, being admissible, if relevant, in a case dependent on circumstantial evidence.

[Ed. Note.—For other cases, see *Burglary*, Cent. Dig. § 90; Dec. Dig. § 36.*]

2. CRIMINAL LAW (§ 1119*) — APPEAL — BILL OF EXCEPTIONS — REMARKS OF COUNSEL.

Improper arguments by the county attorney cannot be relied on on appeal, where there was no bill of exceptions showing that such language was used by him, the only bill of exceptions showing requested instructions that the jury should ignore certain alleged remarks.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. § 2929; Dec. Dig. § 1119.*]

3. BURGLARY (§ 46*) — INSTRUCTIONS — STOLEN GOODS.

Where, in a prosecution for burglarizing a store, there was no explanation of accused's possession of the stolen goods, the court properly refused to charge the law as to possession of stolen property.

[Ed. Note.—For other cases, see *Burglary*, Cent. Dig. §§ 111-120; Dec. Dig. § 46.*]

Appeal from District Court, Kaufman County; F. L. Hawkins, Judge.

Harry Holland was convicted of burglary, and he appeals. Affirmed.

C. E. Lane, Asst. Atty. Gen., for the State.

HARPER, J. Upon a charge of burglary appellant was tried, convicted, and his punishment assessed at four years' confinement in the state penitentiary, in the district court of Kaufman county.

This is a companion case to the case of *Will Spencer v. State* (decided at a former day of this term) 133 S. W. 1049. A store in Terrell under the control of R. Jarvis was burglarized on the night of April 1st. This being a case in which the state relied on circumstances to convict, a more intelligent understanding can be obtained by briefly stating the testimony. Defendant and Will Spencer lived in Dallas, while Cilla Spencer, the mother of Will, lived in Terrell. If the state's testimony is to be believed, and evidently the jury did so, appellant and Will Spencer about 6 o'clock in the evening of April 1st boarded the train at Dallas, saying they were going to Terrell. They were seen in Terrell that night, defendant being seen in the store that was afterwards burglarized that night. Some time between 3 and 5 o'clock the next morning they were seen in Dallas together, waking up a witness, and asking for 40 cents that was owing to Spencer. Upon being refused, in the presence and hearing of defendant, Spencer remarked, "We will have plenty of money in the morning; we have the goods." Freight trains were shown to pass through Terrell going towards Dallas (a distance of 30 miles) between the hours they were seen in Terrell and in Dallas, trains passing through Terrell at about five or six miles an hour. Cilla Spencer, the morning after the burglary, went from Terrell to Dallas, and had a

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep' Indexes

trunk checked for Dallas. Defendant and Will met her at the train, and Will Spencer, after his mother's arrival, gave to a trunk hauler a check for a trunk, telling him he would tell him later where to take the trunk. Defendant Holland came to the driver later and went with him to take the trunk to a house named. Later, Holland had the driver move the trunk to an alley, and later had it moved to the house, where the trunk was found with the clothes stolen from Jarvis' store in it. The record discloses no explanation why defendant was moving the trunk, or why it was found with the stolen goods in it in a house where he placed it, after the arrest of Spencer.

1. Appellant complains by bill of exception of the trunk hauler, after testifying that he had carried the trunk to the place it was found, testifying "it looked like the trunk he hauled and had the same character of rope around it"; that Cilla Spencer "got off the train at Dallas" the morning after the burglary, about the time the check was given to the trunk hauler; that that morning, before daylight, Spencer had said in the presence of defendant, "Never mind, we have got the goods and will have plenty of money to-morrow;" that the station agent was permitted to testify that "freight trains in passing through Terrell at night averaged about six miles an hour," and to testify that the trunk in which the goods were found "looked like the trunk he had checked for Cilla Spencer"; that Spencer was in Terrell the night of the burglary, as well as Holland. One witness testified positively that the trunk that Cilla Spencer checked at Terrell and defendant took charge of at Dallas, and in which the goods were found, was the same trunk, identifying it positively. In the light of the entire record, all this testimony was clearly admissible. In a case of circumstantial evidence, every circumstance shedding light on the matter, however slight, should be admitted in evidence, provided it is a link in the chain proposed to be proven. *Cooper v. State*, 19 Tex. 450; *Preston v. State*, 8 Tex. App. 30; *Harris v. State*, 31 Tex. Cr. R. 414, 20 S. W. 916; *Hedrick v. State*, 40 Tex. Cr. R. 535, 51 S. W. 252.

2. In bills of exception Nos. 7 and 8, complaint is made of the failure of the court to give special instructions requested by appellant to ignore certain remarks alleged to have been used by the county attorney in his argument to the jury. The bills only show that the instructions were requested; there is nothing in the record to show that the county attorney used the language. If he did use the language attributed to him, a proper bill of exception should have been reserved, and the objection stated. In the absence of a showing that such language was used, there is nothing to review. *Booker v. State*, 3 Tex. App. 227.

3. Complaint is made that the court in the fifth paragraph of his charge committed error in that it is claimed said paragraph authorized the jury to convict defendant if he assisted Spencer in disposing of or concealing the property, even though he did not aid in the burglary. We do not think this paragraph subject to the criticism, and the court in another paragraph instructed the jury that "if the evidence or lack of evidence raises in your minds a reasonable doubt as to the presence of the defendant at Terrell at the time and place the store was burglarized (if it was) then you must find the defendant not guilty, even though you may believe from the evidence beyond a reasonable doubt that defendant had some guilty knowledge or connection with the property or a portion thereof, which was stolen from said house (if it was) afterwards in the city of Dallas, because the defendant is charged with the offense of burglary and can be convicted, if at all, for that offense and none other."

4. The only other complaint is that the court failed to submit to the jury the law in regard to possession of stolen property. In the record there is no explanation of defendant's possession, and, in this state of the case, it was proper and right that the court should refuse to charge with reference to that subject. *Baldwin v. State*, 31 Tex. Cr. R. 589, 21 S. W. 679; *Bennett v. State*, 32 Tex. Cr. R. 216, 22 S. W. 684.

Finding no error in the record, the judgment is affirmed.

OLIVUS v. STATE

(Court of Criminal Appeals of Texas. Feb. 8, 1911.)

CRIMINAL LAW (§ 1110*)—CERTIORARI—SUPPLYING STATEMENT OF FACTS.

Certiorari does not lie to bring a statement of facts into the record, where it does not appear that appellant exhausted his statutory remedies to obtain the statement; a mere showing that an affidavit was filed showing his inability to pay for the statement, and requesting that the stenographer be ordered to prepare one, being insufficient.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 2912; Dec. Dig. § 1110.*]

Appeal from Criminal District Court, Dallas County; Ed Sewell, Special Judge.

Paul Olivus was convicted of assault with intent to rape, and he appeals. Affirmed.

J. M. Overstreet, for appellant. C. E. Lane, Asst. Atty. Gen., for the State.

DAVIDSON, P. J. Appellant was convicted of assault with intent to rape; his punishment being assessed at 25 years' confinement in the penitentiary. An appeal is prosecuted; the transcript before us being without a statement of facts or bills of exceptions.

Appellant applies for a writ of certiorari, which is supported by the affidavit of his attorney, Mr. Overstreet. This affidavit was sworn to on the 4th of November, 1910. The court adjourned on the 1st day of October, 1910. The court was in session from the 4th of July, 1910, to the 1st day of October, 1910, as shown by the caption in the transcript. There was no order entered, so far as the record before us shows, authorizing the filing of a statement of facts in the court below; nor is there any reason shown why the statement of facts was not filed within the 30 days after the sentence was pronounced, which occurred on August 18, 1910. Under the statute, where the court is in session more than 8 weeks, the statement of facts must be filed within 30 days after the final judgment or sentence. If this has not been done, then the record must contain an order extending the time. The record shows that nothing of this character was done or sought to be done. The affidavit of Mr. Overstreet shows that he filed with the clerk of the court an affidavit of appellant's inability to pay for the statement of facts, and requesting, under the statute, that the court order the official stenographer to prepare such statement of facts, and that he at the time urged the stenographer to prepare such record, and that the time has passed when such statement can be legally filed, and that, by reason of the refusal of said stenographer to prepare a statement of facts, his appeal has not been duly and legally perfected.

It will be noticed that this affidavit is very general, and does not show at what time this request was made, or the affidavit filed. It fails to show that he called upon the district judge, or presented the matter to the trial court, with a view of obtaining the statement of facts. If these matters had been presented to the district judge, it should be shown to this court that it was through no fault of appellant, and that he exhausted his remedies in trying to obtain the statement of facts. A mere recitation of the fact that he filed such affidavit with the clerk, as we understand the law, is not sufficient diligence. Even if filed within time, this matter should be called to the attention of the trial court, and the proper order entered requiring said statement of facts to be written out by the stenographer, to form a part of the record of the case.

There is an affidavit on this matter, signed by the deputy clerk, in which he states that there had never been filed with him any affidavit by Paul Olivus declaring his inability to pay the cost of a statement of facts, and that the records of the criminal district court of Dallas county fail to show any such affidavit. He further states that the defendant at no time made a motion requesting the judge to order the stenographer to prepare a

statement of facts, and that the record fails to show that the judge ever made such order. He further states that he had heard appellant's counsel state that he was not going to appeal the case, as it was of no use, defendant having escaped, and he also states that said attorney, in the conversation, mentioned that he did not want any record made up in the case. In the attitude that the record presents itself to this court, we are of opinion that the certiorari should not be awarded. There has been no such diligence shown by the affidavit as is required by the statute.

It is the settled law of Texas, under these statutes extending time in which to prepare statement of facts and bills of exceptions, that a failure to secure either or both should arise from no negligence or want of diligence on the part of the party seeking same. This construction of the statute has been uniformly held since *George v. State*, 25 Tex. App. 229, 8 S. W. 25. The present statutes require that, where the court continues for 8 weeks or more, the statement of facts must be prepared within 30 days of the sentence or final judgment, with authority on the part of the court upon proper showing to grant further time. Where the court does not last 8 weeks, then the law itself allows 30 days after adjournment in which to prepare said statement of facts; and, if further time is necessary, it shall be granted upon proper showing to the judge who tried the case, to be entered of record. Without a compliance with these statutes, diligence would be wanting on the part of parties who do not obtain statement of facts. The motion for certiorari was contested by the state, supported by the affidavit of the deputy clerk of the court as heretofore stated.

In the absence of statement of facts and bills of exceptions, there is no question presented that would require a revision by this court.

There being no error of record, the judgment is affirmed.

GOULD v. STATE.

(Court of Criminal Appeals of Texas. Feb. 8, 1911.)

1. CRIMINAL LAW (§ 440*)—EVIDENCE—ADMISSIBILITY.

Under Rev. St. 1895, art. 2312, providing that, to render a deed admissible in evidence, it must be filed in the case before the trial, with notice to the adverse party, and Code Cr. Proc. art. 764, making the rules of evidence in civil suits applicable in criminal actions, the deed records of a county, showing a lease of a building to an amusement company whose employé is on trial for permitting a theatrical performance in the building to be given on Sunday, is inadmissible, where a copy was not filed before the trial and notice given.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1026; Dec. Dig. § 440.*]

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

2. CRIMINAL LAW (§ 445*)—EVIDENCE—CERTIFIED COPIES OF RECORDS.

Under Rev. St. 1895, arts. 2306, 2308, making certified copies of records of public officers prima facie evidence, and requiring the Secretary of State to furnish certified copies of papers in his office, a certified copy of a certificate of authority issued by the Secretary of State to an amusement company is properly received in evidence, in all cases in which the original is admissible.

[Ed. Note.—For other cases, see Criminal Law, Dec. Dig. § 445.*]

3. SUNDAY (§ 29*)—AMUSEMENTS—INFORMATION—SUFFICIENCY.

An information alleging that accused, as agent and employé of the proprietor of a theater, permitted a theatrical performance to be given on Sunday, to which a fee was charged for admission, charges an offense.

[Ed. Note.—For other cases, see Sunday, Cent. Dig. §§ 13, 67-72; Dec. Dig. § 29.*]

4. SUNDAY (§ 29*)—AMUSEMENTS—EVIDENCE—ADMISSIBILITY.

On a trial for permitting a theatrical performance on Sunday, testimony of witnesses as to what took place in the building on the occasion was admissible.

[Ed. Note.—For other cases, see Sunday, Dec. Dig. § 29.*]

Appeal from Dallas County Court, at Law; W. M. Holland, Judge.

O. F. Gould was convicted of violating the Sunday law, and he appeals. Reversed and remanded.

Crawford, Walker & Williams, for appellant. C. E. Lane, Asst. Atty. Gen., for the State.

HARPER, J. In this case the information alleges that appellant, as agent and employé of the Interstate Amusement Company, a corporation which was then and there the proprietor of a place of public amusement, to wit, a theater, situate in the city of Dallas, Dallas county, Tex., and he, the said O. F. Gould (appellant), as such agent and employé, did then and there, on Sunday, unlawfully permit to be open said theater for public amusement, and did permit a theatrical performance to be given on Sunday, to which a fee was charged for admittance, etc.

It being alleged in the information that the Interstate Amusement Company was the owner of the place the only proof offered by the state on this point was to introduce the deed records of Dallas county, showing a lease of the building to the Interstate Amusement Company. Appellant objected to the introduction of this record, and this instrument, on the ground "that he had been given no notice that said copy of said lease would be used in evidence against him in this cause, and no copy of such lease had been filed with the papers in this cause for a period of three days, as required by law, prior to this trial." As this lease is the only proof of the connection of the Interstate Amusement Company with the theater shown to be open on Sunday, its materiality is apparent.

In the case of *Lasher v. State*, 30 Tex. App. 388, 17 S. W. 1065 (28 Am. St. Rep. 922) it is held that "the record books of the county clerk's office of recorded deeds, etc., cannot be introduced in evidence to prove title, at least without notice to the adverse party." Article 764 of the Code of Criminal Procedure provides that "the rules of evidence prescribed in the statute law of this state in civil suits shall, so far as applicable, govern also in criminal actions." Article 2312 of the Revised Statutes of 1895, among other things, provides that, to render a deed admissible in evidence, it must be filed in the cause wherein it is proposed to use it, at least three days before trial, with notice to the opposite party of such filing; and in *Allison v. State*, 14 Tex. App. 402, it is held that in default of such filing and notice the court properly rejected a deed offered in evidence. The execution of the instrument must be proven on the trial to render it admissible, or, if a recorded copy is relied on, a copy must be filed with the papers at least three days before the trial, and the opposite party given notice. The instrument not having been proven upon the trial, and no copy is shown by the record to have been filed, it was error to admit the record copy of the lease.

There was no error in admitting the certified copy of the certificate of authority issued by the Secretary of State to the Interstate Amusement Company. Under our statute the Secretary of State is made the custodian of the archives of the State Department, and he is required to give copies of records to any person applying for same, and it is expressly provided that such certified copies of certificates shall be received in evidence in all cases in which the original would be evidence. Rev. St. 1895, arts. 2306, 2308.

The court did not err in overruling the motion to quash the information and complaint, as it charged an offense under the law, and the court did not err in admitting the testimony of the witnesses Laws and Culum in testifying to what was taking place in the building on the occasion; but, on account of the error hereinbefore pointed out, the cause will be reversed and remanded.

GARRETT v. STATE.

(Court of Criminal Appeals of Texas. Jan. 18, 1911. On Motion for Rehearing, Feb. 22, 1911.)

1. INTOXICATING LIQUORS (§ 40*)—LOCAL OPTION—ADOPTION—EFFECT ON EXISTING REGULATIONS.

Const. 1876, art. 16, § 20, as amended on September 22, 1891, requires the Legislature at its first session to enact a law whereby the qualified voters of any county, or such subdivision of a county as may be designated by the

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

commissioners' court, may determine whether the sale of intoxicants shall be prohibited within the prescribed limits. Act June 24, 1876, c. 33 (Rev. St. 1895, art. 3395), provides that failure to carry prohibition in a county shall not prevent an election being immediately thereafter held in a justice's precinct, town, or city of said county, and failure to carry prohibition in a town or city shall not prevent an election immediately thereafter in the same justice's precinct, nor shall the holding of an election in a justice's precinct prevent the holding of an election for the entire county immediately thereafter. *Held*, that the adoption by a county, at an election held throughout the county, of Act April 24, 1909 (Laws 1909 [1st Called Sess. 31st Leg.] c. 35), amending Pen. Code 1895, art. 402, fixing the penalty for violating the local option law at confinement in the penitentiary for not less than one nor more than three years, superseded the prior local option law adopted in any of the precincts in the county, so that such penalty was operative throughout the county, including such precincts.

[Ed. Note.—For other cases, see *Intoxicating Liquors*, Cent. Dig. § 34; Dec. Dig. § 40.*]

2. CRIMINAL LAW (§ 1159*)—APPEAL—CONFLICTING EVIDENCE.

Where the evidence as to accused's guilt was conflicting, the Court of Criminal Appeals cannot set aside a conviction.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. § 3076; Dec. Dig. § 1159.*]

Appeal from District Court, Clay County; A. H. Carrigan, Judge.

Bill Garrett was convicted of violating the local option law, and he appeals. Affirmed.

Taylor & Jones, for appellant. John A. Mobley, Asst. Atty. Gen., for the State.

PRENDERGAST, J. On September 4, 1909, Clay county adopted the local option law after the act of the Thirty-First Legislature (Laws 1909, c. 15) making it a felony to violate it was in force. The appellant was indicted by the grand jury of Clay county for making a sale of intoxicating liquors in violation of this law. He was tried and convicted, and the jury assessed his punishment at confinement in the penitentiary for the term of two years.

1. In several different ways the appellant properly preserved a point contending that, as several of the precincts in Clay county had previously adopted local option before the act of the Thirty-First Legislature went into effect, said county election was void, and could not affect, and did not repeal, the previous adoption of said law by the said several precincts. It therefore becomes necessary for us to determine whether or not, when one or more precincts in a county, but not all of them, have, before the act of the Thirty-First Legislature went into effect, adopted local option, the county can thereafter hold an election under the present law, and by adopting it put in force in the whole county the penalty of felony for a violation of it.

Section 20, art. 16, of the Constitution of

1876, is as follows: "The Legislature shall, at its first session, enact a law whereby the qualified voters of any county, justice's precinct, town or city, by a majority vote, from time to time, may determine whether the sale of intoxicating liquors shall be prohibited within the prescribed limits." Afterward, on September 22, 1891, this section just quoted was amended, and the following in lieu thereof was adopted, and has since then been in force: "The Legislature shall at its first session enact a law whereby the qualified voters of any county, justice's precinct, town, city (or such subdivision of a county as may be designated by the commissioners' court of said county) may by a majority vote determine from time to time whether the sale of intoxicating liquors shall be prohibited within the prescribed limits."

It is clear by both of these provisions that the Legislature was required to enact a law whereby the qualified voters of any county might determine whether the sale of intoxicating liquors shall be prohibited within the county, as much so as it was to pass a law authorizing the justice precinct to so determine. The first Legislature after the adoption of the Constitution of 1876, by an act approved June 24, 1876 (Acts 15th Leg. p. 26), did pass just such law as it was required to do by said original constitutional provision. Section 4 of that act is as follows: "No election under the foregoing sections shall be held within the same prescribed limits in less than twelve months after an election under this act has been held therein; but a failure to carry prohibition in a county shall not prevent such election being immediately thereafter held in a justice's precinct, town or city of said county; nor shall the failure to carry prohibition in a town or city prevent an election being immediately thereafter held in the same justice's precinct; nor shall the holding of such election in any justice's precinct in any way prevent the holding of an election for the entire county immediately thereafter." It will therefore be seen that the very first act passed by the Legislature, and which has continuously been in force by either this enactment or re-enactments to the same effect (Rev. St. art. 3395), provides that the holding of an election in any justice's precinct shall not in any way prevent the holding of an election for the entire county immediately thereafter.

This identical question was before the Court of Civil Appeals in the case of *Kimberly v. Morris*, 10 Tex. Civ. App. 592, 31 S. W. 809, in which that court held, as we now hold, that the holding of an election in any one or more of the several justice's precincts in a county, even though such precinct adopts the local option law, does not prevent the county from thereafter immediately holding an election for the whole county, and that,

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

when the whole county adopts local option, it supersedes and does away, at least for the length of time that the county continues the law in force, the previous adoption thereof by one or more of the several precincts. This and other cases were cited by this court with approval in the case of *Ex parte Fields*, 39 Tex. Cr. R. 50, 46 S. W. 1127, in an opinion by Judge Hurt, wherein, among other things, the court says: "On the other hand, no precinct, town, city, etc., can prevent the county from declaring that the sale of intoxicating liquors shall be prohibited within the county. If the county has the right to prohibit, it has the right to prohibit the sale in every foot thereof, because the Constitution says that the county may do so. If the precinct has the right to prohibit, as before stated, no county election can prevent it. Let us suppose that a county election is held. A number of precincts vote against prohibition; but, when all the votes are counted, prohibition carries. Can it be contended that prohibition is not in force in every part of that county, notwithstanding the opposition in such precincts? If the contention of the relator be correct, no county election should ever be held. The election should be had by precincts, towns, cities, etc.; and, if all are in favor of prohibition, then prohibition would be in force in the entire county. We do not so understand the Constitution. The county has the same right to declare prohibition as the precinct, etc. They stand exactly upon the same footing with reference to the power to declare it, but not upon the same footing with reference to the power to repeal it; for, if a precinct can repeal it, or defeat the county election, so far as that precinct is concerned, then the county has no right by an election to declare prohibition. All of the acts of the Legislature bearing upon this subject are in accord with this view." And the court in that opinion, after citing the case of *Kimberly v. Morris* and others, then says: "The last opinion was rendered by Judge Stephens, and cites us to several cases, and we think that the question is forever put at rest in Texas." The Supreme Court of this state, in the case of *Griffin v. Tucker*, 102 Tex. 420, 118 S. W. 635, has in effect given the same construction to the Constitution and statutory provision upon this subject that we here now give them.

To hold that both the Constitution and the law enacted thereunder gave the county a right to hold an election, as they both clearly did, and for the statute to say in clear and unequivocal language, "nor shall the holding of such election in any justice's precinct in any way prevent the holding of an election for the entire county immediately thereafter," and then to hold that such an election in the county, if prohibition carried, did not apply to the whole county, because one or more precincts therein—not all—had under some other act, and previously, adopted the local option law, would render such

election by the county of no force or effect whatever. Such was never intended by either the Constitution or the statutory law. If the county has the right to hold an election, and it does so, and a majority votes for prohibition, and it is properly so declared, it thereby puts the law that is then in force in effect in the whole of such county.

Appellant's attorneys have cited us to several cases decided by this court where in arguing the questions then before the court, and also in deciding some such questions, this court has said in substance that where local option has been legally put in operation within a specified territory, such as a justice's precinct, it must remain in force in that territory until voted out by the qualified voters of that particular territory. But these expressions and points decided by this court must be taken in connection with what was then being discussed and decided. No such question in any of the cases where this is said was the question that is now before us. No case has been cited by appellant's attorneys wherein this court has held differently from what we now hold and we know of none. We therefore hold that the act of the Thirty-First Legislature, approved April 24, 1909 (Laws 1909 [1st Called Sess.] c. 35), amending article 402 of the Penal Code of 1895, fixing the penalty of confinement in the penitentiary for not less than one nor more than three years for a violation thereof, having been adopted in Clay county on September 4, 1909, after said act went into effect, is in force in the whole of said county, and that its adoption in the whole county supersedes and sets aside the adoption of the law in any of the precincts in said county previously adopted, and whenever and under whatever act adopted.

2. The only other point raised by appellant in his case is challenging the sufficiency of the evidence to justify the conviction. The evidence was clear and satisfactory that the appellant did sell, in violation of said article of the Penal Code, intoxicating liquor, as charged in the indictment. This was testified to clearly and satisfactorily by the witness Rogers, to whom the indictment charged the illegal sale had been made. His testimony was supported by the testimony of other witnesses and the circumstances detailed by them. While the appellant himself disputed this, the court and jury below, having heard the testimony, saw the witnesses and believed the testimony for the state. We are not at liberty, even if we were disposed to do so, to set aside their judgment and verdict.

There being no error in the conviction and sentence of the defendant, the case is in all things affirmed.

On Motion for Rehearing

The motion for rehearing presents nothing new from what was originally presented,

considered, and decided in the previous opinion. Neither were any additional authorities cited that have not been considered.

However, upon reinvestigating the question, we have found where we think the identical question raised in this case has been previously decided by this court against the appellant's contention. By diligent search we failed to find this decision before the original opinion was rendered herein. Neither appellant nor the state had called our attention thereto. The case we refer to is *Raby v. State*, 42 Tex. Cr. R. 58, 57 S. W. 651. That case shows that in 1895 precinct No. 4 of Bosque county voted for prohibition, and the law was thereafter, under said election, properly declared in force in said precinct. In 1897 the entire county voted on prohibition, and it was carried at that election in the whole county, and properly so declared. The defendant, Raby, was indicted in three counts; the first alleging a sale under the law after the whole county had voted for prohibition, and the second for violating said law under the election in 1895, in which said precinct No. 4 had voted for prohibition, and the law was properly declared in force thereunder. It is unnecessary to state the third count. This court in that case held: "The question here presented is whether or not a conviction for violating the local option law in precinct No. 4 can be maintained when, subsequent to the adoption of local option in said precinct, the entire county had voted on the question, and adopted local option. It has been held that, where local option has been legally adopted in a justice precinct, a subsequent election ordered and held for the entire county is authorized by law, and, if local option is defeated in the entire county, it does not repeal or abrogate local option in the precinct where it formerly existed. *Aaron v. State*, 34 Tex. Cr. R. 103, [29 S. W. 267]; *Ex parte Cox*, 28 Tex. App. 537 [13 S. W. 862]. In our opinion, where local option is adopted for the entire county, it absorbs precincts of the county where local option formerly existed; the law being merged into the county local option law, so that an offense occurring in the precinct territory is no longer an offense against the precinct law, that having been obliterated, but it is an offense against the county local option law, which alone exists in the territory." And that case was reversed by this court because the defendant was con-

victed under the law declared for precinct No. 4 alone.

We have no doubt of the correctness of our holding in this case. The motion is therefore overruled.

JAMES v. STATE.

(Court of Criminal Appeals of Texas. Feb. 15, 1911.)

1. SODOMY (§ 5*)—INDICTMENT—SUFFICIENCY.

An indictment for sodomy, charging that the offense was committed by copulation with a woman, in that he penetrated her fundament or anus with his private parts, is sufficient.

[Ed. Note.—For other cases, see *Sodomy*, Cent. Dig. § 6; Dec. Dig. § 5.*]

2. CRIMINAL LAW (§ 1144*)—APPEAL AND ERROR—STATEMENT OF FACTS—PRESUMPTIONS IN ABSENCE OF.

Where the only ground for motion for a new trial is that the verdict and judgment are contrary to the law and the evidence, in the absence of a statement of facts, the Court of Criminal Appeals will presume that the facts were sufficient.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. § 3031; Dec. Dig. § 1144.*]

Appeal from Criminal District Court, Dallas County; Ed Sewell, Special Judge.

Andrew James was convicted of sodomy, and he appeals. Affirmed.

C. E. Lane, Asst. Atty. Gen., for the State.

DAVIDSON, P. J. Appellant was convicted of sodomy; his punishment being assessed at 10 years' confinement in the penitentiary.

The record is before us without a statement of facts or bill of exceptions. There was a motion made to quash the indictment upon what might be termed a general demurrer, in that it alleges there is no violation of the law charged. Under the authority of *Lewis v. State*, 36 Tex. Cr. R. 37, 35 S. W. 372, 61 Am. St. Rep. 831, we are of opinion the indictment is sufficient. The indictment charges in this case, as it did in the *Lewis Case*, supra, that the offense was committed by copulation with a woman, in that he penetrated her fundament, or anus, with his private parts.

The only ground of the motion for a new trial is that the verdict and judgment are contrary to the law and evidence. The statement of facts not being before us, we will presume that the facts were sufficient.

There being no error, the judgment is affirmed.

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

KARCHMER v. STATE.

(Court of Criminal Appeals of Texas. Feb. 8, 1911.)

CRIMINAL LAW (§ 304*)—JUDICIAL NOTICE—MUNICIPAL ORDINANCES.

A state court will not take judicial notice of city ordinances, and, on appeal from a conviction in a city court, the ordinance must be introduced in evidence.

[Ed. Note.—For other cases, see Criminal Law, Dec. Dig. § 304.*]

Appeal from Dallas County Court, at Law; W. M. Holland, Judge.

E. Karchmer was convicted of violating an ordinance of the City of Dallas, and he appeals. Reversed and remanded.

Israel Dreeben, for appellant. James J. Collins, Lee Richardson, and C. E. Lane, Asst. Atty. Gen., for the State.

HARPER, J. In this case appellant was charged by complaint in the city court of Dallas with violating a city ordinance, an ordinance regulating junk dealers. He was convicted, and on appeal to the county court he was again adjudged guilty, and his fine assessed at \$105, from which judgment he has appealed to this court.

In appellant's bill of exception No. 4 is raised the question of whether or not, on a trial in the county court, it was necessary to introduce the ordinance in evidence. The ordinance does not appear in the record, either in the pleadings or the statement of facts, and the judge trying the cause, in approving the bill of exception, states that it was not introduced in evidence; but, the case having originated in the city court, he did not deem it necessary. Whether, when a case originates in the city court, and is appealed to a state court, the state court will take judicial notice of municipal ordinances, the authorities seem to be in conflict. But the rule adopted in our state, and the better rule, we think, is that the state court will not take judicial notice of city ordinances; but, where they are relied on, they must be introduced in evidence.

This case aptly illustrates the necessity for the introduction of the ordinance in evidence. Appellant contends that the ordinance under which he is prosecuted is unconstitutional. How are we to pass on its constitutionality without reading it? How is it to reach us, if not made part of the record? Every time the constitutionality of an ordinance is raised, shall we adjourn court, and go to the city, and ask the city secretary to show it to us; and, if not, how are we to obtain it? In *Wilson v. State*, 16 Tex. App. 501, Judge Hurt, in passing on this question, says: "It [the charge] assumes the existence of a city ordinance requiring all penal offenses to be published 10 days before their enforcement. In this the court erred. Courts do not take ju-

dicial cognizance of special acts or laws." Chief Justice Gaines, in the case of *City of Austin v. Walton*, 68 Tex. 509, 5 S. W. 71, holds: "The courts do not take judicial knowledge of the ordinances of municipal corporations. They stand upon the same footing as private and special statutes, and the laws of other states and of foreign countries, and must be averred and proved like other facts"—citing *Green v. Indianapolis*, 22 Ind. 192; *People v. Mayor*, 7 How. Prac. (N. Y.) 81; *Harker v. Mayor*, 17 Wend. (N. Y.) 199.

In *Cyc.* the rule is thus laid down in the text: "While the power of municipalities to pass ordinances or by-laws is judicially noticed by the courts within the state, the ordinances or by-laws themselves are not judicially known to courts having no special function to enforce them"—citing many authorities. State courts will not take judicial knowledge of city ordinances.

The other questions raised we do not pass on; the ordinance not being before us.

For the error pointed out, the judgment is reversed, and the cause is remanded.

Ex parte OVERCASH.

(Court of Criminal Appeals of Texas. Feb. 8, 1911.)

HABEAS CORPUS (§ 90*) — PROCEEDINGS — PLACE OF HEARING ON WRIT.

While, under the statute requiring, after indictment is found, that the writ of habeas corpus shall be returnable in the county where the offense was committed, the writ may be granted by any district judge, the hearing thereunder must be in the county where the indictment was found.

[Ed. Note.—For other cases, see Habeas Corpus, Cent. Dig. § 80; Dec. Dig. § 90.*]

Appeal from District Court, Jones County; John B. Thomas, Judge.

Proceeding by habeas corpus by W. J. Overcash for bail. From an adverse judgment, applicant appeals. Judgment set aside, and writ ordered to be made returnable in another county.

J. F. Cunningham, for appellant. C. E. Lane, Asst. Atty. Gen., for the State.

DAVIDSON, P. J. Applicant was indicted in Throckmorton county for murder. The case was transferred, on change of venue, to Haskell county. The trial under the writ of habeas corpus was had in Jones county. Upon a hearing, applicant was remanded to custody without bond.

Motion is made in this court to dismiss the appeal, because the hearing under the writ was unauthorized in Jones county. Under our statute, after indictment is found, application for bail under writ of habeas corpus must be had in the county in which the indictment was found. This question has been several times before this court. See *Ex*

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

parte Trader, 24 Tex. App. 393, 6 S. W. 533; Ex parte Springfield, 28 Tex. App. 27, 11 S. W. 677; Ex parte Graham, 64 S. W. 932. The matter was also discussed to some extent in Ex parte Angus, 28 Tex. App. 293, 12 S. W. 1099. Under the statute, and the decisions construing that statute, requiring the application for bail after indictment found to be heard in the county where the homicide occurred, the case must be tried in the county where the indictment was found. The judge who granted the writ of habeas corpus in this case was authorized to grant it, as any district judge in the state would be authorized to do; but he is not authorized to hear it in any other county than Throckmorton. We therefore hold, under the facts of the case and as this record presents the matter, that the writ was properly granted, but the case was improperly tried in Jones county, and that the writ should have been made returnable to Throckmorton county, before the district judge of the district in which Throckmorton county is situated.

It is therefore ordered that the judgment be set aside, and it is ordered that the writ of habeas corpus be made returnable before the district judge in Throckmorton county, to be there heard and decided.

HARWELL v. STATE.

(Court of Criminal Appeals of Texas. Feb. 15, 1911.)

CRIMINAL LAW (§ 719*)—TRIAL—ARGUMENT OF COUNTY ATTORNEY.

For the county attorney in his argument to state that to his knowledge defendant was a bootlegger, that he induced a witness for the state to leave the state, that he never did a decent thing, there being no evidence of these things, and no evidence attacking his character, was, in the absence of correction by the court, reversible error.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1669; Dec. Dig. § 719.*]

Appeal from Johnson County Court; J. B. Haynes, Judge.

Jim Harwell appeals from a conviction. Reversed and remanded.

Phillips & Biedsoe, for appellant. C. E. Lane, Asst. Atty. Gen., for the State.

DAVIDSON, P. J. Appellant was convicted for violating the local option law.

The state's evidence shows that the alleged purchaser, T. M. Pettigrew, stated that he got a pint of whisky from appellant, for which he paid him 75 cents. This was emphatically denied by appellant; he testifying that he never sold Pettigrew any whisky in his life. Several bills of exception were taken to the argument of the county attorney, and special instructions were requested by counsel for appellant to withdraw these remarks from the jury, with further instruc-

tions not to consider the same. These were refused by the court.

The first bill of exception recites that the county attorney in his closing argument said: "If I was sworn as a witness in this case, I would not be afraid to tell the jury why Tim Pettigrew left here. Jim Harwell was surprised when he saw old Tim here as a witness. We got him back. We got him back. We kept on old Tim's trail, until we got him back, and Jim knows why he went to Georgia, and spent several months doing nothing." The second bill recites that in the closing argument the county attorney said: "Now, gentlemen of the jury, listen: Here is Jim Harwell. Why, Jim only weighs 240 pounds; 28 years old and 240 pounds; yet Jim says he was hashing at the American Restaurant. Now, you know that sounds to me like a lie. I can tell you what he was doing, for I know. Jim was selling whisky; that's what Jim was doing. Two hundred and forty pound man hashing! Now, that's a lie, and you know it." The third bill recites that the county attorney used the following language: "Jim Harwell, a 'hasher' in the American Restaurant; that is the rottenest hole in the United States today, and he is the blackest bootlegger in Johnson county. I say so, because I know him." Another bill recites that while the county attorney was addressing the jury he said: "We can't enforce the law, if the jury will go out here and turn bootleggers like defendant loose in such cases as this; and now, if you want bootleggers to run riot here, go out and turn this one loose." Another bill recites that the county attorney said: "Gentlemen of the jury, I declare to you Jim Harwell never did a decent act in his life, except by accident."

Sundry and divers exceptions were reserved to this language, and requests made of the court, and finally special instructions were requested, not only withdrawing the remarks, but charging the jury they should not consider these matters against appellant. The verdict of the jury gave appellant the maximum punishment, \$100 fine and 60 days' imprisonment in the county jail. As before stated, the evidence for the state shows that Tim Pettigrew bought of appellant, Jim Harwell, a pint of whisky, for which he paid him 75 cents. There is no evidence that appellant was a bootlegger. There is no evidence that appellant run the witness Pettigrew out of the state, or sent him to Georgia. There is no evidence attacking the character of appellant. His character or reputation was not put into issue. Some of the statements that the county attorney made bore directly upon matters of fact which he states were in his knowledge, which were not offered in evidence, and which could not be put in evidence by the state. Some of the statements

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he made might have been introduced against appellant, but were not introduced. If, as a matter of fact, appellant had induced the witness Pettigrew to leave the state, this might have been used, perhaps, against him, and under some circumstances this character of testimony is admissible, as it shows or tends to show effort on the part of the party doing so to prevent evidence of such witness at the trial; but these matters were not before the jury, and some of them would not have been admissible. We are of opinion that the character of argument here indulged is clearly beyond any legitimate line. The charges asked by appellant were refused. The court declined to control the county attorney in his argument, and refused to withdraw the matters from the consideration of the jury. We cannot sustain this character of speech-making.

The judgment is reversed, and the cause is remanded.

WELLS v. STATE

(Court of Criminal Appeals of Texas. Feb. 15, 1911.)

1. CRIMINAL LAW (§ 1097*)—APPEAL—STATEMENT OF FACTS—NECESSITY.

Unless instructions are so fundamentally erroneous that they would be inapplicable to any evidence admissible under the indictment, they cannot be reviewed, in absence of a statement of facts.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 2862; Dec. Dig. § 1097.*]

2. CRIMINAL LAW (§ 1090*)—APPEAL—STATEMENT OF FACTS.

In absence of a bill of exceptions and statement of facts in the record on a criminal appeal, a ruling denying a continuance cannot be reviewed.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 2812; Dec. Dig. § 1090.*]

3. CRIMINAL LAW (§ 1094*)—APPEAL—DISPOSITION — AFFIRMANCE — INSUFFICIENT PRESENTATION ON APPEAL.

A judgment of conviction will be affirmed, where, because of the absence of a statement of facts and bills of exceptions, the alleged errors cannot be reviewed.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2807, 3204; Dec. Dig. § 1094.*]

Appeal from Criminal District Court, Dallas County; Robt. B. Seay, Judge.

Jim Wells was convicted of first degree murder, and he appeals. Affirmed.

C. E. Lane, Asst. Atty. Gen., for the State.

DAVIDSON, P. J. Appellant was convicted of murder in the first degree; his punishment being assessed at life imprisonment.

The record contains neither a statement of the facts nor bills of exceptions. The matters set forth in the motion for new trial, in this condition of the record, are not so presented that they can be intelligently revised.

The charge contained in the record is applicable to a state of facts which could have been shown before the jury. In order to intelligently review a criticism of the charge, the statement of facts must be before the court, unless the charge is so fundamentally erroneous that it would not be applicable to any state of case that would be authorized by the indictment.

The ruling of the court in refusing the continuance, in the absence of the facts and bills of exceptions, cannot be revised.

As the matter is presented by this record, we cannot review them, and the judgment is therefore affirmed.

FRANKLIN v. STATE

(Court of Criminal Appeals of Texas. Feb. 15, 1911.)

THREATS (§ 1*)—INTERFERENCE WITH EMPLOYMENT.

An owner of animals, who by threatened use of violence takes them from one who had taken them up for depredating on his crop, in territory where the local option stock law is in force, does not thereby violate Pen. Code, art. 600, punishing one who by threats or by acts of violence prevents another from engaging in any lawful employment.

[Ed. Note.—For other cases, see Threats, Cent. Dig. §§ 1-6; Dec. Dig. § 1.*]

Appeal from Comanche County Court; J. M. Reiger, Judge.

J. B. Franklin was convicted of crime, and he appeals. Reversed and remanded.

A. B. Haworth, for appellant. C. E. Lane, Asst. Atty. Gen., for the State.

DAVIDSON, P. J. Appellant was indicted under article 600 of the Penal Code (Acts 1887, p. 13). This act reads as follows:

"Any person who shall by threatening words, or by acts of violence or intimidation, prevent or attempt to prevent another from engaging or remaining in or from performing the duties of any lawful employment shall be guilty of a misdemeanor and on conviction thereof shall be punished by fine," etc.

The indictment charges, and the facts show, that the state relied upon the acts of appellant in taking from one Botler a couple of mules which Botler had taken up for depredating upon his crop. Appellant went to the lot of Botler and took the mules away. It is also claimed by the state that there was some act of violence committed by appellant at the time. We are of opinion that the indictment does not charge, nor do the facts show, a violation of the statute quoted. The mules were depredating upon Botler's crop, which was situated in a territory in which the local option stock law was in force. Botler claimed that he had agreed with the son of appellant that he was to have \$2.50 as damages done his crop by the mules. Appel-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'1 indexes

lant went to Botler's house or stock lot and took the mules away over the protest of Botler, and, as Botler says, by the threatened use of violence upon him.

We do not understand from these facts that appellant was preventing Botler from engaging or remaining in or from performing the duties of any lawful employment. The statute above quoted does not include this character of matter. It has relation to an entirely different matter or matters. Appellant did not undertake to interfere with Botler in his farming business, or in any employment in which he was engaged, and the mere fact that Botler may have had some authority or right to take up stock depredating upon his crop did not constitute that as an employment or business as contemplated by the statute. The statute was enacted as a means of preventing persons from interfering with others who are performing labor or engaging in some lawful business by means of which they were earning a support and maintenance, and was never intended to reach the mere taking up of some loose animals that happened to be depredating upon his crop. There was no attempt to prove that Botler was engaged in the business of impounding mules, or that such was his employment.

The Assistant Attorney General confesses error, and we are of opinion he is correct in so doing.

The judgment is reversed, and the cause is remanded.

HAYDEN v. STATE.

(Court of Criminal Appeals of Texas. Feb. 8, 1911.)

1. BURGLARY (§ 41*) — EVIDENCE — SUFFICIENCY.

Evidence held to support a conviction of burglary.

[Ed. Note.—For other cases, see Burglary, Cent. Dig. §§ 94-103; Dec. Dig. § 41.*]

2. CRIMINAL LAW (§ 916*) — NEW TRIAL—GROUNDS.

Where the evidence was clearly sufficient to sustain a conviction of a felony, accused was not entitled to a new trial on the ground that he was not represented by an attorney, in the absence of anything to show that he was fraudulently imposed on, preventing the employment of an attorney.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2159, 2160; Dec. Dig. § 916.*]

Appeal from District Court, Titus County; P. A. Turner, Judge.

Pete Hayden was convicted of burglary, and he appeals. Affirmed.

Rolston & Ward, for appellant. C. E. Lane, Asst. Atty. Gen., for the State.

PRENDERGAST, J. The appellant was indicted for burglary with intent to steal,

charged to have been committed on or about the 16th day of February, 1909. He was convicted, and his penalty assessed at two years' term in the penitentiary. The court gave a full and apt charge on the subject, including a charge on circumstantial evidence. No complaint is made of the charge.

The evidence clearly shows that on the morning of February 16, 1909, John Wilkinson, the witness whose house was burglarized, closed up his house where he and his family lived—no one left therein—and started to Mt. Pleasant, about three-fourths of a mile distant, to mail some letters. As he was leaving his place, just outside of his yard, he met the appellant, who inquired for one of the witness' boys. He was told that the boy was not at home, but was off assisting his mother in washing. The witness knew the appellant, who had been a visitor to his family from time to time. The witness continued toward Mt. Pleasant, but saw the appellant enter his yard, going towards his house. He did not see him enter the house. Witness was gone from his house from 20 to 30 minutes. On returning, when near his house, he saw the appellant leaving his back yard, and he went across a field. He did not stop appellant, or holloa at him, because at that time he had not suspected anything wrong. Just before leaving home the witness had placed his gold watch and gold ring in his trunk, and locked his trunk. After reaching his house, and sitting down and reading awhile, he concluded he would get his watch and put it on. When he went to the trunk, he found the trunk had been broken open, and his watch and ring both gone. He suspected the appellant, and began a search for his watch and ring. Some two or three days later he located his watch in the hands of another party, several miles off, to whom the appellant, the witness says, had pawned it for \$1.50. He identified the watch as his beyond question.

Soon after the burglary, perhaps the same day, the appellant gave the ring to a negro girl about 17 years of age, who lived some few miles from the house burglarized. The ring was clearly identified, showing that it had the initials "J. W." inside of it, which the owner said he himself had put there with his pocket knife. At the same time the appellant handed to the mother of the girl the watch, requesting her at first to keep it for him. A day or two later he wanted her to sell it for him, which she declined to do. He was not wearing the watch or ring either when he reached the place where the girl and her mother lived, to whom he gave the ring and handed the watch. He stayed at this place two or three days. At the time he handed the watch to the mother and gave the ring to the girl, he claimed that both of them had been sent to him by some kinsman

in Louisiana. No one else was shown to have been within or about the house from the time the witness Wilkinson left it, when the defendant was going towards it, till he returned, some 20 or 30 minutes later, when the defendant was leaving his back yard and went across a field.

The appellant, it appears, had no attorney to represent him in the trial of the case. After his conviction he employed attorneys, who filed a motion for new trial for him, which was sworn to by the appellant. The substance of the motion is that the appellant was under 16 years of age; that he did not know that his age was material until after his conviction; that he was misled in not employing attorneys by the sheriff, for whom he worked, who informed him that there was no danger of his being sent to the penitentiary; that some three weeks before the term of the court at which he was convicted, his father, hearing of his indictment, came to see him for the purpose of making an investigation of the charge against him and employing attorneys for him, but that his father was informed by appellant of the information the sheriff had given him (appellant) that he did not need any attorneys and not to employ any, because he did not know that the state was going to press the charges against him; that he also had an aunt, who, in August, was going to make some arrangement for attorneys to represent him, but she was informed by the sheriff that there was no danger of his being sent to the penitentiary, and that he did not need a lawyer, and she did not employ one; that because of all of this, and his information from the sheriff, he had no witnesses subpoenaed; that if he had witnesses he could have proved that the watch which state's witnesses identified was not the watch that had been stolen, but was the property of a negro woman living in Mt. Pleasant, and that the evidence tending to connect him with breaking and entering the burglarized house was insufficient to connect him therewith, and that the watch he had was not the watch of the prosecuting witness Wilkinson, whose house was burglarized. To his motion for new trial is attached the affidavit of his father, who swears that he knows the age of the appellant; that he was born on January 8, 1894, and would be 16 years of age on January 8, 1910; that he did not know his son was in trouble in the court until two or three weeks before; that he then came to Mt. Pleasant, where the appellant had been working, saw him (appellant), asked him about it, and that he was out of jail and working for Mr. Sanders, the sheriff, and that he was not in trouble; that upon his return home he saw an aunt of the appellant, by whom he was informed that said Sanders had told her that there was not anything against defendant, and that he was not in

any danger of going to the penitentiary; that he did not know anything further of the case until after he was informed that the defendant had been convicted, when he came to Mt. Pleasant to see about the case as soon as he could.

The state contested the motion for new trial on the grounds that the matters therein alleged were not true. To this contesting pleading was attached the affidavit of the constable of precinct No. 1, in Titus county, who swore that he knew the defendant, and had known him for some time, and from his personal appearance he believed he was more than 16 years of age, and was at least 17 or 18 years of age. The court, in the judgment overruling the motion for new trial, stated: "And the court, having heard said motion and the evidence thereon submitted, is of the opinion that the same should be overruled"—and did overrule it.

We deem it unnecessary to discuss separately the various grounds set up in the motion for new trial. The evidence is clearly sufficient to sustain the conviction. None of the grounds of the motion for new trial, under the circumstances, are sufficient to entitle appellant to a new trial. This case does not come within any of the cases where the defendant is shown to have been so fraudulently imposed on as to entitle him to a reversal. There is nothing in the record sufficient to justify us to hold that the lower court erred in overruling the motion for new trial on any of the grounds thereof.

The judgment will therefore be affirmed.

WILSON v. STATE.

(Court of Criminal Appeals of Texas. Feb. 8, 1911.)

CRIMINAL LAW (§ 1097*)—STATEMENT OF FACTS—REVIEW OF EVIDENCE.

The sufficiency of evidence to sustain a conviction cannot be reviewed, in the absence of a statement of facts.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 2938; Dec. Dig. § 1097.*]

Appeal from Criminal District Court, Dallas County; Robert B. Seay, Judge.

John Wilson, alias Bully Wilson, was convicted of burglary, and he appeals. Affirmed.

C. E. Lane, Asst. Atty. Gen., for the State.

DAVIDSON, P. J. This conviction was for burglary.

The record is before us without a statement of facts or bills of exception. The only ground of the motion for new trial is the alleged insufficiency of the evidence to support the conviction. In the absence of the statement of facts, this matter cannot be revised.

The judgment is affirmed.

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

BURK v. STATE.

(Court of Criminal Appeals of Texas. Feb. 15, 1911.)

CRIMINAL LAW (§ 1094*)—APPEAL—STATEMENT OF FACTS—NECESSITY.

Where the record on a criminal appeal contains no statement of facts or bill of exceptions, the judgment will be affirmed.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2807, 3204; Dec. Dig. § 1094.*]

Appeal from Criminal District Court, Dallas County; Robert B. Seay, Judge.

Amos Burk was convicted of robbery, and he appeals. Affirmed.

C. E. Lane, Asst. Atty. Gen., for the State.

DAVIDSON, P. J. This conviction was for robbery; the punishment being assessed at 15 years' confinement in the penitentiary.

The record is before us without a statement of the facts or bills of exceptions. The only ground of the motion for new trial is based upon the statement that the verdict and judgment are contrary to law and the evidence. The record, as above stated, being before us without the facts adduced on the trial of the case, this alleged error cannot be reviewed.

The judgment is affirmed.

SWITZER v. STATE.

(Court of Criminal Appeals of Texas. Feb. 8, 1911.)

CRIMINAL LAW (§ 1076*)—APPEAL AND ERROR—RECOGNIZANCE—SUFFICIENCY.

Where a recognizance on appeal from a judgment convicting defendant of violating the local option law did not recite that defendant was convicted of a misdemeanor, nor show the punishment assessed, it was insufficient to sustain the appeal.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2711, 2712; Dec. Dig. § 1076.*]

Appeal from Potter County Court; W. M. Jeter, Judge.

Charles Switzer was convicted of violating the local option law, and he appeals. On motion to dismiss. Granted.

Cooper & Stanford and Cooper, Merrill & Lumpkin, for appellant. C. E. Lane, Asst. Atty. Gen., for the State.

HARPER, J. Appellant was convicted in the county court of Potter county of violating the local option law, and his punishment assessed at a fine of \$100 and 60 days' imprisonment in the county jail.

The Assistant Attorney General moves to dismiss the appeal herein, on the ground that the recognizance is not sufficient to give this court jurisdiction. An inspection of that part of the record discloses that the motion is well taken. The motion to dismiss is predicated on the ground that the recognizance herein does not recite, as the statute

requires, that appellant was convicted of a misdemeanor, nor does it recite the amount of his punishment. The form provided requires that this be stated, and we know of no authority to dispense with these requirements.

The motion of the Assistant Attorney General is accordingly sustained, and the appeal is dismissed.

DUKE v. STATE.

(Court of Criminal Appeals of Texas. Dec. 7, 1910. Rehearing Denied March 1, 1911.)

1. CRIMINAL LAW (§ 1166½*)—APPEAL—REVIEW.

Challenges for cause to jurors will not be reviewed on appeal where it does not appear that appellant exhausted his peremptory challenges, and thereafter was forced to accept a juror subject to disqualification or challenge for cause.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 3117; Dec. Dig. § 1166½.*]

2. CRIMINAL LAW (§ 452*)—EVIDENCE—OPINION EVIDENCE.

Where a witness testified that on the night prior to the homicide accused was drinking heavily and on the point of having delirium tremens, but on cross-examination admitted that he did not know what delirium tremens was, it was proper to exclude his statement as to the delirium tremens.

[Ed. Note.—For other cases, see Criminal Law, Dec. Dig. § 452.*]

3. CRIMINAL LAW (§ 448*)—EVIDENCE—OPINION EVIDENCE.

It was proper to permit a witness to testify that at the time defendant was exhibiting to witness certain weapons he seemed to be very quiet, and that he was sober; the testimony not being a conclusion.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1044-1046; Dec. Dig. § 448.*]

4. CRIMINAL LAW (§ 474*)—EVIDENCE—OPINION EVIDENCE.

On a criminal prosecution, it was proper to sustain an objection to a question to an expert on mental diseases as to whether accused was a fit subject for excessive punishment, as the death penalty, or long continued confinement.

[Ed. Note.—For other cases, see Criminal Law, Dec. Dig. § 474.*]

5. CRIMINAL LAW (§ 485*)—EVIDENCE—EXAMINATION OF EXPERTS.

Either side may put a hypothetical question based upon the facts of the case—that is, such facts as are proved and the party putting the question deems proper to collate in the hypothetical question—and, if the opposite side is not satisfied with the question as put, it may amplify the question or put it under the facts deemed proper.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1073, 1074; Dec. Dig. § 485.*]

6. CRIMINAL LAW (§ 485*)—EVIDENCE—EXAMINATION OF EXPERT.

Where, on a prosecution for homicide, it was developed before the jury that accused testified on a former trial, and went into the details in regard to the killing and attendant circumstances, it was proper in a hypothetical question to an expert on mental diseases to ask

him whether a man who testified to the details several months afterwards could have been so under the influence of liquor as to be temporarily insane and irresponsible.

[Ed. Note.—For other cases, see Criminal Law, Dec. Dig. § 485.*]

7. CRIMINAL LAW (§ 1105*)—APPEAL AND ERROR—RECORD.

The approval of the trial court of a bill of exceptions does not amount to a certificate that the grounds of objection correctly state the facts.

[Ed. Note.—For other cases, see Criminal Law, Dec. Dig. § 1105.*]

8. HOMICIDE (§ 294*)—TRIAL—INSTRUCTIONS.

On a prosecution for homicide, there was evidence that on the evening and night prior to the homicide accused was very much intoxicated, and that on the morning of the homicide he had taken one or two drinks of whisky and a drink of beer, but it did not appear that he was suffering from delirium tremens, and the experts who testified stated that accused had a very low order of mentality, and stated under certain hypothetical questions that he would be insane, but under others that he would be sane. *Held*, that it was sufficient to give an instruction on insanity in the usual form to the effect that, if accused was insane, he should be acquitted, and an instruction on the question of delirium tremens as a phase of insanity was not required.

[Ed. Note.—For other cases, see Homicide, Dec. Dig. § 294.*]

Appeal from District Court, Bexar County; Edward Dwyer, Judge.

E. W. Duke was convicted of murder, and he appeals. Affirmed.

Carlos Bee and C. C. Todd, for appellant. John A. Mobley, Asst. Atty. Gen., for the State.

DAVIDSON, P. J. Appellant was convicted of murder in the second degree; his punishment being assessed at 15 years' imprisonment in the penitentiary.

This is the second appeal. The first appeal will be found reported in 56 Tex. Cr. R. 502, 120 S. W. 894. In the former appeal the judgment was for life imprisonment. A sufficient statement of the evidence in the case as far as the questions involved in this case are concerned will be found in the former opinion.

1. Several bills of exception were reserved to the action of the court overruling challenges for cause to jurors named in the bills of exception. We deem it unnecessary to discuss the merits of the bills, for the reason that it is not shown by the bills that appellant exhausted his peremptory challenges, and thereafter was required or forced to accept a juror who was subject to disqualification or challenge for cause. So far as the bills are concerned, the appellant did not have forced upon him an objectionable juror. It may be stated in this connection that the jurors set out in the bills were challenged peremptorily, and did not sit in the case.

2. Miller, a witness for the state, testified that on the evening prior to the homicide ap-

pellant was drinking heavily, and the last time he saw him on the night prior to the homicide the following day he was on the point of having delirium tremens, and, being subsequently examined by the state, witness was not able to define delirium tremens, and the state thereupon asked that the above statement of the witness be stricken out, and it was so ordered by the court. Appellant contended that the condition of delirium tremens is one of common knowledge, similar to that as to whether a man is drunk or sick, and expert knowledge is not necessary upon the subject. The court signs the bill with the following qualification: "That the witness on cross-examination by the state admitted that he did not know what delirium tremens was, and that the state moved to exclude his declaration upon cross-examination that the defendant was on the point of delirium tremens, because it was the opinion of the witness not based upon the knowledge of the matter concerning which he was testifying, and the court thereupon struck out the opinion of the witness as to the defendant being upon the point of delirium tremens." As this matter is explained by the court, we are of opinion there is no error. The statement on the part of the witness as to his ignorance of the matter is we think sufficient to justify the court in the ruling made.

3. Another bill recites that while the same witness was upon redirect examination the following question was asked him: "While Mr. Duke was showing you this pistol and shotgun, tell the jury whether or not he was excited or cool, calm or deliberate." Appellant objected to this because it called for the conclusion of the witness. This was overruled, and the witness answered: "He seemed to be very quiet. He was sober." This bill is rather indefinite, in that it does not show at what time appellant was showing his pistol and shotgun to the witness, or what connection it had or may have had with the fact of the killing. As a usual rule, this character of testimony is admissible as a shorthand rendering of the facts. Whether a man is drunk or sober, or quiet or boisterous, or matters of that kind, can be stated not so much as a conclusion but as a fact.

4. Another bill of exceptions recites that Dr. Moody had qualified as an expert on mental diseases; that he had examined appellant, and having had presented to him a hypothetical question based upon the testimony in the case, and having answered that the defendant, though, in his opinion, legally sane, was of a very low order of mentality, was asked by the defendant the following question: "From your understanding of this man and your study of him and his history as outlined to you, do you consider the defendant a fit subject for excessive punish-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

ment, as the death penalty, or long continued confinement?" Objection by the state was sustained by the court. Appellant excepted for the reason that the witness was an expert upon mental diseases, and that while the jury are the exclusive judges of the credibility of the witnesses and the weight to be given to the testimony, and in their deliberation weigh and consider testimony in their own way, the testimony of a doctor who has spent 14 years in the constant study of mental diseases, who is associated with the insane daily, who knows the effect of pain and suffering upon the mind, who knows the capacity of the mind to form the cool, calm, and deliberate design, would be important in assisting the jury in arriving at their determination as to whether they would be justified, under the circumstances and conditions of the defendant, in inflicting upon a person so mentally constituted as was the defendant a long and continued confinement. There are several bills of exception embodying practically the same question from different experts who were placed upon the stand, among whom, in addition to Dr. Moody, were Drs. Berry and Nichols. We are of opinion the court's action is correct. The conclusion to be reached in matters of this sort is for the jury. It is not the province of an expert to give his opinion as to how a party accused of crime shall be punished in case of a conviction. He may say that the party is sane or insane, but it has not been held, nor do we believe it could be rightfully held, that the expert could express his opinion as to the amount of punishment that the jury should assess in case they found that the accused was not insane. The jury may take into consideration the low order of intellect of a party they are trying in passing upon the amount of punishment where the punishment is graded from a minimum to a maximum. The question at issue in cases of this character is always the sanity of the party, and does not include the expert opinion of a witness that a low order of intellect should commend itself to the jury in assessing the punishment. This is a matter that the Legislature, if they saw proper to do, may regulate, but it is not within the province of witnesses to do so or even to express their opinion about it. It would not be the subject of expert testimony in any event.

5. Another bill recites that, while Dr. Berry was upon the stand testifying as an expert upon hypothetical questions based upon the facts of the case, he was asked quite a lengthy question stated in the nature of a hypothesis. It is unnecessary to repeat these facts. They are set out, however, in the bill of exceptions. This question was asked by the state. Appellant objected because it did not cover the material facts of the case as adduced by the witnesses, but was only a fragmentary statement, selecting only that portion of the testimony adverse to the con-

tention of appellant, and was not a question based upon a full and complete review of all the testimony, and was therefore prejudicial to the interests of the defendant. These objections were overruled. The answer is not given, and what the answer was we are not informed. This would dispose of the bill. The testimony, however, may have been favorable to appellant, and it may not have been, but be that as it may, whatever the answer was, if any, the question was a legitimate one under the ruling of *Burt v. State*, 38 Tex. Cr. R. 397, 40 S.W. 1000, 43 S.W. 344, 39 L.R.A. 305, 330. The rule was there laid down after a very careful review of this character of question, and, after an able, oral argument and brief, that either side can put a hypothetical question based upon the facts in the case; that is, such facts as are proved and the party putting the question deemed proper to collate in the hypothetical question. If the opposite side is not satisfied with the question as put that side can amplify the question or put the hypothetical question under the facts as he sees proper. We do not believe that it would be of any service to review this question further than was done in the *Burt Case*, supra. For a discussion of the matter here involved, see the opinions in that case both on original hearing and on motion for rehearing.

6. There is another bill which recites that Dr. Nichols, superintendent of the Southwestern Insane Asylum of San Antonio, testified as a witness for the defendant, and qualified as an expert upon mental diseases. Among other things, he was asked by appellant the following question: "From your experience and treatment of these different disorders, is it possible for a man to become so drunk as to be under the statement I made to you, and as you said awhile ago, irresponsible, and remember nothing of the act committed, and yet in that interval preceding be able to transact little matters of business, such as making change and things of that kind?" and in reply gave the following answer: "I will state to the jury we very frequently have conditions of that kind where people appear to be normal and all right and transact business or do things, and not have any remembrance of it afterwards." Thereupon the state asked this question: "Where a party remembers enough about the transaction to testify all about it months after the killing," and thereupon the following colloquy occurred between the court, counsel for the state, and counsel for the defendant:

"Mr. Bee: I except to the question because it has reference to the failure of the defendant to testify, and refers to another matter. I make further objection that it is not predicated upon testimony before the court at this time and upon the record at this time.

"Mr. Davies: I am asking a hypothetical question now, based upon the proposition. I believe he has asked the question. Now this question is pertinent to the very inquiry

he has made, if he can do these little formal acts and forget all about what he did at the time of the transaction. I am cross-examining the witness, and I asked the further question, which your honor heard, whether or not if he did such things and was able to remember, whether or not then, under those circumstances, he would be temporarily insane.

"Mr. Bee: I further except to it because there is no evidence before the court. The hypothetical question is based upon a false premise in this case, because there is no testimony before this court that the defendant in this case remembered any of the acts committed.

"The Court: Answer the question.

"Mr. Bee: I further object because the question previously propounded by counsel is prejudicial to the rights of this defendant as will be fully set out in the bill of exceptions.

"Q. Now I will ask you this question: Whether or not a party who has passed through what I have related to you before in my hypothetical question, in addition thereto, several months afterwards was able to go upon the witness stand and detail what occurred at the time of the homicide from his standpoint, whether or not a man of that kind could be under the influence of liquor to such an extent as to be temporarily insane and irresponsible at the time of the commission of the offense?

"Mr. Bee: I desire to urge two objections: First. I desire to object to the question because it has reference to a matter that is not before this court. There is no evidence before this court on that subject. Second. Because it refers to a matter that is prejudicial to the rights of this defendant in this case, as outlined."

These objections were all overruled. The question was asked, and the witness answered that under the statement made by counsel for the state he would say that the memory of the defendant was all right. Appellant objected because the questions were improper, in that they referred to the testimony of the defendant on a previous trial, and are not predicated upon any testimony before the court at the time, or upon the record in the case at the time, and because the hypothetical question propounded was based upon a false premise so far as this case was concerned, because there was no testimony before the court in this case that the defendant remembered any of the acts committed, and, further, because it refers to the failure of the defendant to testify, and was a reference to matters prejudicial to the rights of the defendant in the case on another trial. As the bill presents these matters, we are of opinion that the ruling of the court was not erroneous. If appellant testified on the former trial, and that fact was developed before the jury, and it was shown that he went into details in regard to the killing and attendant circumstances,

these matters could be embraced in the hypothetical question; that is, if he testified to all the facts and circumstances occurring at the homicide on the former trial, such facts could be included in the question. It was not erroneous to embrace these matters in a hypothetical question in the manner presented by this bill of exceptions. This is based upon the view that the bill fails to show the evidence of appellant on former trial had not been introduced at the time the hypothetical question was put to the doctor. The statement in the bill of exceptions as a ground of objection that he had not so testified is not the statement of the fact that the ground of objection is true. The court approving a bill of this character does not certify to the correctness of the ground of objection. His certificate to the bill is to the effect that the matters occurred therein as stated, and that the grounds of objection were those urged by the party taking the exception. He does not certify that the grounds of objection correctly state the facts. If as a matter of fact appellant's evidence on a former trial was not before the jury so as to form part of the hypothetical question, this matter should have been stated as a matter of fact in the bill, and not as a ground of objection.

7. Without setting out the nature of the requested instructions which were refused, it was suggested in those instructions that the court should have charged the jury with reference to the question of delirium tremens as a phase of insanity. We are of opinion the record does not show such evidence as required the court to give this charge. During the trial it was sought to prove that appellant's mind was affected by the use of intoxicants, and it is shown that on the evening and night prior to the homicide the following day that appellant was very much intoxicated, but on the morning of the homicide, while he had taken one or two drinks of whisky and a drink of beer, yet the evidence does not show that he was suffering from delirium tremens. It is fully doubtful if he was drunk. The court submitted the theory of voluntary drunkenness, but did not submit the theory of settled insanity from the long and continued use of intoxicants. The law draws a distinction which the decisions have clearly recognized between temporary insanity from the recent voluntary use of intoxicants, drunkenness produced from that source, and the settled insanity which is the result of long continued use of such intoxicants. The facts in this case do not show a fixed or settled insanity from long continued use of intoxicants. Had that been an issue in the case, the court should have submitted it. However, the court does give a charge on insanity in the usual form, and not criticised, which instructs the jury that, if appellant was insane at the time of the homicide, they should acquit him on that

ground of any unlawful killing. The distinction between temporary insanity produced by recent voluntary use of intoxicants and that which follows long continued use of such whisky to the extent of unbalancing the mind is discussed in *Evers v. State*, 31 Tex. Cr. R. 318, 20 S. W. 744, 18 L. R. A. 421, 37 Am. St. Rep. 811. Judge Simkins, delivering the opinion of the court in that case, uses this language: "There are two kinds of insanity produced by alcoholism: First. Delirium tremens, caused by the breaking down of the person's system by long continued or habitual drunkenness, and brought on by abstinence from drink. This is what is called 'settled insanity,' to distinguish it from 'temporary insanity' or drunkenness, directly resulting from drink. 'Settled insanity,' from the earliest times, has been held to be a complete defense to crime. Lord Hale says: 'If by means of drunkenness an habitual or fixed madness be caused, though contracted by the will of the party, it will excuse crime.' P. C. pt. 1, c. 4. In *United States v. Drew*, 5 Mason, 28 [Fed. Cas. No. 14,993], decided in 1828, Story, Judge, says: 'Insanity, whose remote cause is habitual drunkenness, is an excuse for crime committed by the party while so insane, but not intoxicated, or under the influence of whisky. Such insanity has always been deemed a sufficient excuse for any crime done under its influence.' *United States v. McGlue*, 1 Curt. 1 [Fed. Cas. No. 15,679]; *Maconnehey v. State*, 5 Ohio St. 77; *Carter v. State*, 12 Tex. 500 [62 Am. Dec. 539]; *Erwin's Case*, 10 Tex. App. 702. Second. The other kind of insanity is that condition of the mind directly produced by the use of ardent spirits; and where a fit of intoxication is carried to such a degree that the person becomes incapable of knowing the act he is doing is wrong and criminal, as above stated, he is in that condition referred to by the statute as being 'temporarily insane,' as stated by this court in the *Kelley Case* [31 Tex. Cr. R.] ante, p. 216 [20 S. W. 357]. There is no difference between the two kinds of insanity so far as the mental status is concerned, but they differ widely in their causes and results. The first is from drinking as a remote result; the second from drinking as a direct result. The first is an involuntary result, from which all shrink alike; the second is voluntarily sought after. In the first, there is no criminal responsibility; but in the second, responsibility never ceases. There is evidence only of temporary insanity in the record, and the court erred in not explaining temporary insanity to the jury, and also instructing them that if they believed that defendant was temporarily insane at the time he formed the intent to kill deceased, and the same was carried into execution while defendant was so insane, they should take such insani-

ty into consideration, both in determining the degree and in reducing the penalty."

As before stated, we fail to find evidence that authorized the court to charge the issue of settled insanity arising from excessive alcoholism and abstinence from such drink, but, whether or not delirium tremens would or not be produced by reason of abstinence from long continued drinking, we are of opinion that the evidence here does not suggest delirium tremens or settled insanity. The experts describe the case more accurately in accordance with the facts as we understand it in their statements to the effect that appellant had a very low order of mentality. They had stated under certain hypothetical questions that he would be insane, but under others that he would be sane. The court, we think, sufficiently gave the law in charging the general issue of insanity, and the law applicable thereto. The fact that appellant was very much intoxicated on the night before the homicide and drinking some on the morning of the homicide does not show delirium tremens or settled insanity. In fact, some of the witnesses who testified about the matter rather exclude the idea of his being drunk. It is unnecessary to go into a detailed statement of their testimony in this respect.

Finding no reversible error in the record, the judgment is affirmed.

NASH v. STATE

(Court of Criminal Appeals of Texas. Nov. 9, 1910. On State's Motion for Rehearing, Jan. 25, 1911. On Appellant's Motion for Rehearing, Feb. 22, 1911.)

1. SEDUCTION (§ 45*)—EVIDENCE—SUFFICIENCY.

The evidence to support a conviction of seduction must be measured and governed by the rules governing the sufficiency of evidence to justify a conviction of any other crime, and any fact essential to the offense may be established by circumstantial evidence as well as by direct proof.

[Ed. Note.—For other cases, see *Seduction*, Cent. Dig. §§ 80-82; Dec. Dig. § 45.*]

2. SEDUCTION (§ 46*)—EVIDENCE—CORROBORATION—"TENDING."

Under Code Cr. Proc. 1895, art. 781, providing that a conviction cannot be had on the testimony of an accomplice unless corroborated by other evidence tending to connect accused with the offense, and article 769, declaring that, in a prosecution for seduction, no conviction can be had unless the testimony of prosecutrix is corroborated by other evidence tending to connect accused with the offense, a prosecutrix is sufficiently corroborated when there are any facts that tend to show that accused committed the offense, and it is error to attempt to lay down a rule as to what particular issues of the case shall be corroborated; the word "tending," meaning to be directed as to any end, object, or purpose.

[Ed. Note.—For other cases, see *Seduction*, Cent. Dig. §§ 83-86; Dec. Dig. § 46.*]

For other definitions, see *Words and Phrases*, vol. 8, pp. 6909, 6911, 7814.]

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

3. SEDUCTION (§ 46*)—EVIDENCE—CORROBORATION.

Evidence held to sufficiently corroborate the testimony of prosecutrix to support a conviction of seduction.

[Ed. Note.—For other cases, see Seduction, Cent. Dig. §§ 83-86; Dec. Dig. § 46.*]

4. CRIMINAL LAW (§ 741*)—WEIGHT OF EVIDENCE—QUESTION FOR JURY.

The jury are the judges of the credibility of the witnesses and the weight of their testimony.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1713; Dec. Dig. § 741.*]

Davidson, P. J., dissenting.

Appeal from District Court, Lamar County; Ben H. Denton, Judge.

Bob Nash was convicted of seduction, and he appeals. Affirmed.

Allen & Dohoney, for appellant. R. L. Lattimore, Dist. Atty., and John A. Mobley, Asst. Atty. Gen., for the State.

DAVIDSON, P. J. This conviction was for seduction; the punishment assessed being four years' confinement in the penitentiary.

The alleged seduced female testified that appellant had sexual intercourse with her on account of a promise to marry; that this occurred about the last of June or first of July; that she submitted to appellant because he promised to marry her, and she thought him true; that she loved him, and thought he would fulfill his promise; that appellant told her he would marry her if she submitted. A child was born on the 15th day of the following March. The parties were about the same age. Coming down to the particular facts of the first intercourse, she said it occurred out by the garden at night after they had returned from an ice cream supper, a distance of about six miles from where the act occurred. The prosecutrix says she came back from the supper in a wagon in company with several other people; that she got out of the wagon at the big gate just in front of the house; that when she got out of the wagon appellant asked her if she would meet him out by the garden. She further testified: "After we got to the house, he asked me if I would not come out there and talk to him. I was fixing to go to town the next morning, and he asked me if I would, and I did not want to go, and he insisted on my coming, and begged me to come, and I went. When we got to the door, he said he wanted to talk to me, and asked me if I would go with him out there. He said he would wait for me, and I went in the house and put up my fan and my handkerchief and some things, and went in and turned the cover down on my bed. The reason I went in the house, I knew they were all awake, and I went in there and slipped out. I didn't want them to know I left the room at all. I pulled off my shoes and went out in my stocking feet. I did not change any of my clothes, and did

not take off any of my clothes. When I came out, he was out by the side of the garden waiting for me, and he asked me to sit down, and I sat down, and we talked on awhile, and he asked me to submit to him, and he promised to marry me. I don't know that I can remember just every word he said to me, but he asked me if I still loved him, and I told him, 'Yes,' and he asked me to submit, and I would not do it, and he said, 'Well, you know I would not harm a hair on your head.' He says, 'You know I would not betray you.' He says, 'You know I would not harm you for anything on earth.' He just asked me if I would let him have it, and I didn't want to at first, and he kept insisting, and I finally agreed. I asked him what would he do. I says, 'People will be finding this out.' He says, 'No, they won't never know anything about it.' He says, 'We mean to get married, and we will get married before anybody knows anything about it.' He says, 'There will be no harm done, for nobody knows it.' I says, 'Well, maybe not.' I suppose that was somewhere between 10 and 11 o'clock. I did not have any feeling or desire for sexual intercourse right at the time that I consented and did not have any desire for it before I consented. He had his arms around me while we were sitting down. I put my arms around him, and he put his arms around me. We sat there in that position but a very few minutes. He had not said anything to me along that line on the way home. There was no opportunity. There were others in the wagon. We were sitting by the side of one another in the wagon, but we did not have our arms around one another. It was not a very light night, but the moon was shining some. When we got to the door, we talked a few minutes, and he asked me if I would meet him out there; said he wanted to talk to me awhile. I went in the house first, because I knew they were all awake and knew they would all get up, and I knew better than to go out there just as I was, and I went in the house and made like I was going to bed, and I pulled off my shoes, turned down my bed, and slipped out. I had no idea what he wanted me to go out there for except what he said. He had hugged me before that time, and I had hugged him several different times. I had sat in his lap. He had not gone with me so often before that happened for some little bit. We had had a falling out, and we had just made up I believe on Monday night before that, and that was on Saturday night."

There is testimony by this witness of two other acts between the parties at intervals of four weeks which occurred under similar circumstances to those already testified. There is evidence that a complaint was filed against appellant some months after this

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

intercourse, and that he left the country and was gone awhile, but was finally arrested. There is evidence to the effect that appellant and prosecutrix were together in public quite a number of times, going to prayer meeting and social occasions, and there is also evidence that she went with other young men occasionally. All the witnesses, or nearly all of them, testified to the good reputation of both prosecutrix and appellant, and that they were young people about the same age, the prosecutrix a little older than appellant. There is no further evidence than that detailed in regard to the promise of marriage, nor is there any evidence other than that of the prosecutrix that appellant ever had intercourse with her except on one occasion where he (appellant) and one of his friends were in town, and the friend said something to appellant in regard to purchasing a toy for his boy; the evidence showing that prosecutrix gave birth to a male child. It may be conceded as a fact not to be controverted that prosecutrix had intercourse with some man. This is the only way to account for the birth of the child.

In order to constitute the crime of seduction, there must be a seducing or leading away of the girl from the path of virtue; the intercourse had with the seducer; the promise of marriage. The alleged seduced female must be corroborated in essential elements of the alleged offense. We are of opinion the evidence does not show that the prosecutrix was corroborated as the law requires. It further appears from the testimony of the prosecutrix that, while they had been sweethearts for a couple of years, they had had a "falling out," and had only made friends on the Monday night previous to the alleged intercourse. She does not state there had been an agreement to marry prior to the night of the first act of intercourse. This is to be assumed, if at all, from the fact that they had been sweethearts before that time, but had broken off their friendly relations. So far as any positive evidence on her part is concerned, the first promise of marriage was made out by the garden after she had gone out of the house to meet him at the designated and agreed point. We are therefore of opinion that, under the facts stated, the evidence does not justify the conviction. There is not sufficient corroboration of the prosecutrix as contemplated by the statutory definition of the offense of seduction and the decisions in this state. *Putnam v. State*, 29 Tex. App. 454, 16 S. W. 97, 25 Am. St. Rep. 738; *Wisdom v. State*, 45 Tex. Cr. R. 215, 75 S. W. 22; *Simmons v. State*, 54 Tex. Cr. R. 619, 114 S. W. 844.

The judgment is therefore reversed, and the cause is remanded.

RAMSEY, J. (dissenting). In that invaluable repository of the common law, Coke's Commentaries on Littleton, that doughty old

knight of the law observes (liber 3, § 378) that: "By reasoning and debating of grave learned men the darkness of ignorance is expelled, and by the light of legal reason the right is discerned, and thereupon judgment given according to law, which is the perfection of reason. This is of Littleton here called *legitima ratio*, whereunto no man can attain but by long studie, often conference, long experience, and continuall observation. Certaine it is, that in matters of difficultie the more seriously they are debated and argued, the more truly they are resolved, and thereby new inventions justly avoided."

We, in this case, seemed not to have justified the remarks of the learned author. On the contrary, the more we have consulted about the case, and these consultations have been both frequent and prolonged, the more widely apart have we drifted. The case has now been with us so long that a further delay in disposing of it would be injustice alike to appellant and to the state, and so we find ourselves at the parting of the ways, and since I cannot agree with my Brethren or go with them, it must result as it did with Lot and Abraham, in the days of the patriarch, that we shall "separate ourselves the one from the other"; the majority speaking for the court and registering its decree, while I am left in the solitary and inhospitable domain of dissent. I recognize that no dissenting opinion can ever justify itself unless it is right; that even then it is most unavailing unless it has the effect to arrest attention, excite inquiry, provoke discussion, and ultimately lead to the ascertainment of the truth. As to whether I am right in my conclusions, both as to the law and the facts of the case, indeed as to whether I am right on either the law or the facts, will be determined by a generous profession of this and other times, and to this judgment, always in the long run both fair and just, I shall make my appeal. I trust, too, that, however lacking in strength and vigor the opinion may be, it will arrest attention, excite inquiry, provoke discussion, and lead the court back some time to what I conceive to be the ancient and settled truths of the law. I am not unmindful of the respect and confidence with which the judgment of my Associates will be received. My own respect and esteem for them would and should indeed constrain and withhold this opinion except for the certainty I feel that I am right. This opinion so entertained by me results after weeks and months of examination and re-examination and all the study I can give to any case. With the views thus entertained, I should feel that I had committed treason to my own convictions, and worse than treason to the law which I not only love but am sworn to support and uphold, if I did not dissent.

From my point of view, the conclusion of the majority is not only erroneous, but the

result, as I view the result, is most unfortunate, not to say deplorable. It is a judgment and conclusion which I fear must greatly weaken the laws of this state designed to protect the innocence and virtue of our women and punish those who, under promise of marriage, would despoil them. The opinion of the majority concedes that no evidence was improperly admitted for the state, and that none properly receivable in appellant's behalf was denied him. The opinion concedes that the learned trial court submitted the law, and all the law of this state, in charge to the jury. The opinion is based on the sole proposition that, as a matter of law, under the facts the conviction is without warrant, and decrees, in substance, that appellant must go free. Against this conclusion I enter my dissent, and shall undertake to give at as much length as may seem necessary the reasons upon which that dissent is bottomed.

It would be conceded, I am sure, by my Associates, that the laws of this state which make for the protection of the home should be upheld in all their vigor. Any interpretation of our laws, not in fairness demanded, which would undermine and sap the strength of the law which safeguards the home and its dearest and most important interests, would be worse than the "pestilence that walketh in darkness, or the destruction that wasteth at noon day." They must recognize, as I do, the truth of the counsel which Laertes gave to Ophelia that:

"The chariest maid is prodigal enough,
If she unmask her beauty to the moon."

And while I recognize that we may not and cannot wholly, in the decisions of this court, instill in the minds of our people those lessons of purity learned at the fireside and strengthened by religious teaching, still, in supplement of these, we can and ought to so administer the law according to its true intent and purport without injustice to any man as to throw proper protection around those whose inexperience and attractiveness point them out as victims of the libertine.

Katie Weddle was a young woman living in the vicinity where appellant resided. Neither her father nor her mother were living. In the spring of 1904, when she first became acquainted with appellant, she was living at his brother's, Will Nash's. She and appellant had been sweethearts for about two years, and during all that time she was his companion, and he waited on her. The first act of carnal intercourse, according to her testimony, was had on the last day of June or first of July, 1906. She states: "I submitted to him because he had promised to marry me, and I thought him true, and I loved him, and I thought he would fulfill his promise. He told me that he would marry me if I submitted to him." She further testifies: That there were two other acts of intercourse. The second act occurred four

weeks from the first; she says that at this time Minnie Nash, appellant's sister, came to town after her in a buggy, and that she went down to Mr. Nash's, the father of appellant, and stayed there Saturday night and Sunday night. That they went to Mt. Olive to prayer meeting, and that the act of intercourse took place as they were coming back home. The details need not be here set out. The third act of intercourse occurred on the occasion of appellant's taking prosecutrix to church, where they went in a wagon most of the way with appellant's mother and sister and some of the rest of the relatives. It developed as a result of the intercourse that a child, a boy, was born on the 15th day of March, 1907. Soon after this an affidavit was filed against appellant charging him with the offense of seduction, and he fled the country, and remained away about a year. During this time the sheriff of Delta county made a search for him without being able to find him. Numerous witnesses were introduced, all of whom testified that the reputation of Miss Weddle as a chaste and virtuous woman was good. They all testified that the relations between appellant and Katie Weddle were intimate and their association frequent. Mrs. Hughley says: "After appellant started there was not any other one kept her company until after I left there; I don't think I ever saw any one else with her but Bob. They would go out in society and places of entertainment and church and things of that kind." George Willis says that during the time appellant associated with her, which covered a period of a year or such matter, and while he was keeping her company, he does not recollect but one other boy keeping her company, and that he went home with her one night from prayer meeting, and that was Ezell Scott; but appellant was with her constantly at entertainments, church and things of that kind; that appellant would be with her nearly every time witness would be at an entertainment or at church or anywhere. Frank Hearne testified that appellant had waited on Miss Weddle something like two years; that he would see them together at many different places, parties, preaching, and Sunday School, and entertainments of all kinds, such as were in the country. Mrs. Hearne testified that appellant went with Miss Weddle something like two years, and that during this time he was keeping her company she did not remember ever seeing any other young man with her unless it was Ezell Scott; that she would see appellant and Miss Weddle together at church, entertainments, and Sunday School and places of that kind. Ed Elliott testified that appellant kept company with Miss Weddle something like a year or two, and that while he was keeping her company witness did not know of any one else going with her; that he would see them at different places together,

at Sunday School, prayer meeting, and parties; that he remembered in the summer of 1906, when a complaint was made against appellant for seduction; that he remembered about the time when Miss Weddle gave birth to a child; that he saw appellant in town one day before this, and they were talking together about a little baseball mit and shoulder, and something was said that he ought to get that for his boy, or something like that was said. He further testified: "I don't remember exactly how it was, but it was something to that amount." On cross-examination touching this matter, he testified: "I was 'joshing' him about the baby, and there was something said about the mit. I think I brought it up myself. I might have been the one that suggested that he buy one for his boy; I won't be certain. We was talking, and he said, yes, he ought to buy it." A number of other witnesses testified to the intimate association between appellant and Miss Weddle, and, without exception, they all stated that her reputation was that of a good, chaste, and virtuous girl, and most of the witnesses testified that appellant's reputation as a law-abiding citizen was good. Charley Cawley testified that he saw appellant and Miss Weddle together during the summer of 1906; that during this time he was the only one that witness knew of that kept her company; that witness remembered when she came to town and stayed awhile, and when she went back out in the country, and appellant was still going with her after she came back out in the country. There is some little evidence that, for a month or two before the act of intercourse, there had been some cessation of appellant's attentions; but these were renewed something like a week or 10 days before the act of intercourse. The only attempt to contradict Miss Weddle was by a witness who testified that prosecutrix said to the witness during the year (time not given) that, if she could not get Bob Nash one way, she would another; that this was before she went to Paris. This was denied by prosecutrix. This witness testified that during all the time that she knew the parties that only one other person had gone with Miss Weddle, and that he went with her one time, and that during the summer months of 1906, June and July, and throughout the summer, appellant and the young lady were together frequently. The testimony of the prosecutrix to the intercourse, to her age, and to the promise of marriage, and her reliance thereon, and indeed to all the essentials of the offense, is clear, positive, and convincing.

The only question raised on these facts is as to whether the corroboration is sufficient as to the promise of marriage and the intercourse, and the opinion of the majority can only be justified and sustained on the ground that the corroboration by the testimony of other witnesses is indispensable in respect to the promise of marriage and the act of in-

tercourse, and that, this being true, the evidence of corroboration in respect to these matters is not sufficient. In determining the sufficiency of the evidence on appeal, we must assume as true not only every fact distinctly proven, but those inferences and conclusions of fact which in fairness the jury could draw from facts directly and positively established. It can no longer be doubted that it is the law that both the act of intercourse and the promise of marriage can be established by circumstantial evidence. No lawyer can, as I conceive, give any reason why the law of circumstantial evidence should not apply in cases of seduction as well as in cases of murder or theft. In the case of *Beeson v. State*, 130 S. W. 1006, the court below instructed the jury, among other things, as follows: "You are, however, instructed that corroborative evidence need not be direct and positive independent of the prosecutrix, Miss Edna Blackshear; but such facts and circumstances as tend to support her testimony, and which satisfy the jury that she is worthy of credit as to the facts essential to constitute the offense of seduction as hereinbefore defined to you, will fulfill the requirements of the law as to corroboration, and it is for you to say from all the facts and circumstances in evidence before you whether she has been sufficiently corroborated." This instruction was sustained and held correct in a very able opinion by Judge Cobb sitting as special judge with Presiding Judge Davidson and myself, Judge McCord not sitting, and is conclusive on the proposition that the evidence of corroboration may be circumstantial. That matter then may be considered as settled.

There are in our Code of Criminal Procedure of 1895 two provisions, in cases of seduction, touching the matter of corroboration of the testimony of the party wronged, who, in the eyes of the law, is treated as an accomplice. Article 781, which is general in its character, is as follows: "A conviction cannot be had upon the testimony of an accomplice, unless corroborated by other evidence tending to connect the defendant with the offense committed, and the corroboration is not sufficient if it merely shows the commission of the offense." Article 769 of the Code of Criminal Procedure, having special reference to the testimony of a woman seduced, is to this effect: "In prosecutions for seduction, under the provisions of the Penal Code, the female alleged to have been seduced shall be permitted to testify; but no conviction shall be had upon the testimony of the said female, unless the same is corroborated by other evidence tending to connect the defendant with the offense charged." I think it probable that the last-named article was intended to institute a somewhat different rule in seduction cases. This, however, may not be quite clear, and it is unnecessary to express a definite conclusion on it. Whether this construction is true or not,

in my opinion, under either article the testimony is abundantly sufficient, and we are not justified under the evidence in concluding otherwise than that the testimony of this woman was corroborated, was confirmed, and was and is true. It is not required, I think, that the corroboration should extend to every essential element of the offense. Article 967 of our Penal Code of 1895, which defines "seduction," is in this language: "If any person by promise of marriage shall seduce an unmarried female under the age of 25 years, and shall have carnal knowledge of such female, he shall be punished by imprisonment in the penitentiary not less than two, nor more than five, years, or by a fine not exceeding five thousand dollars." This statute has been construed, and properly so, to apply only to a woman previously chaste. Therefore, in order to establish the crime of seduction, four things must be shown: First, that the person claimed to be seduced is an unmarried female under the age of 25 years; second, that she is chaste; third, that she submitted to carnal intercourse with the person charged; and, fourth, that this intercourse was obtained by promise to marry upon which the prosecutrix relied.

Now, while there are many loose expressions in the books to the effect, in substance, that the prosecutrix must be corroborated both in respect to the act of intercourse and the promise of marriage, this is not the law, and never was the law. The statute no more requires corroboration in respect to the act of intercourse or to the promise of marriage than it does in respect to the age of prosecutrix, or to her previous chaste character. That it is not essential that corroboration shall exist in respect to every ingredient and essential of the offense was distinctly held by Judge McCord in one of the ablest in many of the excellent opinions rendered by him. In the case of *Williams v. State*, 128 S. W. 1121, in language of admirable clearness, he thus disposes of the contention by appellant that there had been no corroboration in respect to one of the essential facts required to be shown, to wit, that the prosecutrix was under 25 years of age: "It is also contended that there is not sufficient corroboration in the case. It is admitted that the prosecutrix was corroborated on the question of promise of marriage and intercourse. She testified that she was 18 years of age. It is insisted before this court that, because there was no testimony corroborating her upon this point, therefore the conviction cannot stand. We do not agree to this contention. All crimes have in them different issues and different elements that are required to be proved in order to sustain a conviction. The statute is general that the accomplice must be corroborated by other testimony tending to connect the defendant with the commission of the offense. The statute does not say in what this corrobora-

tion shall consist. If the testimony other than that of the accomplice should make out a complete offense, it would not be necessary to use the accomplice's testimony. Hence the law wisely provided that the corroboration must tend to connect the defendant with the commission of the offense, and to require that every constituent element of the offense as sworn to by the accomplice must be corroborated would be requiring of the state an impossibility." This decision is in harmony with the law everywhere except as it has been interpreted in some of the expressions of this court. Among the clearest statements of the rule on this subject I have found is contained in *Am. & Eng. Enc. of Law & Prac.*, vol. 1, p. 583, where it is said: "The testimony of the accomplice need not be corroborated on every material fact, so that, independent of his testimony, a conviction would be authorized, as this would in effect deny to the testimony of an accomplice all value." Among other cases cited as supporting the text are the cases of *Myers v. State*, 7 Tex. App. 640; *Nourse v. State*, 2 Tex. App. 304; *Davis v. State*, 2 Tex. App. 588; *Hoyle v. State*, 4 Tex. App. 239; *Jones v. State*, 4 Tex. App. 529; and *Wright v. State*, 47 Tex. Cr. R. 433, 84 S. W. 593.

Looking to the decisions of the courts elsewhere, we find the following admirable statement in respect to a statute almost identical with our own. In the case of *State v. Lawlor*, 28 Minn. 216, 9 N. W. 698, the court said: "The statute respecting the use of the testimony of an accomplice is as follows: 'A conviction cannot be had upon the testimony of an accomplice, unless he is corroborated by such other evidence as tends to convict the defendant of the commission of the offense; and the corroboration is not sufficient if it merely shows the commission of the offense or the circumstances thereof.' Gen. St. 1878, c. 73, § 104. We think a reasonable construction of this section does not require a case to be made out against the prisoner sufficient for his conviction before the testimony of an accomplice can be considered, for that would make it available only when its necessity did not exist; neither do the terms used require such an interpretation. The corroborating evidence must, independently of the testimony of the accomplice, tend in some degree to establish the guilt of the accused, but need not be sufficiently weighty or full, as, standing alone, to justify a conviction. We have met with no case coming under the common law or statutory law in which full proof was required by way of corroborating evidence."

In the case of *Myers v. State*, supra, which is a murder case where the penalty of death was inflicted, and which was affirmed by this court, Judge Winkler, who delivered the opinion, said: "The authorities are not agreed as to the amount and extent of corroboration required in order to warrant a

conviction on the testimony of an accomplice who, in the sense of a witness, is any direct participant in the crime; but with this we need have no concern, for the reason that the statute has settled it by declaring the extent of the corroboration necessary. It is 'other evidence tending to connect the defendant with the offense committed.' We do not understand that this requires that the different matters testified to by the accomplice are to be supported, each one, by the other testimony to the same isolated facts, but that it must tend to connect the defendant with the offense committed."

In the more recent case of *Criner v. State*, 53 Tex. Cr. R. 174, 109 S. W. 128, in which I wrote the opinion for the court, we said: "We have set out the testimony at this considerable length and have stated practically the testimony tending to connect appellant with the burglary. The rule is, of course, well settled that, before a conviction can be had upon the testimony of an accomplice, there must be other proof tending to connect the person charged with the commission of the offense. Just how strong, in every case, this corroborating testimony shall be, must depend to a large extent upon the facts of each particular case. We believe that, while not strong, it could not in fairness be said that there was no corroborating testimony, or that it was so weak, indefinite, or immaterial as to justify us in holding, in view of the verdict of the jury, that it was wholly lacking."

In the case of *Cohea v. State*, 11 Tex. App. 622, in which Judge Hurt delivered the opinion, it is said: "As we have before held, the evidence of the other witnesses need not corroborate some particular fact testified to by the accomplice, but it must tend to establish the guilt of the defendant."

The rule announced in the case of *Myer v. State*, supra, is in harmony with the decisions of this court in the case of *Jackson v. State*, 4 Tex. App. 293, and *Hoyle v. State*, 4 Tex. App. 239, to the effect that it is not essential that the corroborative evidence should corroborate the accomplice's testimony substantially and in detail. It has likewise been held that it is not essential that the corroborative evidence should suffice of itself to establish the guilt of the accused, and in that event it is said the testimony of the accomplice would not be needed. *Nourse v. State*, 2 Tex. App. 304. In that case Judge Ector, speaking for the court, says: "It will be seen that, to justify a conviction on the testimony of an accomplice, there must be some evidence which, of itself and without the testimony of the accomplice, tends in some degree to connect the accused with the commission of the crime. The Supreme Court of California (in the case of *People v. Melvane*, 39 Cal. 614) say: 'The corroborative evidence may be slight and entitled to but little consideration; nevertheless, the require-

ments of the statute are fully fulfilled if there be any corroborating evidence which of itself tends to connect the accused with the commission of the offense.' This decision was rendered under a statute very similar to ours in regard to the corroboration necessary to be had to the testimony of an accomplice to support a conviction. Article 375 of the Code of California is as follows: 'A conviction cannot be had upon the testimony of an accomplice unless he be corroborated by such other evidence as shall tend to connect the defendant with the commission of the offense, and the corroboration shall not be sufficient if it merely shows the commission of the offense or the circumstances thereof. It is a mistaken idea to suppose that the corroborating evidence must conclusively of itself connect the defendant with the commission of the offense. If so, there would be no use for the testimony of the accomplice.'

One of the best, clearest, and most lucid statements of the rule to be found in the books is that of Judge Simkins in the case of *Wright v. State*, 31 Tex. Cr. R. 354, 20 S. W. 756, 37 Am. St. R p. 822. This case, too, is particularly valuable since it was referred to with approval by Judge Cobb in his opinion in the case of *Beeson v. State*, supra, rendered no longer ago than the 22d day of June of the present year, as will be seen by the above quotation from the Beeson opinion. There Judge Simkins says: "As to the sufficiency of the testimony, we think the witness is amply corroborated as to the promise of marriage and the illicit intercourse. Corroborative evidence need not be direct and positive, or such evidence as is sufficient to convict, independent of that of the prosecutrix, but simply such facts or circumstances as tend to support her testimony, and shall satisfy the jury she is worthy of credit. And, when there is other testimony fairly tending to support the prosecutrix upon facts essential to constitute the offense, it is for the jury to say whether she is corroborated. *State v. Timmens*, 4 Minn. 325 (Gil. 241). She testified she yielded to defendant because he faithfully promised to marry her. The witnesses prove that the young lady was highly esteemed, and visited by other young gentlemen, and moved in the best social circles, with a good reputation for chastity and virtue; that he was received by her family as a suitor, and was so persistent in his attentions that all other gentlemen were compelled to cease attendance. His letters breathe undying affection and strong jealousy, and speak of their marriage in the future as a certainty. We think the evidence is amply sufficient to sustain proof of seduction."

However, under any rule ever announced by this court, I think a careful study of the record must carry conviction that the testimony of corroboration is sufficient. Of

course, in so applying the testimony we must have some reference to the nature of the case, the situation of the parties, their station in life, and the opportunities for securing testimony in corroboration of the prosecutrix. In so doing we should also have some regard to the character of the offense, the situation of the parties, and what we know, and what the jury and the trial court knew of human nature and the relation of the sexes. We should also remember that accomplices, like angels, differ not in glory, but in blame. In this case the prosecutrix is in law called an accomplice, and in a certain sense her testimony suffers the same legal disparagement as that of a burglar, a thief, or an assassin who has turned state's evidence, and the law requires that, before a conviction can be had on her testimony, there must be evidence other than her own tending to connect appellant with the crime, and yet we know that many a woman who has fallen is, as to other men, wholly virtuous, and that many women who have gone astray under such circumstances as this young girl did might, by evidences of deep contrition, thorough repentance, and other evidences of truthfulness, prove as convincing in her testimony as that of any witness whose hand was ever lifted in a courthouse. To the jury hearing this case, and to the court sitting on the bench as a just arbiter between the state and the defendant, this case was committed (subject only to the provision of law that there must be other evidence tending to connect appellant with the crime charged), and the weight to be given to her testimony was for them to determine. It may well be that her demeanor on the stand shadowed forth such clear-eyed and white-souled truthfulness as that they were so thoroughly convinced and so deeply impressed that to them her word, like *Cæsar's*, "might have stood against the world." The weight to be given to her testimony was, of course, for the jury. The only limitation placed upon their action in regard to what credit they would give to her evidence is the rule that other testimony must be produced which shall tend to corroborate her. The quantum of it will differ in accordance with the character of the witness and the facts of the particular case. In respect to an adventuress whose air and demeanor upon the witness stand might disclose her true character, a jury might well hesitate to convict, though supported by abundant circumstances of corroboration. Whether in any given case they shall or do believe the accomplice is wisely by law committed to them.

In this case the evidence shows that, when the parties first became acquainted, the prosecutrix, who, it seems, was a woman of rather an humble station, and an orphan girl, was living with the brother of appellant. It is not denied, and indeed seems to be conceded, and was indubitably proved on

the trial, that she was a woman of blameless life and unsullied reputation. The evidence shows that, at the very time the intercourse between herself and appellant was being indulged in, she was received as a welcome guest at the hearthstone and around the fireside of his father and mother. She is shown to have been the associate and companion of his sister, and was by her, under this evidence, treated as an equal. That some one accomplished her ruin is, of course, certain. As stated, the evidence shows that the prosecutrix had neither father nor mother. Except that her heart belonged to another, she was mistress of her own fortunes and her own destiny. Therefore there was no opportunity for the state to furnish testimony of either father or mother that the daughter had been sought in marriage by her suitor. The fact that she was alone in the world furnishes, too, some reason why the engagement should not be published, or the fact of the engagement communicated to her relatives. The jury knew, too, as we know, and as sensible men must here assume, that they took cognizance of the well-known fact that frequently, if not indeed usually, such engagements are kept secret, and not disclosed until the wishes of the woman and the affairs of the man make it possible to early realize the hopes of the contracting parties. From these and other facts the jury might well find the promise of marriage, and not to believe same, in view of the character of the woman, the intimate association of the parties, was to close their eyes to the experience of the ages. There is no hint or suggestion in the evidence that she had such relations with any other person as would have made it among the possibilities for such other person to have secured her confidence, corrupted her mind, and wrought her ruin. Indeed, the testimony clearly shows that so secure was appellant in her affections and so thoroughly had he outstripped the rivals for her heart that they had dropped out of the race and left him undisturbed. The evidence clearly shows a general recognition among their acquaintances and friends of a relation more than that of merely passing acquaintances. In addition to this, as soon as the complaint was filed against appellant for seduction, he flees the country, and is gone for a year. When her condition becomes known, and in jest some reference is made to his buying a gift for his boy, he falls in with the suggestion and says yes, probably he had better buy it. There is no suggestion of disavowal of this responsibility, when, if he had been innocent of the transaction, every suggestion of self-preservation would have demanded and would certainly have induced a disavowal. It was a situation which from an honorable man, guiltless of any wrong, would have instinctively drawn such a disavowal. In view of their long and intimate association, it is passing strange that if not guilty and not

cognizant of her condition, and not responsible therefor, no incredulity was expressed that she should have so fallen, nor pity for her sad state. On the contrary, her situation was treated as a matter of jest and idle sport. His conduct was only consistent with the conduct of one who had enjoyed her youth and beauty, and, when the evidence of her downfall was at hand, had treated it and her situation as a matter of jest and idle sport. Would not any jury of 12 men find corroboration in their intimate association? Can we say they did not? Would they not find corroboration in his practical admission of the paternity of the child? Shall we say they must not? Would they not find corroboration in the fact that she had no other male acquaintance whose relations with her were at all intimate? Would they not above all find corroboration in her blameless life and pure character, her accepted state as a friend of the family, a guest of the home, and an associate of appellant's sister, and be slow to believe that any woman, such as prosecutrix is shown to have been, would have surrendered her person on any other condition except in the belief that it was to her affianced husband? Again, would not the jury find corroboration in appellant's flight? If he was not guilty, why, as against this young girl without a family, should he flee, and if, having sought flight, and was yet not guilty, why should he avoid arrest and remain away a year? These facts, as I believe, constitute corroboration and ample corroboration not only in respect to the intercourse, but in respect to the promise of marriage. So far from the verdict being unsupported by any testimony of corroboration which, in order to reverse the case, we must hold, from my point of view, no other conclusion is fairly inferable from the testimony except that appellant is guilty. We know that good and pure women, such as this woman was ere she was tempted and fell, do not yield to a casual acquaintance, and where, as in this case, we find a young man, her sole companion and associate, practically admitting the paternity of the child, in the light of all the other attendant circumstances, and having in mind the scriptural evidence "that the guilty as the wicked flee when no man pursueth," I cannot hesitate to believe that he was guilty of the downfall of this young woman, and, applying the safe and sane rules as judges that we would not hesitate to apply as men, I think we should hold, as I firmly believe, that the corroboration is sufficient, and the verdict abundantly supported by the evidence, and should not, in this condition of the record, undo the work of a jury properly impaneled, properly charged, and which has received the verdict and approval of a district judge of large experience on the bench. For my part, I can never consent to the institution of such a rule. I can never consent to a holding which determines, in substance, that

a jury cannot find from circumstances the fact of a promise of marriage when this fact is, as I believe in this record abundantly, if not conclusively, established. Let it ever be understood that in all that I have written, while all is in sorrow and regret, that not one word is to be understood in disparagement of or as reflection upon my Associates. I accord to them the same singleness of purpose and the same honesty of opinion that I claim for myself.

It may be that I attach too much importance to the work and the opinions of this court and its high office. I would have it always to be the great tribunal which the Constitution ordained and provided it should be—an asylum for the oppressed whose rights have been invaded, and a safe harbor for the innocent improperly convicted, but at the same time furnishing ever and always an anchor both true and steadfast, holding securely the fundamentals of our Constitution and preserving the peace of society and the well-being of our citizenship.

I have felt so great an interest in the question that I have at this great and perhaps unnecessary length written my views in the hope that, like bread cast upon the waters, it may be returned to me after many days.

For these reasons I respectfully enter my dissent, in the hope that in some future and in some better day the views here expressed will come to be recognized as the law of this state.

On State's Motion for Rehearing.

HARPER, J. On November 9th of last year an opinion in this case was rendered by Presiding Judge DAVIDSON of this court, in which Judge McCORD concurred, reversing and remanding the case on the ground, in substance, that the verdict of the jury and judgment of the court were unsupported by the evidence, in that there was not in the evidence sufficient proof of corroboration. From that opinion, as the record shows, Judge RAMSEY dissented, filing at the time a lengthy dissenting opinion. Soon thereafter a motion for rehearing was filed on behalf of the state, which was submitted on oral argument by Hon. John A. Mobley, then Assistant Attorney General. On the 14th day of December thereafter Judge McCORD prepared an elaborate opinion on the motion for rehearing concurred in by Judge RAMSEY in which the state's motion was granted, the judgment reversed and set aside, and the cause affirmed. This opinion was not on that day handed down out of deference and respect to Judge DAVIDSON, who had written the original opinion, and who was, as we were advised, detained at home on account of sickness. Judge DAVIDSON not agreeing to the conclusion reached by Judge McCORD, the matter remained in this condition until after the resignation of Judge RAMSEY from the bench, and the case

comes to us for decision. This much we have thought proper to state in view of the condition of the record as it will appear in the reports. Judge McCORD'S opinion is as follows:

"At a former day of this term of court the judgment in this case was reversed and remanded. The opinion was written by Presiding Judge DAVIDSON, in which I concurred. Judge RAMSEY dissented.

"The state has filed a motion for rehearing on the ground that the majority opinion was in error in holding the evidence insufficient to support the conviction. The majority opinion held that the prosecutrix was not sufficiently corroborated, and that in order to convict a party of the crime of seduction it is necessary that the prosecutrix be corroborated both as to the promise of marriage and intercourse. The writer of this opinion has reached the conclusion that the majority opinion was wrong, and, having changed his mind with regard to this matter, in justice to himself feels it is due that he should give the reasons for such change.

"The crime of seduction is a statutory offense. It did not exist at common law. The master, guardian, or parent might bring a civil action for damages for loss of service by reason of his ward, servant, or child being debauched. The Legislature in 1858 passed an act making it a penal offense, in this state, for any man under the promise of marriage to seduce and debauch any female under the age of 25 years. It was also provided that the woman seduced should not be permitted to testify. After the Legislature passed an act permitting defendants in all criminal cases to testify, the Twenty-Second Legislature lifted the ban off the seduced female and declared that she should be a competent witness, but that her testimony would have to be corroborated by other testimony tending to connect the defendant with the offense charged. Before the passage of this act, we had but few prosecutions for this offense, due largely to the fact that the seduced female could not testify. The statutes defining seduction in the different jurisdictions differ somewhat. Some of them merely make it a crime to seduce and debauch an unmarried female of good repute or of previous chaste character, saying nothing of the means employed. Others make it a crime for any man under promise of marriage to seduce and have carnal intercourse with such a female. In other jurisdictions the offense consists in the act of persuading or inducing an unmarried woman of previous chaste character to depart from the path of virtue by the use of any species of arts, persuasions, or wiles which are calculated to have and do have that effect and resulting in her ultimately submitting her person to the sexual embraces of the person accused. See Cyc. vol. 35, p. 1320. In some jurisdictions the female seduced is not required to be corroborated. This corroboration in some

states, like ours, requires that the evidence of the prosecutrix shall be corroborated by other evidence tending to connect defendant with the offense charged. In other states she is required to be corroborated as to the promise of marriage, and, where corroboration is required, the rule seems to be as follows: 'The statute does not require the testimony of another witness, or direct and positive evidence, but the corroborating evidence may be supplied as well by facts and circumstances surrounding the transaction and otherwise established in the case. Nor need the corroboration be of such force as would prove the facts independently of the female's testimony. Where there is some testimony of another witnesses or other evidence supporting testimony on material questions in the case, it is for the jury to determine whether she is sufficiently corroborated.' See Cyc. vol. 35, p. 1363.

"The evidence in a seduction case to support a conviction is to be measured and governed by the rules of any other crime, and any rule that would require a departure from the ordinary rules of testing the sufficiency of the evidence or the amount of proof required, unless prescribed by the statute, would be out of harmony with the spirit of the criminal law. Now, the law provides in seduction, like any other crime, that any fact may be established by circumstantial evidence as well as direct. It simply lays down this rule with regard to this crime which would be applicable to any other case where the law made a witness an accomplice; that is, that no conviction can be had upon the testimony of the person whom the law denominates an accomplice, unless there is other evidence tending to corroborate the witness as to the offense committed. The statute does not say in what this testimony shall consist. It uses language that practically is used in all cases where the state relies upon the testimony of an accomplice. No different rule is authorized. Therefore, when we go back to see what the courts have said with regard to testimony that tended to connect the defendant with the commission of the offense, it simply means such facts and circumstances as will tend to show the defendant committed the offense and that the accomplice's testimony is true. It does not require that the accomplice shall be corroborated in every material particular. It does not require the court to single out this element of the offense or that element and then direct the jury that, unless the accomplice is corroborated on this issue or that issue, they will acquit. Every crime consists of different elements. Murder in the first degree consists of express malice and the killing. Now, if an accomplice should be placed upon the stand who testified both to the express malice and killing, has this or any other court ever directed that the jury will not convict upon the testimony of the accomplice unless he had been corroborated both

as to his testimony of express malice and of the killing? Or of burglary, has this court or any other court ever directed that, before a conviction should be had upon the testimony of an accomplice as to the burglary, he must be corroborated, both as to the breaking and as to the intent? We say no. The statute does not say that the prosecutrix shall be corroborated as to the promise of marriage and intercourse, but says that she shall be corroborated by other evidence 'tending' to show the commission of the offense. Mr. Webster's definition of 'tend' or 'tending' is: 'To stretch, extend, direct one's course; to be directed as to any end, object or purpose; to aim; to have or give a leaning.' Therefore we would gather from this article that if the circumstances lead toward, or tend toward, the defendant as the party who committed the offense, and show the truth of the prosecutrix, this would be all the law required.

"The writer of this opinion in the case of *Williams v. State*, 128 S. W. 1121, uses this language: 'It is insisted before this court that, because there was no evidence corroborating her upon this point, the conviction cannot stand. We do not agree to this contention; all crimes have in them different issues and different elements that are required to be proved in order to sustain a conviction. The statute is general that the accomplice must be corroborated by other testimony, tending to connect the defendant with the commission of the offense. The statute does not say what this testimony shall consist of. If the testimony other than that of the accomplice should make out a complete offense, it would not be necessary to use the accomplice's testimony. Hence the law wisely provides that the corroboration must tend to connect the defendant with the commission of the offense, and to require that every constituent element of the offense, as sworn to by the accomplice, must be corroborated, would be requiring of the state an impossibility.'

"In the case of *Myers v. State*, 7 Tex. App. 640, this language is used: 'The authorities are not agreed as to amount and extent of corroboration required in order to warrant conviction on the testimony of an accomplice who, in the sense of the witness, is any direct participant in the crime, but with this we need have no concern, for the simple reason the statute has settled it by declaring the extent of the corroboration necessary. It is "other evidence tending to connect the defendant with the offense committed." We do not understand that this requires that the different matters testified to by the accomplice are to be supported, each one, by other testimony to the same isolated facts, but that it must tend to connect the defendant with the offense committed.' As said in *Am. & Eng. Enc. of Law*, vol. 1, page 583, the testimony of the accomplice need not be cor-

roborated on every material fact. So that, independent of his testimony, a conviction would be authorized, as this would in effect deny to the testimony of an accomplice all value.

"In the case of *Criner v. State*, 53 Tex. Cr. R. 174 [109 S. W. 128], we find the following: 'We have set out the testimony at this considerable length and have stated practically the testimony tending to connect appellant with the burglary. The rule is, of course, well settled that, before a conviction can be had upon the testimony of an accomplice, there must be other proof tending to connect the person charged with the commission of the offense. Just how strong, in every case, this corroborating testimony shall be, must depend to a large extent upon the facts of each particular case. We believe that, while not strong, it could not in fairness be said that there was no corroborating testimony, or that it was so weak, indefinite, or immaterial as to justify us in holding, in view of the verdict of the jury, that it was wholly lacking.'

"In the case of *Jackson v. State*, 40 S. W. 998, in a case of incest, this court says: 'We have examined the statement of facts carefully in order to ascertain if the testimony of the accomplice, Mattie Jackson, was corroborated by other evidence tending to connect the defendant with the commission of the offense. The evidence in this regard shows that appellant alone had access to prosecutrix and opportunity to have had carnal intercourse with her. The record abundantly shows that he had such opportunities. The testimony shows, by two witnesses, that she was enciente; and her grandmother testified that she was so far gone in pregnancy that she took her away from school. Mattie Jackson testified that she was pregnant, seven months gone, and that she had never had intercourse with any other person except the appellant, who was her brother. We think the testimony tends to connect appellant with the commission of the offense.' See the same rule in the case of *Bales v. State*, 44 S. W. 517; *Faulkner v. State* [53 Tex. Cr. R. 258], 109 S. W. 199. And in fact we believe that the rule laid down in the *Myers Case*, supra, has, with regard to every other crime other than seduction been followed, and that this court has never in any crime other than seduction intimated as to what issues the prosecutrix had to be corroborated. There are some expressions in the opinions of our court on the subject of seduction that have led the profession into the belief that this court requires the state to prove, and the trial court to charge the jury, that before a party can be convicted of seduction the testimony of the prosecutrix will have to be corroborated both as to the promise of marriage and intercourse, and which have led toward the laying down of the rule that the corrobora-

tion as to these issues would have to be of the same character of proof and of the same strength and cogency as the accomplice's testimony, both as to the promise of marriage and the intercourse; and, by reason of these expressions, considerable confusion has arisen, and trial courts have been somewhat confused as to how to charge the jury in a case of seduction. We are at a loss to know why a different rule should obtain in seduction cases from that regarding any other crimes.

"Let us notice some of the decisions of this court where a rule has been attempted to be laid down as to the measure of corroboration of the accomplice's testimony. The first case that our attention has been called to where this court intimated that the prosecutrix had to be corroborated, both as to the promise of marriage and intercourse, will be found in the case of *Gorzell v. State*, 43 Tex. Cr. R. 82 [63 S. W. 126], in which this language is used: 'What has heretofore been said leads up to another proposition relied on by appellant, to wit, that the evidence does not sustain the verdict of the jury. In this connection, we believe appellant is correct. Prosecutrix, as stated before, testified as to the promise of marriage. The only evidence that can be said to support her on this point is one witness, to the effect that appellant said on one occasion that he was going to marry her, and it was further shown he was in the habit of associating with, writing to, and calling her "sweetheart." If it be conceded that an agreement to marry existed between them, still it is not shown, outside of prosecutrix's own testimony, that appellant had carnal intercourse with her at any time. * * * The fact that appellant had carnal intercourse with prosecutrix is a vital issue in this case, and to obtain a conviction she must be corroborated upon this point.' Now, what do we gather from this opinion? First, that the witness must be corroborated. How? By other testimony that defendant had had carnal intercourse with prosecutrix. In the *Spenrath Case*, 48 S. W. 192, this court held that the evidence was insufficient to sustain the conviction because there was no corroborating evidence as to the promise of marriage, and reversed that case. In *Woolley's Case*, 50 Tex. Cr. R. 214, 96 S. W. 27, this court held the evidence insufficient because there was no testimony corroborating the prosecutrix as to the marital contract and as to the act of intercourse. This court says, in that case: 'It is necessary in a case of this character that the prosecutrix, who is an accomplice, be corroborated as to the marital contract and the intercourse with the alleged seducer.' We have searched the books without avail to find where any such rule had ever been laid down by any court in any criminal case. In *Howe's Case*, 51 Tex. Cr. R. 174 [102 S. W. 409], while this case was affirmed by Judge Brooks, Judge

Davidson dissented, and in his dissent used this language: 'This court has uniformly and invariably held, wherever the question has arisen, that she must be corroborated, first, as to the act of intercourse on the part of the accused, and, second, as to his promise to marry her, as a predicate for the intercourse'—and calls attention to the case of *Spenrath*, supra, in support of this proposition. We have not found any case behind the *Spenrath Case*, supra, that had ever attempted to lay down a rule as to the quantum, amount, or value of corroboration. The only rule that has ever been established is that the corroborating evidence must be such as tends to connect the defendant with the offense charged; but here the court not only goes to the extent of saying in what she shall be corroborated, but rather leads to the conclusion that the corroborating evidence on these two issues must be of the same character of testimony as that of prosecutrix. If on the two vital issues she must be corroborated to the same extent as her own testimony would establish, then why use her at all? The rule to our mind is wrong. The decisions of this court, we think, wherever it has held that the proof of the accomplice must corroborate the prosecutrix as to the promise of marriage and intercourse, and that the court should so direct the jury in the trial of the case, should not be followed. In the case of *Wright v. State*, 31 Tex. Cr. R. 354 [20 S. W. 756, 37 Am. St. Rep. 822], is laid down, we think, the correct rule. Corroborative evidence need not be direct and positive or such evidence as is sufficient to convict independent of that of the prosecutrix, but simply such facts or circumstances as tend to support her testimony and which satisfy the jury she is worthy of credit. Or, stated in another way, if the supporting testimony tends to show that the defendant committed the offense, and shall satisfy the jury that she is worthy of credit and is telling the truth, then the law is satisfied, and this was practically so held in the *Beeson Case* (decided at this term and not yet officially reported [130 S. W. 1006]). In the case of *People v. Gumaer*, 80 Hun, 78 [30 N. Y. Supp. 17], the following is in substance held: 'That on a trial for seduction under a promise of marriage evidence of defendant's attention to prosecutrix in the character of a suitor is sufficient corroboration of the testimony of prosecutrix.' In the case of *Armstrong v. People*, 70 N. Y. 38, that court held that the evidence of the accomplice was corroborated when the state showed by proof of circumstances which usually attend an engagement to marry—such as exclusive attention to the female by defendant and the seeking and keeping her society in preference to that of other women. In Iowa, under a statute similar to ours, in the case of *State v. Crawford*, 34 Iowa, 40, it was held that corroborative testimony need not be of a character that goes directly to the commis-

sion of the offense, but such as will tend to strengthen and corroborate the testimony of the injured person and to point out the defendant as having committed the offense. In *State v. Reinheimer*, 109 Iowa, 624 [80 N. W. 669], it was held that the fact that the parties kept company, and acted as lovers usually do and other like circumstances, are sufficient corroboration of the evidence of prosecutrix required by statute. In *State v. Smith*, 84 Iowa, 522 [51 N. W. 24], it was held that direct corroborative evidence of the seductive arts or promises to obtain intercourse is not required, nor need the corroboration necessarily be as to all the elements of the offense, and where the testimony of prosecutrix shows the offense, and to connect defendant therewith she is corroborated by witnesses showing intimacy and courtship between the parties as well as actual intercourse, the case is for the jury, and it is error to direct a verdict for defendant.

"We deduce from the law that the prosecutrix is corroborated whenever there are any facts or circumstances that tend to show that the defendant committed the offense, and that, whenever the court attempts to enlarge upon this rule by laying down a rule as to what particular issues of the case shall be corroborated, it is in error. Now, in this case the prosecutrix testified to the intercourse and the promise of marriage; the defendant was the only man who was shown affirmatively to have kept her company within the period of nine months prior to the birth of the child with one exception, and he was with her at a time that would render it impossible for him to be the father of the child; she lived close to defendant's brothers and mother; she was an orphan girl; defendant had been waiting on her for two years, he went with her to church, to prayer meeting, to social gatherings, public picnics, and she was the associate and companion of his sister; she lived part of the time with his family; she bore a splendid reputation; she was regarded as of a chaste and pure character; the testimony does not disclose a suspicion against her, and she was a fit associate of those that were the dearest to him, and but one young man had ever been seen in company with her other than the defendant, and he went with her home on one occasion. Defendant had almost, we might say, the exclusive opportunity to commit this offense. After it became noised abroad that the young lady was eniente, he jokingly remarked that he ought to buy a mit for his boy. When it became known in the country, he fled, went away, and was gone a year. The officers searched for him and could not find him. The testimony excludes the idea that any one else was the author of her ruin. The testimony shows that the defendant not only believed her to be pure, but he knew it, for, did he not

know it, he would not have put her under the roof with his family, nor allowed his sister to associate with her. Even when she went on a visit once six miles off, defendant's own sister went in a buggy after her. We think these circumstances tend most strongly to corroborate the prosecutrix that the defendant was not only the author of her ruin, and that he was not only engaged to her, but that he had intercourse with her under the promise of marriage. The very fact that he was her exclusive company for two years, is a circumstance corroborating her upon the question of marriage. The very circumstances exclude the idea of any one else having the opportunity, and his close companionship and association with her shows that he was the author of her ruin. The evidence to our minds abundantly shows the guilt of the defendant, and the evidence tending to corroborate the prosecutrix is all that the law requires. Nor is the court called upon to direct the jury in what she shall be corroborated, or the amount and value of the corroboration. The defendant is guilty. The law has been satisfied.

"Let the motion for rehearing be granted, the judgment of reversal be set aside, and the case affirmed. McCord, Judge."

We have carefully read all the opinions prepared in the case, including an elaborate opinion recently prepared by Judge DAVIDSON, in which he maintains with great force and ability the views originally entertained by him. In view of the differences between the members of the court as originally composed, we have ourselves invited argument on the state's motion, and have, in the light of such argument and the opinions theretofore prepared, and after a careful inspection of the record, come to the conclusion that Judge McCORD'S opinion correctly states the facts, is a correct statement of the law, and should be as it is hereby in all things approved and affirmed.

There is no complaint of the trial court's charge. That he properly submitted the question of the corroboration of the witness Katie Weddle is admitted. Under our system the jury is the judge of the credibility of the witnesses and the weight to be given their testimony. The jury found that the witness was corroborated, and we are not disposed to disturb their finding on a question of fact.

It is therefore ordered that the motion of the state be and the same is hereby granted, the judgment of this court heretofore reversing and remanding the cause is set aside, and the judgment of conviction is hereby affirmed.

DAVIDSON, P. J. (dissenting). It is urgently insisted by the Assistant Attorney General, joined by Mr. Lattimore, the district attorney of the judicial district from which this appeal comes, in a motion for rehearing filed by the state, that this court is in er-

ror in reversing the judgment of the lower court. After a careful review of the record, I cannot agree with the views urged in the motion. To affirm the judgment would be to hold that no corroboration is necessary in a seduction case, thereby usurping the power of the lawmaking department of the state and overthrowing and destroying a plainly written statute. This I cannot do and ought not to undertake. The following language occurs in the written argument for the state, to wit: "If the opinion of the majority of this court stands as rendered in this case, it will undoubtedly undermine and sap the strength of the law which was designed and intended to safeguard the homes and its dearest and most important interest."

This, to our minds, when construed in the light of the statute defining seduction and the one fixing the status as to the evidence of the alleged seduced female, is not only quite remarkable, but is fully an astounding proposition. This court had nothing to do with framing the definition of the offense, or fixing the character of quantum of evidence necessary to convict. This is a legislative question as much so as is the defining of any or every other offense and the annexing of penalties. This statute only proposes to punish for the seduction of an unmarried female under the age of 25 years. It does not provide nor intimate a punishment of any female above the age of 25 years, married or unmarried, although she might be a constituent member of the family and as much entitled to the protection and safeguards thrown around the home as is a woman under 25 years of age. It does not protect the married woman, although she be under 25 years of age. Nor does it undertake to throw any safeguard around the home as such, either as to its dearest or its most important interest. Nor do we understand that by following the plain letter of this legislative enactment this court will be destroying the safeguards of homes and their most important interest, nor would we thereby undermine or sap the foundations of society. To usurp legislative authority would be far more detrimental in the direction of undermining and sapping the strength of the law and in the destruction of the safeguards of the home and their dearest interest. This law of seduction, like every other statute defining a public wrong, is for the protection of society, and not so much for the protection of the individual, and we could with as much propriety be called upon to change, enlarge, or modify the law of murder, rape, arson, burglary, robbery, etc., so as to punish, whether or no, a person charged with one of those offenses. To do so would give to this court the legislative power which it does not and cannot, under the Constitution of this state, possess, and it would destroy every vestige of safeguard which the law and Constitution throws around a person charged with crime.

While it is our duty to protect society in the manner pointed out by law, yet our duty is equally as plain and urgent to protect one charged with crime against an unfair and illegal trial or a wrongful verdict. He is as much entitled to have his rights safeguarded and fully protected by this court, whenever called upon to do so, as it is our duty to protect every other member of society. This constitutes the certainty which is said to be the glory of the law. The criminal laws of this state are not laws of vengeance and were not made either to assist in individual revenge or to encourage sympathy in behalf of the person injured. If the individual has been injured in person or property, he or his representatives can find remedy under laws and statutes affecting private rights and remedies. The Constitution of this state has carefully provided for keeping separate the three departments of government—executive, legislative and judicial. This is done, not only in behalf of individual liberty, but to insure the constitutional permanency of our state and form of government. Whenever the time may come when this provision of the Constitution can be disregarded, the Constitution with this wise provision will become a dead letter.

While this provision of the Constitution is made for the protection of both individual rights and the rights of the state, every article of the Bill of Rights is made for the protection of the individual against aggression by the state in the exercise of unlawful powers by any of its departments. We are not willing to give to any law a different construction from that which its context, words, subject-matter, and spirit shows to have been the legislative intention in framing it, for the purpose of enforcing the conviction of a man upon trial simply because some unfortunate victim may excite our sympathy. Pen. Code 1895, arts. 1, 3, 9; White's Ann. Pen. Code, §§ 4, 5, 6, for collated cases. The protection of individual liberty is the duty of courts, and not until some act done by him contrary to the penal law for which he is being tried, and shown by legal evidence, can he lawfully be deprived of such liberty by the infliction of such penalty.

While every one should sympathize with an unfortunate girl who may be the victim of some one's lust, such sympathy cannot be had at the expense of plain judicial duty to such an extent as to cause us to place a construction upon a statute, neither intended, nor provided by the lawmaking power. The statute of seduction has been construed too often by this court to warrant us in giving it a construction other than that heretofore given it. The court would certainly be, if not already there, upon dangerous grounds if a different construction as to well-settled law has to be given every time a case comes before the court to meet some

particular exigency. I fear that we have been drifting rather a long way, and that it may be necessary to take our bearings occasionally, and maybe to call a halt.

"Seduction" is defined as follows: "If any person, by promise to marry shall seduce an unmarried female under the age of twenty-five years, and shall have carnal knowledge of such female, he shall be punished by imprisonment in the penitentiary, not less than two, nor more than ten, years." Article 967, Pen. Code. It follows from this definition that five material facts are necessary to be proved by the state in order to secure a conviction, and the failure to prove any one of these must result in an acquittal:

First. The woman alleged to have been seduced must have been, at the time of the carnal act, unmarried. *Mesa v. State*, 17 Tex. App. 395. Otherwise she cannot be the subject of seduction under a promise of marriage. Same case. See, also, *Ferguson v. State*, 71 Miss. 805, 15 South. 66, 42 Am. St. Rep. 492; *State v. Reed*, 153 Mo. 451, 55 S. W. 74; *Norton v. State*, 72 Miss. 128, 16 South. 264, 18 South. 910, 48 Am. St. Rep. 538.

Second. She must have been, at such time, under 25 years of age. This is as material and as absolutely important as the age of females in cases of rape, where conviction is sought in the absence of force upon a female under 15 years of age.

Third. She must have been chaste, but morally corrupted, by the acts or words of the party alleged to have seduced her to the extent that she would have a less regard for her duty as to the virtue of chastity, than she would have had, but for the blandishments and wiles resorted to by him. However, as the law presumes every woman to be chaste, the prosecution is not required to prove her chastity. The want of chastity is a defensive matter which may be shown in defense of the accusation. The very fact of the law indulging in this presumption of chastity, and the further fact that every one charged with crime is presumed innocent until the contrary is shown, the burden is placed upon the state to prove that she has been seduced—that is, morally corrupted—by the acts or words or conduct of the person accused to that extent that she would have a less regard for her duty as a chaste and virtuous woman than she would otherwise have had. *Putnam v. State*, 29 Tex. App. 454, 16 S. W. 97, 25 Am. St. Rep. 738; *People v. Brewer*, 27 Mich. 134; *State v. Wenz*, 41 Minn. 196, 42 N. W. 933. "The term seduction is used in the sense in which it is commonly understood." Article 968, Pen. Code. It will be seen, therefore, that the Legislature did not attempt to give to the word "seduction" a meaning other than is given to it by common understanding, or as the statute says, as it is commonly understood, but, having used it in connection with the words "carnal knowledge" and as

one of the constituents of the offense, due regard and consideration, as intended by the Legislature, must be given to it, and proof of this fact can be no more dispensed with than can the act of carnal knowledge, or the other constituent elements of the offense.

Fourth. She must have had carnal intercourse with the person accused of the offense. This must be the effect and result of his seductive influences and preceded by promise on his part to marry her, and she must yield her consent to the carnal knowledge from this promise of marriage alone and from no other cause or reason. This is a positive requirement of the law. *Barnes v. State*, 37 Tex. Cr. R. 320, 39 S. W. 684.

Fifth. There must be a promise of marriage to her by the party accused, and, as before said, this must precede the act of carnal knowledge, and must not only induce the act, but be the exclusive reason of her consent to the act. *Barnes v. State*, supra, and cases there cited.

The proof of these five facts are necessary and absolutely essential to establish the corpus delicti; in other words, to make a complete offense, such as is defined by law. These constitute what our statute calls the "offense charged."

While the Legislature, in its wisdom, has permitted the injured female to testify, it has restricted the extent of her testimony to the extent that no conviction can be had alone upon such testimony. "In prosecutions for seduction, under the provisions of the Penal Code, the female alleged to have been seduced shall be permitted to testify; but no conviction shall be had upon the testimony of the said female, unless the same is corroborated by other evidence tending to connect the defendant with the offense charged." This language is found in article 769, Code Cr. Proc. The effect of this statute is to require that the female be corroborated by testimony other than her own tending, not only to identify the defendant as the guilty party, but also as to the commission of the "offense charged." In cases of seduction one includes the other, and the testimony which goes to make the offense must necessarily, at the same time, identify the guilty party if such testimony be true. The law of accomplice as defined in article 781 of the Code of Criminal Procedure has no relation, as there understood, to the law of seduction. The term "accomplice" carries with it and implies guilt, and, because of this fact, the law impeaches the testimony of the accomplice and prohibits a conviction upon his testimony alone. The law of seduction does not proceed upon the idea that the alleged seduced female is a *particeps criminis*, but regards her more in the light of a victim who has been overreached, seduced, and debauched by and through deceptive wiles and promises of the seducer and one who would not have surrendered her

virtue but for such deception. This aids the legal presumption of chastity. But the fact remaining that she is no longer a chaste woman, and as being one who has fallen, without reference to the means used—she having consented—imputes to her that want of moral stamina which would prevent her from being governed by revenge or resorting to any means by which her social condition would or could be bettered. The law regards the danger in which any man might be placed, though entirely innocent, if the same weight and credit be given to the testimony of a woman of that kind as to one whose moral character had not been corrupted to such extent as to cause her to part with her virtue. Hence the law requires corroboration as a protection against her wiles, interests, or revenge or other motive.

So much for the law.

Let us apply the facts as shown by the record. From an examination of the statement of facts we fail to find evidence tending to corroborate the witness Katie Weddle, either as to the promise of marriage, the carnal intercourse with the defendant, or the seductive acts, or words necessary to corrupt, leading up to the act of carnal intercourse. There is proof, undisputed, of carnal knowledge with some one. The child born to her is evidence of this fact. But with whom? Not with the defendant, because the quantum of evidence fixed by law to establish this fact has not been shown. The theory of the state, however, seeks by a process of exclusion and elimination to raise the question of opportunity as a circumstance tending to corroborate Katie Weddle's testimony, and by such process exclude the idea that any person other than defendant is the father of the child. It will be difficult to find anywhere in the books a well-considered case which holds that opportunity alone is of such probative force as to afford the corroboration required by law. In every instance there will be found in the record of cases other facts, such as letters, admissions, or preparations for marriage, or facts of like tenor going to support or in aid of opportunity. To hold opportunity alone to be sufficient would be to overthrow the presumption of chastity in the woman and that of innocence in the man. It would be to write every woman a harlot, and every man a debauchee, regardless of the chastity of the one and the absolute innocence and purity of intention of the other, in the face of the legal presumption that the woman is chaste and the man innocent. It would be to assume that the human family is so loosely constructed and morally weak that the mere appearance of a man in a woman's presence, unseen by others, would result in carnal intercourse. This court ought not to subscribe to so monstrous a doctrine. Upon the contrary, it should cling to those sound and wise presumptions of law which write that every

woman is presumed to be chaste, and every man innocent, until the contrary appears by legal and competent evidence.

Now what is claimed by the state as corroborating facts? The witness Katie Weddle alone testifies to the act of carnal intercourse and the promise of marriage. To corroborate her testimony as to the act of intercourse, the state relies: First, upon opportunity; second, the declaration of the defendant to the witness Ed Elliott; third, as to the flight of the defendant. These we will consider in the order presented and mentioned.

First. As to opportunity: Katie Weddle testified: "I lived at Will Nash's two years. Me and Bob Nash were sweethearts two years. During that time he came to see me, and was my companion, and waited on me. During that time, there were few others that went with me once or twice. These were Will Burns, Calvin Burns, Hugh Easton, and Ezell Scott." In addition to those mentioned, it appears from the evidence of other witnesses that other young men visited her, to wit, Ed Elliott and Jim Beville, and probably others, once or twice. Thus we see the opportunity was not exclusively by any means with the defendant. It is true that neither of the young men were with her as often as was the defendant, but this is immaterial. The opportunity was presented to them and each of them. There is one very cogent fact presented by Katie Weddle's testimony. The defendant was her companion for two years, and during the whole of that time, though the opportunity was frequently presented, he made no proposition of carnal intercourse to her until the time spoken of by her in her testimony, yet, according to her testimony, "he did not seem to be very timid to me at all." Upon several different times and occasions prior to the night of the act of carnal intercourse as testified by her, he had hugged her, and she had hugged him several times, and upon three different times before any offer of marriage she had sat in his lap. These facts, together with the opportunity of others, taken in connection with the testimony of all the witnesses, both for the state and the defendant, as to the good character of defendant both for honorable deportment and gentlemanly conduct, is not to be considered as a corroborative circumstance. Another fact may here be considered as shown by the testimony of the witness Katie Weddle. For about two months prior to the night that she states the act of intercourse occurred, there had been an estrangement between her and defendant. They had ceased to be sweethearts, and their attendance upon the social function on that particular night seems to have been the first time they had been together during this period of estrangement; and it is further to be noted, under the statement of facts, that there is no evidence of any offer upon his

part of marriage at any time until they met by agreement at the garden after she had slipped out of the house. Taking these facts in connection with her testimony heretofore quoted and the manner of her meeting the defendant does not lend probative force to the question of marital contract as being of that character that shows, if appellant seduced her, that it was done as contemplated by the statute, and certainly does not show corroboration. No witness testified to the assignation at the garden, but prosecutrix, or that they were together that night.

The declaration of the defendant to Ed Elliott: Ed Elliott says: "I saw the defendant in town here one day before the child was born, and me and him was talking about a little baseball mit and shoulder, and something was said about he ought to get that for his boy. Something like that was said. I don't remember exactly how it was, but there was something to that amount." And upon cross-examination he said: "I went with her (Katie Weddle) one time, but that was after Bob quit going with her. I went with her to a negro concert. I don't know whether or not Bob quit going with her about May, 1906, but I know that he was not going with her when I went with her. It was some time in the spring or summer after the negro school was out, and I suppose it was in 1906, I don't remember. If he was ever with her at all after I went with her, I don't remember seeing him. That was in the spring before the child was born. I was joshing him about the baby, and there was something said about the mit; I think I brought it up myself. I might have been the one that suggested that he buy one for his boy, I won't be certain. We was talking, and he said, 'yes, he ought to buy it.'" The child was born on the 15th day of March, 1907. To give any weight to this testimony at all, we must first assume that the "mantle of Elijah" had fallen on this witness. What boy was he talking about? At that time Katie Weddle had not given birth to any child. Its sex was not and could not have been known. There is nothing in this conversation which in any way, without a wonderful stretch of imagination, connects the defendant with the subsequently born child of Katie Weddle. Her name was not mentioned. She was not in sight, so far as the testimony shows or tends to show, nor does it appear from anything in the record that either Elliott or any one else knew that the defendant was charged with the alleged offense until after this child had been born. The complaint had evidently not been lodged against the defendant, because at that time he was, according to the testimony of this witness, upon the streets of the county seat; while the sheriff testified that he made search for the defendant "on this charge of seduction" and could not find him. It is true, Elliott says, "I remember in the sum-

mer of 1906, when the complaint was made against him for seduction"; but this was evidently a mistake on his part, as no complaint was made at that time, as we gather from the record. This testimony can have no bearing whatever, we think, on this case, and cannot be considered as a confession of the defendant's guilt. In fact, it ought not to have been admitted.

Third. As to the flight of the defendant: The evidence of flight is not sufficient. Independently of Katie Weddle's testimony, there is nothing in the record suggesting the idea that the defendant knew anything of her seduction, or that any offense had been committed or that officers were seeking to arrest him. Granville Matthews, the constable, says: "I went out to arrest Bob Nash. I did not find him. I first went to Will Nash's, and asked about him, and he said he was over at the old man's, and I went over to his father's and asked him where he was at, and the information that I got was that he was over in some woods, and I went over there and hunted the woods out for him and could not find him. I hunted for him about two hours, I guess, in the big woods in east of Mr. Nash's; but I could not find him. I kept a lookout for him until he was finally surrendered, which must have been probably a year." The sheriff, Jim Frazier, says: "As such officer I made search for Bob Nash, the defendant in this case. I was not able to find him. I kept up the search about a month or three weeks and was not able to catch him." The evidence of flight is very meager and scarcely rises to the dignity of a circumstance. How or where this search was made does not appear. True, it appears that for two hours of the time one of the officers was in defendant's neighborhood, and searched through the woods, and, upon inquiry as to the whereabouts of the defendant, was informed that he was in the neighborhood. Charley Cawley says: "Bob left that community about the time this complaint was sworn out. It was probably a month or so before he left since I had seen him with her. It might have been three months. After the complaint was filed, he left the country, and it was something over a year after that before I saw him again. I know that he went off hunting. And when he came back, the trouble was on."

Neither flight nor confession are admissible to prove the corpus delicti. This, or in other words the offense, must be first shown, and not until then is evidence of such facts admissible. When the corpus delicti has been established, however, in the manner required by law, then the testimony of confession and flight become admissible for the purpose of showing the defendant's connection with the offense charged to have been committed. Here, however, the state is endeavoring to prove its whole case by such circumstances. We must not be understood as holding that circumstantial evidence may

not be had for the purpose of showing guilt; but what we do hold is that, before evidence of flight and confessions can be resorted to, the body of the offense must first be shown. But here we would say that we fail to find any evidence of any confession in this record, and the mere fact of flight may be well attributable to other things or reasons as it would be to the question of seduction. There are many things that actuate men to flee when they may not be guilty, but we deem it unnecessary to go into a discussion of those matters. Katie Weddle alone testifies as to the carnal knowledge and the promise of marriage. Both of these, with the other constituents before mentioned, are necessary to make out a case of the offense charged. As the facts now stand no offense has been legally shown to have been committed, because the law requires that, before her testimony has any probative force whatever, there must be testimony tending to corroborate her. How corroborate her? Both as to the "offense charged" and the identity of the offender. Here we have her, if corroborated at all, only as to the act of carnal intercourse. Carnal intercourse alone does not make the offense, without the necessary proofs of promise of marriage, any more than proof of marriage without the carnal knowledge. We would be as much justified in permitting a conviction to stand where the evidence showed a promise of marriage with no carnal knowledge, as we would be where carnal knowledge alone is shown without proof of the promise of marriage. There is not one syllable of corroborative evidence in any way tending to show promise of marriage, or the meeting at the garden.

In some jurisdictions, every material fact must be corroborated, while, in others, it is sufficient if the corroboration extends to a promise of marriage, and to the intercourse. In every jurisdiction, however, it is held there must be corroboration to the promise of marriage. As is said in *Rice v. Com.*, 100 Pa. 28: "In order to warrant a conviction of seduction under the promise of marriage, there must be evidence to corroborate the testimony of the seduced female that there was a promise to marry. The statute defining the offense is explicit, and the rule is not changed by the fact that a defendant can now testify in his own behalf." And "mere proof that the defendant had opportunity to employ seductive arts does not constitute evidence corroborative of the prosecuting witness." See *State v. Smith*, 54 Iowa, 743, 7 N. W. 402; *State v. Aarah*, 55 Iowa, 258, 7 N. W. 601; *State v. Painter*, 50 Iowa, 317; *State v. Hill*, 91 Mo. 423, 4 S. W. 121. "On the trial of an indictment for seduction under a promise of marriage, the promise cannot be proved by evidence of attentions, or the expressions of contrition for the seduction, and by a promise made after the seduction to marry the girl after a time." *Cole v. State*, 40 Tex. 147; *Rice v. Com.*, 102 Pa.

408; *People v. Clark*, 33 Mich. 112; *People v. Millsbaugh*, 11 Mich. 278.

The testimony of the witness Katie Weddle does not, to our minds, establish the fact that it was exclusively the promise of marriage and her reliance thereupon which caused her to yield to the acts of intercourse. See *Simmons v. State*, 54 Tex. Cr. R. 619, 114 S. W. 841; *Putnam v. State*, 29 Tex. App. 454, 16 S. W. 97, 25 Am. St. Rep. 738. She, the defendant, and several others had just returned in a wagon from an ice cream supper. She alone testifies to these facts. Outside of her evidence there is not a fact tending to show she ever even met appellant at the garden at night. This is where promise of marriage was made, if ever made. When they arrived where she was staying, she and the defendant got out of the wagon. This was between 10 and 11 o'clock at night. She was 22 years of age in December, 1909, and he was 22 September 14, 1909. She says: "When we got to the door, he said he wanted to talk with me and asked me if I would go with him out there (the garden). He said he would wait for me, and I went in the house, and put up my fan and handkerchief and some other things, and went in and turned down the cover on my bed. The reason I went in the house, I knew they was all awake, and I went in there and slipped out when I came out. I didn't want them to know I left the room at all. I pulled off my shoes and went out in my stocking feet. I did not change any of my clothes, and did not take off any of my clothes, except my shoes. 'When I came out, he was out by the side of the garden waiting for me, and asked me to sit down, and I sat down, and we talked on a while, and he asked me to submit to him, and he promised to marry me. I don't know that I can remember every word that he said to me, but he asked me if I still loved him, and I told him yes (which I did), and he asked me to submit to him, and I would not do it, and he said, 'Well, you know I would not harm a hair on your head.' He says, 'You know I would not betray you.' He says, 'You know I would not harm you for anything on earth.' He just asked me if I would let him have it, and I didn't want to at first, and he kept insisting, and I finally agreed. I asked him what would he do. I said, 'People will be finding this out.' He says, 'No, they won't know anything about it.' He says, 'We mean to get married, and we will get married before anybody knows anything about it.' He says, 'There will be no harm done, and nobody knows it.' I says, 'Well, maybe not.' I did not have any feeling or desire for sexual intercourse right at the time I consented, and did not have any desire for it before I consented. He had his arms around me while we were sitting down. I put my arms around him, and he put his arms around me. We sat there in that position but a very few minutes." Then again, "I had no desire whatever to have sexual in-

tercourse before we laid down on the ground." The testimony here detailed is absolutely inconsistent with the idea that she yielded her virtue alone upon her belief in the promise of marriage. Every fact detailed by her points to the conclusion that she prepared for the act of carnal intercourse. The crafty manner in which she sought to deceive the people of the house into the belief that she had gone to bed, the secret and clandestine manner in which she left the house, having first pulled her shoes off, savors more of an assignation than it does of one expecting a promise of marriage. These facts, when taken in connection with the testimony of Mrs. George Willis, show an intent and purpose on Katie Weddle's part to place the defendant in a position where he would be compelled to marry her. Mrs. Willis says: "She (Katie Weddle) told me that if she could not get Bob Nash one way she would another." This testimony of the prosecutrix smacks more of a bargain and barter than it does of a surrender of virtue in good faith upon a promise of marriage.

As was said in *State v. Reeves*, 97 Mo. 668, 10 S. W. 841, 10 Am. St. Rep. 341: "No one can, with any degree of plausibility, contend that a virtuous female can be seduced without any of those arts, wiles, and blandishments so necessary to win the hearts of the weaker sex. To say that such a one was seduced by simply a blunt offer of wedlock in future, in exchange for sexual favors in present, is an announcement that smacks too much of a bargain and barter, and not enough of betrayal. This is hire or salary, not seduction."

I can see no sufficient testimony in this record to support this conviction. Wherefore the motion for rehearing ought to be overruled. I therefore enter my dissent.

On Appellant's Motion for Rehearing.

PRENDERGAST, J. Soon after I came upon the bench, and some time before Judge HARPER delivered the opinion in this case on January 25, 1911, at his instance, I carefully studied the case, read the whole record and the various opinions that had been delivered therein. I then fully agreed with him in the opinion rendered by him. Since then, at the instance of the appellant, we have heard an able and forcible oral argument and written arguments on the appellant's motion for rehearing by his attorneys herein. Again, at Judge HARPER'S instance, I have carefully studied the case and have been more fully convinced than ever that this case has been properly affirmed, and that the opinions herein rendered by Judges HARPER and RAMSEY is the law and is applicable to this case, and that the case should in all things be affirmed.

There had been so much said and written in this case on the question of the corrobo-

ration of the injured party, Miss Weddle, and all on that question alone, that we were inadvertently led to say in Judge HARPER'S opinion that there was no complaint of the trial court's charge. In that, however, we were mistaken. Our attention has been called thereto, and all these various matters forcibly and ably presented by appellant's counsel. We have therefore carefully gone over all of them. We deem it unnecessary to state them or to particularly discuss them. Suffice it to say that it is our opinion that there is no reversible error presented by any of those questions.

Being thoroughly convinced and fully satisfied that the judgment of conviction in this case is correct, and that the injured party was fully and satisfactorily corroborated as required by law, it is our opinion that the appellant's motion for rehearing should in all things be overruled, and it is hereby so ordered.

DAVIDSON, P. J., dissents, deeming it unnecessary to further discuss the facts. The charge is not discussed. I therefore deem it only necessary to say under *Simmons v. State*, 54 Tex. Cr. R. 619, 114 S. W. 841, it is wrong.

MARUE v. STATE.

(Court of Criminal Appeals of Texas. Feb. 15, 1911.)

CRIMINAL LAW (§ 1094*)—APPEAL—RECORD.

In the absence of bill of exceptions and statement of facts, the only ground for new trial being that the verdict was contrary to the law and evidence, the indictment for robbery with a deadly weapon being regular, two counts thereof having been submitted to the jury by appropriate and correct charge, the jury having found him guilty and assessed his punishment at 40 years in the penitentiary, and the judgment being regular, there must be an affirmation.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2807, 3204; Dec. Dig. § 1094.*]

Appeal from Criminal District Court, Dallas County; Robt. B. Seay, Judge.

Earl Marue appeals from a conviction. Affirmed.

C. E. Lane, Asst. Atty. Gen., for the State.

PRENDERGAST, J. The appellant was indicted for robbery with a deadly weapon.

There is no statement of the facts or bills of exception. The only ground of the motion for new trial was that the verdict and judgment are contrary to the law and the evidence. The indictment is regular, charging robbery with a deadly weapon in three counts, two of which were submitted to the jury by an appropriate and correct charge of the court. The jury found the defendant guilty, and assessed his punishment at con-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

finement in the penitentiary for 40 years, and the judgment of the court is regular.

We therefore affirm the judgment.

CUNNINGHAM v. STATE.

(Court of Criminal Appeals of Texas. Feb. 15, 1911.)

CRIMINAL LAW (§ 1144*)—APPEAL—REVIEW—PRESUMPTIONS.

In the absence of a statement of facts, if the charge is applicable to any state of facts that might be made by the testimony under the indictment, it will be assumed that the trial court submitted all the law applicable to the case.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 3032; Dec. Dig. § 1144.*]

Appeal from Criminal District Court, Dallas County; Ed. Sewell, Special Judge.

G. W. Cunningham, alias Frank Bennett, was convicted of theft, and he appeals. Affirmed.

C. E. Lane, Asst. Atty. Gen., for the State.

HARPER, J. In this case the appellant was charged with the offense of theft from the person. He was tried, adjudged guilty, and his punishment assessed at seven years' confinement in the penitentiary.

There is no statement of facts in the record. In the absence of a statement of facts, if the charge is applicable to any state of facts that might be made by the testimony under the allegations of the indictment, on appeal it will be considered and assumed that the trial court submitted to the jury all the law applicable to the case. *Mundine v. State*, 50 Tex. Cr. R. 97, 97 S. W. 490; *Wright v. State*, 37 Tex. Cr. R. 146, 38 S. W. 1004.

The charge of the court presents the law as applicable to the offense charged in the indictment, and the judgment of the lower court is affirmed.

CLEMENTS v. STATE.

(Court of Criminal Appeals of Texas. Feb. 8, 1911.)

1. CRIMINAL LAW (§ 417*)—EVIDENCE—DECLARATIONS BY THIRD PERSONS.

No conspiracy being shown, it was improper to receive evidence of declarations, before the killing, by accused's brother and sister and another in his absence, tending to show intent to kill decedent; or declarations by the sister in accused's absence, and on hearing a pistol fired that accused had killed decedent.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 950-967; Dec. Dig. § 417.*]

2. CRIMINAL LAW (§ 1169*)—APPEAL AND ERROR—HARMLESS ERROR—ADMISSION OF EVIDENCE—CURE BY EXCLUSION.

Erroneous admission of prejudicial declarations by third persons was not cured by excluding them just before the argument, where

they were given prominence throughout reception of the evidence.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 3141; Dec. Dig. § 1169.*]

3. HOMICIDE (§ 169*)—EVIDENCE—CIRCUMSTANCES PRECEDING ACT.

Evidence that decedent was called out of a house just before being shot was inadmissible against accused in the absence of a showing that accused did, or was instrumental in, the calling.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 341-350; Dec. Dig. § 169.*]

4. CRIMINAL LAW (§ 719*)—TRIAL—IMPROPER ARGUMENT OF COUNSEL.

It is improper to permit the state's attorney to argue that there was a conspiracy to kill decedent, where accused was not shown to have been involved in one.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1669; Dec. Dig. § 719.*]

Appeal from District Court, McLennan County; Richard I. Munroe, Judge.

T. B. Clements was convicted of murder, and he appeals. Reversed and remanded.

J. W. Taylor and J. N. Gallagher, for appellant. C. E. Lane, Asst. Atty. Gen., for the State.

DAVIDSON, P. J. Appellant was convicted of murder in the second degree, and his punishment assessed at 15 years' confinement in the penitentiary.

The court submitted murder in the first and second degrees, manslaughter, and self-defense. This statement is made to show the view the trial court took of the evidence, and to avoid the necessity, as we view the matter, in making a statement of the facts.

1. The question in regard to the application for continuance and newly discovered evidence set up in the motion for new trial, will not be considered, inasmuch as these matters may not arise upon another trial.

2. Over the objection of appellant, Will Moore was permitted to testify that he was at the dance where the killing occurred, and was on the gallery about an hour and a half before the killing, and there heard a conversation between Chris Gibson and Jim Clements, the latter being a brother of appellant, and that these two men had only been at the dance a few moments prior to the occurrence of the conversation. The witness was then asked to repeat the conversation heard between the parties. Various and sundry objections were urged to this testimony, all of which were overruled, and the witness testified that Gibson said to Jim Clements, "We will do our work and go," and that Jim Clements remarked, "No; let's stay and dance awhile," and that the parties then went into the house; that it was Jim Clements who said, "No; let's stay awhile and dance," and it was Gibson who said, "Let's do our work and go." Objections were again urged to the admission of this testimony, and after the state had finished its testimony

and rested, motion was made to exclude the evidence from the jury in regard to the conversation and the occurrences between Gibson and Jim Clements. The court overruled this motion and appellant again excepted. It is further recited that the testimony remained before the jury all the time while appellant was introducing his testimony, and was referred to and inquired about various times during the introduction of evidence, and not until after all the evidence was in, and the case closed and ready for argument, did the court exclude the testimony from the consideration of the jury. In this connection, it was also shown that Jim Clements was a brother of defendant, Tebe Clements, and a material witness for the defendant; that he and Gibson both denied that any such conversation occurred as testified by Will Moore; and it was further shown that counsel for the state frequently asserted to the court that they expected to prove a conspiracy to kill deceased at the time and place at which he was killed, and to connect defendant with such conspiracy, and it was shown, as a fact, that no such evidence either showing or tending to show a conspiracy was ever introduced by the state, and it was further shown, as a fact, that counsel for the state, in argument of the case before the jury, claimed there was a conspiracy to kill deceased at the time and place at which he was killed, and that defendant, Chris Gibson, Jim Clements, and George Gifford and others were members of such conspiracy, and the appellant also objected to this argument on the ground there was no such evidence before the court. The court overruled the objection on the ground that the state had the right to argue its theory of the case before the jury. Appellant's objection and motion to exclude the testimony should have been sustained, and state's counsel not permitted to argue the matter of conspiracy under the recitations of this bill. The bill is signed without qualification by the judge. Appellant was in no way bound by this testimony. He was not connected with it. The state utterly failed to show a conspiracy between the parties, and the judge so certifies by signing and approving the bill. The court, however, in the charge to the jury withdrew from their consideration this evidence. It was said in Darnell v. State, 126 S. W. 1122: "The state had used this testimony both before the jury and in the argument of the case as the most damaging testimony against appellant attacking his theory of self-defense." It was further said in the Darnell Case: "We are of opinion that the withdrawal of it from the jury, under the circumstances, did not cure the error." Quite a number of cases are cited in the Darnell Case in support of the ruling. In McCandless v. State, 42 Tex. Cr. R. 58, 57 S. W. 672, it was held that the admission of evidence of a material char-

acter calculated to influence the jury is not cured by subsequent withdrawal from their consideration. And in Henard v. State, 46 Tex. Cr. R. 90, 79 S. W. 810, this language was used: "But it is said that the error of the court in admitting this testimony is cured by the subsequent exclusion thereof and withdrawal by the court of said testimony from the consideration of the jury. This question has been before the courts of this state in a number of cases. See *Railway v. Levy*, 59 Tex. 542, 46 Am. Rep. 269; *Miller v. State*, 31 Tex. Cr. R. 609, 21 S. W. 925, 37 Am. St. Rep. 836. We think the true rule on this subject to be: If the testimony is not of a very material character, it may be withdrawn by the court, and the error thus cured; but if, on the contrary, the evidence was of a material character, and was calculated to influence or affect the jury, the withdrawal of the same from their consideration would not heal the vice of its admission." It was said in *Railway v. Levy*, supra, "It is true that the admission of some kinds of testimony, which a jury is afterwards directed not to consider, may not be sufficient cause for reversal; but we are of opinion that where, in cases like the present, evidence which is calculated to arouse the sympathies of jurors against the opposite party, is erroneously permitted to go before the jury, it is ground for reversal." These extracts are from the Darnell Case, supra. If this is the rule in civil cases, by a much stronger course of reasoning it ought to be the rule in criminal cases. In our opinion the evidence admitted, and the course of conduct, and the manner of putting the whole matter before the jury, taken in the light of the argument, was of a most damaging nature to appellant's cause. If there had been a conspiracy between appellant, Gibson, and Jim Clements, this would have been rather a pregnant fact, damaging in its nature and far-reaching in its consequences, against appellant's issue of self-defense, and, if there was such conspiracy, it would eliminate as well the issue of manslaughter.

3. The state placed on the stand Miss Fannie McMorrough, and proved by her that she was present at the dance on the night of the killing, and was in the house at the time and heard the report of the gun. Thereupon the state asked her whether at the time the shots were fired she heard anybody say anything about the shooting. Various objections were urged to the question. The state, in reply to these objections, stated that the prosecution was going to show that Mrs. Hughes knew that Albert Harris was to be killed that night, and that she knew of a conspiracy existing at that time to kill him. Objections were urged to these remarks of the counsel, and the court instructed the jury not to consider the remarks and withdrew the remarks, but the court overruled the objections and permitted the

witness to testify that, just as quick as the pistol fired at the time of the killing, Mrs. Hughes, a sister of defendant, said, "Tebe has killed Albert, Tebe has killed Albert; my dear brother, my dear brother." The witness further testified that appellant had not come into the house at the time this language was used. Various objections were urged to this evidence, and before the introduction of his testimony began he urged the court to exclude this testimony from the jury, which motion to exclude was by the court overruled, and exception again taken. Said testimony remained before the jury during the introduction of appellant's testimony, and the appellant attempted to rebut said testimony by said Mrs. Hughes, who was a witness for appellant, and she testified denying that she used the language attributed to her by said witness, but in the course of her examination as to what did occur, which examination was rendered necessary by the admission of said illegal evidence and the failure to exclude the same before the appellant began the introduction of his testimony, said witness did state that she, on hearing the pistol fire, turned to her sister-in-law, who is the wife of appellant, and remarked that she, the said sister-in-law, knew what that was about. At the close of all the testimony, on motion of appellant this evidence was excluded, and the jury instructed not to consider it. This bill shows as a fact that appellant was not present and was not in the house at the time these remarks were made. The killing occurred outside of the house, and appellant had not entered the house after the homicide until these remarks had been made, and could not be in any way bound by them. This conversation and these statements were injurious in their effect, and occurred between other parties to which appellant was in no way a party, and was, therefore, inadmissible against him. This evidence ought not to have been permitted, and the objection to it should have been sustained at once, but the objection was not only overruled, but it was permitted to remain before the jury until the close of the case when appellant was forced to go into an examination of the entire matter to rebut as well as he could the statements. Then after the jury got the full benefit and effect of the illegal testimony, the court withdrew it. What was said in the previous section of the opinion, and the authorities there cited, are directly applicable to this question. *Darnell v. State*, 126 S. W. 1122.

4. Miss Ruth Payne was used by the state as a witness. She stated she was at the dance the night the killing occurred, and was in the house at the time of the shooting; that she heard the shots. The state thereupon asked her if after the shots were fired she heard anybody say anything. All sorts of objections were urged to this question.

The court overruled the objections, and permitted the witness to testify that as soon as the shots were fired Mrs. Hughes, a sister of the defendant, turned around and said, "I know what it means, I know what that is; Tebe has killed Albert, Tebe has killed Albert." This bill recites practically the same as the preceding bills. This evidence remained before the jury all the time during the introduction of appellant's testimony, and the court refused to exclude it until appellant moved for its exclusion when the testimony in the case had been closed. The court then excluded it. This was error, for reasons stated in the matters heretofore discussed.

5. Mrs. Will Moore was used by the state as a witness, and it proved by her that she was at the dance when the killing occurred; that she went there with her husband, Will Moore, who was also a witness in the case; that she had been there about an hour before the killing occurred; that that night she saw a man whom she has since learned was Chris Gibson and another man whom she has since learned was George Gifford, and that she saw Jim Clements that night; that Jim Clements was a brother of the defendant, and further proved that she knew Mrs. Hughes, and that Mrs. Hughes was a sister of defendant, and that a short while before the shooting she heard a conversation between Chris Gibson and Jim Clements in the danceroom, and the state asked her to detail the conversation. Various objections were urged to this. It was shown as a fact that appellant was not present in the room where said conversation occurred, but was outside of the room, and not in hearing. All these objections were overruled, and the witness testified that Chris Gibson said, "If there is not something doing right away we have got to be going," and that Jim Clements said, "If you say so they won't dance another damned set in this house to-night," and the said Jim Clements further said, "I am going down and get my (I understood him to say) twenty-two." Witness further testified that the said Mrs. Hughes then turned to the deceased, Albert Harris, at which stage the defendant objected to anything that was said by Mrs. Hughes to the deceased, Albert Harris, upon the same grounds as heretofore stated, and the court overruled said objections and permitted said witness to testify, and the witness did testify before the jury that Mrs. Hughes said to the deceased, Albert Harris, "Albert, they are going to raise a fuss with you," and that the deceased replied, "I didn't come here for any fuss;" that Mrs. Hughes then remarked, "They are all cowards; they won't do anything." Witness further testified that the deceased was right by her, standing with his arm against the door, and calling for the set they were dancing, and that he called the set out, and that about six minutes before he was killed some one whom she did not

know called him out, but that she thought the person who called him was Chris Gibson, but did not know, to which testimony appellant, on the same ground as before stated, objected, and the court overruled the objection, and permitted the witness to so testify before the jury. Said witness further testified that she was in the room where the dance was held at the time the shots were fired, when the deceased was killed, and that Mrs. Hughes was in the room at the time, and upon being asked what Mrs. Hughes did, if anything, at that time, the appellant again objected to the question and any answer that might be given on the ground heretofore given in this bill, and the objection was overruled, and the witness permitted to testify that when the shots were fired Mrs. Hughes jumped up and clapped her hands, and said to some one whom she supposed to be Mrs. Clements, wife of defendant, "Effie, I know what that means; Tebe has killed Albert. Poor Tebe!" and "that Mrs. Hughes then went crying and taking on." In this connection, it is further shown that during all the occurrences so testified about by said witness as hereinbefore recited, the appellant was not in the room but absent therefrom and on the outside, and did not come in until after the same was all over. Objections were again urged as before recited. The appellant, at the close of the state's testimony, and before he began the introduction of his testimony, moved the court to exclude all the foregoing evidence so admitted over his objection in order that the defendant might not have to introduce evidence in rebuttal or in an attempt to rebut the same in order that the same might be removed as early as possible from the consideration of the jury. All these objections were overruled. Again, at the close of the entire testimony in the case appellant moved the court to exclude this testimony before the argument began. The court then excluded it except the testimony that some person called the deceased out just a few minutes before he was killed. Objections were again urged. This was clearly error. These were acts and matters and conversations occurring in the absence of the appellant, and with which he was not connected, and the bill shows that he had no knowledge of them, and no participancy in them, and had no connection with them. It was not shown that he called out the deceased from the room or was in any way instrumental in so doing.

6. Another bill recites that the state having proved by the witness Will Moore, over the objection of the appellant, a certain conversation alleged to have occurred about 1½ hours before the killing between Chris Gibson and Jim Clements, as shown by bill of exception No. 2, which is referred to, and having proved by Miss Fannie McMorrough, over the objection of appellant, certain alleged declarations of Mrs. Alice Hughes, alleg-

ed to have been made at the very time of the killing, as shown by bill No. 3, which is referred to, and having proved by Miss Ruth Payne, over objection of the appellant, certain alleged declarations of Mrs. Hughes, alleged to have been made in the house at the very time of the killing, as shown by bill of exception No. 4, which is referred to, and having proved by the witness Mrs. Will Moore certain alleged acts and declarations of said Mrs. Hughes, alleged to have occurred in the house at the very time of the killing, and certain conversations alleged to have occurred between Chris Gibson and Jim Clements in the house a short time before the killing, and a certain conversation said to have occurred between Mrs. Hughes and deceased, Albert Harris, a short time prior to the killing, all of which is shown by bill of exception No. 5, and here referred to, and each bill so referred to is made a part of this bill to avoid repetition, and the state having rested its case, the appellant moved the court to exclude said testimony of said witnesses aforesaid, and all of the same from the evidence and to instruct the jury to disregard the same because the same and all of the same was admitted in evidence over the objection of the defendant, and because the defendant was shown not to have been present at the time of said occurrences and declarations, and because the defendant was not shown to have known thereof, and not shown to have been connected therewith or in any way made responsible therefor, and because said testimony involved the acts and declarations of third parties, and involved conclusions of the witnesses, and was hearsay, irrelevant, immaterial, and incompetent as evidence against the defendant. In this connection it was shown as a fact that defendant was not present at any of the times involved in said testimony aforesaid and there sought to be excluded, and that the state failed to in any way connect him therewith, or to show in any way that he knew of the same. This motion was made and overruled, and defendant was required to proceed with the introduction of his evidence with such testimony and the issues made thereby before the jury, and the defendant did proceed to introduce his testimony and to rebut so much of said testimony sought to be excluded as he could, and said illegal and immaterial testimony was thereby kept before the jury and in the minds of the jury during the whole of the examination of the defendant's witnesses. In this connection it is shown that the state's counsel, before the court and to the court, and in the presence and hearing of the jury, repeatedly charged that there was a conspiracy to kill the deceased at the time and place in question, and that the defendant, Mrs. Hughes, Jim Clements, Chris Gibson, and George Gifford were members of such conspiracy; and it is further shown, as a fact, that each of said witnesses were on

cross-examination by the state charged with knowing in advance that said killing was to take place, and charged with aiding and abetting the same, all of which was denied by said witnesses, and each of them, but which was brought and kept before the jury by such form of cross-examination and the failure of the court to exclude said testimony. Said testimony remained before the court and jury until all the evidence was introduced, and the case closed and ready for argument, with the defendant seeking still to minimize as far as possible the error of the court, he again moved the court to exclude said testimony, and the court did exclude the same, except the testimony of Mrs. Will Moore to the effect that somebody came and called Albert Harris out of the room just before the killing. This testimony, as heretofore decided in this opinion, was clearly inadmissible and illegal, as shown by the bills of exception, and should have been excluded. This and the prior bills recite the fact as a fact that there was no conspiracy shown between the parties, which bills were approved with these statements of fact contained in them. Upon what theory this testimony could have been admitted we are unable to appreciate, and we cannot understand why the appellant was required to meet and rebut this character of testimony and thus continue the matter before the jury until the close of the testimony. Under all the authorities this testimony was clearly inadmissible, and the whole matter was of such a damaging character that its exclusion at the end of the testimony did not cure such error.

7. There was another bill of exception reserved to the argument of the state's counsel, in which he charged repeatedly in his argument that there was a conspiracy between the defendant, Gibson, Jim Clements, and Gifford to bring the deceased to the dance and provide an occasion for defendant to kill him, and the defendant did kill him in pursuance of said agreement and conspiracy. Objection was urged to this. Upon another trial this character of argument should not be indulged. It is recited in the bill of exception that the state utterly failed to show any conspiracy. This is made patent by what we have said heretofore in regard to the previous bills of exception and statements contained in them. If a conspiracy had been shown, counsel would have had the right to discuss that question before the jury and urged it for all it was worth in making up their verdict. Having utterly failed to so prove, counsel would not be authorized to inject as facts and as a basis for his argument matters that were not only not proved, but certified by the court as not being proved.

For the errors indicated, the judgment is reversed and the cause is remanded.

RIDGE v. STATE.

(Court of Criminal Appeals of Texas. Feb. 8, 1911.)

1. HOMICIDE (§ 250*)—MURDER IN THE PERPETRATION OF ROBBERY—EVIDENCE.

Circumstantial evidence considered, and held sufficient to sustain a conviction of murder in the perpetration of robbery.

[Ed. Note.—For other cases, see Homicide, Dec. Dig. § 250.*]

2. CRIMINAL LAW (§ 1091*)—REVIEW—BILLS OF EXCEPTIONS—SUFFICIENCY.

Bills of exceptions will not be considered unless they are full and explicit within themselves, so that the matters presented to the court for revision may be comprehended without recourse to the statement of facts, or any other part of the record, to perfect or complete them, and such bills must state enough of the evidence or facts proven to render intelligible the ruling of the court excepted to, so that the appellate court can tell therefrom whether error has been committed.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 2832; Dec. Dig. § 1091.*]

3. CRIMINAL LAW (§ 1091*)—REVIEW—BILL OF EXCEPTIONS—NATURE OF CASE.

Though bills of exceptions are not full and explicit enough to be reviewable on appeal, yet where defendant was convicted on circumstantial evidence, and sentenced for life, the court will look into the bills of exceptions and assignments of defendant.

[Ed. Note.—For other cases, see Criminal Law, Dec. Dig. § 1091.*]

4. HOMICIDE (§ 142*)—INDICTMENT—ADMISSIBILITY OF EVIDENCE.

Though an indictment charges the murder to have been committed on February 24, 1910, and the evidence shows it was committed on January 24th, relevant evidence of facts that occurred prior to the date charged were not for that reason inadmissible.

[Ed. Note.—For other cases, see Homicide, Dec. Dig. § 142.*]

5. HOMICIDE (§ 174*)—ADMISSIBILITY OF EVIDENCE—CIRCUMSTANTIAL EVIDENCE.

In a prosecution for murder, where the evidence is wholly circumstantial, evidence as to articles found at the place of the crime, and a bottle of whisky left by defendant in a boarding house, and a watch of deceased's found at a pawnbroker's, is admissible to connect defendant with the crime, where the evidence was such as to form a connecting link in the chain of circumstances.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 359-371; Dec. Dig. § 174.*]

6. HOMICIDE (§ 308*)—TRIAL—INSTRUCTIONS—ROBBERY.

Under an indictment for murder, where the evidence clearly shows a killing in perpetration of robbery, instructions on murder in the perpetration of robbery are properly given.

[Ed. Note.—For other cases, see Homicide, Dec. Dig. § 308.*]

Appeal from District Court, Kaufman County; F. L. Hawkins, Judge.

Sam Ridge was convicted of murder, and he appeals. Affirmed.

A. U. Puckitt and Ed. R. Bumpass, for appellant. C. E. Lane, Asst. Atty. Gen., for the State.

PRENDERGAST, J. The appellant was regularly indicted for the murder of Sling

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

Lee, a Chinaman. The indictment in one count alleged, among other ways, that the appellant killed him by choking him with his hands, and with the Chinaman's queue and hair, and by drawing the same around his throat and by choking him with a rope or cord around his throat, and in the second count that he killed him in some way and manner and by some means, instruments, and weapons to the grand jurors unknown. The evidence was wholly circumstantial. We have carefully examined the whole of the record and several times considered the evidence and the various questions raised.

The testimony clearly and satisfactorily shows that the appellant lived in Dallas, Tex., but that some time on Saturday before the Chinaman was murdered the following Monday night he arrived in Terrell, Kaufman county, where the Chinaman lived and conducted a laundry. No one stayed in the laundry with the Chinaman either in the daytime or at night. He prepared his own meals, and slept in one of the back rooms of the building used by him for a laundry. The building itself was a storehouse cut up into several rooms—a front room, a room back of it next, and then still to the rear a smaller room, where he slept, cooked, and ate. There was a hole in the back wall of the building sufficiently large for a person to go in and out, which was in no way stopped up. The front door was also left unfastened, at least in the daytime, so that persons could go in and out to leave or get their laundry without the Chinaman having to come to the front door. By its being opened a bell was rung back where the Chinaman was, so that it would attract his attention, and persons could thereby call him to the front when they wanted him. The Chinaman was last seen alive late Monday evening about his laundry. He had been seen every day from day to day for several days before then. One party went to his laundry Tuesday morning about 10 o'clock, and, although he opened the front door and left his bundle to be laundered, the Chinaman did not come to the front, and made no response to the ringing of the bell. This witness, however, made no inquiry, and did not undertake to find the Chinaman at that time. About the middle of the evening another party went, and tried to attract him in the same way. Failing, he went back into the next room, and discovered that the Chinaman's trunks were open, and his clothes strewn around over the floor. He thereupon procured others, including the city marshal, and they then went back into the rear room, and found the Chinaman dead on the floor. The only clothing he had on was an undershirt, a pair of pants, and socks. There were several fresh bruises about his face and head and blue streaks around his neck, and his queue, a long one, was wound somewhat around his neck and the end of it lying on

his body. A gash to the bone had been made on his chin. Everything in the room was shown to be torn up, and his clothes and other things strewn around over the floor. His two trunks had been emptied and the clothing thrown out on the floor. His bed-clothes were all torn up—some thrown out on the floor. It is clear to our minds from all of the testimony that the Chinaman was murdered in the perpetration of robbery some time during Monday night. It is also clear to us that he had been choked either by some one's hands or with his queue, and we believe with both, and was killed in that way by choking.

The appellant stayed Saturday and Sunday nights at one negro lodging house in Terrell, but went to another Monday night. The appellant was seen and clearly identified by several witnesses at the Chinaman's laundry Saturday evening, Sunday evening, and Monday evening—once in front of the laundry on the sidewalk, the other two times in the laundry, talking to the Chinaman. On Saturday evening late he was seen in the laundry by a negro, one of the state's witnesses, sitting in the front room with his back toward and behind the door, talking to the Chinaman. When this witness went in, it was rather dark, and he mistook appellant for some one else, and spoke to him. Discovering his mistake, he introduced himself, and the appellant told him his name was Sam White. This witness was in the laundry at that time to procure his bundle, and did so. He also at the same time bought some collars from the Chinaman. All this occurred in the presence of the appellant. On this occasion, while this witness was in the laundry, the defendant asked the Chinaman why he did not run a restaurant instead of a laundry. He replied that he had run a restaurant once in Texarkana, and, as there was no money in it, he quit it. The witness then said to the Chinaman: "Lee, you makes money enough in the laundry business to meet your obligations, doesn't you?" Whereupon the appellant said: "Gee, Lord, yes." The appellant then asked the Chinaman if he kept his money there, or sent it back to China. The Chinaman pointed to a calendar on the wall on which there was a picture of a bank building.

The Chinaman was shown to be in the habit of ordering whisky from time to time from the liquor house of Bruce Liquor Company of Dallas, and that he, among other times, in November and December, 1909, and on January 17, 1910, ordered two quarts of liquor known as "Dripping Springs Whisky," and that on those respective dates the Bruce Liquor Company shipped to the Chinaman at Terrell two quarts each time of this brand of whisky. A carton or box in which liquor was shipped by this company to Sing Lee was found on the floor near the dead body when his body was first discovered.

This box was addressed to Sing Lee at Terrell, Tex. Lying near it was an empty whisky quart bottle with a label on it, "Dripping Springs Whisky." A few days later the city marshal went to the negro boarding house of Cilla Spencer in Terrell, searched her trunk, and found therein a quart bottle of the same size and shape and label about half full of whisky. On Monday night before the Chinaman was found dead the following evening, the appellant went to this negro lodging house about night or dark, and engaged a room in which to sleep that night. He asked the price, and was told that it was 25 cents. He stated he had no money. He did not pay the price then. The next morning he paid the keeper, said Cilla Spencer, 50 cents. When he first engaged the room, she asked him if he wanted then to go to bed. He replied that he did not, that he had some business to attend to, and soon thereafter left her house. He was gone for some time, returned about 10 or 11 o'clock, and brought with him to this lodging house a bottle of whisky which had theretofore not been opened, and was full of whisky. He asked for a paper to wrap it up. The lodging house keeper, upon finding that it was whisky, wanted some, and the appellant opened it, and gave her and some two or three others a drink out of it at that time. He then gave to the lodging house keeper the bottle, then about half full, and she put this bottle in her trunk and locked it. She was called to Ft. Worth on the early morning train the following morning on account of the sickness of her daughter, and was gone about a week. Before she returned, the city marshal had gone into her trunk, found, and took, this bottle of whisky. The defendant himself did not drink any of the whisky that Monday night when the others did. He left Terrell Tuesday morning about daylight, and went to Dallas. After the appellant brought the bottle of whisky to the lodging house of Cilla Spencer about 10 or 11 o'clock, he did not then go to bed, but soon afterwards left the lodging house again. It is not certain from the testimony how long he stayed away on this occasion, but he afterwards did return some time before or about 4 o'clock the next morning. When he returned on that occasion, he had with him a bag or sack which he took to his room and which the witness described as having junk in it, or something that rattled or sounded like money when he placed it down on the floor, and also sounded and made a noise like money when he took it up when he left to go to the train. The witness said it rattled and made a noise like money both when he put it down and afterwards when he took it up. She did not know what was in it, did not ask, and said nothing about it at the time. There were two trains going from Terrell to Dallas in the mornings. The first left about 5:40; the other about an hour later. When

the appellant returned the last time to the lodging house on the Monday night, he wanted the housekeeper to wake him up so that he could catch the early morning train. He did not undress when he retired, but pulled off his coat. The witness thought he slept. She herself did. Upon her awakening in the early morning, she discovered that the depot building was lighted up. She thereupon called to the appellant, and told him the depot which was not far away and in plain view, was lighted up, and the train would soon be there. In the house where they were it was dark. She wanted to make a light so that he could see how to dress and get out, but he prevailed upon her not to do so, and would not let her do so, although she somewhat insisted. As soon as he dressed himself, he took the sack and left on that train. She left about an hour later for Ft. Worth on the next train, having been called there by telegram on account of the sickness of her daughter, and did not know and had not heard that the Chinaman was dead until after her return from Ft. Worth to Terrell about a week later.

The Chinaman was shown clearly and conclusively to have had a gold watch which he sometimes wore on his person and sometimes did not. He was first shown to have had this watch about two years prior to his death. Many witnesses testified to this, and showed clearly and conclusively that he had this watch continuously from about two years before his death up to within a day or two before he was killed. This watch was produced on the trial, and introduced in evidence by the state. It was clearly and unequivocally identified by the various witnesses, some not so positively, but others very positively. At once after the discovery of the dead body of the Chinaman, his person, and soon afterwards his whole premises, were thoroughly searched, especially for a watch. None was found. The city marshal found nine or ten pennies and he thinks one dime scattered about on the floor near the dead body of the Chinaman. A few days after the Chinaman was killed, the appellant had this watch in his possession, and tried to sell it to one of the witnesses, a tailor, in Dallas, Tex., claiming that he had gotten it in Terrell. This witness declined to purchase it. His place of business was about a block and a half distant from the pawnbroker's shop of Jacob Winterman in Dallas, Tex. Shortly after he tried to sell this watch to this tailor, he went to this pawnshop and pawned this watch to the pawnbroker, who advanced him \$3 on it. At the time an accurate description was made by the pawnbroker of the watch, giving a full description and whatever numbers that were necessary to identify it. It was clearly and without doubt shown that this watch was the dead Chinaman's watch, and that it was the same pawned by the appellant, and identified and

introduced in evidence on the trial of this case. When the officers first tried to arrest the defendant, he ran and escaped, but was apprehended and arrested about a week later.

The Chinaman was a delicate little fellow, looked like a little woman, weighed about 110 pounds, and was 35 to 38 years old. The appellant was a big, powerful man physically, weighed about 200 pounds, was about 27 years old, and prize fighting was a part of his business.

We have not undertaken to give the testimony in full. It is quite lengthy, and we have tried to give substantially such a statement of it as to show whether or not the appellant was guilty. This rather full statement is given because the appellant attacks the sufficiency of the evidence to sustain the conviction. In our opinion it is amply sufficient.

The appellant has some 10 bills of exception in the record. The Assistant Attorney General earnestly insists that none of these bills should be considered because they do not comply with the statutes and rules of this court, so that this court can consider them. It has been long and well established by the decisions of this court that bills of exception will not be considered unless they are full and explicit within themselves, so that the matters presented to the court for revision may be comprehended without recourse to the statement of facts, or any other part of the record to perfect or complete them, and that such bills must state enough of the evidence or facts proven to render intelligible the ruling of the court excepted to, so that this court can tell therefrom whether or not error has been committed. We deem it unnecessary to recite these authorities. They are numerous and uniform. Measured by this, it is our opinion that most of these bills, if not all of them, are not such that this court can consider them, and we will not undertake to discuss them separately. However, on account of the life sentence of the defendant, and it being a case where he was convicted on circumstantial evidence wholly, we have looked into each of the bills of exception and assignments of the appellant.

Several of the bills objected to the introduction of certain evidence of facts occurring before February 24, 1910, because of a claimed variance between the indictment which charged the murder to have been committed on February 24, 1910; the evidence establishing that it was committed on January 24, 1910. This is shown by a qualification of some of the bills by the district judge in allowing them. Of course, none of these bills are well taken on that account. Even though the indictment did charge that the murder was committed on February 24th, any relevant testimony of facts that occurred prior to the date the murder was charged in the indictment could not be inadmissible because the evidence showed that the

murder was committed on January 24, instead of February 24, 1910.

Some of the bills are also objections to the introduction of the testimony about the bottle of whisky and empty bottle and box found in the Chinaman's place of business. Some of the witnesses testified to some things about it; others to other things. Taken as a whole, the objections were more to the weight of the testimony than to its admissibility. The qualification of the judge to these bills was such as to show that the whole testimony on the subject should be taken and the bill qualified thereby, instead of taking up each separate piece of testimony by itself. This was correct, and there was no error in any of these matters.

Likewise, the same general kind of objections were made to the testimony of the various witnesses about the watch and its identity, and when and where they had seen the Chinaman have it. These objections were more to the weight than to the admissibility of this evidence. Taken as a whole, as it should be, and was by the district judge as shown by the bills, it made a complete link and chain of evidence showing that the dead Chinaman had this watch as early as two years before he was killed, and that he from time to time thereafter and almost continuously was seen in possession of and had it up to within one or two days before he was killed. There was no error in admitting this testimony over the objections that were made.

Appellant's tenth ground of his motion for new trial in the court below is as follows: "The defendant excepts to paragraphs 8, 9, 10, and 11 of the charge by the court herein, and for said exceptions says that same is not warranted, in this: That the said defendant was not charged with robbery, but with murder of one Sing Lee, and that the charge by the court upon robbery and as specified by the court in said paragraphs is unwarranted." We have given above in effect what the indictment charged. The evidence in our opinion clearly established that the Chinaman was murdered in the perpetration of robbery. The complaint of this charge does not point out any defect in the charge as given which is on the subject of robbery, but it seems that his complaint is that nothing should have been given on the subject of robbery at all. The charge of the court by these paragraphs objected to correctly defines robbery, and tells the jury that, if murder is committed in the perpetration of robbery, it is murder in the first degree. Then tells them that the punishment for murder in the first degree is death or confinement in the penitentiary for life. Then in an apt charge, which is clear and full, submits to the jury if they believe from the evidence beyond a reasonable doubt that the appellant killed the Chinaman in the manner and way charged in the indictment, and that it was done in the perpetration or attempted perpetration of

robbery, and all of the other elements necessary for a conviction were submitted, then they would find defendant guilty, and assess his punishment at death or confinement in the penitentiary for life. It is our opinion that it was essential that such charge should have been given to the jury in this case, and that there was no error therein in giving it.

We think it unnecessary to discuss specially the other assignments of error or bills of exception. As stated above, it was unnecessary for us to have considered any of them in the state of the record, but we have done so, and it is our opinion that none of them point out any reversible error in this case.

We therefore affirm the judgment in all things.

YOUNG v. STATE.

(Court of Criminal Appeals of Texas. Feb. 8, 1911. Rehearing Denied March 1, 1911.)

1. CRIMINAL LAW (§ 1092*)—APPEAL AND ERROR—STATEMENT OF FACTS AND BILL OF EXCEPTIONS—APPROVAL AND VERIFICATION.

A statement of facts and bill of exceptions, not approved and verified by the county judge who heard the cause, is invalid on appeal.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 2836; Dec. Dig. § 1092.*]

2. PHYSICIANS AND SURGEONS (§ 6*)—PRACTICING WITHOUT AUTHORITY—INDICTMENT—SUFFICIENCY.

Under Acts 30th Leg. c. 123, § 4, and subdivision 2 of section 13, defining and regulating the practice of medicine, an indictment charging the defendant with unlawfully practicing medicine, without having properly registered his authority for so doing, and treating and offering to treat physical disease and disorder, and making a charge therefor, is sufficient.

[Ed. Note.—For other cases, see Physicians and Surgeons, Cent. Dig. § 9; Dec. Dig. § 6.*]

3. CRIMINAL LAW (§ 1144*)—APPEAL AND ERROR—STATEMENT OF FACTS—PRESUMPTIONS IN ABSENCE OF.

In the absence of a statement of facts, if the charge of the court is applicable to any state of facts that might be proven under the allegations, the Supreme Court will assume that the county court properly submitted the law of the case.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 3082; Dec. Dig. § 1144.*]

Appeal from Cooke County Court; C. R. Pearman, Judge.

Henry Young was indicted for unlawfully practicing medicine, and he appeals. Affirmed.

See, also, 128 S. W. 1103.

Henry Young, pro se. C. E. Lane, Asst. Atty. Gen., for the State.

HARPER, J. The appellant was indicted by the grand jury of Cooke county for unlawfully practicing medicine, without having properly registered his authority for so doing, and treating and offering to treat physical disease and disorder, and making a charge therefor. The cause was transferred

to the county court, and upon a trial he was adjudged guilty, and his punishment assessed at a fine of \$200 and 60 days' confinement in jail.

1. The Assistant Attorney General files a motion to strike out the statement of facts and bills of exceptions herein filed, because they, nor either of them, are not approved and verified by the county judge. To be of any validity whatever, the statement of facts and bills of exceptions must be approved and signed by the judge. *Lawrence v. State*, 7 Tex. App. 192; *Bennett v. State*, 16 Tex. App. 236; *Johnson v. State*, 29 Tex. 492; *Moss v. State*, 39 Tex. Cr. R. 3, 43 S. W. 983, 44 S. W. 832; *Rushing v. State*, 25 Tex. App. 607, 8 S. W. 807.

2. The indictment is valid, and charges an offense against the laws of this state, under section 4, and subdivision 2 of section 13, of chapter 123 of the Acts of the Thirtieth Legislature, an act to define and regulate the practice of medicine, and, the indictment being valid, in the absence of a statement of facts, if the charge of the court is applicable to any state of facts that might be proven under the allegations, this court will assume that the county court properly submitted to the jury the law of the case. *Wright v. State*, 37 Tex. Cr. R. 146, 38 S. W. 1004; *Jones v. State*, 34 Tex. Cr. R. 642, 31 S. W. 644.

The judgment is affirmed.

MISSOURI, K. & T. RY. CO. OF TEXAS v. GROSECLOSE†

(Court of Civil Appeals of Texas. Jan. 21, 1911. Rehearing Denied Feb. 11, 1911.)

1. ABATEMENT AND REVIVAL (§ 54*)—ACTIONS SURVIVING—INJURY TO REPUTATION.

Rev. St. 1896, art. 3353a, provides that causes of action for injuries, not resulting in death, whether to the health, reputation, or person of the injured party, shall not abate by his death, but shall survive in favor of his heirs and legal representatives. The statute authorized actions for personal injuries resulting in death to be prosecuted by the surviving wife and children. *Held*, that the statute authorized a recovery of all damages which the injured party, if living, could recover, so that the widow and children of one maliciously prosecuted could recover damages for injury to his feelings, etc., as well as to his reputation.

[Ed. Note.—For other cases, see Abatement and Revival, Cent. Dig. § 270; Dec. Dig. § 54.*]

2. HUSBAND AND WIFE (§ 273*)—COMMUNITY PROPERTY—RIGHTS OF SURVIVOR—ACTIONS—PLEADING.

Since damages for injury to the husband's reputation and for mental anguish suffered by the malicious prosecution of a criminal charge were community property, a right of action therefor survived to her as community property on her husband's death, and hence the petition in her action for such damages need not allege that there was no administration on her husband's estate, and no necessity for any.

[Ed. Note.—For other cases, see Husband and Wife, Dec. Dig. § 273.*]

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

† Writ of error denied by Supreme Court.

3. APPEAL AND ERROR (§ 1036*)—HARMLESS ERROR—PARTIES.

While the widow could have sued alone as community survivor to recover for injury to her husband's reputation and feelings by a malicious prosecution against him, it was not reversible error to allow the children to prosecute the action with her.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4069-4074; Dec. Dig. § 1036.*]

4. HUSBAND AND WIFE (§ 273*)—COMMUNITY PROPERTY—ACTIONS—DAMAGES.

In an action by the surviving wife and children for damages to the husband's reputation, and for injury to his feelings by the malicious institution of a criminal charge against him, plaintiffs could not recover damages suffered by themselves, but only those accruing to decedent.

[Ed. Note.—For other cases, see Husband and Wife, Dec. Dig. § 273.*]

5. APPEAL AND ERROR (§ 1053*)—HARMLESS ERROR—DAMAGES.

Any error in an action by the widow and children for damages for injury to the husband's reputation and feelings, etc., by the malicious institution of a criminal charge, in overruling objections to evidence as to damages suffered by plaintiffs, could not have injured defendant, where the court withdrew the question of such damages from the jury.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4178-4184; Dec. Dig. § 1053.* Trial, Cent. Dig. § 977.]

6. EVIDENCE (§ 317*)—HEARSAY.

Evidence in an action for malicious prosecution by causing plaintiff's arrest for embezzlement that W., defendant's special agent, told witness that he had given the matter of the embezzlement as thorough investigation as he could and felt justified in arresting plaintiff, was properly excluded as hearsay.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 1174-1192; Dec. Dig. § 317.*]

7. WITNESSES (§ 286*)—EXAMINATION—REDIRECT EXAMINATION.

Where defendant attempted to show on cross-examination that plaintiff was a regular gambler, and that no one but regular gamblers played at the place where he had been caught playing, the witness could testify, on redirect examination, that some of the best men of the town had been caught playing poker as plaintiff was.

[Ed. Note.—For other cases, see Witnesses, Dec. Dig. § 286.*]

8. MALICIOUS PROSECUTION (§ 60*)—ACTIONS—ADMISSION OF EVIDENCE.

In an action for malicious prosecution by arresting plaintiff, the agent of defendant railroad company, on the charge of embezzlement of funds under the pretense that he had been robbed, testimony by the city marshal that he learned from plaintiff and others in less than 15 minutes after the alleged robbery that two men had robbed the safe, held plaintiff up and taken the money, and that others had seen two men near the place of the robbery, was admissible in evidence to support plaintiff's claim that defendant's agent had not communicated all of the facts to the county attorney in procuring plaintiff's arrest; it appearing that defendant's agent had not informed the county attorney of such facts.

[Ed. Note.—For other cases, see Malicious Prosecution, Cent. Dig. §§ 138-145; Dec. Dig. § 60.*]

9. EVIDENCE (§ 123*)—RES GESTÆ.

In an action for malicious prosecution by procuring the arrest of plaintiff, the agent of

defendant railroad company, on the charge of embezzling money under the pretense that he had been robbed, testimony was admissible as part of the res gestæ that less than 10 minutes after the alleged robbery plaintiff met witness near the depot and told him that he had been robbed, and asked him to go to the depot and stay until plaintiff could get an officer.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 351-368; Dec. Dig. § 123.*]

10. MALICIOUS PROSECUTION (§ 72*)—ACTIONS—INSTRUCTIONS.

In an action for malicious prosecution by causing plaintiff's arrest for embezzlement, the court instructed that if the county attorney advised or caused defendant's agent to make a complaint, but that such agent induced him to do so by false representations, or by failing to lay before him a full and fair statement of the facts known to such agent, and the complaint was made and the prosecution instituted without probable cause and with legal malice, as defined, and the charge of embezzlement was in fact false, the jury should find for plaintiff. *Held*, that the instruction was correct.

[Ed. Note.—For other cases, see Malicious Prosecution, Cent. Dig. §§ 168-173; Dec. Dig. § 72.*]

11. HUSBAND AND WIFE (§ 273*)—ACTIONS—INSTRUCTIONS—CONFLICTING INSTRUCTIONS—DAMAGES.

In an action for damages by a widow and children for maliciously having the husband and father arrested for embezzlement, the court charged that, in assessing plaintiffs' damages, the jury should not consider mental anguish or humiliation suffered by plaintiffs, but only damages sustained by decedent during his lifetime as claimed in the petition, and that any claim for damages other than those sustained by decedent was thereby withdrawn from the jury's consideration. The court also instructed in its general charge that, upon finding for plaintiffs, the jury should allow them such sum as would now, in cash, reasonably compensate them for the injuries, if any, sustained by decedent, considering any loss of time directly resulting from the prosecution of him and the injury to his feelings and reputation, if any, resulting directly from the prosecution and arrest. *Held*, that the first charge did not conflict with the general charge.

[Ed. Note.—For other cases, see Husband and Wife, Dec. Dig. § 273.*]

12. TRIAL (§ 260*)—INSTRUCTIONS—REQUESTS.

Special charges requested were properly refused where they were fully covered by the general charge given.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 651-659; Dec. Dig. § 260.*]

13. HUSBAND AND WIFE (§ 273*)—COMMUNITY PROPERTY.

Since damages recovered by the widow and children for maliciously instituting a criminal prosecution against the husband and father are community property, the law of apportionment of damages between children does not apply, so that damages recovered will be equally divided between the widow and children.

[Ed. Note.—For other cases, see Husband and Wife, Dec. Dig. § 273.*]

Appeal from District Court, Hunt County; R. L. Porter, Judge.

Action by W. M. Groseclose, revived after his death by Susie O. Groseclose and others, against the Missouri, Kansas & Texas Railway Company of Texas. From a judgment for plaintiffs, defendant appeals. Reversed

and remanded, unless plaintiffs consent to a reduction of the recovery.

See, also, 110 S. W. 477.

Coke, Miller & Coke and Templeton, Craddock, Crosby & Dinsmore, for appellant. Evans & Mitchell, for appellee.

RAINEY, C. J. W. M. Groseclose sued the Missouri, Kansas & Texas Railway Company of Texas, F. M. Warden, and J. F. Penn for malicious prosecution. The suit was dismissed as to Warden and Penn. A trial was had on February 21, 1907, and judgment rendered against the railway company for \$4,500. An appeal was taken, and the judgment was reversed and remanded by the appellate court on April 30, 1908. While the case was pending on appeal, in February, 1908, W. M. Groseclose died. The mandate was returned December 22, 1908, to the district court. At the first term thereafter the death of W. M. Groseclose was suggested, and the cause continued to make parties to the suit. On May 28, 1909, Mrs. Susie O. Groseclose, as wife of W. M. Groseclose and as next friend for three of their children, minors, and P. M. Groseclose and Louise Groseclose, children and adults, filed their petition, and alleged that "plaintiffs here now seek to prosecute this suit as survivors, being the heirs, legal representatives, and surviving wife and children of the said W. M. Groseclose, the cause surviving to them, as claimed and set up in this original petition, above set forth."

The petition alleged, in effect: That W. M. Groseclose, through the procurement of Penn and Warden, was without probable cause charged with embezzlement of money from the railway company. That he was arrested on said charge, and detained overnight and until he could make bond and be released thereon. That Penn and Warden were in the employment of the railway company as special agents, and were fully empowered and authorized by the railway company to make investigations and to institute or cause to be instituted suits, both of a civil and criminal nature, as by them might be deemed for the protection of appellant's property, or for the prosecution of any person who may have been guilty of theft or embezzlement. That Groseclose was 46 years of age, of good character and reputation. That he was not guilty, and his reputation for honesty was ruined, whereby he could not procure employment, and for the balance of his life he suffered great physical and mental pain, anguish of mind, humiliation, and distress caused by the malicious prosecution. Defendant railway company answered by special and general demurrers, the general issue, and plea in abatement as to the right of the wife and children to sue, which latter plea was overruled. A trial resulted in a verdict for the plaintiffs in the sum of \$14,000, which was apportioned by the jury as

follows: To the wife, \$4,000, to Jim Tom Groseclose, \$1,000, to Willie Russell Groseclose, Henry Clay, Grace, and Ina Groseclose, each \$2,000, and to P. M. and Louise Groseclose, each \$500, and judgment entered accordingly—from which the railway company prosecutes this appeal.

Appellant's first assignment of error is: "The court erred in overruling and in not sustaining the defendant's plea in abatement filed herein on October 4, 1909, wherein it prayed that the cause of action set up in the plaintiff's amended petition be abated, and, in the alternative, that, if the whole of said cause and causes of action be not abated, then that all the causes of action set out in the said petition except that for injury to the reputation of W. M. Groseclose be abated, all as set forth fully and at large in defendant's bill of exceptions No. 1, which is here referred to and made part hereof, because: (1) All of the said causes of action which the said W. M. Groseclose in his lifetime had, if any, as set out in the amended original petition of Susie O. Groseclose and others, did not survive upon the death of the said W. M. Groseclose, but the same abated. (2) If all the said causes of action which the said W. M. Groseclose had, if any, did not abate upon his death, then all of the said causes of action so set out in the said amended petition, except that for injury to the reputation of the said W. M. Groseclose, did abate upon the death of the said W. M. Groseclose." Appellant's contention is: "All of the causes of action which the deceased, W. M. Groseclose, had in his lifetime, except that for injury to the reputation of the said W. M. Groseclose, abated upon his death, and the court erred in not sustaining the plea in abatement to all such causes of action other than that for injury to the reputation of said deceased." There was no error in not sustaining appellant's plea in abatement. Article 3353a, Rev. St. 1895, provides: "Causes of action upon which suit has been or may hereafter be brought by the injured party for personal injuries other than those resulting in death, whether such injuries be to the health or to the reputation or to the person of the injured party shall not abate by reason of his death, nor by reason of the death of the person against whom such cause of action shall have accrued; but in case of the death of either or both, such cause of action shall survive to and in favor of the heirs and legal representatives of such injured party and against the person, receiver or corporation liable for such injuries and his legal representatives; and so surviving such cause may be hereafter prosecuted in like manner and with like legal effect as would a cause of action for injuries to personal property." When this law was enacted, the statute authorized actions for personal injuries resulting in death by surviving wife and children; hence the exclusion of actions

"other than those resulting in death" by the article heretofore mentioned. Said article embraces all actions for personal injuries other than those resulting in death, and we think it authorizes the survivors to recover all damages which the injured party, if living, would be entitled to, and the survivors are not limited to injury to the reputation, as claimed by appellant.

The second, third, fourth, and fifth assignments of error complain of the court in not sustaining general and special demurrers which attack the legal right of plaintiffs to maintain this suit. The first proposition made is the overruling of a general demurrer is error because the petition does not allege there was no administration on the estate of W. M. Groseclose, deceased, and no necessity therefor. The damages sought to be recovered, if any, were community property of W. M. Groseclose and his wife. The wife having an interest in such cause of action, it survived to her as community property, and, having an interest therein, she was entitled to maintain the suit, and it was not necessary to allege there was no administration on the estate of W. M. Groseclose, nor necessity for any. *Telegraph Co. v. Kerr*, 4 Tex. Civ. App. 280, 23 S. W. 564. The other proposition is that the children named in the petition were neither necessary nor proper parties to this suit. While we are of the opinion that the wife could have maintained this suit alone, as community survivor, and recovered all the damages accrued, yet allowing the children to prosecute with her as plaintiffs was not such error as will cause a reversal of the case. *Faulkenbury v. Wells*, 28 Tex. Civ. App. 621, 68 S. W. 327; *Railway Co. v. Carwile*, 28 Tex. Civ. App. 208, 67 S. W. 160. The foregoing propositions were presented by both general and special exceptions, but we are of the opinion the court did not err in overruling them.

The sixth, seventh, eighth, and ninth assignments of error complain of the overruling of exceptions that were directed to damages that plaintiffs alleged were suffered by them, and did not accrue solely to W. M. Groseclose. These exceptions should have been sustained, but the court did not submit them to the jury, and did directly withdraw them from their consideration, and no injury resulted to appellant thereby. *Railway Co. v. Trump*, 42 Tex. Civ. App. 536, 94 S. W. 903, 98 S. W. 1101; *Railway Co. v. Terhune*, 94 S. W. 381.

There is no reversible error in the action of the court in overruling the exceptions as complained of in the tenth, eleventh, twelfth, and thirteenth assignments of error, as the court only submitted as a basis for recovery such damages as were suffered by W. M. Groseclose and for which he was entitled to recover, had he lived.

Complaint is made to the ruling of the court in not admitting the following testi-

mony of J. F. Penn, viz.: "Todd Warden told me that he had given the matter as thorough investigation as he could, and felt perfectly justified in arresting the plaintiff, Groseclose, * * * and, after getting the condition of the station records from the auditors and finding it in very bad condition, Todd Warden wanted to arrest the agent, Groseclose, for robbing himself." The objection to this testimony was that it was hearsay, and therefore not legitimate. The record shows that the latter part of the testimony, to wit, "after getting the condition of the station records from the auditors and finding it in very bad condition, Todd Warden wanted to arrest the agent, Groseclose, for robbing himself," was admitted. The record also shows that Todd Warden was present at the trial and testified. We think the testimony was hearsay and subject to the objection urged, and was properly excluded.

Objection was made to the testimony of Sam Harris, city marshal of Farmersville, on redirect examination, to the effect that some of the best men of Farmersville had been caught playing cards and poker. This was in answer to a question by appellee's counsel: "Is it not true that a great many of the business men in Farmersville did the kind of gaming Groseclose did in the two cases that he was guilty of gaming in that town?" On cross-examination defendant's counsel had attempted to prove that Groseclose was a regular gambler, and that no one but a regular gambler played at the places where he was caught, and said testimony was admitted to rebut defendant's theory that Groseclose was a regular gambler. The tendency of the testimony to rebut the theory of defendant that Groseclose was a regular gambler was slight, but we are inclined to think it was admissible, to be weighed by the jury for what it was worth. The witness Sam Harris was asked by plaintiff's counsel, in reference to the robbery of W. M. Groseclose, in substance, what he had learned with reference to two men being seen in that neighborhood. He answered: "I learned there were two men robbed the safe, held Mr. Groseclose up, and got off with the money." Also: "I learned that Mr. Smith had seen two men there or near there," and "I also learned from Mr. Stamford, he said he met two men on the road from the flour mill going from the west and coming east." This testimony was objected to on the ground that it was hearsay, immaterial, irrelevant, and prejudicial. A bill of exception was taken, to which the court appended the following: "This bill is approved with this explanation: The facts that Harris learned were from W. M. Groseclose in less than 15 minutes after the robbery, and as to what he learned from other parties was at the same time and place, and it was not intended by this evidence to prove these facts, but in order to show that Harris subsequently

informed the special agent of the defendant, and was all admissible in support of plaintiff's allegation that the defendant failed to place before the officers all that it knew, or a fair statement of what it knew, as to whether two strangers or W. M. Groseclose robbed the safe." W. M. Groseclose was appellant's agent at Farmersville, and claimed to have been robbed one night by two men of \$700 or \$800 while at work in the depot. The defendant's theory was that the claim of Groseclose that he had been robbed was false, and that he had appropriated the money to his own use. Harris had previously testified, in substance, that he learned of the robbery between 8 and 9 o'clock, and went immediately to the depot. Stamford and other parties were there, and Groseclose informed him of the two men doing the robbery. He then investigated the matter, and learned from Stamford and Smith what he stated as above about the two men, and told Penn all about what he had learned before the charge against Groseclose was made. The testimony complained of was to show defendant's agents had been informed as to these circumstances as to the robbery before the charge of embezzlement was made, and bore on the claim of plaintiffs that defendant's agents had not communicated all the facts to the county attorney in procuring the complaint made against Groseclose. This being the object of the testimony, we think it was admissible.

What is here said also applies to the eighteenth assignment of error.

The nineteenth assignment of error is: "The court erred in admitting in evidence over the objections of the defendant the testimony of the plaintiffs' witness Ed Stamford, to the effect that W. M. Groseclose, when he met him east of the depot after the alleged robbery, told him that he had been robbed, and also to go to the depot and stay there until he could get an officer, because the said evidence was hearsay, self-serving, immaterial, and irrelevant as set forth at large in the defendant's bill of exceptions No. 6, which is here referred to and made part hereof." The bill of exceptions, omitting the heading and the signature of the attorneys, is as follows: "Be it remembered that on the trial of the above numbered and entitled cause, while the plaintiffs' witness Ed Stamford was testifying on behalf of plaintiff on his direct examination, having stated that on the night of the alleged robbery of the depot at Farmersville he was walking down the railroad in the direction of the depot, met a couple of men, and, continuing on his journey, after passing them some 200 yards, he met W. M. Groseclose, and that at that time Groseclose was walking pretty peart, was asked this question: Q. What, if anything, did he (meaning Groseclose) say? A. He asked me, says, 'Who is that?' I never spoke right straight, and he said again, 'Who is that?' and I said, 'Ed

Stamford.' Whereupon defendant by its counsel objected to the conversation between Stamford and Groseclose at that time as being hearsay, immaterial, and irrelevant, and self-serving, which objections were by the court overruled. The defendant then and there duly excepted, and the witness, continuing his answer, said further: A. * * * He says, 'Is that you, Mr. Stamford?' and I says, 'Yes, sir,' and he says, 'I have been robbed.' Said, 'Will you go to the depot and stay there until I get an officer?' And I told him I could, and I walked as quick as I could, and, when I got there, I stayed there a few minutes, and seen I did not have any business there, and went on to the section house. To which action and ruling of the court in admitting said evidence over the objections of the defendant the defendant then and there duly excepted, and here tenders this its bill of exceptions No. 6, and asks that the same be approved and filed as part of the record in this cause. Approved: Judge 8th District. This bill is approved with this explanation: It was an issue in the case, made by the defendant, as to whether Groseclose was guilty or innocent of the robbery while running for the officers, and the conversation between them was in less than 10 minutes after the robbery. [Signed] R. L. Porter, Judge 8th District." This testimony was in point of time so intimately connected with the transaction in reference to the robbery that it was a part of the *res gestæ*, and therefore admissible.

The twentieth assignment is: "The court erred in its third paragraph of its charge to the jury, which is as follows: '(3) If you believe from the evidence that defendant, through its representatives, J. F. Penn and F. M. Warden, or either of them, caused, procured, or brought about the making of the complaint against W. M. Groseclose by C. T. Warden, as complained of in the petition, charging W. M. Groseclose with the offense of embezzlement, and you find that W. M. Groseclose was thereby arrested and deprived of his liberty by virtue of a warrant issued thereon, and you find that he was required to enter into bond to await the action of the grand jury of Collin county, and you further find that W. M. Groseclose, in pursuance of the obligation of said bond, made his personal appearance before said grand jury, and that said grand jury failed to indict him, and he was then and there discharged, and if you further find that said prosecution was instituted without probable cause, as defined herein, and if you further find that the said J. F. Penn and F. M. Warden, or either of them, in procuring, causing, or bringing about, if they did, the institution of said prosecution, were actuated by 'malice,' as that term is defined in this charge, and if you further find that the charge of embezzlement against W. M. Groseclose was, in fact, false, and you further

find that by reason of said prosecution, arrest, and imprisonment W. M. Groseclose was caused to suffer and sustain loss and injury, as complained of and set forth in the plaintiffs' petition, then you will find for the plaintiffs. But, unless you so believe, you will find for the defendant." The objection to this charge is that there is no evidence that F. M. Warden either advised, caused, procured, or in any manner brought about the making of said complaint. We do not concur in this contention. F. M. Warden and J. F. Penn were the detectives of appellant. Groseclose had informed Warden of the robbery and the circumstances thereof. Warden reached there Sunday morning and began an investigation. Penn reached there on Monday morning, and after that Penn was the leading spirit in the investigation, but, considering all the facts and circumstances connected with the matter, they show that Warden was co-operating and acting with Penn in the matter, and the court was authorized in giving the charge.

Appellant complains of the following paragraph of the court's charge, to wit: "But if you find that said assistant county attorney advised or caused C. T. Warden to make a complaint, and caused the institution of said prosecution, but if you further find that said agents and servants of the defendant induced him, the said assistant county attorney, to do so by false representations to him, if there were any representations, and if they were false, or if you find that the said Penn and F. M. Warden, acting within the scope of their authority as defendant's agents, induced him, the assistant county attorney, to do so by failing to lay before him a full and fair statement of all the facts known to them, and you further find that said complaint was made and the prosecution instituted without probable cause and with legal malice, as above defined, and you find that the charge of embezzlement against Groseclose was, in fact, false, then you will find for the plaintiffs." The court instructed the jury, in effect, that, if defendant's agents had made to the county attorney a full and fair statement of the facts and that said county attorney had acted upon his own judgment in causing the complaint to be made and was not influenced so to do by Penn or Warden, to find for defendant. The paragraph complained of correctly presents the law governing this cause. It requires the jury to find the want of probable cause and the existence of malice, and conformed to the law announced in this case on the former appeal in an able opinion by Mr. Chief Justice Wilson, reported in 110 S. W. 477. When the charge of the court is considered as a whole, it fully and fairly presented the case to the jury.

The following special charge requested by plaintiff and given by the court is assigned as error, to wit: "You are also instructed that, if you find for the plaintiffs on the is-

sue submitted to you in the charges, then, in assessing their damages, if any, you will not take into consideration any mental anguish, distress of mind, or humiliation suffered by either of the plaintiffs in this case, on account of the prosecution, but they can recover only, if at all, damages sustained by W. M. Groseclose in his lifetime, as claimed and set forth in the petition, and any allegations in the petition filed by plaintiffs, setting forth a claim for damages to themselves other than those sustained by W. M. Groseclose in his lifetime, are hereby withdrawn from your consideration." The criticism of this charge is that it is contradictory of and in conflict with the court's main charge, in that it authorizes the jury to consider elements of damage which are not legal elements of damage. The court in its general charge instructed the jury that: "If you find for the plaintiffs, you will allow them such sum as will now, in cash, reasonably compensate them for the injuries, if any, he, the said W. M. Groseclose, sustained, taking into consideration the loss of time, if any, he sustained from the 19th day of December, 1905, to the date of his death in January, 1908, which you may find was the direct and proximate result of said prosecution, if it was, and the injury, if any, to his feelings, name, fame, and reputation that he sustained, if he did, as a direct and proximate result of said prosecution, arrest, and imprisonment." The special charge did not conflict with the general charge. It limits a recovery to the "damages sustained by W. M. Groseclose in his lifetime as claimed and set forth in the petition," and excludes all damages to plaintiffs other than those sustained by W. M. Groseclose. The charge was more favorable to defendant, as it emphasizes the general charge, and tended to impress the jury with the proposition that damages other than those sustained by W. M. Groseclose could be recovered by them.

The twenty-fourth and twenty-fifth assignments of error, complaining of the refusal of the court to give special charges, is not tenable, as said charges were fully covered by its general charge. Complaint is made that the court erred in not granting the motion for a new trial, as the verdict is not supported by the evidence. There was a sharp conflict in the testimony upon all the important issues raised, and the testimony is such that the jury would have been justified in finding for the defendant, while, on the other hand, it was sufficient to support a verdict for the plaintiffs.

While we think a verdict for plaintiffs was warranted, we think the verdict of \$14,000 is subject to the objection of appellant that it is excessive, and should be reduced to \$8,000. If appellees will within 15 days enter a remittitur of \$6,000, we will reform the judgment, and here render a judgment for \$4,000 for Mrs. Susie O. Groseclose and \$4,000 for the children, to be divided equally be-

tween them, as it is community property and the law of apportionment of damages between children does not apply in this case; otherwise the judgment will be reversed and cause remanded.

LEMONS v. GULF, C. & S. F. RY. CO.†
(Court of Civil Appeals of Texas. Jan. 7, 1911.
Rehearing Denied Feb. 25, 1911.)

INFANTS (§ 11*)—DISABILITIES—REMOVAL—PRESUMPTIONS.

On suit for personal injury during plaintiff's minority, involving an issue of his ratification of a settlement, an order of the district court, before action brought, removing his disabilities, is not presumptively regular; the order not being conclusive on collateral attack, without evidence that the statutory steps have been regularly taken.

[Ed. Note.—For other cases, see *Infants*, Cent. Dig. § 12; Dec. Dig. § 11.*]

Appeal from District Court, Parker County; J. W. Patterson, Judge.

Action by T. E. Lemons against the Gulf, Colorado & Santa Fé Railway Company. Judgment for defendant, and plaintiff appeals. Reversed and remanded.

Stennis & Wilson, for appellant. H. C. Shropshire, Terry, Cavin & Mills, and C. K. Lee, for appellee.

SPEER, J. This is an action by T. E. Lemons against the Gulf, Colorado & Santa Fé Railway Company to recover \$10,000 damages for injuries resulting in the loss of a foot. The accident occurred when plaintiff was a child 9 years of age, and he is now something more than 21 years of age. The case is what is commonly known as a "turntable case." The defendant answered, and pleaded, among other things, a compromise and settlement with plaintiff's guardian, and that plaintiff's disabilities of minority had been removed, and he had fully ratified and confirmed such settlement. The plaintiff also prayed for a writ of certiorari to the county court, asking a review of the orders of that court approving the settlement between the guardian and the defendant, and in his brief as appellant herein he states that such suits were consolidated in the district court, but we fail to find any such order in the transcript.

The trial court gave the following instruction: "Gentlemen of the jury, in this case the undisputed evidence shows that, after the plaintiff was hurt and injured, his father and said railway company entered into an agreement by which the railroad company should pay plaintiff \$1,500 for the injuries sustained; and it further shows that after said agreement was made the father of the plaintiff, T. D. Lemons, was appointed guardian of the estate of said minor, and that after he was so appointed said T. D.

Lemons made application to the county court of Parker county to authorize and empower him, as guardian of said plaintiff, to compromise and settle plaintiff's demand against said railroad company, and that the county judge authorized him so to do, and that in pursuance thereof the said sum of \$1,500 was paid to said T. D. Lemons, as guardian, in settlement of said claim, and, further, that a portion of this money was invested in a tract of land, and that the plaintiff, with full knowledge of all the facts in connection with said settlement and compromise, after he had disabilities removed, sold the land which had been so purchased, and appropriated the proceeds thereof to his own use and benefit. These facts amount to a ratification of the action of his father and guardian and of the county court in approving said compromise, and he will not now be heard to question their validity, and for these reasons the evidence will not support a finding for the plaintiff. You will, therefore, find for the defendants."

It is hardly fair to the trial court to discuss that branch of the case which had for its object the review of the orders of the county court, since, under the view taken by the district court, the question of ratification after the removal of appellant's disabilities was decisive of all others; and so it would be (if shown), if the court was correct in his assumption that appellant's disabilities of minority had been removed, and the charge is attacked upon this point. Appellant testified in a general way that his disabilities had been removed; that he had applied to the district court of Parker county for such relief when he was something more than 20 years of age. There was no evidence, however, of the nature of the proceeding for the removal of his disabilities, whether a petition was filed, notice giving order made by the judge, residence of the applicant shown, or other statutory requirements met. Appellant also testified, however, that at the time his disabilities were removed, and long prior thereto, he was residing in Dallas, and not in Parker, county. If the order removing a minor's disabilities were an ordinary judgment of a court of general jurisdiction, we would be justified, on this collateral attack, in assuming in favor of its regularity; but the rule is otherwise in a proceeding like this.

In *Brown v. Wheelock*, 75 Tex. 385, 12 S. W. 111, 841, our Supreme Court had under consideration an order of the district court upon an application for the removal of a minor's disabilities. The record consisted, first, of an entry appointing an attorney to represent the applicant as guardian ad litem, and, next, of the final order of emancipation. The only recitals in the latter were that the applicant, his attorney, and the guardian

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

† Application for writ of error dismissed by Supreme Court.

ad litem appeared and announced themselves ready for trial, and that it appeared to the court "that it is advisable and will be advantageous to the minor, Briscoe B. Smith, to have his disabilities as a minor removed." The trial court had instructed that the decree removing the disabilities of the minor was conclusive. After a learned review of the nature of the proceedings, the Supreme Court concluded: "It follows, from what we have said, that we are of opinion that no presumptions are to be indulged in favor of the regularity of the order in question. In the language of an eminent English judge: 'However high the authority to whom a special statutory power is delegated, we must take care that in the exercise of it the facts giving jurisdiction plainly appear, and that the terms of the statute are complied with. This rule applies equally to an order of the Lord Chancellor as to any order of petty session.' Coleridge, J., in *Christie v. Unwin*, 3 Perry & D. 208. We take it the evidence upon which the judge has acted need not be shown. When it is made to appear that the statute has been complied with, then the order should be deemed conclusive. The preliminary steps were not shown in this case, nor did they appear upon the face of the order. We conclude, therefore, that the court erred in the charge complained of, and that for this error the judgment should be reversed."

In this state of the evidence the trial court was not justified in assuming, as he did, that appellant's disabilities of minority had been lawfully removed. On another trial, if such fact should be established, this might render unimportant any action of the district court in the certiorari proceedings to review the orders of the county court. This trial under the statutes is of course de novo (*Sayles' Ann. Civ. St.* 1897, arts. 2800 and 339), and in the absence of a binding ratification by appellant the decision in the district court may be all-important. But since the trial judge put the peremptory instruction upon the ground of ratification, based upon the removal of appellant's disabilities as a minor, the cause will be reversed, without discussion of other questions in advance.

Reversed and remanded for another trial.

LOOMIS v. BROADDUS & LEAVELL.

(Court of Civil Appeals of Texas. Jan. 25, 1911. Rehearing Denied Feb. 22, 1911.)

1. APPEAL AND ERROR (§ 916*)—PRESUMPTIONS—PLEADINGS—STATEMENT OF CAUSE OF ACTION—SUFFICIENCY.

Where plaintiff's statement of cause of action in a case originating in a justice's court is not incorporated in the record on appeal from the county court, the Court of Civil Appeals will assume that the pleadings, other than

those appearing from the transcript, were oral, so that their sufficiency cannot be reviewed.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3699-3705; Dec. Dig. § 916.*]

2. JUSTICES OF THE PEACE (§ 174*)—APPEAL—FURTHER PLEADINGS.

Where, in an action originating in a justice's court, the pleadings are oral, the parties may orally replead in the county court, and their pleadings need not be as full and specific as is required when a case originates in the county court.

[Ed. Note.—For other cases, see Justices of the Peace, Cent. Dig. §§ 665-693; Dec. Dig. § 174.*]

3. APPEAL AND ERROR (§ 917*)—REVIEW—PRESUMPTIONS—PLEADINGS.

Where the facts developed on the trial in the county court on appeal from a justice's court disclosed a good cause of action, the court on further appeal from that court must presume in favor of the county court's ruling on a demurrer to the pleadings that such facts were pleaded by plaintiff.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3706-3709; Dec. Dig. § 917.*]

4. BROKERS (§ 40*)—EMPLOYMENT—CONTRACTS.

A broker effecting a sale of real estate may not recover commissions therefor unless he had authority to act as agent in the matter.

[Ed. Note.—For other cases, see Brokers, Cent. Dig. §§ 38-40; Dec. Dig. § 40.*]

5. BROKERS (§ 57*)—COMMISSIONS—WHEN EARNED.

Where the contract employing a broker to procure a purchaser, fixes the terms of sale, the broker, to recover commissions, must find a purchaser ready, willing, and able to purchase on such terms, unless he finds a buyer and introduces him to the owner and the buyer and the owner agree on terms of sale satisfactory to themselves, though differing from those on which the broker was authorized to sell, in which case he may recover the stipulated commissions.

[Ed. Note.—For other cases, see Brokers, Cent. Dig. §§ 66-72; Dec. Dig. § 57.*]

6. CONTRACTS (§ 176*)—CONSTRUCTION—QUESTION FOR COURT.

The court must construe a contract reduced to writing, and hence an instruction containing a correct statement as to the meaning of a contract is not erroneous.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 767-770, 1097; Dec. Dig. § 176.*]

7. BROKERS (§ 56*)—COMMISSIONS—WHEN EARNED.

Where a broker employed to procure a purchaser procured one who made a contract with the owner, the right of the broker to commissions was unaffected by any construction of the contract between the owner and purchaser or by the fact that enforcement against the owner would be inequitable because of a mutual mistake as to the number of acres forming the subject of the contract of sale.

[Ed. Note.—For other cases, see Brokers, Cent. Dig. §§ 85-89; Dec. Dig. § 56.*]

Appeal from El Paso County Court; A. J. Eylar, Judge.

Action by H. W. Broaddus and another against Charles R. Loomis and another. From a judgment for plaintiffs against defendant named, he appeals. Affirmed.

Robt. T. Neill, for appellant. S. P. Weisiger, for appellees.

NEILL, J. This suit was originally brought in the justice court by H. W. Broadus and Charles H. Leavell, composing the firm of Broadus & Leavell, against Charles R. Loomis and John A. Rice to recover the sum of \$175 as compensation or commission as real estate brokers for procuring a purchaser for them of two certain tracts of land listed by the plaintiffs for sale upon certain terms contained in the contract hereinafter referred to. The trial in the justice court resulted in a judgment in favor of the plaintiffs for the sum sued for, from which the defendants appealed to the county court. There upon a trial de novo judgment was rendered against plaintiffs in favor of Rice, and in their favor against Loomis for \$175, with interest. From the judgment Loomis has appealed.

The pleadings of plaintiffs in the justice's court do not appear in the record before us, nor is the statement of their case in the county court shown other than as it may appear from such written pleadings of the several parties filed there. The defendants Loomis and Rice filed separate pleadings in the county court. What appellant styled his "Original Answer in the County Court" contained a general demurrer and denial and a special plea, which is, in substance:

That, acting for himself and his codefendant, John A. Rice, he made and entered into a contract with one Jasper Wooldridge, who claimed to be acting for and whom he supposed to be acting for plaintiffs Broadus & Leavell, which is substantially as follows:

"El Paso, Tex. 2/29, 1908.

"Broadus & Leavell—Dear Sir: I own an interest in lots, private survey, north of and adjoining surveys 9, 11, 14, Block B. San Elizario addition. * * * For 5 days from this date you are hereby authorized to sell for \$27.50. \$525.00 cash, balance assume in V. L. notes for \$225.00 due about May 1908, \$225.00 due about May 1909, balance of purchase price payable one year from delivery of deed. Interest at the rate of 8% per annum. \$2.50 per acre com. payable out of first payment. You are given exclusive sale provided you advertise property at your own expense. * * *

"Remarks.—Can have all you get over \$27.50 payable from payment of last note. Yours truly,

"Address: Loomis & Rice, by Loomis."

That it was thereby mutually agreed that said firm of Broadus & Leavell were authorized to sell the property referred to in said contract for \$27.50 per acre, \$525 of which was to be paid in cash and the balance to be assumed in vendor's lien notes. That it was agreed and understood that out of said sum C. R. Loomis and John A. Rice were to receive net to them the sum of \$23 for each acre of said land, and that Broad-

us & Leavell were to receive no commission except out of such price as they might sell for that would be over the sum of \$25 per acre.

That subsequently, said land having been surveyed, it was found to contain an aggregate of 67 acres. That Broadus & Leavell did not comply with said contract, in that they never furnished defendants, or either of them, a purchaser ready, willing, and able to pay the sum of \$27.50 per acre, or any sum that would net them \$25 per acre. He also denied under oath the existence of any partnership between himself and his codefendant.

Rice pleaded precisely the same matters, and further answered under oath that he at no time gave C. R. Loomis any authority, either verbal or written, to extend the time for him with reference to the sale mentioned in said contract upon which plaintiffs base their suit for commissions for the alleged sale.

The plaintiffs, in what they styled their "Supplemental Petition," in replication to defendants' answers, alleged, in substance: That on February 29, 1908, defendants, acting through Chas. R. Loomis for himself and his codefendant, made and entered into an agreement for the sale of certain lands belonging to said defendants, a substantial copy of which is set out in their answers. That thereafter, and before the expiration of the five days mentioned in said memorandum, Chas. R. Loomis, acting for himself and with full knowledge of his codefendant, held himself out as being authorized to act for him, agreed with plaintiffs to extend the time in which the sale of said lands was to be made, and that, before the expiration of the time extended plaintiffs procured a purchaser for said lands who was ready, able, and willing to buy the same on terms acceptable to defendants and presented such prospective buyer to Charles R. Loomis, who acting for himself and his codefendant, with apparent authority to so act, and with full knowledge on the part of Rice that he (Loomis) had held and was holding himself out as authorized to act for him, entered into an agreement and contract for the sale of said lands with the purchaser so procured by plaintiffs, to wit, John L. Dyer of El Paso, Tex., and that said Loomis on March 7, 1908, acting as above alleged, made and entered into with said Dyer a contract in writing for the sale of the lands referred to in the memorandum set out in defendants' answers, which contract is substantially as follows: "March 7th, 1908. Rec'd of John L. Dyer the sum of fifty dollars, earnest money and part purchase of two tracts of land in El Paso county, Texas, adjoining block 'A' granted to Juan Lujan and I. Escajeda by Corp. of San Elizario, and said to contain 25 acres each, owned by Chas. R. Loomis & John A. Rice on the following terms: \$525 cash, assume note of \$225 due

May 3, 1908, and note of \$875 due one year with int. at 8% payable semi annually, trade to be closed on or before Mar. 14th 1908 and deed to be general warranty executed by Loomis & Rice. Title to be approved by purchaser. [Signed] Chas. R. Loomis. John A. Rice, by Chas. R. Loomis. Survey and abstracts to be adjusted between purchaser and agents March 7, 1908. Accepted. Title is satisfactory and I request deed be delivered to me. [Signed] Jno. L. Dyer."

That the plaintiffs dealt with the defendant Chas. R. Loomis with the understanding that he was acting with authority and in the capacity in which he held himself out and represented himself to have, and, plaintiffs having dealt with him under such belief and understanding, Rice is estopped to deny such agency and authority on the part of his codefendant. That by reason of making and executing the contract of March 7, 1908, above mentioned, defendants became bound as therein stated, and that any prior agreements as to the terms of sale made by them was merged into said last-mentioned contract, and the same was the final consummation of their agreement for the sale of said land. That, if Chas. R. Loomis was not authorized to represent Rice in the sale of the land and in making said contract of sale, then he in so holding himself out as having such authority became obligated and liable to plaintiffs personally, and that they are entitled to recover of him individually the full amount of their commissions sued for. That the contract for the sale of the land finally agreed upon was not by the acre, but for a "lump" sum, as is shown by the contract above referred to. The supplemental petition also contained a general denial of the allegations contained in defendants' answers.

In reply, Loomis, by his first supplemental answer, alleged that he had agreed to the extension pleaded by plaintiffs, but that it was merely an extension of the existing contract made by him with plaintiffs, acting through Wooldridge, and that the price of the land was at all times to be based upon the number of acres, and that he and his codefendant were to receive \$25 per acre net to them. He admitted signing the earnest money receipt set out in plaintiffs' supplemental petition, but averred that at the time both he and appellees understood that there were but 50 acres in the survey, but that a survey had subsequently been made and the acreage ascertained to be 67 acres, and that being advised to that effect, and still being willing to carry out his contract, he refused to convey unless the sum of \$25 per acre should be paid to him and his codefendant; that prior to the survey both he and plaintiffs were laboring under a mutual mistake that the tracts contained but 50 acres, whereas they, in fact, contained 67; that it was not contemplated nor intended that either party to the sale should risk more than the

usual rate of excess or deficiency in similar cases; and that it would be inequitable to compel him and Rice to convey. He also alleged that Dyer or plaintiffs should under the contract pleaded by appellants pay for the survey, but that neither did so. To the matters thus alleged in defendants' supplemental answer plaintiffs interposed a general demurrer and general denial. The demurrers of either party were overruled, and the case was tried before a jury, and upon the verdict judgment was rendered as above stated.

The first assignment of error complains of the court's refusal to peremptorily instruct a verdict for the defendants; the second, of its overruling appellant's general demurrer; and the third of the court's not peremptorily instructing a verdict for the defendants.

The plaintiffs' petition or statement of their cause of action not being incorporated in the record, it may be assumed that their pleadings other than appears from the transcript were oral. It has been held that the sufficiency of oral pleadings in a case originating in the justice court will not be reviewed on appeal, unless such pleadings, together with the objections interposed, and the rulings of the court thereon, are fully shown by bills of exception. *Williams v. Deen*, 5 Tex. Civ. App. 575, 24 S. W. 536. In such cases, though parties may replead in the county court, such pleadings may be oral, and are not required to be as full and specific as required when a case originates in the county court. *Barnes v. Sparks*, 131 S. W. 611; *Threadgill v. Shaw*, 130 S. W. 707. If, then, the facts developed on the trial, including such as were pleaded in writing, disclose a good cause of action, we must presume, in favor of the court's ruling on defendants' demurrer, that such matters were pleaded by the plaintiffs. While it is apparent that plaintiffs pleaded the written contract set up in defendants' answer for the purpose of showing their authority from them to effect a sale and as a basis for their compensation or commission, it is manifest that they relied upon a sale which was effected through their agency in procuring a purchaser ready, willing, and able to purchase the land upon terms agreed on by him (Dyer) and Loomis acting for himself and his codefendant. Without a contract creating such an agency, plaintiffs, to use the expressive language of appellant's counsel, "could not travel"; for, though a broker may effect or be the procuring cause of a sale, he cannot, unless he had authority to act as the agent of the owner in the matter, receive any commission or compensation from him. *Fordtran v. Stowers*, 113 S. W. 634; *Mueller v. Bell*, 117 S. W. 993. Hence it was essential to plaintiffs' recovery that they allege and prove such agency. And this, together with the object showing a basis for their compensation, we apprehend was their purpose of pleading the contract of February 2, 1908.

While, as a general proposition, where the contract of agency between the owner and the broker fixes the terms of sale, to entitle the latter to his commissions, he must find a purchaser ready, willing, and able to purchase upon the terms specified in such contract. But it is equally well settled that if, under such a contract of agency, the broker find a buyer and introduce him to the owner, and they agree upon terms of sale satisfactory to themselves, though differing from those upon which the broker was authorized to sell, he is entitled to his commissions as stipulated in the contract of his agency. *Hamburger v. Thomas*, 118 S. W. 770; *Id.* (Sup.) 126 S. W. 561; *Hancock v. Stacy*, 118 S. W. 180; *McDonald v. Cabiness*, 98 S. W. 943; *Id.*, 100 Tex. 615, 102 S. W. 721.

Waiving the fact, as is shown by the evidence, that the plaintiffs did procure a purchaser in John L. Dyer who was ready, willing, and able to buy the land upon terms stipulated in their contract of agency, it clearly appears from the evidence that, after they procured such purchaser, they brought him and appellant together, and that they then agreed upon the contract of sale which is set out in plaintiffs' supplemental petition, which appellant afterwards failed and refused to perform. Hence a contract was procured through the agency of plaintiffs which either party thereto could have enforced specifically had appellant been authorized to extend the contract of agency for his codefendant as he assumed to do. This, under the authorities above cited, entitled them to recover their commissions as fixed by the contract of agency. See, also, *Newton v. Dickson*, 116 S. W. 143. We therefore overrule the three first assignments of error, and also the fourth.

In the sixth paragraph of its charge the court instructed the jury: "You are instructed that said earnest-money contract [referring to the one incorporated in plaintiffs' supplemental petition] is not a contract for the sale of land by the acre, but is a contract for the gross payment of a lump sum for said tracts of land." In this there was no error, for, the contract being in writing, it was the duty of the court to construe the same. *E. P. & S. W. Ry. Co. v. Eichel*, 130 S. W. 922. It was, however, in so far as it affected plaintiffs, immaterial what construction was placed upon such contract. They having brought the parties together, and they having made a contract in terms to suit themselves, its construction was a matter between defendants and Dyer, and was a matter of no concern to the appellees. As to whether there was such a mutual mistake as to the number of acres in the subject of the contract as would render its enforcement against the appellant inequitable was also a question between the parties to such contract, and, however determined, could not affect plaintiffs' right to recover the commission they

earned by bringing the parties together and their then agreeing upon a contract of sale upon terms satisfactory to themselves. Plaintiffs did not make nor induce the parties to make the contract in the terms it was written, and are in no way responsible for its consequences. The same may be said in regard to Dyer's failure to pay for having the survey made.

In our view of the case the testimony of John L. Dyer, complained of in the seventh assignment, could have in no way prejudicially affected the appellant. Besides, as the court sustained his objection to it and excluded it from the consideration of the jury, it may be presumed that it did not affect the verdict.

There is no error in the judgment, and it is affirmed.

STATE v. POWELL†

(Court of Civil Appeals of Texas. Dec. 21, 1910. Rehearing Denied Feb. 15, 1911.)

1. PUBLIC LANDS (§ 175*)—PATENTS—VALIDATING ACTS.

Act April 7, 1897 (Acts 25th Leg. c. 88) § 1, declaring validated thereby all patents issued on locations or surveys made by virtue of any certificate issued under Confederate Land Certificate Act April 9, 1881 (Acts 17th Leg. c. 106), notwithstanding surveys made by virtue of any such certificate may not have been made contiguous to each other, validates such a patent, notwithstanding a prior judgment in favor of the state canceling it because of the surveys not having been made contiguous to each other, as required by the act of 1881.

[Ed. Note.—For other cases, see *Public Lands*, Cent. Dig. § 569; Dec. Dig. § 175.*]

2. PUBLIC LANDS (§ 173*)—SCHOOL LANDS—FUNDS.

Unless, when the judgment was rendered, more than half the public domain had been exhausted by grants and patents from the state for the benefit of others than the public free school fund, land covered by a patent issued by the state did not, at once, by virtue of a judgment, in favor of the state, canceling the patent, become the property of such school fund, under Const. art. 7, § 2, declaring that half the public domain of the state and money from sale of any portion of it shall constitute a perpetual school fund.

[Ed. Note.—For other cases, see *Public Lands*, Cent. Dig. §§ 544-551; Dec. Dig. § 173.*]

3. EVIDENCE (§ 23*)—JUDICIAL NOTICE—DISPOSITION OF PUBLIC LANDS.

Judicial notice cannot be taken that in 1895, when a judgment in favor of the state canceled a patent issued by it, more than half the public domain had been exhausted by grants and patents from the state for the benefit of others than the public free school fund.

[Ed. Note.—For other cases, see *Evidence*, Cent. Dig. §§ 29, 30; Dec. Dig. § 23.*]

4. PUBLIC LANDS (§ 173*)—RETROACTIVE EFFECT.

Acts 26th Leg. c. 81, declaring that all lands theretofore or thereafter recovered by the state shall at once become part of the permanent school fund, cannot have a retroactive effect as to land, the patent to which was prior to such act validated by the Legislature, after

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes
† Writ of error denied by Supreme Court.

having been declared invalid by a judgment in favor of the state.

[Ed. Note.—For other cases, see Public Lands, Dec. Dig. § 173.*]

5. PUBLIC LANDS (§ 173*)—SCHOOL LANDS—STATUTES.

An act of 1900 (Acts 26th Leg. 1st Called Sess. c. 11), in effect declaring that more than half the public domain at that time had been exhausted for purposes other than for the benefit of the public free school fund, and making an appropriation for the benefit of the school fund to cover such deficit, not having undertaken to declare that such condition existed in 1895, cannot be looked to in aid of the contention that it did then exist.

[Ed. Note.—For other cases, see Public Lands, Dec. Dig. § 173.*]

Appeal from District Court, Travis County; Chas. A. Wilcox, Judge.

Action by the State against E. M. Powell. Judgment for defendant. Plaintiff appeals. Affirmed.

Jewel P. Lightfoot, Atty. Gen., and L. A. Dale, Asst. Atty. Gen., for the State. Holloway & Holloway, for appellee.

RICE, J. This is an action of trespass to try title, brought by the state against appellee, for the recovery of 1,280 acres of land situated in Wichita county. Defendant replied by plea of not guilty. The case, having been tried before the court without the intervention of a jury on an agreed statement of facts, resulted in a judgment in behalf of appellee, from which the state has prosecuted this appeal.

The facts as agreed upon are briefly, in substance, as follows: That the John Wheat Confederate scrip certificate was located on the land in question by E. M. Powell, assignee of said Wheat. At the same time said Powell surveyed for the state an equal quantity of land, which, however, was not contiguous to the land in question, but was located in another county. The land so surveyed for the state was taken by the state under said survey and sold by it. The land in question was patented to said Powell as assignee of John Wheat by patent No. 165, vol. 37, dated May 21, 1888. Prior to the 4th day of June, 1895, the state of Texas instituted a suit against said Powell in the district court of Wichita county to cancel said patent on the sole ground that the land surveyed for the state was not contiguous to the land covered by the patent, and on this issue between the state and said Powell judgment was rendered in said cause on the 4th day of June, 1895, a copy of which judgment was attached to said agreement, and is made a part of said statement of facts. This judgment was not appealed from. The land in question was duly assessed for taxes from the date of said patent, and all taxes thereon were paid by said Powell to the year 1908, inclusive.

It is conceded by the defendant that the

state of Texas is entitled to a judgment for said land in this suit by virtue of said judgment of June 4, 1895, unless the act of the Legislature of April 7, 1897, validating Confederate scrip locations, had the effect of validating and confirming appellee's title, notwithstanding the intervening judgment of June 4, 1895. It is conceded by the state that but for the judgment of June 4, 1895, the validating act of April 7, 1897, would have had the effect of validating the defendant's title. The exhibit referred to is a final judgment of the district court of Wichita county rendered on June 4, 1895, giving judgment to the state of Texas for the land sued for, and decreeing cancellation of the patent therefor, being the same patent above mentioned. Prior to the act of 1897 it had been held by our Supreme Court that the act of 1881 (Acts 17th Leg. c. 106) contemplated that the surveys to be located by virtue thereof under Confederate scrip certificates, in order to be valid, should be contiguous to each other. See *Von Rosenberg v. Quellar et al.*, 80 Tex. 249, 16 S. W. 58. It appears from the statement of facts that the land surveyed for the state under this certificate was not contiguous to the land covered by the patent, and that the judgment of the district court of Wichita county canceling the same was based alone upon this fact.

There are but two questions arising in this appeal as presented by appellant's assignments. The first is whether or not the validating act of 1897, above referred to, by reason of its terms, had the effect of validating the patent to appellee, notwithstanding the intervening judgment rendered in behalf of the state canceling the same. The second question is: Did the land in issue, by reason of the judgment of the district court canceling the patent, at once become the property of the public free school fund of the state, and therefore not subject to location under the certificate, notwithstanding the act of 1897, validating said locations? The state contends that the first question should be answered in the negative, and the latter in the affirmative; the first for the reason that the act in question would be, in effect, judicial legislation, and would nullify the judgment rendered long prior to its enactment, and, further, because it cannot be gathered from the act itself that it was intended to have such effect. In 1897 the Twenty-Fifth Legislature (page 113) passed the following act: "Sec. 1. Be it enacted by the Legislature of the state of Texas: That all patents issued by the state upon locations or surveys of land made by virtue of any certificate issued under the provisions of an act of the Legislature of the state of Texas, entitled 'An act granting to persons who have been permanently disabled by reason of wounds received while in the service of this state

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

or of the Confederate States, a land certificate for twelve hundred and eighty acres of land,' approved April 9, 1881, be and are hereby validated, and the fact that the school and individual sections, or surveys made by virtue of any such certificate, may not have been made contiguous or adjacent to each other, shall not be held to invalidate the patent issued on such survey, nor to invalidate the right of the public free school fund to the land located or surveyed for the benefit thereof by virtue of any such certificate." It will be seen, therefore, that by the terms of the law it was not the object of said act to set aside the judgment of the court, but only to validate locations and patents to surveys made thereunder, notwithstanding the fact that the sections surveyed by virtue thereof were not contiguous to each other. So that the law, in effect, simply declared that the failure to so locate the two surveys did not render the location void, but declared that the same should be validated.

Appellee contends that the act in question rendered his location and patent valid ab initio, notwithstanding the intervening judgment in favor of the state. We think this view correct. It is true that appellee concedes that the original location and patent were invalid under the rule laid down in *Von Rosenberg v. Cuellar*, supra, but it is also conceded by the state that but for the judgment of June 4, 1895, the act of 1897 would have had the effect of validating defendant's title. The decree setting aside the patent did not render it void. It was already so under the authority last quoted.

Appellee further contends that the case of *Utter v. Franklin*, 172 U. S. 416, 19 Sup. Ct. 183, 43 L. Ed. 498, is conclusive of the question presented. In that case, as shown by his brief, "Pima county, Ariz., had issued \$200,000 in bonds in aid of a certain railroad. Suit was brought to recover the interest on \$150,000 of these bonds. The Supreme Court of Arizona and the Supreme Court of the United States held that the bonds were invalid. Thereafter certain validating acts were passed by the territory of Arizona and by the Congress of the United States, the effect of which acts was to validate all such bonds issued in aid of railroads. After the last validating act of Congress, a mandamus proceeding was brought against the territory officials to compel them to issue new bonds in lieu of the original issue, which had been declared void. It was insisted that the validating act did not have the effect of validating these particular bonds because they had been declared void by the former judgment. The Supreme Court of Arizona refused the mandamus on this ground, but the Supreme Court of the United States reversed that decision, and held that the bonds were validated by the act of Congress, notwithstanding the intervening

judgment declaring them void." Justice Brown said in passing upon this question: "The fact that this court had held the original Pima county bonds invalid does not affect the question. They were invalid, because there was no power to issue them. They were made valid by such power being subsequently given, and it makes no possible difference that they had been declared to be void under the power originally given. The judgment in that case was *res adjudicata* only of the issue then presented of the facts as they then appeared and of the legislation then existing."

In *Steele County v. Erskine*, 98 Fed. 215, 39 C. C. A. 173, where the county commissioners had contracted for having certain of its records transcribed, in payment for which it had issued its warrant which had been assigned, and upon which suit was brought against the county, the Supreme Court of North Dakota upon appeal from that judgment held the contract invalid on the ground that the commissioners had no authority under the law to make the contract. Thereafter a validating act was passed, and a new suit instituted upon the same cause of action, and the suit was sustained, notwithstanding the prior judgment. The court said in passing upon the question: "The former judgment between the parties simply declared the contract unenforceable because it was made without legislative authority. How can such a judgment be a bar to an action upon the same contract after it has received legislative sanction? Judgments declare the rights of parties after they have been pronounced, but do not preclude the assertion of rights subsequently acquired. In reply to an objection identical with that we are now considering, the Supreme Court said: 'It surely cannot be seriously urged that the Legislature is stripped of its power to authorize a contract to have effect in the future by judicial interpretation of the contract, and which at the time had reference to the present and the past only. A very large proportion of the legislation in all the states is prompted by the decisions of the courts, and is intended to remedy some mischief pointed out or resulting from the utterances of the courts of the country.' The present action comes within the principle of a second suit to recover real property based upon a newly acquired title. Such an action is never barred by an adverse judgment in respect to the same property, which was rendered before the new title was acquired." Discussing the question as to whether the act under consideration amounted to judicial legislation, the court further said: "The objection that the act in question was judicial legislation wholly misconceives the nature of the act. The Legislature did not declare the contract valid which the court had adjudged invalid, but made it valid by imparting to it legislative sanction which the court had declared was the only element wanting to its validity.

The act did not construe, but completed, the imperfect contract which the county had made. Seizing upon the duty that in good conscience rested upon the county to pay for the service which it had received, the Legislature, by virtue of its authority over the municipality as a public agency of the state, ratified its act, and thereby changed its moral duty into a legal obligation. Its act was formative, not judicial." The court in the same case, reviewing *Pennsylvania v. Wheeling & B. Bridge Co.*, 18 How. 421, 15 L. Ed. 435, says: "It is (the case just cited) a striking illustration of the power of the Legislature to render lawful that which had been declared unlawful by the courts. In that case the Supreme Court adjudged a bridge which had been constructed across the Ohio River at Wheeling under an act of the Legislature of Virginia to be an obstruction to navigation, and a common nuisance, and ordered it to be changed so as not to interfere with vessels in use upon the river. The ground upon which the decision rested was that the bridge had been constructed over a navigable stream without authority of Congress, and in violation of rights secured by congressional legislation. Thereafter Congress passed an act which was in direct contravention of the decree. It declared the bridge which the court had adjudged to be a nuisance to be a lawful structure, and, instead of requiring the bridge to be accommodated to the vessels, it required the vessels to be so operated as not to interfere with the bridge. The act was assailed as in effect annulling the judgment of the court already rendered, and the rights determined thereby in favor of the plaintiff. But the act was sustained by the court, which held that the want of congressional authority was all that rendered the bridge an unlawful structure, and, the authority having been conferred, its character was changed. The act did not change the decree, but the subject-matter upon which the decree operated."

In the case of *Richman v. Supervisors*, 77 Iowa, 513, 42 N. W. 422, 4 L. R. A. 445, 14 Am. St. Rep. 308, it is said, as shown by the syllabus: "If the proceedings of a board of supervisors of a county be void for want of jurisdiction, and if the thing wanting in such proceedings, or which failed to be done, is something which the Legislature might have dispensed with by a prior statute, it is within the power of the Legislature to dispense with it by subsequent statute. Where, therefore, a county board of supervisors proceed to construct a levee, and to assess the cost thereof against certain lands supposed to be benefited thereby, but its proceedings are adjudged to be void for want of jurisdiction, solely because a petition was not filed in the office of the county auditor, signed by a majority of the persons resident of the county, owning lands adjacent to the improvement, setting forth the same and the starting point, route and termini, an act of the

Legislature subsequently enacted to validate such proceedings will not be unconstitutional, since the jurisdictional act was one with which the Legislature could have dispensed in the first instance."

In the case of *Wrought-Iron Bridge Co. v. Town of Attica*, 119 N. Y. 204, 23 N. E. 542, the plaintiff had constructed a bridge for the town, and sued for the contract price. The court held against the plaintiff on the ground that the contract was without authority, and all proceedings were unauthorized. Subsequently a curative act was passed by the Legislature, legalizing the proceedings taken by the town. A new suit was filed which was resisted upon the ground that the Legislature had no power to validate a claim against the town which had been adjudged invalid by the courts. The Court of Appeals of New York gave judgment for the bridge company, notwithstanding the prior judgment in favor of the town of Attica. The town of Attica had acquired no vested right by virtue of the first judgment, nor was the validating act an usurpation of judicial functions.

Applying the principle running through these cases to the case at bar, it will be perceived that the Legislature did not undertake to declare valid the prior location which the court had adjudged invalid, but simply declared all such locations valid, notwithstanding the fact that the former law required said surveys to be contiguous. The act simply rendered that legal which had been illegal by ratification thereof. The state had obtained the benefit of the location made for it, and had disposed of the land so surveyed by appellee. Certainly the equities of the appellee were as great as those of other locators in like condition, against whom no judgment had been rendered. And we do not think it was the intention of the state by this act to exclude him, or others in like position, from its benefits. It will be observed that no exceptions are contained within the act as to whom it shall apply. We are therefore constrained to believe notwithstanding the intervening judgment that appellee's location and title by reason of said validating act was rendered valid, and that the trial court did not err in so holding.

The second contention can only be sustained upon the ground that at the time of the rendition of the judgment in the Wichita county district court that the land so instantly became the property of the school fund. This it is claimed was true by reason of section 2, art. 7, of the state Constitution, which is as follows: "All funds, lands and other property heretofore set apart and appropriated for the support of public schools; all the alternate sections of land reserved by the state out of grants heretofore made or that may hereafter be made to railways, or other corporations, of any nature whatsoever; one-half of the public domain of the state and all sums of money that may come to the state from the sale of any portion of

the same, shall constitute a perpetual school fund." And *Hogue v. Baker*, 92 Tex. 58, 45 S. W. 1004, is referred to in support of this contention. We think, in order to so hold, we must declare that at the time said judgment was rendered that more than one-half of the public domain had been exhausted by grants and patents from the state for the benefit of persons other than the public free school fund. There is no evidence of this fact in the record, nor do we think that we can take judicial cognizance of such fact. It is true that this was so declared in *Hogue v. Baker*, supra, but it must be recalled that that case went off on demurrer by the relator to the state's answer setting up the facts showing that one-half of the public domain had been exhausted; which, by agreement of the parties, was held to have been admitted, so that case is not authority for holding that the court could take judicial cognizance of the fact (if it be one) that more than one-half of the public domain had been exhausted prior to June, 1895, the date when the state recovered judgment for said land. Nor do we think the act of 1899 (Acts 26th Leg. c. 81) or 1900 (Acts 26th Leg. 1st Called Sess. c. 11) applicable, the first of which declares that "all the lands heretofore or hereafter recovered from railroad companies, firms, corporations or persons by the state of Texas, by suit or otherwise, shall at once become part of the permanent school fund of the state, and shall be disposed of as other lands, except as herein provided," for the reason that said act was passed two years after said validating act. If the land by reason of the validating act of 1897 became the property of appellee, then said subsequent act of 1899 could not in our judgment be held to have retroactive effect, so as to divest title out of him. Nor do we see that the act of 1900, relied upon by appellant, which, in effect, declares that more than one-half of the public domain at that time had been exhausted, and making an appropriation for the benefit of the school fund to cover such deficit, can be looked to by us in aid of appellant's contention, because that act does not determine or undertake to determine that such condition was true in 1895 at the time the Wichita county judgment was rendered, under which the state claims the land, for which reason we are constrained to hold that the land in question did not become the property of the school fund eo instanti by virtue of the judgment of the district court of Wichita county rendered in 1895 canceling said patent, but that it thereby became the property of the state, which had the authority to pass the validating act, reinvesting appellee with title thereto, notwithstanding said judgment; and we therefore conclude that appellant's assignment presenting this question should be overruled.

Finding no error in the judgment of the court, the same is affirmed.
Affirmed.

TAUB v. WOODRUFF.

(Court of Civil Appeals of Texas. Dec. 22, 1910. Rehearing Denied Feb. 9, 1911.)

1. LIMITATION OF ACTIONS (§ 107*)—COMPUTATION OF TIME—STAY OF PROCEEDINGS.

In an action by a builder for the contract price, defendant, after answer, applied for a stay of proceedings pending the determination of a suit in another court by a subcontractor to establish a lien on the building, and an order was entered reciting the subcontractor's suit, and ordering that the further progress of the builder's suit be stayed until the further progress of the court. *Held*, that the stay was merely to prevent the case from coming to trial until the question of the subcontractor's lien was determined, and did not preclude the filing of an amended petition, and hence did not prevent the running of the statute of limitations as to claims for extras not mentioned in the original petition.

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. § 517; Dec. Dig. § 107.*]

2. CONTRACTS (§ 353*)—BUILDING CONTRACT—ACTION—INSTRUCTIONS—SUPPORT IN EVIDENCE.

In an action by a builder for the contract price, the owner counterclaimed for delay. The contract required the builder to claim in writing an extension of time for completion within 24 hours after the delay occurred which entitled him to it. Much of the delay was caused by delay of a distant subcontractor to furnish millwork, which, in turn, was due to the failure of the architect to furnish plans and specifications. Plaintiff testified to asking the owner whether he required a written claim in relation to this delay, and that he replied that he did not; that the delay was due to the placing of the order for the millwork at a distance to get a better job; that he was more interested in getting a good job than in completion in the contract time. *Held* insufficient to warrant the submission of the issue of the owner's waiver of all claim of damages for delay from whatever cause, or of the claim of damage for delay in completion caused by delay in receipt of millwork, the waiver testified to being only of the written claim of an extension of time for completion.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 1829-1844; Dec. Dig. § 353.*]

3. CONTRACTS (§ 287*)—BUILDING CONTRACTS—ARCHITECT'S CERTIFICATE OF COST—ADMISSIBILITY IN EVIDENCE.

Where the owner of a building forfeited the building contract under a provision thereof permitting him on certificate by the architect to terminate the contract for failure to properly prosecute the work and to complete the work at the builder's cost, the cost of so doing and any damages from the builder's breach of the contract to be certified by the architect, such certificate to be conclusive, the architect's certificates in the absence of any showing of bad faith or collusion with the owner were admissible in evidence in the builder's suit for compensation as against the objection that they were made after plaintiff's work on the building had ceased, and were merely ex parte and unsworn statements.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 1344-1351; Dec. Dig. § 287.*]

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

4. CONTRACTS (§ 287*)—BUILDING CONTRACTS—ARCHITECT'S CERTIFICATE—EFFECT OF BAD FAITH.

If the architect acted in bad faith or arbitrarily in certifying to the builder's failure to perform looking to a forfeiture of the contract, or in certifying to the cost of completion, such certificates would not be admissible as evidence of the facts therein stated.

[Ed. Note.—For other cases, see *Contracts*, Cent. Dig. §§ 1344-1351; Dec. Dig. § 287.*]

5. EVIDENCE (§ 471*)—OPINIONS—NONEXPERTS.

A nonexpert witness in a contractor's suit for compensation may not give his opinion as to the character of the work done on defendant's building.

[Ed. Note.—For other cases, see *Evidence*, Cent. Dig. §§ 2149-2185; Dec. Dig. § 471.*]

6. CONTRACTS (§ 232*)—BUILDING CONTRACTS—CHARGES—EXTRAS.

Where a building contract provided that no changes or alterations should be made in the work shown or described in the drawings or specifications, except on written order of the architect, and, when so made, the value thereof should be computed by the architect, the contractor is not entitled to compensation for extra work unless ordered in writing by the architect, and the value thereof computed by him, except where the architect acts arbitrarily and in bad faith in computing or refusing to compute the value of such extra work.

[Ed. Note.—For other cases, see *Contracts*, Cent. Dig. §§ 1071-1097; Dec. Dig. § 232.*]

Appeal from District Court, Harris County; W. P. Hamblin, Judge.

Action by W. E. Woodruff against J. N. Taub. From a judgment for plaintiff, defendant appeals. Reversed and remanded.

L. B. Moody, for appellant. Baker, Botts, Parker & Garwood, for appellee.

PLEASANTS, C. J. This suit was brought by appellee against appellant to recover a balance alleged to be due upon a contract for the construction by appellee of a dwelling house for the appellant, and to recover certain items of special damage alleged to have been sustained by appellee by reason of acts and omissions on the part of appellant in the performance of said contract.

The petition alleges that there was a balance due plaintiff on the contract price of the work, including amount due for extra work as provided in said contract, of \$2,980.60, and that, in addition thereto, defendant is liable to plaintiff in the sum of \$850 on account of delay and extra expense caused plaintiff in the performance of his contract by reason of the delay of defendant in furnishing plans and specifications for the work and the errors and mistakes in the plans and specifications furnished, and the failure of the defendant to pay for certain hardware which, under the agreement between the parties, the defendant was required to furnish, and for which plaintiff was forced to pay. The several items of damage which went to make up the sum of \$850 were alleged. The defendant answered by general denial and by special pleas, claiming credit

for various amounts paid plaintiff, and paid for material which, under the contract, plaintiff was required to furnish, and also for amounts averred to be the difference in value between material furnished by the plaintiff and materials which he was required to furnish under the terms of the contract. He also pleaded that the contract provided that plaintiff should pay to the defendant the sum of \$3.50 per day for each day that the building remained unfinished after the date specified in the contract for its completion, and that the building had remained unfinished for 205 days after said date, and defendant was therefore entitled to recover of plaintiff on account of such delay the sum of \$717.50. He further pleaded: "Defendant further shows to the court that the contract sued on herein by the plaintiff contains the following provisions: 'Art. 5. Should the contractor at any time refuse or neglect to supply a sufficiency of properly skilled workmen, or of materials of the proper quality, or fail in any respect to prosecute the work with promptness and diligence, or fail in the performance of any of the agreements herein contained, such refusal, neglect, or failure being certified by the architect, the owner shall be at liberty, after three (3) days' written notice to the contractor, to provide any such labor and materials, and to deduct the cost thereof from any money then due or thereafter to become due to the contractor under this contract; and, if the architect shall certify that such refusal, neglect, or failure is sufficient ground for such action, the owner shall also be at liberty to terminate the employment of the contractor for the work and to enter upon the premises and take possession, for the purpose of completing the work comprehended under this contract, of all materials, tools, and appliances thereon, and to employ any other person or persons to finish the work and to provide materials therefor, and, in case of such discontinuance of the employment of the contractor, he shall not be entitled to receive any further payment under this contract until the said work shall be wholly finished, at which time, if the unpaid balance of the amount to be paid under this contract shall exceed the expense incurred by the owner, in finishing the work, such excess shall be paid by the owner to the contractor, but, if such expense shall exceed such unpaid balance, the contractor shall pay the difference to the owner. The expense incurred by the owner as herein provided either for furnishing materials or for finishing the work, and any damage incurred through such default, shall be audited and certified by the architects, whose certificate thereon shall be conclusive upon the parties.' Defendant further shows to the court that the plaintiff neglected to supply a sufficiency of properly skilled workmen, and failed in all respects to prosecute

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

the work with promptness and diligence, which neglect and failure was certified to defendant by the architect, and defendant gave written notice thereof to plaintiff, and said architect certified to defendant that such neglect and failure on the part of the plaintiff was sufficient ground to authorize defendant to terminate the employment of the plaintiff for the said work. Defendant further shows to the court that thereafter, to wit, about the 7th day of June, 1906, plaintiff of his own motion discontinued work under said contract, and notified defendant and his architect that he would not do anything further under said contract, claiming that he had completed said building in accordance with said contract. Defendant further shows to the court that at the time of the abandonment of the work upon said building by the plaintiff the same had not been completed in the manner required by the contract sued on herein, and thereupon defendant was compelled to employ, and did employ, workmen and purchase materials for the finishing and completion of said building in the manner provided for by the contract sued on herein at a necessary expense to defendant in the sum of one thousand and fifty-nine and $\frac{11}{100}$ dollars (\$1,059.11), which expense was audited and certified by the architect and paid by the defendant." He further pleaded limitation against plaintiff's claim for the \$850 before mentioned. In reply to defendant's answer, plaintiff filed a supplemental petition, alleging fraud and collusion on the part of the defendant and his architect in the certificates by the architect as to plaintiff's failure to comply with his contract and the certificates as to the amounts necessarily expended by defendant in completing the building. The cause was tried with a jury, and a verdict and judgment was rendered in favor of plaintiff for the sum of \$2,923. On motion for new trial filed by the defendant, plaintiff remitted \$328.93 of this amount, and thereupon the trial judge overruled the motion.

Having concluded that the judgment of the court below should be reversed because of errors committed upon the trial, we shall only discuss the assignments of error which we think should be sustained, and those which present questions upon which, in view of another trial, we think it best to express our views, and will not state the facts shown by the evidence further than is necessary to understand the questions presented by the assignments discussed in this opinion. The defendant requested the trial court to instruct the jury to return a verdict in his favor as to all of the items making up the sum of \$850, damages claimed by plaintiff before mentioned, on the ground that plaintiff's right to recover each and all of said items was barred by the statute of limitation at the time plaintiff filed his amended petition in which for the first time he asserted the right to recover said damages. The record shows

that these items of damage accrued more than two years before the filing of the amended petition, and that no claim was made therefor in the original petition. The only answer appellee makes to appellant's assignment of error complaining of the refusal of the court to give the requested instruction is that he was prevented from sooner filing his amended petition and setting up his claim for these items by an order of the court made and entered in this cause upon the motion of appellant. The facts in regard to this order are that, after the original petition was filed and defendant had answered herein, a suit was brought in the United States District Court at Houston by a subcontractor under appellee seeking to establish a lien upon appellant's building to secure the payment of an amount claimed to be due said subcontractor for work and material furnished by him to appellee in the construction of appellant's building. After this suit was filed, appellant filed an affidavit in the court below setting up the facts as to the filing of said suit, and moved the court to stay proceedings in this cause until said suit in the United States court should be determined. On this motion the court made and entered the following order: "On this 13th day of April, 1907, there came on to be heard the application of the defendant, praying that this cause be stayed until the final termination of a certain suit pending in the United States court in the Southern district of Texas, upon the equity docket, being No. 80, and entitled Le-coutour Bros. Stair Manufacturing Company v. W. E. Woodruff et al., and the court, having heard said application, is of the opinion that it ought to be granted, and it is therefore ordered that the further progress of the suit in this court, No. 40,712, and entitled W. E. Woodruff v. J. N. Taub, be stayed until the further order of this court." This order was clearly not intended to restrain appellee from filing any additional pleadings he might desire to file in this cause, and it cannot be given that construction. The evident sole purpose of the application was to prevent a trial of this case before the claim of a lien upon appellant's building asserted by the plaintiff in the suit in the federal court was determined, and the order of court restraining "the further progress" of this suit can be given no wider scope, and cannot be held to have tolled the statute of limitation against the filing by appellee of an amended petition setting up claim for damages not made in his original petition. It follows that the trial court erred in refusing the requested instruction.

There is evidence showing that the building remained unfinished for 205 days after the 120 working days allowed by the contract for its completion. Appellee pleaded that he was delayed 150 days by the failure of appellant's architect to furnish the necessary plans and specifications for the work, and, as

before shown, claimed damages for such delay. There was evidence to support this claim. In submitting the issue of appellant's right to recover damages for delay, the trial court charged the jury as follows: "If you believe from the evidence that more than 120 working days elapsed from the date of the written contract to such a time after the date when, as the plaintiff alleges, he was compelled to abandon the work, or, as the defendant alleges, he discontinued same, as would reasonably have been required to complete said work according to the plans and specifications, then you will find for the defendant on his claim for delay for \$3.50 per day for each day of said excess. But if you believe from the evidence that such excess, or any part thereof, was caused by the delay mentioned in paragraph 3b thereof, and if you believe that the defendant stated to the plaintiff, during the course of the work, that he would make no claim for the delay, then you will find nothing for the defendant on his claim for the delay." Under an appropriate assignment of error, appellant complains of this charge upon the ground, among others, that it submits to the jury the issue of a waiver by appellant of his claim for damages for delay when there is no evidence to support such issue. The assignment must be sustained. The contract provided, in effect, that, if appellee should be delayed in the construction of the building by causes which under the provisions of the contract would entitle him to an extension of time, no claim for such extension would be allowed, unless made in 24 hours after the delay occurred. Appellee claims in his pleading, and the evidence tends to show, that a large portion of the delay in the construction of the building was caused by the delay of a St. Louis subcontractor to furnish certain millwork ordered by appellee to be used in constructing the building, and this delay was due to the failure of appellant's architect to furnish the necessary plans and specifications. Appellee testified that pending this delay in receiving this millwork he had frequent conversations with appellant in reference thereto; his testimony on this point being as follows: "I had frequent conversations with Mr. Taub about the delay, when I was being delayed, and asked him if he required me to make a claim in writing on account of it, as required in the contract, and he said no, that he understood that the delay was caused by placing the order for the millwork at St. Louis, which was done to give him a better job, that he was living in another house of his own, and that he was more interested in getting a good job than he was in having it finished in the time stated in the contract." This is the only testimony relied on by appellee to sustain the contention that the evidence raises the issue of a waiver by appellant of all claim for damages for delay. We do not think this

testimony can be so construed. The only reasonable inference to be drawn therefrom is that appellant waived the requirement of the contract that appellee, in order to claim an extension of time for delay not chargeable to him, should give written notice of his claim for such extension within 24 hours after the delay occurred. This charge is objectionable for another reason, viz.: The jury were told in effect that if any part of the delay for which appellant claims damages was caused by the delay in receiving the millwork from St. Louis, and that such delay was due to the failure of the architect to furnish the necessary plans and specifications, appellant cannot recover for any delay in the construction of the building. This is manifest error. If the statement of appellant shown by this testimony could be regarded as a waiver of his right to claim damages for delay, it could not possibly be made to apply to any such damages other than those caused by delay in receiving the millwork from St. Louis, and, as before shown, this is by no means all of the delay which might have been found from the evidence and for which appellant claims damages.

Upon the trial of the case appellant offered in evidence the certificates of the architect as to the cost of the completion of the building according to contract after appellee had abandoned his contract. Appellee objected to this evidence on the grounds that said certificates were irrelevant and immaterial as evidence in this case, that they were made after the appellee had discontinued work on the building, and were merely ex parte and unsworn statements of the architect. These objections were sustained by the trial judge, and under an appropriate assignment of error appellant complains of this ruling. Article 5 of the contract, which has been before set out in stating the pleadings of appellant, provides that if "the contractor [appellee] should at any time refuse or neglect to supply a sufficiency of properly skilled workmen or of materials of the proper quality, or fail in any respect to prosecute the work with promptness or diligence or fail in the performance of any of the agreements herein contained, * * * and if the architect shall certify that such refusal, neglect, or failure is sufficient ground for such action, the owner shall also be at liberty to terminate the employment of the contractor for the work, and to enter upon the premises and take possession, for the purpose of completing the work comprehended under this contract, of all materials, tools, and appliances thereon, and to employ any other person or persons to finish the work, and to provide materials therefor, and, in case of such discontinuance of the employment of the contractor, he shall not be entitled to receive any further payment under this contract until the said work shall be wholly finished, at which time, if the unpaid balance

of the amount to be paid under this contract shall exceed the expenses incurred by the owner, in finishing the work, such excess shall be paid by the owner to the contractor; but, if such expense shall exceed such unpaid balance, the contractor shall pay the balance to the owner. The expense incurred by the owner as herein provided, either for furnishing materials or for finishing the work, and any damage incurred through such default, shall be audited and certified by the architects, whose certificate thereon shall be conclusive upon the parties." There was evidence tending to show that appellee had failed in the respects mentioned in this article of the contract, and that the architect had certified that such failure was sufficient ground for the owner to take charge of the work and proceed to complete same in accordance with the contract. Appellant on May 16, 1906, gave appellee the following written notice: "You are hereby notified that because of your failure to comply with your contract and complete my building in the time specified, and because of your failure to meet your claims against you for labor and material, that I will immediately take charge of the job and complete it myself." The evidence shows that after this notice was sent by appellant, appellee, with the consent of appellant, continued to direct the workmen who were engaged upon said building until June 7, 1906, when because of a disagreement between him and the architect he ceased to have any further connection with the work. The work was completed under the direction of the architect by workmen employed by appellant, and the certificates offered in evidence were certificates of the architect as to the cost of completing the work according to contract. We think the evidence is sufficient to show that appellee's contract was forfeited by the architect under the provisions of the contract, and that, if the architect acted in good faith and without collusion with the owner, his certificates as to the cost of completing the work would, under the terms of the contract, be conclusive. *McKenzie v. Barrett*, 43 Tex. Civ. App. 451, 98 S. W. 230.

The issue of bad faith on the part of the architect was raised by the pleading and evidence, but was not submitted to the jury. If upon a proper submission the jury should find that the architect acted arbitrarily and in bad faith in declaring the contract forfeited or in making his certificates of the cost of completing the work, such certificates should not be considered by the jury, but in determining the question of whether appellee was entitled to recover anything upon his contract they should only consider the sworn testimony of the witnesses as to the reasonable cost of completing the work.

The objection of the appellant to the testimony of the witness Hagerman as to how

the work on appellant's building was done should have been sustained. The testimony was merely the opinion of the witness, and, as he was not shown to have been an expert, his opinion as to the character of the work was clearly inadmissible.

Appellee, as before stated, claimed compensation for extra work which he alleged was made necessary because of errors in the specifications furnished him by the architect. The contract provided that no changes or alterations should be made in the work shown or described by the drawings and specifications except upon a written order of the architect, and that, when so made, the value of the work added should be computed by the architect. Under this provision of the contract, appellee would not be entitled to compensation for extra work in making changes in the plans and specifications, unless such changes were made on the written order of the architect, and then only to the value of such extra work computed by the architect, unless the jury should find from the evidence that the architect acted arbitrarily and in bad faith in computing or refusing to compute the value of such extra work.

The paragraphs of the court's charge complained of by the twenty-seventh and twenty-eighth assignments of error are predicated upon the assumption that the appellee was entitled to recover the reasonable value of such extra work without regard to the issue of bad faith on the part of the architect, and are therefore erroneous.

For the errors indicated, the judgment of the court below is reversed and the cause remanded.

Reversed and remanded.

HARRIS v. RATHER.†

(Court of Civil Appeals of Texas. Jan. 25, 1911. Rehearing Denied Feb. 22, 1911.)

1. DEEDS (§ 145*)—COVENANT OR CONDITION—AFFECTING REMEDY.

Where plaintiff contracted to sell land to defendant, defendant agreeing to erect a building to cost a specified amount within a certain time, but the deed made in pursuance of the contract was silent as to the building but retained a vendor's lien for the price, the agreement to build was a covenant, and not a condition subsequent, and hence plaintiff's remedy for a breach was an action for damages, and not for cancellation.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. § 471; Dec. Dig. § 145.*]

2. DEEDS (§ 144*)—CONDITIONS—FORFEITURE—RIGHT OF RE-ENTRY.

Apt and appropriate words must be used or a right of re-entry reserved, to create a condition in a deed, breach of which will work a forfeiture.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. §§ 469, 470, 472; Dec. Dig. § 144.*]

Appeal from District Court, Travis County; George Calhoun, Judge.

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Index

† Writ of error denied by Supreme Court.

Action by Sidon Harris against C. T. Rath-
er. From a judgment for defendant, plain-
tiff appeals. Affirmed.

Sidon Harris, for appellant. C. T. Rather,
for appellee.

RICE, J. On the 21st day of May, 1908, the parties hereto entered into a written contract, whereby the appellant, in consideration of the sum of \$5,000 to be thereafter paid by appellee, bound himself to convey to appellee five acres of land in the city of Austin, upon which the latter agreed to erect a residence to cost not less than \$10,000, work to commence within 12 months. On the 25th of June thereafter appellant and wife, by warranty deed, conveyed to appellee said tract of land in consideration of \$5,000, \$2,000 of which was paid by appellee at the time, and the assumption by him of the payment of \$3,000 owing by appellant to his vendor, said deed retaining a vendor's lien to secure the payment thereof. There is no mention in said deed of the agreement on the part of appellee to erect a \$10,000 residence on said property. Appellee having failed to commence the erection of said building within the period named, this suit was brought on the 9th of June, 1909, by appellant to cancel said deed and to remove cloud from title to said property cast thereon by same. There was a jury trial, in which the court instructed a verdict for appellee, and judgment was entered in accordance therewith, from which this appeal is taken.

The material question for our consideration is whether or not the provision relative to the erection of a \$10,000 residence upon the property in question should be regarded as a covenant or a condition subsequent. If the former, then upon the breach thereof appellant would have his action for damages, and, if the latter, then the right to rescission and cancellation of the deed would exist upon failure to comply therewith. The evidence showed that appellant owned 100 acres of land adjoining the tract in controversy upon which there were no houses or improvements, and that he would not have sold this tract to appellee but for the fact that appellee agreed, in addition to the payment of the \$5,000, to begin the erection within 12 months thereafter of a \$10,000 residence, and appellant testified that this was the principal inducement for the sale thereof to him.

Appellant contends by his assignments that the evidence did not conclusively establish that the provision with reference to the erection of the residence was a mere personal covenant, and that, therefore, the court erred in instructing a verdict in behalf of appellee. It is insisted, however, on the part of appellee by his counter proposition, that, notwithstanding the fact that he contracted to begin building a house upon the five acres of land described in the petition within 12 months from May 21, 1908, and notwithstanding the fact that he breached said contract

by failing to begin the erection of said house within said period, said breach did not forfeit the grant or vest in appellant any legal right to recover the five acres of land, because the stipulation to build said house was a covenant, the breach of which gave rise to an action for damages, or for specific performance, and not a condition subsequent, the breach of which was legal grounds for rescinding or forfeiting the grant. We believe that the record sustains the contention of appellee. If, as insisted by appellant, the agreement on the part of appellee to begin the erection upon the land conveyed within 12 months of a \$10,000 residence was a part of the consideration for the conveyance, and if this consideration had been recited in the deed, still we do not think that this would have given appellant a right to rescind. The grantor did not make or attempt to make the failure on the part of his grantee to erect said building a cause for forfeiture or rescission of the contract. It is true that the deed reserved a lien to secure the payment of the purchase money, but it will be observed no lien whatever was retained in the deed to enforce the obligation with reference to the erection of said residence. The appellant had the right to have inserted such a clause, but, having failed to do so, it seems to us the presumption would obtain that he intended to rely upon his contract, a breach of which would merely authorize a suit for damages.

In the case of Ry. Co. v. Titterington, 84 Tex. 218, 19 S. W. 472, 31 Am. St. Rep. 39, a similar question to the one here presented was considered. Titterington and wife conveyed certain land to the company. The consideration, as expressed, was that the company, among other things, would construct a railway upon the tract of land and establish and maintain thereon a station, the latter of which was not done. The suit was brought by him to cancel and annul the deed because of the failure on the part of the company to locate or maintain a railway station on the land conveyed. In passing upon the question thus presented, the court said: "It is very evident that the deed contains no conditions precedent, nor do we think that the language used would indicate even a condition subsequent. * * * Conditions of this character are not favored by the courts, and, in case of doubtful language or intention, the promise or obligation of the grantee will be construed to be a covenant limiting the grantor to an action thereon, and not a condition subsequent with the right to defeat the conveyance. Under the authorities, we think it must be held, and we do hold, that the promises or obligations of the railway company referred to in the deed are in the nature of covenants, not conditions, and therefore the plaintiffs, aside from other questions in the case, could not reclaim the land itself on account of nonperformance of the covenants or promises by the grantee,

but would be required to sue for the damages arising from the breach of the contract."

In the case of *Moore v. Cross*, 87 Tex. 557, 29 S. W. 1051, suit was brought by Cross to cancel a deed which he had made to Moore. It was alleged, among other things by the plaintiff, that he had been induced to execute the deed by certain representations and guaranties of Moore, to the effect that, if he did so, Moore would give him remunerative employment as specified therein, and that a railway roundhouse and machine shops would be established contiguous to property which was conveyed to him by Moore in exchange, and thereby greatly enhance the value of that property. There was a verdict and judgment for the plaintiff, and upon appeal, the Supreme Court in passing upon the question presented said: "It does not appear from the evidence that the alleged promises constituted any part of the consideration for the exchange of the property. If, however, they were the consideration, and had been inserted in the deed in the terms stated in the conclusions of fact, their breach would not afford ground for canceling the deed, but the party must resort to his action for damages, if any. If as contemporaneous parol agreements they can be proved under the circumstances of this case, which question is not before us, then assuredly they could have no greater force than would be given to them if embodied in the deed in the form of covenants."

In the case of *Mayer v. Swift*, 73 Tex. 369, 11 S. W. 378, Lavinia Swift, a very old woman, conveyed to Mayer a house and lot upon consideration that he would support and maintain her during the remainder of her life, which it was claimed he failed to do, whereupon she brought suit for cancellation of the deed, and recovered. The case was reversed, chiefly upon the charge of the court, which instructed the jury that if Mayer did not reasonably and in good faith carry out his undertaking to support her, and it was manifest by his conduct that he did not in good faith intend to comply with his undertaking, that the consideration of such contract had failed, and they would find for the plaintiff. This charge was held error, the court saying that: "The suit was not to charge the land with a trust, but was for the cancellation of a deed, and the judgment of the court annulled and set aside the deed and restored the possession of the land to the plaintiff. The deed, as we have said, is an absolute and unqualified conveyance of the land upon a valuable consideration, shown upon the face of the deed to be unpaid, but no lien is reserved or condition expressed upon the face of the deed. If the only issue presented by the pleadings and submitted to the jury had been whether the deed was fraudulently obtained, and the verdict had been in favor of the plaintiff and the judgment had been for its rescission and the res-

toration of the land to the plaintiff, we would find no ground in the record for setting it aside. If, on the other hand, there was no fraud in obtaining the deed sufficient to justify it being set aside, then we do not think the failure to pay the consideration or comply with its terms subsequently furnished any grounds for rescinding it."

In *Byars v. Byars*, 11 Tex. Civ. App. 565, 32 S. W. 925, which was a suit brought for the recovery of a tract of land and the cancellation of a deed made by the parents to the son against his widow, made upon the express consideration of \$1,250, which it is alleged was untrue, but that the real consideration was that he would support and maintain them in their old age, and that by reason of his death it became impossible for him to comply therewith, it was held that the parents could not maintain the action for cancellation of the deed, but that their remedy would be for damages for breach of the covenant and not to recover the estate, citing *Thornton v. Trammell*, 39 Ga. 202, which was an action brought by the heirs of Thornton to recover a certain tract of land which had been conveyed in fee simple by their ancestor to the company, the conveyance reciting that it was expressly understood by the parties "that said tract or parcel of land is not to be put to any other use than that of a depot square, and that no business or improvements are to be put on said tract but that which is immediately connected with the Western & Atlantic railroad." There was a breach of said provision, and it was held, as shown by the syllabus, that these words in the deed were words of covenant and not words of condition, and that the plaintiff's remedy for a breach thereof was an action for damages, and not a forfeiture of the estate for condition broken. See, also, *Beaumont Pasture Co. v. S. & E. T. Ry. Co.*, 41 S. W. 543; *G. C. & S. F. Ry. Co. v. Dunman*, 74 Tex. 265, 11 S. W. 1094; *Elliott v. Elliott*, 109 S. W. 217; *Cox v. Combs*, 111 S. W. 1070; *Johnson v. Gurley*, 52 Tex. 227; *G. H. & S. A. Ry. Co. v. Pfeuffer*, 56 Tex. 73; *Ryan v. Porter*, 61 Tex. 106; *H. & T. C. R. Co. v. McKinney*, 55 Tex. 176. In 13 Cyc. pp. 683, 684, it is said: "Apt and appropriate words must be used or a right of re-entry be reserved to create a condition in a grant. * * * If land is deeded for a specific use or purpose, or it is deeded in consideration of its use for a certain purpose, or in consideration of the doing of a certain act, and there is nothing to show that a condition was intended, none will be created, either precedent or subsequent. * * * Covenants and conditions may be created by the same words, but forfeitures are not favored. Courts are therefore more favorably inclined to holding that the language used constitutes a covenant rather than a condition which will forfeit the grant. This rule is especially applicable when the words used

are in the form of a covenant pure and simple, and there are no words of proviso or condition, or provision for re-entry in the deed."

It will be remembered that there are no provisions or conditions inserted in the deed before us, nor in the preliminary agreement or contract. So that in this case, in the absence of any such provision or condition for re-entry, we hold that the court correctly instructed a verdict in behalf of defendant.

Finding no error in the judgment, the same is affirmed.

Affirmed.

CARUTHERS v. HADLEY.†

(Court of Civil Appeals of Texas. Dec. 24, 1910. On Motion for Rehearing, Feb. 18, 1911.)

1. JUDGMENT (§ 495*)—PROBATE COURTS—PRESUMPTION—COLLATERAL ATTACK.

A county court being a court of record and of general jurisdiction as to the estates of deceased persons, having assumed jurisdiction in partition of decedent's estate, all presumptions should be indulged in favor of the validity of its judgment, which could not be collaterally attacked for want of proof that it had jurisdiction to partition the particular estate.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 933; Dec. Dig. § 495.*]

2. JUDGMENT (§ 504*)—COLLATERAL ATTACK—PARTITION DECREE—VALIDITY.

A decree partitioning the land in controversy, though invalid for failure to sufficiently describe the land, was nevertheless admissible in trespass to try title to show that both plaintiff and defendant claimed from a common source.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 946; Dec. Dig. § 504.*]

3. TRESPASS TO TRY TITLE (§ 18*)—TITLE FROM COMMON SOURCE—TITLE IN THIRD PERSON.

Defendant in trespass to try title, where the parties claimed from a common source, may defeat the action by showing a superior outstanding title in a third person on proof of such title anterior to that of the common source, and that such prior title never vested in the common source.

[Ed. Note.—For other cases, see Trespass to Try Title, Cent. Dig. § 21; Dec. Dig. § 18.*]

4. TRESPASS TO TRY TITLE (§ 41*)—EVIDENCE—COMMON SOURCE—OUTSTANDING TITLE.

Where, in trespass to try title, there is proof that both parties claimed under a common source, it will be presumed that such common grantor had the title when he undertook to convey the title which defendant claimed, involving the assumption that he had acquired the title of all previous owners, so that proof that prior to that time a third person had the title was not sufficient to defeat the action.

[Ed. Note.—For other cases, see Trespass to Try Title, Dec. Dig. § 41.*]

5. EVIDENCE (§ 274*)—DECLARATIONS OF PRIOR OWNER OF LAND—REMOVAL OF BOUNDARY LINE.

Where, in trespass to try title, both parties claimed under a common source, declarations of such common owner that the west boundary line of the survey had been moved east, and the division line in dispute also moved east from where it was originally established in order to

give purchasers the amount of land sold to them by the declarant, was admissible on an issue as to the establishment and location of such division line.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 1133; Dec. Dig. § 274.*]

6. FRAUDS, STATUTE OF (§ 70*)—BOUNDARY LINE—ESTABLISHMENT AND RECOGNITION.

The removal of an established boundary line by landowners and subsequent recognition of the boundary line established is not obnoxious to the statute of frauds, though not in writing, or within the statutes regulating conveyances of real estate.

[Ed. Note.—For other cases, see Frauds, Statute of, Cent. Dig. § 112; Dec. Dig. § 70.*]

7. APPEAL AND ERROR (§ 742*)—RECORD—STATEMENT.

Where error was assigned to the refusal of a request to charge, but the statement under the assignment did not set out the testimony bearing on the question, and did not point out the page of the record where such testimony could be found, such assignment will not be reviewed.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3000; Dec. Dig. § 742.*]

8. BOUNDARIES (§ 41*)—ESTABLISHMENT—INSTRUCTIONS.

In trespass to try title involving a disputed boundary line, the court charged that, if the east and west lines of the H. tract which had been conveyed by S. the common source of title in 1884 were moved further east by S., and that the parties who then owned the H. tract consented to the change, and at that time S. owned all the land that was east of and adjacent to the H. tract and to the original east line of the survey, then all persons agreeing to the change and all parties who afterwards bought land from the common source of title which was adjacent to and east of the H. tract with notice that the east line of the H. tract had been moved east would be bound by the change. In another paragraph the court stated that if S. did not so extend the H. tract further east, or if, when defendant purchased his land, he had no notice of the fact, but bought to the west line of the strip in controversy, or if the H. lines were extended by the common source, but as extended no part of the same was within the inclosure of the defendant, the jury should find for him. *Held*, that such instructions constituted a correct application of the law to the facts, and covered a request to charge that, if in the subdivision of the survey when it was deeded to S. the division line between the two tracts on the west of defendant's land was recognized and acquiesced in and agreed upon by the parties as the true division line between the land owned by the defendant and the H. or G. tract, and at and just before defendant purchased the land S. pointed out the line to him as the true west division, and defendant on the faith of the acts of the parties thereafter purchased up to that line, then the jury should find for the defendant.

[Ed. Note.—For other cases, see Boundaries, Cent. Dig. §§ 205-207; Dec. Dig. § 41.*]

9. APPEAL AND ERROR (§ 742*)—RECORD—BRIEF—STATEMENT.

Where the only statement of facts attached to assignments of error to the court's refusal of certain charges in question was "the special instruction No. '7' (Tr. pp. 13-14) and special instruction No. '8' (Tr. pp. 11-13), are correctly copied in the assignment," the assignments will not be reviewed.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3000; Dec. Dig. § 742.*]

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

† Application for writ of error dismissed by Supreme Court.

Appeal from District Court, Johnson County; O. L. Lockett, Judge.

Action by W. B. Hadley against R. W. Caruthers. Judgment for plaintiff, and defendant appeals. Affirmed. Motion for rehearing overruled.

See, also, 115 S. W. 80.

S. C. Padelford, for appellant. Odell & Johnson and Mitchell Davis, for appellee.

TALBOT, J. On the 30th day of April, 1906, the appellee instituted this suit against the appellant in the form of an action of trespass to try title to recover about $2\frac{1}{2}$ acres of land, a part of the Dyer Nuner survey, situated in Johnson county, Tex. We think, however, that it is a boundary case involving the true location of the division line running north and south between the plaintiff's land on the west and the defendant's land on the east. The defendant answered by general denial, plea of not guilty, and the statutes of limitation of five and ten years. The case was tried before the court and a jury, and resulted in a verdict and judgment in favor of the plaintiff, and the defendant appealed.

The defendant requested the court to charge the jury to the effect that the evidence showed that the plaintiff was not the owner of the land in controversy, and therefore to return a verdict in favor of the defendant. This charge was refused, and the jury instructed in the first paragraph of the court's general charge "that the uncontroverted evidence shows that the plaintiff and the defendant are each claiming their respective lands in controversy from and under J. J. Snyder, who is the common source of title to each of them, and you are instructed that the deeds and instruments in writing, introduced in evidence by each party, are sufficient to vest the title to their respective tracts of land to each of them, except as their titles may be affected by the instructions hereinafter given you." The refusal of the one and the giving of the other of these charges is made the basis of several assignments of error, but the propositions contended for, in substance, are that the plaintiff failed to deraign title from the state or to show that he and the defendant claimed title from a common source; that the contradicted evidence showed that J. J. Snyder, who the court charged was the common source of title, in 1871, long anterior to the purchase of any of the parties under whom the plaintiff claimed, had by warranty deed conveyed all the land in controversy to one J. A. Snyder, and there was no evidence that the said J. J. Snyder subsequent to his conveyance to the said J. A. Snyder had reacquired the title to said land, or that the defendant claimed through J. A. Snyder, therefore a superior outstanding title was shown, and the trial court erred in not instructing a verdict for the defendant as requested by him. The plaintiff did not, as contended by the appellant, deraign his title from the state,

but we think the evidence very clearly shows that he and the appellant claimed title to the land from a common source. The land was patented to Dyer Nuner, but no conveyance was shown from him to any one. J. J. Snyder purchased the entire Nuner survey from Samuel R. Smith, and received a deed therefor on the 4th day of December, 1861. From whom Smith purchased does not appear. J. J. Snyder took possession of the land, and sold the greater portion of it to different parties before his death, which occurred in 1887. It was shown that J. J. Snyder on the 18th day of February, 1884, conveyed the land claimed by the appellee to W. D. Hall and H. T. Hall, and that the title thereto by mesne conveyances was passed to and vested in the appellee. It was also shown, as we understand the evidence, that the land claimed by the appellant was in the possession of and claimed by J. J. Snyder at the date of his death; that the same by partition made between his heirs in the county court of Johnson county, Tex., passed to his son, H. C. Snyder, and his daughter, Mrs. M. A. Barry, and thence by a regular chain of conveyances to the appellant. Appellant, however, contends, in effect, that the decree of partition referred to above is void and cannot be considered as a link in the chain of his title, because there was nothing showing that the county court of Johnson county, Tex., had jurisdiction to partition the estate of J. J. Snyder, deceased, and because of uncertainty in that it does not describe any real estate whatsoever. We think this contention should not be sustained. The county court of Johnson county is a court of record and of general jurisdiction in all matters pertaining to the estates of deceased persons, and, having assumed jurisdiction in the matter of partitioning the estate of J. J. Snyder, all presumptions will be indulged in favor of the validity of its judgment, and it cannot be attacked collaterally as attempted in this case. As to the claim that the decree of partition in question is void for uncertainty in that it does not describe the land set apart to Mrs. Barry and H. C. Snyder, it may be said that, while said decree does not describe the land by metes and bounds, it does "allot and set apart to Mrs. Barry and H. C. Snyder each one-half of all the remaining interest in the Dyer Nuner survey in Johnson county, Tex., which the said J. J. Snyder owned at the time of his death," and the testimony shows that the land claimed by appellant came into the hands of J. J. Snyder's administrator as a part of his estate, was not sold by said administrator, and went into the possession of Mrs. Barry and H. C. Snyder after the decree of partition was rendered, and acts of ownership exercised by them over it without objection on the part of any one. But, if it should be conceded that for either of the reasons urged by appellant said decree was void, still it was admissible in evidence to be considered in determining the

question whether or not the plaintiff and the defendant claimed title from a common source. A deed or other muniment of title introduced which shows such a claim by the defendant is sufficient, although it may be from some cause inoperative. "A void tax deed purporting to evidence the sale of land as the property of an owner named may be used to show the claim of title by a defendant when sued by some one claiming from the same source." *Burns, Guardian, v. Goff*, 79 Tex. 236, 14 S. W. 1009; *Garner v. Lasker*, 71 Tex. 433, 9 S. W. 332.

The next question is: Did the appellant, by proving that the land in controversy had been conveyed by J. J. Snyder to J. A. Snyder, in 1871, anterior to the purchase of any of the parties under whom the appellant claims, show a complete defense to the appellee's action? We think not. It is well settled that when the plaintiff has proved that he and the defendant claim title to land from a common source, and that of the two titles emanating from that source his is the superior, and while the defendant, notwithstanding the proof of the insufficiency of his title under the common source, may still defeat the action by showing a superior outstanding title in a third party, without connecting himself with such superior title, yet, in order to do so, he must prove affirmatively not only that some one had the title anterior to that of the common source, but also that such previous title never vested in the common source. *Rice v. Railway Co.*, 87 Tex. 90, 26 S. W. 1047, 47 Am. St. Rep. 72. In the case cited, after announcing the rule above stated, the Supreme Court of this state says: "But, as we understand it, all the authorities hold that, when one accepts a conveyance from another, it is at least prima facie evidence, as against the grantee, of title in the grantor. It follows that, if a plaintiff in an action of trespass to try title proves that he has acquired the title of such grantor—for example, that he has the only or elder valid conveyance of such title—he shows a right to recover, provided there be no sufficient evidence to rebut the presumption arising from an acceptance by the defendant of the deed of his grantor. Does mere proof that some one held a title anterior to the time at which the grantor undertook to convey show that at that time he had no title? Certainly not. A state of things once shown to exist is ordinarily presumed to continue, in the absence of proof to the contrary. But here the very point presents itself upon which the determination of the question under consideration must turn. Evidence that the defendant claims title under the common grantor is prima facie proof that such grantor had the title at the time he undertook to convey the right which the defendant claims; and this necessarily involves the assumption that he had acquired the title of all previous owners. The rule as to proof of common source

means this, if it means anything. The rule is statutory in this state; and to permit a defendant to defeat its operation by showing the naked fact that previous to the time the grantor undertook to convey some third party had the title would render it nugatory. To show that the title to the land in controversy was in some third person before the Cleveland brothers claimed it is merely to prove what we knew before, and falls far short of showing that the title was not in them when the decree of partition was rendered. In other words, proof of title in Morgan does not overcome the prima facie case made by the plaintiff when he introduced evidence showing that defendants derived their title through deeds which purported to convey the land as the property of Lafayette Cleveland." The defendant did not affirmatively show that the previous title of J. A. Snyder did not vest in the common source from which appellee and appellant claim before the subsequent conveyance of J. J. Snyder, and we are of the opinion that the case at bar falls within the principle of the case from which the above quotation is made, and is not ruled, as contended by the appellant, by the case of *Ferguson v. Ricketts*, 93 Tex. 565, 57 S. W. 19. We are strengthened in this view, perhaps, by the fact that the evidence shows that J. A. Snyder was the son of J. J. Snyder, and that in 1884, when the latter conveyed the land now claimed by the appellee to W. D. and H. T. Hall, he, J. J. Snyder, was in possession of said land and also of the land claimed by appellant, and dealing with both tracts as his own.

There was no error in admitting the testimony of Long and Hadley to the effect that J. J. Snyder told them that as the west boundary line of Dyer Nuner survey had been moved east that it cut off some land from those people to whom he had previously sold, and that he had moved the line, the true location of which is in dispute in this suit, 42 varas east of where it was originally established, in order to give those people the complement of land that he sold them. The evidence was insufficient to show an outstanding title in J. A. Snyder of the land in controversy at the time these statements were made. J. J. Snyder was in possession of and the owner of the land east of and adjacent to said original line at that time, and the evidence shows the owners of the land west of said line consented to the moving of it east and to the point where it was then established. The appellant was claiming under J. J. Snyder, and the said Snyder's acts and statements in reference to the establishment and location of the division line in question were admissible.

The seventeenth assignment of error complains that the court erred in refusing to read to the jury appellant's special charge, to the effect that if the east boundary line of the Hall and Corley surveys was marked and designated by a stone at the south boundary

line, and by marked trees along its eastern boundary line, and that this line was run and marked upon the ground at and before the time of the deed from J. J. Snyder to Walraven, and from J. J. Snyder to the two Halls, the first of said deeds being made in 1882, and the other in 1884, and that this line was so designated at or before the execution and the making of said two deeds, does not include any of the land in controversy, and is where the defendant's fence is now located, to find for the defendant. The only proposition under this assignment is that "a party cannot by parol substitute one boundary line for another, and thus by such parol testimony convey real estate, as, under the statute of frauds, real estate cannot be conveyed except by an instrument in writing." We think there was no error in refusing this charge. The evidence, as we understand it, shows that J. J. Snyder discovered after he had sold and conveyed a part of the Dyer Nuner survey that the west boundary line of said survey, as called for in said conveyances, was located about 42 varas too far west; and, to correct this mistake and still give to the parties who had purchased or some of them the quantity of land bought by them, respectively, it became necessary to move and establish the east line of such tract 42 varas east of its original location; that to this end the division line between the lands now owned by the appellant and appellee was moved and established 42 varas east of its original location by the consent of the parties then owning said lands, and through whom both the appellee and appellant claim. Such an establishment and recognition of boundary lines is not obnoxious to the statute of frauds or within the statute regulating the conveyances of real estate.

Appellant's twenty-first assignment complains of the court's refusal to give the following special charge: "You are further instructed that if you find that in the subdivision of the Dyer Nuner survey, when the same was sold and deeded by J. J. Snyder, the division line between the tract known as the Grogan and Corley tracts on the west of the defendant's land and the land owned by H. C. Snyder lying east of the said tract was recognized and acquiesced in, and agreed upon by said parties, as a true division line between the land owned by the defendant and the Hall or Grogan tract of land, that at and just before the defendant purchased said land the said Snyder pointed out said line to him as the true western division line of his said H. C. Snyder's land, and that the said Grogan, while he was in possession of the said land, pointed the same out to the defendant as the true eastern boundary line of the said Hall or Grogan tract, and that the defendant upon the faith of said acts of said parties thereafter purchased up to said line, then, and in such case, without further inquiry, you will find for the defend-

ant, and so say by your verdict." The statement made in support of this assignment or the proposition thereunder is insufficient to warrant us in saying the court erred in refusing this charge. The statement does not set out the testimony bearing upon the question, so that this court may determine its force and effect, but simply states the conclusion or deduction of the appellant as to what said testimony showed. Nor does it point out the page or pages of the record where such testimony may be found. We are not required to search the record for the testimony, and, the same not being set forth in the statement under the assignment, we are unable to determine whether or not appellant's deduction was a proper one to be drawn from it. It must therefore be presumed in favor of the court's ruling that the testimony did not call for the charge refused in the form in which it was drawn. Looking, however, to the court's general charge, we think it sufficiently covers the special charge refused. In the second paragraph of the court's general charge the jury were told, in effect, that if the east and west lines of the Hall tract, which was deeded to Hall in 1884, were moved farther east by J. J. Snyder than they had formerly been, and that the parties who then owned the Hall tract agreed and consented to said change, and that at that time J. J. Snyder owned all of the land that was east of and adjacent to the Hall tract and to the original east line of the Dyer Nuner survey, then all parties agreeing to said change and all parties who afterwards bought land from J. J. Snyder which was adjacent to and east of the said Hall tract with notice that the said east line of the Hall tract had been moved east would be bound by such change. In the third paragraph of said charge they were instructed, in effect, that if J. J. Snyder did not extend the said Hall tract of 80 acres farther east while he owned all the land between said extended lines and the original east line of the said Nuner survey, or if the said Hall tract of land was extended east by J. J. Snyder, as above instructed, but that at the time that R. W. Caruthers purchased his land he had no notice of said fact and bought to the west line of the strip of land in controversy, or if the said Hall lines were extended by J. J. Snyder, but, as extended, no part of the same was within the inclosure of the appellant, to find a verdict in his favor. This charge was a correct application of the law to the facts, and so guarded and protected the rights of appellant that he suffered no substantial injury by the refusal of the special charge.

Assignments of error 18 and 20 complain of the court's refusal to give special charges Nos. 7 and 8, requested by the appellant, in which the jury is told that, if they find certain facts enumerated in said charges to exist, to find for the appellant. Neither of these assignments is entitled to considera-

tion, for the reason that no such statement as is required by the rules governing the briefing of cases is subjoined to either of said assignments. None of the evidence, if any, necessary to the establishment of the facts enumerated in the charges, to which the assignments relate, is stated, and to decide the question sought to be presented we would have to search the statement of facts for such evidence. This we are not required to do. The only statement made is as follows: "The special instruction No. '7' (Tr. pp. 13-14) and special instruction No. '8' (Tr. pp. 11-13) are correctly copied in the assignment."

The other assignments not discussed have either been disposed of against the appellant by what has already been said, or point out no reversible error.

The verdict of the jury is supported by the evidence and the judgment entered thereon in the court below will be affirmed.

Affirmed.

On Motion for Rehearing.

The majority of the court adhere to the views expressed in the original opinion and appellant's motion for a rehearing will be overruled.

The writer, however, after further consideration of the case upon the motion for a rehearing, has reached the conclusion that appellant showed an outstanding title in John A. Snyder, and therefore the appellee was not entitled to recover. It appears without dispute that some years prior to the purchase of the land in controversy by the appellee and those under whom he claims J. J. Snyder, the common source, by a warranty deed reciting a valuable consideration, conveyed said land to John A. Snyder, and there is no evidence whatever that J. J. Snyder after such conveyance reacquired the land. In the case of *Ferguson v. Ricketts*, 93 Tex. 565, 57 S. W. 19, Martin, the common source, derived his title to the land involved in that suit, directly from the original grantee, Gregoria Garcia. About 22 years prior to the conveyance of the land to Martin, Garcia sold and transferred the same to Adolphus Stern. In holding that the facts stated showed a superior outstanding title in Stern, the Supreme Court, speaking through Mr. Justice Brown, said: "The government was the common source as to Martin and Stern. The latter, having the prior conveyance, had the superior title. There was no chance for Stern's title to be in the chain of the common source, because the direct connection of Martin with Garcia necessarily excluded the conveyance to Stern. No presumption arises that the common source has acquired an independent outstanding title. Such presumption would nullify the rule that the title of the common source may be attacked by showing a superior outstanding title."

Here, notwithstanding the rule as to proof of common source that when one accepts a conveyance from another the presumption arises, as against the grantee, of title in the grantor, the Supreme Court, although there was no evidence to rebut such presumption, refused, because of the direct connection of Martin with Garcia, to apply such rule and indulge the presumption that either Garcia, before his conveyance to Martin, the common source, had reacquired the land from Stern or his grantees, or that Martin had acquired it. If, therefore, there was no chance for Stern's title to be in the chain of common source and the presumption could not be indulged that the common source had the title from the state, then it would seem to necessarily follow that where, as in the case at bar, the outstanding title emanates directly from the common source, such presumption could not be indulged. By the deed from J. J. Snyder, the common source of title in this case, to John A. Snyder, whatever title the former had in the land in controversy passed to and vested in the latter, and to hold that J. J. Snyder had reacquired the land before his conveyance to the Halls under whom appellee claims such acquisition must be presumed under the facts of this case. Applying the principle of the *Ferguson-Ricketts* Case, which I believe controls the decision of the question, this cannot be done. I do not think that either such possession as J. J. Snyder had of the land at the time he sold the same to H. T. Hall and W. D. Hall, or his assumption of ownership at that time, or the relationship which existed between him and John A. Snyder, materially affects the question.

I am therefore of the opinion that appellant's motion for a rehearing should be granted, and the judgment reversed. The majority of the court, however, takes a different view of the matter, and the motion is overruled.

TODD v. STATE et al.†

(Court of Civil Appeals of Texas. Jan. 19, 1911. Rehearing Denied Feb. 23, 1911.)

1. JUDGMENT (§ 525*) — CONSTRUCTION — DEFAULT.

Where a judgment for taxes while reciting that defendants came not but wholly made default, also recited that a jury not having been demanded all questions of law and fact were submitted to the court, and that after hearing the pleadings and evidence, and duly considering the same, the court was of the opinion and found that defendant was indebted to plaintiff for certain taxes specified and for costs, such subsequent recitals controlled the former which was an evident mistake, and prevented the judgment operating as a judgment by default.

[Ed. Note.—For other cases, see Judgment, Dec. Dig. § 525.*]

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

† Writ of error denied by Supreme Court.

2. PLEADING (§ 343*) — VERIFICATION—JUDGMENT.

Where the state filed an unverified petition to recover certain taxes and foreclose a lien therefor, the fact that defendants filed a duly verified answer, denying the allegations in the petition and the state's right to recover, did not entitle defendants to judgment.

[Ed. Note.—For other cases, see Pleading, Dec. Dig. § 343.*]

3. TAXATION (§ 643*)—ACTION TO RECOVER TAXES—FORECLOSURE OF LIEN—PETITION—VERIFICATION.

Sayles' Ann. Civ. St. 1897, art. 5232f, provides that a petition in a suit to recover taxes and to foreclose a lien on land therefor, shall be signed by the attorney bringing suit, and shall be verified by the affidavits of such attorney, or the county judge, to the effect that the averments made in the petition were true to the best of the knowledge and belief of the affiant. *Held*, that the statute requiring a verification of such petition, is directory and not mandatory and that failure to verify such petition was not a jurisdictional defect.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. § 1306; Dec. Dig. § 643.*]

Error from District Court, Bowie County; P. A. Turner, Judge.

Action by the State and others against Charles S. Todd. Judgment for plaintiffs, and defendant brings error. Affirmed.

Chas. S. Todd, for plaintiff in error. Patrick G. Henry, Co. Atty., and Sam H. Smelser, for defendants in error.

WILLSON, C. J. The suit was by the state against plaintiff in error Chas. S. Todd and Bruce Christopher and James K. Wadley, as the owners of lot 4 in block 90 in the city of Texarkana, to recover sums alleged to be due by them as taxes on said lot, and to foreclose a lien asserted on same to secure the payment of such taxes. The requirement of the statute that the petition in such a suit should be verified by the affidavit of the attorney bringing it, or by the county judge, to the effect that the averments contained therein were true "to the best knowledge and belief of affiant" (Sayles' Ann. Civ. St. 1897, art. 5232f) was not complied with. The answer of the defendants, duly verified, was filed May 10, 1909. In it they specially excepted to the petition, on the ground that it had not been verified as required by the statute, denied the truth of the allegations therein, and specially denied "that," quoting, "the said lot No. 4, in block No. 90, was ever separately assessed for taxes for the years mentioned in plaintiff's petition, and say that the same was assessed in connection with lots Nos. 5 and 6; that is, lots Nos. 4, 5 and 6 were assessed in one assessment on the _____ day of _____, 1908, amounting to \$322. Wherefore defendants say that taxes sued for herein have been paid and plaintiff ought not to recover." It does not appear from the record that the exception to the petition was called to the attention of the

court, and therefore it must be treated as having been waived. A trial had January 27, 1910, resulted in a judgment in favor of the state against all of the defendants, but the writ of error was sued out by the defendant Todd alone.

The contention made that the case "was called up in the absence of defendants, and a judgment by default taken and entered without the introduction of any evidence." is not supported by the record. While it is recited in the judgment that "the defendants came not, but wholly made default," it is also recited therein that "a jury not having been demanded all questions of law and fact were submitted to the court, and after hearing the pleadings and evidence and duly considering the same, the court is of the opinion and finds that the defendants Chas. S. Todd, Bruce Christopher, and Jas. K. Wadley, are indebted to the plaintiff, the state of Texas, for the taxes due it for the years 1895, 1896, 1897, 1898, 1899, 1901, and 1903, in the sum of \$107.42, and for interest and costs," etc. The recital that the defendants "came not, but wholly made default," is, obviously, erroneous, for the defendants had duly filed an answer to the petition, and in that way were before the court. That recital, erroneous as it so appears to be, should not be held to show that the judgment was one by default. In the face of the further recitals that the court before rendering the judgment heard and considered the pleadings, and heard and considered evidence which he believed to be sufficient to support findings made the basis for the judgment rendered. In determining the character of the judgment, we think the latter recitals should be regarded as controlling, and that the judgment should be construed to be one rendered on the merits of the case.

A further contention made is that "the defendants' duly verified answer entitled the defendants to judgment." There is no statement of facts with the record before us. Therefore a presumption must be indulged that every fact alleged in the petition and necessary to be proved to authorize the judgment rendered was proved. *Curry v. York*, 3 Tex. 357; *Gentry v. Schneider*, 77 Tex. 2, 13 S. W. 614. If every such fact was proved, certainly the fact that the allegations in the defendants' answer had been verified by their affidavit was not a reason why a judgment should not be rendered against them. To hold otherwise would be to say, in effect, that all the defendant in such a suit need ever do, in order to defeat a recovery by the state, is to verify by his affidavit and file with the clerk an answer denying its right to recover as claimed in its petition.

The remaining contention is that the petition, because it was not verified as required by the statute referred to, was not sufficient

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

to support the judgment. The language of the statute is: "The petition in such suits shall be signed by the attorney bringing the suit, and shall be verified by the affidavit of said attorney, or the county judge, to the effect that the averments contained in said petition are true to the best knowledge and belief of affiant." Had the exception to the petition, on the ground that it had not been so verified, been called to the attention of the trial court, there is authority for saying it should have been sustained. *Cockrell v. State*, 22 Tex. Civ. App. 568, 55 S. W. 580. The failure to direct the attention of the court to the exception and to have him rule thereon, operated as a waiver of the defect it pointed out in the petition, if the defect was one which could be waived. Therefore the question is, Was a verification of the petition a requirement which could not be waived, because indispensable to an exercise by the court of power to hear and determine the suit? In other words, was the court without jurisdiction to hear and determine the suit unless the petition was verified? We think not. While the language of the statute is that the petition in such a suit "shall" be verified, we do not think it was intended to be mandatory, in the sense that a compliance with its requirement should be necessary in order to confer upon the court jurisdiction of the suit. The statute does not declare that such a suit shall not be commenced and prosecuted otherwise than by a petition verified as it directs. Indeed, it seems that, without reference to the statute, the state might, as against a known owner of land delinquent for taxes assessed against it, by an unverified petition, and in accordance in other respects with the law and procedure controlling in the institution and conduct of ordinary foreclosure suits, have commenced and prosecuted such a suit as this one was. *City of Henrietta v. Eustis*, 87 Tex. 14, 26 S. W. 620; *Cave v. Houston*, 65 Tex. 619; *Cordray v. Neuhaus*, 25 Tex. Civ. App. 247, 61 S. W. 416. If the court to which this suit was brought might have heard and determined it without reference to, or in the absence of, the statute in question, it would not, we think, be reasonable to conclude that the Legislature intended by the language it used, if the petition was not verified, to deny to the court power to hear it because brought with reference to the statute, when, if it had not been so brought, the court might have heard and determined it. The purpose of the Legislature in requiring the petition to be sworn to, we think, was to insure good faith on the part of its officers in instituting the suit, and so prevent its citizens from being harassed by suits improvidently commenced, and not to place a limitation on the right of the court to entertain jurisdiction of such a suit when com-

menced. *Johnson v. Milling*, 19 Mont. 30, 47 Pac. 340. "It has long been settled," said Judge Cooley, speaking with reference to rules for construing statutes, "that particular provisions may be regarded as directory merely; by which is meant that they are to be considered as giving directions which ought to be followed, but not as so limiting the power in respect to which the directions are given that it cannot effectually be exercised without observing them. * * * Those directions which are not of the essence of the thing to be done, but which are given with a view merely to the proper, orderly and prompt conduct of the business, and by failure to obey which the rights of those interested will not be prejudiced, are not commonly to be regarded as mandatory; and if the act is performed, but not in the time or in the precise mode indicated, it may still be sufficient, if that which is done accomplishes the substantial purpose of the statute." *Cooley's Const. Lim.* (3d Ed.) pp. 74 and 78. "Where the statute is affirmative," said Mr. Sutherland, "it does not necessarily imply that the mode or time mentioned in it is exclusive, and that the act provided for, if done at a different time or in a different manner, will not have effect. Such is the literal implication, it is true; but since the letter may be modified to give effect to the intention, that implication is often prevented by another implication, namely, that the Legislature intended what is reasonable, and especially that the act shall have effect; that its purpose shall not be thwarted by any trivial omission, or a departure from it in some formal, incidental or comparatively unimportant particular." *Lewis' Suth. on Stat. Con.* § 611. We think the defect in the petition did not operate to deprive the court of jurisdiction to hear and determine the suit, but was a defect defendants could waive. As it appears that they did waive it, we think the contention made should be overruled.

The judgment is affirmed.

BICKERS v. LACY, Judge.†

(Court of Civil Appeals of Texas. Jan. 14, 1911. Rehearing Denied Feb. 16, 1911.)

1. INTOXICATING LIQUORS (§ 37*)—LOCAL OPTION—PUBLICATION OF RESULT.

A judgment on the contest of a local option election declaring that prohibition carried the election was not invalid because publication of result of the contest was ordered to be made by the clerk in a newspaper to be selected by him, *Sayles' Ann. Civ. St.* 1897, art. 3391, requiring the judge to publish the result as declared by the commissioners' court if in favor of prohibition in a paper to be selected by the court, but no publication being required of the judgment of the court on a contest.

[Ed. Note.—For other cases, see *Intoxicating Liquors*, Dec. Dig. § 37.*]

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

† Writ of error denied by Supreme Court.

2. ELECTIONS (§ 304*)—CONTEST.

An election contest is a proceeding in rem, and a judgment therein is binding and conclusive on all the world.

[Ed. Note.—For other cases, see *Elections*, Cent. Dig. § 316; Dec. Dig. § 304.*]

Appeal from District Court, Leon County; S. W. Dean, Judge.

Mandamus by W. T. Bickers to compel W. D. Lacy, as county judge of Leon county, to grant the applicant a license to sell intoxicating liquors in the town of Concord. From a judgment denying the petition, applicant appeals. Affirmed.

Geo. G. Clough and Wm. Watson, for appellant. Thos. B. Greenwood, B. D. Dashiell, and Joe H. Seale, for appellee.

PLEASANTS, C. J. This is a suit for mandamus brought by appellant to compel the appellee, who is county judge of Leon county, to grant appellant's petition for a license to sell intoxicating liquors in the town of Concord in said county. The appellee refused the petition on the ground that a local option prohibition law against the sale of intoxicating liquors had been adopted, and was in force in said county.

The facts are these: An election regularly called was held in said county on February 23, 1909, to determine whether or not the sale of intoxicating liquors should be prohibited in said county. The returns from said election were received and canvassed by the commissioners' court of said county on March 31, 1909, and the result declared to be against prohibition by a majority of seven votes. On April 4, 1909, John A. Childress and others, citizens and qualified voters of said county, filed a contest of the election in the district court of said county, claiming that a majority of the legal votes polled at said election was in favor of prohibition. The county judge and county attorney were named as contestees in said suit. On September 29, 1909, the following judgment was rendered in said cause: "On this day, the 29th day of September, A. D. 1909, came on to be heard the above-entitled cause, when the contestee, W. D. Lacy, as county judge of Leon county, Tex., presented to the court his motion to dismiss this cause as against him, and the court, after due consideration, finds that said motion is well taken and should be sustained. Wherefore it is ordered by the court that the motion of the contestee, W. D. Lacy, county judge of Leon county, Tex., to dismiss this cause against him be and it is hereby sustained, and the said contestee is discharged with judgment against contestants for his costs herein. And then, the above-entitled cause being legally called for trial, the contestants appeared by their attorneys and announced ready for trial, and the contestee, J. M. Chatham, as county attorney of Leon county, Tex., also

appeared in person and by his attorneys, and also announced ready for trial, and, neither party having demanded a jury, the issues both of fact and of law were submitted to the court, and the court, after hearing the pleadings and evidence, finds the facts and the law are with the contestants. It is therefore ordered, adjudged, and decreed by the court that the result of the election, which was held in Leon county, Tex., on the 20th day of March, 1909, under the order of the commissioners' court of said county to determine whether the sale of intoxicating liquors should be prohibited in said county resulted in a majority of the votes 'for prohibition,' and the contestants and contestee agreeing in open court that the prohibition of the sale of intoxicating liquors in Leon county should become effective on the 10th day of July, 1910, and no earlier, which agreement is in all things approved by the court, it is further ordered, adjudged, and decreed by the court that the sale of intoxicating liquors within the limits of the county of Leon, Tex., be, and the same is, absolutely prohibited except for the purpose and under the regulations specified in title 69 of the Revised Civil Statutes of the state of Texas from and after the 10th day of July, 1910, until such time as the qualified voters of Leon county may at a legal election, held for that purpose, by a majority vote, decide otherwise, and that a certified copy of this judgment be published for four successive weeks immediately next preceding the 10th day of July, 1910, in some newspaper published in the county of Leon, Tex., to be selected for that purpose by the clerk of this court."

No appeal was taken from this judgment and no proceedings of any kind have been taken to have same set aside. The clerk of said district court, in compliance with the order contained in said judgment, published a certified copy of the judgment in the *Jewett Messenger*, a newspaper published in said county, for four successive weeks next preceding the 10th day of July, 1910. This newspaper was not selected by the county judge of Leon county, and he had nothing to do with the publication of said judgment. Appellant's petition for license was heard and refused by the appellee on July 7, 1910. Upon these facts the district judge refused to grant the mandamus.

Appellant's contention is that the judgment should be reversed because "a local option law can only be put in operation in a county where the result of the election has been carried or been found by the district court in a contest, to be for prohibition, by the publication of the result as found for four successive weeks by the county judge in a newspaper selected by him, if one be published in the county." There is no merit in this contention. Article 3391, *Sayles' Ann. Civ.*

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

St. 1897, requires the county judge to publish the result of the election as declared by the commissioners' court if such result is declared to be in favor of prohibition, but no publication is required by the statute of the judgment of a district court rendered in a contest of such election. The case of *Chenoweth v. State*, 50 Tex. Cr. R. 238, 96 S. W. 19, and others cited by appellant, holding that a local option prohibition law does not go into effect until the county judge has caused publication of the result of the election as prescribed by the article before cited, are cases in which the commissioners' court had declared the result of the election to be in favor of prohibition, and not cases in which that result was declared by a judgment of a district court in a contest proceeding brought for that purpose. An election contest is a proceeding in rem, and a judgment in such proceeding is binding and conclusive upon all the world. *Evans v. State*, 55 Tex. Cr. R. 450, 117 S. W. 167.

Such being the character of the contest proceeding, all persons are charged with notice of the judgment therein rendered, and therefore no publication of said judgment is deemed necessary, and none is required by the statute. It may be that the district court had no authority to order the publication of the judgment, but such order in no way affected the validity of the judgment declaring that prohibition carried in such election. The judgment was effective without any publication, and not having been appealed from or set aside, but being in full force and effect, the local option prohibition law against the sale of intoxicating liquors thereby became operative in Leon county, and appellant was properly refused a license to engage in the sale of such liquors.

These conclusions require that the judgment of the court below should be affirmed, and it has been so ordered.

Affirmed.

ATWOOD v. FAGAN et al.

(Court of Civil Appeals of Texas. Jan. 21, 1911. Rehearing Denied Feb. 18, 1911.)

1. DAMAGES (§ 81*)—STIPULATIONS.

A stipulation in a contract for the sale of real estate that a sum deposited by the vendee as part payment on the purchase price shall in case of breach of the contract be received by the vendor will be treated as a penalty even though it be designated as liquidated damages, where the actual damages sustained by the vendor are susceptible of definite ascertainment, but if the damages be uncertain or indeterminate, the sum specified will be treated as fixing by stipulation the amount of the recovery.

[Ed. Note.—For other cases, see *Damages*, Cent. Dig. § 177; Dec. Dig. § 81.*]

2. DAMAGES (§ 81*)—STIPULATIONS.

Where a vendee in a contract for the sale of real estate deposited a sum of money with a bank, and the contract provided that in case the vendee did not consummate the purchase the

money should be received by the vendor as fully liquidated damages, and it appeared that it was doubtful whether a certain railroad station would be built opposite the property, which event largely affected the value of the property, the provision would be treated as one for liquidated damages.

[Ed. Note.—For other cases, see *Damages*, Cent. Dig. § 177; Dec. Dig. § 81.*]

3. VENDOR AND PURCHASER (§ 331*)—CONSTRUCTION OF CONTRACT—MARKETABLE TITLE.

Where a contract for the sale of real estate provided that an abstract of title should be furnished showing a marketable title to the satisfaction of the vendee's attorney, and the abstract showed that the title was deranged through one who claimed under a will, but did not show that any inventory of the estate was ever filed, it was a question of fact in an action for damages whether there was a merchantable title.

[Ed. Note.—For other cases, see *Vendor and Purchaser*, Dec. Dig. § 331.*]

4. VENDOR AND PURCHASER (§ 137*)—CONTRACT OF SALE—CONSTRUCTION.

Where a contract for the sale of land stipulated that the vendor should furnish an abstract of title showing a merchantable title to the satisfaction of the vendee's attorney, in the absence of any bad faith the decision of the attorney would be decisive.

[Ed. Note.—For other cases, see *Vendor and Purchaser*, Cent. Dig. § 260; Dec. Dig. § 137.*]

5. VENDOR AND PURCHASER (§ 331*)—CONTRACT OF SALE—ACTION BY VENDOR.

In an action by a vendor for damages, held, that the good faith of the vendee's attorney in finding that the title was not a merchantable one as shown by the vendor's abstract was a question for the jury.

[Ed. Note.—For other cases, see *Vendor and Purchaser*, Dec. Dig. § 331.*]

6. DAMAGES (§ 81*)—LIQUIDATED DAMAGES.

Where the vendee in a contract for the sale of real estate deposited a sum of money with a bank as liquidated damages in case of nonperformance on his part, the rights of the parties were fixed as to the damages when the contract was terminated and the fact that the vendor thereafter sold the property for a greater sum than the vendee had agreed to pay did not affect the vendor's right to the damages.

[Ed. Note.—For other cases, see *Damages*, Cent. Dig. § 177; Dec. Dig. § 81.*]

Appeal from Potter County Court; W. M. Jeter, Judge.

Action by W. S. Atwood against S. T. Fagan and others. From a judgment in favor of defendants, plaintiff appeals. Reversed.

Cooper & Stanford, for appellant. Maden, Trulove & Kimbrough, for appellees.

DUNKLIN, J. W. S. Atwood and S. T. Fagan entered into a written contract by the terms of which the former agreed to sell and the latter agreed to buy two lots in the city of Amarillo. The consideration for the property named in the contract was \$10,000 and at the time it was executed Fagan deposited with the First National Bank of Amarillo \$400 as a guaranty that he would perform the obligations imposed upon him by the terms of the contract. There was a fur-

ther stipulation in the contract that in the event Fagan should not consummate the purchase, then Atwood should receive the \$400 "as full liquidated damages accruing to him by reason of such failure, and in that event this contract shall thereafter be canceled and held for naught as to all parties hereto." In the contract the \$400 was also designated as "forfeited money," and Atwood was designated as the first party and Fagan as the second party. The fifth clause of the contract reads: "It is especially agreed and understood by all parties hereto that the abstract of the title to said property shall be examined and passed upon by any reputable practicing attorney who is licensed to practice law in the district courts of Texas, that second party may select, at the cost of second party, and should he, the said attorney find that first party had not a good and merchantable title to said property or should defects be discovered in said title that cannot be cured in a way satisfactory to said attorney within a reasonable time, then and in that event second party shall not be required to consummate this purchase and the forfeit money shall then be returned to him, the second party, and thereafter this contract shall be null and void and of no further force and effect."

The abstract of title furnished by Atwood showed that he deraigned title through Mrs. Mattie S. Brown, who claimed the same under a will in her favor executed by Miss S. A. Spiller. This will purports to devise and bequeath all the property owned by the testatrix to Mrs. Mattie S. Brown. The abstract shows title vested in the testatrix before her death, and does not show any deed from her conveying the property to any one. The will was duly probated in the county court of Bell county. The order of court admitting the will to probate directed the issuance of letters testamentary to Sam J. Brown, the executor named in the will, "upon filing an inventory and appraisal of said estate and making bond in the sum of one thousand dollars," but the abstract fails to show that any inventory of the estate was ever filed. Upon receipt of the abstract of title Fagan employed an attorney to examine it, who rejected the title as unmerchantable by reason of the absence of such a showing. Affidavits were procured purporting to show that Miss S. A. Spiller owned the property at the time of her death and these were tendered to Fagan's attorney, but were not considered sufficient to cure the defect noted above. Atwood then tendered to Fagan a deed to the property duly executed by himself and wife in accordance with the terms of the contract, but the same were refused by Fagan on account of the disapproval of the title by his attorney. Atwood then instituted this suit to recover the \$400 deposited with the bank. The trial court gave a peremptory instruction to the jury to

return a verdict in favor of the defendant and from a judgment entered in accordance with that instruction Atwood has appealed. Upon request of appellant's attorney the trial court filed findings and conclusions of law, and appellee insists that in the absence of exceptions to those findings, appellant is bound thereby. The rule thus invoked would be applicable if the case had been tried without the intervention of a jury, but we know of no law which contemplates such findings when the case is tried by a jury and must, therefore, overrule that contention.

The testimony showed that at the time the contract was executed it was expected by Fagan that a railroad depot would be located just across the street from the property he contracted to purchase; that immediately after the execution of the contract a rumor was current in the community that this depot would be located about six blocks further distant; that the market value of the property was speculative and uncertain; that the location of the depot in close proximity to the property would cause it to sell for a greater sum than could be realized if the depot were located elsewhere. While it is true, as held in *Collier v. Betterton*, 87 Tex. 440, 29 S. W. 467, that a stipulation in a contract of this character that a sum deposited as the \$400 in this case was deposited will be treated as a penalty, even though designated as liquidated damages, if the actual damages sustained by the complaining party are susceptible of definite ascertainment, yet it is equally well established that "if the damages be in their very nature uncertain, or the amount indeterminate, the sum specified will be treated as fixing by stipulation the amount of the recovery." *Talkin v. Anderson* (Sup.) 19 S. W. 852; *Neblett v. McGraw*, 41 Tex. Civ. App. 239, 91 S. W. 309; *Eakin v. Scott*, 70 Tex. 442, 7 S. W. 777.

We think that the terms of the contract clearly indicate that the \$400 deposited by Fagan with the bank was intended and understood by the parties as the amount of damages to which appellant would be entitled in case of a breach of the contract by the appellee and we have found nothing in the testimony indicating or tending to show that such was not true.

It was also further stipulated in the contract that in the event Atwood should be entitled to receive the forfeit money on account of a breach of the contract by Fagan, he would pay one-half of the same to Gilvin & Gilvin, real estate agents, representing him in the transaction, and appellee insists that this rendered Gilvin & Gilvin necessary parties to the suit and that for that reason, if for no other, the judgment of the trial court should be sustained. We are unable to agree to this contention. Gilvin & Gilvin were not parties to the contract, and there was no proof that they had assented there-

to. *Milling Co. v. Eaton*, 86 Tex. 401, 25 S. W. 614, 24 L. R. A. 369, 9 Cyc. 380.

We cannot say that the objection made by Fagan's attorney to the title was capricious and without any foundation to support it. Our statutes do require the return of an inventory of an estate administered in the probate court, and, even though the absence of such an inventory should be held insufficient of itself to show a substantial defect in the title, nevertheless, it cannot be held as matter of law that the irregularity would not render the title unmerchantable. *Schmeltz v. Garey*, 49 Tex. 49. Whether or not a title with such an irregularity was merchantable we think is a question of fact. The contract stipulated that Atwood would furnish a merchantable title to be determined by Fagan's attorney and the evidence shows without controversy that the attorney was not satisfied therewith by reason of the irregularity noted above. The decision of the attorney we think would have been decisive of the case and would have required the peremptory instruction given by the trial court but for the fact that there was testimony upon the issue of lack of good faith on the part of Fagan's attorney in rendering his decision upon the title. It was proven that the attorney was interested with Fagan in the contract for the purchase of the property, and as indicated already there was proof that the rumor was current immediately after the execution of the contract that the expected railway depot would be located at a considerable distance from the property, and that unless located near the property the value of property would be less than the contract price. This testimony and the attorney's interest in the contract would tend to show a motive on the part of the attorney to give an adverse decision upon the title, and while the attorney testified that it did not influence him in any manner, and that he was confident all the while that the depot would be located just across the street from the property, where in fact it was afterwards located, yet we do not believe that the trial court had the right to take such issue of good faith from the jury, but that such issue should have been submitted to them for their determination. The failure to submit that issue will require a reversal of the judgment.

It was proven upon the trial that subsequent to Fagan's refusal to consummate the contract of purchase Atwood sold the property for \$1,000 more than he would have realized if the proposed sale to Fagan had been consummated, and appellee insists that as this proof showed that Atwood did not sustain any loss by Fagan's refusal to take the property, no other judgment than the one rendered could have been sustained. The rights of the parties relative to the \$400

in controversy were fixed when the contract was terminated, and if Atwood was entitled to recover the \$400 at that time, we fail to see how that right could be destroyed by his sale thereafter for a greater sum than Fagan agreed to pay.

For the error noted above, the judgment is reversed and the cause remanded.

BAYLE et al. v. NORRIS et al.†

(Court of Civil Appeals of Texas. Feb. 2,

1911. Rehearing Denied Feb. 23, 1911.)

1. APPEAL AND ERROR (§ 882*)—INVITED ERROR.

Plaintiffs, in an action for cutting timber from their land, who described the land in their petition as a parallelogram constituting the south quarter of a certain league, cannot object on appeal that the court did not find the land to be a parallelogram in the southwest corner.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3591-3610; Dec. Dig. § 882.*]

2. APPEAL AND ERROR (§ 1008*)—FINDINGS—CONCLUSIVENESS.

Findings of fact by the trial court on an issue raised by the evidence are conclusive on appeal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3955-3969; Dec. Dig. § 1008.*]

3. TROVER AND CONVERSION (§ 46*)—DAMAGES—MEASURE.

Where defendant takes property of plaintiff willfully or with culpable negligence in not knowing the true ownership, the measure of damages is the value at the time of demand, and if the property has been altered by manufacture, the value in its manufactured state may be recovered; but if the taking was under belief of title in good faith, and not culpably negligent, the measure of damages is the value at the time and place of taking.

[Ed. Note.—For other cases, see Trover and Conversion, Cent. Dig. § 263; Dec. Dig. § 46.*]

4. PLEADING (§ 236*)—AMENDMENT—TIME FOR AMENDMENT—DISCRETION OF COURT.

Sayles' Ann. Civ. St. 1897, art. 1188, 1189, require amendments to pleadings, when the court is in session, to be filed by leave and before the parties answer ready for trial, and that they must be filed long enough before trial not to surprise the opposite party. After plaintiffs' motion for a continuance had been denied, defendants announced ready for trial, and plaintiffs who were suing for damages for cutting timber, then moved to be allowed to amend their petition so as to describe a materially different tract of land. The question of title was in issue. *Held*, that refusal of leave to amend was no abuse of discretion.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. § 601; Dec. Dig. § 236.*]

5. DESCENT AND DISTRIBUTION (§ 71*)—PRESUMPTION FROM NONCLAIM—RECEIPT OF SHARE.

Eight, out of eleven heirs of a deceased owner of land, conveyed a specific tract of the land in 1842. The other three heirs were daughters, one of whom also joined in the deed, but failed to convey her interest because of a defective acknowledgment, she being married. The other two never conveyed their interest. *Held*, that the fact that no claim was ever made by either of the three to any of the tract con-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

† Writ of error denied by Supreme Court.

veyed raised no presumption that their share of the inheritance was satisfied out of the rest of the land of their ancestor.

[Ed. Note.—For other cases, see Descent and Distribution, Cent. Dig. § 233; Dec. Dig. § 71.*]

6. ADVERSE POSSESSION (§ 44*)—CONTINUITY OF POSSESSION.

Where possession was taken of land under claim of title in 1887 and houses, cribs, fences, etc., built thereon, and the occupant lived there and raised crops on some part of the land annually till 1899, when he rented it, and kept it rented to various tenants, who raised crops on the land every year up to and including 1905, there was no break in the actual occupancy except that incident to a change of tenants, and never for more than two months at a time. Held to establish continuous possession sufficient to confer title by adverse possession.

[Ed. Note.—For other cases, see Adverse Possession, Cent. Dig. §§ 226-231; Dec. Dig. § 44.*]

Appeal from District Court, Harris County; W. P. Hamlen, Judge.

Action by Joseph Bayle and others against W. H. Norris, receiver, and others. From a judgment for insufficient relief plaintiffs appealed, and defendants assigned cross-errors. Reversed and rendered in part; reformed and affirmed in part.

W. D. Gordon, for appellants. Spotts & Matthews, for appellees.

McMEANS, J. Joseph Bayle and his co-plaintiffs brought this suit against W. H. Norris, receiver of the Tyler County Land & Lumber Company, to recover damages in the sum of \$35,000, alleged to have been sustained by them by reason of the defendant having unlawfully cut and removed from land alleged to belong to plaintiffs 5,000,000 feet of pine timber, which they alleged he manufactured into lumber and appropriated to his own use, the sum so sought to be recovered being the value of the timber after it was manufactured into lumber.

Plaintiffs alleged that they were the owners in fee simple of the land from which the timber was taken and describe the same in their petition by the following field notes: "The south one-fourth of the Mary Thomas league in Polk county, Texas. * * * Beginning at the southwest corner of the said Mary Thomas League; thence north 50 deg. W. 1,332.5 varas, more or less, to corner on west line of said Mary Thomas League; thence N. 70 deg. E. 5,330 varas, more or less, to the east line of said Mary Thomas League. Thence S. 50 deg. E. 1,332.5 varas, more or less, to the S. E. corner of said Mary Thomas League; thence S. 70 deg. west 5,330 varas, more or less, to the S. W. corner of said Mary Thomas league to the place of beginning containing 1,107 acres of land more or less."

The defendant filed an answer to the suit vouching in certain warrantors, alleging that he, as receiver, had purchased the timber from these warrantors on the specific tracts,

which he described in his answer. He set up that these warrantors had conveyed him the timber and that they had a right to do so, having acquired title to the lands by adverse possession, and he pleaded their limitation titles in defense of the plaintiffs' suit, and in the alternative for judgment against the warrantors for the value of the timber conveyed to him by the deeds of the settlers. He also set up that, as receiver of the said Lumber Company, and of the Railway Company, which really was the tram used by and in connection with the Lumber Company, it was impossible for him to give his personal attention to the purchase of all the timber necessary to the operation of the mill in his charge, and that he had employed careful agents, who made the purchases and upon whose judgment in making the same, he was compelled to rely and did rely. He alleged that these agents made diligent inquiry as to the nature of the title from those from whom they purchased and believed and so reported to the defendant that good titles to the timber purchased were acquired by the purchases set out in the answer, and that, so believing, he caused the timber to be cut for use in the mill, in good faith, and hence, that if plaintiffs were entitled to recover anything they should recover only the value of the trees.

The warrantors brought in by the receiver were B. W. Wiggins, from whom defendant alleged he had purchased the timber on two tracts of 160 acres each, and who answered by general denial and plea of not guilty; J. C. Salter, A. D. Salter, J. G. Masterson, and W. C. Stockley, from whom defendant alleged he had purchased the timber on a tract of 152 acres, who did not answer, but suffered judgment by default; J. M. Mullins and wife, and Mrs. E. Mullins, who answered by general denial and pleas of not guilty. The case was tried before the court without a jury, and resulted in a judgment in favor of plaintiffs against defendant Norris for \$1,205.91, being the value of the timber taken from the most western of the tracts conveyed by B. W. Wiggins to defendant and for the value of the timber sold to defendant by the Salters, Masterson, and Stockley, and denied plaintiffs a recovery for the value of the timber as manufactured into lumber, and also denied them a recovery for the value of the timber sold defendant by Wiggins on the other tract of 160 acres, and for the value of that sold to him by J. M. Mullins and wife and Mrs. E. Mullins, or for any other timber taken from the land. Judgment was also rendered for defendant over against B. W. Wiggins and the Salters, Masterson and Stockley on their covenants of warranty. From the judgment, the plaintiffs appeal, and the receiver, Norris, filed cross-assignments of error.

The trial judge upon proper request filed

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

his findings of fact and conclusions of law, which are as follows:

"(1) That the said Mary Thomas League mentioned in the pleadings in this cause was granted to Mary Thomas in 1835. The north and south lines of said survey are parallel and run north 70 degrees east, and the east and west lines thereof are parallel and run north 50 degrees west. Each line of the survey is 5,330 varas in length and Big Sandy creek runs through the survey crossing the north line thereof nearer to the northeast corner than to the northwest corner thereof, and passing out of said survey across the south line thereof about 600 or 800 varas south, 70 degrees west, from the southeast corner thereof.

"(2) That said Mary Thomas died prior to the 2d day of September, 1842, leaving surviving her 11 children and heirs, viz., Wiley S. Thomas, Benjamin Thomas, A. Jackson Thomas, I. D. Thomas, Anna Thomas, Theophilus Thomas, S. D. Thomas, G. L. Thomas, Maria N. Roberts, wife of N. G. Roberts, Margaret Davis, the wife of E. K. Davis, and a daughter named —, who married — Brownrigg.

"(3) All of the above-named children of Mary Thomas, except the two last named, and S. D. Thomas, on September 2, 1842, executed to S. D. Thomas a deed conveying to him the lower quarter of said league. This deed was signed by Maria Roberts and her husband, Noel G. Roberts, but it did not appear that her acknowledgment thereto was taken in accordance with the statute, the certificate of acknowledgment not showing that she was examined separate and apart from her husband, or that the instrument was explained to her, or that she declared that she did not wish to retract, but showing that her acknowledgment was taken as though she were a femme sole.

"(4) On March 5, 1846, said S. D. Thomas by S. W. Blount, attorney in fact, under a power of attorney, which was introduced in evidence, conveyed to Jacinto Aleix the lower quarter of the league.

"(5) Jacinto Aleix died January 2, 1861, and on the 13th day of July, 1872, his children conveyed to his surviving wife, Severinne Aleix, the lower quarter of said league, describing it as beginning on the southwest boundary thereof 2,665 varas south 50 degrees east from the most western corner of the league, and running thence north 70 degrees east 2,665 varas. Thence south 50 degrees east 2,665 varas to the southeast boundary line of the league. Thence south 70 degrees west with the east line of said league 2,665 varas to its most southern corner. Thence north 50 degrees west with the southwest line of said league 2,665 varas to the beginning, calling for marked bearing trees at each corner of the quarter, and calling for branches where the lines cross them.

"(6) Severinne Aleix, the widow of Jacinto Aleix, died on the — day of —,

1873, and left surviving four children, viz., Edward, who is still living, Oscar, Leopold and Mary Amanda, wife of Joseph Bayle. Oscar married and died leaving surviving his widow, but no children.

"(7) On April 20, 1882, Edward Aleix conveyed to Leopold Aleix his interest in said lower quarter of said league, describing it by the same field notes given in said deed from the children of Jacinto Aleix to their mother, Severinne Aleix.

"(8) Leopold Aleix and Mrs. Bayle died before the institution of this suit, and all of their children except one are the plaintiffs in this suit, it being conceded on the trial by both plaintiffs and defendants that with the exception of that part of the land to which their rights are barred by limitation, they are the owners of $19/24$ of such part of or interest in the land as Jacinto Aleix acquired through the deed to him from said S. D. Thomas.

"(9) From the year 1848 to the year 1900, with the exception of about six years, the said Jacinto Aleix paid taxes on 1,107 acres of said survey or redeemed the same from tax sales thereof.

"(10) About 1856, Jacinto Aleix had surveyed one quarter of said league. The field notes of said survey were introduced in evidence by plaintiffs, and they are the same as the field notes contained in the said deed from the heirs of said Jacinto Aleix to their mother, Severinne Aleix, and in said deed from Edward Aleix to Leopold Aleix.

"(11) There has never been any possession of any part of said Mary Thomas survey by Jacinto Aleix or any of his heirs, nor have any of them ever been on the land, except the plaintiff, Joseph Bayle, who inspected the land some eight or ten years since, but what part thereof he inspected does not appear.

"(12) That for more than 10 years and for about 14 years prior to the date of the deed executed by J. M. Mullins to W. H. Norris, receiver of the Tyler County Land & Lumber Company, conveying the pine timber situated on 160 acres of land out of said Mary Thomas survey, which tract of land and said deed are described in the first amended original answer herein of said Norris, as such receiver, the said J. M. Mullins claiming to have good and perfect title to said 160 acres of land, had held peaceable, continuous, and adverse possession thereof, cultivating, using, and enjoying the same, and paying all taxes thereof, and after the expiration of said period and after the execution of said deed to him, the said Norris, as such receiver, cut the timber thereon which had been sold to him as aforesaid, the amount so cut being 306,505 feet, of the value of three hundred and six and $89/100$ dollars.

"(13) That on the 7th day of September, 1907, B. W. Wiggins by his deed of that date conveyed to W. H. Norris, receiver of the Tyler County Land & Lumber Company, the

pine timber on two certain tracts of land out of said Mary Thomas survey, both of which tracts of land and said deed are described in the said first amended original answer of said Norris as such receiver; that for more than 10 years, and for about 15 years before the execution of said last-mentioned deed, the said B. W. Wiggins and those through whom he claimed same, claiming to have good and perfect title to the 160-acre tract first described in said deed, had held peaceable, continuous, and adverse possession thereof, cultivating, using, and enjoying the same, and paying all taxes thereon, but had not exercised such acts of ownership over the last tract described in said deed as to entitle him to hold same under the statutes of limitation; that after the execution of said deed to him by said B. W. Wiggins he, the said Norris, as such receiver, cut the pine timber on both of the tracts of land so conveyed to him by said B. W. Wiggins, the amount of timber cut by him on the tract of land first described in said deed being 882,183 feet, of the value of \$882.183, and that cut on the tract of land last described being 949,920 feet of the value of \$949.920, said values being the market values of the timber as it stood in the trees at the time the same was cut on said two tracts of land.

"(14) That on the 29th day of August, 1906, J. C. Salter, A. D. Salter, J. G. Master-son, and W. C. Stockley, by their deed of that date, conveyed to said W. H. Norris, as receiver as aforesaid, the pine timber on a certain 152-acre tract of land out of said Mary Thomas survey, which tract of land and deed are described in first amended original answer of said Norris, as such receiver. That for the greater part of the time for 15 years before the execution of said deed, the said J. C. Salter, A. D. Salter, J. G. Master-son, and W. C. Stockley, and those through whom they claimed same, claiming to have good and perfect title to said 152-acre tract of land, had and held an adverse possession thereof, cultivating, using, and enjoying the same broken and not continuous, but not such continuity of possession thereof as to entitle them to hold same under the statutes of limitation and after the execution of said deed the said Norris, as such receiver, cut the pine timber thereof, the amount so cut being 573,337 feet, of the value of \$573.33, such being the market value of the timber of said land as it stood in the trees at the time the same was cut.

"(15) That on the 22d day of January, 1906, Mrs. E. Mullins by her deed of that date conveyed to W. H. Norris, as receiver as aforesaid, the pine timber on a certain tract of 160 acres of land out of said Mary Thomas league, which tract is described in the field notes thereof introduced in evidence and which is situated west of the tract so conveyed by said J. M. Mullins to said Norris as such receiver, and east of the tract

first described in said deed from B. W. Wiggins to said Norris, as such receiver; that for more than 10 years and for about 14 years before the execution of said deed last mentioned, the said Mrs. E. Mullins, and those through whom she claimed same, claiming to have a good and perfect title to the said last-mentioned 160-acre tract of land, had held peaceable, continuous, and adverse possession thereof, cultivating, using, and enjoying the same, and paying all taxes thereon, and after the execution of said deed by said Mrs. E. Mullins, he, the said Norris, as such receiver, cut the pine timber on said last-mentioned tract of land, the amount of timber so cut thereon being 129,224 feet, of the value of \$129.22.

"(16) That all the pine timber cut by said Norris as such receiver on any of the lands claimed by plaintiffs, was that so conveyed to him by said B. W. Wiggins, J. M. Mullins, Mrs. E. Mullins, J. C. Salter, A. D. Salter, J. G. Masterson, and W. C. Stockley; that before said conveyances were made and before said timber was cut the said Norris, as such receiver, exercised such care and diligence as a prudent person would exercise under the same circumstances to ascertain the true ownership of the timber, and acting under such information as he obtained in regard to such ownership, and on the advice of counsel whom he had employed to ascertain the ownership, he purchased such timber and paid what at the time of the purchase thereof was the value thereof, and believing in good faith that by said purchase he became the owner of said timber he afterwards cut the timber so purchased by him: that upon the execution of said deeds to said Norris as such receiver by these made defendants herein by him, or as said timber was cut, he, the said Norris as such receiver, paid to the respective parties executing such deeds the amounts named in his answer as paid to them.

"(17) That the grantors in the said deeds from Wiley S. Thomas and others to S. D. Thomas, and the grantor in the deed from S. D. Thomas by his attorney in fact to Jacinto Aleix intended to convey the land described in plaintiff's petition herein, being the south half of the south half of said league, and did not intend to convey the southwest quarter of said league as contended by plaintiffs on the trial, and did not intend to convey the southeast quarter of said league as contended by the defendants on the trial.

"Conclusions of Law.

"(1) That though said deed from Wiley S. Thomas and others to S. D. Thomas did not convey the interests of Maria N. Roberts, Margaret Davis, or Mrs. Brownrigg in the land therein described, each of them then owning an undivided one-eleventh thereof, yet, as it does not appear from the evidence

that they have ever asserted any claim there-to since the execution of said deed in 1842, it must be now presumed that they have in some way received their full shares or interest in said league out of other portions thereof than the lower quarter thereof, and therefore Jacinto Aleix and those claiming through him have acquired the title of all the heirs of Mary Thomas to said lower quarter of said league.

"(2) That the plaintiffs are not entitled to recover of W. H. Norris as receiver of the Tyler County Land & Lumber Company on account of the timber cut by him on the tracts claimed by J. M. Mullins, Mrs. E. Mullins, or on the tract first described in the deed to him from B. W. Wiggins, but are entitled to recover nineteen twenty-fourths ($19/24$) of the value of the timber cut on the tract last described in said deed from B. W. Wiggins, being the most western of the two tracts so conveyed by B. W. Wiggins, such nineteen twenty-fourths ($19/24$) of such value being \$752 and are also entitled to recover nineteen twenty-fourths ($19/24$) of the value of the timber cut on the 152-acre tract described in said deed from A. D. Salter, J. C. Salter, J. G. Masterson and W. C. Stockley, such $19/24$ of said value being \$453.91, said values so fixed being the market value of the timber as it stood in the trees at the time the same was cut. The defendant W. H. Norris, receiver of the Tyler County Land & Lumber Company, is entitled to recover of B. W. Wiggins the sum of \$752 on account of the covenants of warranty contained in his said deed, and is entitled to recover of the said J. C. Salter, A. D. Salter, J. G. Masterson and W. C. Stockley the sum of \$453.91 on account of their covenants of warranty contained in their said deed."

Appellants' first and second assignments of error are as follows:

"The court erred in not holding that the land owned by plaintiffs and denominated the lower quarter of said Mary Thomas league was that described in the fifth finding of fact, to wit, beginning on southwest boundary of the said league 2,665 varas south 50 degrees east from the most western corner of the league; thence north 70 degrees east 2,665 varas. Thence south 50 degrees east 2,665 varas to the southeast boundary line of the league. Thence south 70 degrees west to the east line of said league 2,665 varas to the most southern corner. Thence north 50 degrees west with the southwest line of said league 2,665 varas to the beginning; and in not adjudging the case accordingly."

"The court erred in finding 17 in holding that the plaintiffs' land was not located as designated in assignment of error No. 1, but extended in a parallelogram across the southeast portion of said league, parallel with the said southeast line."

If the court committed error in the re-

gard complained of in the above assignments it was an error of which the appellants should not now be heard to complain. They described the land as being the south one-fourth of the league, and the field notes set out in their petition show the land to be a parallelogram 1,332 varas wide and 5,330 varas in length, and extending entirely across the league. It was not contended in their pleadings that the quarter of a league owned by them was its southwest quarter. The description given in the petition could not in any way be applied to the boundaries of the southwest quarter, which are given in the court's fifth finding of fact which describes that quarter as having lines of equal length, each being 2,665 varas long. The assignments cannot be sustained.

The third assignment complains that the court erred in not holding that the possession of the B. W. Wiggins tract mentioned in the thirteenth finding of fact was insufficient to mature title under the 10-year statute of limitation, because, he contends, said Wiggins, and his father, under whom he claimed, lived entirely east of the southwestern quarter of the land designated in the fifth finding of fact, and that there was not sufficient possession of any of plaintiffs' land to form the basis of title by limitation.

This assignment is predicated upon the assumption that plaintiffs owned the southwestern quarter of the league which had been segregated from the balance, and that while Wiggins' lines extended from the southeastern quarter across the division line into the southwestern quarter, all his improvements and his actual possession were upon the former. If this contention was borne out by the testimony we think the assignment should be sustained. It appears from the evidence that the children and heirs of Jacinto Aleix, after the death of their father, conveyed, by metes and bounds, the southwestern quarter of the league to their mother, Severinne Aleix, and that the field notes used in this conveyance were those furnished by a surveyor who had made the survey at the instance and during the lifetime of Jacinto Aleix. The plaintiffs held title as heirs of Severinne Aleix. There was proof that the land claimed by Wiggins was east of this line and that most of his improvements, if not all of them, including the house he lived in, were east of the east line of the southwestern quarter of the league. But, on the other hand, there was testimony to the effect that Wiggins' home, barns, inclosure, and other improvements were west of this line and entirely on the southwestern quarter. This is notably true as to the testimony of B. W. Wiggins, who testified that he was familiar with the line that had been run north 50° west from the middle point on the south line of the league, which is the east line of the southwestern quarter, and that his house was west of that line, but the line cuts off about 20 feet of the 160-acre

tract he lived on. This testimony raised an issue of fact to be decided by the court, and the court's determination of the issue against the plaintiffs is conclusive upon us. The assignment is overruled.

The fourth and fifth assignments are addressed to the action of the court in restricting plaintiffs' right of recovery to the value of the timber at the time and place it was taken, and in not allowing, as the measure of recovery, the value of the timber in its manufactured state.

Upon this issue it was shown that the timber taken by defendant was from two tracts of 160 acres each purchased by him from B. W. Wiggins, and from a tract of 152 acres purchased from the Salters, Masterson and Stockley, and from the two tracts purchased from the Mullinses. Appellant makes no question as to the title of the tracts held by the parties last named having been perfected in them by limitation, nor as to one of the 160-acre tracts purchased from Wiggins other than as raised in his third assignment which has been hereinbefore discussed, so that the defendant's liability rests upon his good faith, or rather the want of it, in taking the timber from the other 160-acre Wiggins tract and from the 152-acre tract of Salters, Masterson and Stockley. Upon this issue the following testimony was introduced. Norris, the defendant, testified: "I have been out to the land several times, and had a superintendent there. When I cut the timber I did not know that there were no limitation claimants to the part of the land outside of the Wiggins tracts. My instructions were to cut what timber belonging to the different parties we bought from; they had title to it by limitation. Mr. Moonney, at Woodville, said we had a good title to it, and that we had a good title through the settlers. I did not furnish him with an abstract. I told our superintendent, Mr. Hickman, to take the matter up with Mr. Moonney, and if the matter was not all right, not to buy it. I left it to Mr. Moonney to tell Mr. Hickman whether the squatters owned the land. Mr. Moonney was retained by me as the local attorney. I did not ask the squatters to show me their chain of title, but I suppose Hickman did. I told him to pick up all the squatters' timber to be safe on, and take the matter up with Moonney, and he did. I left the matter of buying timber to my superintendent, and he required of the sellers proof of their title; they put up what claim they had to the superintendent, and he put it up to Mr. Moonney. Mr. Moonney is considered the best attorney in Tyler county, and I think he is as good as any. At the time I accepted the conveyances in evidence I believed I was getting a good title, and would not have taken them if I had not thought so, and if I had not thought so I would not have permitted the timber to be cut by my employes. The tim-

ber was all cut off after I became the receiver of the Tyler County Land & Lumber Company, and at the same time I was receiver of the J. L. Campbell Company and the Warren, Corsicana & Pacific Railroad Company, in one cause, and I was operating, under the orders of the court, the mill of the Tyler County Land & Lumber Company, and the properties of the other companies, and the nature and extent of my duties as receiver were such that I could not give my personal attention to the details of the business out about the mill, or the details of buying timber, but was required to avail myself of the services of an agent. I had then known Mr. Hickman for 10 or 12 years, and had always found him to be a careful man. I paid Mr. B. W. Wiggins for all the timber cut on the two tracts claimed by him. While operating the mill I bought a good deal of timber standing on the Mary Thomas survey, the Morales survey, the Palmer survey, what they called the Dodd survey, and a half dozen other places on the road, and on the Loving survey and other surveys. I bought some from squatters and some from other persons, being the record owners, and bought some land straight out, and have not had any litigation over any that I bought, except as to this and that on the Morales survey. On the Morales survey the controversy was over the title. Probably one-third of the timber I bought was from squatters. If I had the advice that the squatters' title was better than the record owners' title, I bought and ignored the record titles. If my attorney said the titles were all right, I said, 'Go ahead and buy it.' I didn't know anything about the titles myself, but obtained the opinion of my attorney."

C. T. Hickman testified that he was superintendent for W. H. Norris while he was receiver for the Tyler Land & Lumber Company, and operating the mill at Warren for two years, and bought the timber on the 320 acres of land from B. W. Wiggins, and from the Henry Wiggins tract, and from J. M. Mullins, and bought it under Mr. Norris' instructions. "When I bought the timber I made inquiries in regard to the claims of the respective claimants. At that time Mr. Wiggins told me that he had lived on the place, and I don't remember how many years—about twenty-five years—and remember that fact because he showed me some tax receipts which dated back a number of years, but I don't remember how many years. This statement was made at Mr. Wiggins' house, and was made at the mill, and also at Warren. I went over the land with him—I think over both tracts—and he told me that he had been in possession of both tracts, and from Mr. Wiggins' statement to me I thought, when I purchased the timber on the two tracts claimed by him, that I was getting a good title. Judge Moonney, of Woodville, looked into the matters and advised me to go ahead

and buy it. I also looked over the other tracts, and talked to the persons who sold them to me. After my conversations with the various persons from whom I had bought, we conferred with Mr. Mooney, and he sent a man down there to investigate it and see the parties in person. I think he sent his partner, Mr. Mann, down there. After Mr. Mooney had made the investigations he made a report in writing. (This report is shown to have been lost.) I showed this report to Mr. Norris. I am not sure he saw it, but I think he did. I reported to Mr. Norris all of the information I had obtained in regard to the possession and limitation of these lands. The substance of Mr. Mooney's report to me was that he thought that the titles were good. Before buying I went to the records and got an abstract to show who the record owners of the lands were. We had it abstracted, and Judge Mooney investigated the title, and advised me that it was all right. When we bought the lands we paid for them. We bought from the squatters, and I took affidavits from those from whom I bought, as to the character of their possession, in addition to talking with the persons from whom I bought. I presume there was a record title to the land in somebody else's name, but we did not investigate it any further than to have Mooney examine the title."

We understand the law to be that where one person takes property belonging to another, whether such taking be done willfully or intentionally or as the result of culpable negligence in not knowing that the property is not his own, the measure of recovery against him therefor is the value of the property at the time of demand therefor by the owner; and if the form of the property has been changed by manufacture, the measure of recovery is the value of the property in its manufactured state. If, however, the taking is not willful or intentional, but if the taker at the time of taking in good faith believes the property to be his own, and is not culpably negligent in not knowing that it belongs to another, he is liable to the owner only for its value at the time and place of taking. *Louis Werner Stave Co. v. Pickering*, 119 S. W. 333; *Ripy v. Less*, 118 S. W. 1084; *Railway v. Starr*, 22 Tex. Civ. App. 353, 55 S. W. 393; *Railway v. Jones*, 34 Tex. Civ. App. 94, 77 S. W. 955; *Young v. Pine Ridge Lumber Co.*, 100 S. W. 784; *Messer v. Walton*, 42 Tex. Civ. App. 488, 92 S. W. 1037; *Pettit v. Frothingham*, 48 Tex. Civ. App. 105, 106 S. W. 907.

We think the evidence raised the issue of good faith of Norris in cutting the timber, and this issue was one for the determination of the trial court and not this court. *Pettit v. Frothingham*, supra. The assignments are overruled.

The sixth and eighth assignments are without merit, and are overruled without further comment.

The seventh is sufficiently disposed of by what we have said in disposing of the fourth and fifth assignments.

The tenth assignment complains of the action of the court in refusing plaintiffs leave to file an amended original petition. It appears that when the case was called for trial the plaintiffs announced not ready and filed a motion for continuance, which was overruled. Thereupon the defendant announced ready for trial. Plaintiffs then asked leave to file the amendment, and their request was refused. The amendment which plaintiffs sought to file, among other things, changed the description of the land they claimed to own so as to describe the southwestern quarter of the league instead of the south quarter thereof.

Article 1188, Sayles' Ann. Civ. St. 1897, provides that all amendments to pleadings when the court is in session must be filed under leave of the court before the parties announce ready for trial and not thereafter; and article 1189 provides that such leave shall be given, and such amendment filed, for a reasonable time before the case is called for trial, so as not to operate a surprise to the opposite party. The limitation as to the time within which an amendment may be made is directory. *Railway v. Goldberg*, 68 Tex. 685, 5 S. W. 824. It was a matter within the discretion of the trial judge as to whether he should permit the filing of the amendment in question at the time it was offered, and the exercise of that discretion can only be questioned upon appeal when it clearly appears that the discretion confided in the court has been abused, and this the record does not show. *Dublin v. Railway*, 49 S. W. 867; *Id.*, 92 Tex. 540, 50 S. W. 120; *White v. Bank*, 27 Tex. Civ. App. 487, 65 S. W. 498; *Miller v. Morris*, 55 Tex. 418, 40 Am. Rep. 814; *Glasscock v. Hamilton*, 62 Tex. 160.

Appellee has presented several cross-assignments of error, the first challenging the first conclusion of law of the trial court to the effect that though the deed from Willey S. Thomas and others to S. D. Thomas, through whom plaintiffs claimed title, did not convey the interest of Maria N. Roberts, Margaret Davis, or Mrs. Brownrigg in the land therein described, each of them owning an undivided one-eleventh thereof, yet as it did not appear from the evidence that they had ever asserted any claim thereto since the execution of said deed in 1842, it must be now presumed that they have in some way received their full shares or interests in said league out of the other portions thereof than the lower quarter thereof, and that therefore Jacinto Aleix and those claiming through him have acquired the title of all the heirs of Mary Thomas to said lower quarter of the league.

As before shown, the court found, and the finding is sustained by the undisputed evidence, that Mary Thomas acquired the league

in 1835, and died prior to 1842, leaving 11 children and heirs, all of whom, except three, viz., Maria Roberts, Margaret Davis, and Mrs. Brownrigg, conveyed the lower quarter to Jacinto Aleix, whose heirs are the plaintiffs in this suit; that Mrs. Roberts signed the deed, but on account of a defective acknowledgment the deed was ineffective to convey her title. There was no proof that Mrs. Davis, Mrs. Roberts and Mrs. Brownrigg had parted with their interest in said land, nor that they had or had not claimed the land since the execution of the deed by the other heirs conveying their interest to S. D. Thomas, nor that they had received their shares out of other portions of the league. In the absence of all proof the court was not warranted in presuming that said persons had so received their full interests in the league out of other portions thereof, and if the presumption could be indulged as to Mrs. Brownrigg and Mrs. Davis because they did not join in the conveyance we can see no reason for indulging the presumption against Mrs. Roberts, who signed the deed, but whose title was not thereby conveyed because of the defect noted. The assignment must be sustained.

It follows that we must also sustain appellee's third cross-assignment, which complains that the court erred in rendering judgment against him for $10/24$ instead $10/24$ of $2/11$ of the value of the timber taken from the most western of the two tracts conveyed to him by B. W. Wiggins. The ancestor of plaintiffs through whom they assert title not having acquired the $2/11$ interest of Mrs. Davis, Mrs. Roberts and Mrs. Brownrigg, were not entitled to recover the value of their interest in the timber cut by Norris.

The fifth cross-assignment complains in effect that the court erred in concluding that defendant was liable to plaintiffs for part of the value of the timber cut from the 152-acre tract described in the deed from A. D. Salter, J. C. Salter, J. G. Masterson, and W. C. Stockley, because the evidence showed that the parties named and those through whom they claimed had acquired the title to said tract under the statute of limitations of 10 years before the filing of plaintiffs' suit.

The court found in its fourteenth finding of fact that the Salters, Masterson, and Stockley sold to Norris the pine timber on the 152 acres on August 29, 1906; that for the greater part of the time for 15 years before the execution of said deed the said Salters, Masterson, and Stockley and those through whom they claimed, claiming to have a good and perfect title to said tract, had and held adverse possession of said tract, cultivating, using, and enjoying the same but that their possession was broken and the continuity of possession was not such as to entitle them to hold under the statute of limitations. We have carefully examined the evidence in the record, and are constrained to hold that the court was in error in not

finding therefrom that the continuity of possession of the Salters, Masterson, and Stockley, and those under whom they claimed, was such as to entitle them to the land under the statute. The evidence shows that Henry Wiggins went on and settled upon the land in 1887, claiming it as his own, and built a dwelling house, cribs, and other houses on it during that year; that he opened a part of the tract to cultivation during said year, and continuously resided upon and cultivated a portion of the land every year up to and including the year 1899. In the latter part of 1899, or the early part of 1900, he moved off the land and rented it for the year 1900 to one Lewellyn, who took possession just after Wiggins left, and who made a crop on it and continued in possession one year. When he moved off, one Gilley rented the land from Wiggins and moved onto and made crops upon it for two years, and when he vacated he was succeeded by one Williford who made a crop on the land the year after Gilley left. This brings us to the end of 1903. In 1904 and 1905 one Kryer occupied and cultivated the land under contract with and as tenant of the Salters, Masterson and Stockley, who had at that time purchased the land from Wiggins. There was no break or want of continuity of actual possession during all of said time that Wiggins lived on the land, and none since then up to and including 1905, except such as was incident to a change of tenants; and at such times the existence of the houses, the fenced land and recent cultivation were sufficient to give to the owner notice of adverse claim. All the persons who lived upon the land after Wiggins moved off were tenants either of Wiggins or the Salters, Masterson, and Stockley. The place was never vacant for more than two months at any one time, and there has been farming on it every year from 1893, when the 152-acre tract was surveyed, up to and including the year 1905. In view of this state of facts we think the court erred in rendering judgment against Norris for the timber taken by him from the 152-acre tract in question.

The other cross-assignments presented by appellee are believed to be without merit and are overruled.

The judgment of the court below, in so far as it permits a recovery in favor of plaintiffs against defendant Norris for the timber cut off the 152-acre tract is reversed and here rendered for defendant Norris, and the judgment in favor of said Norris over against the defendants Salters, Masterson, and Stockley on the covenants contained in their deed conveying the timber on said tract to Norris is also reversed and judgment here rendered in favor of said Salters, Masterson, and Stockley; and the judgment in favor of plaintiffs for the timber cut off the most western of the two tracts purchased by Norris from B. W. Wiggins is so reformed as to

allow a recovery in plaintiffs' favor against said Norris for $19/24$ of $5/11$ of the value of said timber, and as so reformed the judgment as to such part is affirmed.

Reversed and rendered in part.

Reformed and affirmed in part.

SAUNDERS v. MONTGOMERY et al.†
(Court of Civil Appeals of Texas. Jan. 28, 1911. Rehearing Denied Feb. 23, 1911.)

BROKERS (§ 84*)—RIGHT TO COMMISSIONS.

Where a broker procured a purchaser of timber under a contract of sale showing that the number of feet stated therein was a mere estimate, not binding upon the parties, and that the purchaser could not be required to accept and pay for any tract so situated as to make it impossible or impracticable to log the timber to reasonable advantage, so that the vendor could only compel the purchaser to pay for the portion which he could show was so situated that it could be practically logged, the broker suing for his commissions would be compelled to prove the extent of such portion, he being entitled to commissions only on that part of the timber, and, where no evidence was offered to show what portion of the timber the purchaser was required to take, there could be no recovery for commissions.

[Ed. Note.—For other cases, see *Brokers*, Cent. Dig. §§ 104, 105; Dec. Dig. § 84.*]

Appeal from District Court, Jefferson County; L. B. Hightower, Jr., Judge.

Action by J. W. Saunders against E. F. Montgomery and others. There was a directed verdict for defendants, and plaintiff appeals. Affirmed.

F. J. Duff and A. L. Davis, for appellant. W. D. Gordon and Oliver J. Todd, for appellees.

PLEASANTS, C. J. This suit was brought by appellant against appellee E. F. Montgomery to recover the sum of \$6,250 alleged to be due as commissions for the sale by appellant, under a contract with appellee, of 50,000,000 feet of pine timber. Plaintiff alleged, in substance: That on or about January 15, 1907, defendant Montgomery, owning, or claiming to own, 50,000,000 feet of standing pine timber in Newton county, Tex., or claiming to have the right to sell the same, contracted and agreed with plaintiff that, if plaintiff would procure a purchaser for said timber at a price not less than \$2.50 per thousand feet, that defendant would pay to plaintiff a commission of 5 per cent. of such price for said services. That, acting under said contract, plaintiff procured a purchaser, to wit, the Orange Lumber Company, and that through the efforts of plaintiff the said purchaser entered into a valid and binding written contract with defendant, by the terms whereof it agreed to purchase said timber at the price of \$2.50 per thousand feet. That said Orange Lumber Company was, and at all times since has been, amply

solvent and fully able to carry out said contract, and that said contract was approved and accepted by defendant, whereupon defendant became liable to plaintiff for plaintiff's commissions in the amount sued for, with 6 per cent. interest from the date of the contract. The defendant answered by general demurrer and general denial, and by special plea set up a contract for the purchase from him by the Orange Lumber Company of 50,000,000 feet of pine timber, which contract he admits was procured by the plaintiff, but he expressly denies that he ever agreed to pay plaintiff a commission for obtaining said contract, and only agreed to pay him 5 per cent. of the amount realized by defendant from said contract, and avers that he has never received anything on said contract. He further avers that, in accordance with his said agreement with plaintiff, he transferred and assigned to him 5 per cent. of the amount that might become due under said contract, and asks that the Orange Lumber Company be made a party, and that he recover against said company 95 per cent. of the amount due under said contract, and that plaintiff be required to join in said suit against said company and be not allowed any recovery against this defendant.

On the trial in the court below a plea of privilege filed by the Orange Lumber Company was sustained, and that branch of the case between defendant Montgomery and defendant Orange Lumber Company was transferred to Harris county. The case then went to trial as between the plaintiff and the original defendant, and, after both sides had introduced their evidence, the court instructed the jury to return a verdict in favor of defendant, which they accordingly did. From the judgment rendered upon said verdict, the plaintiff prosecutes this appeal.

The evidence is in substance as follows: The plaintiff, J. W. Saunders, testified: That during the year 1907 he was engaged in the business of selling pine timber stumpage. That in January of that year he met the defendant Montgomery in Beaumont. That the defendant Montgomery said to plaintiff: "I have 50,000,000 feet of pine stumpage." And that he further said: "I will give you 5 per cent. commission if you can find me a buyer." That plaintiff then took defendant, and that they went to Houston, and to the office of the Orange Lumber Company, where a written contract was entered into between the defendant Montgomery and the Orange Lumber Company, by which the lumber company agreed to purchase 50,000,000 feet of timber from the defendant Montgomery. That at the time of the first conversation in Beaumont, and before the contract was made with the Orange Lumber Company, the defendant Montgomery exhibited to plaintiff maps and blueprints of the land, showing the land owned by the defendant in colors, and the esti-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

† Writ of error denied by Supreme Court.

mate of the amount that each tract would cut. The contract between Montgomery and the Orange Lumber Company, the execution of which was admitted by all parties, and which was introduced in evidence by plaintiff, reads as follows: "State of Texas, County of Harris. This contract of agreement made and entered into by and between E. F. Montgomery of Burkeville, Newton county, Texas, hereinafter known as first party, and the Orange Lumber Company, a Texas corporation with its principal office in Houston, Harris county, Texas, hereinafter known as second party, witnesseth, as follows, to wit: That first party agrees to sell and convey and second party agrees to purchase and pay for all of the merchantable pine timber at the price of two and $\frac{50}{100}$ (\$2.50) dollars per thousand feet, as per Doyle Scale; that is upon the following described tracts or parcels of land, situated in Newton county, Texas, and in the state of Louisiana, as hereinafter further provided: 2,000 acres of the S. Swift survey, estimated to cut 5,000 feet per acre. 272 acres of the Jno. Spears survey, estimated to cut 4,000 feet per acre. 300 acres of the D. L. D. Moore survey, estimated to cut 50,000 feet per acre. 400 acres of the E. M. Nicholson survey, estimated to cut 6,000 feet per acre. 322 acres of the W. H. Stark survey, estimated to cut 6,000 feet per acre. 234 acres of the F. Deason survey, estimated to cut 4,000 feet per acre. 320 acres of the W. N. Shaw survey, estimated to cut 3,000 feet per acre. 175 acres of the Thos. Byerly survey, estimated to cut 8,000 feet per acre. 80 acres of the Mary Davlin survey, estimated to cut 7,000 feet per acre. 200 acres of the Mary Davlin survey, estimated to cut 6,000 feet per acre. 280 acres of the Mary Davlin survey, estimated to cut 4,000 feet per acre. 80 acres of the T. Hickman survey, estimated to cut 10,000 feet per acre. 177 acres of the Dan Doncho survey, estimated to cut 6,000 feet per acre. 110 acres of A. M. Beville survey, estimated to cut 6,000 feet per acre. All the above in Newton county, Texas. Eighty acres situated in Louisiana, opposite the Thos. Byerly survey in Newton county, Texas, estimated to cut 8,000 feet per acre. The second party agrees to begin to estimate the pine timber on the above-described lands within thirty days from the date hereof, and to complete said estimation as rapidly as possible. It is further understood that, in estimating same timber as aforesaid, that only such pine timber as is known as 'floating timber' shall be estimated and which will measure ten inches and up in diameter at the usual and customary place of estimating pine timber. The first party shall furnish to second party within ten days after the estimate of each respective tract, as aforesaid, a complete abstract of title to such tract or tracts of land. If the record title of the first party to said tract or tracts of land is good, then, second party shall purchase at said price named above said timber

upon said tract or tracts of land. If, however the record title of first party is not good and defects are pointed out by the attorney of second party, first party shall have sixty days in which to cure and remove said defects, and, if first party succeeds in removing said defects to the satisfaction of Baker, Potts, Parker & Garwood, attorneys, within said time, then the sale of said timber as aforesaid shall be consummated at the price as aforesaid. If, however, title to said tract or tracts of land, or either of them, is not good and first party cannot remove said defects to the satisfaction of said attorneys within said sixty days after they are placed with them, the second party shall have the right to cancel this contract, so far as affects such tracts as title thereto is defective, and no other. It is understood that an estimate of the pine timber upon said tract and tracts of land has been made and reported to second party, as designated above; and it is further understood that the second party is not satisfied to accept said estimate as final, and will within the next thirty days begin to have each of the said tracts re-estimated as aforesaid and will report such re-estimate to the first party. If this purchase is consummated, it shall be on the basis of said re-estimate. If, according to said re-estimate the amount of merchantable pine timber upon any one of the said tracts is materially less than the amount indicated above, then, first party shall have the right and privilege of refusing to carry out this sale upon the basis of said re-estimate upon that particular tract, upon which the said re-estimate shows an amount materially less than above designated, and that tract only. It is further understood and agreed by and between the parties hereto that the first party binds himself to deliver to the second party within six months from date hereof, and the second party agrees to purchase, and pay for, an additional amount of pine timber of twenty-four million (24,000,000) feet, at the same price and on the same estimate basis as herein provided for; said timber to be located in Newton county, Texas, and in the state of Louisiana, opposite Newton county, Texas, and said timber to be located also within three miles of the Sabine river, or some tributary stream thereof that is cleaned out for the purpose of running or driving logs, that is acceptable to second party, or its nominee. The three-mile limit above referred to shall be construed as to mean three miles from the immediate center of any particular tract that may be offered under this contract, but second party is not to be required under this contract to accept a narrow strip of land, the center of which may technically come within the aforesaid three-mile limit. The second party is not required in any provision or provisions of this contract to accept and pay for any tract or tracts of land which may be so situated, surrounded, or located as to make it impossible or impracticable to log

same to reasonable advantage. The party of the first part agrees to pay all expenses incurred in the securing of the timber to be delivered under this contract, including surveying the lands, submitting abstracts and acceptable titles to the attorneys of the second party. It is hereby understood and agreed that either party thereto shall have the right and privilege to cancel this contract as to the additional twenty-four million (24,000,000) feet of timber by giving thirty days' written notice of their intention so to do to the other party. It is hereby understood and agreed that second party is to have not less than ten years to remove the timber on any of the above-described tracts of land, and not less than fifteen years on the additional twenty-four million (24,000,000) feet, which is to be delivered under this contract. Hereunto witness the signatures of the parties hereto in duplicate this the 25th day of January, A. D. 1907. [Signed] E. F. Montgomery. The Orange Lumber Company, by R. M. Farrar, Vice President."

Upon the same day, and immediately after the execution of this contract, appellee Montgomery executed and delivered to appellant the following instrument: "This indenture, witnesseth: That, whereas, J. W. Saunders has been instrumental in my selling to the Orange Lumber Company certain timber in Newton county, Texas, and for and in consideration of his services, I agree that the Orange Lumber Company shall retain for him out of said sale five per cent., and remit to him out of each transaction the amount of five per cent. aforesaid. There are other lands that I own, and that I contemplate buying and contracting for, both in my name and in the name of Montgomery & Hicks, and as J. W. Saunders has been instrumental in our making sales, and is still in position to help us, and in consideration of those facts and of other valuable considerations, we agree to pay him a commission of five per cent. on those sales when made; he, however, is to give us such time as we may demand of him, and help us in the proposition as we demand and deem is necessary from him. This contract is written in plural, but it is intended to cover any lands owned by Mr. Montgomery, the signer, or Montgomery & Hicks. The lands to be located are in Newton, Jasper, and Sabine counties, Texas, or across the river opposite those counties in Louisiana. This contract covers and includes only timbered lands that are sold to the Orange Lumber Company per their contract this day made with E. F. Montgomery and in bodies to other parties, and all sales of land under this agreement are to be contracted or sale agreed upon within six months from date hereof. This 25th day of Jan., 1907. Witness my hand, this ——— day of January, A. D. 1907. [Signed] E. F. Montgomery. Witness: N. E. Meador."

Appellant testified that in accepting this

assignment of 5 per cent. of the amount that might become due by the Orange Lumber Company under its contract with Montgomery he did not agree nor intend to cancel Montgomery's liability to pay him 5 per cent. commissions on the amount of the consideration for the sale to the lumber company, but he also testified: "It is a fact that I decided that I would rather look to the Orange Lumber Company than to Mr. Montgomery for the payment of my fee. They became my paymasters. I wanted to collect my money out of them. I took this contract for that purpose." He also testified that, under his oral contract with Montgomery, he was to perform no other service than to find a purchaser, and that there were no conditions or terms in said contract which he had not performed, and that he had never been called upon by Montgomery to do anything further in connection with the sale of said timber. The estimate as to the number of feet upon the various tracts of land mentioned in the contract before set out were made by the defendant Montgomery. Plaintiff has never been paid anything for procuring said contract. The Orange Lumber Company, though often requested by Montgomery to have the timber on said lands estimated and to comply with its contract, has failed and refused to do anything in the way of carrying out the terms of said contract, and has not taken or paid for any of said timber.

Under appropriate assignments of error, appellant assails the charge of the court instructing the jury to find a verdict for the defendant Montgomery on the ground that the evidence before set out would authorize a finding by the jury that appellant only undertook to find a purchaser for the 50,000,000 feet of timber offered for sale by Montgomery, and, having found a purchaser ready, able, and willing to buy upon the terms and for the price named by Montgomery and the latter having entered into a binding contract for the sale of the timber to said purchaser, appellant has earned and was entitled to recover his commissions, and this right to recover his commissions from Montgomery was not affected by appellant's subsequent agreement to accept his compensation out of the money to be paid by the purchaser.

The propositions advanced by appellant are absolutely sound, but they are not applicable to the case made by the evidence. According to appellant's testimony, Montgomery agreed to pay him a commission of 5 per cent. if he would find him a purchaser for 50,000,000 feet of pine timber situated as described in the contract at a price of \$2.50 per thousand feet. If under this agreement appellant had found a purchaser able, willing, and ready to buy said timber, and Montgomery had entered into a binding contract with such purchaser for the sale of the timber, appellant would be entitled to his commission. *Conkling v. Krakauer*, 70 Tex. 735,

11 S. W. 117; *Brackenridge v. Payne*, 91 Tex. 527, 44 S. W. 819, 43 L. R. A. 593. Or, if appellant had procured a binding contract for the purchase of any part of said timber and this contract was accepted by Montgomery, the latter would be liable for appellant's commissions of 5 per cent. of the purchase price of the timber so contracted to be sold, but in a suit for such commissions the burden would be upon appellant to show the amount and value of the timber so contracted to be sold.

It may be conceded that the contract between Montgomery and the Orange Lumber Company is not a mere option, and that the lumber company could not defeat its liability thereunder by refusing to have an estimate made of the amount of timber on the several tracts of land, or by making a fraudulent estimate, or making frivolous and unreasonable objections to Montgomery's title, still the contract was not an unconditional contract of purchase and sale of the 50,000,000 feet of timber claimed to be owned by Montgomery, and could only be held binding on the lumber company as to such portion of the timber as might be shown to be of the kind and be situated as required by the terms of the contract. Appellant's right of recovery against Montgomery is measured by Montgomery's right against the Orange Lumber Company under the contract of sale, and the extent to which this contract is enforceable is not shown by any evidence in this record. Upon the verbal contract between appellant and Montgomery, no warranty can be implied that the several tracts of land mentioned in the contract with the lumber company had thereon the number of feet of timber mentioned in said contract, nor that all of said timber was so situated as to make it practicable for the purchaser "to log it to reasonable advantage." The contract shows upon its face that the number of feet stated was a mere estimate, and was not binding upon the parties. If appellant had with his agreement with Montgomery procured an unconditional contract with the lumber company to take 50,000,000 feet of timber from Montgomery upon the terms and at the price named, he could have held Montgomery liable for his commissions on that amount because, when Montgomery authorized him to sell that much timber, there was an implied warranty that he owned that amount and appellant could have relied thereon. But the contract procured by appellant was not unconditional as to any specific amount of the timber. By its express terms the purchaser was not required "to accept and pay for any tract or tracts of land which may be so situated, surrounded or located as to make it impossible or impracticable to log same to reasonable advantage." Under this provision, it is clear that Montgomery could only compel the lumber company to accept

and pay for that portion of the timber which he could show was so situated that it would be practicable for the Orange Lumber Company to log it to reasonable advantage. This burden would be upon Montgomery in a suit by him against the purchaser to enforce performance of the contract, and a like burden was upon appellant in this case. No evidence was offered upon this issue, and there was nothing by which the jury could determine what portion, if any, of the timber the lumber company was required to take.

Appellant could only recover his commissions upon the value of the timber which the contract bound the lumber company to take, and, in the absence of evidence showing what this amount was, he was not entitled to recover anything, and the trial court properly so instructed the jury.

It follows that the judgment of the court below should be affirmed, and it is so ordered.

Affirmed.

SOUTHERN PACIFIC CO. et al. v. WEATHERFORD COTTON MILLS.

(Court of Civil Appeals of Texas. Jan. 21, 1911.)

1. CARRIERS (§ 180*)—INTERSTATE COMMERCE—LIMITATION OF LIABILITY.

Under Act Cong. June 29, 1906, c. 3591, § 7, 34 Stat. 595 (U. S. Comp. St. Supp. 1906, p. 1166), providing that common carriers shall be liable for any loss or injury by any connecting carrier, and that nothing shall exempt such carrier from such liability, a stipulation in a bill of lading for exemption of the carrier, or any connecting carrier, from liability for loss or damage to goods by fire is without effect, if the fire was due to the negligence of any carrier handling the goods.

[Ed. Note.—For other cases, see *Carriers*, Cent. Dig. §§ 815-828; Dec. Dig. § 180.*]

2. CARRIERS (§ 132*)—LOSS OR INJURY TO GOODS—PRESUMPTION.

Where goods are damaged by fire occurring upon premises in possession or under control of a carrier, the carrier is presumed to be negligent, and the burden is on it to rebut the presumption.

[Ed. Note.—For other cases, see *Carriers*, Cent. Dig. §§ 578-582; Dec. Dig. § 132.*]

3. CARRIERS (§ 132*)—LOSS OR DAMAGE TO GOODS—EVIDENCE.

In an action against a carrier for damage to goods by fire while in control of the carrier, evidence held insufficient to conclusively overcome the presumption of defendant's negligence.

[Ed. Note.—For other cases, see *Carriers*, Cent. Dig. §§ 578-582; Dec. Dig. § 132.*]

Appeal from District Court, Parker County; J. W. Patterson, Judge.

Action by the Weatherford Cotton Mills against the Southern Pacific Company and others. From a judgment for plaintiff, defendant company appeals. Affirmed.

H. C. Shropshire, for appellant. F. O. McKinsey, for appellee.

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

DUNKLIN, J. The Weatherford Cotton Mills recovered a judgment against the Southern Pacific Company and the Texas & Pacific Railway Company for damages to goods which plaintiff shipped from Weatherford, Tex., to Valetie in the state of New York, and the Texas & Pacific Company has appealed.

The goods were shipped on a through bill of lading issued by the appellant, the initial carrier, and the damage to the goods for which judgment was recovered was caused by a fire in the wharf under control of the Southern Pacific Company in the city of New York, where the goods had been unloaded from one of the boats of the last-named company and were there awaiting further transportation to the place of destination.

The bill of lading contained stipulations that the initial carrier should be exempt from liability for damages to the goods sustained on the line of any connecting carrier, and the further stipulation "that the Texas & Pacific Railway Company nor any connecting carrier handling this shipment shall be liable for damage or destruction of said property by fire. * * *"

The shipment being interstate, Act Cong. June 29, 1906, c. 3591, § 7, 34 Stat. 595, Fed. St. Ann. Supp. 1907, p. 180 (U. S. Comp. St. Supp. 1909, p. 1166), must control. That act provides: "That any common carrier, railroad, or transportation company receiving property for transportation from a point in one state to a point in another state shall issue a receipt or a bill of lading therefor and shall be liable to the lawful holder thereof for any loss, damage, or injury to such property caused by it or by any common carrier, railroad, or transportation company to which such property may be delivered or over whose line or lines such property may pass, and no contract, receipt, rule, or regulation shall exempt such common carrier, railroad, or transportation company from the liability hereby imposed: Provided, that nothing in this section shall deprive any holder of such receipt or bill of lading of any remedy or right of action which he has under existing law. That the common carrier, railroad or transportation company issuing such receipt or bill of lading shall be entitled to recover from the common carrier, railroad, or transportation company on whose line the loss, damage, or injury shall have been sustained the amount of such loss, damage, or injury as it may be required to pay to the owners of such property, as may be evidenced by any receipt, judgment, or transcript thereof."

Unquestionably the stipulation in the bill of lading for exemption from liability for loss or damage to the goods occasioned by fire is without effect, if the fire was due to the negligence of any carrier handling the goods. The employees of the Southern Pacific Company testified that the fire originated in

a tier of cotton upon the wharf, but that they were unable to discover its cause after diligent effort made to do so, and, as there was no evidence to show how it started, appellant insists that there was no proof of negligence on the part of the Southern Pacific Company as a basis for the judgment. The presumption of negligence arose from damage to the goods by fire occurring upon premises in the possession and under the control of the Southern Pacific Company, and the burden was upon the appellant to rebut this presumption by competent evidence. *Ryan v. Railway*, 65 Tex. 13, 57 Am. Rep. 589; *M., K. & T. Ry. v. China Mfg. Co.*, 79 Tex. 27, 14 S. W. 785; *T. & P. Ry. v. Richmond*, 94 Tex. 571, 63 S. W. 619.

There were watchmen employed upon the pier at the time of the fire, and, while the fire was first discovered by them, none of them were called to testify in the case. Nearly all the witnesses testifying concerning the fire were absent from the wharf at the time of its occurrence and gained their information from hearsay, and it was shown that the pier was used by no one except the Southern Pacific Company. Furthermore, while some of the witnesses testified that after the fire had burned for a short time the city authorities assumed control of all operations to extinguish it, and excluded every one else from the wharf; yet the jury would have been authorized to find that, by the exercise of ordinary care, the goods could have been removed before such action of the city authorities and after the fire started, more than 200 feet distant from the goods.

In view of the entire record, we are unable to say that the presumption of negligence on the part of the Southern Pacific Company was conclusively overcome by the evidence. This will require an affirmance of the judgment.

The foregoing conclusion renders it unnecessary to determine a further question which has occurred to us, namely, whether or not the act of Congress referred to should be construed as an enactment of the common-law rule of liability of common carriers, with restrictions against a limitation of that liability by contract, as was done by *Sayles' Ann. Civ. St.* 1897, arts. 319 and 320, in case of shipments wholly within this state, and further fixing the liability of the initial carrier for all damages for which any connecting carrier would be liable under the common-law rule. If that act should be so construed, then appellant would be liable for the damages to appellee's goods proven in this case, even though it had not been shown that the injury to the goods resulted from negligence on the part of the Southern Pacific Company; there being no evidence to show that the damage occurred through the act of God or through any other agency exempting the carrier from liability under the common law. For a discussion of the common-law rule of liability of common carriers,

see *G., C. & S. F. Ry. v. Levi*, 76 Tex. 340, 13 S. W. 191, 8 L. R. A. 323, 18 Am. St. Rep. 45; *T. & P. Ry. v. Richmond*, 94 Tex. 571, 63 S. W. 819; 4 Elliott on Railways, § 1454.

The judgment is affirmed.

CARIKER & WINTZ v. W. J. VAWTERS & SON.

(Court of Civil Appeals of Texas. Jan. 31, 1911. Rehearing Denied Feb. 23, 1911.)

1. NOVATION (§ 5*)—SUBSTITUTION OF NEW DEBTOR.

Where a third person, for a consideration moving to him, agreed with a creditor to assume the account of the debtor and to pay it, and the creditor discharged the debtor, the third person is responsible for the account.

[Ed. Note.—For other cases, see *Novation*, Cent. Dig. § 5; Dec. Dig. § 5.*]

2. NOVATION (§ 10*)—SUBSTITUTION OF NEW DEBTOR—OPERATION AND EFFECT.

Where a third person who had become responsible to a creditor for the account of a debtor sold goods to the creditor, the latter could apply the amount thereof as a credit on the account of the debtor, and was entitled to a judgment against the third person for any excess.

[Ed. Note.—For other cases, see *Novation*, Dec. Dig. § 10.*]

3. TRIAL (§ 203*)—ISSUES—INSTRUCTIONS.

Where the issues raised by the pleadings and evidence were not sufficiently submitted in the general charge, the refusal to give a special charge submitting the issues was erroneous.

[Ed. Note.—For other cases, see *Trial*, Cent. Dig. §§ 477-479; Dec. Dig. § 203.*]

Appeal from Nacogdoches County Court; F. P. Marshall, Judge.

Action by W. J. Vawters & Son against Cariker & Wintz and another. From a judgment for plaintiffs, defendants named appeal. Reversed and remanded.

King & King, for appellants. Blount & Strong, for appellees.

McMEANS, J. The statement of the case made by appellants in their brief is substantially correct, and is adopted. On January 12, 1910, appellee filed this suit in the county court of Nacogdoches county, alleging that in the month of December, 1908, the plaintiff sold to defendants, Cariker & Wintz, certain lumber, amounting to the sum of \$450.41. To the petition is attached a bill of particulars marked Exhibit A, and made a part thereof. It is charged in the petition that the lumber had never been paid for, and that the defendant Wintz had sold to the defendant Daniels, who had bound himself to pay one-half of the indebtedness of Cariker & Wintz, and he was made a party defendant to the suit. It is charged that the amount had never been paid, and judgment was asked against all of the defendants for the amount alleged to be due, with 6 per cent. interest from maturity of the various items of the account. On January 18, 1910, ap-

pellants answered by general demurrer and general denial, and specially answered that they never purchased the lumber mentioned in Exhibit A, and agreed to pay for the same in money; but replied that about the 1st day of October, 1908, one Geo. S. Huston was engaged in the operation of a sawmill near the town of Cushing, and was indebted to the defendants in the sum of \$531.42, for money and supplies furnished for the operation of the said mill, under a contract, by the terms of which appellants were to receive lumber from the mill in payment of their debt, and that said Huston was also indebted to appellee in the sum of \$400 upon an old account; that about the time mentioned said Huston became involved to the extent that he could not meet his immediate and pressing indebtedness, and had closed down the mill, having on hand at the time 350,000 feet of merchantable pine lumber of the reasonable market value of \$2,500, which appellants were buying, and were preparing to take over on the millyard in payment of their indebtedness and certain indebtedness due by said Huston to his mill hands, when appellee Vawters & Son agreed that if they would forbear from taking over the stock and release their right to purchase the same, under their agreement with Huston, and allow them to purchase the lumber in order to collect and protect their indebtedness against said Huston, that they would purchase the lumber, and would assume the indebtedness of Huston to appellants, and obligate themselves to take up and pay off their account, to which appellants agreed, and appellee purchased the lumber, and appellants discharged Huston from the account due by him to them, credited him upon their books with the assumption of the account by appellee, and charged the Huston account to appellee; that appellee took charge of the lumber, under the agreement, and began to dispose of the same, delivering to appellants the lumber mentioned in Exhibit A, which they, in obedience to the agreement made, applied as a credit upon the \$531.42 assumed by appellee.

Appellants pleaded in the alternative that, if it should be ascertained that they were without right to credit the Huston account, assumed by appellee, with the purchase price of the lumber, appellee had originally undertaken to pay the Huston account of \$531.42 to them, and that Huston had been discharged from further liability thereupon, because of which appellee was indebted to appellants in the sum of the Huston account, which they pleaded as an offset and counterclaim against the amount claimed to be due for the lumber, and prayed judgment that the same be set off against appellee's demand, and that they have judgment over against appellee for the excess of \$71.54.

By supplemental petition, appellee replied

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

by general and special exception and by general denial. They specially denied that they had undertaken to pay the Huston account due appellants, and that they took the lumber over from said Huston with the understanding that they would first pay themselves the amount Huston was due them, then the laborers, and the balance, if any, they prorate among the creditors of said Huston, including the account due by him to appellants, and that there was not sufficient lumber, when the same had been disposed of, to pay themselves and the laborers, and therefore they were due appellants nothing.

Upon this state of the pleadings, the case went to trial before a jury, and a verdict was rendered in favor of appellee for \$422.40, and in favor of the plaintiffs against the defendants on the plea in offset, and judgment rendered accordingly. From this judgment the defendants, after their motion for a new trial had been overruled, have appealed.

Appellants by their sixth assignment of error complain of the action of the court in refusing to give to the jury the following special charge requested by them: "You are instructed, in connection with the main charge of the court, and as a part of the law of this case, that the defendants in answer to plaintiffs' suit allege that the plaintiffs, for a valuable consideration moving to them, assumed and obligated themselves to become responsible for and to pay off the account due to defendants by Huston & Wallace, in the sum of \$531.42, and that Huston & Wallace were thereupon discharged from the payment of said account, and that the same was charged to, and became due to, them, by the plaintiffs W. J. Vawter & Son. Now, if you believe from a preponderance of the evidence that Huston & Wallace, about the time plaintiffs took over the lumber and logs from them, was indebted to the defendants in the sum of \$531.42, or in any sum less than said amount, and that plaintiffs, for a consideration then moving to them, agreed with the defendants to assume and pay off said account of Huston & Wallace, and by agreement obligated themselves to become responsible for and pay off said account, and that the defendants thereupon released and discharged said Huston & Wallace from further obligation to pay said account, then the plaintiffs would become responsible to the defendants for the account of Huston & Wallace, not exceeding the sum of \$531.42, and in such case the defendants had the right to apply the proceeds of the lumber received by them from plaintiffs as a credit upon said account of Huston & Wallace, and if you find the facts to be, you will return a verdict against the plaintiffs and in favor of the defendants, and if the account of Huston & Wallace due to the defendants, as assumed by the plaintiffs, if they did assume it, is in

excess of the proceeds derived from the sale of said lumber by plaintiffs to defendants, and if you find and believe, by a preponderance of the evidence, that said account was in excess of the proceeds of the sale of said lumber, then you will return a verdict in favor of the defendants against the plaintiffs for such excess, not exceeding the sum of \$71.54, this being the amount alleged in the answer of the defendant to be due them by the plaintiffs, and this notwithstanding you may find and believe that the plaintiffs thereafter returned a portion of the lumber so taken over by them from said Huston & Wallace to the said Huston & Wallace, or either of them."

The pleadings and evidence raised the issue submitted in the special charge, and those issues were not sufficiently submitted in the court's general charge. It follows that the special charge should have been given, and that the court erred in refusing to give it.

We have examined all the other assignments of error presented in appellants' brief and find no reversible errors in any of them.

For the errors indicated, the judgment of the court below is reversed, and the cause remanded.

Reversed and remanded.

PROSSER v. FIRST NAT. BANK OF DEL RIO.

(Court of Civil Appeals of Texas. Feb. 1, 1911.
Rehearing Denied March 1, 1911.)

1. APPEAL AND ERROR (§ 916*)—REVIEW—PRESUMPTIONS—QUESTIONS NOT RULED ON AT TRIAL.

Where exceptions to plaintiff's petitions were not presented to nor acted on by the trial court, it must be assumed on appeal that the petitions stated a cause of action.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3702; Dec. Dig. § 916.*]

2. BANKS AND BANKING (§ 153*)—SPECIAL DEPOSITS—CONVERSION BY BANK.

Plaintiff agreed to loan M. \$2,000 to pay the balance of the price of certain land, M. agreeing to deposit the amount in defendant bank as a special deposit, and to use the same only to pay for the land, and to give plaintiff a lien thereon as soon as the title was transferred. The money was deposited by M. in defendant bank to the credit of an account styled "Henry I. Moore, special," but the bank had no knowledge of the agreement between plaintiff and M., M. having overdrawn his general account, the amount of the special deposit, under agreement between M. and the bank, was transferred to his general account, and checked out, and not applied to the purchase price of the land. Held, that the style of the deposit was insufficient to put the bank on inquiry, and that its acts as to such deposit were not a conversion thereof as against plaintiff.

[Ed. Note.—For other cases, see Banks and Banking, Cent. Dig. §§ 483-501; Dec. Dig. § 153.*]

3. LIMITATION OF ACTIONS (§ 100*)—ACTIONS FOR RECOVERY OF SPECIAL DEPOSITS.

Where plaintiff could have ascertained an alleged conversion of a special deposit by the bank by reasonable diligence within six months after plaintiff had let the depositor have the money under a special agreement, but plaintiff took no steps to enforce any alleged rights as against the bank for more than two years after the conversion, if any occurred, his rights, if any, as against the bank, were barred by the two-year statute of limitations.

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. § 490; Dec. Dig. § 100.*]

4. LIMITATION OF ACTIONS (§ 100*)—SUSPENSION—FRAUD.

Neither fraud alone nor ignorance of its existence will suspend the running of limitations, but ignorance of the facts to effect such result must be attended with such concealment of the fraud as will prevent its discovery by reasonable diligence.

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. §§ 480, 481; Dec. Dig. § 100.*]

Appeal from District Court, Bexar County; J. L. Camp, Judge.

Action by R. W. Prosser against the First National Bank of Del Rio. Judgment for defendant, and plaintiff appeals. Affirmed.

C. C. Clamp and Seth S. Searcy, for appellant. Walter Gillis and Clark & Bliss, for appellee.

NEILL, J. This suit was brought by R. W. Prosser against Henry I. Moore and the First National Bank of Del Rio to recover the sum of \$2,000. After the defendants answered, the plaintiff on August 16, 1905, filed his first amended original petition, in which he alleged, substantially: That on August 16, 1905, Henry I. Moore contracted to purchase from one Ellis certain property situated in the city of Del Rio, agreeing to pay \$3,000 for the same. That Moore had paid his vendor \$500 of the purchase price, and would pay him further to the extent of a like amount, but needed \$2,000 more in order to obtain a clear title to the property. That on October 16, 1905, Moore, being desirous of liquidating said indebtedness of \$2,000, procured from the plaintiff such sum, which he advanced Moore for that purpose, with the understanding that Prosser was to be secured in its payment by a valid lien on the property until the money so advanced was repaid. That, Ellis being a resident of a different part of the state, it was understood between all the parties that the title papers, deeds, and all instruments in writing necessary to close said transaction between him and Moore should be delivered to and pass through the defendant bank, which was fully advised of the nature of the understanding between Prosser, Moore, and Ellis. That when plaintiff advanced said sum of money Moore represented to him that the title had not been cleared up on said property, but that on the return of the title papers to the bank he would take up and close said deal

in accordance with the understanding between the parties. That the money so advanced Moore by plaintiff was by means of two checks for \$1,000 each, which the former retained possession of for some time without cashing or depositing the same, awaiting the return to the bank of the deeds and title papers relating to the property. That the bank, knowing Moore held the checks, requested him to deposit them with it on special account for the purpose of discharging said indebtedness and closing the land transaction with Ellis. That Moore, then, at the instance and request of the bank, on November 1, 1905, indorsed both checks, and deposited them with said bank on special account, with the understanding that they were to be used by him and the bank in closing said land transaction. That Moore, who was a depositor and customer of the bank, distinctly stated to it at the time said deposit was made that it was on special account, telling its cashier, Rosenfield, as well as its assistant cashier, Wheeler, at the time that he did not wish said \$2,000 intermingled with his general current account. That for some reason unknown to plaintiff the land transaction between Moore and Ellis was delayed many months. That in December, 1905, prior to the time the land transaction should have been closed, said bank, without Moore's consent or knowledge of plaintiff, charged said special account of \$2,000 off the special account, and placed the same to the credit of Moore's general account, who at the time was indebted to said bank on his general current account. That Moore protested against said act of the bank at the time without avail. That Moore and the bank failed to inform plaintiff of said act, and he never learned of the unlawful appropriation by the bank of the \$2,000 until in March, 1908. That Moore during the years 1906 and 1907 at divers times during said years assured plaintiff that the land transaction between him and Ellis would be closed, and that the \$2,000 which had been advanced by him had been paid to Ellis, and that the deed to the property was being held by the defendant bank until such time as Moore would pay the remaining \$500, when it would be delivered to him and plaintiff get his lien as agreed. That about March 1, 1908, the plaintiff pressed Moore to close said transaction, whereupon Moore, for the first time, informed him that the \$2,000 so deposited had been used by the bank to balance Moore's general account and converted to its own use and benefit, and that he (Moore) was unable to obtain said sum of money from the bank, and had given Ellis notes for the unpaid purchase money on said land, and that suit had been filed against him by Ellis to foreclose the lien on said property. That plaintiff had no reason to suspect Moore until the discovery in such manner from him of the misap-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

plication of said sum of money, and that up to March, 1908, plaintiff labored under the belief that the facts represented to him by Moore were true. That Moore, so far as plaintiff's knowledge extended, stood well in the community in which he lived, had held various public offices of trust, and to all intents and purposes was thoroughly reliable and responsible.

The defendant Moore answered by a general denial. The other defendant pleaded a general denial and the two and four years statutes of limitation. The case was tried without a jury, and the court, upon hearing the evidence, rendered judgment in favor of plaintiff against the defendant Moore and against plaintiff in favor of defendant the First National Bank of Del Rio. From the judgment against him in favor of the bank, the plaintiff has appealed.

It may for reasons which naturally suggest themselves to the legal mind be doubted whether the appellant would be entitled to recover from the appellee had he proved all the allegations in his petition. But, as the latter's exceptions to the petitions were not presented to nor acted upon by the trial court, we will assume for the purpose of deciding the questions presented that the petition showed a good cause of action in favor of appellant against the appellee. There being nothing alleged that showed any contract or privity between the plaintiff and the bank, it must appear that the latter was guilty of some negligence, fraud, or deceit towards the former regarding the deposit of the \$2,000 made by Moore with the bank. This deposit was not, when made, the plaintiff's money, but was Moore's, loaned to him by the plaintiff for a specific purpose with the express understanding between them that it should be used by the borrower for that purpose. If in any case it can be held that a bank as a depository is charged with the duty to a third party of seeing that its depositors draw, use, and appropriate their money deposited with it for and to the purpose for which they acquired it, certainly such duty cannot be held to arise unless it be shown that the bank knew the facts in relation to the deposit which impose upon it such a duty. We do not mean to intimate that even in such a case any such duty devolves upon a bank, but simply put it as the most favorable position plaintiff can occupy in the case under consideration. The evidence in this case fails to show that the appellant or any of its officers knew anything, either when the money was deposited or when any of it was checked out by Moore or at the time it was placed to his general account, about the agreement or understanding between plaintiff and Moore in regard to the purpose and use for which the \$2,000 was loaned by the former to the latter. Nor do we think that the fact that the deposit by Moore was made on special account placed the bank upon inquiry as to what the special

account was, so as to charge it with notice of the agreement between plaintiff and Moore in regard to the purpose and use for which the money was intended by the parties. The deposit being made on an account styled "Henry I. Moore, Special," conferred no notice of the purpose and use to which the money was to be applied.

In a recent case, where money was deposited in a bank to the credit of "Ray Miller, Agent," the Supreme Court said: "It is beyond question that a bank receiving a deposit, made as this one was, became bound, and therefore entitled to treat the depositor as the owner of the fund, and to honor and pay his checks properly drawn, without concerning itself with any question as to the ultimate ownership or as to the application made or to be made of the money drawn out." *Silsbee State Bank v. French Market Grocery Co.* (Sup.) 132 S. W. 465. This, it seems to us, is in point, and decisive of the question under consideration; for if a deposit in a bank to "Ray Miller, Agent," bound and entitled the bank to treat the depositor as its owner, we can perceive no reason why a deposit to the credit of "Henry I. Moore, Special," should not be regarded in the same manner.

But, apart from the matter just considered, we think it sufficiently appears from the evidence that plaintiff's action, if any he had, is barred by the two-year statute of limitation. As before observed, this suit was filed August 4, 1908. The undisputed evidence shows that plaintiff delivered the two checks to Moore on October 16, 1905, one drawn in his favor on the Del Rio National Bank, the other in his favor on the Lockwood National Bank of San Antonio, each for \$1,000; that on November 1, 1905, Moore indorsed both and delivered them to the appellee, and he was given credit on appellee's books for the total amount in an account styled "Henry I. Moore, Special"; that Moore began checking against this special account immediately, and on December 28, 1905, had \$1,516.25 left to his credit on such account; that on this date such balance in Moore's favor was, with his consent, transferred to his general account; that at the time his general account with the bank was overdrawn to the amount of \$1,191.08; that after the transfer was made he continued to draw on his general account, and by January 5, 1906, had overdrawn to the extent of \$152.42, after having been credited on his general account with said sum of \$1,516.56 transferred from said special account; that plaintiff let Moore have the money for the purpose of paying it on the purchase price of a house and lot in Del Rio purchased by the latter from Ellis on Moore's promise that he would have the property conveyed to his wife, and that plaintiff should be secured by a first lien thereon; that Ellis conveyed the property to Moore, instead of to his wife, and that plaintiff knew, either at the time he advanc-

ed the money or shortly afterwards, that Moore had obtained possession of the property; that plaintiff knew the checks were cashed, one on November 1, 1905, and the other on the next day; that he knew that Moore had not conveyed the property to his wife, nor given him an express lien thereon to secure him in the payment of the money. This he must have known or was charged with knowledge of it, for he testified that he inquired of Moore frequently about the matter, and that Moore always put him off with some excuse. Yet there is no evidence tending to show that he ever took any steps to protect himself or that he ever inquired at appellee's bank, where Moore had told him the papers were, about the matter, though he frequently was in the city of Del Rio. If there were any proof tending to show a fraudulent conversion of the money by the bank, which there is not, plaintiff could have by the exercise of reasonable diligence ascertained the fact within six months after he let Moore have the money. The evidence in the record is insufficient to show any fraudulent concealment by the appellee as to what was done with the money. It is the law in this state that neither fraud alone nor ignorance of its existence will prevent the statute of limitation from running. The ignorance which effects such a result must be attended with such concealment of the fraud as will prevent its discovery by the exercise of reasonable diligence. *Calhoun v. Burton*, 64 Tex. 516; *Stanford v. Finks*, 45 Tex. Civ. App. 30, 99 S. W. 452; *Dunn v. Taylor*, 42 Tex. Civ. App. 241, 94 S. W. 348, and authorities cited.

There is no error in the judgment, and it is affirmed.

FERRELL v. CITY OF HASKELL.

(Court of Civil Appeals of Texas. Feb. 4, 1911.)

1. PLEADING (§ 433*)—SUFFICIENCY AFTER VERDICT—PRESUMPTIONS.

Where the petition was not demurred to, the court after verdict must indulge in its favor all reasonable intendment.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 1451-1477; Dec. Dig. § 433.*]

2. PLEADING (§ 237*)—AMENDMENTS—To CONFORM TO PROOF.

Where the petition, in an action for depreciation in the value of plaintiff's land by the use by a city of adjacent land for a dumping ground, alleged that the dumping ground adjoined plaintiff's land, used as a place of residence until on or about the — day of February, 1908, when he sold the land, that previously, on or about the — day of February, 1908, defendant acquired control of the adjacent land, and plaintiff, without objection, testified that he occupied the premises until March, 1909, when he sold the land, the refusal to allow an amendment of the petition, so as to state the correct date of the sale of the land, was erroneous, because the variance in the date

of the sale alleged and testified to was not misleading.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 603-619; Dec. Dig. § 237.*]

3. TRIAL (§ 169*)—MOTION FOR DIRECTED VERDICT—DEMURRER.

A motion after plaintiff's evidence for a directed verdict, in an action for depreciation in value of plaintiff's land by the use by a city of adjacent land for a dumping ground, on the ground that the petition alleged that no time intervened between the city's acquisition and use of the land and the sale by plaintiff of his land, was but a demurrer to the petition, so that, if it had been presented and ruled on at the proper time, plaintiff could have amended so as to show that he sold his land more than a year after the acquisition and use by the city of its land.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 381; Dec. Dig. § 169.*]

Appeal from District Court, Haskell County; C. C. Higgins, Judge.

Action by J. S. Ferrell against the City of Haskell. From a judgment for plaintiff, defendant appeals. Reversed and remanded.

Nelson & Pool and Helton & Murchison, for appellant. Clyde F. Elkins and H. G. McConnell, for appellee.

CONNER, C. J. This suit was instituted by appellant for the recovery of damages in depreciation in value of the plaintiff's land, and for discomfort to his family because of the purchase and use by the city of an adjacent tract as a dumping ground.

After the introduction of the plaintiff's testimony, the city attorney presented the following motion: "Now comes the defendant, the city of Haskell, and moves the court to direct a verdict in this case for defendant for the following reasons, to wit: First, the pleadings will not support a judgment for plaintiff in any sum, because it is therein alleged that the plaintiff sold his land on the — day of February, 1908, and it is also alleged that defendant acquired its land for a dumping ground on the same date, to wit, the — day of February, 1908, and therefore no damage could possibly have been caused to plaintiff, as alleged, between the time of the purchase of the city's dumping ground by defendant and the time when plaintiff sold his land; there being no time intervening."

At the time of the hearing of this motion, as shown by the bill of exceptions, appellant insisted that the allegation that he had sold his land "on the — day of February, 1908," was a clerical mistake; that the sale of his land occurred in fact in March, 1909, as he testified upon the trial, and he prayed leave of the court to so amend his pleading. This, however, was denied, the motion sustained, and the jury peremptorily instructed to return a verdict in the city's favor, which was done, and judgment entered accordingly.

Plaintiff, among other things, alleged that the tract of land described as the dumping

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

ground "adjoined the defendant's tract of land, hereinafter mentioned, plaintiff's said land being, at all times since he became the owner of the same, used and occupied by himself and family as a homestead and place of residence until on or about the — day of February, 1908, when plaintiff sold said land. That heretofore, to wit, on about the — day of February, 1908, defendant became the owner and acquired control of about 100 acres of land which, as aforesaid, adjoined the plaintiff's land," and upon which it was further alleged the acts complained of had been committed. There was no demurrer to the petition, and it is not questioned that it is otherwise fully sufficient to authorize a recovery in appellant's favor. The plaintiff upon the trial had been permitted to testify without objection fully to the material allegations of his petition, including the fact of the deposit by the city of large quantities of effete material, producing noxious odors and resulting in great discomfort and depreciation in the value of his land, stating that he had occupied the premises owned by him and described in the petition from the time of its purchase in the latter part of 1907 until in March, 1909, and we think the court was in error in the rulings made. It is true that Rev. St. 1895, art. 1188, among other things, provides that "all amendments to pleadings, pleas, and pleas of intervention must, when court is in session, be filed under leave of the court, upon such terms as the court may prescribe before the parties announce ready for trial, and not thereafter." The limitation, however, of the right of amendment thus indicated is very generally held by our courts to be directory. See *Fidelity Casualty Co. of N. Y. v. Carter*, 23 Tex. Civ. App. 359, 57 S. W. 315, and cases therein cited.

Treating the plaintiff's petition as a whole and indulging in its favor all reasonable inferences, as should be done, in the absence of demurrer and after verdict, it seems reasonably certain that the plaintiff, in addition to the allegations quoted, charged the commission of the acts complained of as having occurred during the time he owned and occupied the premises; and hence was in conflict with the construction appellee places upon the averment, that the plaintiff sold his land upon the same day that appellee purchased the dumping ground. We think, therefore, that the court should have adopted the construction most favorable to the pleader, or at least have permitted the amendment sought by appellant; the variance in the date of the sale as alleged and as testified to by appellant not being, as we think, calculated to mislead or surprise the defendant, as we are, perhaps, authorized to infer from the fact that no suggestion of that kind was made. Moreover, the motion in its substance amounted to no more than a de-

murrer to the petition which, had it been presented and ruled upon at the proper time, would have left appellant's right to amend quite clear.

It is ordered that, for the errors discussed, the judgment be reversed, and the cause remanded.

SUTER v. FT. WORTH & D. C. RY. CO.

(Court of Civil Appeals of Texas. Jan. 28, 1911.)

1. WATERS AND WATER COURSES (§ 179*)—CONSTRUCTION OF RAILROAD—OVERFLOW.

In an action against a railroad for injuries to plaintiff's land, caused by an overflow, plaintiff alleged the building of the road adjacent to plaintiff's land and its failure to provide sufficient culverts for the natural flow of water flowing across plaintiff's land, and that thereafter said defendant narrowed certain of the culverts in said roadbed and thereby obstructed the natural flow of water, so that such water as fell on and flowed across plaintiff's land was held thereon, so as to injure growing crops and permanently injure the land. Plaintiff amended his complaint and charged that Johnson grass was growing along defendant's right of way, and that, by reason of the wrongful acts charged in the original petition, the water was diverted from its natural flow, and thereby 100 acres of plaintiff's land was seeded with Johnson grass from defendant's right of way. Held that, under the allegations of the amended petition, plaintiff could recover for such damages only as were caused by reason of the fact that "such water as fell on and flowed across plaintiff's said land was held thereon."

[Ed. Note.—For other cases, see *Waters and Water Courses*, Cent. Dig. §§ 244-250; Dec. Dig. § 179.*]

2. WATERS AND WATER COURSES (§ 179*)—CONSTRUCTION OF RAILROAD—OVERFLOW—EVIDENCE.

In an action against a railroad company for damages to plaintiff's land, caused by the overflow of said land, resulting from the defective construction of defendant's road, the evidence held insufficient to warrant a verdict for plaintiff.

[Ed. Note.—For other cases, see *Waters and Water Courses*, Cent. Dig. §§ 244-250; Dec. Dig. § 179.*]

Error from District Court, Wichita County; A. H. Carrigan, Judge.

Action by R. H. Suter against the Ft. Worth & Denver City Railway Company. Judgment for defendant, and plaintiff brings error. Affirmed.

A. Hughes and Stephens & Miller, for plaintiff in error. L. H. Mathis, C. C. Huff, and Spooner, Thompson & Barwise, for defendant in error.

DUNKLIN, J. Plaintiff in error's farm is situated on the north side of defendant in error's railway. The railway crosses Plum creek just south of the farm and also at another point west of the farm. From the latter crossing Plum creek runs in a southeasterly direction south of the track, thence in a northeasterly direction to the east crossing, and thence across plaintiff in er-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

ror's land. Walker's creek flows into Plum creek south of the railway. The railway also crosses this creek west of the west crossing of Plum creek. Plaintiff in error instituted this suit to recover damages for loss of crops and injury to the land.

In his amended petition he alleged: "Heretofore, to wit, in the year 1885, the defendant, the Ft. Worth & Denver City Railway Company, built a line of railroad south of and adjacent to plaintiff's said land and failed to provide sufficient culverts in its roadbed to provide for the natural flow of water falling on and flowing across plaintiff's said land, and thereafter, in the year 1907, said defendant narrowed and closed certain of the culverts in said roadbed, and thereby obstructed the natural flow of water falling on and flowing across plaintiff's said land, so that such water as fell on and flowed across plaintiff's said land was held thereon in such a way and manner as to injure and destroy growing crops and to permanently injure the value of plaintiff's land, to the extent and in the way hereinafter more fully pleaded."

In his trial amendment he alleged: "At all of the times mentioned in plaintiff's said amended petition, Johnson grass was growing along the right of way of defendant company, and along the public road lying northwest, and by reason of the wrongful acts in plaintiff's petition charged, the water was diverted from its natural flow along said right of way and public road, and thereby 100 acres of plaintiff's said land was seeded with Johnson grass and injured and damaged as pleaded in plaintiff's said amended petition, and said seed came from defendant's said right of way and adjacent thereto, which the defendant well knew."

Under the allegations quoted from the amended petition, plaintiff in error could recover for such damages only as were caused by reason of the fact that "such water as fell on and flowed across plaintiff's said land was held thereon." Of course, nothing but an overflow of Plum creek as it crossed plaintiff in error's farm would result in causing the water to stand upon the land. Whether all the water in this creek at the place it crossed the farm had followed the channel south of the track, and thence under the railway again at the east crossing, or some of it had been obstructed at the west crossings and, after running along the public road on the north of the railway, again entered the channel of Plum creek, would make no difference in the volume of water in the creek, where it crossed the farm.

It was further proven beyond controversy that, during some of the overflows complained of, Plum creek overflowed south of the track to such an extent as to cause water to overflow the track, and thence to spread over the farm not only in the channel of the creek

at the east crossing, but at other places as well. Clearly this shows that the farm would have been overflowed and Johnson grass seed washed thereon, in the absence of the railway track.

Under the pleadings and the evidence, there was no reasonable basis for a verdict in plaintiff's favor, and accordingly the judgment is affirmed, without discussing the assignments of error presented in plaintiff in error's brief.

WARD v. BOYDSTON.

(Court of Civil Appeals of Texas. Jan. 21, 1911.)

1. BILLS AND NOTES (§ 471*)—ACTIONS—ATTORNEYS' FEES—PETITION.

Where certain notes sued on stipulated for 10 per cent. on the amount due as attorneys' fees if suit was brought thereon, or if placed in the hands of an attorney for collection, plaintiff was not entitled to recover attorneys' fees on a petition merely alleging that plaintiff elected after October 31, 1907, to declare both notes due and placed them in the hands of certain attorneys for collection and suit thereon, but failing to allege the date when the notes were placed in the hands of the attorneys.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. §§ 1467-1470; Dec. Dig. § 471.*]

2. BILLS AND NOTES (§ 534*)—SET-OFF—ATTORNEYS' FEES.

Defendant executed two vendor's lien notes for the price of certain real estate stipulating for 10 per cent. attorneys' fees in case suit was brought thereon, and on suit being brought alleged that at the time of the purchase plaintiff represented that certain improvements which were of the value of \$2,500 were located on the land, which was not the fact, and prayed an offset to that amount on the notes. The jury returned a verdict finding that improvements of the value of \$1,500 had been included in the sale which in fact were not on the land. Held, that plaintiff was not entitled to recover attorneys' fees on the amount of such offset.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. §§ 1948, 1947; Dec. Dig. § 534.*]

Appeal from District Court, Randall County; J. N. Browning, Judge.

Action by J. M. Boydston against G. R. Ward. Judgment for plaintiff, and defendant appeals. Reversed and remanded unless a remittitur is filed.

Carl Gilliland, for appellant. Brooks & Brooks and B. Frank Bule, for appellee.

CONNER, C. J. Appellee instituted this suit against the appellant upon two promissory vendor's lien notes each for the sum of \$2,736, dated October 15, 1906, due October 15, 1907, and October 15, 1908, respectively, bearing interest at the rate of 8 per cent. per annum from date until paid, and each stipulating for 10 per cent. interest on the amount of principal and interest then due as attorney's fees in case suit was brought on same or if placed in the hands of an attor-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

ney for collection. It was alleged that the notes had been given as part of the purchase money for certain sections of land described in the petition, and there was a prayer for judgment for the principal, interest and attorney's fees with foreclosure of the vendor's lien.

The appellant answered and admitted the plaintiff's cause of action as stated in his petition, but pleaded in offset that at the time of the purchase of the land certain improvements specified in the answer were represented by plaintiff to be upon the land which in fact were not so located; that these improvements were of the value of \$2,500, to the extent of which he prayed that plaintiff's notes be canceled. The court instructed the jury that it would be their duty to find for the plaintiff in the sum of \$7,544.50, and to find the lien sought to be foreclosed unless they should find for defendant upon his cross-plea, which was submitted in terms not complained of upon the trial, in which event they would deduct from the amount due the plaintiff as stated in the charge, the value as found by the jury of the improvements specified in defendant's plea. The trial as appears from the judgment was had upon the 18th day of November, 1909, and resulted in a verdict and judgment in the plaintiff's favor for the sum of \$6,044.50 with a foreclosure of the vendor's lien upon the land described in the plaintiff's petition.

Among other things it is insisted by appellant that the court erred in overruling a special exception to that part of plaintiff's petition which relates to the attorney's fees embraced in the plaintiff's suit. After alleging the execution of the notes and that each stipulated "for 10 per cent. on the amount of principal and interest then due as attorney's fees in case suit is brought on same or if placed in the hands of an attorney for collection," and after alleging a provision in the notes that upon a failure to pay either note or any installment of interest the holder at his election might declare both notes due, the petition further specially charged that plaintiff "did after October 21, 1907, declare said second note due, and did thereafter place the said notes in the hands of Brooks & Brooks, and Frank Bule, attorneys, for collection and suit thereon," etc., the date of such deposit with the attorneys for collection not being otherwise shown. To this failure the special exception was directed and we think it should have been sustained. By the terms of the notes as alleged the plaintiff was entitled to recover 10 per cent. of the amount of principal and interest due at the date upon which he should place the notes in the hands of an attorney for collection and this date not having been alleged, the basis of the calculation is uncertain. The interest upon the notes was payable annually, but it is not averred that upon a de-

fault in interest payment that such matured interest should bear interest at the rate specified in the notes, and if we should compute all interest due upon the notes up to October 31, 1907, the most favorable date for appellee that we could in any event adopt, and interest at the rate of 6 per cent. per annum upon the matured interest and to the principal and interest as thus computed add 10 per cent. thereof as attorney's fees, there would not be due appellee the amount specified in the court's charge. Moreover, it is evident from the verdict of the jury that they found in appellant's favor that improvements of the value of \$1,500 had been included in the original sale which in fact were not part of the land purchased by appellant. If so, the value of the improvements so purchased and not received should have been deducted from the face of the notes as otherwise appellee would be accorded a privilege to which he was not entitled, viz., the right of recovering interest and attorney's fees upon \$1,500 worth of property that he did not own at the time of the original sale. Deducting, as we think should be done, the \$1,500 offset established by the verdict of the jury from the principal of the two notes sued upon, and computing the interest on this balance at the rate of 8 per cent. per annum from the date of the notes to the date of the judgment, and interest upon the matured interest sums at the rate of 6 per cent. from the date of maturity to the date of the judgment and the 10 per cent. due as attorney's fees, as we have indicated, with 6 per cent. thereon to the date of the judgment, and adding all of these sums together we find the total amount due the appellee at the date of his judgment \$5,518.29, less by \$526.21 than the amount found by the verdict and judgment below.

It is accordingly ordered that appellant's first assignment be sustained and the judgment reversed and the cause remanded unless within 20 days appellee shall file a remittitur for \$526.21, in which event the judgment will be affirmed for the remainder.

STATE v. DOWNMAN.*

(Court of Civil Appeals of Texas. Jan. 18, 1911. Rehearing Denied Feb. 22, 1911.)

1. APPEAL AND ERROR (§ 1122*)—FINDINGS OF FACT—ADDITIONAL FINDINGS ON APPEAL.

Where there is no conflict in the evidence, it is proper for the appellate court to supplement the findings of fact as made by the trial court by the addition of facts appearing in the record.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4420; Dec. Dig. § 1122.*]

2. TAXATION (§ 63*)—SUBJECTS OF TAXATION—MINERALS IN PLACE—SEVERANCE—"PROPERTY."

Ores and minerals in place are property, which by a proper conveyance may be severed from the land by the owner thereof, and when

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

† Application for writ of error denied by Supreme Court.

so severed they become subject to taxation separate and apart from the land itself.

[Ed. Note.—For other cases, see *Taxation*, Cent. Dig. § 147; Dec. Dig. § 63.*]

3. TAXATION (§ 63*)—MINERALS—SEPARATION FROM LAND—CONVEYANCE—CONSTRUCTION.

Const. art. 14, § 7, provides that the state releases to the owners of the soil all mines or minerals, subject to taxation as other property. Article 8, § 1, makes all property not owned by a municipality taxable in proportion to its value, and Sayles' Ann. Civ. St. 1897, art. 5062, declares that real property for the purposes of taxation shall include lands and all rights and privileges belonging, or in any wise appertaining thereto, and all mines and minerals, in and under the same. The owners of land supposed to contain minerals, conveyed to defendant all metals, ores, granites, rocks, stones, and other minerals, metallic and nonmetallic, organic and inorganic, in place, or severed from the earth, which might be worked for profit by underground excavations or open workings, or both, and the by-products thereof, and all such ores and substances known to be or thereafter found to be in or upon the land described, together with the right to enter and search, dig and explore for such things and substances, with the right to appropriate so much of the surface of the land as might be required. *Held*, that such conveyances did not create a mere privilege or incorporeal right, but constituted a severance of the minerals and mineral substances contained in the land as between the landowner and the grantee, investing the latter with an interest in the land, which was subject to taxation apart from the land itself.

[Ed. Note.—For other cases, see *Taxation*, Cent. Dig. § 147; Dec. Dig. § 63.*]

4. TAXATION (§ 593*)—MINERAL RIGHTS—BURDEN OF PROOF.

Where a deed conveyed to the grantees a right to explore and take minerals from the land, and constituted a severance of the minerals from the ownership of the surface, it was not necessary for the state, in order to sustain a tax on the grantee's mineral interest, to show that the land described contained mineral ores or other valuable substances, but the burden was on the grantee resisting a tax so imposed to show that the land did not contain such minerals.

[Ed. Note.—For other cases, see *Taxation*, Cent. Dig. § 1215; Dec. Dig. § 593.*]

5. TAXATION (§ 446*)—PRIMA FACIE CASE—INTRODUCTION OF TAX ROLL.

In an action by the state to recover taxes assessed on a mineral interest severed from the ownership of the surface, the introduction of the tax roll showing the assessment of the taxes established a prima facie case.

[Ed. Note.—For other cases, see *Taxation*, Cent. Dig. §§ 784-786; Dec. Dig. § 446.*]

6. TAXATION (§ 593*)—ASSESSMENT—MINERAL INTEREST.

In an action to recover taxes assessed on the mineral interests in land severed from the ownership of the surface, evidence *held* insufficient to show that an assessment against the owners of the surface covered or was intended to include the value of the mineral interests.

[Ed. Note.—For other cases, see *Taxation*, Cent. Dig. § 1216; Dec. Dig. § 593.*]

7. TAXATION (§ 40*)—ASSESSMENT—EQUALITY.

That a tax assessor was directed to assess for taxes all mineral rights, by whomsoever held, within the county which had been severed by conveyance from the surface estate, did not direct the assessor to disregard in his assessment those holding lands in which mineral rights existed which had not been severed by conveyance to others, and hence did not render the assessment made on the severed mineral

rights invalid because of nonuniformity and inequality, in that mineral rights nonsevered were not taxed.

[Ed. Note.—For other cases, see *Taxation*, Cent. Dig. §§ 68-89; Dec. Dig. § 40.*]

8. TAXATION (§ 40*)—MINERAL RIGHTS—INEQUALITY.

An assessment of mineral rights, severed from the ownership of the surface by conveyance, was not rendered invalid for inequality because the assessor did not reduce the assessment of the land, as levied against the surface owners, thereby requiring the surface owners to pay the same amount of taxes on their land as other owners who had not conveyed the mineral rights in their respective tracts.

[Ed. Note.—For other cases, see *Taxation*, Dec. Dig. § 40.*]

Appeal from District Court, Llano County; Clarence Martin, Judge.

Action by the State against R. H. Downman to recover taxes. Judgment for defendant, and the State appeals. Reversed and rendered.

Knight Stith, Slator & Oatman, Jewell P. Lightfoot, Atty. Gen., and R. E. Crawford, Asst. Atty. Gen., for the State. Gregory, Batts & Brooks, for appellee.

RICE, J. Prior to the 1st day of January, 1907, appellee Downman had purchased from various persons, as shown by their deeds in evidence, certain interests in and to the minerals, ores, rocks, etc., contained in the lands therein described, and popularly known as "mineral rights." The language employed in the habendum clauses of all said conveyances, except 6, was as follows: "Have granted, sold and conveyed, and by these presents do grant, sell and convey, unto the said R. H. Downman all metals, ores, granites, rocks, stones and other minerals, metallic and non-metallic, organic and inorganic, in place or severed from the earth, which might or could be worked for profit by underground excavations or open workings, or both, and the by-products of and all such ores and substances, now known to be or hereafter found to be in or upon the hereinafter described lands, together with the right to enter upon the same and search, dig and explore for such things and substances; and the right to use and appropriate so much of the surface of said lands, as may be required," etc. And the other six conveyances conveyed, without any restriction, the mineral rights in the lands therein described. Appellee did not render for taxation for said year any interest whatever in said several tracts of land, and the taxes due thereon for said year became delinquent.

On the 12th of June next thereafter, the commissioners' court of Llano county passed and entered upon its minutes the following order, viz.: "In accordance with the advice and instructions of the Comptroller of the State of Texas, it is considered and ordered by the court that the assessor of taxes of Llano

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

county be and is hereby directed to assess for taxes all minerals and mineral rights in and upon and attaching to any and all land in Llano county, where it is found that said minerals and mineral rights are owned by a different person from the owner or owners of the surface estate in and to all such lands, and that said minerals and mineral rights so held and owned be assessed for taxes independent of the surface estate." By virtue of said order the assessor of taxes for said county assessed and listed for taxes against appellee the mineral rights so conveyed to him, as set forth in said conveyances; and thereafter presented said respective assessments to the commissioners' court for their approval, which were accordingly accepted and approved by said court; and the assessor was by them directed to place said assessments upon the delinquent tax roll, which was accordingly done by him. Thereafter, the collector of taxes for said county, in accordance with the provisions of the act of the Twenty-Fifth Legislature, passed at the regular session thereof (chapter 103, p. 132 et seq.), made on the 31st day of March, 1906, a triplicate list of said lands upon which the state and county taxes for the preceding year remained unpaid, charging against the same all taxes and penalties assessed against the owner thereof, and presented the same to the commissioners' court of said county for examination and correction; and said court, upon examination, approved the same, and the collector, in accordance with said act, filed one copy with the county clerk of said county, retained one copy thereof, and forwarded the other to the Comptroller with his annual settlement report, which said corrected list was advertised and published, as required by law, and this suit was thereafter, on the 6th day of March, 1906, duly filed in the district court of Llano county in the name of the state by the county attorney against appellee, to enforce the collection of said taxes, interest, penalty, and costs, as well as for foreclosure of plaintiff's lien on said minerals and mineral rights of appellee in and to each tract described in its petition.

After a general demurrer and general denial, appellee, as shown by appellant's brief, specially answered, denying that he had any interest in certain of the lands described in plaintiff's petition; admitting, however, as to certain others, that he held an undivided interest, and asserting that as to all the others he had only purchased the right, privilege, or license to enter thereon and to prospect for and develop, mine and sell as his own, such minerals and mineral substances as he might discover therein by prospecting, and which could be worked for profit by underground excavations or open workings or both. He likewise denied that there were any developed mines existing upon any of said tracts of land, either now or at the time of the execution of said conveyances; and

also denied that there were any minerals thereon capable of being developed or sold for a profit, and alleged that his purpose and intention in acquiring said license or privilege was merely to secure the right to prospect said land for such mineral substances as might be mined and sold for a profit; that he had not as yet prospected any of said lands, and had never examined many of said tracts; that the same were not different in character from the average lands of Llano county; that the lands in Llano and adjoining counties are supposed to contain valuable minerals, but no discoveries have as yet been made of mines or deposits capable of being worked at a profit. Defendant further alleged that prior to the tax assessment made against his interest in said lands, if any, that the respective owners in fee of each of said tracts of land mentioned in plaintiff's petition, had rendered them for all purposes of state, county, and district taxes, which renditions had been accepted by the proper tax officers, and that all taxes due thereon had been charged on the tax rolls against said lands to the persons who so rendered them for taxation, and all taxes due thereon were subsequently paid by the owners; that after said lands had been rendered by their respective owners for the year 1907, and said renditions had been accepted and entered of record, and after said assessments had been reported by the assessor to the commissioners' court to be equalized, said court did, by order of July 12, 1907, as hereinbefore set out, direct the assessor to assess for taxes all minerals and mineral rights in and upon or attached to any and all lands of Llano county, where said minerals or mineral rights were owned by persons different from the owner of the surface estate; and that said minerals and mineral rights should be assessed for taxes independent of the surface estate; that the tax assessor, in pursuance of said order and upon no other authority, thereupon entered and made the tax assessments upon which plaintiff's suit was predicated; that in making said entries he wrote upon the assessment records nothing to indicate that taxes were intended to be thereby assessed against any other or different interest in said land for the year 1907 than the entire fee simple and absolute title in same; that having entered said rendition, the tax assessor thereupon reported the same to the commissioners' court; that said court, without hearing any evidence to show that said lands contained any minerals, or that the values were in any respect enhanced by the presence of minerals, and without any such evidence having been heard by the assessor, approved said assessments, and ordered same to be entered on the tax rolls. That in pursuance of said order, said assessments were entered upon the unrendered rolls of said county; that at the head of said assessments were written the words "mineral rights only," and that the roll made up in

the manner alleged constituted the sole basis for the claims against defendant in the plaintiff's petition; that in assessing said minerals and mineral rights in the lands mentioned in plaintiff's petition, no reduction in the valuation at which said lands had been assessed against the holders or owners of the fee-simple title was made; that in assessing all other lands of the county for said year, in respect to which no mineral rights had been granted by the owners of the fee-simple title, the officers valued the same at the same figures as the lands mentioned in the plaintiff's petition; that said other lands are of the same character as those mentioned in said petition; that the same reasons exist for supposing that said other lands contained minerals as existed for supposing that the lands mentioned in plaintiff's petition contained minerals, and that by reason of such system of valuation the lands on which mineral privileges are retained by the owners of the fee were valued at a different and lower rate, for the purposes of taxation, than the other and similar lands in which the mineral privileges had been conveyed to others other than the owners of the fee; that for said reasons said tax assessments of said county for said year are unequal, not uniform, arbitrarily and systematically discriminatory against the defendant, and all other persons who have mineral privileges in lands of others in said county. The case was tried by the court without a jury, and judgment rendered in behalf of the defendant, from which this appeal is taken.

It was submitted to the court upon an agreed statement. There is also in the record a statement of facts, and, at the instance of appellant, the court filed its findings of fact and conclusions of law, wherein, after finding that defendant owned no interest whatever in certain of said tracts on January 1, 1907, by reason of previous sales, and for other reasons, and as to certain other tracts he had paid the taxes assessed against them, found that, with the above exceptions said Downman was on January 1, 1907, the owner of such interest, if any, in or with respect to each of the tracts of land described in plaintiff's petition as were conveyed to him by the instruments hereinbefore mentioned, and was not the owner of any other interest in or with respect to said lands or any part or parts thereof; that all of said conveyances were exactly similar in form and legal effect, only differing as to the names of the respective grantors, the consideration and the description of the lands conveyed; that each of the grantors in all of said instruments voluntarily rendered each of the tracts of land mentioned in plaintiff's petition for state and county taxes for the year 1907, in the manner hereinafter specified. All of said renditions were made by said grantors prior to the making of any of the tax assessments against the defendant on which the taxes

claimed in this suit are predicated. Said renditions by said grantors were accepted by the tax assessor in the form and manner that they were made, they were carried forward into the tax rolls as made, and all taxes predicated thereon have been paid. All said renditions made by said grantors, and the tax assessments in pursuance thereof are in similar form, and are similar in all respects to the rendition and assessment of the lands of A. J. Bauman, one of said grantors, which rendition and assessments are as follows:

"Inventory of property owned by A. J. Bauman and rendered for assessment of taxes for the year 1907 by owner to J. A. Cone, assessor of Llano county, state taxes. Assessment of 'timber only' must be placed on separate sheet. Chapter 52, Acts of Twenty-Ninth Legislature. Real estate.

Abstract No.	Cert. or Scrip No.	Survey No.	Original Grantee.	Acres Rendered.	Value.
249	187	184	Fisher & Miller	283	1650
250	187	122	Fisher & Miller	306	1080
815	296	92	A. Vogt	330	960
1123		24	R. Bauman, R. M.	160	320
1487		888	M. L. Bauman, on mountain	94%	200
1424		17	M. L. Bauman	160	320
1422		16	H. C. Bauman, Taylor Holler	160	320
854	507	51	F. W. Wrede	100	320
200	399	98	L. Ethrop	320	960
199	899	97	L. Ethrop	320	960
1026	1323	3	E. & L. R. R. Co.,	640	1920
1460			W. D. Wright	35	105
260	502	85	C. Fix	129	355
261	502	86	C. Fix	129	355
769	64	1	S. F. I. W. Co.	160	490
578		16	D. F. Owens,	160	320
693	297	93	A. Strauss	320	960
727	993	53	F. Shenk	79%	240
300	4	121	Gerring Co.	85	240"

And each of said grantors in rendering said lands for taxation listed same as "real estate" and did not employ any language indicating an intention to exclude or except from their rendition as made any mineral rights or other interest whatever in said lands. They each in making renditions wrote therein the name of the owner of the land, the abstract number, the number of the survey, the name of the original grantee, the number of the certificate, the number of acres and the value of the land, in the manner and form prescribed by statute for the rendition of real estate. Said renditions as made were accepted by the tax assessor, and were approved by the Board of Equalization. The tax rolls, as made up and predicated upon said renditions and assessments are in the form prescribed by the statute for making up such rolls, showing taxes due on real estate, where the same has been rendered for taxation by the owners, and do not in any way or by any language indicate an intention to exclude from the taxes shown to be due any interest in the lands

listed thereon. At the same time of approval of renditions of the grantors of R. H. Downman there were submitted to the commissioners' court approving the same the tax assessments made as hereinafter stated by the tax assessor of Llano county against R. H. Downman contained in the list hereinafter referred to and on which this suit for taxes is predicated, which said tax assessments against said R. H. Downman were at the same time and contemporaneously with the assessments against said grantors approved by said commissioners' court.

On July 12, 1907 (after the tax renditions by said grantors had been made and accepted by the tax assessor, as above stated), the commissioners' court of Llano county passed and had entered on its minutes an order, in the following terms. (Here follows the same order of the commissioners' court as above set out.) The tax assessor of Llano county made the tax assessments on which this suit is predicated in pursuance of said order of the commissioners' court. In making said assessments the tax assessor heard no evidence and examined no lands to ascertain whether they in fact contained minerals or not, but merely examined the deed records of the county, and made therefrom a list of all lands in the county in which the owners had executed and recorded instruments purporting to grant to others mineral rights or the right to search for minerals in their lands. The list so made contained no mention of any tracts of land in which the entire fee-simple titles were held by the same person or persons or in which mineral rights had not been conveyed by the owners of the fee to third persons. At the head of the list so made the tax assessor wrote the words "mineral rights only." Opposite each tract of land shown on the list he wrote the assessed value of 50 cents per acre, the name of the owner of the mineral rights, and the description of the land by abstract number, survey number, original grantee, and so on, as shown by the statement of facts. The list so made was submitted to the board of equalization as a roll of unrendered property, was by the board approved as made, without any evidence having been heard, and now forms the basis of the claim against the defendant for taxes. *Said list was approved by the board contemporaneously with its approval of the rolls showing the assessment made against the grantors of defendant, as hereinbefore specified.* In assessing the lands mentioned in plaintiff's petition for taxation against the grantors hereinabove mentioned for the year 1907, and in assessing for taxation against the owners of the fee-simple titles the other lands in the county in which mineral rights had been conveyed to third persons, neither the tax assessor nor the board of equalization made any reduction in the valuation of same on account of the fact that mineral rights

therein had been conveyed to third persons; but said lands were, in assessing the taxes of the owners of the fee-simple titles, valued exactly as other lands in the county of similar quality were valued in assessing taxes against those landowners who had not conveyed to third persons any mineral or other rights in their lands. In other words, all lands in the county in which the ownership of the entire fee-simple title had not been divided by conveyance of mineral rights to third persons were assessed for taxation at values corresponding exactly to the value placed on the lands mentioned in plaintiff's petition in assessing same for taxation against the grantors of defendant. No developed mines exist or existed on January 1, 1907, on any of the lands mentioned in plaintiff's petition, and no minerals of any character capable of being worked for profit, or having a value, are shown to have ever existed on any of said lands. Said lands do not differ, so far as mineral indications are concerned, from the lands of the county in general in which mineral rights have been conveyed to third persons by the owners of the fee-simple title. Defendant is and was on January 1, 1907, a resident and citizen of the parish of Orleans, state of Louisiana.

The commissioners' court of Llano county at its regular term in February, 1907, by an order of said court made and entered in the minutes of said court, levied a county general and special tax on all property in the county subject to taxation for said year, and said order was made and entered in the manner and form prescribed by statute. The rates of taxation so levied, and the various purposes for which they were levied will be found in the statement of facts, and as there contained are hereby made a part of these findings. The taxes here sued for were assessed in the manner shown by the inventory assessment sheet or list which is copied in the statement of facts, were thereafter carried to and placed upon the tax rolls for the year 1907 of said county, and said tax rolls for said year were made up and certified to by the proper officer; all of said proceedings having been done in the form and manner prescribed by statute. The delinquent list for said county for taxes unpaid are delinquent on March 31, 1908, for the year 1907, in which appear the taxes sued for herein, were prepared in triplicate, showing the penalties assessed against same, including penalties sued for herein, by the tax collector of Llano county, and presented by him to the commissioners' court of said county for examination and correction of errors that may appear therein; said delinquent tax list showing the taxes and penalties sued for herein, was thereafter examined and approved by the aforesaid commissioners' court and the three copies thereof disposed of as the law directs, and said delinquent tax list was thereafter duly pub-

lished for the time required by law in the Llano News, a newspaper published in Llano county, Tex., all of said proceedings having been done and performed in the manner and form prescribed by statute.

Conclusions of Law.

1. The written instruments of the stereotyped form above mentioned conveyed to the defendant only such of the minerals and mineral substances located on the lands mentioned in plaintiff's petition as might be ascertained to exist and to be capable of being worked for profit by underground excavations or open workings, or both. There is no evidence that there exists on the lands any physical property to which title has vested in defendant by virtue of the grant contained in the instrument, and as it is agreed that the defendant has no interest in the lands, except such interest (if any) as vested in him by virtue of said instruments, I conclude that he did not own on January 1, 1907, any interest in said lands, except the incorporeal license or privilege to prospect and develop said lands, and to thereby acquire title to such (if any) of the minerals or mineral substances as might be discovered thereon or therein of the character, quality, and quantity specified in the instruments. I further conclude that the tax assessments on which the suit is predicated do not purport to assess for taxation the incorporeal licenses or privileges above mentioned, and that same could not lawfully be assessed against him in Llano county.

2. As an additional reason why the plaintiff should not recover the taxes claimed under said stereotyped conveyances I conclude that under the Constitution and laws of this state, before defendant could be compelled to pay taxes in Llano county on account of any interest, right, or privilege vested in him by the terms of these deeds, it would devolve upon the plaintiff to establish by evidence that there was mineral or mineral substances on the lands embraced in these deeds that could be worked at a profit by underground excavations or open workings or both, and that said facts are not established by the evidence.

3. I conclude that the burden of proof was upon the plaintiff to show by a preponderance of the evidence that there existed on January 1, 1907, some mineral or mineral substances upon those lands mentioned in the plaintiff's petition in which the defendant owns unqualified mineral rights by virtue of the six nonstereotyped instruments above mentioned, and that plaintiff is not entitled to recover of defendant the taxes claimed against those lands, because the preponderance of the evidence does not show that any minerals or mineral substances were located on or contained in said lands, or that said instruments vested in defendant the title to any physical property.

4. I conclude that the tax renditions for 1907 made by the grantors of the defendant, as above stated, and the tax assessments predicated thereon, embraced all interest in the lands mentioned in plaintiff's petition, including *"all mines, minerals, quarries, and fossils in or under same"*; and that all taxes due the state and county on said lands for the year 1907 have been paid, including all taxes due on the minerals in or on said lands. I further conclude that when the state and county once assesses the entire interest in property for a given year and collects the taxes thereon, they cannot thereafter reassess the same property or reassess any interest therein for the same year, in the name of another, and cannot collect taxes thereon for said year, even though the second assessment be against the real owner of the interest assessed.

The above conclusions make it necessary to render a judgment for the defendant, and I therefore find it unnecessary to reach any conclusion on the question of whether or not the facts disclosed by the record and above stated in my findings of fact, render the tax assessments against the defendant void because of inequality and systematic discrimination in the plan by which they were made. To which conclusions of fact and law as announced by the court in rendering the judgment in this cause, the plaintiff then and there in open court excepted, and now assigns error as set forth by the first and second assignments.

By the first assignment it is urged that the court erred in its first conclusion of law in holding that the stereotyped deeds introduced in evidence by the plaintiff did not convey to the defendant R. H. Downman any interest or right in land taxable under the Constitution and laws of the state of Texas; and by its second it is urged that the court erred in its second conclusion of law, in holding that said stereotyped deeds did not convey any interest to said R. H. Downman taxable under the Constitution and laws of the state of Texas until the plaintiff had established by evidence that there were minerals or mineral substances on the lands embraced in said deeds that could be worked at a profit by underground excavations or open workings, or both, in that the grantors of said defendant Downman had, for a valuable consideration, to wit, \$2 per acre, conveyed to said Downman by said instruments certain rights, titles, and interest in said lands, and whether it was of much or of little value, it did not place the burden upon the state to develop and establish the value of the rights conveyed to said Downman in order to make the same taxable. And by its proposition thereunder the state asserts that the instruments in stereotyped form conveyed an interest in the lands described in said instruments, taxable under the laws of the state of Texas, whether or not it was known

that minerals capable of being worked or mined at a profit existed on said lands at the time of their execution.

As there is no conflict in the evidence, we deem it not improper to supplement the findings of fact as made by the court with certain other matters appearing in the evidence; and will add that there are no facts in the record showing that minerals did or did not exist on the lands mentioned in plaintiff's petition. The evidence in this respect is that no mines exist on the lands, and that it is unknown whether minerals, capable of being worked at a profit, existed on said lands. It appears, however, from the statement of facts, that the defendant paid for the rights he acquired from \$1.50 to \$2 per acre. And it further appears that there are showings of mineralization, floats and iron stains on said lands, and that the defendant was induced to purchase the same by reason of this fact, as well as the generally reputed fact that rich mineral ores exist on the lands in said section.

It will therefore be seen that the questions for our determination, as involved in these assignments are, first, whether or not the court was correct in its conclusion, in holding that said deeds to Downman did not convey to defendant any interest or right in the land subject to be taxed under the Constitution and laws of this state, but only a license or right to prospect for minerals therein, which franchise or right is not taxable in this state; and, second, if such deeds did convey an interest in land taxable under the laws of this state, then whether or not the burden was upon the plaintiff to show that such mineral substances as named in said conveyances capable of being worked for a profit existed upon said lands before the same became subject to taxation.

We think it is clear under the authorities that ores and minerals contained in land are property, and that the same, by proper conveyance, can be severed from the land by the owner thereof, and when so severed the same become the subject of taxation, separate and apart from the land itself. One party may own the surface estate and another the minerals or mineral rights in said land; and, when so owned separately, each are subject to be taxed for their respective properties in the land. Of course, until so severed, it is a part of the land, and is subject to taxation as such in the hands of the owner. It is said in *White on Mines and Mining Remedies*, pp. 541, 545, § 410, that "the duty of paying taxes being primarily upon the owner of the land, so long as the ownership of the ore is the same as that of the surface, the surface owner should pay taxes on the ore in place as a part and parcel of his land; but when there is a severance of the titles, and the ownership of the ore passes to other than the surface owner, he should bear the burden of his own property, the same as the surface owner

should; and the surface and the mineral in place should be accordingly assessed to the respective owners.

Our own Constitution (article 14, § 7) provides that the state of Texas releases to the owner or owners of the soil all mines or mineral that may be on the same, subject to taxation as other property. Article 8, § 1, of the Constitution, declares that all property in this state, whether owned by natural persons or corporations, other than municipal, shall be taxed in proportion to its value, which may be ascertained as provided by law, etc. Section 11 of said article provides that all such property shall be assessed for taxation and the taxes paid in the county where situated. Section 15 provides that the annual assessment made upon landed property shall be a special lien thereon, and all property, both real and personal, belonging to any delinquent taxpayer, shall be liable to seizure and sale for the payment of all taxes and penalties due by such delinquent.

Article 5062, *Sayles' Ann. Civ. St.* 1897, provides that real property for the purposes of taxation shall be construed to include land itself, whether laid out in town lots or otherwise; and 'all the buildings, structures and improvements of whatsoever kind thereon, and all the rights and privileges belonging or in any wise appertaining thereto, and all mines, minerals, quarries, and fossils in and under the same.

Now did the deeds in evidence convey to Downman an interest in land? If so, such interest was taxable under the laws of this state in the county where the lands were situated. It seems to us that the conclusion is irresistible that they did, and that no mere privilege or incorporeal right was conveyed thereby, notwithstanding the restrictions mentioned in the stereotyped conveyances first above referred to. It seems the parties themselves evidently considered the mineral rights so conveyed as real estate, since the instruments are in form similar to ordinary conveyances of real estate, containing all the requisites of deeds of conveyance. They were acknowledged as required for such conveyances and recorded in the deed records of the county where such mineral rights were located. The grantee considered the interest so conveyed valuable, paying therefor a consideration of from \$1.50 to \$2 per acre, as recited in the deeds, which is supported by the testimony.

In discussing the case of *In re Major*, 134 Ill. 19, 24 N. E. 973, whether or not mineral interest in land which had been reserved from the conveyance of said land to other parties was subject to taxation against the grantor, who had reserved such interest, the court in its opinion said: "It is, however, said that the question is not as to the right to assess and tax coal in land which is reserved and held separate from the fee of the surface, but the question is as to the existence of the coal assessed, and it is urged

that there is no coal mine open or in operation upon said land, and no evidence that coal exists thereunder, and therefore the assessor was not authorized to make the assessment. It is alleged in the petition and is otherwise manifest that whatever there was of coals or minerals underlying said land was reserved and continued to be the property of appellant, with the right to mine the same. If it was property, it was the duty of the assessor to return an assessment thereof. If valued too high, another mode is pointed out for redress, to which appellant might have resorted. The ownership of the coal was severed from the ownership of the soil, and the fee of the coal was property and as such was liable for its just portion of taxation."

In discussing the taxability of mineral rights, the court in *Sholl et al. v. People*, 194 Ill. 24, 61 N. E. 1122, said: "The estate in minerals is denominated a 'mining right' in sections 6 and 7 of said chapter of the statute entitled 'Mines' before referred to [Starr & C. Ann. St. 1896, c. 94] and if the estate has been created by the reservation in a deed conveying the land to another, of the right to retain and take the mineral, it would not inappropriately be called a 'mining right reservation.' If the interest of the objectors was not that of a mining right, but a mere easement, it was in their power to prove such to be the state of the case, and the burden rested upon them to do so."

In the case of *Consolidated Coal Co. of St. Louis v. Baker*, 135 Ill. 545, 28 N. E. 651, 12 L. R. A. 247, certain tracts of land had been assessed for taxes against certain owners thereof. The tax assessor had also returned an assessment for coal under the same lands against the Consolidated Coal Company. The Coal Company objected to the assessment against it on the ground, first, the coal was not assessable separately from the land in which it lies; and, second, the taxes have been paid on the land in which the coal lies, and that land was assessed without excepting the coal. The opinion says: "It is insisted, first, that the burden was upon the collector to show that the owners of the land had in some way sold and conveyed the coal underlying their lands respectively; and having failed to do so, the objections should have been sustained. We are unable to concur in this view. The assessment was introduced in evidence and the assessor called as a witness, who testified that in making the assessment he decreased the value placed upon the land by the amount he placed upon the coal, and that 'the superintendent of objector's mines where the coal is situated, told me the number of acres in each tract yet unmined, and I followed his statement' in making the assessment. The collector's return of the delinquent list, with statutory notice and proof of publication, prima facie entitles the collector to judgment for the tax returned as

delinquent. The presumption is that the assessor and other officers charged with the levy and collection of taxes have done their duty, and have not made an illegal assessment or returned an illegal tax delinquent. We have repeatedly held that the burden of showing such matters as would avoid the tax or establish its illegality is upon the person objecting thereto (citing authorities). Where the return of the collector is in conformity with the statute, the presumption of the regularity of the assessment and validity of the tax is indulged until facts are shown that impeach their legality. Here the tax was returned delinquent against the coal underlying the several tracts named, and the presumption must obtain that it was properly so assessed and returned, until the contrary is made to appear. It is insisted, however, that under the revenue laws of this state coal and other substances, which in their natural state and situs are part of the realty cannot be so severed from the ownership of the land or the land itself as to become separately taxable, and that therefore the assessment made upon the coal underlying these lands is void; that the land having been assessed to the several owners thereof, and the taxes thereon duly paid, there was no further liability because of any substance upon or forming part of the land. The fourth section of the revenue act (Rev. St. c. 120) provides: 'Real property shall be valued as follows: First, each tract or lot of real property shall be valued at its fair cash value estimated at the price it would bring at a fair voluntary sale; second, taxable leasehold estates shall be valued at such a price as they would bring at fair voluntary sale for cash. * * * Fourth, in valuing any real property on which there is coal or other mine or stone or other quarry, the same shall be valued at such a price as such property, including the mine or quarry, would sell at a fair voluntary sale for cash.' And it is insisted, therefore, for the purposes of taxation, that there can be no severance of the mine from the land, but, as before said, the value of the mine must be included in the valuation of the land, however separated by contract or severally held and owned. Section 1 of article 9 of the Constitution of this state provides that 'the General Assembly shall provide such revenue as may be needed by levying a tax by valuation, so that every person and corporation shall pay a tax in proportion to the value of his or its property.' Construing the provisions of the revenue law quoted in the light of the provision of the Constitution, it would seem that the question was whether appellant had, or could have held, by deed of conveyance or lease, such an interest in the coal underlying these lands as would be property and assessable as land. By the statute of New York, the term 'land,' as used in the law relating to property liable to taxation,

etc., is by statute to be construed 'to include the land itself, including land and water, all buildings and other articles erected upon or affixed to the soil, all trees and under-wood growing thereon, and all mines, minerals, quarries, and fossils in and under the same.' In *Smith v. Mayor of New York*, 68 N. Y. 552, it was held that, under the definition of 'land' thus given, 'one may be taxed as owner of the fee of the land, and another for the trees, buildings, and other structures thereon, and the minerals and quarries therein'; and it was there held that a pier built upon the land of the city by the appellant *Smith* was real estate, within the meaning of the statute, and taxable as such, although built upon the land of another. In *People v. Cassidy*, 46 N. Y. 46, the question was as to the right to tax the track of a street railway placed in the streets of a city as land, and it was held to be land within the statute. The position was there taken that it was not real estate, but the court said: 'The statute means, for its purpose, to make two general divisions of property; one all lands, another all personal property, and then, to be more definite, it declares that by "land" is meant the earth itself, and also all buildings and other articles erected upon or affixed to the same. We do not think that, when buildings or other articles are erected upon or affixed to the earth, they are not, in view of the statute, land, unless held and owned in connection with the ownership of the fee in the soil. We are of opinion that the statute means that such an interest in real estate as will protect the erection or affixing thereon and the possession of the fixtures, will bring such buildings and fixtures within the term "lands," and hold them to assessment as the land of whomsoever has the interest in the real estate and owns and possesses the buildings and fixtures.' See *People ex rel. v. Commissioners of Taxes*, 10 Hun (N. Y.) 207, and *People ex rel. v. Board of Assessors*, 93 N. Y. 308, wherein it was held in the last case that the parties might regulate their several interests in real estate by contract, so that one might own the buildings and another the fee, holding that the buildings in such case were properly assessed as land. The court further adds: 'We do not deem it necessary to extend this opinion by citation from other courts. Our statute provides that in valuing lands on which there is coal or other mine, or stone or other quarry, the price or value of such mine or quarry shall be included. This necessarily requires a valuation of the mine or quarry, and, if there is no division of ownership, it will all properly be assessed with the fee. It is, however, a matter of common knowledge that the coal underlying lands is conveyed by deed or other instrument, so as to vest the coal, with right of mining the same, in another than the owner of the fee. Ordinarily, perhaps, there is an

absolute conveyance of the coal or other mineral, with a lease of sufficient of the surface for shafts, etc., at which to deliver the coal from the mine, or it may be mined by entries from other adjacent lands, without entering upon the surface of the particular tract of land upon which the coal is situated. The grant is more than a mere license to enter and mine the coal; it is a conveyance of the coal itself, as it lies impacted between the stratas of stone, slate, or clay in the state of nature. The title passes to it as property. It is true its value must be added to the valuation of the land, but it by no means follows that it must be assessed with it. The parties have created two distinct properties in the same land; one holding one property right in the land, and the other a distinctly separate property interest therein. The statute, as before said, when read in view of the constitutional provision quoted, would require the assessment to be made in the names of the persons or corporations holding such property interest in the land. True, the total assessment must equal the value of the land augmented by the value of the coal or mine, but the assessment of each should be made separately according to the several holdings to the end that each "shall pay a tax in proportion to the value of his, her, or its property." The coal thus reserved by the grantor of the land is not personal property, and cannot be until it is severed. By the conveyance of it, an interest in the land itself passes to the grantee—the ownership of portions of the constituents of the land—and falls within the designation of real estate."

In *Benavides v. Hunt*, 79 Tex. 380, 15 S. W. 396, it was held that the contract granting to the lessee the right to mine coal or other minerals on land for a term of years, conveys to him an interest in the land described, and that therefore, the four-year statute of limitation, which was pleaded, did not apply. See, also, *Stuart v. Commonwealth*, 94 Ky. 595, 23 S. W. 367; *Sander-son v. Scranton*, 105 Pa. 469; *Kincaid v. McGowan*, 88 Ky. 91, 4 S. W. 802, 13 L. R. A. 289; *Wolfe County v. Beckett*, 127 Ky. 252, 105 S. W. 447, 17 L. R. A. (N. S.) 688.

From the foregoing authorities we hold that the deeds to *Downman* conveyed to him an interest in lands, such as is taxable under the laws of this state. We further believe, and therefore hold, that it was unnecessary on the part of the state, as claimed by appellee, to show that the lands described in the deeds of conveyance to *Downman* contained any mineral ores or other valuable substances, because we think the burthen was on the appellee to show that they did not contain such minerals. The state by the introduction of the tax rolls in evidence made a *prima facie* case, the onus of rebutting which was upon the appellee. We therefore sustain both of said assignments, and

hold that the court erred in the conclusions of law therein complained of.

What we have said under the previous assignments we think disposes of the question raised by the third assignment, for which reason it will be unnecessary to discuss same.

By its fourth assignment appellant insists that the court erred in its fourth conclusion of law in holding that the tax rendition for 1907 made by the grantors of appellee Downman embraced all interests in the land mentioned in plaintiff's petition, when in truth and in fact said renditions at the time made, while not in the manner and form as made, expressly excluding from said rendition the idea that all interests were rendered, were never approved by the commissioners' court as a full rendition of all interest in the lands, but, on the contrary, said commissioners' court ordered and directed the tax assessor of Llano county to render and assess separate and apart for taxes the said estate and rights that had been by said grantors conveyed to defendant Downman, and said renditions as made by said grantors were not approved until the said assessments had been made by the assessor against said Downman, at which time the said commissioners' court of Llano county approved the renditions as made by the assessor of Llano county of the estate and rights of R. H. Downman as conveyed to him by the stereotyped and six other deeds introduced in evidence, and because it held that, inasmuch as the grantors of R. H. Downman had rendered the land as above specified, that the commissioners' court had no authority before the date of approving the said renditions of said grantors to instruct the tax assessor to assess separately the estate and rights in the lands conveyed by said grantors to R. H. Downman and thereafter to approve both assessments and require the payment of taxes by the grantors of R. H. Downman of the estate they owned in said land, and also the payment by R. H. Downman of the taxes assessed against him for the estate and rights he owned in the lands. And by its proposition thereunder, appellant urges that the fact that each of the grantors of the interests conveyed to appellee in the tracts of land mentioned in plaintiff's petition rendered said lands for taxation, listing same as real estate and did not employ any language indicating an intention to exclude or except from their valuation as made any mineral rights or other interest whatever in said lands, but said renditions were made as of the whole interests in said lands in the manner and form prescribed by statute for the rendition of real estate, and were accepted by the tax assessor and approved by the board of equalization, and the tax rolls made up therefrom and predicated on said renditions and assessments in the form prescribed by statute for making up rolls showing taxes due on real estate, where the same has been rendered for taxation by the owners, did not render

invalid the subsequent assessment of the mineral rights owned by appellee in said tracts of land.

It will be recalled that the fourth conclusion of law held that the tax rendition for 1907 made by the grantors of Downman and the tax assessments predicated thereon embraced all interest in the lands mentioned in plaintiff's petition, inclusive of the mines, mineral, quarries, and fossils in or under the same, and that since all taxes due the state and county on said lands for 1907 had been paid, therefore the state was precluded from reassessing the same property or any interest therein for the same year in the name of another, and again collecting taxes for said year, notwithstanding the second assessment might be against the real owner of the interest assessed. This conclusion was based upon the fourth finding of fact above set out. Appellee by his first counter proposition contends that as the undisputed evidence in the case sustains the finding of the trial court that all taxes due for the year 1907 on each of the tracts of land mentioned in plaintiff's petition had been paid in full prior to the trial of this case, that the trial court, for this reason, properly rendered judgment for appellee, regardless of any other defense presented, citing in support of his contention articles 5062 and 5076, Rev. St. 1895; also *State v. A. & N. W. R. R. Co.*, 94 Tex. 530, 62 S. W. 1050; *Commonwealth v. Chicago R. R. Co.*, 105 S. W. 127, 32 Ky. Law Rep. 10; *Commonwealth v. Ingalls*, 121 Ky. 194, 89 S. W. 157; *Spalding v. O'Callaghan* (Ky.) 78 S. W. 189; *Commonwealth v. Gaines & Co.*, 80 Ky. 489; *Commonwealth v. Ches. & Ohio R. R. (Ky.)* 91 S. W. 672.

The authorities cited by appellee sustain abstractly the contention as made by him, and if his premise is correct, then there can be no question that the court was correct in the conclusions reached; because if, in fact, the grantors of Downman had by their voluntary assessment, which had been accepted and acted upon by the authorities, rendered for taxation not only their interest in the real estate mentioned in said conveyances, but that the same embraced the mineral rights of Downman as well, and the state had collected from said grantors the whole amount of taxes so due, then and in that event the state, through its officers, could not reassess and collect an additional tax from Downman. But was this done? Appellee contends that it was, by reason of the fact that in the renditions of said real estate as given in by the grantors of Downman and accepted by the assessor no mention was made in said assessments of the fact that they had previously conveyed their interest in the mineral rights underlying said lands, and there was nothing to indicate any such fact in any of said assessments. While this is true, and it would have been better for said grantors to have mentioned in said assessments that they only rendered the sur-

face estate in said lands, yet we find that when the commissioners' court met as a board of equalization, and these assessments of Downman's grantors were presented for their consideration, they, with knowledge of the fact that the mineral rights had been conveyed by said grantors, deferred action thereon, and directed the assessor, by an order spread upon their minutes, as hereinbefore set out, to assess for taxation all mineral rights in lands in said county where it appeared that the owners of the surface estate had conveyed the mineral rights therein. The record shows that the assessor literally followed the direction of the commissioners' court in this respect, and assessed as against Downman the mineral rights so conveyed to him by each of said grantors, which assessments were at the same time together with the assessments of the lands rendered by said grantors, submitted to said court for their consideration, and at the same time said court approved the assessments of said grantors as well as the assessments against Downman for his mineral rights in the tracts so conveyed to him by said grantors. This being true, it clearly appears that the commissioners' court did not consider the rendition of Downman's grantors as embracing the mineral rights in said lands; but, on the contrary, specially directed that the same should be assessed separate and apart from the interest of the grantors therein, and the same was so assessed, and the assessments so separately made were approved by them. For which reason, it seems to us that the rule contended for by appellee does not apply, but, on the contrary the contention of appellant is correct and should be sustained.

There was no finding in its conclusions of law by the trial court relative to whether or not the tax assessments against the defendant were void on the ground of inequality and systematic discrimination, the court holding that since it made a general finding in favor of the defendant, it was unnecessary to pass upon this question; and while appellant has presented no assignment discussing this question, yet since the judgment of the court, if correct, could be sustained upon the theory if warranted by the facts which is not admitted that said tax was not uniform and equal but systematically discriminatory against the appellee, notwithstanding the fact that the court did not base its judgment upon this feature of the case, and especially in view of the fact that appellee in his brief presents this phase of the case and urges that the judgment of the court is correct, since its findings of fact show, as he contends, that the assessments in question were void because it appeared from said finding that appellee's mineral rights were assessed for taxes, whereas the mineral rights belonging to other persons in said county, who owned both the surface estate and the mineral rights were not so assessed for taxes, we

therefore think it appropriate to present our views upon this question. Appellee cites the following authorities in support of his contention: Section 1, art. 8, Tex. Const.; section 1, Const. U. S. Amend. 14; *Lively v. M., K. & T. Ry. Co.*, 102 Tex. 558, 120 S. W. 852; *M., K. & T. Ry. Co. v. Shannon et al.*, 100 Tex. 396, 100 S. W. 138, 10 L. R. A. (N. S.) 681; *Cummings v. Merchants', etc., Bank*, 101 U. S. 153, 25 L. Ed. 903; *Raymond v. Chicago U. T. Co.*, 207 U. S. 20, 28 Sup. Ct. 7, 52 L. Ed. 78; *Taylor v. L. & N. Ry. Co.*, 88 Fed. 350, 31 C. C. A. 537; *Bank v. Hines*, 3 Ohio St. 15; *Ex parte Ft. Smith, etc., Bridge Co.*, 62 Ark. 461, 36 S. W. 1060; *Chicago, B. & Q. Ry. Co. v. Board, etc.*, 54 Kan. 781, 39 Pac. 1089; *Andrews v. King County*, 1 Wash. St. 46, 23 Pac. 409, 22 Am. St. Rep. 136.

The order of the commissioners' court above recited, under which the assessments against appellee were made, as well as the facts in evidence, we think, fail to sustain appellee's contention in this respect. It is true that the tax assessor thereunder was directed to assess for taxes all mineral rights in said county by whomsoever held, where it appeared that the same had been severed by conveyance from the surface estate; still, this is not equivalent to a direction to the assessor to disregard in his assessment those holding lands in which mineral rights existed but had not been severed by conveyance to others. And it would seem to us that before the contention made by appellee could be upheld that it ought to be made to appear that the tax assessor of Llano county and the tax authorities thereof had declined to assess for taxes those owning such mineral lands. Nor do we think this is made manifest by a failure on the part of said assessor to reduce the value of the assessment against the lands of Downman's grantors. The other lands in said county were assessed for taxes against the owners as lands are usually assessed. Such an assessment unquestionably embraced the mineral rights in said lands, because the same were unqualified and included an assessment against the minerals, if any there be thereon, as well as against the surface estate. The order of the commissioners' court was not a direction to assess alone the mineral rights held by Downman, but it was general and embraced within it all persons holding and owning mineral rights where the same had been severed by the owner from the surface estate. We think this is an entirely different question from that determined in the case of *Lively v. M., K. & T. Ry. Co.*, supra. In that case it was shown that the assessment of the intangible assets of the railway company was fixed at their full market value, while the value of all other property in the county was assessed at two-thirds of its actual value. Therefore, such corporation was denied the right of equal and uniform taxation secured to it by section 1, art. 8, of the state Constitution, as well as

the right to equal protection of the laws, as guaranteed by section 1 of the fourteenth amendment of the Constitution of the United States; to our minds an entirely dissimilar proposition to the one here presented. Besides this, we are inclined to think that the evidence fails to show any such lack of uniformity and inequality or systematic discrimination as complained of by appellee. It does not appear from the evidence that the taxes assessed against the defendant were greater than those assessed against any other owner of mineral rights in Llano county. But the argument made, based on the facts, is that the owners of the surface estate, to wit, Downman's grantors, were required to pay and did pay the same amount of taxes upon their lands as other owners who had not conveyed the mineral rights in their respective tracts. This latter feature, however, does not make the assessments in our judgment contravene either the letter or the spirit of the constitutional provisions above quoted.

Before closing this opinion the writer desires to express his appreciation of and acknowledgment for the great aid afforded him in the investigation of the questions here discussed by the able and elaborate briefs of the distinguished counsel representing the respective parties hereto.

Believing that the court erred, for the reasons hereinbefore pointed out, it becomes our duty to reverse the case and to render such judgment as the court below should have rendered. We therefore direct that the judgment of the court below be, and the same is hereby, reversed and rendered in behalf of appellant.

Reversed and rendered.

ST. LOUIS SOUTHWESTERN RY. CO. OF TEXAS v. McCAULEY.†

(Court of Civil Appeals of Texas. Jan. 26, 1911. Rehearing Denied Feb. 23, 1911.)

1. RAILROADS (§ 300*)—FRIGHTENING ANIMALS—CARE REQUIRED.

Where a part of a railroad right of way had been used for a public street without objection for 20 years, the railroad company was liable for injuries to a traveler thereon, in consequence of her horse becoming frightened by unnecessary noises of an engine moving parallel with her.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 1241-1244; Dec. Dig. § 360.*]

2. RAILROADS (§ 300*)—LICENSEES—CARE REQUIRED.

Operators of an engine on a track, parallel to a part of the right of way used by the traveling public without objection, must not unnecessarily permit the engine to become so enveloped by smoke and steam as to present an unusual appearance so as to frighten a horse driven by a traveler on the right of way.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 1241-1244; Dec. Dig. § 360.*]

3. RAILROADS (§ 358*)—LICENSEES—CARE REQUIRED.

An engineer who discovers the peril of a traveler on a part of the right of way commonly used by the public without objection must use the reasonable means at hand to avoid threatened injury.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. § 1236; Dec. Dig. § 358.*]

4. RAILROADS (§ 401*)—LICENSEES—INSTRUCTIONS—CARE REQUIRED.

Where traveling on a part of a railroad right of way, commonly used by the public without objection, was not dangerous except as made so by the operation of engines and cars on the track, a charge that if an engineer saw a traveler's dangerous position in time to avoid injury by the use of the means at his command, and he failed to do so, and to avoid an accident to the traveler caused by her horse becoming frightened, the company was liable, was not erroneous as leading the jury to believe that the engineer must do more than use the means at hand.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 1382-1390; Dec. Dig. § 401.*]

5. RAILROADS (§ 358*)—LICENSEES—CARE REQUIRED.

A railroad company must exercise due care not to injure licensees whom it knows to be on its right of way and keep a lookout to discover and avoid injury to all who may be expected to be there.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. § 1236; Dec. Dig. § 358.*]

6. RAILROADS (§ 400*)—LICENSEES—CONTRIBUTORY NEGLIGENCE—QUESTION FOR JURY.

Whether a traveler on a part of a railroad right of way, used without objection by the traveling public, was guilty of contributory negligence in using the right of way while there were other ways as near, if not as good, held for the jury.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. § 1377; Dec. Dig. § 400.*]

7. TRIAL (§ 253*)—INSTRUCTIONS—IGNORING ISSUES.

Where, in an action for injuries to a traveler on a part of a railroad right of way used by the traveling public, in consequence of her horse becoming frightened, the refusal to charge that if the way along which plaintiff was traveling was dangerous because of its proximity to the track and was known so to be by the plaintiff, and was chosen by her when she might have chosen another way, there could be no recovery, was properly refused because requiring a verdict against plaintiff, without reference to the issue of discovered peril raised by the evidence.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 613-623; Dec. Dig. § 253.*]

8. TRIAL (§ 260*)—INSTRUCTIONS—REFUSAL TO GIVE INSTRUCTIONS COVERED BY THE CHARGE GIVEN.

It is not error to refuse instructions covered by the court's charge so far as they state the law and are warranted by the evidence.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 651; Dec. Dig. § 260.*]

9. APPEAL AND ERROR (§ 1002*)—VERDICT—CONCLUSIVENESS.

In determining the issues on conflicting evidence, the jury may look alone to the portion of it favorable to the successful party, and the court on appeal cannot say that such a verdict is not supported by the evidence.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 8935; Dec. Dig. § 1002.*]

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

† Writ of error denied by Supreme Court.

Appeal from District Court, Hopkins County; R. L. Porter, Judge.

Action by Miss Mattie McCauley against the St. Louis Southwestern Railway Company of Texas. From a judgment for plaintiff, defendant appeals. Affirmed.

E. B. Perkins and Templeton, Craddock, Crosby & Dinsmore, for appellant. C. A. Sweeton and D. Thornton, for appellee.

WILLSON, C. J. Appellant's line of railway ran east and west through Sulphur Springs. Mulberry and Seventh streets, west of appellant's depot, ran north and south. Between them was Johnson's gin lot, the south boundary line of which was marked by a fence running parallel with the track of said railway from Mulberry to Seventh street, a distance of about 227 yards, and was identical with the north boundary line of appellant's right of way. During 20 years that part of said right of way lying between said two streets on the east and west and between said fence and said track on the north and south had been used for the general purposes of a public street and as a public way to and from the city cemetery, situated about 80 yards east of said lot. The width of the right of way at the point specified is not shown by the testimony in the record, but it appears that the part thereof used as a street was about 30 feet from the track of the railway. November 20, 1908, a number of people including appellee, in vehicles drawn by horses, forming a funeral procession, were traveling along said part of said right of way, going west to the cemetery, when employes of appellant in charge of one of its engines ran same along said track from a point east of Mulberry street to a point opposite appellee's place in said procession. The horse appellee was driving grew restless as the engine moved towards him, and when it reached a point on the track opposite him became unmanageable. As a result appellee was thrown or caused to jump from the buggy in which she was riding, thereby sustaining injury to her person. She recovered a judgment against appellant for the sum of \$1,500, her damages as found by a jury. The verdict involved findings that appellant was and that appellee was not guilty of negligence proximately causing the injury she sustained, and that her damages amounted to the sum adjudged in her favor. There was testimony to support such findings, and we adopt them as our own.

In his main charge the court instructed the jury to find for appellee, unless they believed she had been guilty of negligence contributing to the accident resulting in the injury of which she complained, if they believed that "one," quoting from the charge, "of the defendant's engines on its said line of railroad ran up behind and by the side of and in close proximity to plaintiff while she was traveling and driving said horse on said

road, street, or highway, and if you further find that while said engine was approaching and was near plaintiff that the engineer in charge, knowing of plaintiff's presence in said buggy being drawn by said horse, if he did, negligently permitted steam or vapor unnecessarily to escape from his engine, or any of the cocks, valves, or places where the same usually escapes, or if you believe that he negligently made any unnecessary use of steam in propelling same, or if by the negligence of the defendant the working part thereof was not properly lubricated, polished, and oiled, and if by the negligence of the defendant said engine was unskillfully operated, as alleged by plaintiff in her petition, and by the use of all or any of such means (if any), the noises thereof (if any), the unusual and frightful appearance thereof (if any), as alleged by plaintiff in her petition, scared the horse being driven by plaintiff and caused it to become unmanageable, as alleged by plaintiff in her petition, and caused plaintiff to be thrown from the buggy in which she was riding and thereby injured the plaintiff, and if you further believe that such negligent acts on the part of the defendant (if any) were the proximate cause of the plaintiff's injuries (if any) as alleged in her petition." The instruction is attacked as being erroneous in several respects. Obviously, it lacks the clearness of statement which should characterize every instruction to a jury, and it has not been without hesitation that we have reached the conclusion that it should not be held to have been erroneous, because calculated to confuse and mislead the jury. It was shown by testimony that the portion of appellant's right of way along which appellee was traveling with the funeral procession had been used for all the purposes of a public street, without objection on the part of appellant, during a period of 20 years. It was also shown that appellant's employes in charge of the engine, while switching cars on another track, at a point some distance east of the place where the accident occurred, discovered the vehicles in the procession, and afterwards ran the engine onto the track parallel with the way the procession was traveling and followed after the procession to the point where the accident occurred. There also was testimony sufficient to support findings by the jury that the engine, as it moved, first towards the procession and afterwards along the track parallel with it, made unnecessary noise and unnecessarily emitted steam and smoke. So far as the noise was concerned, it seems to be clear that if it was unnecessary in the operation of the engine, and was due to negligence on the part of the persons in charge of the engine, and if because thereof appellee's horse became frightened, and, as a result of his fright, she was thrown from the buggy and thereby was injured, she was entitled to recover, if she

was herself without fault. *Railway Co. v. Belt*, 24 Tex. Civ. App. 281, 59 S. W. 611; *Puppovitch v. Railway Co.*, 45 Tex. Civ. App. 138, 99 S. W. 1143; *Railway Co. v. Partin*, 33 Tex. Civ. App. 173, 76 S. W. 237. We see no reason why she should be denied a right to recover, if, instead of being frightened by the unnecessary noise, the horse was frightened by an "unusual and frightful appearance" of the engine, produced by steam and smoke unnecessarily and negligently caused or permitted to escape from and envelop it. The duty which appellant's employees in charge of the engine owed to appellee was to use such care in the operation thereof as an ordinarily prudent person would have used under the same circumstances, and we think this duty could have been as well violated by unnecessarily causing or permitting the engine to become so enveloped by smoke and steam as to present an "unusual and frightful appearance" to the horse, as it could have been violated by causing or permitting it to make unnecessary noises. If this is true, then the instruction, however lacking it may be in precision, it seems to us, cannot be said to have been erroneous; for its effect was to tell the jury, other conditions specified concurring, to find for appellee if they believed the horse became frightened because of noise, and "the unusual and frightful appearance" of the engine, and further believed that such noise and appearance of the engine were the result of negligence on the part of appellant's employees in particulars specified.

The court in his main charge, further instructing the jury, told them to find for appellee although they believed she was guilty of contributory negligence, if they also believed from the evidence that the engineer in charge of the engine "actually saw and knew of plaintiff's dangerous position (if she was in a dangerous position) in time to have avoided the injury (if any) by the use of the means at his command," and further believed that he "failed to use all reasonably ordinary efforts at his command, consistent with the safety of his engine, locomotive, and tender, and those riding thereon, to avoid the accident," and further believed "that such failure (if any) on the part of said engineer was the proximate cause of plaintiff's injury (if any)." The objection made to this portion of the charge is that it was misleading in that it required the engineer to "use all the means at his command to avoid the accident, if he saw and knew of her dangerous position, when she was in a dangerous position from the time she entered the way where it ran over defendant's premises," and that she "being at most a mere licensee thereon, the engineer was not required to use all the means at his command to avoid the accident, at least until after he saw and knew from the actions of plaintiff's horse that an accident

was imminent." It did not appear that the way appellee was traveling was dangerous, except as it might be made so by the operation of appellant's engines and cars along its track parallel with same. The peril arose, not because of the way, but because of the operation of the engine. When the engineer discovered that she was in peril on account of the operation of the engine, it became his duty to use the means at hand to avoid the injury threatened to her, and we think the jury reasonably could not have understood the instruction to mean otherwise. Therefore we do not think the instruction, in the particular pointed out was erroneous.

At the request of appellee, the court instructed the jury that if the way along which appellee was traveling at the time she sustained the injury complained of had been "commonly and publicly used by persons in traveling in vehicles drawn by horses to and from the city cemetery, * * * with the knowledge, consent, permission, or acquiescence of the defendant," it was appellant's duty "in operating and propelling its engines while approaching and passing said road, street, or highway to have exercised ordinary care in the operation and control of its said engine, so as not to endanger the persons known to defendant's servants and agents to be using said road, street, or highway, even though you believe said road, street or highway ran along and upon defendant's right of way." Appellant insists that persons traveling on and along the used way on its right of way were mere licensees, and that as to licensees it had "the absolute right to operate its engines and trains on its track by the side of the said way in the usual and customary manner, even though the safety of such travelers is endangered thereby, and defendant is under no duty to use such care in the operation of its trains as not to endanger the safety of such travelers." We do not agree that the law is as appellant asserts it to be. To say that a railway company owes no duty to use care in the operation of its trains not to injure persons whom it knows to be on its right of way and whom it has licensed to be there, would be to impute to the law the lack of a humaneness which ought to be one of its chief characteristics. There is ample authority for saying the law in this particular is not justly subject to such an imputation. "If a railroad company," says Judge Elliott, "licenses or acquiesces in the use of its track or premises by others, it must exercise reasonable care not only to avoid injuring them after they are discovered to be in danger, but also to keep a careful lookout to discover and avoid injury to all who may be expected to be upon their right of way or premises." 3 Elliott on Railroads, § 1250, citing as supporting the statement, among other cases, *Railway Co. v. Bolton*, 36 Tex. Civ. App. 87, 81 S. W. 123, and *Railway Co. v. Lee*, 34 S. W. 160. Speaking further with reference to the duty of

such companies to licensees and trespassers on their premises, Judge Elliott says: "It is a sound and wholesome rule of law, humane and conservative of human life, that without regard to whether the person killed or injured in the particular case was or was not a trespasser or a bare licensee upon the track of the railroad company, the company is bound to exercise special care and watchfulness at any point upon its track, where people may be expected to be in considerable numbers, as, for example, in a city where the population is dense; even between streets where the track has been extensively used for a long time by pedestrians; or where the roadbed is constantly used by pedestrians; or at a bridge in a thickly settled community, which the public, in considerable numbers, have used for years. At such places the company is bound to anticipate the presence of persons on the track, to keep a reasonable lookout for them, to give warning signals, such as will apprise them of the danger of an approaching train, to moderate the speed of its train so as to enable them to escape injury; and a failure of duty in this respect will make the railway company liable to any person thereby injured, subject of course to the qualification that his contributory negligence may bar a recovery." 3 Elliott on Railroads, § 1726; Ry. Co. v. Sanders, 42 Tex. Civ. App. 545, 94 S. W. 149.

It was shown that there were other ways as near, if not so good, as the one chosen by appellee, by which she could have reached the cemetery without traveling along appellant's right of way at the point thereon where the accident occurred. The court refused to instruct the jury as requested by appellant to find for it, if they believed the way along which appellee was traveling was dangerous because of its proximity to appellant's track, and was known so to be by appellee, and was chosen by her when she might have chosen another and safe way to the cemetery of about the same distance. We think the instruction properly was refused. Without respect to the circumstances which induced her to travel the way she was traveling at the time she was injured, appellee could not be said to be guilty of negligence barring a right she otherwise would have had to recover, because that way, within her knowledge, was a dangerous one, and she could have traveled another and safe way. Whether appellee was guilty of negligence in traveling along the way she was traveling or not was a question for the jury to determine with reference to the circumstances surrounding her as shown by the testimony, and was not a question the court had a right to determine as a matter of law. In his main charge the court instructed the jury to find for appellant if they believed "an ordinarily prudent person situated as plaintiff was, while going

and traveling from the residence of her father to the cemetery, would not have traveled the road or street traveled by plaintiff, but would have traveled some other route." This instruction, we think, was as favorable to appellant as the testimony warranted. *Railway Co. v. Matthews*, 100 Tex. 63, 93 S. W. 1068; *Railway Co. v. Wall*, 102 Tex. 362, 116 S. W. 1140; *Railway Co. v. Wall*, 110 S. W. 457. We think the requested instruction properly was refused for another reason. It required the jury to find against appellee if they believed she chose a way she knew to be dangerous, when she might have chosen another and safe way, without reference to the issue of "discovered peril" made by the evidence. There was testimony sufficient to support a finding that the engineer as he approached the point opposite the place where the accident occurred became aware of the fact that appellee's horse was frightened, and that her situation because of that fact was a perilous one, and that thereafter said engineer not only failed to use the means at his command to so manage the engine as to avoid further frightening the horse, but so operated said engine as to cause or permit it to continue to make unnecessary noise, and unnecessarily to emit smoke and steam in a manner calculated to, and which did, add to the fright of the horse.

The action of the court in refusing to give to the jury other special instructions requested by appellant is assigned as error. So far as these instructions correctly stated the law and were warranted by the testimony we think they were in effect given in the court's main charge.

The assignment attacking the verdict as unsupported by the testimony, in that the testimony showed appellee, and failed to show appellant's engineer, to have been guilty of negligence, is overruled, as is also the one attacking the verdict and judgment as excessive. The evidence was conflicting. Looking alone to the portion of it favorable to appellee's contentions, as the jury had a right to do in determining the conflict, we cannot say that it was insufficient to support the findings complained of.

The judgment is affirmed.

KEEL & SON v. GRIBBLE-CARTER GRAIN CO.

(Court of Civil Appeals of Texas. Feb. 16, 1911. Rehearing Denied March 2, 1911.)

APPEAL AND ERROR (§ 376*)—BONDS—PARTIES TO.

One defendant secured an order impleading another, and a judgment was rendered in favor of the plaintiff against the first defendant, and in favor of the first defendant against the second. It provided that any money taken on execution issued upon the second judgment, should be applied to the satisfaction of the first. An

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes
134 S.W.—51

appeal was taken by the second defendant who gave a bond obligated only to the first defendant. *Held*, that the plaintiff was interested in the judgment adversely to him, and should have been made a party to the bond, and for failure to do so, the appeal will be dismissed.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2011-2016; Dec. Dig. § 376.*]

Appeal from Lamar County Court; L. L. Hardison, Judge.

Action by J. S. Williams against the Gribble-Carter Grain Company, in which Keel & Son were impleaded. From a judgment in favor of plaintiff against the Gribble-Carter Grain Company, and a further judgment in favor of the latter against Keel & Son, they appeal. Appeal dismissed.

Davis & Thomason, for appellant. Burdett & Connor, for appellee.

HODGES, J. In November, 1908, J. S. Williams, who was residing at or near Brookston, Tex., began negotiations with the Gribble-Carter Grain Company of Sherman, Tex., the appellee in this suit, for the purpose of purchasing a car load of corn. He wanted No. 2 Northern corn, and asked for prices. Further correspondence followed, resulting in a written contract by which the Gribble-Carter Grain Company agreed to sell Williams a car load of No. 2 mixed corn, f. o. b. cars at Brookston, at 70 cents per bushel. The corn which was finally shipped in compliance with this agreement was purchased by the appellee, Gribble-Carter Grain Company, from Keel & Son of Gainesville, Tex., who are the appellants in this suit, the price paid to them being 67½ cents per bushel. There was a written contract between the grain company and Keel & Son, substantially the same as that between the former and Williams, calling for a car load of No. 2 mixed corn f. o. b. cars at Brookston. The corn was shipped by Keel & Son to Brookston during the latter part of November. The bill of lading was made out to shipper's order, notifying Gribble-Carter Grain Company. Upon the shipment of the corn Keel & Son drew their draft, with the bill of lading attached, upon Gribble-Carter Grain Company for the price, which was paid without the grain company's ever having seen the corn. The Gribble-Carter Grain Company then drew its draft upon Williams for the price, attached thereto the bill of lading, and sent it to a bank in Paris for collection. Williams was at the time absent from the state, but the draft was promptly paid by his agent before any inspection of the corn was made. Upon its arrival the corn was unloaded from the car and carried to Williams' ranch about two miles distant in the country, by his employes. A portion of it was thereafter fed to his stock. About December 6th following Williams returned, made an examination of the grain, and decided that it was

of an inferior quality and not up to the grade he had contracted for. He immediately sent a sample to the Gribble-Carter Grain Company with his complaint and asking that proper steps be taken to make his loss good. The grain company thereupon notified Keel & Son of Williams' complaint, and requested them to make a satisfactory adjustment. This, however, was not done; and in February, 1910, Williams filed a suit in the county court of Lamar county, against the Gribble-Carter Grain Company for the damages he claimed to have sustained by reason of the breach of the contract in shipping him an inferior quality of corn. The Gribble-Carter Grain Company answered by general denial and specially pleaded that it had purchased the corn from Keel & Son, and asked that they be made parties, and for judgment against them in the event Williams should recover in his suit. It seems that Williams made no objection to this proceeding, and Keel & Son were accordingly brought into the litigation. They answered by pleading their privilege to be sued in the county of their residence, by an exception to the special plea of the grain company in which it sought to have them made parties to that suit, and other matters in bar not necessary here to notice. The plea of privilege and exception were overruled, the case submitted to the court without a jury, and a judgment rendered in favor of Williams against the Gribble-Carter Grain Company for \$452, and in favor of the latter over against the appellant, Keel & Son, for the same amount. The judgment also provided that any money collected upon an execution issued on the judgment against Keel & Son should be applied by the officer collecting the same on the judgment rendered in favor of the plaintiff, Williams, against the Gribble-Carter Grain Company.

Keel & Son alone have appealed. The appeal bond filed by them was made payable to the Gribble-Carter Grain Company only. Before the submission of this case a motion was filed by the appellee, Gribble-Carter Grain Company, to dismiss the suit on account of several alleged defects in that bond. Those pointed out were: A failure to describe the judgment with sufficient accuracy, and failure to make Williams an obligee. In answer to that motion Keel & Son tendered in this court a new bond curing some of the objections made by the appellee in its motion to dismiss, but still have failed to make the bond payable to Williams as one of the obligees. The motion was passed for consideration with the case. A perusal of the judgment shows that Williams is adversely interested to Keel & Son. Whether the provision in the judgment directing that any money collected on an execution issued against them be applied in satisfaction of his judgment against the Grain Company be

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

correct or not, it is nevertheless a portion of the judgment rendered. Williams to that extent was made a beneficiary by having that recourse against Keel & Son for the satisfaction of his debt, in addition to his right to an execution against the property of the Gribble-Carter Grain company. We think, under the record in this case, Williams should have been made a party to the bond. This not having been done, this court is without jurisdiction of this appeal, and it is accordingly dismissed.

NORTHERN TEXAS TRACTION CO. v. GRIMES.†

(Court of Civil Appeals of Texas. Feb. 4, 1911.
Rehearing Denied Feb. 25, 1911.)

COSTS (§ 184*)—WITNESS FEES—RECOVERY.

Minor stepchildren of plaintiff, recovering judgment for negligent injury to his wife, the mother of the children, are entitled to witness fees, taxed as costs against defendant, where they were regularly summoned as witnesses for plaintiff, and attended the trial to testify in the case; the children claiming the fees and transferring them to a third person.

[Ed. Note.—For other cases, see Costs, Cent. Dig. § 725; Dec. Dig. § 184.*]

Error from District Court, Dallas County; E. B. Muse, Judge.

Action by G. W. Grimes against the Northern Texas Traction Company. There was a judgment for plaintiff, and from a judgment overruling a motion by defendant to retax costs, it brings error. Affirmed.

Baker, Botts, Parker & Garwood, Spence, Knight, Baker & Harris, and W. H. Walne, for plaintiff in error. W. J. J. Smith, for defendant in error.

BOOKHOUT, J. This suit was instituted by defendant in error against plaintiff in error on April 13, 1906, to recover damages on account of personal injuries alleged to have been sustained by the wife of defendant in error on January 8, 1906. The nature of the claim of defendant in error is fully set up in plaintiff's first amended original petition, filed March 19, 1907, on which trial was had. The defendant answered by general demurrer, special demurrers, and general denial. The case was tried on December 14, 1908, and resulted in a verdict and judgment in favor of the defendant in error in the sum of \$200. The plaintiff in error paid the judgment of \$200; but, when the cost bill prepared by the clerk was presented, it declined to pay certain items therein, and filed its motion to retax. The court sustained the motion as to the witness fees claimed by the wife of defendant in error, Nannie Grimes, but overruled said motion as to the balance of the items of costs com-

plained of in said motion. Motion to retax was filed August 10, 1909, and by the court overruled on November 5, 1909, to which ruling the plaintiff in error excepted, and perfected this appeal.

The question presented by this appeal is: Were the three witnesses, Bessie Smith, Ettie Smith, and Lettie Smith, who claimed witness fees in the sum of \$17.12 each, and who were the minor daughters of Mrs. Nannie Grimes, wife of the plaintiff, and the stepdaughters of the plaintiff, G. W. Grimes, entitled to such fees? Plaintiff in error insists that, these witnesses being minors, they are not entitled to witness fees; that the earnings of a minor child, as a witness or otherwise, are the community property of its parents; that the parent alone is entitled to the earnings of such minor child; that a party to a suit is not entitled to witness fees for himself, and such party cannot tax witness fees for his minor child, who is called as a witness on the trial, because the fees so taxed would belong to the parent, and this would be in a sense allowing witness fees to the party himself. We do not concur in this contention. These witnesses were in no sense parties to the suit. They had been regularly summoned as witnesses, traveled the number of miles stated in their certificates, attended upon the trial, and testified in the case.

In the case of Gause v. Edminston, 35 Tex. 73, cited by appellant, it is held that a party to a suit, who testified either in his own behalf or on being called by his adversary, is not entitled to a witness fee. This decision places the ruling strictly on the ground that he is a party. None of the stepchildren of the defendant in error were in any sense parties or interested in the recovery in this case. The recovery became the community property of Grimes and his wife, to be disposed of as they saw fit, and even could have been bequeathed to strangers, to the entire exclusion of the children. The fact that the parent is entitled to the services of the child is no argument in favor of plaintiff in error. There is nothing in the record to show that the stepfather, who was plaintiff, claimed these fees; but the evidence is to the contrary, that the witnesses claimed them, and the witnesses had transferred them to a third party. Even if the parents had the right to collect the witness fees, there is no good reason advanced by plaintiff in error, and none occurs to us, why the children, wholly disinterested in the result of the suit from a legal standpoint, should not have their fees taxed and paid.

We conclude that the trial court correctly held that these witnesses were entitled to the fees, and the judgment is affirmed.

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

† Writ of error denied by Supreme Court.

JORDAN et al. v. MASSEY.

(Court of Civil Appeals of Texas. Jan. 26, 1911. Rehearing Denied March 2, 1911.)

1. COURTS (§ 163*)—JURISDICTION—JURISDICTION OF COUNTY COURT.

Notes presented to an administratrix for allowance having been rejected by her, an action was brought in the county court, and the petition alleged, after the usual allegations employed in suits on notes, that they were given for the purchase money of certain land, that a lien was reserved in the deed for the payment of the notes, and that the vendor's lien remained in full force and effect, and the prayer for relief was that plaintiff have judgment establishing his debt against the estate of deceased, and for general relief. *Held*, that the action was within the jurisdiction of the county court.

[Ed. Note.—For other cases, see Courts, Dec. Dig. § 163.*]

2. JUDGMENT (§ 252*)—PLEADING.

Under a prayer for general relief, plaintiff may recover whatever the facts alleged and proved will justify.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 441, 442; Dec. Dig. § 252.*]

3. PLEADING (§ 72*)—PRAYER FOR GENERAL RELIEF.

A prayer for general relief is a demand for such relief as the tribunal under the facts alleged has the power to grant, and will not be considered as asking the court to transcend its power, unless it clearly appears from the language used.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 143, 144; Dec. Dig. § 72.*]

4. PLEADING (§ 72*)—PRAYER FOR GENERAL RELIEF.

Under Sayles' Ann. Civ. St. 1897, art. 1191, requiring a petition to state the nature of the relief requested, a prayer for relief is an essential part of plaintiff's petition and determines the character of the order or decree which the court is called upon to render.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 143, 144; Dec. Dig. § 72.*]

5. ACTION (§ 53*)—SPLITTING CAUSE OF ACTION.

The right to recover a personal judgment for a debt secured by a lien on real estate and the right to have a foreclosure of the lien are severable, and may be made the subject-matter of two distinct causes of action.

[Ed. Note.—For other cases, see Action, Cent. Dig. §§ 549-623; Dec. Dig. § 53.*]

6. WITNESSES (§ 159*)—TRANSACTIONS WITH DECEASED PERSON.

In an action against an administratrix on notes given by her intestate, it was error to permit plaintiff to testify that he did not owe a note which was pleaded in offset but had paid it, the testimony concerning a transaction with a decedent.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 666-669; Dec. Dig. § 159.*]

7. TRIAL (§ 121*)—CONDUCT OF COUNSEL—EXAMINATION OF WITNESSES.

In an action on notes, wherein a note was pleaded in off-set, there was a question whether the testimony of plaintiff concerning the payment of the note urged as an off-set was the same as on a former trial in which the jury had failed to agree, and counsel for plaintiff asked several witnesses, who had acted as jurors on the former trial, if the jury had not stood five to one in favor of plaintiff on the issue of payment of the note in question. *Held*, that such action of the attorney was reversible error, even

though the court sustained objections to the questions and affirmative answers.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 294-300; Dec. Dig. § 121.*]

Appeal from Cooke County Court; C. R. Pearman, Judge.

Action by E. M. Massey against Mrs. Millie C. Jordan individually and as administratrix of the estate of J. N. Massey, deceased, and others. From a judgment in favor of plaintiff, defendants appeal. Reversed on rehearing.

Robt. E. Cofer, for appellants. Stuart & Bell, for appellee.

HODGES, J. The appellee was the owner and holder of two promissory notes for \$200 each, executed by J. N. Massey and wife in April, 1905, as part of the purchase price of a tract of land deeded by appellee to J. N. Massey. J. N. Massey died after having paid only \$100 on the notes. This was entered and allowed as a credit on one of them. On the 10th day of August, 1907, the appellant, who was the surviving wife of J. N. Massey, was appointed administratrix of his estate. She subsequently married M. G. Jordan, who is joined with her pro forma in this suit. In due course of time the notes were presented to the administratrix for allowance as a claim against the estate, and upon being rejected by her this suit was instituted in the county court of Cooke county. From a judgment in favor of the appellee establishing his claim this appeal is prosecuted by the administratrix.

The objection first urged against the judgment raises the question of the jurisdiction of the trial court over the subject-matter of this suit. In support of that contention it is insisted that this is an action to enforce a lien on real estate, of which the district court alone can take cognizance. The force of that objection can best be tested by examining the plaintiff's original petition for the purpose of ascertaining the cause of action there stated. After the allegations usually employed in suits on promissory notes, it says: "Plaintiff further represents that said notes were signed by J. N. Massey and M. C. Massey, then his wife, but now the wife of M. G. Jordan; were given as part of the purchase money for the following described tract of land situated in Cooke county: [The description is omitted.] That said property was theretofore, to wit, on the 26th day of April, 1905, conveyed by this plaintiff to John N. Massey by a deed in writing of that date, in consideration, among other things, of the two notes herein described; and in said deed a lien was reserved on the land to secure the payment of said notes. That each of said notes is due and unpaid." In another portion it contains these averments: "That said John N. Massey did not pay the said sum of money due plaintiff, or any part

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

thereof, during his lifetime, except the sum of \$100, and the balance thereof still remains due and unpaid; and that said vendor's lien now remains in full force and effect, and is a valid and subsisting lien against said land." It then closes with the following prayer for relief: "The premises considered, plaintiff prays the court for the citation of the defendant herein to answer this petition, and after a final hearing plaintiff have judgment establishing his debt as his legal and subsisting claim and indebtedness against the estate of John N. Massey, deceased, and all costs to be taxed and said claim be classified by the court for payment as the law directs. He prays further for all other orders and decrees herein as may be required by law, and for general relief in the premises." The notes referred to were attached as exhibits and made a part of the petition. They show upon their face that they were given for the purchase of land, and the retention of the vendor's lien. Appellants pleaded a general demurrer, a general denial, that the claim was barred by the lapse of more than 90 days between the time of its presentation to the administratrix and the institution of this suit, payment of the notes, and further insisted upon an offset amounting to \$300 evidenced by a certain promissory note executed by the appellee and delivered to J. N. Massey during his lifetime.

As decisive of the question of jurisdiction both parties referred to the following authorities: *Jenkins v. Cain* (Sup.) 12 S. W. 1114; *Investment Co. v. Jackman*, 77 Tex. 622, 14 S. W. 305; *George v. Ryon*, 94 Tex. 317, 60 S. W. 427. In the case last cited the decision was in answer to certified questions. That suit was one instituted against an administratrix by a creditor upon a rejected claim. The facts show that the claim amounted to a sum within the jurisdiction of the district court, and that it was secured by a deed of trust upon 179 acres of land. Upon its rejection by the administratrix the creditor instituted suit in the district court for the establishment of the claim as a money demand against the estate. The administratrix answered, denying the validity of the claim, and averring that the land upon which the deed of trust had been given was the homestead of herself and deceased husband at the time of its execution, and that the deed of trust was void; and asked affirmatively for a cancellation thereof and removal of the same as a cloud upon her title. The plaintiff demurred to that portion of the answer setting up the invalidity of the deed of trust, alleging that the district court was without jurisdiction to try the question of lien. The demurrer was overruled, and the issue of homestead was submitted to the jury along with that as to the validity of the claim. The questions propounded to the Supreme Court were: (1) Did the court below err in overruling the demurrer of the plaintiff to the answer of the administratrix that

the land described was the homestead of herself and husband at the time of the execution of the deed of trust, that the deed of trust was void, and praying for the cancellation thereof? (2) Did the district court have jurisdiction to try the question of the validity of the deed of trust as a lien upon the land in this suit? In the certificate the attention of the court was directed to the cases of *Jenkins v. Cain* and *Investment Co. v. Jackman*, above referred to. The Supreme Court held that the district court had jurisdiction to try the question of the validity of the deed of trust as a lien upon the land and did not err in overruling the demurrer based upon the ground that the trial court was without jurisdiction. Justice Williams in rendering the opinion (*George v. Ryon*, supra) thus epitomizes the propositions established by the decisions of the Supreme Court upon the questions involved: "(1) That when a claim for money against an estate, secured by lien on land of the estate, has been established by allowance by the administrator, and approval by the probate court, the lien must be enforced through that court, under the law regulating administrations. *Cannon v. McDaniel*, 48 Tex. 308; *Cunningham v. Taylor*, 20 Tex. 128. (2) When the claim for money has been allowed, and the lien denied by the administrator, suit cannot be maintained in the district court to establish the lien, inasmuch as the action of the administrator cannot affect it, and the claimant still has his complete remedy in the probate court for its enforcement. *Investment Co. v. Jackman*, 77 Tex. 622, 14 S. W. 305. (3) In such cases, however, the claimant may have some legal or equitable right connected with his claim for the adjudication of which the powers of the probate court are inadequate, and for the enforcement of which suit may be maintained in the district court. *Cannon v. McDaniel*, supra. (4) Where the claim for money has been rejected by the administrator, and the claimant forced to sue for its establishment, he may secure in the district court judgment not only for the debt, but for the establishment of his lien. *Jenkins v. Cain* (Sup.) 12 S. W. 1114; *Cunningham v. Taylor*, supra; *Perkins v. Sterne*, 23 Tex. 564, 76 Am. Dec. 72."

Looking both to the facts alleged and the prayer for relief, can we say that the existence of the lien set forth in the petition was one of the questions which the court below was called upon to settle? The plaintiff alleged facts which, if true, would authorize a judgment establishing the vendor's lien which his petition described; but did he ask that this be done? Not unless it can be said that the prayer for general relief had that effect. His prayer for special relief is confined exclusively to the establishment of the money demand and the classification of his claim. In considering this question upon the original submission of the case, we held that the prayer for general relief was sufficient

to put in issue the existence of the lien as well as the debt. Upon further investigation we have reached the conclusion that in so holding we gave too broad an interpretation to the prayer for general relief, and in that way were led into an erroneous disposition of the case. It is true that under a prayer for general relief the plaintiff may recover whatever the facts alleged and proved will justify. *Silberberg v. Pearson*, 75 Tex. 290, 12 S. W. 850; *Kempner v. Ivory*, 29 S. W. 538; *Trammell v. Watson*, 25 Tex. 216; *Garvin v. Hall*, 83 Tex. 301, 18 S. W. 731; *Zadick v. Schafer*, 77 Tex. 504, 14 S. W. 153. This manner of stating the rule is probably misleading when applied to a situation like the present. The scope of the prayer for general relief becomes a matter of construction, and this must be governed by the law as well as the facts pleaded. By this is meant not only the law which governs substantive rights, but the law of procedure as well—that which limits and defines the power and duties of the court. The pleader in such cases in effect says, "Give me such further relief as this tribunal, under the facts alleged, has the power to grant." He will not be considered as asking the court to transcend its power, unless that clearly appears from the language used. Usually doubtful constructions should be resolved in favor of the jurisdiction of the court. Evidently the court below construed appellee's petition as only seeking the establishment of the money demand; that was all that was passed upon in the judgment rendered. That indicated the limited construction which the plaintiff and the court placed upon the petition. 16 Ency. Plead. & Prac. 785. If we are correct in saying that the existence of the lien was not one of the questions which the trial court was called upon to decide, then it follows that it was no part of the subject-matter of the suit and should not be considered in determining whether or not the court had jurisdiction.

The mere fact that the claim for the establishment of which this suit was brought is described as being one secured by a lien upon real estate, does not necessarily have the effect of putting the existence of that lien in issue. The issues are made by the questions which the court must decide in order to grant or refuse the relief which the parties ask for. Facts stated in the petition which do not aid the court in passing upon those questions may be treated as surplusage. Article 1191, Sayles' Ann. Civ. St. 1897, provides that: "The petition shall set forth clearly the names of the parties and their residences, if known, with a full and clear statement of the cause of action and such other allegations pertinent to the cause as the plaintiff may deem necessary to sustain his suit, and without any distinction between suits at law and in equity, and shall also state the nature of the relief which he requests of the court." A prayer for relief is

therefore an essential part of the plaintiff's petition, and will determine the character of the order or decree which the court is called upon to render. *Hogan v. Kellum*, 13 Tex. 399; *City of Houston v. Emery*, 76 Tex. 282, 13 S. W. 264. It not only serves the purpose of indicating the desire of the petitioner as to some particular adjudication which he wishes the court to make, but of fixing a limit beyond which the court is not authorized to go in making its judicial award. *City of Houston v. Emery*, 76 Tex. 285, 13 S. W. 264. Therefore, in ascertaining what is the subject-matter in controversy in any given case, we must look, not only to the averments of fact set forth in the pleadings, but to the prayer for relief also. In failing to do this we may not be able to distinguish the facts which are material in forming the subject-matter of the suit, from those which are not.

There is another view which, if correct, might sustain the jurisdiction of the court below. It is now well settled that the right to recover a personal judgment for a debt secured by a lien on real estate and the right to have a foreclosure of that lien are severable, and may be made the subject-matter of two distinct causes of action. *McAlpin v. Burnett*, 19 Tex. 497; *Ball v. Hill*, 48 Tex. 641; *Kempner v. Comer*, 73 Tex. 202, 11 S. W. 194. The one is a legal proceeding, and the other equitable. 1 Pomeroy on Equity Jurisprudence, §§ 112, 171. Some courts have held in cases where the two are embraced in the same suit, and one is within the jurisdiction of the court and the other not, that the court may proceed to judgment over that which is within its jurisdiction and refuse to take cognizance of the other. *Starke v. Cotten et al.*, 115 N. C. 81, 20 S. E. 185; *Holden v. Warren*, 118 N. C. 328, 24 S. E. 770; *Phillips v. Sanders*, 80 S. W. 567; *Gentry v. Bowser*, 2 Tex. Civ. App. 388, 21 S. W. 569. We therefore think the court below did not err in assuming jurisdiction of this case.

In other assignments of error appellants complain of the action of the court in permitting the appellee, the plaintiff in the suit, to testify that he did not owe the note which was pleaded in offset, but had paid it. The objection is based upon the ground that it was testifying to a transaction with the decedent. We think the objection is well taken, and the testimony should have been excluded.

It appears that there was some controversy as to whether the testimony of the appellee concerning the payment and cancellation of the note urged as an offset was the same upon the trial from which this appeal is taken, as it was upon a former trial in which the jury had failed to agree. The bill of exception shows that some of the jurors upon the former trial testified as witnesses in the case upon that issue, and that while they were being interrogated counsel for appellee formulated his questions in a manner to bring out the fact that the jury upon that

trial stood 5 in favor of a verdict for the appellee and 1 for the appellant. The bill of exception is as follows: "Be it remembered that upon the trial of this cause, while the witness S. E. Long was testifying, the plaintiff's attorney R. R. Bell asked the witness if he was not one of the jurymen on the former trial and if that jury did not stand 5 to 1 in favor of plaintiff upon the issue that plaintiff had sworn only that he thought he had the \$300 note at home; that defendant objected to said question, but the witness answered same before he could be stopped; that the court excluded said answer. That said attorney for plaintiff, R. R. Bell, asked the next witness, Charles Dustan, the same question, if it was not true that the jury on the former trial stood 5 to 1 in favor of plaintiff's statement; that defendant excepted to this, but the witness answered before he could be stopped; that the court sustained the objection as before. That said attorney R. R. Bell for the plaintiff put the same question to the next witness, Pete Klepper, and asked him if it was not true that the jury on the former trial stood five to one in favor of the correctness of plaintiff's statement, and to this defendant objected and excepted, and the court sustained the exception, but after the witness had answered." We think the action of appellee's attorney in repeatedly putting a question in that form disclosed a purpose to get before the jury the opinion of the majority of the jurors upon the former trial; and he succeeded in doing so. The fact that the court sustained the objection did not remove from the minds of the jurors the impression made by the question and the answer. Practice of that sort, we think, should be discouraged, and we know of no better method of doing this than that of reversing judgments which it has probably assisted in obtaining.

The motion for rehearing is granted, and the judgment will be reversed and the cause remanded.

TEXAS SEATING CO. v. FARMERS' & MECHANICS' NAT. BANK.

(Court of Civil Appeals of Texas. Jan. 7, 1911.
On Motion for Rehearing, Feb. 4, 1911.)

1. BANKS AND BANKING (§ 148*)—PAYMENT ON FORGED INDORSEMENTS—PETITION.

Where the petition in an action against a bank for paying drafts on forged indorsements merely alleged that the forgeries were committed by a third person, there could be no recovery if the third person procured another to make the forgeries, or if the forgeries were committed by another.

[Ed. Note.—For other cases, see Banks and Banking, Cent. Dig. §§ 438-452; Dec. Dig. § 148.*]

2. BANKS AND BANKING (§ 148*)—INDORSEMENTS—PAYMENT—LIABILITY.

Where an employe had authority to indorse drafts in favor of his employer, and a bank pay-

ing a draft on the employe's blank indorsement had no notice that the employe was without authority to collect drafts properly indorsed, a payment by the bank to the employe of a draft indorsed by him in blank was valid as against the employer.

[Ed. Note.—For other cases, see Banks and Banking, Cent. Dig. §§ 438-452; Dec. Dig. § 148.*]

3. TRIAL (§ 237*)—INSTRUCTIONS—MISLEADING INSTRUCTIONS.

A charge that the burden of proof is on plaintiff to make out its case by preponderance of the evidence following instructions submitting the material issues on which a recovery is allowable is not misleading as leaving the jury to determine for themselves questions of law and fact controlling the issue of liability.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 548-551; Dec. Dig. § 237.*]

Appeal from District Court, Tarrant County; Jas. W. Swayne, Judge.

Action by the Texas Seating Company against the Farmers' & Mechanics' National Bank. From a judgment for defendant, plaintiff appeals. Affirmed.

Wray & Mayer, for appellant. Capps, Cantey, Hanger & Short, for appellee.

DUNKLIN, J. The Texas Seating Company, a corporation, sued the Farmers' & Mechanics' National Bank to recover the proceeds of certain drafts drawn in its favor. In its petition plaintiff alleged that its name had been forged to indorsements on the backs of the drafts by Theodore Eisenlohr, one of its employes; that upon such forged indorsements defendant had paid the proceeds of the drafts to Eisenlohr, who had appropriated the same to his own use, and deprived plaintiff of any benefit thereof. Judgment was in defendant's favor. In effect, the court charged the jury that, if they should find that the indorsements of plaintiff's name on the backs of the drafts were forged by Eisenlohr, then a verdict should be returned in plaintiff's favor for the amounts of those drafts; but that, if they should find that Eisenlohr had authority to so indorse the drafts, then a verdict should be returned in defendant's favor.

Eisenlohr testified substantially that he indorsed and collected the drafts, and that he was authorized by plaintiff to do so. Some of plaintiff's witnesses testified that the indorsements were in Eisenlohr's handwriting, while other witnesses for plaintiff testified that the indorsements were in the handwriting of an employe of plaintiff other than Eisenlohr. According to the rule as announced in the decisions cited by appellant, it would seem that defendant would be liable for the proceeds of the drafts, if Eisenlohr forged the indorsements thereon. See *Farmer v. People's Bank*, 100 Tenn. 187, 47 S. W. 234, and decisions there cited. Also *Buckley v. Second National Bank of Jersey City*, 35 N. J. Law, 400, 10 Am. Rep. 249.

Appellant insists that the charge given by

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep't Indexes

the court was erroneous because it failed to embody an instruction to the jury to return a verdict for the plaintiff if they should find that Eisenlohr procured the forgery of the indorsement of the drafts; and appellant complains further of the court's refusal to give a special instruction to that effect, which was requested by plaintiff. In its petition upon which the case was tried it was alleged that the forgeries charged were committed by Eisenlohr. The petition contained no allegation by way of an alternative plea that the alleged forgeries were committed by any other person at Eisenlohr's instance or by his procurement. In *Lewis v. Hatton*, 86 Tex. 535, 28 S. W. 50, Lewis was sued for damages for a wrongful seizure of goods. At the time of the seizure he was sheriff, and the seizure was by virtue of process of court. The plaintiff in that suit alleged that the seizure was made by the defendant, while the proof upon the trial was that the levy was made by a deputy sheriff acting under Lewis; and our Supreme Court held this to be a fatal variance between the pleadings and proof. Logical application of that decision to the question presented by the assignments now under discussion is obvious, and therefore the assignments referred to above are overruled. See, also, *Guffey v. Moseley*, 21 Tex. 408.

It is insisted, further, that, conceding for the sake of argument, authority in Eisenlohr to indorse the drafts was shown, still such authority was no authority to collect the proceeds of the drafts, and that there was error in the instruction to return a verdict for defendant upon the single predicate that Eisenlohr was authorized by plaintiff to indorse the drafts. The drafts were indorsed in blank, and were therefore transferrable by delivery. Plaintiff did not allege that defendant had notice that Eisenlohr was without authority to collect the drafts after they were rightfully indorsed, nor was there any proof to show notice to the bank of such lack of authority in Eisenlohr to collect the drafts after they were properly indorsed. The only grounds for a recovery alleged in the petition were that the indorsements of the drafts were forgeries committed by Eisenlohr, and that defendant was guilty of negligence in paying them to him without first ascertaining the genuineness of the title and the authority of Eisenlohr to collect them. If Eisenlohr was authorized to make the indorsements, the payment of them by the bank to a thief who had stolen them or to one who had found them after being lost would have constituted a good defense to the suit in the absence of notice to the bank. 5 Cyc. 550.

The instruction to return a verdict for the defendant in the event of a finding that Eisenlohr had authority to indorse the drafts is criticised as denying to plaintiff a recovery, even though the jury should believe that

the indorsements were forgeries committed by some one other than Eisenlohr. A sufficient answer to this is that there was no allegation in the petition that any one other than Eisenlohr committed the alleged forgeries, and hence proof of such fact would not warrant a recovery under the decisions above cited. Furthermore, when the charge is considered as a whole, the jury must have understood that the portion of the charge now under discussion was meant to be applicable in the event only of a finding that Eisenlohr indorsed the drafts.

The following instruction was given: "The burden of proof is on the plaintiff to make out its case by a preponderance of the evidence, and, if you do not believe by a preponderance of the evidence that the defendant is liable, then you will find for the defendant." This instruction is criticised as leaving the jury to determine for themselves questions of law and fact controlling the issue of liability vel non of the defendant. We must assume that the jury construed this instruction in connection with the instruction preceding it, wherein were submitted the material issues of fact upon which a recovery was allowed, and we do not think it probable that they interpreted it in the sense suggested in the criticism presented.

We are of the opinion that the evidence did not as a matter of law show negligence in appellee in paying the proceeds of the drafts to Eisenlohr, and we are of the opinion further that the evidence was sufficient to support the judgment.

The judgment is affirmed.

On Motion for Rehearing.

In addition to the facts noted in our opinion rendered upon the original disposition of the case, the record shows an agreement by appellant upon the trial in the court below, in effect, that in acquiring the drafts from Eisenlohr appellee's cashier acted in good faith. This strengthens our conclusions already announced, and the motion for rehearing is overruled.

CAPPS et ux. v. CITIZENS' NAT. BANK OF LONGVIEW et al.

(Court of Civil Appeals of Texas. Feb. 16, 1911.)

1. GARNISHMENT (§ 146*)—ANSWER OF GARNISHEE—AMENDMENT.

Where a garnishee answered stating the amount of money in its hands belonging to defendant city, but failed to state that it did not know of any person or persons having in his or their possession any effects belonging to the city, and such omission was found not willful, but an oversight of the garnishee, the court, on sustaining a motion to strike out the answer, properly permitted the garnishee to file a new answer curing the defect.

[Ed. Note.—For other cases, see *Garnishment*, Cent. Dig. § 274; Dec. Dig. § 146.*]

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

2. MUNICIPAL CORPORATIONS (§ 1031*)—MUNICIPAL FUNDS—LIABILITY TO GARNISHMENT.

Funds of a city deposited in a city depository in the manner provided by law cannot be subjected to the city's debts by process of garnishment.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. § 2201; Dec. Dig. § 1031.*]

3. MUNICIPAL CORPORATIONS (§ 886*)—MONEY APPLICABLE TO GENERAL EXPENSES—PAYMENT OF DEBTS.

Where money held by a city to pay current expenses was inadequate for the purpose, no part of the fund could be applied to the payment of a general creditor.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. § 1868; Dec. Dig. § 886.*]

Appeal from Gregg County Court; J. H. McHaney, Judge.

Action by M. F. Capps and wife against the Citizens' National Bank of Longview, garnishee, and others. Judgment in favor of the garnishee, and plaintiffs appeal. Affirmed.

F. B. Martin, for appellants. M. L. Cunningham, for appellees.

WILLSON, C. J. Appellants recovered a judgment against the city of Longview, and to enforce payment thereof sued out and had a writ of garnishment served on the Citizens' National Bank, the depository under the law of the funds of said city. The bank answered that as the depository of said funds it held for the city the sum of \$9,513.15. It failed to state in its answer that it did not know of any person or persons having in his or their possession any effects belonging to the city. Because of this omission, the trial court, on motion of appellants, struck out the answer, but permitted the garnishee to file another answer curing the defect in the one originally filed. This action of the trial court and his refusal, when the original answer was stricken out, to render a judgment by default in appellants' favor against the garnishee, are complained of as error. It appears from a recital in the judgment that it was shown to the satisfaction of the trial court that the omission in the original answer was not a willful one, but was due to an oversight on the part of the garnishee. In *Jemison v. Scarborough*, 56 Tex. 360, as here, the answer of the garnishee was defective. The court said: "This is not a case where the garnishee is in default for the want of an answer. But here the answer is defective, and, standing alone, would not authorize a judgment to be rendered discharging him; but, until excepted to, it is such an answer as ought to preclude the rendition of a judgment by default against him. In such a case the plaintiff ought to except to the answer; for then, if the same is insufficient, the garnishee would have the right to amend, so as to fully place his case before

the court." On the authority of that case, and *Bank v. Robertson*, 8 Tex. Civ. App. 150, 22 S. W. 100, 24 S. W. 659, and *Simon v. Ash*, 1 Tex. Civ. App. 202, 20 S. W. 719, we overrule the assignments presenting the contention.

At the instance of the garnishee, the city was made a party, and answered that the funds in the hands of the garnishee were in its custody as an agent of the law, and that same were not subject to the writ because needed by the city to pay its current expenses. It was shown that the city was incorporated under the general incorporation law (*Sayles' Ann. Civ. St. 1897*, cc. 1 to 10, tit. 18); that the funds held by the garnishee represented taxes collected by the city; that all except \$1,428.51 of same constituted special funds for special purposes provided as authorized by law (*Sayles' Ann. Civ. St. 1897*, art. 416); that the \$1,428.51, which alone was available for the purpose of paying the current expenses of the city, was not sufficient for that purpose; that the funds held by the garnishee represented taxes collected by the city; and that the garnishee had been duly selected as provided by law (sections 34 to 40, Act May 1, 1905 [*Gen. Laws 1905*, pp. 395 to 398]; Act April 5, 1907, amendatory section 34 thereof [*Gen. Laws 1907*, p. 132]) as the depository of said funds. Section 35 of said act 1905 requires a depository selected by a city in accordance with its provisions to enter into a bond payable to the city, conditioned for the "faithful performance of all duties and obligations devolving by law or ordinance upon said depository, and for the payment upon presentation of all checks drawn upon said depository by the city treasurer, whenever any funds shall be in said depository applicable to the payment of said check; and that all funds of the city shall be faithfully kept by said depository, and with the interest thereon according to law." Section 36 makes it the duty of the city treasurer, immediately after the city council has made an order approving the bond of the depository selected, to transfer to such depository all the funds in his hands belonging to the city, and thereafter as he receives such funds to deposit same with such depository. Section 37 declares that "no money belonging to the city shall be paid out of the city depository except upon checks of the city treasurer." Section 39 declares that "no check shall be drawn upon the city depository by the treasurer except upon a warrant signed by the mayor and attested by the secretary." The portions quoted of said act 1905 are consistent with those provisions of the law which give to the city council the management and control of the city finances and forbid the disbursement of any of the funds belonging to the city, except as ordered by the city council (*Sayles' Ann. Civ. St. 1897*, arts. 414,

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

415, 409), and are not consistent with a right in a creditor to subject such funds, while held in the depository, to the satisfaction of his debt by the process of garnishment. If such a right exists in favor of one creditor, it exists in favor of every creditor of a municipal corporation operating under the general law. If it exists and can be exercised by one, it can be exercised by each of such creditors. It is easy to foresee what would be some of the results of an exercise of such a right by creditors of a city. Its revenues, which should be devoted to the accomplishment of the purposes for which it exists as a municipality, would be wasted in the payment of court costs, etc., and it soon would be without means to carry on its governmental affairs. We are unwilling to concede that a right, the exercise of which might be fraught with such consequences to a city, exists in favor of its creditors. The provisions of the statutes referred to, and others exempting from forced sale property owned and held by cities for public purposes (Sayles' Ann. Civ. St. 1897, art. 2399) and empowering the city council "to appropriate money and provide for the payment of the debts and expenses of the city" (Sayles' Ann. Civ. St. 1897, art. 415), indicate the policy of the law to be against the existence of any such right in the creditor of a municipality. The funds of the city while in its depository should, we think, be regarded as in the hands of an agent of the law, and should be held to be disburseable by it only in the way designated by law. *Curtis v. Ford*, 78 Tex. 283, 14 S. W. 614, 10 L. R. A. 529; *Pace v. Smith*, 57 Tex. 538; *City of Sherman v. Smith*, 12 Tex. Civ. App. 580, 35 S. W. 296; *Brooks v. Cook*, 8 Mass. 246; 14 A. & E. Ency. Law, pp. 808, 817.

But, if we thought the bank as the depository of funds belonging to the city was liable to be summoned as a garnishee, we would be of the opinion, nevertheless, that the judgment should be affirmed. Appellants seem to concede that they were not entitled to have their judgment paid out of any of the funds held by the depository for special purposes designated by the city council. Their contention is that the \$1,426.51 held in the depository for general purposes of the city should have been applied to the payment of their judgment. As before stated, it was shown that this fund was the only fund available to the city out of which to pay its current expenses, and that it was wholly insufficient for that purpose. It seems to be the rule that such expenses are entitled to priority of payment as against other indebtedness of the city, out of its revenues, and that the excess of such revenues over and above such expenses alone can be looked to for the satisfaction of such other indebtedness. In *City of Sherman v. Shobe*, 94 Tex. 126, 58 S. W. 949, 86 Am. St. Rep. 825, Chief

Justice Gaines said: "It is only upon the surplus of the general revenues of a county (city) that remain after the current expenses have been paid that a general creditor has a claim, and to subject that surplus to the payment of his debt the writ of garnishment is not the remedy." And see *City of Sherman v. Smith*, 12 Tex. Civ. App. 580, 35 S. W. 296; *Gordon v. Thorp*, 53 S. W. 861; *City of Sherman v. Williams*, 84 Tex. 421, 19 S. W. 606, 31 Am. St. Rep. 66; *City of Denton v. Foster*, 37 S. W. 167.

The judgment is affirmed.

ROBERTS v. HOLLAND et al.[†]

(Court of Civil Appeals of Texas. Jan. 14, 1911. Rehearing Denied Feb. 11, 1911.)

1. EXECUTORS AND ADMINISTRATORS (§ 7*)—MANAGEMENT OF ESTATE—SALE OF PROPERTY—CAVEAT EMTOR.

The rule of caveat emptor applies to a purchaser from an independent executor, as well as from an ordinary executor.

[Ed. Note.—For other cases, see *Executors and Administrators*, Dec. Dig. § 7.*]

2. BROKERS (§ 61*)—COMPENSATION—PERFORMANCE OF CONTRACT.

Where a broker employed by executors to sell land procured a purchaser able and willing to take the property, but who refused to complete the contract on learning that there was a vendor's lien against the property, the broker, in the absence of fraud or misrepresentation as to the title by the executors, is not entitled to recover compensation.

[Ed. Note.—For other cases, see *Brokers*, Cent. Dig. §§ 77, 78, 92, 93; Dec. Dig. § 61.*]

Appeal from District Court, Parker County; J. W. Patterson, Judge.

Action by W. S. Roberts against G. A. Holland and another, as independent executors of the will of J. R. Coutts. From a judgment for defendants, plaintiff appeals. Affirmed.

F. O. McKinsey, for appellant. C. K. Bell and Hood & Shadle, for appellees.

SPEER, J. W. S. Roberts sued G. A. Holland and I. W. Stephens as independent executors of the will of J. R. Coutts, deceased, for commissions alleged to be due him as a land broker for procuring a purchaser for lands belonging to the estate of said Coutts. The district judge sustained general and special exceptions to the petition, and the plaintiff has appealed.

The following statement by appellant is sufficient for a determination of the appeal: "Plaintiff alleged that he was a real estate agent or broker; that defendants Holland and Stephens were the independent executors and trustees of the will of J. R. Coutts, deceased, and as such had full authority, power, and discretion to sell and contract to sell the lands of said estate at such price and on such terms as by them might be deemed proper, and to employ brokers to sell or procure brokers to sell or procure purchasers for

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

† Writ of error denied by Supreme Court.

said lands the same as if same belonged to them, being fully authorized thereunto by the terms of said will, and that said will was duly probated in the county court of Parker county; that they proposed to pay plaintiff a commission of 2 per cent. to sell or procure purchasers for 72,094 acres of land situated in Bailey county, Tex., which land belonged to the estate of said J. R. Coutts, deceased, and which said executors had full authority to sell as aforesaid; that, relying upon the offer of defendants, plaintiff showed said land to several parties, and among them one J. W. Wile, who went with plaintiff to see the defendants; that it was agreed by and between Wile and defendants that they would sell Wile, or Wile and his associates, said land at \$2 per acre, one-fourth cash to be paid on or before June 1, 1906, and the balance in 10 equal annual installments, for which notes were to be executed at 6 per cent. interest secured by vendor's lien. It was further agreed that defendants would sell said land to Wile or to him and associates and give him until June 1st to make the cash payment of one-fourth if before that time and before the land should be sold to some other party he or they would deposit in the Citizens' National Bank of Weatherford \$10,000 in cash, which sum was to be applied as a part of the first cash payment, if on or before June 1st the purchasers paid the balance of the one-fourth cash payment, in which event the defendants were to execute deed of conveyance, and the purchasers were to execute their notes aforesaid; but, in the event the purchasers failed to make balance of the cash payment within the time specified, the \$10,000 so to be deposited was to be forfeited to the defendants. Plaintiff alleged that thereafter, on February 9, 1906, and before the defendants had sold said land to any other person, the said Wile and his associates Nostrum and Boyer accepted the terms of said proposed sale, and were then and there able, ready, and willing and offered to accept the terms of said sale and to carry out the same and to purchase said land in accordance therewith and to perform the stipulations to be performed by them, and to take and pay for the land upon the terms proposed and offered then and there to enter into contract for the purchase of said land as aforesaid, said offer having never been withdrawn; that said Wile and Nostrum, acting for themselves and for their associate Boyer, were able, ready, and willing and offered to make said deposit of money upon the terms and stipulations aforesaid, and to buy and pay for said land on the terms agreed upon, and they were able, ready, and willing to take and pay for the same upon the terms offered by the defendants. But after reaching Weatherford for the purpose of closing up said sale upon the terms proposed and agreed upon, having with them funds with which to make said deposit, and being ready, able, and willing they proposed to make the deposit afore-

said and purchase the lands upon the terms agreed upon, and were ready, able, and willing and offered to enter into contract for the purchase of said land as aforesaid, when for the first time it was made known to them and they discovered that there was a vendor's lien against said land in favor of Leon H. Blum Land Company to the amount of \$51,000, they and plaintiff being ignorant up to that time of the existence of such lien, and by reason thereof the defendants were unable to make a title to said land, being unable or unwilling to free said land from said incumbrance, by reason whereof and without any fault of plaintiff said sale failed and was not consummated. Plaintiff avers that the total value of said land was \$144,188, and that his commissions would have amounted to \$2,883.76. Plaintiff avers that the estate of said J. R. Coutts, deceased, is solvent, free from debt, and that the defendants as such independent executors have in their hands ample property and funds belonging to said estate and liable therefor to discharge and pay plaintiff's claim, and that same is due and wholly unpaid. He prays for judgment for his said debt and damages and for costs and general relief."

It is well settled that the rule of caveat emptor applies to a purchaser from an executor. *Lynch v. Baxter*, 4 Tex. 431, 51 Am. Dec. 735; *Medlin v. Wilkins*, 60 Tex. 409; *Dallas County v. Land & Cattle Co.*, 95 Tex. 200, 66 S. W. 294. No reason is apparent why the same rule does not apply to independent executors as to ordinary executors or administrators. We think it should. An independent executor merely has the power to do without an order of the county court every act which an ordinary executor administering an estate under the control of the court could do with such order. *Dwyer v. Kalteyer*, 68 Tex. 554, 5 S. W. 75; *Ellis v. Howard Smith Co.*, 35 Tex. Civ. App. 566, 80 S. W. 633. And, in the absence of an allegation of fraud or misrepresentation as to the title by the executors, we think no cause of action is shown against them. *Altgelt v. Mernitz*, 37 Tex. Civ. App. 397, 83 S. W. 891. There is nothing in the petition to indicate that appellees undertook to do more than to sell such title as the estate owned, and appellant's customer declined to buy this. It is apparent, then, that appellant has not procured a purchaser at all. What we have said is upon the theory that the petition really points out a defect in the title, but we are inclined to hold that it does not. It shows that the supposed defect in the title was no more than an incumbrance in an amount very much less than the unpaid purchase money in the proposed purchase. However that may be, and irrespective of the other grounds urged by appellees in support of the judgment, we are content to rest our decision on the ground first discussed.

All assignments are overruled, and the judgment is affirmed.

TEXAS CO. v. GARRETT.

(Court of Civil Appeals of Texas. Feb. 7, 1911.)

1. APPEAL AND ERROR (§ 742*)—ASSIGNMENTS OF ERROR—PROPOSITIONS ACCOMPANYING ASSIGNMENT.

An assignment of error in admitting the testimony of certain witnesses, not followed by any proposition or statement, except the bill of exception reserved to the admission of the testimony, which is insufficient to show that the testimony was harmful, or even that it was not admissible, will not be considered on appeal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3000; Dec. Dig. § 742.*]

2. MASTER AND SERVANT (§ 217*)—INJURIES TO SERVANT—ASSUMPTION OF RISK—KNOWLEDGE OF DEFECT.

Where a servant knew of knots in a lever before it broke, and of the effect of the knots as rendering the lever weak and insufficient, he assumed the risk of injury therefrom by continuing in the service.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 574-600; Dec. Dig. § 217.*]

3. MASTER AND SERVANT (§ 295*)—INJURIES TO SERVANT—ACTION—INSTRUCTIONS—ASSUMPTION OF RISK.

A charge that, if plaintiff's injuries were caused by the breaking of a lever, and the lever was defective and insufficient, yet the jury should find for defendant on that issue, because it was shown by the uncontradicted evidence that, if the lever was defective and insufficient, such defect and insufficiency were known to plaintiff, and, so knowing them, he continued in the service of defendant, and assumed the risk incident to its use, could not have been misunderstood as instructing that, if the breaking of the lever caused the injury, the jury should find for defendant, regardless of the other grounds of negligence relied on.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 1168-1179; Dec. Dig. § 295.*]

4. MASTER AND SERVANT (§ 217*)—INJURIES TO SERVANT—ASSUMPTION OF RISK—KNOWLEDGE OF DANGER.

To charge an employé with knowledge of a defective implement and the assumption of risk in using it, it must be shown that he knew of the defect, or, in the exercise of ordinary care in the discharge of his duties, must necessarily have acquired the knowledge, and not that in the exercise of such care he should have discovered the defect.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 574-600; Dec. Dig. § 217.*]

Appeal from District Court, Jefferson County; L. B. Hightower, Jr., Judge.

Action by W. W. Garrett against the Texas Company. From a judgment for plaintiff, defendant appeals. Reversed and remanded.

Jas. L. Autry, H. M. Whitaker, and Robt. A. John, for appellant. Blain & Howth and M. G. Adams, for appellee.

McMEANS, J. Appellee Garrett, plaintiff in the court below, sued the appellant, the Texas Company, for damages sustained by him while in the service of appellant in the capacity of pipe fitter, while engaged with others in laying a pipe line.

It appears that appellee was a member of a crew engaged in laying for appellant a lateral pipe line from appellant's refinery at Port Arthur to one of its tanks; the work of the crew consisting of screwing joints of pipe together, so as to form a continuous line of pipe that was to be laid, and then lowering the jointed pipes into a trench or ditch. Before being lowered into the ditch, the pipe was sustained over the ditch by a "growler board" and a "jack." The growler board consisted of a piece of scantling six or eight feet long, which was placed across the ditch, and the immediate end of the pipe was sustained by a jack. Before the pipe could be lowered, it was necessary to remove both the board and the jack. The ditch was about two feet wide and three feet deep. In order to relieve the board and jack of the weight of the pipe, so that both might be withdrawn, the pipe had to be pryed up by the use of a lever operated by a part of the crew. On the occasion of his injury, it was the appellee's duty to remove the growler board, and the duty of Jack Walsh, another member of the crew, to remove the jack. Just before appellee was hurt, a part of the crew had, by means of the lever, which consisted of a 4x4 scantling, raised the pipe above the board and the jack, and appellee was in the act of removing the board, when the lever broke, precipitating the pipe into the ditch, striking the growler board which had been partially withdrawn, causing one end of it to fly up with considerable force, striking and breaking appellee's jaw and inflicting the injuries for which he sued. It was shown that it was the duty of Walsh to not remove the jack until the board was fully withdrawn, but that on this occasion he removed the jack before appellee could withdraw the board. Appellee in his petition predicated recovery upon the appellant's negligence in the following particulars: (1) That the lever with which the pipe was being lifted was defective, being knotty, unsound, unseasoned, and unsafe, causing the same to break, and that the furnishing of such scantling by appellant as a lever was negligence; (2) the carelessness and negligence of appellant's foreman, Jim Donohue, who had charge and superintendence of the work, with authority from appellant to employ and discharge appellee and his fellow workmen, and with authority to control and direct them in their work, in that said foreman permitted and ordered the use of the lever, knowing that the same was defective and unsafe; and (3) that appellant was further negligent in employing Jack Walsh and in retaining him in its employment, for the reason that he was "inexperienced and incompetent for the work to which he was assigned, to wit, removing the jack from under the pipe during the process of lowering the

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

pipe into the ditch," in that, by reason of an injury to his head, his mind had been weakened, his nervous system disorganized; that he was naturally thoughtless and erratic, and habitually reckless in removing the jack from underneath the pipe before its removal was known to the other employes; and that on the occasion in question the jack was untimely removed by him, and that this was an act of negligence due to Walsh's "incompetency, carelessness, recklessness, and mental weakness aforesaid." Each of these issues was submitted by the court in the charge to the jury. Defendant answered by general denial and pleas of assumed risk and contributory negligence, and further pleaded that, if appellee's injuries were caused by the negligence of Donohue or Walsh, that they were the fellow servants of appellee. The case was tried with a jury, and resulted in a verdict and judgment for appellee, from which appellant prosecutes this appeal.

Appellant's second assignment of error complains of the action of the court in admitting the testimony of certain witnesses. This assignment is not followed by any proposition or by any statement, except the bill of exception reserved to the action of the court in admitting the testimony, and this, by itself, without other explanation, is not sufficient to show that the testimony was harmful, or even that it was not admissible. The assignment is not presented in the manner required by the rules, and appellee's objection to a consideration of it by this court must be sustained.

The court in its general charge submitted to the jury the issue of assumed risk arising from appellee's knowledge of the defectiveness and insufficiency of the lever. The appellant requested the court to charge the jury, substantially, that, if they should conclude that plaintiff's injuries were caused by the breaking of the lever, and that the lever was defective and insufficient, yet they should find for appellant on that issue, because it was shown by the uncontradicted evidence that, if the lever was in fact defective and insufficient, such defects and insufficiency were known to appellee, and so knowing them he continued in the service of appellant, and thereby assumed the risks incident to the use of the lever. On this issue the testimony showed that the lever had been used the entire morning before appellee's injuries; that it had broken once; but as to whether at that time appellee was present, the evidence was conflicting. He did not deny that he knew of the defectiveness and insufficiency of the lever, further than to say that he made no inspection of it. There were some 8 or 12 knots in the lever, which weakened it. These knots could be plainly seen. Before appellee's suit was filed, he went to appellant's attorney, Robert A. John, and voluntarily made a written statement detailing how the accident occur-

red. Among other things he said that the lever was a 4x4 scantling of grained pine and had a knot in it, and that in raising the pipe with this lever the end of the scantling broke, causing the pipe to fall on the growler board, one end of which flew up, striking him on the jaw; that the scantling had already broken once. "I noted the knots on the scantling before it broke;" that he made a remark to Jim Donohue: "Jim, that's no good. We had better get another lever." This statement was introduced in evidence. On being recalled as a witness in his own behalf, appellee testified: "I remember making a statement to Mr. John in Houston. When I detailed to him how the thing occurred, I was telling it to him the way I understood it occurred after the accident—the knowledge I gained after I got hurt. As to whether I told Mr. John that I, before the accident, warned Mr. Donohue about the defective lever, or told him that he was warned about the defective lever—I had reference to him; that Donohue had been warned about the lever. I did not know at the time of the accident that Donohue had been warned. I found that out some time after that; I can't say just how long it was. I just gave him this statement; merely information I gained from the witnesses how this accident happened, and what I learned from the witnesses." This testimony may amount to a denial of so much of the written statement which says that he told Donohue that the lever "was no good," and "we had better get another lever," but in no wise contradicted that part of the statement in which he said "I noted the knots on the scantling before it broke." He says, in his explanation of the statement, that he was only undertaking to detail the information he gained after the accident. Certainly he did not in this way gain the information that he had observed the knots before the lever broke, and it is hard to see that he in this way gained the information that he had said to Donohue, after he observed the knots, "Jim, that's no good; we had better get another lever." The uncontradicted evidence in the record shows that the knots in the lever had the effect of weakening the same, and that the lever in fact broke at one of the knots, and that appellee knew of the knots in the lever before it broke, and of the effect of the knots as rendering it weak and insufficient for the use to which it was applied. Knowing the defects as he did he must necessarily have known of the danger incurred by its use. We think, therefore, that the special charge should have been given. The charge should be so worded, however, as to make it clear to the jury that the breaking of the lever must have been the sole cause of appellee's injury, for otherwise the issue of liability arising from Walsh's incompetency would be ignored. We think that the jury could not have misunderstood the charge as

instructing them that if the breaking of the lever caused the injury to find for defendant, regardless of the other grounds of negligence relied upon by plaintiff to sustain a recovery.

The reasons stated in the special charge why the assumption of such a risk precluded a recovery were unnecessary and immaterial. We think, however, that to charge an employé with knowledge of a defective implement and the assumption of risks in using it, the testimony should show that the employé knew of the defects, or that, in the exercise of ordinary care in the discharge of his duties, he must necessarily have acquired the knowledge, and not that in the exercise of such care he could have discovered the defects, as stated in the charge (*Railway v. Hannig*, 91 Tex. 350, 43 S. W. 508; *Railway v. Warner*, 22 Tex. Civ. App. 167, 54 S. W. 1067; *Railway v. Cox*, 55 S. W. 356; *Bookrum v. Railway*, 57 S. W. 920); but, in view of the testimony before set out, this inaccuracy in this charge would have been harmless.

We have examined the other assignments presented by appellant in its brief, and have concluded that no reversible errors are pointed out in any of them.

For the error indicated the judgment of the court below is reversed, and the cause remanded.

Reversed and remanded.

MYERS et ux. v. TEXAS & P. RY. CO.

(Court of Civil Appeals of Texas. Feb. 2, 1911.
Rehearing Denied March 2, 1911.)

1. MASTER AND SERVANT (§ 279*)—EVIDENCE—SUFFICIENCY.

Evidence held not to show that the foreman of a bridge crew was negligent in directing the crew to remove a hand car on the track in front of an approaching train.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. §§ 973-980; Dec. Dig. § 279.*]

2. MASTER AND SERVANT (§ 206*)—ASSUMPTION OF RISK—INCIDENTAL DANGERS.

A servant assumes the risks ordinarily incident to the particular service, and assumes that he has capacity to understand the nature and extent of the service and the requisite ability to perform it.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. § 550; Dec. Dig. § 206.*]

3. MASTER AND SERVANT (§ 149*)—INJURIES TO SERVANT—ASSUMPTION OF RISK.

The foreman of a bridge crew in directing the crew to remove a hand car from the track in front of an approaching train had a right to assume that a member of the crew knew and appreciated the ordinarily incident dangers and that in performing his duties he would conduct himself as an ordinarily prudent person would.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. §§ 291-295; Dec. Dig. § 149.*]

4. MASTER AND SERVANT (§ 286*)—INJURIES TO SERVANT—EVIDENCE—SUFFICIENCY.

In an action for the death of a member of a bridge crew who was struck by a locomotive while attempting to remove a hand car from the track in front of an approaching train, held a question for the jury whether those in charge of the train were negligent.

[Ed. Note.—For other cases, see *Master and Servant*, Dec. Dig. § 286.*]

Appeal from District Court, Harrison County; W. C. Buford, Judge.

Action by W. L. Myers and wife against the Texas & Pacific Railway Company. From a judgment in favor of defendant, plaintiffs appeal. Reversed.

S. P. Jones, for appellants. F. H. Prendergast, for appellee.

WILLSON, C. J. The first trial of this case resulted in a verdict and judgment in favor of appellants, plaintiffs below, the father and mother of Charles Myers, who, while in appellee's service as a bridge workman, was killed by one of its trains. The ground upon which the recovery was had was that deceased, with other bridge men, was required by their foreman to assist in removing from the track a hand car on which they were riding, at a time when an approaching train was so near as not to give sufficient time to enable them safely to remove it; and that deceased in attempting to reach a place where he would be safe from an impending collision of the train and the hand car was struck by the former and killed. An appeal from that judgment having been prosecuted to this court by appellee, we reversed same because we were of the opinion that the evidence was not sufficient to support a finding that the foreman was guilty of negligence in the particular charged. 125 S. W. 49. On the trial resulting in the judgment from which this appeal is prosecuted, a recovery was sought on the same ground of negligence, and also on the ground that the persons in charge of the train were guilty of negligence in that, having discovered the hand car on the track and the perilous position of the bridge men, they failed to stop the train or to slacken its speed. The testimony on the last trial in all material respects was the same as it was on the first trial. The facts it established were stated in the opinion of this court on the former appeal. See 125 S. W. 49. They will not be restated here.

On the last trial the court peremptorily instructed the jury to find in favor of appellee, on the theory, it is assumed, that the testimony did not make an issue as to negligence on the part of either the bridge foreman or the persons in charge of the freight train. The action of the trial court in this particular is vigorously attacked as erroneous. So far as an issue as to negligence on the part of the foreman as charged in the

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

petition is concerned, we still entertain the opinion expressed on the former appeal. No complaint was made because of the conduct of the foreman in having deceased and the other bridge men to run the hand car into the cut around a curve in the track, without first taking the precaution to ascertain that the train he expected to meet was not so near the curve as to render such an attempt dangerous, or if it was so near, without taking the precaution to have same flagged, and so, or otherwise, prevent a collision between it and the hand car as the latter passed through the cut. The allegation in the petition was that he was negligent in having the bridge men to attempt to remove the hand car from the track after he discovered the train approaching. The foreman having testified that when he discovered the train it was only three or four telegraph poles (shown to be 176 feet apart) away and approaching at the rate of 18 or 20 miles an hour, it is argued that the jury by calculation might have found that less than 18 seconds intervened between the time the train was discovered and the time the collision occurred, and reasonably might have concluded that in having his men to attempt in so short a time to remove the hand car the foreman was guilty of negligence. Looking at the conduct of the foreman in the light alone of that testimony, we would agree that an issue as to negligence on his part was presented. For, clearly, reasonable minds might have differed as to whether, under such circumstances, the danger appeared to be so imminent or not as to make it negligence in the foreman to have had his men to attempt to remove the hand car. But, short as the time, as shown by this testimony, may have been, other testimony established indisputably that it was sufficient to have demanded that the foreman, in the discharge of his duty to protect the approaching train, should have made the attempt; for it appeared that an attempt to remove the car was made, and that it was unsuccessful only because the men lifting one end of same dropped it before they got the car clear of the track. And it further indisputably appeared that even after such failure the foreman and Rogan, one of his men, made another attempt, and, again failing to remove the hand car from the track, still had time to step across the track to a safe place on the north side thereof. There is no reason, in the evidence in the record, to doubt that, had deceased continued to assist the foreman in the effort he was making to remove the hand car until the time when the foreman directed Rogan to "let it go," instead of leaving it and running east along the south side of the track, he still would have had time sufficient to go to the north side of the track where he would have been safe from the effects of the collision which occurred. Reasonably it appeared, therefore, that he lost his life, not because he obeyed an order of

the foreman, but because he did not obey same. Keeping in mind the duty which appellants do not question the foreman owed to protect the approaching train by removing the hand car from the track, if it could be removed without too great a risk to himself and his men, it is clear, we think, that he was not guilty of negligence, unless it should be said that he should have anticipated that deceased might become so confused by the situation he was in as to act as he should not act, and so incur avoidable risks. In accepting the service he was engaged in performing it may be said of deceased as was said of the plaintiff in *I. & G. N. R. R. Co. v. Hester*, 64 Tex. 403, that he "not only assumed the risks ordinarily incident to the particular service, but he also assumed that he had capacity to understand the nature and extent of the service, and the requisite ability to perform it." The foreman, we think, had a right to assume, in the absence of anything indicating the truth to be to the contrary, that deceased knew and appreciated the dangers ordinarily incident to the service he had undertaken to perform, and that in performing those duties he would conduct himself as an ordinarily prudent person under the same circumstances would conduct himself. The case cited above was very much like this one. There a section hand was injured as the result of a collision between a train and a hand car which he and other section men were endeavoring to remove from the track as the train approached. "It appears from the evidence," said the court in that case, "that Wilson (the foreman) had been directed by his superior to repair a certain portion of the track on his section, the day appellee received the injuries, and that the accident occurred while the gang were on their way to the designated point. The evidence shows that the morning was foggy and dark, and that the accident happened about 8 o'clock, some three or four miles east of Duval, the place from which they started. That they knew the west-bound passenger train was behind the schedule time, and that they were likely to meet it at any time. They were moving at the rate of about two miles per hour, halting frequently to look and listen for the expected train. At the point at which the collision occurred the track was straight and level, and it appears that the engineer had the headlight of the engine burning. According to the evidence of appellee, the train when discovered by them was from 50 to 150 yards distant, and that they immediately stopped the hand car, and Wilson directed them to take it from the track; that they had turned it across the track so as to remove it, when he noticed that the engine was so near, that he attempted to get out of the way of danger, but the engine struck the hand car, throwing it upon that side of the track where he was, striking him with the 'jigger stick' of the hand car, by which his

thigh was broken, and his head and eye were severely injured. It was the admitted duty of the 'section gang' to remove the hand car from the track, if that could be done without unnecessarily exposing themselves to danger. The gist of the complaint seems to be that Wilson's negligence consists in his failure to order the men to get out of the way and protect themselves, as soon the occasion required him to do so. Upon this point appellee testified that Wilson ordered them to take the car from the track, and that if he afterwards directed them to let the car go, and to get out of the way, then he did not hear the order. He was on the east while the others were on the west side of the track, and that he was confused by the situation. He further states that the other hands told him afterward that Wilson did give the order for the men to get out of the way, and they obeyed the order and escaped injury." After referring to other testimony to the effect that Hester "was short-sighted and partly deaf, and seemed stupid, having to be told two or three times often about his work," and quoting a witness as testifying that "we were all trying to get the hand car off the track, and when we were ordered to get out of the way, we all, except plaintiff, got off on the west side of the track out of the way. We were equally exposed with plaintiff, but had time to get out of the way after we were ordered to"—the court said: "There is no culpable negligence upon the part of Wilson shown by the evidence. On the contrary, he seems to have discharged his duty faithfully and with due care, considering the situation; while appellee, it appears, had accepted employment in a dangerous service, and one in which he had but little experience, and for which he was unfit." So far as the conduct of the foreman here, with reference to the attempt made to remove the hand car, is concerned, we see no reason why it should be held to be any less free from negligence than was the conduct of the foreman in the Hester Case.

We think the testimony in the record raised an issue as to negligence on the part of the persons in charge of the train which should have been submitted to the jury, and that the trial court, therefore, erred in peremptorily instructing them to find for appellee. Rogan, one of the men with the hand car, testified that when he first saw the train it was about a quarter of a mile away and moving at the rate of about 20 miles an hour. Waller, the foreman of the bridge gang, testified that when he first discovered the train it was 3 or 4 telegraph poles, or about 250 yards, away and was moving at the rate of 18 to 20 miles an hour. He further testified that when he and Rogan, who was assisting him in a further attempt to remove the hand car from the track, desisted from such attempt the train was only about 90

feet away and was moving at the rate of from 18 to 20 miles an hour. It thus appeared that the speed of the train had not been slackened between the time it was discovered by the men in charge of the hand car and the time it reached a point 90 feet therefrom. The jury might have inferred from the fact that Rogan saw the train approaching at a distance of a quarter of a mile that the men in charge of the train, in the discharge of their duty to keep a lookout for it, saw the hand car and the situation of the bridge men with reference to it in time by the use of proper care to have avoided the accident which occurred; and they might have inferred, from the testimony showing that the speed of the train had not been slackened, that the men in charge thereof, after discovering the hand car and the perilous position of those in charge of it, had not used due care to avoid the accident. *Ry. Co. v. McVey*, 81 S. W. 991.

The judgment is reversed and the cause will be remanded for a new trial.

OSBORNE v. TEXAS TRACTION CO.

(Court of Civil Appeals of Texas. Feb. 11, 1911. Rehearing Denied Feb. 25, 1911.)

1. CARRIERS (§ 347*)—CONTRIBUTORY NEGLIGENCE—BOARDING CAR.

It is not negligence per se in one desiring to get on board a car with a view of taking passage thereon to attempt to board the car while it is moving.

[Ed. Note.—For other cases, see *Carriers*, Cent. Dig. §§ 1346-1397; Dec. Dig. § 347.*]

2. CARRIERS (§ 321*)—BOARDING CAR—MISLEADING INSTRUCTIONS.

In an action for injuries to a passenger while attempting to board a car, a charge that if those in charge of the car were guilty of negligence, there should be a finding for defendant, is misleading.

[Ed. Note.—For other cases, see *Carriers*, Cent. Dig. § 1326; Dec. Dig. § 321.*]

Appeal from District Court, Dallas County; Kenneth Foree, Judge.

Action by George F. Osborne against the Texas Traction Company. From a judgment for defendant, plaintiff appeals. Reversed, and cause remanded.

Lewis T. Carpenter and W. R. Bishop, for appellant. T. B. Williams and M. B. Templeton, for appellee.

BOOKHOUT, J. Appellant, plaintiff in the court below, instituted suit against the Texas Traction Company, appellee, for damages for personal injuries received at Plano, Tex., on November 1, 1908. Plaintiff alleged in his petition that on said date he went to the passenger station of defendant at the town of Plano, intending to become and was a passenger on one of defendant's passenger cars from Plano to Dallas; that, when said car arrived at the station of Plano on its way to

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

Dallas, it stopped, and the plaintiff, having reached said station prior to the arrival of said car, proceeded with reasonable dispatch, care, and diligence to board said car, but the defendant, its servants and agents in charge of and operating said car, negligently failed to stop same a sufficient length of time to permit or enable plaintiff to board same in safety, and negligently stopped said car at said place an unreasonably short time, and negligently started same again before the plaintiff could board said car, and as plaintiff was in the act of boarding said car, and had his hand on the bar used for the purpose of assisting passengers boarding said car, the servants and agents of defendant in charge of said car and operating the same negligently started the same with a sudden jerk and at a high rate of speed, whereby plaintiff in attempting to board said car was thrown with great violence to the ground, and thereby was injured as is fully set out in his petition; that the agents and servants in charge of said car knew, and by the exercise of reasonable diligence could and would have known, that at the time the car was started plaintiff had not yet boarded same, and had not had reasonable opportunity so to do, and that he was in the act of boarding same, and they negligently and without regard to the safety of plaintiff started the car with a sudden jerk, and at a high rate of speed, and permitted same to be so started before plaintiff had boarded, and before he had had time to board the car, and while he was in the act of so doing, and the car was thus negligently put in motion, and the plaintiff in attempting to board the car, and on account of and by reason of the car being so put in motion, and the motion of the car, was thrown and caused to fall violently to the ground, and was thus injured. The defendant answered by general demurrer and general denial, and specially pleaded that, if the plaintiff was injured, the same was the result of his own careless, negligent, and reckless conduct; that he undertook to board one of the cars of the defendant while the same was in motion, and after it had stopped at Plano station for the usual and reasonable time; and that, after same started and was under headway, plaintiff, without any notice or notification on the part of defendant, its agent or employes, undertook to catch and board the moving car, and in doing so fell. The case was tried on February 4, 1910, and resulted in a verdict and judgment for the defendant. Appellant filed his motion for new trial, which was overruled by the court, and he gave notice of appeal, and in due time perfected his appeal.

Upon the trial the court, at the request of defendant, gave four special charges, reading as follows:

"You are instructed that, if the plaintiff in this case waited until after the car of defendant started from the station before undertaking to actually get aboard the car, he

would not be entitled to recover, and your verdict should be for the defendant."

"If you believe in this case that the car of the defendant stopped the usual and a reasonable length of time for passengers to alight therefrom and for persons intending to board the car to get on the same, and that the plaintiff did not attempt to board the same until after it started, then you will find for the defendant."

"If you believe from the evidence in this case that the plaintiff was not in the act of getting upon the steps of the car at the time it started, but undertook to board the car after it did start, then you will find for the defendant."

"If you believe from the evidence in this case that the defendant's car stopped the usual and a reasonable time at Plano, and that, after it started from the station, plaintiff undertook by walking, trotting, or running after the same to get aboard the same, and in the effort failed, then in this case you will find for the defendant."

The giving of these charges is complained of in four separate assignments of error, which are grouped.

The propositions presented are (1) that a passenger in attempting to board a car at a station after the car has started is not guilty of negligence per se; (2) that it is a question of fact for the jury whether the facts in evidence constitute contributory negligence, and the giving of a charge assuming that such facts, if proved, will amount to contributory negligence, is error.

As to how the appellant sustained the injury, the witness Richardson, who was with appellant at the time, testified: "We left Mr. Roark's house and got to the depot something like four minutes before the arrival of the car, and we were standing right at the depot when the car came up. There were quite a number of people getting on and off, and Mr. Osborne made an effort to get on the car. He had me by the left arm, and pushed me through the crowd to get to the car, and, just as I boarded the bottom steps of the car, it gave a sudden start, just as I went up the steps, and Mr. Osborne, I believe—I am not sure—but I think he, had his arm to the handle next to the body of the car. He was right behind me, pushing up the car with one hand, had hold of the handle with the other one, and, just as I was going up the steps, the car started—just as I thought Mr. Osborne got it—and I looked back just in time to see him hit the ground, and the car ran about twelve, probably a car and a half length, maybe not quite so far, little over a car and a half length, and then stopped, and Mr. Osborne came up and got on the car, and walked right by me through the car. I was still in the vestibule watching him, and he walked in the car and sat down. I saw his face skinned and his hand and chin, and it seemed to me I saw a place on his wrist. I stepped up, and I thought he

had stepped up, and, when I got on the first step, I stepped up on the second to get on. He turned me loose. I was going up the steps when I felt his hand turn me loose. I had not yet reached the platform. The car started off so quick, and somehow he got overbalanced and lost control of himself and fell, and just as I looked around I saw him fall and hit the ground. The car was standing still when I got on, and moved just as I got on the step."

George F. Osborne, the plaintiff, testified: "I went from Athens to Plano on November 1, 1908. I had been up to Mr. Roark's house—he is my brother-in-law—and came down to take the car back to make connection with the T. & N. O. at Dallas. That train goes back something about 7 o'clock now, and I got there just a little bit before the car went to the station. Mr. Roark walked down there with us from the house, and the car came up and there were several getting on and off, and, as the car came in, I told Roark good-bye, and shook hands with him, and then touched Richardson, and told him to let's get on, and about the time Richardson got on the car I came up with him, and somebody in behind me elbowed between us, and I just touched Richardson up, and I believe I was against him, and just about the time he got inside the car it snatched me that way before I could do anything at all, and I couldn't recover myself, and I never could get straight up to catch the car. I didn't turn loose when the car started because I couldn't—I couldn't think to turn it loose. I don't know whether it jerked me a step or two, and, of course, I just clung to it as long as I could, and it hit me on the side of the face. The car was not moving when I tried to get on the car. It was standing still. I had not yet gotten to the bottom step. I was just getting on the bottom step. I could not say whether my foot was on it or not. I don't know how many feet were on the step when it jerked me. I mean by 'jerk' that it started suddenly, and caused me to fall against the ground. I mean the car started quick. I had my left hand hold of the handhold. I didn't have my right hand hold of anything. I had hold of Richardson just before. He had already stepped on. I came up right behind him. I touched him that way on account of his eyes. As soon as it jerked me, I fell right back. I don't know how far I held on it, it scared me so. I know no reason why I cannot tell whether my feet were on the ground or on the step, except that the car jerked me. I had not been drinking that night nor that day. * * * There were other passengers getting on and off all the time Richardson and I were getting on. I don't know whether Richardson was the last man in or not. It strikes me that there was a fellow pushed by me just like you would squeeze into a place. I saw the conductor. He was right in front of Richardson, in a kind of parti-

tion. I saw him when I was trying to get on the car. He was up in the car ahead of me. I could see him inside the car. I didn't hear him when he gave two bells to start. I didn't hear him say 'All aboard.' That was a jerk or a kind of a lurch. It didn't pull my hand loose, but kind of jerked me sideways. I held on to it as long as I could until it flummoxed me. There were people getting on and off while I was standing there waiting to help Richardson on."

The decisions seem to be uniform in holding that it is not negligence per se in one desiring to get on board a car with the view of taking passage thereon to attempt to board the same while the car is moving. The charges complained of assumed as a matter of law that, if appellant attempted to board the car after it had started, he was guilty of contributory negligence, and hence was not entitled to recover. In this respect the charges did not announce a correct proposition of law. Whether appellant in attempting to board the car after it had started was guilty of contributory negligence was a question for the jury, and depends upon whether appellant was using such care and caution as an ordinarily prudent person would have used under the same or similar circumstances. *Railway v. Stewart*, 14 Tex. Civ. App. 708, 37 S. W. 770; *Mills v. Railway*, 94 Tex. 242, 59 S. W. 875, 55 L. R. A. 497; *Bennett et al. v. Railway*, 11 Tex. Civ. App. 423, 32 S. W. 834; *Railway v. Shannon*, 50 Tex. Civ. App. 194, 111 S. W. 1060.

The court had correctly charged the jury in his main charge that if they believed from the evidence "that the plaintiff, at the time and place charged in his petition intending to become a passenger on one of defendant's cars, undertook to board said car, and you find that those in charge of said car failed to stop the car a sufficient length of time to permit the plaintiff to board and enter said car, and started said car with a jerk and at a high rate of speed, if they did, while plaintiff was in the act of boarding the same, and you believe from the evidence that in starting said car at the time and in the manner in which it was started that those in charge of said car failed to exercise that high degree of care and caution that, under like circumstances, would have been usually exercised by very prudent and careful persons, and you further find from the evidence that as the direct and proximate result of said failure, if any, to stop the car a sufficient length of time for plaintiff to board the same, or that by reason of a sudden jerk of said car, if there was a sudden jerk, plaintiff suffered any of the injuries complained of, you will find for the plaintiff."

Error is assigned to a clause of the charge reading as follows: "If you fail to find that those in charge of the car were not guilty of negligence, you will find for the defendant." This charge is misleading, and should be corrected on another trial.

For the error pointed out in the first four assignments, the judgment is reversed and the cause remanded.

ST. LOUIS, S. F. & T. R. CO. v. TAYLOR.[†]
(Court of Civil Appeals of Texas. Feb. 11, 1911. Rehearing Denied Feb. 25, 1911.)

1. MASTER AND SERVANT (§ 90*)—INJURIES TO SERVANT—NEGLIGENCE—CARE REQUIRED IN GENERAL.

To authorize a recovery by a servant for personal injuries, it is not necessary that the very occurrence complained of could have been foreseen by ordinary care, but only that a reasonably prudent man, in view of the facts, would have anticipated some like injury.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 139; Dec. Dig. § 90.*]

2. TRIAL (§ 260*)—INSTRUCTIONS—REQUESTS—INSTRUCTIONS COVERED BY CHARGE GIVEN.

Where, in an action for injuries to a servant, the court submitted to the jury whether the master was negligent in inspecting the appliances causing the accident, and whether the defect therein was dangerous, and whether it was the proximate cause of the injury, a charge that, if the accident could not reasonably have been anticipated as a result of the defect, the verdict should be for the master, was properly refused, because covered by the instructions given, so far as correct.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 651; Dec. Dig. § 260.*]

3. CONSTITUTIONAL LAW (§ 208*)—CLASS LEGISLATION.

A statute which embraces all of a specified class in a particular character of business is not class legislation, inhibited by the federal or state Constitutions.

[Ed. Note.—For other cases, see Constitutional Law, Dec. Dig. § 208.*]

4. CONSTITUTIONAL LAW (§ 208*)—CLASS LEGISLATION—ACT FOR PROTECTION OF EMPLOYÉS.

Acts 31st Leg. c. 10, providing that, in actions against railroads for injuries to employes, the fact that the employe was guilty of contributory negligence shall not bar a recovery, but the damages shall be diminished in proportion to negligence of the employe, applies only to railroad employes, making a class of them; and it is not class legislation, within the state and federal Constitutions.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. §§ 654, 661; Dec. Dig. § 208.*]

5. DAMAGES (§ 95*)—PERSONAL INJURIES—MEASURE OF DAMAGES.

The jury in allowing damages for personal injuries may award such sum as will, as a present cash payment, fairly compensate for the time lost on account of the injuries, for the diminished capacity on account thereof, for physical pain and suffering sustained by reason of the injuries, or which it is reasonably probable will be suffered in the future on account thereof.

[Ed. Note.—For other cases, see Damages, Cent. Dig. § 222; Dec. Dig. § 95.*]

6. MASTER AND SERVANT (§ 205*)—ASSUMPTION OF RISK—INSPECTION OF APPLIANCES.

A servant may assume that the master has furnished reasonably safe appliances for him to use, and he need not inspect them before using them.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 547; Dec. Dig. § 205.*]

7. APPEAL AND ERROR (§ 1056*)—REVIEW—HARMLESS ERROR—EXCLUSION OF EVIDENCE.

The error, if any, in excluding testimony of a witness on cross-examination offered to show bias in favor of the successful party is harmless, where the successful party did not depend alone on the testimony of the witness, especially where the evidence, if admitted, would have rebutted any inference of bias.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4187; Dec. Dig. § 1056.*]

8. DAMAGES (§ 173*)—PERSONAL INJURIES—EVIDENCE—ADMISSIBILITY.

Where, in an action for injuries to a switchman, plaintiff testified that for 13 years he had been working in various kinds of construction works, for industrial plants, and the last two years in railroad, earning from \$70 to \$100 a month, and that while working for a telephone company he made less than \$70 a month, the exclusion of evidence, as bearing on the question of damages, that railroad service paid better than ordinary jobs of a similar character, because of the dangers involved in railroad work, was not erroneous.

[Ed. Note.—For other cases, see Damages, Cent. Dig. §§ 490-492; Dec. Dig. § 173.*]

9. EVIDENCE (§ 364*)—DOCUMENTARY EVIDENCE—PERSONAL INJURIES—MORTALITY TABLES.

A mortality table used by insurance companies in this country as a basis for life expectancy is properly admitted, as bearing on the life expectancy of one suing for a personal injury.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 1520; Dec. Dig. § 364.*]

Appeal from District Court, Grayson County; B. L. Jones, Judge.

Action by G. W. Taylor against the St. Louis, San Francisco & Texas Railroad Company. From a judgment for plaintiff, defendant appeals. Affirmed.

Andrews, Ball & Streetman and Head, Dillard, Smith & Head, for appellant. Wolfe, Hare & Maxey, for appellee.

RAINEY, C. J. Appellee sued appellant to recover damages for personal injuries. Verdict and judgment for plaintiff for \$8,500. Defendant appeals.

The petition alleged, in substance, that plaintiff was working for appellant as a switchman, and that he was injured by the defective condition of a car upon which he was working as such switchman; that there was a bolt projecting several inches from said car, which should have fitted up against the car; that, while descending from said car in the performance of his duties at night, his lantern caught on said bolt and caused him to fall between the moving cars; his hand was so injured that amputation between the elbow and wrist was necessary; also that appellant was negligent in making inspection, and in furnishing same in a defective condition. We conclude that the evidence supports all the material allegations of plaintiff's petition.

The refusal to give the following requested charge is assigned as error, viz.: "Even

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

† Writ of error denied by Supreme Court.

though you find and believe from the evidence that defendant's car inspectors failed to discover said projecting bolt or rod, yet, if you believe that the accident to plaintiff could not reasonably be anticipated and foreseen as likely to be caused thereby, as a result of the condition of said rod or bolt, you will find for the defendant." Appellant contends "that the court cannot say, as a matter of law, that defendant ought reasonably to have foreseen that such protruding bolt would hang his lantern, and thereby cause the servant to fall, while descending the car by means of the handhold." The evidence shows that appellee was injured while descending from a car at night, by reason of his lantern catching on a projecting bolt and causing him to fall. It also shows that such projection was in close proximity to the ladder or handhold used for the purpose of descending and ascending the car, and that such protruding bolt at that place was dangerous. The court by its charge left it to the jury to say whether or not defendant was negligent in inspecting the car, as to whether or not the bolt projecting as it did was dangerous, and whether or not it was the proximate cause of plaintiff's injury. The charge was a clear presentation of the issues involved, and when considered as a whole sufficiently covered the requested charge. The requested charge was calculated to impress the jury that defendant ought reasonably to have foreseen that the accident would likely happen by a lantern being caught, as was done, in order to be liable for an injury. In that respect the charge is wrong. "It is true an accident that cannot be reasonably anticipated by either of the parties, and that occurs without fault of the person charged with it, is not actionable. * * * It is not the law that there should be no liability, if the very occurrence itself complained of could not have been foreseen by the use of ordinary care, but if no danger could be supposed to exist from the defects, under any circumstances, after the exercise of such care." *Lumber Co. v. Denham*, 85 Tex. 56, 19 S. W. 1012. "The test is whether a reasonably prudent man, in view of all the facts, would have anticipated, not necessarily the precise, actual injury, but some like injury." *Railway Co. v. Bigham*, 90 Tex. 223, 38 S. W. 162; *Bering Mfg. Co. v. Peterson*, 28 Tex. Civ. App. 194, 67 S. W. 133; *Railway Co. v. Jackson* (decided by this court January 9, 1911, not yet officially published) 133 S. W. 925. The court did not err in refusing said charge.

Error is assigned to that portion of the court's charge which reads: "In this connection you are further instructed that the statute of this state provides that, in actions against any common carrier or railroad to recover damages for personal injuries to an employé, the fact that the employé may have been guilty of contributory negligence shall

not bar a recovery, but the damages shall be diminished by the jury in proportion to the amount of negligence attributable to such employé. So, if you find for the plaintiff under instructions given you, and if you believe from the evidence that plaintiff failed to make such observations and keep such lookout for his own safety, while attempting to descend from the car, as an ordinarily prudent person would have done under the same or similar circumstances, and that such failure, if you find he did so fail, directly and proximately helped or contributed to cause the injuries, if any he sustained, then you will find that he was guilty of contributory negligence, and if you so find, and if you find for plaintiff, the amount of damage you would otherwise allow him shall be diminished in proportion to the amount of negligence which from the evidence you may believe attributable to plaintiff. In this connection you are further instructed that, if you believe from the evidence that, while descending from the car in question, the plaintiff, in the manner in which you find from the evidence he did so, exercised such care for his own safety as an ordinarily prudent person would have done under the same or similar circumstances, then in such event the plaintiff would not be guilty of contributory negligence." The criticism of this charge is that it is unconstitutional and void, in that it exempts from responsibility of contributory negligence only such persons as are employes of common carriers by railroad, which classification is arbitrary and unreasonable and violates those provisions of the fourteenth amendment to the Constitution of the United States, which provides against a state depriving any person of property without due process of law; also contrary to the Constitution of this state for the foregoing reasons, and without regard to the nature of the employment, whether hazardous or safe, and attempts to govern and protect all such employes, whether clerks, train operators, or those engaged in any other kind of manual service, whether attended with hazard or not.

The court, in the foregoing charge, followed the act of the Legislature passed in 1907 (see Acts 31st Leg. p. 279). The act relates to railroad employes, and the question raised is: Is it such class legislation as is denounced by either the Constitution of the United States or of Texas? The act of the Legislature applies only to employes of railroads, and when an act embraces all of a specified class in a particular character of business, such act does not fall under the ban of class legislation inhibited by the Constitution. *Campbell v. Cook*, 86 Tex. 630, 26 S. W. 486, 40 Am. St. Rep. 878. This principle is recognized as applying to railroads by the United States Supreme Court, in the case of *Railway v. Ellis*, 165 U. S. 157, 17 Sup. Ct. 258, 41 L. Ed. 666, wherein it is

said: "That such corporations may be classified for some purposes is unquestioned. The business in which they are engaged is of a peculiar nature and the Legislature, in the exercise of its police powers, may justly require many things to be done by them in order to secure life and property." Legislation changing the common law of liability of railroad companies for acts of fellow servants in their employ has been held constitutional (*Railway v. Turnipseed*, 219 U. S. 35, 31 Sup. Ct. 136, 55 L. Ed. —), and we can see no difference in principle in such legislation and the act here under consideration. So we conclude the assignment is not well taken.

Complaint is made of the following paragraph of the court's charge, to wit: "If you find for plaintiff, you will allow him such sum as you find and believe from the evidence will, as a present cash payment, reasonably and fairly compensate him for the time, if any, he has lost on account of his injuries, for his diminished capacity, if any, he has lost on account of his injuries, for his diminished capacity, if any, to labor and earn money in the future by reason of his injuries, for physical pain and mental suffering, if any, he has sustained by reason of his injuries, and for the mental suffering, if any, which you believe from the evidence it is reasonably probable he will suffer in the future on account of his said injuries." The criticism of this charge is that the "jury could believe it probable that he would suffer mental pain in future, and yet believe he would not suffer such pain, while the word 'reasonably' adds nothing to the certainty of the event." Our Supreme Court, in the case of *Railway v. Harriett*, 80 Tex. 73, 15 S. W. 556, approves the language used in the court's charge, and we therefore hold it was not erroneous.

Plaintiff had the right to assume that defendant had furnished reasonably safe cars for him to use, and the court did not err in telling the jury that plaintiff was not required to inspect the car before using it.

Complaint is made to the action of the court in excluding the testimony of plaintiff's witness, Lemon, which was objected to on the ground as irrelevant and immaterial. Lemon testified by deposition, and had previously testified that he and plaintiff belonged to the same union, viz., the Brotherhood of Railway Trainmen. The question and answer excluded was: "Q. Is it not a fact that the members of said order, or union, stand together and help each other whenever they can, and is it not a fact that it is one of the principles or ideas of said union, or order, that its members assist each other whatever way they can? Especially, is it not a fact that the members of said order, or union, assist each other in every way that they can, as against the railway companies? A. Yes, the members stand together when it is right to do so. That is true, when it is

right and just to do so. No, this is not true." It is urged that said testimony was offered to show bias on the part of witness in favor of plaintiff, and that it was error in the court to exclude it. We are of the opinion that the exclusion of the testimony, if error, was harmless and caused no injury to defendant, for plaintiff's right of recovery did not depend alone upon Lemon's testimony; and the testimony excluded, if admitted, would not have shown any bias in favor of plaintiff, but, on the other hand, would have had a tendency to rebut the inference of bias, if any, that might have been drawn from his testimony that he was a member of the Brotherhood of Railway Trainmen, especially as to the railroad company; for his answer, "No, this is not true," in response to the question if it was not a fact that members of the union assist each other in every way that they can as against the railway companies, positively denies such a state of feeling on his part.

After plaintiff had testified that while in the railway service he made from \$70 to \$100 per month, that while working for the telephone company he made \$67.50, on cross-examination defendant asked him: "As a matter of fact, Mr. Taylor, railroad service pays better than the ordinary jobs of a similar character, does it not? A. Yes, sir; as a general thing. Q. Isn't it largely because of the dangers involved in railroad work?" To which question plaintiff's counsel objected on the ground that it was irrelevant, immaterial, and calling for an opinion and conclusion of the witness, which objections were sustained by the court and the witness not permitted to answer, to which defendant excepted. Plaintiff testified that for the last 13 years he had been working in various kinds of construction works for industrial plants, and the last two years in railroad. The bill of exception fails to show what would have been the answer of the witness to said questions. *Reddin v. Smith*, 65 Tex. 26. If the answers would have been in the affirmative, we are unable to perceive how it would have affected the question of amount of recovery. There was no error in not admitting the testimony.

The court admitted, over defendant's objection, as evidence, what purported to be the American Experience Mortality Table, computing life expectancy. Objection was made on the ground that said table was not shown to be authentic, and what it purports on its face to be. Witness Beldon testified: That he had lived and been engaged in the life and fire insurance business in Sherman for the past 25 years; that the insurance companies use as a basis of insurance written in this country the American Experience Table—mortality table. This table is estimated from their experience, based on a certain number of lives at a certain age, as to the expectation of the average time they

will live. That he had examined the policies of a number of insurance companies, and, so far as his knowledge extended, they all fixed their rate in writing insurance on basis of the life expectancy from the American Experience Table; that, so far as he knew, there was no exception to that basis in this country. The witness then, referring to the table he had in his hand, which he testified was the American Experience Table, said that it was a standard or experience table of all the insurance companies' experience combined; that the table the witness had was furnished him by the Travelers' Insurance Company; that from the table he had in his hand the life expectancy of a man 34 years of age is 32½ years. He further testified, in substance, that he had nothing to do with making up such table; that he knew nothing personally, of his own knowledge, how it was made up, nor how many men helped, nor when it was made; that he had never compared the figures in the purported mortality table with those of any other purported table or copy thereof, and did not know whether it was an exact copy of the American Experience Table or not. It being shown that this table was used by insurance companies in this country as a basis for life expectancy, we are of the opinion that the table was properly admitted. *Railway v. Mangham*, 95 Tex. 413, 67 S. W. 765; *Railway v. Smith*, 26 S. W. 644.

The jury after hearing all the evidence fixed plaintiff's damage at \$8,500, and we do not feel called upon to disturb it as excessive.

The judgment is affirmed.

UNION NAT. BANK v. MENEFEE.†

(Court of Civil Appeals of Texas. Jan. 14, 1911. Rehearing Denied Feb. 11, 1911.)

BILLS AND NOTES (§ 334*)—BONA FIDE PURCHASERS—CIRCUMSTANCES AFTER TRANSFER.

Where a nonresident indorsee of a note, after learning of fraud in the acceptance and negotiation of the note, had in its hands funds of the nonresident payee sufficient to pay the note, the maker is not liable to the indorsee.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. §§ 812, 813; Dec. Dig. § 334.*]

Appeal from District Court, Tarrant County; R. H. Buck, Judge.

Action by the Mechanics' Banking Company against O. R. Menefee, and the Union National Bank was substituted as plaintiff. From a judgment for defendant, plaintiff appeals. Affirmed.

Flournoy, Smith & Storer, for appellant. Bryan & Spoonts and Capps, Cantey, Hanger & Short, for appellee.

SPEER, J. This suit was originally instituted by the Mechanics' Banking Com-

pany and the Union National Bank was afterwards substituted as plaintiff by agreement of the parties, that bank having become the owner of the note sued on since the bringing of the suit. The action was based upon a promissory note for \$2,500 executed by O. R. Menefee payable to the order of the Peabody Buggy Company. The Peabody Buggy Company, the Mechanics' Banking Company, and the Union National Bank are corporations domiciled at Fostoria, Ohio. The note was indorsed by the Peabody Buggy Company to the Mechanics' Banking Company. The defense in substance was want of consideration and fraud in the inception and negotiation of the instrument, and, further, that after the plaintiff, Union National Bank, learned of the facts constituting this defense it had on deposit with it funds belonging to the payee indorser, Peabody Buggy Company, in excess of the amount due on said note which it ought in law to have applied to the satisfaction of that company's obligation to it. A trial before a jury resulted in a verdict for the defendant, and from a judgment based thereon the plaintiff has appealed.

The issue of W. O. Allen representing the Peabody Buggy Company in the transaction leading to the execution of the note by Menefee and the consequent notice to that company of the defense pleaded was clearly raised by the evidence, and the assignments contending to the contrary are therefore overruled.

The remaining assignments are either to the effect that the court should have instructed summarily for the plaintiff or that he erred in submitting to the jury to find whether or not the plaintiff bank had on deposit funds belonging to the Peabody Buggy Company sufficient to pay the indebtedness, instructing, if it did, that such fact would constitute a defense. It is of course apparent that if this latter instruction is the law, the other assignments must of necessity fail. That it is the law we think is abundantly determined by the line of cases in this state headed by *Van Winkle Gin & Machinery Co. v. Citizens' Bank of Buffalo*, 89 Tex. 147, 33 S. W. 862. In that case, which is in no important respect unlike the one before us, the Supreme Court says: "The case then comes to this: the indorser in good conscience should pay. The bank has its funds in its hands sufficient to satisfy the demand with a perfect right in equity to offset same in satisfaction of the bill; the pursuit of the acceptor in a foreign jurisdiction is clearly not necessary to the bank's protection, but can only serve to allow the indorser (indorsee) to avail himself of the protection given by law to an innocent purchaser in order to cut the acceptor off from a just defense and compel it to pay a sum of money which in equity it

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

† Writ of error denied by Supreme Court.

should not pay. Under these circumstances with knowledge of the failure of consideration, probably at the time of the filing of the original answer, but certainly when the depositions of its officers were taken as above stated it presses the claim to judgment upon its plea of innocent purchaser in a suit instituted at the instance and expense of the indorser. While expressly waiving its equitable right to offset the deposit conferred upon it by law for its protection and which appears in this case to have been adequate to its complete protection, it invokes the application by the court of another equitable principle, not for its protection, but for the sole and evident purpose of aiding the indorser to obtain an undue advantage over the acceptor. We are of opinion that under these circumstances and for such a purpose the bank was not entitled to the protection afforded by law to an innocent holder and that as between it and the acceptor the deposit should be offset against the bill." See, also, *State Bank v. J. Blakey & Co.*, 35 Tex. Civ. App. 87, 79 S. W. 331; *Johnson County Savings Bank v. Renfro*, 122 S. W. 37; *Sperlin v. Peninsular, Loan & Discount Co.*, 103 S. W. 232.

The charge correctly presented the law applicable to a state of facts which the evidence raised, if it did not indisputably establish.

All assignments are overruled, and the judgment affirmed.

SANDIFER v. FOARD COUNTY.†

(Court of Civil Appeals of Texas. Jan. 21, 1911. Rehearing Denied Feb. 25, 1911.)

1. BROKERS (§ 71*) — COMPENSATION — CONSTRUCTION OF CONTRACT.

A contract by which a county listed land with a broker to be sold at \$4 per acre net to the county does not necessarily mean that the broker is to receive all excess above \$4 per acre, nor that his commission is to come out of the proceeds of the sale, but, to sustain the validity of the contract, will be construed as meaning that the broker is to obtain a purchaser at the best price obtainable, and to receive therefor a reasonable compensation, the price in no event to be less than \$4 an acre net to the county, and that a reasonable compensation is to be paid by the county in some lawful manner; that is, out of current or general funds.

[Ed. Note.—For other cases, see *Brokers*, Cent. Dig. § 56; Dec. Dig. § 71.*]

2. COUNTIES (§ 152*)—PUBLIC DEBT—PROVISION FOR PAYMENT—"DEBT."

A contract by which a county lists land with a broker for sale does not create a debt to the broker, within Const. art. 11, § 7, forbidding the creation of a debt by any county unless provision is made at the time for its payment.

[Ed. Note.—For other cases, see *Counties*, Dec. Dig. § 152.*]

For other definitions, see *Words and Phrases*, vol. 2, pp. 1864-1886; vol. 8, p. 7028.]

Appeal from District Court, Foard County; S. P. Huff, Judge.

Action by C. P. Sandifer against Foard County. From a judgment for defendant, plaintiff appeals. Reversed and remanded.

W. D. Berry, Robert Cole, and F. P. McGhee, for appellant. R. P. Brindley and G. W. Walthall, for appellee.

SPEER, J. The appellant as plaintiff below sued the appellee to recover commissions as a real estate broker for the sale of 17,712 acres of county school land belonging to the defendant, and from an adverse decision by the trial court he has appealed.

The order of Foard county constituting the contract of employment relied on is as follows: "This order entered into the 13th day of February, 1909, by and between the commissioners' court in and for Foard county, Texas, parties of the first part, and C. P. Sandifer, of Foard county, Texas, party of the second part, witnesseth: That the parties of the first part have this day listed for exclusive sale with the party of the second part for a term of six months from date herewith the following described property, to wit: 17,712 acres of land the same being Foard county school lying and being situated in Bailey county, Texas, at and for the sum of \$4.00 per acre with five per cent. interest from date payable annually or semi-annually, said price being net to the county of Foard, state of Texas, and payable twenty years from date of sale with option to the purchaser to pay any part or all the principal at or on any interest paying period after ten years from date of sale. It is also understood and agreed that the sale of the above-described land is to be made subject to a lease now on said land which expires on the 30th day of September, 1913. The party of the first part agrees to deed said land in subdivisions, provided the party of the second part thinks necessary to do so in disposing of the said land to the better advantage to the county." This agreement is signed by the members of the commissioners' court of appellee and by appellant. No other order of the commissioners' court or further act of the parties indicated the amount of compensation to be paid to appellant in case he effected a sale further than what may be implied from the fact that before a sale was consummated appellant notified the commissioners' court that he would expect five per cent. commission. Neither did the commissioners' court make any provision whatever for the payment of these commissions, if the same be considered as a debt owing by the county within the meaning of our Constitution.

We will first address ourselves to a consideration of the contract itself and determine whether or not it is void on its face as contended by appellee. The vice pointed out as rendering the contract void is that it con-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

† Writ of error granted by Supreme Court.

tains an agreement to pay appellant for his services as broker all sums of money received for the county school lands above \$4 per acre, and that such compensation is to come out of the proceeds of such sale. Both parties have apparently treated the subject as though this were the legal effect of the agreement. But we do not so construe it. The contract does not necessarily mean either that appellant is to receive all excess above \$4 per acre or that his commissions are to come out of the proceeds of the sale at all. When rightly interpreted we think the contract means that appellant as agent for appellee county is to procure a purchaser for the land at the best price obtainable, and to receive therefor a reasonable compensation, the price for the land in no event to be less than \$4 per acre net to appellee. *Turnley v. Micheal*, 15 S. W. 912; *Boysen v. Robertson*, 70 Ark. 56, 68 S. W. 243. And the contract further means, we think, that this reasonable compensation is to be paid by appellee in some lawful manner, that is, out of current or general funds. *Matagorda County v. Casey*, 49 Tex. Civ. App. 35, 108 S. W. 476. The above interpretation is at least a fair and reasonable one and has the effect of upholding the validity of the contract, whereas the construction contended for by appellee would make it of no force whatever. Without determining whether or not section 7, art. 11, of the state Constitution, forbidding the creation of a debt by any county, unless provision is made at the time for its payment, is applicable to an inland county such as Foard (*Mitchell County v. City National Bank*, 91 Tex. 361, 43 S. W. 880), we do hold that this was not the creation of a debt contemplated by that section of the Constitution, and that the trial court erred in not sustaining an exception to such a defense. The evidence was such as to call for a determination of the case on its merits.

The judgment is therefore reversed and the cause remanded for another trial.

CITY OF FT. WORTH v. LOPP.

(Court of Civil Appeals of Texas. Jan. 28, 1911.)

1. MUNICIPAL CORPORATIONS (§ 818*)—STREETS—OBSTRUCTIONS—INJURIES TO TRAVELERS—EVIDENCE.

In an action for injuries to a traveler by his horse falling over a water pipe projecting five inches above the surface of a street, evidence that at the time of the accident witness was street commissioner, that he had put in the gutter at the point in question, and had notified the city plumber to cover the water pipe, and evidence of a member of the city council that he had found the water cap above grade and had notified the commissioner to cut it down, was admissible not only to show the condition of the obstruction, but also that the city had notice thereof.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. §§ 1726-1738; Dec. Dig. § 818.*]

2. TRIAL (§ 62*)—RECEPTION OF EVIDENCE—REBUTTAL.

Where defendant on cross-examining one of plaintiff's witnesses indirectly imputed to L. an effort to bribe another witness to state facts favorable to plaintiff's case, plaintiff was entitled to show by his father and mother and by his attorneys that neither of them had at any time offered anything to any witness to testify in the case.

[Ed. Note.—For other cases, see *Trial*, Dec. Dig. § 62.*]

3. NEW TRIAL (§ 44*)—GROUND—MISCONDUCT OF JURY.

Rev. St. 1895, art. 1371, as amended by Gen. Laws 1905, c. 18, provides that a new trial in the discretion of the trial court may be granted for misconduct of the jury, where the misconduct proved or testimony received or communication made is material. In an action for injuries to a traveler by a water cap permitted to extend above the grade of a highway, a new trial was applied for by the city for misconduct of the jury in discussing plaintiff's inability to pay costs in case a verdict was rendered against him, and because the foreman of the jury after deliberation had begun measured the height of the water cap and took such measurements before the jury. Only a single juror testified to the fact, and he declared that he told the jury that the payment of costs "would cut no figure in the case," and there was no testimony that any juror gave any serious consideration to the suggestion. The measurements taken were in defendant's favor indicating that the cap was substantially in line with the surface of the street. The trial court also went before the jury and expressly instructed them not to consider any extraneous matter and no juror testified that he was influenced. *Held* insufficient to require a new trial.

[Ed. Note.—For other cases, see *New Trial*, Cent. Dig. §§ 80-85; Dec. Dig. § 44.*]

4. NEW TRIAL (§ 108*)—NEWLY DISCOVERED EVIDENCE—WEIGHT.

Where alleged newly discovered evidence was of doubtful weight and conflicted with that of other credible witnesses who were in a position where they could not have been mistaken, it was insufficient to require a new trial.

[Ed. Note.—For other cases, see *New Trial*, Cent. Dig. §§ 226, 227; Dec. Dig. § 108.*]

5. NEW TRIAL (§ 102*)—GROUND—NEWLY DISCOVERED EVIDENCE—DILIGENCE.

Where diligence exercised by attorneys for a city to discover evidence before trial which was subsequently found and urged as a ground for a new trial had been begun and prosecuted but a short time before the trial, which was some six years after the accident, and there was no legal showing as to what effort, if any, former city attorneys and other city officers had made to secure the testimony, the diligence was insufficient.

[Ed. Note.—For other cases, see *New Trial*, Cent. Dig. §§ 210-214; Dec. Dig. § 102.*]

Appeal from District Court, Tarrant County; Jas. W. Swayne, Judge.

Action by Phillip Lopp, by next friend, against the City of Ft. Worth. Judgment for plaintiff, and defendant appeals. Affirmed.

W. H. Slay and A. B. Curtis, for appellant. Capps, Cantey, Hanger & Short and Ben M. Terrell, for appellee.

CONNER, C. J. The city appeals from an adverse judgment in a suit instituted in be-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

half of Phillip Lopp, a minor, for personal injuries. The trial resulted in a judgment in his favor for \$750.

It was alleged and shown that Phillip Lopp on or about the 1st day of February, 1903, was attempting to drive one of his father's cows along Florence street in the city of Ft. Worth, and that while going in a "jog of a trot," at the intersection of Florence street with West Belknap street, his horse stumbled and fell over a water cap situated in the main traveled way which extended above the surface for several inches, and thereby was severely injured. The testimony of a number of witnesses was objected to for various reasons, but we think all such testimony was plainly relevant and admissible. For instance, one William Lahey testified that on the 1st day of February, 1903, he was street commissioner, and as such put in the gutter at the intersection of the north line on Belknap and Florence streets; that the water pipe in question was left above the surface about five inches, and that he notified the city plumber that it was dangerous and to cover it. The witness Thompson testified that prior to the construction of the gutter under the direction of Lahey the water pipes extended above the surface some five inches, and the witness Waggoman testified that he was a member of the city council of Ft. Worth in February, 1903, and chairman of the street and alley commission; that he ordered the workmen to put in the gutter and found that the water cap extended above the grade, and that he notified Lahey to cut it down and put the cap in on a grade with the gutter. Negligence in the construction and maintenance of the gutter in such condition was alleged, and we think the evidence referred to was relevant, not only to those issues, but also upon the issue of notice to the city of the dangerous condition of the pipe, it otherwise appearing that the water cap remained in the condition indicated by the above testimony until after the alleged injuries.

Error is further assigned to the action of the court in permitting A. B. Lopp and Mrs. Fannie Lopp, the father and mother of plaintiff, and Ben M. Terrell and W. A. Hanger, attorneys for the plaintiff, to testify over objection that neither of them since the filing of the suit or at any time had offered any one anything to testify in the case. The record, however, indicates quite plainly we think that one of appellant's counsel on cross-examination of one of the appellee's witnesses at least indirectly imputed to the witness Lahey an effort to bribe another witness to state facts favorable to appellee's case, and the testimony above indicated was clearly in answer to this imputation and properly receivable.

The remaining questions arise under the assignments of error to the court's action in overruling the motion for a new trial. On the hearing appellant sought to show miscon-

duct of the jury in discussing the plaintiff's inability to pay costs in event a verdict was rendered against him, and because the foreman of the jury after deliberation had begun measured the height of the water cap and took such measurements before the jury. Rev. St. 1895, art. 1371, as amended by an act approved February 24, 1905 (Gen. Laws 1905, p. 21), provides that a new trial may in the discretion of the trial court be granted where the misconduct proven, or testimony received or communication made is material, but we find nothing in the occurrences above mentioned which requires us to disturb the discretion exercised in the present instance by the trial court. There was but a single jurymen testifying to the fact. He declares that he told the jury that the payment of costs "would cut no figure in the case," and there is not testimony in the record to the effect that any juror gave any serious consideration to the suggestion about costs. The act of the juror in exhibiting the measurements mentioned, if it had any influence whatever, was in appellant's favor. It was shown that throughout the trial the juror was favorable to appellant; that the measurement was taken long after the accident in question, and was in entire harmony with the contention of appellant to the effect that the cap was substantially in line with the surface of the street, and not extending above as alleged in plaintiff's petition and as shown by his testimony. Moreover, the record shows that the trial court went before the jury and expressly instructed them not to consider any extraneous matter, and no jurymen testified that he was influenced. We regard the whole as entirely insufficient as cause for a new trial, at least as reason why we should disturb the view taken by the trial court. See *Kaltayer v. Mitchell*, 102 Tex. 390, 117 S. W. 792, 132 Am. St. Rep. 889.

It was further insisted that a new trial should have been granted because of newly discovered evidence. Appellant attached to his motion affidavits by Addison Pettitt and Mrs. Lewis, his mother, to the effect that Addison Pettitt was assisting Phillip Lopp in driving the cow at the time of his injury and that the horse did not stumble on anything, but slipped and fell on his right side after having been jerked by Phillip. These affidavits were in distinct conflict with the testimony of B. K. Mynatt, who testified upon the trial, and with an affidavit presented by appellee on the hearing of the motion by E. C. McCaskell which tended to render the statements of Addison Pettitt and his mother of doubtful weight at least. Mrs. Lewis while stating that she saw the accident fails to state her exact position in relation to the water cap so as to render certain that she could not be mistaken, and at the time of the accident, as appears, Addison Pettitt could not have been more than 9 or 10 years old. On the other hand, the conflicting testi-

mony was from mature men shown to be credible persons and in position where they could not have been mistaken in their rendition of the occurrence. Moreover, we think the diligence shown to procure this testimony insufficient. True, the city attorney, W. H. Slay, and his assistant, A. B. Curtis, who tried the case, manifested commendable diligence in the effort to ascertain the names of persons who witnessed the occurrence, but this diligence began and was prosecuted a short time before the trial only, some six years after the accident, and there was no legal showing of what effort, if any, former city attorneys, of which there were at least two, and other city officers had made to secure testimony. The diligence required was that of appellant and not that alone of the counsel who tried the case in its behalf. On the whole we see no reason for overruling the discretion of the trial judge. See *Ables v. Donley*, 8 Tex. 331, 332; *G., C. & S. F. Ry. Co. v. Blanchard*, 96 Tex. 616, 75 S. W. 6.

Judgment affirmed.

MISSOURI, K. & T. RY. CO. OF TEXAS v. SCHROETER.[†]

(Court of Civil Appeals of Texas. Feb. 4, 1911.
On Rehearing, Feb. 25, 1911.)

1. RAILROADS (§ 358*)—INJURIES TO PERSONS ON OR NEAR TRACKS—NEGLIGENCE.

A sand train was standing on a track near which was a path habitually used by pedestrians. The locomotive was standing at a distance from the cars, and a wire cable was operated between the cars and locomotive in such a way that, as plaintiff passed along the path, she was struck by the cable, which in its operation sometimes swung to and fro. Plaintiff was in a position to have been easily seen by the operatives of the train. *Held*, that the facts warranted a charge on negligence.

[Ed. Note.—For other cases, see *Railroads*, Cent. Dig. §§ 1236, 1237; Dec. Dig. § 358.*]

2. RAILROADS (§ 381*)—INJURIES TO PERSONS ON OR NEAR TRACKS—CONTRIBUTORY NEGLIGENCE.

The facts were insufficient to show contributory negligence.

[Ed. Note.—For other cases, see *Railroads*, Cent. Dig. § 1285; Dec. Dig. § 381.*]

3. RAILROADS (§ 369*)—INJURIES TO PERSONS ON OR NEAR TRACKS—LOOKOUTS.

Operatives of trains must use diligence in keeping a lookout for persons along the track, and to use proper precaution to prevent inflicting injury upon them.

[Ed. Note.—For other cases, see *Railroads*, Cent. Dig. §§ 1259, 1261, 1265; Dec. Dig. § 369.*]

4. RAILROADS (§ 401*)—INJURIES TO PERSONS ON OR NEAR TRACKS—ACTIONS—INSTRUCTIONS.

In an action for injuries to plaintiff, who, while walking on a path near a track, was struck by a wire cable operated in connection with a sand train, it was proper to refuse a requested instruction on the principle of "safe and dangerous" way.

[Ed. Note.—For other cases, see *Railroads*, Cent. Dig. §§ 1382-1390; Dec. Dig. § 401.*]

5. TRIAL (§ 260*)—INSTRUCTIONS—REQUESTS—INSTRUCTIONS ALREADY GIVEN.

Where two charges on the same subject are requested and one is given, no error is committed by refusing the other.

[Ed. Note.—For other cases, see *Trial*, Cent. Dig. § 651; Dec. Dig. § 260.*]

Appeal from District Court, Dallas County; J. C. Roberts, Judge.

Action by Josephine Schroeter against the Missouri, Kansas & Texas Railway Company of Texas. From a judgment in favor of plaintiff, defendant appeals. Affirmed.

Thomas & Rhea, for appellant. Parks, Patton & Plowman and Hugh W. Peck, for appellee.

RAINEY, C. J. Appellee brought this suit against the appellant to recover damages for personal injuries inflicted upon her in the negligent operation of its wire cable and steam shovel attached to its locomotive engine.

The defendant demurred and answered generally, and specially pleaded: (1) That plaintiff was a trespasser on defendant's track, being there contrary to printed and posted notices and the penal ordinances of the city of Dallas; (2) that plaintiff was on its track in a position necessarily and obviously dangerous at the time of the accident, and that she assumed the risks of her position; (3) that plaintiff could have traveled a public street, which was safe and free from danger, and that in her lack of care in not traveling the public street she was guilty of negligence, which directly contributed to the accident. A trial resulted in a verdict and judgment in favor of appellee for \$6,600, from which appellant appeals.

Conclusions of Facts.

Appellee was hurt while walking along a foot path near appellant's track at a point in the city of Dallas where pedestrians frequently and habitually travel, when she was struck and injured by the swaying to and fro of a wire cable being operated by appellant's servants. Said cable was operated in connection with a sand train. One end was attached to the engine, while the other was attached to a plow or shovel placed on flat cars for removing the sand thereon. The said train was standing across a highway, running east and west; that is, the engine was standing north of the crossing, and the cars loaded with sand or dirt were standing south of the crossing about 400 feet from the engine, and the cable was lying on the track between, but attached at either end, as above stated. The engine was facing north, and appellee was going south. After passing the engine, she heard it making a noise as though it was going to move. She looked back, and, seeing it moving north, she started south, and just then the cable swung, struck

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

† Writ of error denied by Supreme Court.

her on the leg, breaking her ankle, and doing other injury to her leg and body. At the point she was struck there were two tracks running north and south. She was on the path west of the west track, and the sand train was on the east track. The path along which she was traveling was located far enough away from the track, so that pedestrians were in no danger from passing trains. She did not see the cable until about the time she was struck. In the operation of the cable it sometimes swings to and fro. The employes say they did not see appellee until she was struck. She was in a position to have been easily seen by them, but they did not keep a lookout for persons who might reasonably have been expected to be at that place. Appellee was not guilty of contributory negligence, nor did she assume the risk. Appellant's counsel in their brief make the following admission: "The petition alleged and the proof justified the finding that the place in the yards of the defendant where the appellee was traveling at the time of the accident was commonly and habitually used to such an extent as to charge the defendant's employes in control of the work train with the knowledge that the same was used by pedestrians."

Conclusions of Law.

The first five assignments question the sufficiency of the evidence in various particulars to support the verdict and judgment, and the sixth complains that the verdict is excessive. We cannot concur in these contentions of appellant. We think the evidence fully shows that had appellant's employes used the care imposed upon them by law appellee would not have been injured, and that it justified the amount of damages assessed by the jury.

The court charged the jury as follows: "You are instructed that if you find and believe from the evidence herein that the plaintiff, on the occasion of the accident in question, was walking or traveling a way or path commonly or habitually used and traveled by the general public on foot prior to and including the date of the accident by the tacit consent of the defendant, and if you further find that while plaintiff was so traveling, if she was so traveling, the defendant in the operation of its engine and cars, or in the operation of its engine, cable, and plows, caused, allowed, or permitted its cable to swing back and forth or over said way, if any, that the plaintiff was following at the time of the accident, and to come in contact with plaintiff's person, and if you further find and believe from the evidence that the defendant in allowing, causing, or permitting said cable to swing back and forth over or upon said way, and to come in contact with plaintiff's person, if it did cause, permit, or allow said cable to swing back and forth over or upon said way, and to come in contact with plaintiff's person in the manner described in plaintiff's petition, did not use that

degree of care for the safety of the plaintiff, while upon said way, that an ordinary prudent person would have used under similar circumstances, and that such failure, if any, on the part of the defendant to use the care aforesaid for the safety of the plaintiff was the proximate cause of the accident to the plaintiff and the injuries received by her, as set forth in plaintiff's petition, then, if you so find, the defendant was guilty of negligence, and you will find your verdict for the plaintiff, unless you find for defendant under some other instructions given you." The appellant complains of the foregoing charge, and contends, in substance, that appellee, at best, was a mere licensee, and appellant was under no legal obligation to operate its cable and cars in any particular manner or use active vigilance to prevent injury to appellee, that the allowing of the cable to swing back and forth was not negligence to her, and that by such use of the premises she assumed the risk of all concomitant dangers and risks. The evidence shows that appellee was traveling along a path that was commonly and habitually used by the public, that the train was standing still, and the cable was lying on the ground between the rails of the track on which the said train was standing, and the starting of the machinery under the circumstances shows such a want of care and circumspection on the part of appellant's employes as to warrant the charge of negligence making appellant liable to appellee for the damages sustained by her.

The rule in this state, as we understand it, is that operatives of trains must use diligence in keeping a lookout for persons along its track and to use proper precaution to prevent inflicting injury upon them. "But this is not upon the ground that they are licensees, but for the reason that they may be expected to be there. This is especially applicable when the use of the track as a pathway, either along or across it, has become so common as to apprise the company of the probable presence of trespassers, and of the danger of not keeping a lookout to discover their presence." *Railway Co. v. Shiftlet*, 98 Tex. 323, 83 S. W. 677. This principle applies especially to this case, as the facts show that the employes were not keeping a lookout for persons that might be expected at the place where appellee was injured. The pathway had been used by the public for about 20 years, and with such frequency that the company could not help being apprised of the fact. We can see no reason why the rule should not apply to the sand trains of the company as well as to passenger and freight trains. The machinery is just as dangerous, in fact more so, as a cable is operated in connection therewith, which appliance other trains do not have, and this case illustrates that its operation at times proves dangerous to persons along the track.

The evidence fails to show that appellee assumed the risk or was guilty of contributory negligence in being at the place where she was injured. The path along which she was walking was far enough away that trains could pass her in safety. She did not see the cable, and was not familiar with the manner of its operation. She saw the engine moving in an opposite direction, and the facts show she was using care and caution in her movements, unless the mere fact of her walking along at that point on the company's right of way can be said to be negligence per se, and this cannot be done.

There was no error in refusing appellant's requested charge on the principle of "safe and dangerous" way, as the facts did not call for such a charge, but the court gave a charge on this question requested by appellant. Where two charges on the same subject are requested and one is given by the court, no error is committed by refusing the other.

All the other assignments of error have been considered, but, finding no error, the same are overruled.

The judgment is affirmed.

On Rehearing.

At the request of appellant, we find the following facts: "That at the time of the accident to plaintiff there was in force in the city of Dallas an ordinance in which it was provided that 'it shall be unlawful for any one in the city to trespass upon, interfere with, or use the property of another person or of a corporation, without the consent of the owner,' and that 'any person violating the provisions hereof shall be fined in any sum not exceeding \$100.'"

DOYLE v. SCOTT et al.

(Court of Civil Appeals of Texas. Jan. 28, 1911.)

1. LANDLORD AND TENANT (§ 80*)—SUBTENANT—NOTICE.

A subtenant is chargeable with knowledge of the terms of the lessee's lease.

[Ed. Note.—For other cases, see *Landlord and Tenant*, Cent. Dig. §§ 254-257; Dec. Dig. § 80.*]

2. LANDLORD AND TENANT (§ 80*)—SUBLESSEES—BREACH OF CONDITIONS OF LEASE.

A lessor may for any breach of conditions of the lease evict the lessee and his subtenant.

[Ed. Note.—For other cases, see *Landlord and Tenant*, Cent. Dig. §§ 254-257; Dec. Dig. § 80.*]

3. LANDLORD AND TENANT (§ 80*)—SUBTENANT—RIGHTS ACQUIRED.

A subtenant of a lessee in a lease permitting subletting may not on the termination of the lease for the insolvency of the lessee assert any rights against the lessor; the consent to subletting merely waiving the lessor's right to object to the subletting.

[Ed. Note.—For other cases, see *Landlord and Tenant*, Dec. Dig. § 80.*]

Appeal from District Court, Tarrant County; Jas. W. Swayne, Judge.

Action by W. J. Doyle against Winfield Scott and another. From a judgment for defendants, plaintiff appeals. Affirmed.

Lattimore, Cummings, Doyle & Bouldin, for appellant. Stephens & Miller and Capps, Cantey, Hanger & Short, for appellees.

SPEER, J. The appellant, a subtenant of a certain room or place in the Worth Hotel building in Ft. Worth, in which he is operating a saloon, sought an injunction against Winfield Scott and another to restrain them from engaging in the sale of intoxicating liquors at another place in said building and otherwise from breaching the terms of complainant's lease from the Worth Hotel Company, the original tenants under whom complainant holds. After the execution of the lease by the Worth Hotel Company to complainant, the respondent Scott, who was the owner of the building, also became the owner of the Worth Hotel Company's lease by reason of the insolvency of that company, the appointment of a receiver, and the sale of its property. The district judge refused the injunction, and the complainant has appealed.

We find it unnecessary in the view we take of the case to enter into a consideration of the terms of the sublease whereby the Worth Hotel Company sublet to appellant a portion of the Worth Hotel property, since by the termination of the lease by which the company itself held appellant as subtenant thereunder is in no position to assert any right whatever as against the original lessor. It is true in the original lease it was expressly stated that the premises or any part thereof might be sublet. But this would not have the effect of making the subtenant liable to the original lessor on the lessee's covenants, nor the original lessor liable to the subtenant on the tenant's covenants. There is no privity of contract whatever between the original lessor and the subtenant; the consent to a subletting merely having the effect to waive the right of the original lessor to object to the subletting. It is well settled that a subtenant is chargeable with knowledge of the terms of the lessee's lease. *Forrest v. Durnell*, 86 Tex. 647, 26 S. W. 481; *M., K. & T. Ry. of Texas v. Keahy*, 37 Tex. Civ. App. 330, 83 S. W. 1102; *Peer v. Wadsworth*, 67 N. J. Eq. 191, 58 Atl. 379. For any breach therefore of the conditions of the original lease the lessor is entitled to evict, not only his lessee, but the subtenant as well. *Peer v. Wadsworth*, supra; *Geer v. Boston Little Circle Zinc Co.*, 126 Mo. App. 173, 103 S. W. 151; 1 *Woods, Landlord and Tenant* (2d Ed.) § 80; 1 *Taylor's Landlord and Tenant* (8th Ed.) § 109. Appellee has cited some authorities to the effect that a surrender of the lease by

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

the tenant will not have the effect of terminating a sublease entered into with the consent of the landlord. This is true, but for the very excellent reason that a surrender between the lessee and landlord is essentially a new contract (made with notice of the rights of the subtenant), and not a termination of the original lease for breach of its terms. There is no conflict in this holding and those of the authorities above cited, for all proceed upon the binding force of the terms of the original lease as to all parties having notice. The termination of the Worth Hotel Company's lease having put an end to appellant's rights which are necessarily asserted thereunder, we find it unnecessary to discuss any other question in the case, unless possibly it is that of an implied lease by appellee to appellant after the termination of the Worth Hotel Company's lease. But the trial judge's refusal of the writ of course implies a finding against appellant on this issue, and the evidence is such as to justify that finding.

We find no error in the judgment, and it is affirmed.

DOYLE v. SCOTT et al.

(Court of Civil Appeals of Texas. Jan. 28, 1911.)

1. INTOXICATING LIQUORS (§ 261*)—INJUNCTION—GROUNDS.

The court at the suit of a private citizen and taxpayer will not enjoin one from maintaining a saloon without first applying for a license in the manner required by Acts 31st Leg. c. 17, §§ 7, 9, where he has a license which is duly posted as required by law.

[Ed. Note.—For other cases, see Intoxicating Liquors, Cent. Dig. § 401; Dec. Dig. § 261.*]

2. APPEAL AND ERROR (§ 1009*)—EVIDENCE—REVIEW.

The court on appeal from an order refusing an injunction must accept as true the testimony of a party in whose favor the trial court found.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3970-3973; Dec. Dig. § 1009.*]

3. INTOXICATING LIQUORS (§ 64*)—LICENSES—"INTERESTED IN BUSINESS."

An owner of property who leases it for a saloon for a specified sum per month, and a part of the profits of the business, is not interested in the business within Acts 31st Leg. c. 17, § 9, requiring each person desiring a liquor license to state his name in the application, and to swear that no other person is interested in the business; the word "interested" meaning an interest in the business itself.

[Ed. Note.—For other cases, see Intoxicating Liquors, Cent. Dig. § 64; Dec. Dig. § 64.*]

For other definitions, see Words and Phrases, vol. 4, p. 3710; vol. 8, pp. 7691, 7692.]

4. INTOXICATING LIQUORS (§ 115*)—SALOONS—"OPEN HOUSE."

Under Acts 31st Leg. c. 17, § 15, defining an "open house" as one in which no screens obstructing the view through the place of entrance into such house are used, a saloon conducted in a wing of the entrance lobby of a

hotel in plain view of the entrance thereto is conducted in an "open house."

[Ed. Note.—For other cases, see Intoxicating Liquors, Cent. Dig. § 125; Dec. Dig. § 115.*]

For other definitions, see Words and Phrases, vol. 6, p. 4987.]

Appeal from District Court, Tarrant County; R. H. Buck, Judge.

Action by W. J. Doyle against Winfield Scott and another. From an order refusing an injunction, plaintiff appeals. Affirmed.

Lattimore, Cummings, Doyle & Bouldin, for appellant. Stephens & Miller and Capps, Cantey, Hanger & Short, for appellees.

CONNER, C. J. This is an appeal from an order of the judge of the Forty-Eighth judicial district refusing an injunction. Appellant sues as "a private citizen and property taxpayer of the city of Ft. Worth, Tarrant county, Tex.," and alleges: That F. H. Barfield and Winfield Scott "are now engaged in selling spirituous, vinous, and malt liquors at retail, and pursuing the occupation of retail liquor dealers, in the southern part of the lobby of the Worth Hotel in Ft. Worth, Tarrant county, without first applying for and obtaining a permit from the Comptroller of the state of Texas to engage in the business of selling spirituous, vinous, and malt liquors at retail in said place, and without first applying for a license to sell spirituous, vinous, and malt liquors at retail at said place to the county judge of Tarrant county, Tex., for license to engage in said business at said place, and that the said Winfield Scott and F. H. Barfield are pursuing the occupation of retail liquor dealers, and are selling spirituous, vinous, and malt liquors at retail in the south part of the lobby of the Worth Hotel without first obtaining a license, as required by law, and without first making a bond, as required by law, and without first posting up retail liquor dealers' license in said place of business as required by law. That said place of business is not an open house such as the statute requires the place of business of a retail dealer to be, and the bar of said place of business is not in view of the streets and alleys of the city of Ft. Worth, and the defendant Winfield Scott and the defendant F. H. Barfield are not authorized under the laws of Texas to engage in the selling of spirituous, vinous, and malt liquors at said place, and are not authorized to pursue the business of retail liquor dealers at said place." When the petition was presented, it was ordered filed and notices to issue to the defendants to appear at a date named to show cause why the injunction should not issue. At the time fixed, however, the writ was refused after a hearing of the evidence offered by the respective parties.

Regardless of technical questions not in-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

volving the merits, the evidence is such as requires us to support the court's order. It is clear from the testimony of Barfield that at the time of the trial he had due license to engage in the business of a retail liquor dealer in the place designated in the petition, and that the same was duly posted as required by law. The fact, therefore, that Barfield in his original effort to secure license failed to make application in writing, etc., as required by sections 7 and 9 of the act regulating the sale of intoxicating liquors (Gen. Laws 1909, p. 293), becomes immaterial, inasmuch as it is a well-established rule relating to injunctions that where, as here, "the relief sought is purely preventive, a court of equity will not continue or perpetuate an injunction after the cause for which it was granted has been removed and the rights of the complainant are no longer in danger." High on Injunctions, § 41. As presented to this court but two questions in appellant's favor seem to justify discussion. The first is whether the license is invalid because of the relation of Winfield Scott to the business. The license is in the name of Barfield only, and the law (section 9, supra) requires each person, where more than one, who desires to obtain a retail liquor dealer's license to state his name in the application therefor, and to swear "that no other person or corporation is in any manner interested in or to be interested in the proposed business." Barfield testified, and this we must accept as true in view of the court's finding in his favor, "Mr. Scott wanted \$200 a month for that space for the purpose of a bar. I told him I didn't think I could give it. Then he says, 'Well, you give me \$150 then, and, after all expenses are paid, cut the profit in two with me.' I says, 'Yes; after drawing \$100 a month for myself, I will.' And we agreed to that, and he drew up a lease for \$150 a month, and Mr. Scott is to get, after all expenses are paid, a half of the net proceeds as a further rental consideration. I am to pay for the rent of the premises where that bar is, \$150 a month, plus half of the net proceeds, after the expenses are paid, and my \$100 a month comes out. That is the trade I made with Winfield Scott. Mr. Scott has no interest whatever in the goods I have, or in the bar or the fixtures." This state of facts does not constitute Scott a partner or "in any manner interested" in the business within the meaning of the law cited. The "interest" meant by the law means something more than the general interest every landlord has to receive the desired rentals for the use of his property. It must mean some interest in the business itself. A quotation from Parsons on Partnership may be looked to in illustration. He says: "Where the owner of property leases it for business purposes, agreeing to receive in return a proportion of the profits of the business, he receives the amount merely as rent, and is not a partner in the business.

So where one party took cattle of the other party to fatten, and his compensation was fixed at half the net proceeds over the agreed value of the cattle, this did not create a partnership between them. So where an owner of a farm lets it on half profits, the landlord and tenant certainly are not partners; for, if we suppose the tenant should go into great expense for some new mode of cultivation, and become insolvent, no one would think of calling on the landlord as liable on the tenant's contracts. So, in the very common case of shipments on half profits, it is never supposed that such a shipment makes a partnership between the shipper and shipowner; and the same principle has been applied where one advanced money to buy goods, and consigned them, to be repaid out of the goods, and to have a part of the net profits." See, also, to like effect, *T. & P. Ry. v. Smitten*, 81 Tex. Civ. App. 549, 73 S. W. 42, and cases cited.

The remaining question is whether the house is an "open" one within the meaning of the act cited. It is thus defined in the law itself (section 15): "An open house in the meaning of this chapter is one in which no screens or other device is used or placed inside or outside of such house or place of business for the purpose of or that will obstruct the view through the open door or place of entrance into any such house or place where intoxicating liquors are sold to be drunk on the premises." The evidence tends to show that the bar or saloon in question is conducted in the south wing of the entrance lobby of the Worth Hotel, and Barfield thus testified on the subject: "That bar is an open house. The bar is in plain view of the entrance to that bar. I have liquor cases there to show it is a bar. There is whisky in the liquor cases, and wines and so on, and brandies. * * * This bar cannot be seen from the front doors of the lobby of the hotel. I don't believe it can be seen from the middle of the lobby of the hotel. That south wing of the lobby is approximately 18 feet wide. The screen that is between the north end of that bar and the main wing of the lobby I would say is about 8 or 9 feet, something like that. That bar can be seen from the entrance of the bar. There is an entrance to the bar. It is about 7 or 8 feet between the screen and wall back east of the door. There is a space of 7 or 8 feet between the east wall of that south wing of the lobby and this screen that sets or stands just north of this bar." This evidence we think at least supports the conclusion that must be attributed to the trial court that the saloon in question is an open one. The inhibitions of the act are against obstructions to the view through the place of entrance where the intoxicating liquors are to be sold. This does not necessarily mean that the bar must in all cases be within view of an outside entrance to the building. Where, as here, the house includes many rooms, noth-

ing in the act or in the laws relating to contracts makes it unlawful for the owner to lease an inside room for the purposes of a saloon, and, should he do so, the lessee would comply with the requirement under consideration by keeping the view through the place of entrance into such inner room or place unobstructed.

We conclude that the judgment must be affirmed.

FIRST NAT. BANK OF MEMPHIS v. FIRST NAT. BANK OF CLARENDON.†
(Court of Civil Appeals of Texas. Dec. 31, 1910. Rehearing Denied Feb. 11, 1911.)

1. APPEAL AND ERROR (§ 1036*)—PARTIES—DISMISSAL—PREJUDICE.

Where, in an action by a collecting bank against its correspondent to recover the proceeds of a remittance covering the collection of a check, the drawer and payee of the check were made parties defendant, but defendant bank filed no plea to recover over against its codefendants, and the petition alleged facts sufficient to show a liability on the part of defendant bank, it was not prejudiced by an order dismissing the action as to the drawer and drawee of the check.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4073; Dec. Dig. § 1036.*]

2. BANKS AND BANKING (§ 161*)—COLLECTIONS—MEDIUM OF PAYMENT.

In accordance with custom, a bank to which a check is sent for collection in the city in which the drawee bank is located may accept the drawee's draft or check in payment, and is not negligent in failing to demand payment in money.

[Ed. Note.—For other cases, see Banks and Banking, Cent. Dig. §§ 556, 557; Dec. Dig. § 161.*]

3. APPEAL AND ERROR (§ 1040*)—PREJUDICE—RULINGS ON DEMURRER.

Defendant was not prejudiced by the overruling of exceptions to allegations in the petition tendering an issue which the court did not submit to the jury.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4105; Dec. Dig. § 1040.*]

4. EVIDENCE (§ 205*)—ADMISSION—INTEREST—TELEPHONE CONVERSATION.

Plaintiff bank having received a check from defendant bank for collection accepted drafts from the drawee bank in payment, and forwarded its own check to defendant in settlement of the collection, but, the drawee bank having failed before defendant received plaintiff's check, plaintiff's cashier telephoned defendant of the drawee bank's insolvency and requesting the return of plaintiff's check, which defendant's cashier promised to do. *Held*, that evidence of such promise was admissible in an action by plaintiff against defendant to recover the proceeds of plaintiff's check, which defendant thereafter refused to surrender, as an admission against interest.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 699-703; Dec. Dig. § 205.*]

5. EVIDENCE (§ 471*)—OPINION—CONCLUSION OF WITNESS.

Where a bank in failing condition paid a check drawn on it to the collecting bank by drafts which were worthless and shortly thereafter closed its doors, evidence of the bank's manager that the checks drawn on it would not

have been paid in cash if cash had been demanded was not objectionable as an opinion of the witness, when offered in an action by the collecting bank to recover the proceeds of its remittance made on the faith of the worthless drafts.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 2149-2151; Dec. Dig. § 471.*]

• Appeal from District Court, Donley County; J. N. Browning, Judge.

Action by the First National Bank of Clarendon against the First National Bank of Memphis. Judgment for plaintiff, and defendant appeals. Affirmed.

Elliott & Bryant and Gustavus, Bowman & Jackson, for appellant. A. T. Cole and Madden, Trulove & Kimbrough, for appellee.

DUNKLIN, J. The First National Bank of Clarendon recovered a judgment against the First National Bank of Memphis, from which the latter bank has appealed.

The recovery was for money remitted to the Memphis bank by the plaintiff bank in satisfaction of two checks which the plaintiff bank had undertaken to collect, and which had been sent to it for collection by the defendant bank. The checks were drawn by the Clarendon Mercantile Company in favor of the Mickle-Burgher Hardware Company, which the latter company had deposited with the Memphis bank for collection, and which were sent by that bank to the plaintiff bank for the same purpose. The checks were drawn on the Citizens' Bank of Clarendon, and the drawer had money to his credit with the drawee sufficient to pay the checks, but on the day following the presentation of the checks it closed its doors on account of insolvency. The plaintiff bank presented the checks for payment on the same day they were received, which was one day prior to the cessation of business by the Citizens' Bank, and accepted in payment therefor drafts upon other banks given by the Citizens' Bank, but these drafts proved to be worthless on account of the insolvency of the Citizens' Bank who issued them. As soon as plaintiff received those drafts, it forwarded to the Memphis bank its own check on the Ft. Worth National Bank; its cashier believing at the time that the drafts so accepted would be paid. Before the Memphis bank received the check drawn by the plaintiff bank, its cashier was notified over the telephone of the insolvency of the Citizens' Bank of Clarendon, and promised to return the same. Relying upon this promise, the cashier of the plaintiff bank took no steps to recall its check sent to the Memphis bank, and later the Memphis bank collected the check, and, having refused to refund the amount thereof to the plaintiff, this suit was instituted to recover the amount so collected by the Memphis bank. The Clarendon Mercantile Company, drawer of the check,

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

† Application for writ of error pending in Supreme Court.

on the Citizens' Bank of Clarendon, and the Mickle-Burgher Hardware Company, the payee, were made parties defendant with the Memphis bank, but their demurrer to plaintiff's petition was sustained, and they were dismissed from the suit. Appellant assigns this ruling of the court as error. It had no plea over against its codefendants, who were so dismissed, but it insists that it was acting as the agent only for the Mickle-Burgher Hardware Company to collect the check and that no liability could be established against it, unless the liability of the drawer and drawee of the check was first fixed. The petition charged that appellant had received the money and the facts already recited were set out in the petition. We think that such allegations were sufficient to show liability on the part of the Memphis bank, and, if there was error in sustaining the demurrer urged by its codefendants, we are unable to perceive how the same could be prejudicial to appellant.

The evidence showed that, when the plaintiff bank presented the checks to the Citizens' Bank of Clarendon, the latter bank had money on hand sufficient to have paid the same in currency. The appellee alleged in its petition a custom among banks to accept payment in drafts of checks received by it for collection, and evidence was introduced establishing that custom, which was well known. As a predicate for a verdict in plaintiff's favor, the jury were instructed that they must find that plaintiff exercised due diligence and care in receiving the drafts in payment of the checks which they attempted to collect; that in so doing plaintiff in good faith believed that the drafts so received by it would be paid; and, further, that a demand for cash on the checks would have been refused by the Citizens' Bank. The jury were also instructed to return a verdict in favor of the defendant if they believed that the Citizens' Bank would have paid cash in satisfaction of the checks, if the same had been demanded. Appellant insists that, in the absence of an instruction from it to the contrary, appellee had no authority to accept payment of the checks in anything but money, and upon this question the authorities seem to be in conflict. In *National Bank of Commerce v. American Exchange Bank of St. Louis*, 151 Mo. 320, 52 S. W. 265, 74 Am. St. Rep. 527, the Supreme Court of Missouri holds that, when a bank accepts a worthless check in payment of a draft which it undertakes to collect, it makes the check so accepted its own, and its liability is the same as if cash had been received, and that a usage of banks to so collect checks is unreasonable. The opinion in that case is in line with numerous authorities cited therein. On the contrary, it is held in many states that a collecting bank is justified by usage or custom in receiving as payment the check or draft of the debtor drawn on another

bank. See 5 Cyc. 506, and decisions there cited. The latter rule seems to us supported by better reasoning and more consistent with equitable principles which should govern in such transactions. It is a matter of common knowledge that the consideration received by a collecting bank for such services is small, and, if a custom or usage has grown up among banks to accept drafts of other banks in lieu of money, authority to collect in accordance with custom and in the exercise of due diligence should be implied, in the absence of some special instruction to the contrary. An additional reason for the application of this rule in the case at bar is found in the fact that under the charge already quoted the jury necessarily found that the checks which the plaintiff bank undertook to collect would not have been collected in money, if money had been demanded, thus showing the worthlessness of the check which the plaintiff was employed to collect. 5 Cyc. 511.

The court did not submit the issue presented in plaintiff's petition of the agreement over the telephone by appellant's cashier to return the check mailed to him by appellee's cashier to cover the amount which appellee supposed would be realized upon the drafts accepted by it from the Citizens' Bank. This is a sufficient answer to the assignment complaining of the action of the court in overruling the exceptions to the allegation of those facts in plaintiff's petition. Nor was there error in admitting evidence of that agreement. The testimony shows that the conversation over the phone occurred before the receipt of appellee's check by appellant's cashier, and at a time when appellee's cashier could have stopped payment of it if he had so desired, and thus prevented appellant from collecting it. The agreement thus proven was certainly an admission against the interest of appellant by its duly authorized agent intrusted with the conduct of the business then in hand.

W. H. Cook controlled and managed the business of the Citizens' Bank, and his testimony that the checks in controversy would not have been paid in cash, if cash had been demanded, we think was admissible as against appellant's objection that the same was the expression of an opinion only of the witness, as we know of no other method by which proof of that fact could have been made. In view of our conclusions noted above, we overrule appellant's assignment complaining of the refusal of a peremptory instruction in its favor, which it requested, and also another instruction, in effect, that it was negligence as a matter of law to accept payment of the check in controversy in anything except cash. We are of the opinion, further, that the verdict of the jury is sustained by the evidence.

We have found no error in the record, and the judgment is affirmed.

CITY OF HASKELL v. BARKER.†

(Court of Civil Appeals of Texas. Feb. 4, 1911.)

1. MUNICIPAL CORPORATIONS (§ 755*)—TORTS—CONTROL OF SIDEWALKS.

Sayles' Ann. Civ. St. 1897, art. 381, authorizes the incorporation of any city containing 1,000 inhabitants or over, and article 419 declares that such a city shall have exclusive control over its streets. Article 379 relates to towns or villages containing more than 500 and less than 10,000 inhabitants, and article 594 provides that the board of aldermen of such towns shall have exclusive control over the streets, within the corporate limits. *Held* that, whether a city was incorporated under article 381 or article 579 it would have control over sidewalks within its limits, and would be liable for negligence with respect thereto.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 1587-1590; Dec. Dig. § 755.*]

2. MUNICIPAL CORPORATIONS (§ 822*)—TORTS—NOTICE OF DEFECTS IN SIDEWALK.

In an action against a city for injuries from a defective sidewalk, the court instructed that what facts would be sufficient to constitute notice to the city is a question for the jury, and unless the city through some one of its officers had notice, either actual or constructive, of the defective sidewalk, then the city was entitled to a verdict. *Held*, that the instruction was erroneous, as it stated in effect that notice to an officer of the city who has no authority over the streets and sidewalks would be notice to the city.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 1758-1762; Dec. Dig. § 822.*]

Appeal from District Court, Haskell County; C. C. Higgins, Judge.

Action by F. E. Barker against the City of Haskell. Judgment for plaintiff, and defendant appeals. Reversed and remanded.

Clyde F. Elkins and H. G. McConnell, for appellant. Helton & Murchison, for appellee.

SPEER, J. This action was instituted by F. E. Barker against the city of Haskell to recover damages for injuries received by him on account of having stepped into a hole in a defective sidewalk in said city. There was a verdict and judgment for the plaintiff in the sum of \$275 and the defendant has appealed.

Two or three charges are complained of because of an instruction that the defendant city had control of the sidewalks within its corporate limits, and would be liable for its negligence with respect thereto. It is suggested by appellant that since the evidence fails to show whether appellant city was incorporated under article 381, Sayles' Ann. Civ. St. Tex. 1897, authorizing the incorporation of any city, town, or village containing 1,000 inhabitants or over, or under article 579 (Id.) relative to towns or villages containing more than 500 and less than 10,000 inhabitants, the authority of the city over its sidewalks is not so certain under the law as to authorize the charges referred to. As we view the law, however, it is immaterial

whether appellant was incorporated under the one or the other article. If under the article first cited, then article 419 declares that such city shall "have the exclusive control and power over the streets, alleys, and public grounds and highways of the city," etc. If under the latter article, then it is prescribed (article 594): "The board of aldermen shall have and exercise exclusive control over the streets, alleys and other public places within the corporate limits," etc. It may be that towns and cities incorporated under article 381 have broader powers with reference to the sidewalks (see article 426) than have towns or villages incorporated under the towns and villages chapter, but we think in all cases the corporation has the exclusive control of the streets which would include the sidewalks and where it has assumed to exercise such control, as is abundantly shown here, would be liable for its negligence resulting in injury to another.

The remaining assignment is that the court erred in the following instruction: "What facts would be sufficient to constitute notice upon the part of the officers of the city is a question for the jury to pass upon from all the facts and circumstances in evidence, and unless you believe from the evidence in this case that the city through some one of its officers had notice either actual or constructive of the defective sidewalk in question, if you believe it was defective, then the city is entitled to a verdict for the defendant." The proposition in effect is that notice to an officer of the city who has no authority over the streets and sidewalks would not be such notice as to make the city liable for such officer's negligence. This is correct. It is not every officer of a city whose knowledge would be chargeable to the city, and the plain effect of the charge is to authorize a verdict for the plaintiff if any officer of the city had notice or was chargeable with notice of the condition of the sidewalk. *City of Dallas v. Meyers*, 55 S. W. 742.

For the error contained in this charge, the judgment is reversed, and the cause remanded for another trial.

BOTTOM et al. v. TINSLEY et al.

(Court of Civil Appeals of Texas. Feb. 4, 1911.
Rehearing Denied Feb. 25, 1911.)

1. RELIGIOUS SOCIETIES (§ 25*)—DIVISION—CONTRACTS—SPECIFIC PERFORMANCE—PLEADING.

A petition alleging that, as a result of the action of a minority of the members of a church in sending messengers to a county association which had a different method of government and mission work from the association to which the messengers had formerly been sent, there grew up two factions alleged to be the parties to the contract sought to be specifically enforced for the sale of the interest of defendant faction to the plaintiff faction; that the contract was effected through the vol-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

untary action of a majority of both factions; that it was agreed that the faction buying the property should be members of the church; and that the members of the selling faction should take letters and retire from the church; and that the defendant faction hold possession of the property to the exclusion of the use thereof by plaintiffs as a place of worship, and seeking specific performance of the contract of sale, and an injunction against interference with plaintiffs' right to use the church property—is sufficient, at least as against a general demurrer.

[Ed. Note.—For other cases, see Religious Societies, Dec. Dig. § 25.*]

2. RELIGIOUS SOCIETIES (§ 23*)—PROPERTY—DIVISION OF SOCIETY.

It is not essential to the validity of a contract between two factions of a church for the sale of the church property by one faction to the other that the contract be authorized or actually entered into by a majority of all the members, where open conferences were held, there was no concealment, and no member was prevented from attending such conferences or otherwise denied participation therein.

[Ed. Note.—For other cases, see Religious Societies, Dec. Dig. § 23.*]

3. RELIGIOUS SOCIETIES (§ 25*)—SPECIFIC PERFORMANCE—PLEADING—SPECIAL DEFENSES.

In an action to enforce specifically a contract by defendant faction of a church to sell its interest in the church property to the plaintiff faction, a special answer stating that at the conference when the committee was appointed looking to a sale of the property there were only 35 members present while there were more than 200 members in the church, that, when the committee made its report in favor of a sale, the conference adjourned to meet the next day because no deed had been written, the parties having failed to agree as to whom the deed should be made, and action was deferred to another conference at which there was a full attendance of the membership, and, after a thorough consideration, a motion was adopted to rescind the act of the previous conference providing for a division of the property and sale, and the sale was set aside, was sufficient to state a defense.

[Ed. Note.—For other cases, see Religious Societies, Dec. Dig. § 25.*]

Appeal from District Court, Hill County; W. C. Wear, Judge.

Action by J. R. Tinsley and others, in their own behalf and as deacons of the Missionary Baptist Church of Abbott, Tex., against C. Bottom and others. From a judgment for plaintiffs, defendants appeal. Reversed and remanded.

Ivy, Hill & Greenwood, for appellants. Morrow & Smithdeal, for appellees.

TALBOT, J. This is an action brought by the appellees, suing in their own behalf, and in their capacity as deacons of the Missionary Baptist Church of Abbott, Tex., against the appellants for specific performance of an alleged contract to convey to appellees the church house and lot of said church described in plaintiffs' petition. It is alleged, in substance, that all parties reside in Hill county, Tex.; that plaintiffs and defendants are members of said church, and that said church is a voluntary association or reli-

gious society, and that appellees are successors to the original deacons of said church; that the government of said church was and is by a majority of its members, and its business transacted at conferences held at stated times, and that its government was in keeping with all Missionary Baptist churches throughout the country; that said church for many years had affiliated with and sent its messengers to the Hillsboro Baptist Association meeting at Hillsboro, but that in 1908 said church was affiliated with and its messengers sent to the Hill County Baptist Association by the action of a minority of its members, and that the Hill County Association had a different method of government and of missionary work from the Hillsboro Association and from said church, and that as a result of the differences growing out of those matters there grew up two factions in the church, and that these conditions finally resulted in a conference of the church on February 6, 1909, composed of both factions, at which a committee was appointed composed of six members, three from each faction, one known as the "General Convention Party," to which appellants belonged, and the other known as the "Baptist Missionary Association Party," to which appellees belonged; that at said conference by resolution adopted C. Bottom, Ford Marshall, and John B. Adams, as representatives of the General Convention side, and R. L. Dawson, P. H. Davidson, and J. R. Tinsley, as representatives of the Baptist Missionary Association side, were appointed and instructed to place a value on the church property, and that the party who set the price should make a proposition to give or take—that is, to sell or buy a one-half interest at the price named—that said resolution further provided that those buying should remain in the house and the others take letters and go out; that afterwards the committee held a meeting, and that the committee men belonging to the Baptist Missionary Association side set a price of \$1,400 on the property, proposing to give \$700 for the one-half interest of the opposite party, and that the General Convention side of the committee agreed to take the \$700 for the interest of the party that they represented; that afterwards, on March 6th, at a regular conference of the church, the said proceedings of said committee were reported in writing and the same approved and adopted, and the deacons of said church adhering to the General Convention side were directed by said conference to make a conveyance of said property and deliver possession of the same to plaintiffs J. R. Tinsley and J. T. Bobbitt, the deacons of said church adhering to the said Baptist Missionary Association side, and that all of said matters were spread upon the minutes of the church in writing; that afterwards the plaintiffs, for the purpose of carrying into effect said

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agreement, tendered the said \$700 to the defendants; and that defendants have refused to make said conveyance.

It is further alleged that the plaintiffs upon the faith of said agreement have secured the said sum of \$700 by subscription, and have procured the services of a minister, and have prepared to continue the church organization for religious purposes at Abbott, Tex.; that the defendants, in violation of their agreement and in disobedience to the orders of the church conference, are retaining the possession of said church property, to the exclusion of the use thereof by the plaintiffs as a place of worship, and have and are preventing the plaintiffs from the use of the same for religious purposes and for Sunday school purposes; and that, by reason thereof, the plaintiffs are without a place of worship and the other members of said church adhering to the said Baptist Missionary Association side thereof, constituting as plaintiffs believe a majority of all of the members of said church, are without a place of worship, etc. The prayer of the petition is that specific performance of the contract alleged be decreed; that an injunction, restraining the defendants from further interfering with the plaintiffs' use of said church house and property and requiring defendants to desist from using the same, be issued; and that they have such relief in law or equity to which they may be entitled.

The defendants answered (1) by general exception; (2) by special exception to the effect that plaintiffs' petition wholly failed to allege such facts as would give the court jurisdiction over the subject-matter, that it appeared that the suit was based upon a church controversy, and the petition failed to disclose such facts as would invoke the jurisdiction and authority of the court; (3) a general denial; and (4) specially, in substance, that about three years before this suit was filed there was organized in Hill county a Baptist Association known as the Hill County Association, which meets annually and is made up of messengers elected and sent by various Baptist churches; that each of said churches and the Abbott Baptist Church has a congregational form of church government, in which each member has a right to vote; that the Abbott Baptist Church did send its messengers to said association, and that such action was regular, and that no opposition was expressed at the time; that the Hill County Association did not have a different form of government from other associations, nor a different way of dealing with the Mission question from said church. It was alleged that no association or convention has anything to do with reference to the government of the church, having no jurisdiction or supervision over a Baptist church; that plaintiffs and a small minority of the church acting with them became so dissatisfied because the church had sent its messengers to the Hill County As-

sociation that they entered into open rebellion against the church and held a factional meeting, and pretended to elect a pastor, notwithstanding the fact that at that very time the church had a regular pastor, who had been serving it for a long time.

It was further alleged that at the conference when the committee was appointed looking to the sale of said property there were only 35 members present, and that at said time and now there were, and now are, more than 200 members in said church, that the committee made its report on March 6th in favor of a sale, and that the conference adjourned to meet next day, because no deed had been written, the respective parties having failed to agree as to whom the deed should be made, and that as a matter of fact no agreement was ever reached as to whom said deed should be made, and action in regard thereto was deferred to the next conference, which met on April 3d; that in the meantime it became widely known among all the members of the church that a move was on foot to sell the property, and divide the membership, and that, when this became known, sentiment rapidly developed against such division, and that as a result there was a full attendance of the membership at said last conference, and that, after a thorough consideration of the entire matter, a motion was made by R. L. Dawson, who theretofore had belonged to plaintiffs' faction, to rescind the act of the previous conference providing for a division of the property and sale, and hold the same for naught, and to set such former action aside; that 55 members voted for the motion to rescind and only 20 against it; that this was the official action of the church at a large and representative meeting after the matter was thoroughly considered; that plaintiffs themselves participated in said meeting and are bound by it, and are estopped from attacking same; that the church, having a congregational form of church government, had the right by and under its organic construction, government, and policy to change, modify, order, or set aside at a subsequent meeting its own action of a previous meeting on the same subject; that the overwhelming majority of the members are opposed to a sale and division, and that it is for the best interest of the church, now and hereafter, that such division do not occur; that already a large number of the minority faction have reconsidered their course, and are convinced that there should be no division. It was also alleged that the committee was without authority to sell, because the church and a majority of its members are opposed to a sale, and were so opposed at the time the committee was appointed and at the time the act of rescission occurred, and that the committee could not bind the church nor affect the rights of the members to the use and enjoyment of the property. Appellees filed their first supplemental petition on Sep-

tember 20, 1908, and excepted (1) to appellants' first amended original answer; and (2) especially excepted to subdivision 4 of said answer, because it presented no defense; and (3) to said answer because it was not alleged that the contract to sell was procured by fraud, accident, or mistake, and because it was not alleged that plaintiffs agreed to such rescission; and (4) a general denial to all of said answer; and (5) a tender of \$700 into court; and (6) that said contract could not be rescinded except by consent of plaintiffs. On September 20th defendants filed their first supplemental answer, and alleged that the original grantees in the deed conveying said property were necessary parties to this suit, and especially alleging that the act of rescission was in writing and spread upon the minutes of the church, and was the act of the church itself, and that the act of rescission was at a conference which was a continuation of the former conferences. The defendants' general demurrer to plaintiffs' petition was overruled, and plaintiffs' special exception to the special answer set up by the defendants was sustained and said answer stricken out. The cause upon its merits was tried before the court without a jury, and judgment rendered in favor of plaintiffs as individuals and as deacons divesting out of defendants all right, title, and interest in and to the property involved, and decreed that it should be vested in plaintiffs, and that defendants recover \$700 from plaintiffs, and in favor of plaintiffs for specific performance, and that possession be vested in plaintiffs, and that defendants be enjoined from interfering with or obstructing the use of said property. Appellants excepted to the judgment of the court, and gave notice of appeal and perfected the same.

Appellants' first assignment of error complains of the court's action in overruling their general demurrer to plaintiffs' petition. The contention, in substance, is that the petition shows no cause of action, because it discloses upon its face that the plaintiffs' alleged cause of action is based upon a church controversy, and that the church in question has a congregational form of church government and its affairs controlled by a majority of its members; that the petition fails to allege that a majority of the members of said church entered into, or in any manner ratified, or acquiesced in, the contract sought to be enforced, and fails to show that either the plaintiffs or the defendants had or have any individual rights or ownership in the property in controversy; that where there is a schism among the members of a church having a congregational form of government courts will not interfere to settle such differences, nor interfere with the property of such church, hence the plaintiffs' petition fails to show that any such contract was made, as can be enforced by the courts. The decision of the question

presented has not been without difficulty, but we have reached the conclusion that if it be conceded that the proposition of law embraced in appellants' contention is, generally speaking, correct, still the same should not be applied and given controlling effect in this case. At least, tested by a general demurrer, we are inclined to think the allegations of the petition are sufficient to show a cause of action. It would seem that no good reason or legal impediment existed to prevent the respective members of the two factions of the church from entering into a binding contract for the transfer of such interest, or right of possession and use that the one faction had in and to the church property to the other for a money consideration and in consideration that the faction selling should withdraw from the church. As has been seen, the petition alleged that as a result of the action of a minority of the members of the church in sending, in 1908, the messengers of the church to the Hill County Baptist Association, which had a different method of government and mission work from the Hillsboro Association, instead of sending them to the latter association as had formerly been done, there grew up the two factions in the church, alleged to be parties to the contract sought to be specifically enforced in this action, that the execution of said contract was effected through the voluntary action and by a majority vote of the members of both factions present, and that it was agreed, in effect, that the faction buying the property should remain members of the Abbott Baptist Church, and that the members of the faction selling or relinquishing their use of the property should take letters and retire from said church. The petition did not allege that a majority of all the members of the church entered into said contract or ratified or acquiesced in the same, but the absence of such an allegation did not in our opinion render the petition obnoxious to a general demurrer. We do not regard it as absolutely essential to the validity of the contract that the same should have been authorized or actually entered into by a majority of all the members of the church. The radical differences of opinion and action giving rise to the two factions were evidently generally known among the members of the church. Open conferences were held with a view of one faction securing the relinquishment of the other faction's interest and use of the church property in the manner alleged, and no member, for aught that appears in the record before us, was prevented by any concealment or secret action on the part of those authorizing the contract from attending such conferences or otherwise denied participation therein, and we think the action of the majority, as alleged, was sufficient to give force and effect to said contract. We know of no decision that holds that such a contract entered into under the facts and circumstances alleg-

ed is not binding and cannot be enforced. Again, it is alleged, in effect, that the defendants have not only violated their contract and agreement to sell and relinquish their interest in and use of the property in controversy, but have and hold the possession of said property to the exclusion of the use thereof by plaintiffs as a place of worship under their said organization, and are preventing them from the use of said property for religious purposes, etc. These allegations for the purposes of the demurrer must be taken as true, and it would seem that, if the contract alleged by plaintiffs cannot be specifically enforced for the reasons urged by the appellants, still the defendants, as members of the Abbott Baptist Church, would have no right to take exclusive possession of the church house and other property held in trust by the deacons of said church, and thereby prevent plaintiffs and those members adhering to the Baptist Missionary Association from using the same for religious purposes. The right to so use said church as members thereof is such a property or valuable right as would it seems under the allegations of plaintiffs' petition, even though the contract set up cannot be enforced, furnish sufficient grounds for the interposition of the equity powers of the court to enjoin and prevent such a wrong.

The second assignment of error is that the trial court erred in sustaining the plaintiffs' special exception to the defendants' special answer. We think this assignment must be sustained. The special answer stricken out by the action of the court in sustaining plaintiffs' demurrer averred, among other things, that the Abbott Baptist Church had at the time the alleged contract was made a congregational form of government in which each member had the right to vote; that at the conference when the committee was appointed looking to the sale of said property there were only 35 members present, and that at said time there were, and now are, more than 200 members in said church; that the committee made its report on March 6th in favor of a sale, and that the conference adjourned to meet next day, because no deed had been written, the respective parties having failed to agree as to whom the deed should be made, and that as a matter of fact no agreement was ever reached as to whom said deed should be made, and action in regard thereto was deferred to the next conference, which met on April 3d; that in the meantime it became widely known among all the members of the church that a move was on foot to sell the property and divide the membership; and that, when this became known, sentiment rapidly developed against such division, and that, as a result, there was a full attendance of the membership at said last conference, and that after a thor-

ough consideration of the entire matter a motion was made by R. L. Dawson, who theretofore had belonged to plaintiffs' faction, to rescind the act of the previous conference providing for a division of the property and sale, and hold the same for naught, and to set such former action aside; that 55 members voted for the motion to rescind and only 20 against it; that this was the official action of the church at a large and representative meeting after the matter was thoroughly considered; that plaintiffs themselves participated in said meeting, and are bound by it, and are estopped from attacking same; that the church, having a congregational form of church government, had the right by and under its organic construction, government and policy, to change, modify, order, or set aside at a subsequent meeting its own action of a previous meeting on the same subject. It was further alleged in a supplemental answer that the act of rescission referred to in the said special answer was at a conference of the church, which was a continuation of the former conferences at which the matter of dividing and selling the church was considered. The allegations of these answers, and especially those to the effect that the church had, at the time the alleged contract was entered into, a congregational form of government, that at the conferences of March 6 and 7, 1909, the committee appointed to negotiate and secure the said contract had not agreed to whom the transfer or conveyance of the church property should be made, and that action in regard thereto was deferred by said committee and said conferences to the conference which met on April 3, 1909, and that at said last-named conference the acts of the previous conferences in regard to the sale and division of the church property were rescinded and annulled by a majority vote of the members of the church attending said conference, showed a good defense to plaintiffs' action for specific performance of the contract alleged. These allegations upon demurrer must be considered and taken as true, and the court erred in striking them out and refusing to hear evidence in support thereof.

Indeed, it may be stated in this connection that the statement of facts shows that the parties to the suit have agreed that the Abbott Baptist Church has always had a congregational form of church government, and that a majority of its members rule, and that in its conferences it often happens that matters which took place at previous conferences or meetings of the church may be afterwards taken up and discussed and set aside.

For this error we think the judgment of the court below should be reversed and the cause remanded, and it is accordingly so ordered.

Reversed and remanded.

WILKS v. KREIS.

(Court of Civil Appeals of Texas. Jan. 7, 1911.
Rehearing Denied Feb. 11, 1911.)

1. TROVER AND CONVERSION (§ 32*)—ALLEGATIONS OF PETITION—NATURE OF ACTION.

A petition alleged that plaintiff on a certain date possessed and owned the mules described, which were of a certain value, and that defendant on such date unlawfully took possession of them and converted them to his own use, depriving plaintiff of their possession, to his damage, wherefore plaintiff prayed judgment for recovery of the mules and for their value, with interest, damages, and costs, and for general relief. *Held*, that the action was for the conversion of the mules, notwithstanding the prayer for their recovery, which did not change the legal effect of the facts alleged.

[Ed. Note.—For other cases, see Trover and Conversion, Cent. Dig. §§ 191-202; Dec. Dig. § 32.*]

2. PLEADING (§ 72*)—ALLEGATIONS OF PETITION—PRAYER—EFFECT.

A prayer cannot change the legal effect of the facts alleged in the charging part of the petition.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 143, 144; Dec. Dig. § 72.*]

3. TROVER AND CONVERSION (§ 68*)—VERDICT—MEASURE OF DAMAGES.

As plaintiff's measure of damages is the value of the property converted, with interest from the date of the conversion, in an action for damages for the conversion of mules, the verdict need only state the aggregate value of the mules.

[Ed. Note.—For other cases, see Trover and Conversion, Cent. Dig. §§ 304-307; Dec. Dig. § 68.*]

Appeal from District Court, Childress County; S. P. Huff, Judge.

Action by D. F. Kreis against G. W. Wilks. From a judgment for plaintiff, defendant appeals. Affirmed.

J. H. Aynsworth, for appellant. Fires & Diggs, for appellee.

CONNER, C. J. Appellee instituted this suit, alleging that he was the owner and possessed of 122 head of mules, of the value of \$60 per head, and of the aggregate value of \$7,320, which the defendant, G. W. Wilks, had converted to his own use. Defendant, in answer, claimed the mules under a contract of sale set up by him, to the effect that defendant was to pay for the mules at the price per head stated in the plaintiff's petition by conveying to the plaintiff certain land, of the value of \$4,800, and by executing his promissory note in the further sum of \$3,160, and tender of conveyance and note was made. To this answer the plaintiff replied that a tentative agreement such as pleaded by the defendant had been made, but that it was conditioned upon the land mentioned in the contract being good agricultural land, as it was represented by defendant; that the land was not as represented, and that he had never concluded the agreement; notwithstanding which defendant, without his consent, had taken possession of and converted the mules,

as originally alleged. The several issues thus indicated were submitted in a trial before the jury, which resulted in a verdict and judgment in plaintiff's favor for the sum of \$7,076, with interest, etc., and defendant appeals.

By assignments of error to the court's charge, to the judgment, and to the action of the court in overruling the motion for a new trial, appellant insists that reversible error was committed, on the ground that the verdict and judgment awards a total sum for damages, without giving the specific values of each of the mules for which the suit was brought. Numerous authorities are cited which support appellant's contention in cases where the suit is for the recovery of specific property; but we need not stop to consider them, nor the reasons upon which they are based, for in our judgment they have no application to the case before us. The appellee's petition in terms and in legal effect makes the case one of simple conversion. Excluding formal parts it is as follows: "That heretofore, to wit, about the 15th day of April, A. D. 1909, plaintiff possessed and owned 122 mules, branded ——— on left shoulder and various other brands not now remembered by plaintiff, which said mules were then and there located and situated on plaintiff's premises in the northeast portion of said Childress county, which said mules were of the value of \$60 per head, or an aggregate sum of \$7,320. That on or about the day above named the defendant unlawfully took possession of the said mules, and converted the same to his own use, and has deprived the plaintiff of the possession thereof, to his damage in the sum of \$8,000. Wherefore plaintiff prays that defendant be cited to answer this petition, and that he have judgment for the recovery of said mules, and for the value thereof, with his interest, damages, and costs of suit, and that he have general relief."

It is to be observed that the only part of the petition which looks to the specific recovery of the mules is one of the prayers; but this cannot control the legal effect of the facts alleged in the charging part of the petition. *Milliken v. Smoot*, 64 Tex. 171; *McIlhenny Co. v. Todd*, 71 Tex. 403, 9 S. W. 445, 10 Am. St. Rep. 753. It was correct, therefore, for the court to charge the jury that in event they found against the defendant upon his defense, and that the mules had been converted as charged, to find for the plaintiff as damages the value of all of the converted mules. So, too, the verdict and judgment were sufficient in stating the aggregate value, as the rule is well established that in cases of conversion the plaintiff's measure of damages is the value of the converted property, with interest thereon from the date of the conversion. *Grimes v. Watkins*, 59 Tex. 133; *Hudson v. Wilkinson*, 61

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

Tex. 607; Hull v. Davidson, 6 Tex. Civ. App. 588, 25 S. W. 1047.

The only other question presented that is worthy of notice is appellant's contention that the evidence is insufficient to support the verdict and judgment; but a careful examination of the evidence entirely refutes the contention.

The judgment is accordingly affirmed.

KIDD et ux. v. McCRACKEN et ux.†
(Court of Civil Appeals of Texas. Dec. 31, 1910. Rehearing Denied Feb. 11, 1911.)

1. DISMISSAL AND NONSUIT (§ 8*)—NONSUIT—TIME OF TAKING.

Under Sayles' Ann. Civ. St. 1897, art. 1301, providing that plaintiff may take a nonsuit before the jury retires, and, on trial by the judge, before decision is announced, plaintiff cannot take a nonsuit after being informed by the judge of what his decision will be, though a judgment is not then actually rendered.

[Ed. Note.—For other cases, see Dismissal and Nonsuit, Cent. Dig. §§ 20, 21; Dec. Dig. § 8.*]

2. EVIDENCE (§ 271*)—DECLARATIONS OF PARTIES—SELF-SERVING DECLARATION.

In an action to have an absolute deed declared a mortgage, evidence that plaintiff told witness a week or two after the transaction that he had disposed of the buildings conveyed by the deed for a certain price, but that he had a right to redeem within two years, was properly excluded as self-serving.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 1068-1104; Dec. Dig. § 271.*]

3. NEW TRIAL (§ 102*)—GROUNDS—NEWLY DISCOVERED EVIDENCE—DILIGENCE.

Where a witness, to procure whose testimony as newly discovered a new trial was asked, lived in appellant's home town in the county of the venue, and the trial lasted several days, so that there was sufficient time to procure his attendance, after the witness whose testimony was to be rebutted by such witness, had testified a new trial was properly denied.

[Ed. Note.—For other cases, see New Trial, Cent. Dig. §§ 210-214; Dec. Dig. § 102.*]

4. APPEAL AND ERROR (§ 981*)—DISCRETION OF TRIAL COURT—NEW TRIAL—NEWLY DISCOVERED EVIDENCE.

An appellate court will not reverse for refusal to grant a new trial for newly discovered evidence, unless it clearly appears that the trial court has abused its discretion, and there was no abuse where the alleged newly discovered testimony was largely for impeachment purposes and the contradiction between the proposed testimony and that of the witness to be impeached was not so contradictory as to make it probable that the result would be changed.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3876; Dec. Dig. § 981.*]

5. NEW TRIAL (§ 108*)—GROUNDS—NEWLY DISCOVERED EVIDENCE—CHARACTER OF NEWLY DISCOVERED EVIDENCE—INDEFINITE EVIDENCE.

An affidavit made by the newly discovered witness, in an action to have a deed declared a mortgage, to the effect that defendant told such witness that he had loaned plaintiff money on the building conveyed, was too indefinite, where the affidavit further stated that such witness was not sure whether defendant had said

he loaned the money to plaintiff or paid it to him on the purchase price.

[Ed. Note.—For other cases, see New Trial, Cent. Dig. §§ 226, 227; Dec. Dig. § 108.*]

Appeal from District Court, Parker County; J. W. Patterson, Judge.

Action by C. C. Kidd and wife against Joe H. McCracken and wife. From a judgment for defendants, plaintiffs appeal. Affirmed.

R. E. Carswell and Hood & Shadle, for appellants. Stennis & Wilson, for appellees.

SPEER, J. C. C. Kidd and wife instituted this suit against Joe H. McCracken and wife, alleging that a certain warranty deed in form executed by plaintiffs to defendants, conveying lot 5, block 8, Springtown, Tex., upon a recited consideration of \$6,000, was in fact a mortgage to secure an advancement of that amount, and seeking a decree of the court to that effect, offering at the time to repay the loan, with interest. The defendants denied generally and specially plaintiffs' allegations, and the cause was tried before the court without a jury, resulting in a judgment for the defendants, from which the plaintiffs have appealed.

It is first insisted that the court erred in refusing to permit appellants to withdraw their announcement of ready, and take a nonsuit. According to appellants' bill of exceptions presenting this question, the request for a nonsuit was made under the following circumstances: On the afternoon of November 18th, after the evidence was all in and after the argument of counsel had been concluded, the court announced that he would take the matter under advisement and render his decision on the following morning. When court was called on the following morning, appellant C. C. Kidd requested and was granted permission to submit some further remarks, at the conclusion of which remarks the court made the following statement, to wit: "I do not think there can be any question from the evidence but that John McCracken came down here as the agent of Joe McCracken (defendant) to buy the property in question; so the only question in the case in my mind is as to whether the instrument in controversy was intended as a mortgage or as an outright sale. I do not believe that the decisions, wherein it is said that the proof, in order to set aside a deed, must be clear and satisfactory, place on plaintiffs a greater burden than to prove by a preponderance of the evidence that the deed was intended and understood by the parties to be a mortgage. I think the language used to that effect in some of the decisions means, in the light of the decisions read by Mr. Hood, that it must be clear to the court that the preponderance of the evidence is in plaintiffs' favor, and it is not clear to my mind that the preponderance of the evidence is in favor of the plaintiffs' con-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes
† Writ of error granted by Supreme Court.

tention that the instrument was a mortgage. It is true, the plaintiffs have one more witness than the defendant in favor of the instrument's being a mortgage, but all the written testimony in the case bears out the contention of the defendant. And I admitted certain testimony conditionally; that is, I stated that I would hear it and announce my ruling later, as to whether I would consider it or not. I will have the stenographer come in and have him take down my ruling in regard to this testimony." At this point counsel for appellants moved the court to permit them to withdraw their announcement of ready for trial, and take a nonsuit, which the court refused, and proceeded to render judgment against them. A proper decision of the question here presented calls for a construction of article 1301, Sayles' Ann. Civ. St. 1897, which reads: "At any time before the jury have retired the plaintiff may take a nonsuit, but he shall not thereby prejudice the right of an adverse party to be heard on his claim for affirmative relief; when the case is tried by the judge such nonsuit may be taken at any time before the decision is announced."

It is the contention of appellants that a preliminary statement by a judge, even though it may indicate what the final decision will be, is, nevertheless, not such an announcement of that decision as will preclude a plaintiff in his right to a nonsuit, and some authorities from other states are cited which appear, in a measure, to support this contention; but, so far as we have been able to examine those authorities, they appear to be based upon statutes which are construed to confer the right to a nonsuit on a plaintiff up to the time when the judge has actually entered his final findings. It will be observed that our statutes confer the right on a plaintiff to take a nonsuit at any time "before the decision is announced." By this language we think is meant any announcement by the judge of what his decision in the case would be. If the Legislature had intended that the right to a nonsuit could be exercised at any time until final judgment was actually rendered, the law could easily have been so written. We think the spirit of the statute is that the plaintiff will be denied nonsuit after he has learned from the court his decision in the case, and this is eminently fair; for he should not be allowed the privilege, after he has learned from the court's announcement what his decision in the case would be, to take a nonsuit, and then bring a new action and continue to do so indefinitely, until, by good fortune on his part or bad fortune on the part of the defendant, he has succeeded in securing a judgment in his favor.

The next ruling complained of presents a question of evidence. Appellants offered to prove by the witness Dr. Walter Wood, who had testified that he had had a conversation with appellant C. C. Kidd some week or two

after the transaction in question, that "Mr. Kidd told me he had disposed of the buildings. I don't know what he got for them, except that I asked him what he got for them, and he told me \$6,000. I asked him if that was not pretty cheap, and he told me it was; but he had a right to redeem them within two years." Appellants offered this testimony to support their contention made at the trial that the transaction was a loan, and especially to meet the testimony of appellees' witness, Dr. W. F. Gordon, who had testified that appellant C. C. Kidd, about the time of the transaction in question, had stated to him that he had sold his (Kidd's) rock houses to Dr. Joe H. McCracken. The testimony offered by appellants was excluded by the court upon the objection that such statements were self-serving, and we think properly so. In *Ætna Insurance Co. v. Eastman*, 95 Tex. 34, 64 S. W. 863, Chief Justice Gaines, speaking to the question under consideration, says: "But two rules are reasonably well established. First, that, in the absence of evidence impeaching the credibility of a witness, such testimony is never admissible. *Moody v. Gardner*, 42 Tex. 414. Second, that, whenever a witness is sought to be impeached by showing that he has made declarations inconsistent with the testimony given by him upon the trial, and the tendency of such impeaching evidence is to show that the testimony of the witness is by reason of some motive existing at the time of the trial, or some influence then operating upon him, fabricated, it is proper to admit evidence of his former declarations which corroborate his testimony, provided such declarations were made at a time when no such motive or influence existed." That a motive existed at the time appellant made this statement sought to be proved, calculated to influence him in making it, cannot be denied. At the time of the trial the motive may have been stronger, but this is a difference in degree, and not in kind. It is further to be noticed that in the course of the opinion above quoted from, the learned Chief Justice says: "We doubt, however, whether the declarations of a party to a suit, made at a time when they are in any manner self-serving, ought ever to be admitted in corroboration of his testimony given upon the trial."

Neither do we find any error in the court's action in refusing a new trial on the ground of newly discovered evidence. The witnesses, to procure whose testimony the new trial was sought, lived in Parker county at appellants' home town; the trial lasted several days, and for aught that appears there was sufficient time to procure their attendance at court after the witness Dr. Gordon, whose testimony it was sought to meet, had testified. Besides, we would not reverse the trial court in a matter of this kind, unless it clearly appeared that he had abused his discretion, and in the present case he has not

done so. The newly discovered testimony is in a large measure for impeaching purposes, and an examination of the testimony of the witness Gordon and of the proposed testimony of the absent witnesses fails to show such contradiction as would probably have changed the result upon another trial. The force of the affidavit made by the newly discovered witness, Acklin Harris, to the effect that appellee Joe H. McCracken had stated to him that he had loaned appellant Kidd money on his rock building at Springtown, is practically destroyed by his further affidavit, made to appellee's counsel on the same day, that he was not sure whether Dr. McCracken had said he loaned Kidd the money or paid him the money on a purchase of the property. The trial court correctly refused to grant a new trial to enable appellants to procure the testimony of a witness who was so uncertain and indefinite in his statements.

While there is a very marked conflict in the testimony upon the vital issue determined by the court, nevertheless there is abundant evidence to support his findings, and we accordingly affirm the judgment.

Affirmed.

LONE STAR LIGNITE MINING CO. v. CADDELL et al.†

(Court of Civil Appeals of Texas. Jan. 19, 1911. On Motion for Rehearing, March 2, 1911.)

1. MASTER AND SERVANT (§ 118*)—INJURIES TO SERVANT.

Where the timber crew in a mine had commenced to brace the roof of one of the rooms, and while at work there a member of the track crew, whose duty it was to lay track and clear away obstructions, was killed by the caving in of the roof and deceased had nothing to do with the work of timbering or propping, the master was not absolved from liability under the rule as to the liability to servants who are engaged in the business of making safe an unsafe place.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 209; Dec. Dig. § 118.*]

2. MASTER AND SERVANT (§ 288*)—INJURIES TO SERVANT—ASSUMPTION OF RISK.

Where a servant employed in a mine knew that the roof of a certain room was considered probably dangerous, but he had been assured by his superior, who was an expert, that the roof was safe, and he was directed to proceed with his work, in an action for his death, owing to the fall of the roof, the question of assumption of risk was one for the jury.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 1068-1088; Dec. Dig. § 288.*]

3. MASTER AND SERVANT (§ 289*)—INJURIES TO SERVANT—CONTRIBUTORY NEGLIGENCE.

The question of contributory negligence was one for the jury.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 1089-1132; Dec. Dig. § 289.*]

4. MASTER AND SERVANT (§ 217*)—INJURIES TO SERVANT—ASSUMPTION OF RISK.

A servant, in order to be charged with an assumption of risk on the ground that he knows

of the existence of the defect, must not only know of the situation, but also of the danger that is likely to result from it.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 574-600; Dec. Dig. § 217.*]

5. MASTER AND SERVANT (§ 270*)—INJURIES TO SERVANT—ACTION—EVIDENCE—ADMISSIBILITY.

In an action for the death of a miner owing to the caving in of the roof of one of the rooms in the mine, the negligence relied on was failure to exercise care in propping the roof of the mine so as to prevent caving in, and defendant interposed a general denial. A witness testified that in his opinion the caving could have been prevented had the timbering been done in time, and that in his opinion the timber crew was about six weeks or two months behind the miners with the timbering work, and he then testified, over the objection of defendant, that the space where the accident occurred could have been timbered in two or three days. *Held*, that the evidence was not inadmissible as against an objection that there were no allegations charging that defendant was behind with the timbering work, or that such negligence was the proximate cause of the injury, and that the testimony was irrelevant and immaterial.

[Ed. Note.—For other cases, see Master and Servant, Dec. Dig. § 270.*]

6. WITNESSES (§ 379*)—IMPEACHMENT.

In an action for the death of a miner owing to the caving in of the roof of a room in the mine, a witness was asked if defendant's mine boss did not state that, if the owner of the mine had let the boss have had his way, the mine would have been sufficiently provided, and that deceased would not have been killed, to which he was permitted to reply in the affirmative over objection. *Held*, that the mine boss having testified on cross-examination that he had not made such statements, and having testified as an expert that the accident was the result of a general "squeeze" or movement of the earth, which could not have been prevented, the evidence was admissible for the purpose of impeaching the boss.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 1209, 1220-1222, 1247-1256; Dec. Dig. § 379.*]

On Motion for Rehearing.

7. MASTER AND SERVANT (§ 278*)—INJURIES TO SERVANT—EVIDENCE.

In an action for the death of a miner owing to the caving in of the roof of a room in the mine, evidence *held* to warrant a finding that deceased was killed because of the unsafe condition of the place where he was at work, due to defendant's negligent failure to prop the roof.

[Ed. Note.—For other cases, see Master and Servant, Dec. Dig. § 278.*]

Appeal from District Court, Hopkins County; R. L. Porter, Judge.

Action by Mrs. Lella Caddell and another against the Lone Star Lignite Mining Company. From a judgment in favor of plaintiffs, defendant appeals. Affirmed.

Harry P. Lawther, for appellant. Templeton, Craddock, Crosby & Dinsmore, for appellees.

HODGES, J. In 1909 the appellant owned and was operating a lignite mine in Hopkins county, and on the 13th day of July of that

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

† Writ of error denied by Supreme Court.

year John Caddell, one of its employes, was killed while at work in the mine by the caving in of the earth from above. Appellees are the widow and child of Caddell, and bring this suit to recover damages sustained by reason of his death.

The negligence relied on as a ground of recovery is the failure of the appellant to furnish the deceased a safe place in which to work—the failure to exercise proper care in propping the roof of the mine so as to prevent its caving in while he was performing his duties. The testimony shows that the mine had been worked for some time, and considerable excavations made. It was divided up into compartments which the witnesses called “entries” and “rooms.” One was designated as the “main entry,” and the others by numbers, differing according to location. The employes consisted of the miners, who dug coal by the ton; the timber crew, whose duty it was to prop the roof of the mine as it was needed during the progress of the work; and the trackmen, who were employed to lay the track in the mine over which the coal was hauled, and to keep it clear of obstructions. J. A. Gray, a man of extended experience in mining, was the general foreman or mine boss, a man by the name of Warner was the foreman of the timber crew, and C. R. Cranford was the boss of the trackmen, and under him Caddell worked. The fall of the earth which caused the death of Caddell occurred in the eighth entry. The roof in this portion of the mine had not been propped. It is apparent from the testimony that propping the roof was not regarded as necessary till it began to slough off and fall. This condition did not necessarily indicate that the roof had become dangerous and unsafe, but that it would become so in the course of time if not properly supported. The roof in the eighth entry had been sloughing for several days, and the timber crew had commenced to brace it. On the day of the accident the falling of slate and earth in this place assumed such proportions that it became questionable whether or not the timber crew might with safety proceed with their work of supporting it. At the noon hour on the day Caddell was killed, Gray, the mine foreman, and Warner, the timber boss, went down into the mine for the purpose of making an inspection in this particular locality. Witnesses for the appellees testified that upon his return Gray told the employes, among whom was Caddell, that he had made an examination, and that the mine was safe, and directed them to go on with their work. This, however, is denied by Gray. About 1 o'clock p. m. on that day Caddell, together with Cranford, his immediate superior, Gray, and some employes, returned to the mine for the purpose of resuming work. When they reached the eighth entry, they found that the track at that place was covered with debris which had fallen

some time during the day; and Caddell, Cranford, and one other employe began to remove it. Gray and Warner were both present, and, according to witnesses who testified for appellant, Gray was making a further investigation of the condition of the roof by driving his chisel into it at various places, and sounding to see whether or not it was solid. While thus engaged, a crack appeared in the slate above, and, before the employes could get out of the way, a large quantity of earth fell, killing Caddell and partially burying another employe. Gray discovered the crack indicating that a fall was probable, and gave the warning, but too late for Caddell to escape.

The principal defense relied on in this appeal is that the rule of law making the master liable for a failure to furnish the servant a reasonably safe place in which to work has no application under the facts of this case. Complaint is made in the first group of assigned errors of the refusal of the court to give a peremptory instruction in favor of appellant, and in submitting to the jury the issue of negligence as a basis of liability. The proposition asserted is as follows: “The safe place rule does not apply where in a mine the workmen were engaged in timbering a dangerous place and had been temporarily stopped by the sloughing from the roof of such quantities of shale and slate as to make the continuation of the work appear dangerous, and, while the foreman was testing and inspecting the roof for the purpose of determining whether it was safe to go on with the timbering, it suddenly and without warning caved in and killed the servant.” The principle of law invoked by counsel for appellant seems to have found its application in determining the master's duty with reference to those servants who are at the time engaged in the business of making safe a place that is unsafe, or those who, by reason of the fact that such work is being done, are put upon notice of an unsafe condition of the place in which to work. As to those servants who are engaged in repairing an unsafe place, the rule finds its rationale in the doctrine that the servant assumes the risks ordinarily incident to his employment, and that a danger existing by reason of the unsafe condition of the place is one of the necessary incidents to the service of making the place safe. After all, the rule rests upon the hypothesis that the danger is, or should be, known to the servant, and for that reason the risk is regarded as one which he assumes. 1 Labat, Master and Servant, §§ 29, 268. The argument of counsel for appellant upon the above proposition proceeds upon the assumption that Caddell was one of the servants engaged at that time in repairing the unsafe condition of the mine roof. The assumption is not justified by the facts. The business of propping the roof and preventing its caving was distinctly that of the timber

crew, of which Warner was the boss. Caddell was not a member of that crew, and it was no part of his business to assist in that work. He was a trackman, working under the supervision of another boss and in an entirely different department of the service. He was there upon that occasion, according to the testimony of witnesses for the appellees, for the purpose of performing a service in the line of his duty—that of removing obstructions from the track—and was not expected to take any part in propping up the roof. It cannot therefore be said that he was a servant engaged at the time in making safe an unsafe place. There was abundant evidence to support a finding by the jury that the appellant was guilty of negligence in not sooner placing props under the roof at this particular place. The testimony shows that the roof had been falling there for several days, and it seems to be conceded that when this condition arises, prudence dictated that it should be supported. The contention that Caddell assumed the risk of the dangerous condition of the place must rest upon the ground that it was a danger of which he knew. The proof shows that Caddell was an inexperienced man, and had been at work in the mine only a few months. He knew that the earth was falling at this particular place, and had, prior to the time he was injured, expressed some fear regarding its safety. But the testimony also shows that, after he had expressed those apprehensions, Gray, the mine boss and an expert in such matters, had assured him, together with other employes, that he had made an examination, and that it was safe, and had ordered them to return to work. Under that state of facts, we do not think it can be said that Caddell assumed the risk, or was guilty of contributory negligence as a matter of law. *G., C. & S. F. Ry. Co. v. Duvall*, 12 Tex. Civ. App. 348, 35 S. W. 700; *Oil Mill Co. v. Farmer*, 56 Tex. 301; *T. & N. O. Ry. Co. v. Kelly*, 98 Tex. 123, 80 S. W. 82; *Id.*, 34 Tex. Civ. App. 21, 80 S. W. 1076; *Shadford v. Railway Co.*, 121 Mich. 224, 80 N. W. 30; *Commerce Milling & Grain Co. v. Gowan*, 104 S. W. 916; *Rowden v. Mining Co.*, 136 Mo. App. 376, 117 S. W. 695. The servant, in order to be charged with an assumption of the risk upon the ground that he knows of the existence of the defect, must not only know of the situation, but also of the danger that is likely to result from it. *Rigsby v. Oil Well Supply Co.*, 115 Mo. App. 297, 91 S. W. 460; *Railway Co. v. Jones*, 77 Ark. 367, 92 S. W. 244, 4 L. R. A. (N. S.) 837; *Robertson v. Hammond Packing Co.*, 115 Mo. App. 520, 91 S. W. 161; *M., K. & T. Ry. Co. v. Dumas*, 93 S. W. 493; *1 Labat, Master and Servant*, § 296, and cases cited. Caddell may have known that the roof was sloughing off, and that it should be propped, but the jury had a right to conclude that he was not guilty of a want of proper care in

relying upon the statements of an expert miner that the situation was not dangerous and that he might safely pursue his work at that place.

The fourth and fifth assignments of error complain of the admission of certain testimony which, it is claimed, was prejudicial to the appellant. The bill of exception shows that Davis, a witness for the appellees, had testified that in his opinion the timber crew was about six weeks or two months behind the "entry men" (probably meaning the miners) with the work of timbering the mine. The witness was then permitted, over the objection of counsel for appellant, to say that the space where the accident occurred could have been timbered in two or three days. The objection to this testimony was that there were no allegations in the petition charging that appellant was behind with the timbering, or that such negligence was the proximate cause of the injury, that the evidence showed that this entry was timbered to within a few feet of where the accident occurred, and the testimony objected to was irrelevant and immaterial. We do not think the objections were tenable. Appellant had by its general denial put in issue all the material facts alleged, necessarily including those upon which the appellees relied as charging appellant with negligence in not having timbered this entry. Davis had previously testified, without objection, that in his opinion this falling of the earth could have been prevented had the timbering been done in time. We think his answer which was admitted over the objection was relevant as tending to show that the appellant was negligent in not having done this sooner. Its relevancy was strengthened by the testimony of Gray, afterwards given, in which he stated that in his opinion the accident was the result of what the miners call a "squeeze"; that is, a sloughing of such proportions that no amount of timbering could have prevented it.

The third bill of exception shows an objection to the following question: "Q. I will ask you if Mr. Gray (appellant's mine boss) did not state to you in the conversation down there at the new mine that, if Mr. Watelsky (the owner) had let him have his way, he could have had the mine sufficiently provided, and that John Caddell would have been a live man to-day?" Objection was made to the witness' answering that question upon the ground that it appeared from the testimony that Gray at the time he is alleged to have made that statement was no longer in the employ of the appellant, and that appellant could not be bound by any admission or statement made by him under such circumstances; that the testimony was improper and incompetent, and not admissible even for purposes of impeachment. The objections were overruled by the court, and the witness answered, "Yes." The qualification

tion appended by the court to this bill of exception shows that this testimony was admitted after Gray had testified on cross-examination that he had not made such statements as those inquired about, and that this question and answer were permitted only for the purpose of impeaching Gray, and it was so stated by counsel for appellees in the presence of the jury. Gray had testified previously as an expert in such matters and had stated that the accident was the result of a general "squeeze" and extraordinary sloughing of the earth, which could not possibly have been prevented by any amount of timbering. His testimony would tend to show that Caddell was injured as the result of an inevitable accident, for which the appellant could not be held responsible. The effect of the statements attributed to him by Davis was to impeach Gray in that respect; and upon that issue at least we think the testimony of Davis was material and proper.

Finding no error in the judgment, it is accordingly affirmed.

On Motion for Rehearing.

There are no just grounds for saying the jury was not warranted in reaching the following conclusions: (1) That the place where Caddell was working at the time of his death was unsafe, and that by reason of that condition he was killed; (2) that this unsafe condition was due to the failure on the part of the appellant to sooner prop the roof and prevent its falling; (3) that the failure of appellant to sooner prop the roof was due to its negligence. It is insisted, however, that Caddell knew of the unsafe condition of the roof, and, whether engaged in the work of making the place safe or not, he assumed the risk of any injury that might result from that condition. We can best answer the contention of counsel by quoting portions of the testimony upon which the jury might have relied in support of its conclusions.

Slayten, a witness for the appellee, in speaking of the debris which had fallen on the track in the eighth entry before the accident, stated: "I would guess that piece of rock or slate which fell to weigh between two and four tons. The employes of the company, not men working by the ton, were the ones that were taking this slate and stuff off of the track at the time of the accident. John Caddell and the man Daniels were both company men. The company men do this cleaning up of falls, and the diggers and drivers don't have help unless they are just a minded to. * * * Bob Cranford worked with John Caddell when they were not removing this falling stuff. They worked on the track, laying switches, tracks, etc. * * * After Mr. Gray went down in the mine to examine that place at noon, he came back, and said he thought we could go back to work all right that afternoon. We were supposed to start down in the mine to work at

about 15 minutes of 1 o'clock. I do not know exactly who was present when he told us to go back to work that afternoon. Several of the boys were there. John Caddell was there. * * * John was talking to me about that place while we were eating dinner, and before Mr. Gray said for all of us to go back to work. He said he rather thought the place was dangerous. John was helping remove this slate before dinner. I did not hear any one tell him to do this work. I did not hear Gray say anything directly to John when he was talking to us about going back to work. He was talking to all of us. * * * In my opinion, if this place had been propped, the fall would not have occurred. Mr. Cranford was with Mr. Gray when he came out of the mine that first time. He said he thought the place was all right, and to go back and finish cleaning it up and get to work." Ed Duncan, a witness for the plaintiff, testified: "While we were at the top eating dinner, John Caddell said that, if he had not been sick and laying off, he would not go back that afternoon. When Mr. Gray came up out of the mine, he said that he had examined the place, and thought it was perfectly safe. Told me to get the other driver to also pull in my place until we could get this place cleaned up. This was just before work time, and after John had said that about being sick. He said this in the presence of John Caddell. John Caddell and I went down to work at the same time. * * * Bob Cranford was the head trackman. Caddell was his helper. Head trackman attends to the main track. It is the duty of the company man that first finds any slate or stuff on the track to take it off. * * * Caddell was a trackman. It was a part of Caddell's duty as trackman to help take off this stuff. There was no timber at this place where he was killed. It was not propped. It was not safe without props there. Its condition was very bad, was arched out 7 or 8 feet high. If it had been properly timbered, it would have prevented this fall. It was liable to fall at any time when there was no timber there. When Mr. Gray came back up after his examination, he did not say how he examined the place, but said it was perfectly safe and for us to go back to work."

C. R. Cranford, a witness for the defendant, and Caddell's immediate superior, testified: "At the place of this fall, shale or slate had fallen on the track. The roof where this stuff had fallen out looked to be good. The roof was then of rock. The slate had already fallen. * * * We went down there to sound around, and see if we thought the place was good and all right. When we went down there, I picked up a few chunks of dirt or slate, and threw it off the track. Mr. Gray was sounding around. I do not know now what he used to sound the place with. * * * I have sounded the roof of mines. That roof sounded safe. I could hear

the sound it made when Mr. Gray knocked on it. I do not believe he did anything except to sound the mine. I did not do anything. * * * I suppose there was a ton of this stuff that had fallen on the track, or maybe not so much; maybe only about 1,000 pounds. * * * We all got up to this fall in the eighth entry. Mr. Gray, Warner, Caddell, and myself were all throwing some of this fallen stuff off of the track. This was the fall where I had been with Mr. Gray that morning. Gray was there with us. If he was doing anything besides throwing this stuff off of the track, I did not notice him. * * * Nobody told me to pick up that slate. I do not know of anybody telling Caddell to pick it up. The reason I was picking this stuff off of the track was that, when I saw any stuff on the track, I went to work at removing it; considered it my place. Caddell and I did not go up there to clean track. We were on our way to get our tools. Nobody told me to stop and clean track before I got my tools. * * * When I got there to where this stuff was on the track, I stopped and started to throwing it off. I was at this place about three-quarters of an hour before this fell on Caddell. I did not notice anything that would indicate that this place would fall in. Did not see any sign, or did not notice any. They had timbered right up to the place of this fall. * * * I do not know how many times he (referring to Gray) knocked. I was watching him. I was picking up coal at the same time. I was within a few feet of him. * * * When he sounded, it sounded to me like it was safe and would not fall. You cannot tell always whether it is dangerous or not. Yes; it was dangerous without props. It did sound good. I cannot say whether I thought the place was dangerous without props at the time Mr. Gray and I were there inspecting it. Yes; I think it ought to have been propped. I expect it was dangerous without it. We were propping it before it fell. When Gray was sounding it there by me, it looked to be good, but I could not tell much about it. * * * When a fall occurs on the track, it is to the interest of the company to get it up off of the track as soon as possible, so as not to stop the operation of the cars. It is my opinion that it was my place to help do this. Yes; I was helping there, because I think it was my duty. Yes; John Caddell was doing that. Yes; I understand it was a part of his duty as well as mine to help pick up that stuff. Yes; he was under my supervision and under Mr. Gray's at the time he was doing this work. Yes; and where Mr. Gray and myself could both see him. Yes; I considered it my duty to do this work when it was needed. Yes; it was my helper's duty also. Yes; John Caddell was actually engaged in helping clean this track at the time he was killed."

A. L. Daniels, a witness for the appellant, testified: "After we got down in the mine,

Mr. Gray or Mr. Warner, one, I could not say which, told us to get this place cleaned up so we could go to hauling coal, and, while we were at work, there one of them hollered, 'Look out, this place is dangerous!' And I did not know anything else. I do not know that Caddell said anything down there. I did not see Caddell that morning. * * * This happened so quick that I knew nothing about it until it was on me. It happened in a second or two after somebody hollered 'Look out!' [This witness was injured at the same time and by the same fall that caused the death of Caddell.] When I got back from dinner and had gotten to the scales, Bob Cranford was there, and said that Mr. Gray was back there, and to come on back and go to work. I do not remember whether he said Mr. Gray said it was safe or not. My best recollection is that he said that Mr. Warner and Gray said that it was all right, and for us to come back and go to work. Cannot say whether Mr. Gray said it or not. * * * He said the place was all right. * * * John Caddell was there at the time he told us this."

J. A. Gray, the appellant's mine boss, testified: "It is hardly ever the case that a whole mine is timbered. Sometimes we find a rotten or faulty roof, and then we timber it. When it commences to slough off, then it should be timbered. When a roof sounds drummy and begins to slough off, then they go to timbering it." In speaking of the roof at the place where the fall occurred, Gray testified: "It sounded solid, but would keep on flecking off. Was the most peculiar place I ever saw. When a place sounds solid, it does not fleck off, but this place sounded solid and flecked off at the same time. That flecking is usually accompanied by a drummy sound. I did not know what to think. We then went back out of the mine for dinner." Again he says: "And there were places in the mine that seemed to need timbering worse than that place did. I went to timbering there as soon as Warner reported. When I was tapping and examining this roof, I did not expect it would fall until after I discovered the crack. When I saw the crack and thought the place was going to fall, I hollered for the men to look out, and for everybody to get back. * * * I suppose it had been flecking at the place of the accident some three or four days. I do not know that I thought about timbering the whole place when I saw this flecking. * * * I did not decide it all needed timbering until the day before the accident. * * * The reason I did not keep on timbering right on up to the accident is because the roof was too low, and we had to wait for it to slough off. That is the only reason. * * * This place was in uncertainty; yes. Was in uncertainty probably three days prior to the accident; noticed it had been falling more than it was in the habit of. I did not get anxious, but got interested, and wanted to see what

was the matter. Yes; I decided that place needed timbering that day before the accident. Yes; I decided it was dangerous. * * * I did not know at the time whether the place was safe or unsafe. I had not formed a definite opinion at that time. I knew it was uncertain. I did not warn a man then. I did not know any were there. I told Warner at the top that I was going down ahead of them, and see if the place was sound and all right; that I had examined it that morning and it sounded solid, but was the most peculiar place I had ever seen; and that I was going to make a thorough examination before the men got back to work. I did not direct them not to go back to work. * * * I do not know that I told Charley Davis, at the new mine, that, if Watelsky had let me done as I wished, the mine would have been fixed up in better shape, and that Caddell would have been alive to-day. * * * I remember being asked some question like that in Como. Some one in the crowd answered that, if I had had my way, I would have had the mine fixed up, and that if Watelsky had let me do as I wanted to that John Caddell would have been alive to-day, and then turned to me and asked me if that was not true. I said it might be possible. Did not say I had been to Watelsky several times for hands and timber to fix up this mine, or this place. * * * A man who had only worked in the mines could not tell from looking at a roof that had begun to fleck whether or not it was dangerous. That is sometimes a difficult matter for an experienced man. Must be a man of some experience to know this; must have some knowledge of the formation of the earth, and know how to make the test. * * * Right at this particular place where Caddell was killed it had been flecking, I suppose, about three or four days. Flecked something like a half a ton I suppose. That was that draw slate I was speaking of. It was an ordinary occurrence for this draw slate to fleck off. Yes; sometimes after this flecks off the blue shale above will stand all right without any props. Yes; we had stopped timbering close to the place of the accident about a week before the accident. Started up again the afternoon before the accident. * * * We had stopped at this place because it had not fallen out high enough to be timbered, and also it did not seem to need it."

Walter Slusher testified for the appellees: "I remember Mr. Gray coming out of the mine just as I finished dinner. I had already finished eating. I was sitting around the shaft. I remember him saying he had been down and found it all right, he thought. John Caddell was sitting right past me at the time. He was talking to all of us there, I suppose."

The foregoing testimony establishes the following facts: That at the time Caddell

was killed he was at work in the performance of his duty, and at a place where he was expected and known to be; that he had been previously assured by his superior, who was an expert in such business, that the mine roof was safe and that he might proceed with his work, and was directed to do so; that danger of the roof's falling was not so imminent and threatening as to justify the conclusion that he was guilty of contributory negligence as a matter of law in exposing himself in the manner he did.

If these conclusions be correct, then we can see no reason for changing the disposition previously made of the case, and the motion for rehearing is overruled.

MACK et ux. v. HOUSTON E. & W. T. RY. CO.

(Court of Civil Appeals of Texas. Feb. 4, 1911. Rehearing Denied Feb. 23, 1911.)

1. NEGLIGENCE (§ 32*)—CONDITION OF LAND—CARE OWED LICENSEES.

A landowner owes a licensee no duty to keep his premises in a safe condition.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. §§ 42-44; Dec. Dig. § 32.*]

2. RAILROADS (§ 274*)—INJURIES TO PERSONS AT STATIONS—LICENSEES—WHO ARE.

Though persons who congregate around a railroad station without business are only licensees, one in the employ of men, whom the railroad allowed to erect a building at the station which they used for a store, in which was the post office, and which was used by the railroad for a ticket office, was not a mere licensee, but was an invited person lawfully there to the extent his employment required his presence at the station, and as such was entitled to reasonable care on the part of the railroad.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. § 869; Dec. Dig. § 274.*]

3. PLEADING (§ 34*)—DEMURRER—GENERAL DEMURRER—INFERENCES AS TO VALIDITY OF PLEADING.

On general demurrer, every reasonable indendment will be indulged in favor of the pleading.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 66-75; Dec. Dig. § 34.*]

4. PLEADING (§ 193*)—DEMURRER—GENERAL DEMURRER—PETITION.

If evidence admissible under the allegation of a petition might show a cause of action, a petition is good on general demurrer.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 428-443; Dec. Dig. § 193.*]

5. RAILROADS (§ 282*)—INJURIES TO PERSONS AT STATIONS—PLEADING—ALLEGATION OF NEGLIGENCE—PROOF.

Where the petition in an action by a father against a railroad for the wrongful death of his minor son caused by the negligent maintenance of a defective crane at a certain station alleged that the son was lawfully and necessarily upon the station, proof that the decedent was necessarily near the crane is permissible.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. § 911; Dec. Dig. § 282.*]

Appeal from District Court, Polk County; L. B. Hightower, Judge.

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

Action by Henry Mack and wife against the Houston East & West Texas Railway Company. From a judgment sustaining a general demurrer and dismissing the action, plaintiffs appeal. Reversed and remanded.

F. Campbell, for appellants. Baker, Botts, Parker & Garwood, J. C. Feagin, and J. S. McEachin, for appellee.

REESE, J. Henry Mack and wife bring this suit against the Houston East & West Texas Railway Company to recover damages for the death of their son, Ellis Mack, 15 years of age, alleged to have been occasioned by the negligence of defendant. The trial court sustained a general demurrer to plaintiffs' petition, and, plaintiffs declining to amend, dismissed the suit. From the judgment of dismissal, plaintiffs appeal.

The petition alleged that appellee had a depot or station for receiving and discharging freight and passengers and the United States mails at a place called Bering on its line of railway; that, instead of bringing its trains to a stop to take on and put off the mails, appellee constructed at said station and alongside its track a machine called a "mail crane," by means of which the mail pouches were taken on and put off while trains were running at a high rate of speed, and that this machine was so negligently constructed that the steps thereto, which were designed to be suspended by hooks when not in use, would fall from the fastenings when trains moved by; that the defects in said machine were well known to appellee, but wholly unknown to the said Ellis Mack; and that appellee continued to use said crane without warning to any one of its danger. The crane was located on the depot grounds where people were in the habit of congregating on the arrival and departure of trains. The petition further alleged: "That a lumber manufacturing plant was situated at said station, and that said manufacturing company owned and maintained a commissary or store by the full consent of defendant company, immediately by the track of said railroad, which said storehouse was used by defendant company as a warehouse and passenger ticket office. That within the said building operated as said warehouse and ticket office the United States post office was by consent and knowledge of defendant company kept and maintained, and all persons were by permission and action of defendant company invited upon said depot premises, especially those in the employ of said lumber manufacturing concern, as was the plaintiffs' said son on the day he was killed. That the plaintiffs' son, Ellis, was in the employ of said lumber manufacturing concern, and that by virtue of the invitation of defendant company as aforesaid and the plaintiffs' said son's duties to his employer he was upon said defendant's grounds, and the plaintiffs' son did have a right to, and did expect, an ordinary degree of safety while up-

on said grounds. That on June 16, 1907, the plaintiffs' son, Ellis Mack, was standing near the mail crane and at a safe distance from the defendant's track, when one of defendant's passing trains caused said steps to fall from their fastening, struck the plaintiffs' son, Ellis, and knocked him upon the railroad track and under the said moving train. That the wheels of defendant's cars passed over their son's body, killing him instantly." There were further allegations showing the damages sustained by appellants from the death of their son. Under appropriate assignment of error appellants question the correctness of the ruling of the trial court sustaining the general demurrer.

From the brief of appellee we gather that the ground of demurrer relied upon, and which determined the court's ruling, is that, according to the allegations of the petition, Ellis Mack was a mere licensee, so far as his being upon the premises and at the place where he was injured were concerned, and appellee owed him no duty to keep the premises in a safe condition. We recognize fully the rule in this regard as to licensees; that is, persons who are not trespassers, but are upon the premises of another merely by his permission, expressed or implied, and not by any express or implied invitation. The law on this point is well settled, and if Ellis Mack was a mere licensee, as the case is stated in the petition, there was no error in sustaining the general demurrer. The machine in question was not a trap calculated to catch the unwary, nor was the deceased injured by any negligent act occurring after he came on the premises. But was he a mere licensee? We are familiar with the ordinary cases of persons congregating at depot grounds and upon depot platforms in pursuit of their own pleasure or convenience, their presence there having no connection, direct or indirect, with the business of the company. Such persons are there merely by the permission of the company, and, as long as such permission continues, are not trespassers. But, as to such persons, such permission may be withdrawn at any time, and those who were formerly licensees would thereby become trespassers. To such persons who are merely licensees the company owes no duty to see that the premises are in a safe condition. But in the circumstances that are alleged to have existed in this case deceased did not occupy this attitude. He was in the employment of the men who had been permitted by appellee to erect a building at the station, and to carry on their business of keeping a store or commissary therein. In this building was the United States post office and appellee's ticket office, and it was also used by it as a warehouse. The deceased was in the employment of the persons so occupying said building in connection with the business there carried on. As to the deceased, then, at least, whose employment required him to use the grounds in going to

and from about his business, appellee could not, so long as it permitted such business to be thus carried on upon its own grounds at the station, claim the privilege of barring deceased from the grounds so far as it was necessary or proper for him to be there in the usual and ordinary discharge of his duties to his employer. In so far, he was certainly there by the invitation of his employer, who was an occupant of the premises with the consent of appellee and for their mutual convenience and profit, and, so long as this condition continued, he had a legal right to so use the premises. It was not necessary that deceased should have had business with appellee. The quotation in appellee's brief from Elliott on Railroads (volume 2, pp. 1950, 1951) is applicable to the present case: "To come under an implied invitation, as distinguished from a mere license, the visitor must come for a purpose connected with the business in which the occupant is engaged, or which he permits to be carried on." By permitting the building in which deceased was employed to be erected on its grounds and to be used by the occupant as a store or commissary, which, as is shown, was at least in part for the convenience of appellee, appellee impliedly invited the employees of such occupant to make such use of the premises as was reasonably necessary and proper in the discharge of their duties. 29 Cyc. 456; *Gile v. J. W. Bishop Co.*, 184 Mass. 413, 68 N. E. 837.

In the case of *Wright v. Perry*, 188 Mass. 268, 74 N. E. 328, the facts, briefly stated, were: The defendant was the lessee of the entire building in which the accident happened. He sublet the building to various tenants for business purposes, retaining control of the elevator and its approaches. The plaintiff while delivering goods to one of the tenants was injured by stepping into a hole in a platform at the entrance to the elevator, and falling into the open elevator, which was unguarded, was injured. The court says: "There can be no doubt that the plaintiff was lawfully on defendant's premises for the purpose of business with one of the tenants of the defendant, and, as such, had the right to have the premises reasonably safe." The following cases are cited in support of the text: *Gordon v. Cummings*, 152 Mass. 513, 25 N. E. 978, 9 L. R. A. 640, 23 Am. St. Rep. 846; *Marwedel v. Cook*, 154 Mass. 235, 28 N. E. 140; *Drennan v. Grady*, 167 Mass. 415, 45 N. E. 741; *Coupe v. Platt*, 172 Mass. 458, 52 N. E. 526, 70 Am. St. Rep. 293; *Plummer v. Dill*, 156 Mass. 426, 31 N. E. 128, 32 Am. St. Rep. 463; *Sears v. Merrick*, 175 Mass. 25, 55 N. E. 476.

We think this doctrine is applicable to the facts of this case as stated in the petition.

On general demurrer every reasonable intendment will be indulged in favor of the pleading excepted to. If by evidence legally

admissible under the allegations of the petition plaintiff could show a right of recovery, the petition is good as against a general demurrer. It does not appear from the allegations of the petition that the defective crane was necessarily so situated with reference to the store or commissary in which the deceased boy was employed as to make it reasonably necessary or proper that he should in the usual prosecution of his business as such employé have made use of that part of the grounds where he was at the time he sustained his injury, but he would have been allowed to show this by proper evidence under the allegations of his petition. This is a matter to be brought out by the evidence.

We think the learned trial judge confounded this case with the ordinary case of persons on the premises of another in pursuit of their own pleasure or convenience unconnected with any business with the owner of the premises, and overlooked the distinction here attempted to be pointed out, and which we think is well recognized by the authorities, between such a case and the one stated in the petition. Counsel for appellee in their very able and exhaustive brief have, we think, made the same mistake.

We think the court erred in sustaining the general demurrer. The judgment is reversed and the cause remanded.

Reversed and remanded.

WESTERN UNION TELEGRAPH CO. v. LANDRY.†

(Court of Civil Appeals of Texas. Feb. 1, 1911.
Rehearing Denied March 1, 1911.)

1. APPEAL AND ERROR (§ 1097*)—LAW OF CASE—SUBSEQUENT APPEAL.

Where the Court of Civil Appeals reversed a judgment upon a stated theory, and its judgment was reversed by the Supreme Court, that theory must be deemed to have been repudiated and the law of the case established to the contrary, though the opinion of the Supreme Court did not discuss it, and hence that point cannot be again considered by the Court of Civil Appeals on a subsequent appeal.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. § 4364; Dec. Dig. § 1097.*]

2. TELEGRAPHS AND TELEPHONES (§ 67*)—FAILURE TO TRANSMIT MESSAGE—DAMAGES.

Where a telegraph company failed to transmit a message sent by a daughter to her father, which message was: "Gus very low. Send some one to me"—the company had notice that some one in close relationship to the sender of the message was expected and that her father might be one of them.

[Ed. Note.—For other cases, see *Telegraphs and Telephones*, Cent. Dig. § 65; Dec. Dig. § 67.*]

3. APPEAL AND ERROR (§ 1053*)—REVIEW—HARMLESS ERROR—ADMISSION OF EVIDENCE.

In an action against a telegraph company for failure to transmit a message which stated: "Gus very low. Send some one to me"—if it was error to permit plaintiff to testify that she

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes.

† Writ of error denied by Supreme Court.

wanted some of her kinfolks, brothers, sisters, or some of the family, in that such testimony placed too broad a construction on the notice imputed to defendant as to the object of the message, such ruling was harmless error where it appeared that only her father and two brothers might have come, and the court charged the jury that recovery depended on whether any one of them would and could have come.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4178-4184; Dec. Dig. § 1053.*]

4. APPEAL AND ERROR (§ 274*)—PRESENTATION OF GROUNDS OF REVIEW IN LOWER COURT—EXCEPTIONS.

Where a witness testified in a deposition to certain facts, and no exception was taken, an exception to a later statement whereby he affirmed the truth of his former testimony, is insufficient to allow the former testimony to be questioned on appeal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 1631; Dec. Dig. § 274; * Trial, Cent. Dig. § 258.]

5. APPEAL AND ERROR (§ 1051*)—REVIEW—HARMLESS ERROR—QUESTION OF EVIDENCE.

Where a telegraph company delayed the transmission of a message for more than three hours, and the following day transmitted a message between the same points in less than an hour, the admission of testimony that it only took eight minutes to receive a response from messages sent between two other points which were on the same line and nearly as far apart, was harmless where this fact was uncontroverted, and the delay of the first message was not explained.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4161-4170; Dec. Dig. § 1051.*]

6. TELEGRAPHS AND TELEPHONES (§ 66*)—ACTIONS—EVIDENCE—ADMISSIBILITY.

In an action against a telegraph company for delay in transmitting a message, which had to be relayed to a distributing station, and from thence sent to another distributing station where it was again relayed to its destination, the distance between the distributing stations being greater than the distance from either of the receiving stations to its respective distributing station, evidence of the time it took to transmit a message between the two distributing stations was admissible.

[Ed. Note.—For other cases, see Telegraphs and Telephones, Cent. Dig. § 62; Dec. Dig. § 66.*]

7. TRIAL (§ 295*)—INSTRUCTIONS—CONSTRUCTION AS A WHOLE.

In an action against a telegraph company for delay in the transmission of a message, it appeared that there was an unwarrantable delay, although the message was promptly delivered after being received. The jury was charged to find for plaintiff if defendant was negligent in failing to transmit and deliver the message, and also charged to find for defendant if defendant properly transmitted the message. *Held* that, though the prompt delivery was admitted, it is impossible, when considering the whole charge, to believe that the jury understood that it submitted to them the issue of prompt delivery, and hence delay being clearly shown this instruction was not misleading.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 703-717; Dec. Dig. § 295.*]

Appeal from District Court, Bexar County; J. L. Camp, Judge.

Action by Ida Landry against the Western Union Telegraph Company. From a judg-

ment for plaintiff, defendant appeals. Affirmed.

Webb & Goeth, for appellant. Cocke & Cocke, for appellee.

JAMES, C. J. This cause was here once before on appeal, and was remanded to the trial court by the Supreme Court. *W. U. Tel. Co. v. Landry*, 108 S. W. 461 (Court of Civil Appeals); 102 Tex. 67, 113 S. W. 10 (Supreme Court). In these opinions the nature of the case is sufficiently stated.

At the recent trial, plaintiff, by amended pleading, abandoned her claim for exemplary damages, and alleged actual damages on account of mental anguish resulting to her from the failure of defendant to promptly transmit and deliver the telegram in question, which resulted in her not having her father, Sam Rountree, Sr., or one of her brothers, Sam and Joe, with her in time to aid and comfort her in connection with the burial, and the preparations for the burial, of her husband, Gus Landry. Defendant pleaded certain exceptions, a general denial, and alleged in substance that plaintiff's object in sending the telegram was to secure funds to embalm the body, and that such funds could have been sent her, or that she could have embalmed the body without the presence of her relatives, and her failure to do so was due to her own carelessness and indifference, and that if the body had been embalmed, it would have been in a condition to have been shipped to Louisiana when her brother arrived, in which event she would not have been damaged. The telegram sent by plaintiff read: "Sam Rountree, Schriever, La. Gus very low. Send some one to me. Answer." We conclude as facts supported by evidence that the agent receiving the message both knew and was charged with knowledge of its nature and urgency; that defendant was negligent in its transmission; that the result of such negligence was that she had no one of her immediate family, contemplated by the terms of the message, with her during the preparations for the burial of her husband, and at his burial; and that, but for such negligence, one of them would have been there; and that she suffered mental anguish in said respect as the direct consequence of such negligence.

We shall consider, first, the twelfth assignment of error, which is that the court erred in refusing to direct a verdict for defendant, because the undisputed evidence shows that Mrs. Landry's sole and only desire in sending the message was to secure funds with which to embalm the body of her husband and thereby enable her to arrange for its transportation to Louisiana, and therefore the damage complained of in her petition was not within her contemplation at the time of filing the message for transmission. It was

upon this very ground we reversed the former judgment and rendered a judgment for appellant. The Supreme Court did not agree with us. Although the Supreme Court did not discuss the question, in the opinion it delivered, it remanded the cause, and this must have been done upon the theory that regardless of such desire and object on her part, defendant would be responsible for the mental anguish, which plaintiff sustained as the direct result of defendant's failure to properly transmit the message, in connection with the circumstances attending the burial of her husband at Center Point in the absence of her said relatives. We, therefore, overrule the assignment, and also the thirteenth, fifteenth, seventeenth, and eighteenth assignments of error.

The assignments of error Nos. 1, 2, 3, 5, 6, 7, and 8 all relate to substantially the same matter, which is indicated by this proposition: "The Telegraph Company will only be held liable for such damages as it may reasonably be expected to foresee under the circumstances at the time the contract was made, and unless it had notice of the fact that plaintiff's father was expected to come in response to the message, it cannot be held liable for the damages sustained on account of his absence." Appellant's idea seems to be that the message being to her father stating, "Send some one to me," the company had no notice that the father was included among those who would be expected to come. The evidence was that the father or a brother would have started from Schriever on the train passing there in the forenoon of March 1st had the message been delivered that morning, as it should have been, in time to have enabled them to take that train. The above assignments seem to concede that defendant would have contemplated the coming of the brother, but not the father.

We in effect passed upon this question on the former appeal, in the following language: "In the present case the message from Ida Landry was: 'Send some one to me.' Defendant had notice that she was communicating to one who was near to her and had an interest in her welfare, and that she wanted some such person sent to her at once, and had notice that a failure to promptly forward the message would result in depriving her of the presence of some such person in connection with the death of Landry. We think it was immaterial that the message did not designate the relationship of the person summoned. Evidently, from the telegram, the sender herself did not know who would come. No one would suppose from it otherwise than that it was addressed to a person in close relationship to the sender, and that it sought to bring one in like relationship, one that would naturally be of service and comfort to the sender." Defendant had notice that some person in close relationship to plaintiff that could come was expected to

come, and this included the father. The assignments are overruled.

The 4th assignment complains of plaintiff's statement that she wanted "some of her kinfolks, brothers, sisters, or some one—some of her family," with her on the occasion of the death and burial of her husband, for the reason, first, that having alleged that her father, or one of her brothers, Sam or Joe, would come in response to the telegram, she should not have been permitted to testify that she wanted some of her kinfolks, brothers, or sisters, to come; and, second, because defendant could not reasonably have foreseen that she desired or expected her father. Inasmuch as the telegram implied, and was broad enough to include, such persons, her said testimony really added nothing. Besides, the only persons who it was shown would and could have come, was the father, or her brothers, and the court by its charge made the case depend on whether or not the father or the brother Joe could and would have come.

The ninth assignment should be overruled. It is that defendant objected to, but the court allowed to be read, the following part of witness Rountree's deposition: "I am positive as to all statements made by me in answer to these questions regarding what other members of my family would have done on the 1st of March, 1905, with reference to going to Texas." The objection was that the statement with reference to other members of the family was general; and that the inquiry should be confined to the question as to whom he would have sent in response to the telegram, and the names of such persons should be given, the company having no notice as to who might be a member of the family.

The testimony that was objected to was simply an assertion that the witness was positive as to some statements he had made in his testimony. The objection was not to said statements, and the question of their admissibility cannot be inquired into under such an assignment as this. Besides, the brief does not attempt to inform us as to what such statements were. If testimony is introduced, its admissibility may be questioned by exception and assignment, but not by an exception to a subsequent declaration of the witness whereby he merely asseverates the truth of his testimony.

The tenth assignment complains of testimony of the witness Strauss, who stated: "Have lived in San Antonio 24 years. I am engaged in the wool and hide business. In conjunction with my business I have occasion to send telegrams over the lines of the Western Union Telegraph Company. I had occasion to do so about the 1st of March, 1905—that is, I suppose we did; we handle messages every day in the week. We have had occasion to send messages from San Antonio to Louisiana, and did have at that

time. We did a great deal of telegraphing at that time. We did receive responses from the messages sent from San Antonio to New Orleans in from four to seven or eight minutes.

There was testimony that the agent at Ganahl (the station at and near Center Point) received the message about 7:25 o'clock a. m. of the 1st, and got it off to San Antonio at 8:27 o'clock. Defendant's manager at San Antonio testified that in transmitting death messages, announcing trouble or severe sickness, it is the effort and desire of the company to send it and give such messages precedence over ordinary commercial business. The agent at Ganahl and said manager disclaimed any knowledge of what the company's records showed, if anything, concerning the time this message was received in San Antonio, Galveston, or New Orleans. The Ganahl agent admitted, however, that the reply to the message in question showed that it was filed at Schriever at 9:30 a. m. of the 2d, and reached Ganahl at 10:20 a. m., thus consuming less than one hour. Appellant does not in connection with this assignment undertake to show or to claim that there was any testimony whatever contravening what the above indicated, or explaining why the message in question did not reach Schriever sooner and in time for the addressee or some one to take the train that morning which passed that point at 10:14. We take it that all the evidence on the subject goes to show that there was unnecessary delay in the transmission, and that therefore the testimony of Strauss, if improper, was not prejudicial. But we look upon his testimony as proper evidence. It is true it did not profess to state the time for messages to go from Ganahl to Schriever, and states only the time for messages to go from San Antonio to New Orleans. The telegram was sent direct from Ganahl to San Antonio, the distributing office, a distance of about 60 miles, and from there it was sent to New Orleans, La., and from there it went back to Schriever, La. The relays consumed some of the time, but what evidence there is on the subject is indefinite though it indicates that this time was not considerable. The time it took a message to be transmitted from Ganahl to San Antonio or from New Orleans to Schriever, would evidently not take more time than a transmission from San Antonio to New Orleans. Hence evidence of the time within which common messages would go between San Antonio and New Orleans was relevant and material to the issue. We may refer, in this connection, to the case of *W. U. Tel. Co. v. Lydon*, 82 Tex. 366, 367, 18 S. W. 701.

The twenty-third assignment is based upon a fact as undisputed, which was not of that character.

The fourteenth assignment of error com-

plaints of the charge "because the jury were instructed to find for the plaintiff if the defendant was guilty of negligence in failing to promptly transmit and deliver the message," etc., when it was admitted on the trial that there was a good delivery after the message reached Schriever, the charge thus proceeding upon the theory that there may have been negligence in both transmitting and delivering the message, and ignores the admission.

In order for such a matter to reverse a judgment, it ought to appear to be misleading. The charge was brief. In the first clause it authorized a verdict for plaintiff if, among other things, "the defendant failed to promptly transmit and deliver the message." In the second clause it directed a verdict for defendant if defendant promptly transmitted the message. It being formally admitted at the trial that there was no fault in delivering the message after it reached Schriever, it is wholly improbable and unreasonable, taking the two clauses of the charge together, to consider that the jury understood the charge as submitting to them that fact as an issue, or that they based the verdict on a finding contrary to the admission. The first clause—the one complained of—was, if anything, unfavorable to plaintiff, and if the verdict had been for defendant plaintiff might be here complaining of the charge in this respect, for better reason.

Besides this, it seems to us that the testimony leaves no doubt that there was unreasonable delay in the transmission of this message, and that really the only issue of fact was whether or not one of plaintiff's family could and would have taken that morning's train, had it not been for such delay.

The charge referred to by the sixteenth assignment was correctly refused. Also the charge referred to in the nineteenth and twentieth assignments. The matter pertaining to them has been sufficiently discussed.

Affirmed.

SUTHERLAND v. KIRKLAND et al.

(Court of Civil Appeals of Texas. Feb. 7, 1911.)

1. TRIAL (§ 403*)—CONCLUSIONS OF FACT AND LAW.

Rev. St. 1895, art. 1333, provides that on a trial by the court the judge shall, at the request of either of the parties, state in writing the conclusions of facts found by him separately from the conclusions of law, which conclusions of fact and law shall be filed by the clerk and constitute a part of the record, and by Acts Ex. Sess. 1907, c. 7, the time for filing such conclusions was extended to 10 days after adjournment. *Held*, that there is no authority for filing such conclusions after the time allowed, except possibly in case it be shown that the same could not have been filed sooner.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 954-956; Dec. Dig. § 403.*]

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

2. TRIAL (§ 403*)—CONCLUSIONS OF LAW AND FACT.

It is the plain right of any party upon seasonable application to have proper conclusions filed and within the time required by law, and parties are not required to accept conclusions filed after such time and run the hazard of having them stricken.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 954-956; Dec. Dig. § 403.*]

3. APPEAL AND ERROR (§ 549*)—REVIEW—BILL OF EXCEPTIONS.

Rev. St. 1895, art. 1333, and Acts Ex. Sess. 1907, c. 7, require in a cause tried by the court conclusions of law and fact to be filed within 10 days after the term on request of either party. *Held*, that a bill of exceptions, complaining of the failure of the judge to file the conclusions "during the term" where 18 days had elapsed at the time the bill was taken, would not be ignored.

[Ed. Note.—For other cases, see Appeal and Error, Dec. Dig. § 549.*]

4. APPEAL AND ERROR (§ 1165*)—RECORD—REVIEW.

Where the trial court failed to file conclusions of law and fact within 10 days after the term, as required by Rev. St. 1895, art. 1333, and Acts Ex. Sess. 1907, c. 7, appellant on bringing the cause to the appellate court without any statement of facts would be entitled to a reversal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4522; Dec. Dig. § 1165.*]

5. APPEAL AND ERROR (§ 1165*)—REVIEW.

Where the trial court failed to file conclusions of law and fact on request of appellant within the time specified under Rev. St. 1895, art. 1333, and Acts Ex. Sess. 1907, c. 7, but there was in the record a statement of facts prepared by appellant sufficient to warrant an examination of the assignments of error, the cause would not be reversed for want of conclusions.

[Ed. Note.—For other cases, see Appeal and Error, Dec. Dig. § 1165.*]

6. COVENANTS (§ 130*)—WARRANTY—BREACH.

Where, in trespass to try title, the judgment gave a vendee the land called for by his deed, and as much as he purchased, he was not entitled to recover against his grantor on his cross-action against him for breach of warranty on the ground that he bought with reference to a line which had been established by agreement between his grantor and adjoining owners in contemplation of his purchase, and that he did not receive a portion of the land that he supposed he would receive, where it did not appear that the land he claimed to have lost was of any greater proportionate value than that which he received in place thereof under the judgment.

[Ed. Note.—For other cases, see Covenants, Dec. Dig. § 130.*]

7. TRESPASS TO TRY TITLE (§ 56*)—IMPROVEMENTS.

Where a judgment in trespass to try title recited that the parties had agreed that any improvements on the land adjudged to any party might be removed by the owner within 30 days, and it was ordered that no writ of possession should issue for 30 days, it was proper not to allow a party the value of that portion of his barn located on a strip of land which he was not awarded by the judgment, and proper not to allow him what it would cost him to remove it.

[Ed. Note.—For other cases, see Trespass to Try Title, Dec. Dig. § 56.*]

8. COSTS (§ 32*)—APPORTIONMENT.

Where, in trespass to try title, it appeared that one defendant had been responsible for the entire litigation, and his contentions were not sustained, it was proper to adjudge plaintiff all costs against such defendant, and that the other defendants recover all costs against him.

[Ed. Note.—For other cases, see Costs, Cent. Dig. §§ 108-132; Dec. Dig. § 32.*]

Error from District Court, Harris County; W. P. Hamblen, Judge.

Action by W. H. Kirkland, as executor, against William Sutherland and others. Judgment in favor of plaintiff, and defendant Sutherland brings error. *Affirmed*.

Sam, Bradley & Fogle, for plaintiff in error. Hunt, Myer & Townes, for defendant in error Kirkland. Love & Channell, for defendant in error Edmundson.

REESE, J. This is an action in form of trespass to try title by W. H. Kirkland, executor, against William Sutherland, W. L. Edmundson, Mrs. A. Schweikart, and others whose connection with the case is immaterial, to recover property embracing, according to the boundaries in the amended petition, all of lots 1 and 2, and part of lot 12, in block 239, in the city of Houston, fronting 150 feet on Clay avenue and 95 feet on Jackson street. As the case was tried it turned upon the location of the boundaries between lot 12, owned by Kirkland, executor, and a tract 50 feet by 95 feet embracing the west end of lots 1 and 2 adjoining lot 12, belonging to Mrs. Schweikart, and between Mrs. Schweikart's lot and a tract 50 feet by 95 feet, being the east end of lots 1 and 2, adjoining the part owned by Mrs. Schweikart, belonging to William Sutherland. Lot 12 had a frontage of 50 feet on Clay avenue. Mrs. Schweikart's lots fronted on Clay avenue 50 feet, running back between parallel lines across lot 1, 50 feet, and lot 2, 45 feet. Sutherland's part fronted 50 feet on Clay avenue, running back 50 feet on lot 1 and 45 feet on lot 2, giving him a frontage of 95 feet on Jackson street. Lot 1 has a front of 50 feet on Jackson street and lies along Clay avenue abutting thereon 100 feet. Lot 2 lay next to it, fronting 25 feet on Jackson street. As we understand the situation from the record, Mrs. Schweikart's west fence extended about 4 feet over on what Kirkland claimed to be lot 12, and the fence between Mrs. Schweikart and Sutherland was the same distance over on Mrs. Schweikart's lot, as found by the court. The real dispute as presented by this appeal is as to the 4 feet east of this fence, which the court found to be part of Mrs. Schweikart's lot, but which Sutherland claims to be part of the land sold to him by Edmundson.

Kirkland's testatrix had originally owned all of the property, but he had sold to Edmundson lots 1 and 2, a tract fronting 100

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

feet on Clay avenue and 95 feet on Jackson street, and adjoining lot 12, still owned by him, on the west. Edmundson then sold to Mrs. Schweikart the 50 by 95 feet of lots 1 and 2 abutting on lot 12, and afterwards the 50 by 95 feet of lots 1 and 2 lying between Mrs. Schweikart's part and Jackson street, being the east half of the two lots. The case was tried without a jury, resulting in a judgment establishing the different lines as claimed by the plaintiff, by which Sutherland got the 50 by 95 feet conveyed by the terms of his deed from Edmundson. By the result Sutherland's lot was moved 4 feet further east than it should be located as claimed by him, giving him 50 feet front on Clay avenue and 95 feet on Jackson street. But his contention seems to be that he bought with reference to a line which had been established by agreement between Kirkland, Mrs. Schweikart, and Edmundson, made just before and in contemplation of his purchase, whereby the lines of his lot were located so as to place it 4 feet further west than it was according to the lines established by the court. He claims that according to the lines thus run, his part ran up to the fence between his lot and that of Mrs. Schweikart. It was also contended by him that relying upon this location of the lines he in good faith had placed certain improvements on the disputed 4 feet, and he prayed to be reimbursed therefor. He further, by cross-action against Edmundson, set up his purchase on the faith of the survey establishing the lines as claimed by him, and prayed for damages against Edmundson, on his warranty, in case he lost any of the land located by this survey, on part of the lots 1 and 2 conveyed to him. The deed to Sutherland described the land conveyed as "50 feet by 95 feet of ground fronting 50 feet on Clay avenue and running back for depth between parallel lines and making a front on Jackson street of 95 feet, being 50 by 50 feet of lot 1 and 45 feet by 50 feet of lot 2, all in block 289," etc. We do not understand that any contention is made on this appeal that Sutherland did not receive by the judgment the land conveyed by the terms of the deed, nor does he present, by any assignment of error, the contention that the judgment, in so far as it establishes the respective lines, is erroneous. It clearly appears that if the line between himself and Mrs. Schweikart be established at the present fence between them, Sutherland will get 4 feet more ground than is called for in his deed, and that much more, in quantity, than he bought and paid for. The question presented by the assignments of error is as to the refusal to allow him to recover on his warranty against Edmundson the proportionate value of the 4 feet on that part of lots 1 and 2 adjoining Mrs. Schweikart's lots, which he was led to believe by the agreed survey referred to was a part of the lots sold to him, and the value of his improvements. All of the parties seem

to be satisfied with the judgment except Sutherland, who brings the case to this court on writ of error.

The main contention as we view it, of plaintiff in error, is presented by his first assignment of error, by which he claims that the judgment should be reversed on account of the failure of the court to file its conclusions of fact and law, and is based upon the following facts as shown by the record.

The case was tried on June 9, 1909. Plaintiff in error's motion for a new trial was overruled on the 25th of June, on which date he filed in writing, and called to the attention of the court, a motion or request to the court to file conclusions of fact and law. The term of the court ended on August 17, 1909. On September 4, 1909, plaintiff in error presented to the court his bill of exceptions to the action of the court in failing to file its conclusions "during the term." This bill was signed with the qualification or explanation that the court filed the conclusions after the adjournment of the term. As shown by the record, what the court intended for such conclusions was filed on the 4th of September, the same day the bill of exceptions was presented, and on the 18th day after the adjournment of the court for the term. Plaintiff in error prepared a statement of facts, which was adopted by the court, the parties having failed to agree, and defendants in error having prepared no statement. This statement of facts is in the record.

While we have concluded that the judgment should not be reversed on account of this failure of the court to file proper conclusions within the time required by law—that is, within 10 days after adjournment—for reasons which will be hereafter stated, the condition presented, we think, calls for some expression of our views upon the question presented.

The provisions of article 1333, Rev. St. 1895, are plain and imperative. "Upon a trial by the court the judge shall, at the request of either of the parties, also state in writing the conclusions of fact as found by him separately from the conclusions of law, which conclusions of fact and law shall be filed by the clerk and constitute a part of the record." These conclusions were to be filed during the term, and by properly excepting thereto an appeal might be prosecuted from the judgment without a statement of facts. The time for filing such conclusions was afterwards extended to 10 days after adjournment. Section 1, c. 7, 1st Called Sess. 30th Leg., Acts 1907, p. 446. There is no authority for filing such conclusions after the time allowed, except possibly in case it be shown that the same could not have been filed sooner. *Osborne v. Ayers*, 32 S. W. 74. So that it is entirely clear that it is a plain statutory right of any party in a case tried by the court without a jury, upon reasonable appli-

cation therefor, properly called to the attention of the court, to have proper conclusions filed, and within the time required by law. Parties are not required to accept conclusions filed after such time and run the hazard of having them stricken out for this cause. One purpose of the statute, as plainly stated, is that parties may be enabled to appeal without going to the expense, often useless, where proper conclusions are filed, of bringing up a statement of facts. We quote with approval from the opinion of Judge Head in *Osborne v. Ayers*, supra: "We are not prepared to hold that appellant's statutory right to have these conclusions filed could be made subservient to the disposition of other business of the court." These conclusions are a part of the proper procedure in the trial of the case.

In the bill of exceptions taken by plaintiff in error he excepts to the failure of the judge to file the conclusions "during the term," and the contention is made by defendants in error that the law did not require this, but allowed 10 days after the term. Eighteen days had elapsed at the time the bill of exceptions was taken, and while it is technically inaccurate we are not disposed to ignore it on that account. Clearly what plaintiff in error was excepting to is the failure to file the conclusions as required by the statute. Whether they had been filed at all at that time or not does not appear, though they appear to have been filed that day.

In *Callaghan v. Grenet*, 66 Tex. 240, 18 S. W. 508, it is said by the court: "What the statute requires is a succinct and clear statement of what the judge thinks is the true result of the evidence," and we doubt whether the conclusions filed in this case can be considered at all as a compliance with the statute. They are a mere skeleton, and could not be of any value whatever in presenting the case on appeal.

If plaintiff in error had contented himself, as was his clear right, with bringing the case here without any statement of facts at all he would have been entitled to have the judgment reversed on account of the failure of the trial court to prepare and file, within the time required by law, proper conclusions. *Buckner v. Davis*, 129 S. W. 639. Where, as in this case, insufficient conclusions are filed after the time allowed by law, plaintiff was not required to request further findings.

There is, however, in the record a statement of facts prepared by plaintiff in error himself, and a very cursory examination of such statement enables us to see that the case as presented by the assignments of error can be satisfactorily determined without the conclusions of the trial court. The facts, as to the contentions presented by the assignments, are few, simple, and practically undisputed. To reverse for want of conclusions of fact of the trial court in such case can

serve no other purpose than to rebuke the court at the expense of the litigants. This we are not disposed to do. *Jacobs v. Nussbaum & Scharff* (by this court, opinion filed January 7, 1911) 133 S. W. 484. The first assignment of error is overruled.

Without discussing in detail the several remaining assignments of error, it will be sufficient, we think, in disposing of the appeal to give our views as to the questions presented. We have already stated the issues involved. None of the assignments of error presents objections to the judgment as to the location of the respective boundary lines. There is no question that plaintiff in error by the judgment gets the land that was conveyed, and that if it is not located exactly as he supposed it would be, and if he loses four feet on the west which he supposed he was buying, he get four feet on the east to make up for it, the only difference between the land actually conveyed to him, and that which he claims he was led to believe was included in his deed, is that the lot is moved four feet to the east. There is no attempt made to show that the land he claimed to have lost is of any greater proportionate value than the remainder, or that he is not fully compensated by the four feet on the east. He could not reasonably expect to get both, which would give him just that much more than he bought and paid for. This conclusion does not in any way conflict with the cases cited by plaintiff in error holding that if the vendor points out land as included in the land which he is selling, but which is not so included within the description in the deed, the warranty of title will cover that portion of the land thus pointed out. *Chestnut v. Chism*, 20 Tex. Civ. App. 23, 48 S. W. 553; *Meade v. Warring*, 13 Tex. Civ. App. 320, 35 S. W. 310. There is no right of recovery on the warranty, as there was no damage shown.

It is recited in the judgment that the parties had agreed that any improvements on the land adjudged to any party may be removed by the owner within 30 days, and in pursuance of this recited agreement, which is not denied by plaintiff in error, it was ordered that no writ of possession should issue for 30 days, the purpose being to allow any of the parties that length of time to remove improvements. In view of this agreement and judgment there was no error in refusing to allow plaintiff in error the value of that portion of this barn located on the disputed four feet if such had been practicable at all, nor in not allowing him what it would cost him to remove them.

The court adjudged that Kirkland, executor, recover all costs of plaintiff in error and Mrs. Schwellkart, and that they and the other defendants recover all costs of plaintiff in error. We do not think this was error. Plaintiff in error seems to have been responsible for the entire litigation.

We have examined all of the assignments of error and the several propositions thereunder, and are of the opinion that none of them presents sufficient grounds for reversal.

We find no error requiring the judgment to be reversed, and it is therefore affirmed.

Affirmed.

SANBORN v. NELSON.

(Court of Civil Appeals of Texas. Jan. 21, 1911. On Motion for Rehearing, Feb. 25, 1911.)

1. PARTNERSHIP (§ 325*) — RECEIVERS — GROUNDS FOR APPOINTMENT—LOSS OF PROPERTY—AFFIDAVITS.

On an application for appointment of a receiver between partners in transactions concerning land and other deals, the showing of applicant in view of the counter affidavits held insufficient to show that the property or funds were in danger of being lost, removed, or materially injured, as required by Rev. St. 1895, art. 1465.

[Ed. Note.—For other cases, see Partnership, Cent. Dig. §§ 757-767; Dec. Dig. § 325.*]

On Motion for Rehearing.

2. PARTNERSHIP (§ 325*) — RECEIVERS — APPOINTMENT — ORDER — PARTIAL VALIDITY—EFFECT.

Where, under Rev. St. 1895, art. 1465, authorizing the appointment of receivers between partners and others jointly interested in property or funds, an order is made appointing a receiver, that an inconsiderable portion of the property is personal property to which applicant had a right to a receiver would not sustain the order, the showing as to the real estate comprising the greater portion of the property involved being insufficient to sustain the order.

[Ed. Note.—For other cases, see Partnership, Cent. Dig. §§ 757-767; Dec. Dig. § 325.*]

Appeal from District Court, Potter County; J. N. Browning, Judge.

Action by O. H. Nelson against H. B. Sanborn. From an order appointing a receiver, defendant appeals. Reversed, and receivership vacated.

Gustavus, Bowman & Jackson, W. O. Davis, and Stephens & Miller, for appellant. Madden, Trulove & Kimbrough, for appellee.

CONNER, C. J. This appeal is from an order of the honorable J. N. Browning, judge of the Forty-Seventh district, appointing a receiver upon the petition of appellee. Omitting much detail and transmutation in title not deemed necessary to an understanding of our conclusion, appellee's petition exhibits transactions leading to the joint acquisition by appellant and appellee of some 135,736 acres of land known as the "Bravo Ranch," together with several thousand dollars worth of personal property consisting of horses, cattle, and ranch appurtenances, all situated in the counties of Hartley and Oldham, and a later partition of the same whereby appellant became the sole owner of a specified three-fourths and appellee sole owner

of the remaining one-fourth, consisting of certain designated sections of the land. It was alleged that the ranch had been bought with a view of subdividing it and of reselling the same in smaller quantities and at a profit, in the meantime the ranch to be operated at the greatest advantage; that in the acquisition of the ranch and in its operation until the partition mentioned, including a resale of some nine thousand acres for cash and notes, appellant and appellee were partners and doing business as such; that the notes and personal property had never been divided, but was yet, so far as unwasted, wholly retained by appellant. It further appears that at the time of the partition appellee was indebted to appellant in a large sum, viz., about \$30,000, for moneys advanced in behalf of appellee in part payment for his one-fourth interest, and that appellant had incurred a liability for a further large sum, viz., some \$80,000, upon appellee's paper due the vendors. Appellee, being unable to pay or secure these several sums, and at appellant's insistence that he be paid and secured, joined appellant in a further agreement dated June 1, 1907, placing in escrow with J. L. Smith of Amarillo, Tex., a deed termed a "quitclaim deed," by which appellee in terms conveyed to appellant the fee-simple title to the one-fourth, or 31,493 acres, of land set apart to appellee in the partition, which deed, the conditions of its deposit not having been complied with on appellee's part, was delivered by said J. L. Smith to appellant in accordance with the terms of deposit on the ——— day of November, 1907.

This agreement of June 1, 1907, after reciting the indebtedness and obligation of appellee to pay appellant, contained among other things the following:

"(a) Should the said O. H. Nelson at any time before Oct. 1st, 1907, pay to the said H. B. Sanborn the full amount, principal and interest, owing to him by said O. H. Nelson and for which he is surety or in any wise liable, or pay such indebtedness and indemnify and protect the said H. B. Sanborn, then said deed shall be returned to the said O. H. Nelson, and may be destroyed and shall be of no force and effect.

"(b) Should the said O. H. Nelson fail to pay his indebtedness to H. B. Sanborn by Oct. 1st, 1907, and fail to have him released from all of the obligations of the said O. H. Nelson for which he is surety or in any way liable, or fail to pay said indebtedness and indemnify the said H. B. Sanborn against all obligations for which he is liable satisfactorily to the said H. B. Sanborn, or fail to do either or any of said acts, then said deed shall be delivered by the said J. L. Smith to H. B. Sanborn and shall be effective, operative, and binding, as a deed of conveyance, and the said H. B. Sanborn may have said deed recorded.

"Fourth. Should the said O. H. Nelson fail to pay his indebtedness to the said H. B. Sanborn by Oct. 1st, 1907, and have him released from or indemnified against the obligations of the said O. H. Nelson for which he is or may be liable, the fee-simple title to said lands embraced in said deed from the said Nelson to the said Sanborn shall be and remain in the said H. B. Sanborn, and may be sold and conveyed by the said H. B. Sanborn for such prices and upon such terms and conditions as he may see fit: Provided, however, that one-half of the net profits arising from the sales of said lands shall belong to the said O. H. Nelson, but the interest of the said Nelson therein shall be retained and applied by the said Sanborn to the payment of the indebtedness of the said Nelson, and provided, further, that after the payment of all indebtedness on and obligations assumed against the said lands, and of the full payment of all indebtedness to said H. B. Sanborn, the said lands then remaining unsold, if any, shall be equally divided on the basis of value between the said H. B. Sanborn and O. H. Nelson, and the said H. B. Sanborn shall execute and deliver to the said O. H. Nelson, a deed of conveyance to his portion thereof.

"Fifth. It is understood that the said O. H. Nelson in the interim between this date and Oct. 1st, 1907, may continue the sales of his said lands at retail through the agencies now existing with Eli Browning and George Knoblauch Land Company, and shall use and apply the proceeds as under the arrangements and agreements now existing, but should the said Nelson at any time attempt to sell and convey said lands in any manner other than through such regular channels, and in a manner that would or may defeat the rights of the said H. B. Sanborn, such acts shall constitute a breach of this contract, and the said deed this day placed in escrow shall be delivered to the said H. B. Sanborn and may be placed of record by him, and no rights or profits shall belong to the said O. H. Nelson, and the said H. B. Sanborn shall be and become the full and absolute owner of said lands."

Neither the integrity of this agreement nor the right of Smith to deliver the quitclaim deed referred to is attacked, but appellee alleges that "there never has been a complete settlement of the partnership business, that the defendant (appellant) has the books of said partnership, and that said business as well as all property both real and personal in connection therewith is entirely in the hands of the defendant, and he has excluded the plaintiff from the possession and use of said books as well as from the possession and use of said property; that defendant has failed to keep fair and correct books of accounts of the transactions which he has had respecting plaintiff's said lands and respecting plaintiff's said interest in said per-

sonal property, and instead of keeping separate books respecting plaintiff's land so as to show what expenditures have been made thereto, and what receipts, incomes, revenues, and what proceeds of the sales of said lands have been received, said defendant has wrongfully mingled and mixed plaintiff's said lands and defendant's lands deeded to him by Swift, and has confused and mingled together the expenditures alleged to have been made on behalf of plaintiff's lands and in respect to said personal property with expenditures made in respect to his own lands in said ranch, and not only that, but, in addition thereto, the defendant has mixed and commingled with expenditures claimed to have been made on behalf of plaintiff's lands and property, the expenditures and expenses, outlays, and disbursements made by him in the various and sundry individual transactions and in the numerous lines and branches of business, trades, transactions, loans, and innumerable deals, contracts, and other matters in no way connected with or related to plaintiff's lands, and that neither defendant nor any other person can determine from defendant's books what proportion, if any, of said expenses have properly and legally been made for the purpose for which defendant has the right to make outlays on behalf of plaintiff's lands and property." Some other allegations are made as the basis of the action, but they amount to no more than allegations of overcharges in expenses, want of proper care, and waste of personal property and misappropriation of some notes acquired before the partition, and we think it unnecessary to make further reference to the petition.

In support of the court's order, much stress is laid in behalf of appellee upon the contentions, first, that the transactions detailed in the petition constitute appellee and appellant partners in the matter to which they relate; and, second, that the agreement and quitclaim deed of June 1, 1907, were intended as security only and amount to no more than a mortgage, and hence that our statute authorized the appointment. In the view, however, that we have taken of the case, these questions are not material to the conclusion we are now called upon to make; for whether one or the other or both contentions be correct, in order to justify the appointment of a receiver, it must be shown that the property or funds involved in the controversy are in danger of being lost, removed, or materially injured, as will be seen from Rev. St. 1895, art. 1465, which reads, "so far as here pertinent: "Receivers may be appointed by any judge of a court of competent jurisdiction in this state, in the following cases: (1) In an action by a vendor to vacate a fraudulent purchase of property, or by a creditor to subject any property or fund to his claim, or between partners or others jointly owning or interested in any property

or fund, on the application of the plaintiff or any party whose right to or interest in the property or fund or the proceeds thereof is probable, and where it is shown that the property or fund is in danger of being lost, removed or materially injured. (2) In an action by a mortgagee for the foreclosure of his mortgage and sale of the mortgaged property when it appears that the mortgaged property is in danger of being lost, removed, or materially injured, or that the condition of the mortgage has not been performed, and the property is probably insufficient to discharge the mortgage debt."

This necessary element of danger of loss or injury, however, does not appear. Upon the hearing of the application for the receivership appellant presented affidavits, depositions, and testimony specifically denying the material allegations of appellee's petition relating to waste or injury of the personal property, and as opposed to this we have only appellee's unsupported affidavits. It is also undisputed that all but a very small part of the land claimed by appellee remains undisposed of, and that prior to the appointment of the receiver appellee had caused to be filed in the proper counties a lis pendens notice of his suit which protects him from any possible loss or injury from an unauthorized sale or disposition of his interest in the lands involved in the controversy. See Gen. Laws 1905, p. 316; High on Receivers (3d Ed.) § 561. Complaint cannot be legally made that appellee has been excluded from the business in view of the unimpeached voluntary agreement of June 1, 1907, which so contemplates, and, if there be improper book entries, overcharges, etc., full relief can be afforded appellee in a trial upon the merits. The evidence shows that appellant is a man of large means, and his solvency is but indirectly, if at all, questioned. So far, therefore, as we can be informed by the record, he is amply able to respond in damages for whatever loss or injury, if any, he may have occasioned appellee. Indeed, appellee's failure to show appellant's insolvency together with the affidavits and evidence denying the material allegations of waste, etc., constitutes a complete answer to appellee's application. See *Falfurrias Immigration Co. v. Spielhagen* (Sup.) 127 S. W. 164; *High on Receivers*, § 24.

We conclude that the order appealed from should be set aside and the receivership vacated, and it is so ordered.

On Motion for Rehearing.

In view of the very earnest and able argument on the motion for rehearing, we should perhaps briefly add to what was said in our original opinion. It is urged that, in order to authorize the appointment of the receiver in cases of partnership, it is not necessary that it be "shown that the property or fund is in danger of being lost, removed

or materially injured," as required by Rev. St. 1895, art. 1465, and the case of *Rische v. Rische*, 46 Tex. Civ. App. 23, 101 S. W. 849, and *Holder v. Shelby*, 118 S. W. 590, are pressed upon us as sustaining this contention. We think we need not stop to consider whether the construction of the statute given in these cases be correct as they are easily distinguishable from the case here. In those cases it was expressly held that the fact of partnership had been established, and that the further fact of the exclusion of the complaining party from participation in the partnership business justified the receivership, stress being laid, in the leading case, on article 1492 of the Revised Statutes. Here, however, contrary to appellant's contention, no partnership was in existence at the date of the application for the appointment. It is specifically denied by verified plea of appellee, and appellee thus alleges the fact in his amended petition: "Plaintiff says that there has been an actual termination of the partnership relations between himself and defendant, but that there has never been a complete settlement of the partnership business." This logically means that there is neither a partnership nor one in process of dissolution. It is already dissolved. As made by appellee's petition, this seems to be a case where a partnership once existing has been dissolved with an express written agreement authorizing the principal owner of the partnership property to retain possession of at least the principal part thereof and sell it and out of the proceeds to pay himself for large advances and divide the remainder, if any. In other words, at best, appellee would seem to be in the main but a contingent creditor of the managing partner, and in no event entitled to the appointment of the receiver without showing danger of loss or injury. See *City Nat. Bank of Dallas v. Dunham*, 18 Tex. Civ. App. 184, 44 S. W. 605; *People's Inv. Co. v. Crawford*, 45 S. W. 738; *High on Receivers*, §§ 3-511. But it may be said and in effect is said, as we understand, that the agreement giving appellant right of possession and power of sale does not comprehend the personal property and choses in action specified in appellee's petition, and that as to such property at least the appointment of the receiver was justified. It is evident from the record, however, that this property constitutes but an inconsiderable part of the whole over which the receiver was given dominion, and that, as to such property, appellee at most is but a joint owner entitled to partition, and hence afforded other adequate remedies. If, as we think must be admitted, appellee makes no case for the appointment of the receiver as to the real estate in view of the uncontested agreement relating thereto, the court's order as a whole should not be sustained because of allegations pertinent to the relatively small personal estate, especially as ap-

pellant's controverting affidavits deny the material allegations relating to waste, injury, or danger of loss.

It is further strenuously insisted that the trial court passed upon the facts and that his findings thereon are conclusive; the case of Cemetery Co. v. Drew, 13 Tex. Civ. App. 536, 36 S. W. 802, being cited in support of the contention. In so far as the case referred to may be said to so hold, it seems to be in necessary conflict with the case of Falfurrias Immigration Co. v. Spielhagen, 127 S. W. 164, cited in our original opinion, in which our Supreme Court specifically holds that a receiver should not be appointed in cases where the material allegations of the petition therefor are denied under oath. Moreover, the rule giving conclusive effect to the trial court's finding upon a conflicting state of facts, in our judgment, has no application where there has been no trial upon the merits, and where, as here, the facts under consideration are evidenced by written affidavits pro and con submitted upon the hearing of an application for an ancillary order.

We conclude that the motion for rehearing should be overruled.

LOUISVILLE & N. R. CO. et al. v. RAY (two cases).

(Supreme Court of Tennessee. Feb. 18, 1911.)

1. NEW TRIAL (§ 155*)—PROCEEDINGS TO OBTAIN NEW TRIAL—TIME FOR HEARING AND DECISION OF MOTION—STATUTES.

Judgments against the defendants were entered in the circuit court on June 3, 1910, the same day that the verdicts were rendered, and as a matter of course, under Shannon's Code, § 5892, subsec. 3 (Acts 1805, c. 45, § 2). Motion for a new trial was filed by defendants June 29th, called up by the court for a hearing on July 5th, argued July 6th, and on July 9th, overruled. Acts 1885, c. 65 (Shannon's Code, § 4898), following a similar enactment (Acts 1871, c. 59), relating to the time within which appeal might be granted, provides by section 1 that the appeal should be taken to the Supreme Court and the appeal bonds executed within 30 days after judgment; otherwise, under the provision of section 2, the judgment should be executed. *Held* that, where a motion for a new trial is filed within the 30 days from the rendition of judgment, it may be disposed of after the expiration of such 30 days.

[Ed. Note.—For other cases, see New Trial, Cent. Dig. § 315; Dec. Dig. § 155.*]

2. APPEAL AND ERROR (§ 345*)—TIME FOR PROCEEDINGS—PENDENCY OF MOTION FOR NEW TRIAL.

Where a judgment is entered as a matter of course at the time of recording the verdict, as authorized by Shannon's Code, § 5892, subsec. 3 (Acts 1805, c. 45, § 2), leaving no time between the verdict and judgment for a motion for a new trial, the judgment is only quasi final until after 30 days from the entry, and if motion for a new trial is made within the 30 days the judgment for the purpose of the motion and appeal is treated as nonexistent.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1895, 1896; Dec. Dig. § 245.*]

3. NEW TRIAL (§ 155*)—PROCEEDINGS TO PROCURE NEW TRIAL—TIME FOR DECISION.

The motion for a new trial is a part of the trial itself, and under Acts 1899, c. 40, relating to the disposition of suits pending, at or near the expiration of the term of court, its disposition may be carried over into the time allowed by law for the next term of court.

[Ed. Note.—For other cases, see New Trial, Cent. Dig. § 315; Dec. Dig. § 155.*]

4. APPEAL AND ERROR (§ 281*)—MOTION FOR NEW TRIAL—NECESSITY IN GENERAL.

A motion for a new trial must be made to review matters proper to be recorded in a bill of exceptions.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1650-1661; Dec. Dig. § 281.*]

5. APPEAL AND ERROR (§ 867*)—EXTENT OF REVIEW—DECISION ON MOTION FOR NEW TRIAL AFTER ENTRY OF JUDGMENT.

Where a judgment is entered previous to the overruling of a motion for a new trial, the judgment takes effect as of the date of the order, and an appeal prosecuted on the overruling of the motion is from the judgment, and not from the order, and brings up for review all the errors assigned as ground for new trial.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3476-3486; Dec. Dig. § 867.*]

6. NEGLIGENCE (§ 23*)—THINGS DANGEROUS TO CHILDREN—RAILROAD TURNABLES AND CARS—ATTRACTION.

The plaintiff, a boy about 12 years of age, with another of about the same age, observing a boat unloading at a wharf, to which there was no land approach except across lots or along defendant's spur track, crossed lots to the wharf, and, after a refusal of permission to stay aboard the boat, climbed upon defendant's box cars, standing close to the wharf on the spur track, to watch the unloading of the boat, and while in this position heard a noise as if the cars were about to move, and jumped to the ground, and broke his leg. *Held*, in an action against the defendant for this injury, that the doctrine of the turntable cases had no application, since the plaintiff was not attracted to the place by the cars, but by the unloading of the boat.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. §§ 33, 34; Dec. Dig. § 23.*]

7. NEGLIGENCE (§ 23*)—THINGS ATTRACTIVE TO CHILDREN—RAILROAD TURNABLES AND CARS—STANDING CARS.

The theory of the turntable cases, or the attractive nuisance theory, while recognized by the court, does not apply to cars left standing by a commercial railway to be loaded in the course of business, especially where they are left in charge of a shipper engaged in loading, and in whose care they are at the time being.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. §§ 33, 34; Dec. Dig. § 23.*]

8. NEGLIGENCE (§ 136*)—INSTRUCTIONS—RULE IN TURNABLE CASES.

In an action for negligence based upon the theory of the turntable cases, the court should give a special instruction as a matter of law, where the case proven falls within the class of cases or subjects covered by that doctrine.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. § 313; Dec. Dig. § 136.*]

Error to Circuit Court, Davidson County; M. H. Meeks, Judge.

Actions by James L. Ray, by his next friend, and by A. P. Ray, father of the plaintiff in the first action, against the Louisville

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

& Nashville Railroad Company and others. From judgments in the Court of Civil Appeals for defendants, plaintiffs bring the cases up by certiorari. Judgments affirmed.

Claude Waller and Frank Slemons, for plaintiffs in error. James P. Atkinson, for defendants in error.

NEIL, J. These two actions were brought in the circuit court of Davidson county against plaintiffs in error for an injury caused to James L. Ray, a minor about 12 years of age, as the result of his jumping from a freight car, the property of plaintiffs in error. The first action was brought by the father, and the second in behalf of the boy himself by next friend.

In the first case there was a recovery of \$1,000, and in the second one of \$2,500. The facts will be stated more at large when we reach the second branch of the case.

The first point presented is that the motion for new trial was not disposed of until the expiration of 30 days from the rendition of the judgments, and therefore that the matter was coram non iudice, when the trial judge acted upon the motion. The verdict in each case was rendered on June 3, 1910, and judgment was rendered thereon on the same date. Motion for new trial was marked "Filed" by the clerk of the trial court on the 29th day of June, 1910, called up by the court for hearing July 5, 1910, continued until the 6th, on which latter day it was argued and held under advisement until July 9, 1910, when it was overruled. At the hearing of this motion, defendant in error objected to its consideration, upon the ground that any action relative thereto was beyond the power of the court, because the time for appeal expired after the expiration of 30 days from the date of the judgment on the verdict, relying upon Acts 1885, c. 65, §§ 1, 2. Plaintiffs in error prayed an appeal to the Court of Civil Appeals, and on that date, July 9, 1910, were granted 30 additional days to give bond and perfect the appeal. When the case reached the Court of Civil Appeals, the same point was there made and overruled. That court then proceeded to consider the case upon its merits and sustained the motion for peremptory instructions which had been made in the court below. Thereupon a petition was filed in this court for the writ of certiorari.

Prior to the act of 1885 was Acts 1871, c. 59, which was as follows:

"In all cases in the inferior courts of this state, wherein an appeal to the Supreme Court may hereafter be prayed and granted upon the terms now imposed by law, and the party appealing is a resident of another county or state, or is unable, by reason of physical inability, to be present, the court granting said appeal, may, in its discretion, allow the appellant time, in no case exceed-

ing thirty days, in which to give bond or file the pauper's oath for the prosecution of said appeal, and such appeal bond approved by the clerk of the court from which the appeal is taken, or the pauper's oath filed with said clerk within the time allowed by the court, shall render said appeal as effectual as if done as now required by the law, during the term of court at which the judgment appealed from was rendered."

Before the act of 1871 the practice in chancery causes was for the chancellor to grant such length of time as he might see proper, even beyond the end of the term, for the execution of a bond for an appeal previously prayed (*McPhartridge v. Gregg*, 4 Cold. 324, 326; *Andrews v. Page*, 2 Heisk. 634, 638; *Adamson v. Hurt*, 3 Shan. Cas. 424; *Davis v. Wilson*, 85 Tenn. 383, 5 S. W. 285); but no such power was recognized as belonging to the circuit courts (*James Ricks, Ex parte*, 7 Heisk. 364). To correct this practice, and to make the rule uniform in both circuit and chancery courts, the act of 1871 was passed. That act, however, was construed by this court in *Jackson v. McDonald*, 2 Leg. Rep. 21, decided at the December term, 1877, to mean that the grace given for execution of the bond should be computed from the day of the adjournment of the court, and not from the time at which it was granted. The result of this construction was that there were frequently great delays in the prosecution of appeals, and often they were not prosecuted at all after long indulgence had been granted under this construction, thereby delaying the enforcement of the judgment without any security to cover contingencies that might arise between the adjournment of the court and the time allowed. To meet this hardship, a great hardship where the terms were long, covering several months, as in the cities, the act of 1885 was passed. It was as follows:

"Section 1. That hereafter when an appeal, or an appeal in the nature of a writ of error, is prayed from a judgment or decree of an inferior court to the Supreme Court, the appeal shall be prayed for and appeal bond shall be executed, or the pauper's oath taken, within thirty days from the judgment or decree, if the court hold so long; otherwise, before the adjournment of the court; but, for satisfactory reasons, shown by affidavit or otherwise, and upon application made within the thirty days, the court may extend the time to give bond or take the oath in term or after adjournment of the court; but in no case more than thirty days additional.

"Sec. 2. That in all cases where the appeal has not been prayed for within the time prescribed in the first section of this act, the judgment or decree may be executed."

This act covers all the ground previously covered by Acts 1871, c. 59, and was intended to take its place, and the two were improv-

erly amalgamated in section 4898 of Shannon's Code.

We thus see the evil which was intended to be remedied by the act of 1885 and the previous act. There was no purpose on the part of the Legislature to interfere with the practice upon the subject of motions for new trial. It was held by this court in the case of *Railroad v. Johnson*, 16 Lea, 387, that it could not be evaded on the theory that the judgment was within the breast of the judge during the term, and that he could set it aside after the expiration of 30 days and enter a new judgment, from which the appeal could be prosecuted. It was held in *Ellis v. Ellis*, 92 Tenn. 471, 22 S. W. 1, that a motion to set aside a judgment by default could not be maintained, if made more than 30 days after the entry of such judgment, under the act of 1885 above reproduced; but in so doing the court pointedly remarked that no application had been made for a new trial within 30 days from the rendition of the final judgment, and no sufficient excuse had been given why the motion was not made within that time. This qualification indicated that, if there had been such motion made within 30 days, it could have been maintained and acted upon after the expiration of that period. Such, indeed, has been the universal practice of the circuit courts, the understanding of this court, and the view entertained by the bar in general, since the passage of the act of 1885. The judgment in the circuit court is entered by the clerk as a matter of course when he records the verdict. Shannon's Code, § 5892, subsec. 3. At common law there was always an interval between the entry of the verdict and the entry of the judgment within which time the motion for new trial could be made. There is no interval under our practice. Therefore the judgment is only quasi final until after the expiration of 30 days from this entry: that is, its finality is conditioned upon the absence of the entry of a motion for new trial within that time, and its subsequent sustainment by the court, or, we may add, the motion in arrest of judgment, or motion for a judgment non obstante veredicto. In other words, if a motion for new trial is made within the 30 days, the judgment for the purposes of the motion is treated as being nonexistent. If the motion for new trial is sustained, the verdict is set aside and the judgment goes with it; so if a motion in arrest of judgment is sustained, or a motion for judgment non obstante veredicto, the provisional entry of the judgment cannot interfere with any of these rights of the losing party. To hold otherwise would be not only to extend the provisions of the act of 1885 very far beyond its purposes, but it would unduly restrict the rights of litigants, and impose unwarrantable burdens upon trial judges who must, in the course of things, have sometimes several motions for new tri-

al on hand at the same time in important cases, all requiring time and careful consideration. It would make it incumbent upon the trial judge to dispose of these motions within the limited time of 30 days from the date of the entry of the judgment, even though they did not come to him until near the expiration of that period, when it was impossible for him to give due thought to the disposition of them. As held by the court in *Street Railroad Co. v. Simmons*, 107 Tenn. 392, 396, 64 S. W. 705, the motion for new trial is a part of the trial itself, and may be carried over into the time allowed by law for the next term of the court, under Acts 1899, c. 40. *Ray v. State*, 108 Tenn. 282, 298-301, 67 S. W. 553; *Rhinehart v. State*, 122 Tenn. 698, 127 S. W. 445. Such motions must be made in all cases where it is desired to review any matters proper to be recorded in a bill of exceptions (*Railroad v. Johnson*, 114 Tenn. 632, 88 S. W. 169; *Seymour v. Railroad*, 117 Tenn. 98, 98 S. W. 174); and they must be considered by the trial court before they can be considered by the Supreme Court (*Telephone & Telegraph Co. v. Smithwick*, 112 Tenn. 463, 470, 79 S. W. 803). The action of the trial court thereon is an indispensable prerequisite to the action of the Supreme Court, for the review of matters proper to go into a bill of exceptions as above indicated, for the purpose of enabling the Supreme Court to say whether the trial court acted correctly in refusing a new trial, or under the act of March 24, 1875 (*Railroad v. Conley*, 10 Lea, 531; *Morgan v. Bank*, 13 Lea, 241; *Baugh v. Railroad*, 98 Tenn. 120, 38 S. W. 433; *Jenkins v. Hankins*, 98 Tenn. 548, 41 S. W. 1028) granting a new trial. When a new trial is refused by the trial court, then only can an appeal be prosecuted from the judgment. For such purposes of appeal the judgment, although previously entered, really dates as of the order of the court overruling the motion for new trial. The appeal is then prayed, and if duly prosecuted brings up for review all of the points made in the motion for new trial, and duly assigned for error in the appellate court, and that court thus acquires control of the judgment entered in the trial court. It is not correct to say, as held by the Court of Civil Appeals, that the appeal is from the order of the lower court overruling the motion for new trial. As we have already stated, when a motion for new trial is made within 30 days the existence of the judgment is ignored, and upon the motion being overruled the judgment for purposes of appeal must be treated as if then entered upon the verdict. The previous entry is made in obedience to the section of the Code above referred to (Shannon's Code, § 5892, subsec. 3; Acts 1805, c. 45, § 2), which was enacted to prevent the delay in entries of judgment which at common law sometimes resulted in the failure to make the entries altogether.

Plaintiffs in error assign as error the refusal of the trial judge to give a peremptory instruction in their favor.

The uncontroverted facts are in substance as follows:

In March, 1909, the minor in question, James L. Ray, went upon the Woodland Street bridge that spans the Cumberland river between Nashville and East Nashville, in company with a boy about his own age, one James Gallagher, for the purpose of viewing the waters of the river; the river then being at a high stage. While on the bridge their attention was attracted to the steamer Bob Dudley, which was unloading some 250 feet to the northward. They decided to get a nearer view of this process, so descended the bridge by steps leading down to the ground about 70 feet below, then went through the premises of the Standard Box Company till they reached a bluff which constitutes the end of Main street, in East Nashville. They mounted this, and then descended by a steep path down to the vicinity of the Ryman elevator plant, which was situated about 80 feet from the river. From this they descended a sloping path till they reached the wharf at which the unloading was in process. At this point the plaintiffs in error had caused to be located two box cars into which lumber was being unloaded from boats. Desiring to get a nearer view of what was going on, and also to secure a ride back across the river, one or both of the boys went upon the gangplank of the boat and made the request just indicated. This was refused. Concluding, then, that they could get a better view of the unloading of the boat by going upon the box cars, they did so. After having reached this elevation, they watched the unloading for a time, and, becoming dissatisfied with this entertainment, began to jump from one of the cars upon a pile of sand that lay near the car, which they had increased and built up with their own hands for the purpose. They jumped several times, and climbed back upon the car by its ladder. Tiring of this sport, they were just about to sit down on the edge of the car, when they heard a creaking noise under the car they were on, indicating that it was about to move. Alarmed by this noise, and fearing that the car would go into the river, which was within a few feet, they jumped off. Gallagher escaped without injury, by jumping on the sand pile; but Ray struck the bare ground and broke his leg. This was the injury for which he sued.

The place where the injury occurred was a wharf or landing used by the boats on the river for unloading freight from time to time which they had for the various factories in that neighborhood, of which there were a considerable number. There was a baseball ground about 100 yards away, which was used by small boys, and in which sport they were sometimes joined by the railroad employees for a few minutes at a time. It does not appear, however, that any game was

going on near the period of the accident, or how long prior thereto. Quite a number of people congregated there from time to time to watch the unloading of the boats. A considerable number of boys were there also from time to time, especially near the Ryman elevator, engaged in picking up corn and other grain to feed to their pigeons. On one or more occasions it had been thought necessary by the people engaged in the unloading process to run the boys away from the cars. It does not appear, however, that the plaintiffs in error had any knowledge of this. They were not concerned with the wharf, except to furnish cars for transportation purposes, which cars on demand were shunted down on the spur track, which ran right by the margin of the river, so close that a gangway could be constructed, from the boats to the cars, into which freight could be transferred.

This track was on a grade of 235 feet to the mile. In order to make the cars stand so that they could be loaded, it was necessary that the brakes should be set, and also that the wheels should be chocked or scotched. The cars were delivered on the spur track at 10 minutes after 7 o'clock on the morning in question. The injury occurred late in the afternoon. When the cars were placed at the point indicated, they were secured by the setting of the brakes and by chocking on the east side. The west side could not be chocked, because the wheels stood in the water at the edge of the river, which was partly over the track.

The area of land within which the wharf lay may be roughly described as bounded on the south by the Woodland street bridge, on the east by Front street in East Nashville, on the north by the property of the Kirkpatrick Company's mills, and on the west by the river. The Woodland Street bridge was 250 feet distant. There was no approach to the wharf from this direction, except along the spur track of the railway, or across lots; the latter being the course pursued by the boys when they left the Woodland Street bridge. To the north the country was open up to the Kirkpatrick Company's mills. There does not appear to have been any wagon road down to the wharf. It was merely a landing where freight was loaded into cars standing on the spur track from boats on the river. Of course, people on foot could get to it from over the rough way pursued by the boys, or more easily from the north and east.

It is insisted that the point is disputed whether the cars were properly secured by brakes and chocks; but what is said upon this subject in the evidence adverse to plaintiffs in error simply amounts to statements of witnesses that they did not see the chocks. A brakeman of the railway company testified that he put the brakes on, and another that he saw the brakes put on, and the latter that he himself put the chocks under the car. No

one disputes this. The fact that others did not see it would amount to nothing; it not appearing that their attention was called to the matter.

It is a disputed matter as to whether the boys were ordered off the cars. Some witnesses for the plaintiffs in error say that they were so ordered; but the boys say they were not. There is also a dispute as to whether the boys interfered with the brakes upon the car. One witness for the plaintiffs in error testified that he saw them doing so; but the boys say they did not.

The moving of the cars is accounted for by the witnesses for the plaintiffs in error by testimony to the effect that loading heavily tends to press the car down upon the springs, thereby lowering the body of the car, and loosening to some extent the brake shoe. It is supposed that something of this kind occurred. The second car was already loaded with lumber, and the first or upper car was about half loaded, when the cars began to move. They ran over only about 15 feet, and were stopped by a bumper at the end of the spur track.

In the view that we take of the case, the disputed points are immaterial.

It may be conceded, as the jury found, that the boys did not interfere with the brakes, and that they were not ordered from the cars. However, as to this latter point there is no evidence to the effect that it was known by the plaintiffs in error, or any of its agents, that the boys were on the cars, but only by the boat people engaged in unloading the boats.

The examination of James L. Ray shows that he is a very bright, alert, and intelligent boy; also well advanced in his school studies for a person of his age.

The question to be determined is whether the attractive nuisance theory, or what is generally known as the law of the "turntable cases," applies to the facts stated.

We are of the opinion that it does not. Aside from the fact that the cars were properly secured when the servants of the plaintiffs in error left them in the morning, and they had no knowledge that boys were occasionally at the place where the cars were, and had been run away from there a time or two prior to the occasion in question by the agents of the boat companies while engaged in unloading, and aside from the fact that plaintiffs in error's servants knew nothing of the presence of the boys at the time the defendant in error James L. Ray was hurt, and aside from the remoteness of the place where the cars were standing, we think the law referred to does not apply, because the boys were not attracted to the spot by the cars, but by the boat, which was in course of unloading, and only mounted the cars, after they reached the place, as a vantage ground for witnessing the process of unloading the boat. We are also of the opinion that the attractive nuisance theory does

not apply to cars standing upon a commercial railway, left to be loaded, in the ordinary course of the company's business; certainly not when they are left in charge of the shipper, who is engaged in the act of loading, and in whose care the car is for the time being. There are authorities which hold that it does not apply to such cars at all; that is, to standing railroad cars. *Barney v. Hannibal & St. J. R. Co.*, 126 Mo. 372, 28 S. W. 1069, 28 L. R. A. 847; *Chicago & A. R. Co. v. McLaughlin*, 47 Ill. 265; *East St. Louis Connecting R. Co. v. Jenks*, 54 Ill. App. 91; *Central Branch Union P. R. Co. v. Henigh*, 23 Kan. 347, 33 Am. Rep. 167.

In the brief of counsel for plaintiffs in error our attention is called to several cases from other states in which the whole doctrine expressed by the attractive nuisance theory is repudiated, and others in which it is confined to the specific case of turntables left unfastened and unguarded. In addition, we have examined numerous other cases. A full collection of the authorities, and a discussion of them, may be found in a note to *Cahill v. E. N. & A. L. Stone & Co. (Cal.)* 19 L. R. A. (N. S.) 1095-1165, and the cases reported therewith—*Wilmot v. McPadden*, 79 Conn. 367, 65 Atl. 157, 19 L. R. A. (N. S.) 1101; *Swartwood v. Louisville & N. R. Co.*, 129 Ky. 247, 111 S. W. 305, 19 L. R. A. (N. S.) 1112, 130 Am. St. Rep. 465; *Briscoe v. Henderson Lighting & P. Co.*, 148 N. C. 396, 62 S. E. 600, 19 L. R. A. (N. S.) 1116; *Wheeling & L. E. R. Co. v. Harvey*, 77 Ohio St. 235, 83 N. E. 66, 19 L. R. A. (N. S.) 1136, 122 Am. St. Rep. 503; *Thompson v. Baltimore & Ohio R. Co.*, 218 Pa. 444, 67 Atl. 763, 19 L. R. A. (N. S.) 1162, 120 Am. St. Rep. 897. Other cases, since the publication of that volume, are found in *Kelly v. Benas*, 217 Mo. 1, 116 S. W. 557, 20 L. R. A. (N. S.) 903; *Hermes v. Hatfield Coal Co.*, 134 Ky. 300, 120 S. W. 351, 23 L. R. A. (N. S.) 724; *Brown v. Chesapeake & O. R. Co.*, 135 Ky. 798, 123 S. W. 298, 25 L. R. A. (N. S.) 717; *Covington & C. R. T. & B. Co. v. Mulvey*, 135 Ky. 223, 122 S. W. 129, 26 L. R. A. (N. S.) 204; *Olson v. Gill Home Invest. Co.*, 58 Wash. 151, 108 Pac. 140, 27 L. R. A. (N. S.) 884; *Sweeden v. Atkinson Improv. Co. (Ark.)* 125 S. W. 439, 27 L. R. A. (N. S.) 124.

We do not deem it necessary for the purposes of the present case to enter upon a general discussion of the subject. We have in our own state six cases: *Whirley v. Whiteman*, 1 Head, 610 (1858); *Bates v. Railway Co.*, 90 Tenn. 628, 15 S. W. 1069, 25 Am. St. Rep. 665 (1891); *Cooper v. Overton*, 102 Tenn. 211, 52 S. W. 183, 45 L. R. A. 591, 73 Am. St. Rep. 864 (1899); *Railroad v. Cargille*, 105 Tenn. 628, 59 S. W. 141 (1900); *Burke v. Ellis*, 105 Tenn. 702, 58 S. W. 855 (1900); *Stone Co. v. Pugh*, 115 Tenn. 688, 91 S. W. 199 (1905). In *Whirley v. Whiteman* the court was committed to the doctrine. In that case it appeared that a child but little more than three years of age was injured by some

exposed cogwheels, revolving within from 10 to 20 inches from the ground, on the outside of a mill, within 20 feet of a public street in the city of Nashville, in an open space, wholly exposed, without any cover, guard, or inclosure whatever, and that children were accustomed to play about the mill every day. It was shown that the wheels might have been boxed at very trifling expense, or an inclosure made around them, so as to secure them against possibility of injury to any one; also that on the day in question the mill was left running with no one to watch, direct, or guard the machinery, while all of the operatives went to their noon meal, and that during their absence the injury was inflicted. On the facts it was held that the owner of the mill was liable. In *Bates v. Railway* the doctrine was conceded, but held not to apply to a turntable which was sufficiently fastened to keep it securely in place when unmolested. In *Railroad v. Cargille* it was held to apply to a turntable which was uninclosed, and wholly unfastened; and in *Burke v. Ellis* to an open flat car loaded with loose earth, where the child was invited, or at least permitted, upon the car with the knowledge of the superintendent of the company. In *Cooper v. Overton* it was held not to apply to a pond of water formed by recent rains upon a vacant city lot, the property of a nonresident owner, the existence of which pond was unknown to the owner, who had his lot viewed by his agent once every two months, and where it appeared that the water would not have gathered into a pond except for the unauthorized act of the city in filling with garbage, unknown to the owner, the mouth of a drain that ran across the lot, and that the lot was 50 feet from the nearest street, and the pond had nothing on it to make it attractive to children, except a plank, and that the owner of the lot did not know that the plank was there. It appeared there was a school in the neighborhood, and that children played upon this lot occasionally, or from time to time. It was said that: "The liability does not exist, even in the case of children, unless they are induced to enter upon the land by something unusual and attractive placed upon it by the owner, or with his knowledge permitted to remain there." 102 Tenn. 237, 52 S. W. 189, 45 L. R. A. 591, 73 Am. St. Rep. 864. In *Stone Co. v. Pugh*, it was held that it did not apply to a low-hung wagon, made for hauling heavy stone, driven into the yard of an asylum where a large number of children were kept, and cared for during the day; the wagon and team being in charge of a competent driver. In this case it was held that *Burke v. Ellis* should be confined to its own facts. It should be remembered that while the doctrine is recognized here, and applied in proper cases, the recent authorities have shown a disposition to limit its

application. It should further be noted that in all of the cases the court itself has, in one form or another, determined the classes of cases or subjects to which the doctrine applies. In *Whirley v. Whiteman* it was said in the opinion that the trial judge should have "instructed the jury specially, as a matter of law, that the facts stated, if true, constituted the degree of negligence which would render the defendants liable in damages." 1 Head, 624. So in *Burke v. Ellis* it was held that the facts proven made a case for the application of the doctrine. *Railroad v. Cargille* stood on declaration and demurrer. In *Bates v. Railroad* it was held that a specific instruction should have been given to the jury, which instruction really determined whether the case proven fell within the class of cases covered by the doctrine. In *Cooper v. Overton* it was determined that the facts which we have recited did not make a case for the application of the doctrine, and so in *Stone Co. v. Pugh*. Such is the state of the law in Tennessee upon this subject.

On the grounds stated, we are of the opinion there is no error in the judgment of the Court of Civil Appeals, granting the peremptory instruction and dismissing the actions, and the certiorari is therefore refused.

HUMPHREYS COUNTY BOARD OF EDUCATION et al. v. BAKER.

(Supreme Court of Tennessee. Feb. 21, 1911.)

1. DEEDS (§ 160*)—BREACH OF CONDITIONS.

Where property was conveyed to school directors and their successors for a site for a schoolhouse and church, with a reservation that the same should revert in case its use for such purpose was abandoned, proof that the building constructed thereon had been neglected to such an extent that it was in a very dilapidated condition, and that shortly prior to the filing of the bill school was not taught in the building, because of the erection of a more commodious building in another place, its use being continued, however, for church purposes, was insufficient to show an abandonment.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. §§ 505-517; Dec. Dig. § 160.*]

2. DEEDS (§ 8*)—PROPERTY SUBJECT TO GRANT—POSSIBILITY OF INTEREST.

An interest in land, in order to be the subject of a valid grant, must exist in possession, reversion, or remainder, or by executory devise or contingent remainder, and be something more than a bare possibility of an interest, which is uncertain.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. §§ 13-18; Dec. Dig. § 8.*]

3. DEEDS (§ 156*)—CONDITIONS—AVAILABILITY.

Where there is a breach of the conditions in law, it may be availed of by the grantor, his heir, or assignee, by entry; but a breach of conditions in deed is available only to the grantor and his heirs, and not to a stranger taking by assignment or deed.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. §§ 496-499; Dec. Dig. § 156.*]

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes.

4. DEEDS (§ 168*)—CONDITIONS IN DEED — FORFEITURE—MODE.

The only mode of taking advantage of a breach of a condition in deed, which has the effect to defeat or work a forfeiture of an estate, is by entry, which reduces the estate to the same condition and causes it to be held on the same terms as if the estate to which the condition is annexed had not been granted.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. §§ 526-533; Dec. Dig. § 168.*]

5. DEEDS (§ 166*)—CONDITIONS—CONSTRUCTION—WAIVER.

Defendant's grantor had conveyed the property in question to school directors and their successors in office, to be used for a schoolhouse and church only; the deed providing that, whenever the lot was abandoned for such purposes, the title should revert to the grantor. *Held*, that the condition for reversion on abandonment of the particular use was a condition in deed, available only to the grantor and his heirs, and the right of entry for breach thereof was waived by a subsequent conveyance of the land to defendant, though the grantor's right of reversion was not an estate which could be the subject of a conveyance, so that defendant acquired nothing by his deed.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. §§ 522-525; Dec. Dig. § 166.*]

Appeal from Chancery Court, Humphreys County; J. W. Stout, Chancellor.

Action by the Board of Education of Humphreys County and others against J. W. Baker. From a judgment in favor of plaintiff for part only of the relief demanded, all parties appeal. Affirmed on defendant's appeal, and reversed on complainants' appeal.

Morris & Morris and B. R. Thomas, for complainants. H. C. Carter and J. F. Shannon, for defendant.

LANSDEN, J. This is an action of ejectment, brought by the board of education of Humphreys county to recover a lot situated in the town of McEwen, the possession of which was taken by defendant under the following facts: In 1881, J. N. Simpson conveyed the lot in question to the school directors of the Sixteenth school district of Humphreys county upon the following conditions:

"To have and to hold the same unto the school directors and their successors in office for the purposes and uses aforesaid, viz., building a schoolhouse and church, to be used for that purpose only; and whenever the said lot of ground is abandoned for the purposes of school and church, then the title is to revert back to me, and this shall not be any title to any other person for other purposes whatever."

On September 23, 1897, Simpson attempted to convey this lot to the defendant, Baker. This deed was an ordinary deed of conveyance, and referred to the lot conveyed as the same "lot given by J. N. Simpson to the public school directors for school purposes, and used heretofore for that purpose." On August 2, 1907, Simpson made another deed to Baker containing the following recital:

"Whereas, on the 18th day of October,

1881, I conveyed to the school directors of what was then the Sixteenth school district of Humphreys county, Tennessee, a certain town lot in the town of McEwen, in said Humphreys county, which deed was duly acknowledged by me and duly recorded in Book Z, pages 4 and 5, of the register's office of Humphreys county aforesaid, to which reference is here made for full description of said lot and the terms of the deed; and whereas, said deed provided that said school directors are to build a schoolhouse and church on said lot to be used for that purpose only, and that when said lot of ground is abandoned for the purpose of school and church the title was to revert back to me; and whereas, on the 23d day of September, 1897, believing said lot had been abandoned for school and church purposes, I transferred, sold, and conveyed to James W. Baker for the consideration of five hundred dollars the said lot above mentioned, but since the date of this last deed some question has arisen as to whether there was abandonment of the same on the 23d of September, 1897, the date I conveyed the lot to Baker; and whereas, since then said lot has been abandoned for school and church purposes for years."

About the date of this last deed, defendant, Baker, with the consent of one of the old school directors, took possession of the lot, claiming it under his deeds from Simpson. Thereupon the complainants, who are the county board of education for Humphreys county and the county superintendent of public instruction, who is ex officio secretary of the county board of education, filed this bill to recover the lot from Baker, alleging that the public accepted the deed of Simpson and built a house upon the lot for school and church purposes, and had continuously used it for such purposes up to a very recent date before the filing of the bill, when defendant took possession of the property and nailed up the house. It was charged that there was no abandonment upon the part of the public, and for that reason the right of re-entry had never existed in Simpson, and therefore Baker could not acquire a right of entry under the deeds to him from Simpson. It was further charged that Simpson, by the execution of the deed to Baker, deprived himself of all right of re-entry which he had reserved to himself, although the contingency provided for in the deeds as conferring that right should have happened.

The defendant answered the bill, and admitted that a public school and church house was built upon the lot, and admitted the conveyance to him by Simpson as charged in the bill, but asserted that by reason of the right of re-entry reserved by Simpson in his deed to the school directors the defendant acquired title under the subsequent conveyance from Simpson, because the contingency provided for in the deed of Simpson to the

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

school directors had happened, in that the property had been abandoned for school and church purposes. After the filing of the bill, the Legislature passed an act amending the charter of the town of McEwen, so as to establish for said town a school system under the control of its board of mayor and aldermen, and transferred all school property within its corporate limits, including the lot in question, to the municipality. After this was done, the board of mayor and aldermen filed a petition in the case to be permitted to be made complainants, with the right to prosecute the suit in their name, and this was done. The case was heard by the chancellor upon the pleadings and proofs, and he declared that there had been no abandonment of its rights by the public at the time of the institution of this suit, and therefore the defendant had no right to the possession of the property at that time, and he allowed a recovery of the lot by the board of mayor and aldermen, and admitted them to the possession thereof. He held, however, that the two deeds from Simpson to defendant, Baker, passed to Baker "all the rights that Simpson reserved to himself in his deed to the school directors in 1881 to re-enter upon the property whenever it should be abandoned for school and church purposes." To the first part of the decree the defendant excepted, and has appealed and assigned errors; and to the last part, the complainants excepted, and have appealed and assigned errors.

Upon the evidence, it can hardly be insisted that there has been an abandonment of this property for school and church purposes by the public. The only testimony which tends to establish an abandonment is to the effect that the house had been neglected to such an extent that it was in bad repair and in a very dilapidated condition, and some time prior to the filing of the bill the public school was not taught in this house, because of the erection of a more commodious building at another place in the town, and the school property that had theretofore been used in it was removed to the new building. It is shown, however, that the house was used for church purposes by different denominations, and for Sunday school purposes by the congregation of the Christian Church up to about April before the execution of the last deed to Baker by Simpson. There is not an intimation in the record that the public has surrendered its rights in the property by any affirmative act upon its part. There is nothing to show but what it is intended at some future time to rebuild or repair the house and continue to use it for church and school purposes. It is not necessary that it should be used for the public schools alone, but under the terms of the grant by Simpson to the public it is sufficient that it shall be used by private schools, and if not used by any school it would be sufficient if it were used for church purposes

only. The mere fact that the school directors, or other public officials intrusted with the care of this property, had neglected to repair it, is not evidence of an abandonment of its rights by the public. The chancellor so held, and we agree.

Under the assignment of error made by the complainants, it is proper to determine the effect upon the reserved right of re-entry in favor of Simpson in his deed of 1881, which should be given to his subsequent deeds of 1897 and 1907 to the defendant, Baker. It is insisted by the complainants that Simpson merely had a right of re-entry contingent upon the happening of the bare possibility of the abandonment of the property by the public for the uses to which it was dedicated, and that, as his conveyance to the school directors divested him of all interest in the estate conveyed, this contingent right of re-entry is not a grantable interest in the property, and therefore the chancellor was in error in decreeing that Baker would become vested with a right of entry by virtue of his deed from Simpson whenever the public should abandon the property. We think this contention is sound. It is not every right in real estate that is the subject of grant. A bare possibility of an interest, which is uncertain, is not grantable. It must be an interest in the land existing in possession, reversion, or remainder, or by executory devise or contingent remainder. The rule which passes the after-acquired title of a grantor under his covenants of warranty to his grantee is an apparent exception to the general principle just stated; but the exception is more apparent than real. In such case the grantee has his right of action for a breach of the covenant, and, when the grantor acquires the title after the breach, the grantee has such an inchoate interest in the title so acquired that it may well be said that he does not acquire a bare possibility of an interest, which is uncertain, within the meaning of the rule here stated; but upon his covenant of title he has a possibility coupled with an interest, which will cause the after-acquired title to pass to him immediately upon its acquisition by his grantor. So it may be said generally that a bare possibility of an interest in lands is not grantable. This is said with respect only to conditions reserved in the deed. There seems to be a difference between conditions in law and in deed. If there is a breach of the conditions in law, a grantor, his heir, or assignee may avail himself of the right to enter; but conditions in deed are reserved to the grantor only, and are personal to him and his heirs, and a stranger cannot take advantage of the breach of the condition by entering and defeating the estate. It is a right which cannot be aliened, nor assigned, nor passed by a grant of the reversion at common law. The only mode of taking advantage of a breach of a condition in deed which has the effect to defeat or work a forfeiture

of an estate is by entry, and this is true upon the principle that it requires as solemn an act to defeat, as to create, an estate. When such entry is made, the effect is to reduce the estate to the same condition, and to cause it to be held on the same terms, as if the estate to which the condition was annexed had not been granted. But, notwithstanding a breach of the condition, the estate, if a freehold, is only defeated by an entry made, and until there is a re-entry it loses none of its original qualities or incidents. The right of re-entry is at the election of him who has the right to enforce it, and, if he once dispense with it, he cannot afterwards enter for a subsequent breach of the condition. Wash. Real Prop. vol. 3, pp. 370, 371; Id. vol. 2, pp. 13-15; *Rice v. Boston & W. R. R.*, 12 Allen (Mass.) 141.

From the foregoing principles, it is clear that the conveyance by Simpson to Baker was a relinquishment of his right of re-entry and an election upon his part not to exercise it, and yet the interest which Simpson had in the estate before the breach of the conditions was a bare possibility coupled with no interest in the land, and was, therefore, not grantable. The decree of the chancellor holding to the contrary is reversed, and a decree will be entered here cancelling the deeds of Simpson to Baker as clouds upon complainants' title, and decreeing that the complainants are the owners in fee and entitled to the immediate possession of the land sued for.

Other questions made upon the demurrer and plea of defendant were disposed of orally.

LOUISVILLE & N. R. CO. v. SMITH.

(Supreme Court of Tennessee. Feb. 18, 1911.)

1. CARRIERS (§ 228*)—INJURY TO LIVE STOCK—EVIDENCE.

In an action for injuries to horses in transit, evidence that the horses were improperly tied by the carrier's employé on reloading them after feeding, whereby the horses were injured, is sufficient evidence of defendant's negligence.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. § 960; Dec. Dig. § 228.*]

2. CARRIERS (§ 218*)—LIVE STOCK—LIMITATION OF LIABILITY.

Before a shipper can be bound by a limited liability contract, it must appear that it was known to him that the carrier was willing to ship the goods under the common-law liability, and that a rate was fixed therefor.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. § 677; Dec. Dig. § 218.*]

3. CARRIERS (§ 228*)—INJURIES TO LIVE STOCK—LIMITATION OF LIABILITY—SUFFICIENCY OF EVIDENCE.

In an action for injuries to horses in transit, evidence held insufficient to show that the shipper was notified that the carrier would ship under the common-law liability at a rate fixed

therefor, so as to make valid a limited liability contract.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. § 960; Dec. Dig. § 228.*]

4. CARRIERS (§ 218*)—LIVE STOCK—READING SPECIAL CONTRACT.

A shipper, in the absence of fraud or misrepresentation, is bound by a live stock shipping contract limiting liability, though he did not read it.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. § 679; Dec. Dig. § 218.*]

5. CARRIERS (§ 218*)—LIVE STOCK—SPECIAL CONTRACTS—LIMITATION OF AMOUNT OF LIABILITY.

A limited live stock shipping contract, though reciting that the shipper might ship at the rates established by it therefor, or, in consideration of risks assumed by the shipper, at greatly reduced rates, is not sufficient to give notice to a shipper that he has an option to ship at rates imposing a common-law liability on the carrier, where there is nothing in the contract showing what the established rate of the company was.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 677, 691; Dec. Dig. § 218.*]

6. TRIAL (§ 261*)—REQUESTED INSTRUCTIONS.

Requested written instructions, not correct in themselves, are properly refused.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 660; Dec. Dig. § 261.*]

7. COMMERCE (§ 61*)—LIVE STOCK—LIMITATION OF LIABILITY—INTERSTATE COMMERCE ACT.

The right of a state to refuse to enforce a special live stock shipping contract limiting the liability of a carrier, made in a foreign state, is not affected by the interstate commerce act (Act Feb. 4, 1887, c. 104, 24 Stat. 379 [U. S. Comp. St. 1901, p. 3154]).

[Ed. Note.—For other cases, see Commerce, Cent. Dig. § 84; Dec. Dig. § 61.*]

8. APPEAL AND ERROR (§ 702*)—RECORD—INSTRUCTIONS.

Where the whole charge does not appear in a record, the court will not consider assignments based on special requests refused or given.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2936-2938; Dec. Dig. § 702.*]

9. CARRIERS (§ 218*)—LIVE STOCK—LIMITATION OF LIABILITY—REASONABLENESS OF AMOUNT.

A live stock shipping contract, containing a limitation of liability, in case of stallions, to a specific amount, is unreasonable and of no force, where the stallions actually shipped and injured by the carrier's negligence are worth at market value two or three times as much as the amount limited, as such contract is a mere cloak to avoid liability for the carrier's negligence.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 933-939; Dec. Dig. § 218.*]

Error to Circuit Court, Giles County; Sam Holding, Judge.

Action by O. S. Smith, to the use of John L. Amis, against the Louisville & Nashville Railroad Company. From a judgment for plaintiff, affirmed by the Court of Civil Appeals, defendant brings the case up by certiorari. Affirmed.

E. E. Eslick, for plaintiff in error. Ben Childers, for defendant in error.

NEIL, J. This action was brought originally before a justice of the peace of Giles county for injuries alleged to have been inflicted upon two stallions in course of shipment from Shelby City, Ky., to Lynnville, Tenn. There was a judgment before the justice of the peace, and the case was appealed to the circuit court of Giles county, and there tried, resulting in a judgment of \$450 in favor of the plaintiff below. From this judgment an appeal was prayed and prosecuted by the railway company to the Court of Civil Appeals, and there the judgment of the trial court was affirmed. The case was then brought to this court by the writ of certiorari, and was argued at the bar.

The charge of the court below is not before us. In lieu thereof there is the following memorandum in the bill of exceptions, under hand of the trial judge, viz.:

"There was no exception to the charge of the court, except with reference to the measure of damages. The defendant relied upon the agreed value clause in the bill of lading; but the court ignored this clause, and instructed the jury that if, under the instructions given them, they found the defendant justly liable, then the plaintiff would be entitled to recover the difference in the market value of the two stallions between the condition in which they were delivered to the defendant and the condition of the same in the injured condition. In other words, the plaintiff would be entitled to recover for the loss of value in the market due to the injuries caused by the defendant's negligence."

The errors assigned are as follows:

First, that there was no evidence to support the verdict.

Second, the charge of the court upon the subject of the valuation clause above referred to.

Third, that the court refused to charge special request No. 1, submitted in behalf of defendant below as follows:

"If you find that neither plaintiff nor his agent read the contract in evidence in this case, but that the agent of plaintiff simply signed the contract presented by the railroad company, and never read it, and that plaintiff's failure to read it, or the agent of plaintiff's failure to read it, was not induced by fraud, misrepresentation, or mistake of the railroad company, said contract was nevertheless notice to the shipper that he might ship under either the full rate contract or the limited rate contract."

Also in refusing special request No. 4 in behalf of defendant below, as follows:

"If you find that the plaintiff did not read the contract of affreightment in evidence in this case, and that plaintiff's agent did not read the same, but that said agent simply signed the contract presented by the defendant railroad company, and never read it, and that his failure to read it was not induced by fraud, misrepresentation, or mistake on

the part of defendant railroad company, the plaintiff will be nevertheless conclusively presumed to know, at the time said contract was accepted and signed by his agent, O. S. Smith, that said contract contained the following clauses, to wit:

"That the carrier will carry live stock at the rates established by it therefor, or where certain risks and liabilities are assumed by the shipper as hereinafter specified will carry such live stock at greatly reduced rates."

"In the present instance the shipper elects to avail himself of the said reduced rates, and has delivered on the cars of the carrier the following described stock, to wit: [Description of stock, etc.]"

"And plaintiff is therefore conclusively presumed to know that he could have availed himself of the reduced rate limited liability contract, or the full rate liability contract. Neither the shipper nor the agent was obliged to sign the contract, which was signed by O. S. Smith, the agent for the plaintiff; but, if he saw fit to do so, the shipper will be conclusively held to know that said contract contained said clauses, unless the failure of O. S. Smith, agent for the plaintiff, to read said contract, was due to the fraud, misrepresentation, or mistake of the defendant railroad company."

Fourth, that the court erred in refusing to give in charge special request No. 7 in behalf of defendant below, as follows:

"The live stock involved in this lawsuit was shipped by the plaintiff from Shelby City, Ky., to Lynnville, Tenn., thence to Pulaski, Tenn., and the same was an interstate shipment, and as such is governed by the act relating to the shipment of commerce between states. If the plaintiff shipped these horses on a declared valuation, securing a lower rate of transportation, the plaintiff would be prohibited from collecting a larger amount by way of damages than the declared valuation at the time of entering into the contract of shipment."

Also in refusing to charge request No. 9 in behalf of defendant below, which is as follows:

"If the shipper shipped these horses over the line of defendant under the contract, wherein the values of these horses was fixed—that is, these stallions at \$150 each—and upon these values, and under this contract so fixing the values, this cheaper freight rate was made the plaintiff, then plaintiff would not be entitled to collect damages for these horses upon a higher valuation than that which was the basis of securing the transportation in this case, \$150 a head; \$150 per head being the largest amount for which the defendant would be liable under said contract."

Also in refusing to charge special request No. 10 in behalf of defendant below, which was as follows:

"It is admitted by the plaintiff that O. S.

Smith was his agent in the shipment of these horses involved in this case, and, that being true, the knowledge of O. S. Smith, agent, and his acts in making the contract and fixing the values of the horses, would be acts of the plaintiff J. L. Amis, and would be binding on him."

We shall now consider these assignments of error.

There was evidence of negligence in this: O. S. Smith testified that he attended to the loading of the car; also to the making of the stalls or partitions therein; that he had upright scantlings put in the car and securely nailed, and banisters nailed to these, so as to place the animals separate from each other, cutting up the car into stalls; that the stock were tied short (there were several other horses besides the two in question), so that the stallions could not fight. They were securely tied with sea-grass ropes running in both directions, so that they could not move any distance. One stallion was put in one end of the car, and the other stallion in the other end. They were well and securely tied. When the car got to Lynnville, it showed that the live stock had been unloaded and were not put back in the car carefully. One of the stallions showed that he had been tied with a long rein to the rope, and the other one was almost loose, and they were close together. When they reached Lynnville, one of them, described as a bay, had a capped hock and a hock that was buggy. The other, described as dark bay or brown, was hurt on the ankle, and some skin was off his shin. These injuries rendered them permanently lame. These horses were sound and in good condition when they were loaded. The railway company introduced evidence to the effect that the cars were carefully handled all the way from Shelby City to Lynnville, but admitted that they had been unloaded at Nashville for feeding purposes, and had been reloaded. The manner in which the horses were tied was evidence of negligence sufficient to justify the jury in finding the railway company was liable for damages.

The next question to be considered is whether it was liable for the amount found by the jury. In reaching this amount the jury were bound under the judge's charge to disregard the values fixed in the contract.

We are therefore now to determine whether he was justified, under the state of the record as it appeared to him, in so charging the jury.

Before stating the evidence applicable to this phase of the case, it must be premised, as authorities upon this subject agree, that before the shipper can be bound by the terms of a limited liability contract it must appear that it was made known by him in some form that the railway company was ready and willing to ship the goods under its common-law liability, and that a rate was fixed there-

for; that is to say, that a fair option was offered to him to ship the goods under the common-law liability of the railway at a rate fixed therefor or under the limited liability contract. *Railroad v. Stone & Haslett*, 112 Tenn. 348, 363, 79 S. W. 1031, 1034, and authorities cited on the latter page. In one of these cases, *Railroad v. Gilbert, Parkes & Co.*, 88 Tenn. 430, 12 S. W. 1018, it is said:

"A company standing before the public as a common carrier and enjoying the advantages and franchises as such must be ready to do the business of a common carrier with the full measure of responsibility imposed by the common law; and it at the same time may offer to do the same business with a limited liability, the limitation resting upon a sufficient consideration. An offer, or readiness to transport the goods of its customer with the one or the other degree of responsibility, at his option, is as little as can be required of any common carrier. Less than this does not present a bona fide and reasonable alternative. Reduction of freight charges is the usual consideration for the diminution of responsibility on the part of the company."

In another of these cases, *Railroad v. Sowell*, 90 Tenn. 17, 24, 15 S. W. 837, 838, it is said:

"Both the witness for plaintiff and defendant agreed that no other contract than that signed was tendered; but they also agreed that no other was demanded. It was therefore competent for the defendant to show that it was willing and ready to execute another upon terms reasonable to the shipper, if he preferred it, in which no agreed valuation or limitation of liability was required as a prerequisite to the shipment. He need not specifically tender another contract. An offer or readiness to make it is sufficient."

In still another of these authorities, *Deming & Co. v. Merchants' Cotton Press, etc.*, Co., 90 Tenn. 327, 17 S. W. 93, 13 L. R. A. 518, it is said:

"The option need not in fact be offered to the shipper. It is sufficient if it would have been given had he demanded it."

In *Railroad v. Stone & Haslett*, supra, the special limited liability contract tendered to the shipper, and executed by him and the railroad company, recited in its face, in the first line thereof, that the tariff rate on the shipment from Shelbyville, Tenn., to Louisville, Ky., was \$82 per car; thus, as said in the opinion, indicating to the shipper the regular tariff rate. It then recited that the company would transport the stock at the reduced rate of \$41 per car in consideration that the shipper would accept certain risks of transportation. As also said in the opinion in that case, the record showed that the shipping agents of the defendant company had instructions to issue a bill of lading of common-law liability if the shipper demanded it, and that the tariff rate on such a bill of

lading would be twice the special rate. It was shown that the agent of the company at Shelbyville, Tenn., was authorized to receive the hogs for shipment without the execution of a special live stock contract, but upon the company's common-law liability.

It also appeared in that case that, over the objection of defendants, testimony of the plaintiffs below and of other shippers was admitted to the effect that they had no knowledge of any bill of lading for shipment of live stock other than the special live stock contract under which the shipment in question was made, and did not know of any other contract under which stock could have been shipped; that they had never been offered any other or different contract in all their experience as shippers. It was held that this testimony was relevant to the issue as to whether defendant company had a common-law contract of shipment, and held itself in readiness to give the shipper the benefit of such an alternative; that it was competent for the purpose of contradicting the evidence introduced on behalf of the company tending to show that the company held itself in readiness to give the shipper the benefit of such common-law contract.

The special limited liability contract executed by the parties in the present case was as follows:

**"Louisville & Nashville Railroad Company's
Contract for the Transportation of
Live Stock over Its Own Lines.**

"Shelby City, Kentucky.

"W. Depot, Route 61, Station, 2/21, 07.

"This contract, entered into at the above time and place, between the Louisville & Nashville Railroad Company, hereinafter called the carrier, and O. S. Smith, hereinafter called the shipper:

"Witnesses, that the carrier will carry live stock at the rates established by it therefor, or where certain risks, duties, and liabilities are assumed by the shipper, as hereinafter specified, will carry such live stock at greatly reduced rates.

"In the present instance the shipper elects to avail himself of the said reduced rate, and has delivered on the cars of the carrier the following described live stock, to wit:

Consignee, Destination &c.	Description of Stock.	Car No.
O. S. Smith, Lynnville, Tennessee.	7 horses, S. L. & Co.,	L. & N. 9955

"Charges, \$.....

"The carrier agrees to transport said live stock to destination, if on said carrier's line of railroad, otherwise to the place where said live stock is to be received by the next connecting carrier for transportation to or towards destination, and the carrier guaran-

tees that the freight rate thereon from point of shipment to destination shall not exceed the reduced rate of \$46 per car to Lynnville, Tenn.

"In consideration of all of which the shipper hereby agrees to assume the risks, duties, and liabilities hereinafter specified, and that the transportation shall be upon the following conditions, which are admitted and accepted by said shipper as just and reasonable, viz.:

"(1) The shipper hereby releases the carrier from all liability in the transportation of said live stock, except as hereinafter agreed, and agrees that such liability shall be only that of a private carrier for hire, and that all liability of the carrier shall cease at the station to which such live stock is destined, if its destination be on the carrier's line of railroad, or, if destined to a point beyond said carrier's line of railroad, then at said carrier's station, at its terminus, when ready to be delivered to the shipper, consignee, or carrier whose line may constitute a part of the route to destination.

"(2) The shipper has examined and found in good order and condition the car or cars provided by said carrier for the transportation of said animals, and hereby accepts the same, and agrees that they are, as thus provided, suitable and sufficient for said purpose; and said shipper will at his own expense provide such bedding or other suitable appliances in said car or cars as will enable said animals to stand securely on their feet while in the same; and said shipper hereby releases said carrier from all liability for and on account of any and all injury or injuries which the said animals, or any of them, may receive in consequence of any or either of them being vicious, wild, unruly, or weak, and in consequence of any of them being killed, or maimed, bruised, or otherwise injured, and in consequence of heat, suffocation, or other ill effects of being crowded in the cars, and in consequence of being injured by the burning of hay, straw, or other material used by the shipper or his agent for feeding or bedding the said animals, or otherwise, and also from all damage or injury or loss which may be sustained by reason of any delay or detention in such transportation, whether occasioned by any mob, strike, or threatened violence to person or property from any source, and from any injury to track or yards, and from any and all other causes, whether mentioned herein or not, and from the escape of any of said animals, and for loss or damage to said animals from any cause or thing whatever not resulting from the negligence of the agents or servants of said carrier.

"(3) Said shipper will separate the different kinds of stock in said car or cars by strong partitions, which he will provide at his own expense and risk, and said stock shipped in mixed car load or car loads shall

be at the entire risk of the shipper on account of any damage that may occur by reason of partitions in said car or cars not being properly made and sufficiently strong to prevent damage to said stock.

"(4) Said shipper will load and unload said animals at his own risk, and feed, water, and attend to the same at his own expense and risk while they are in the stockyards of the carrier awaiting shipment, and while on the cars or at feeding or transfer points, or where they may be unloaded for any purpose.

"(5) Said shipper will see that said animals are securely placed in the cars furnished, and that the cars are securely and properly fastened, so as to prevent the escape of said animals therefrom.

"(6) The employes of the said carrier shall provide the owner or person in charge of the said animals all proper facilities on trains and at stations for taking care of the same, but the business of the said carrier shall not be delayed by the detention of trains to unload and reload said animals for any cause whatever; but the cars may be left at a station upon the request of the person in charge of the same, and unloaded and reloaded by him to be forwarded by the next freight train, if he so directs; and said carrier shall not be held liable for any damage or injury that may occur to said animals during the time the same may remain so unloaded and out of the cars as aforesaid; and in case said animals are kept over at any given point by the said shipper or his agent beyond a reasonable length of time for feeding and watering, subject always to local laws of any state through which they may pass while in transit, then this contract shall be held to be voidable, at the option of the said carrier, and in such case such rates of freight may be imposed and collected by said carrier as may be deemed proper, not to exceed local rates from point where received for transportation to such point of detention.

"(7) In case of accident to or delay of trains, from any cause whatever, the shipper is to feed, water, and take proper care of said animals at his own expense.

"(8) The presentation of this bill of lading shall be sufficient evidence of ownership to relieve and release the carrier from all liability on account of wrong delivery, but shall not be held to operate against the rights of the carrier to demand, if it elect, the identification of the party presenting this contract before delivering the said animals to him.

"(9) Should damage occur for which the said carrier may be liable, the value at the place and date of shipment shall govern the settlement, in which the amount claimed shall not exceed for a stallion or jack \$100; for a horse or mule, \$75; mare and colt together, \$100; cow and calf together, \$35;

domestic horned animals, \$30 each; calves, hogs, or sheep, \$5 each—which amounts it is agreed are as much as such animals as are herein agreed to be transported are reasonably worth.

"(10) In case the said carrier shall furnish laborers to assist in loading and unloading said animals, they shall be subject to the orders and deemed employes of said shipper while so assisting.

"(11) As a condition precedent to the shipper's right to recover any damages for loss or injury to said animals, he will give notice in writing of his claim thereof to the agent of the railroad company or other carrier from whom he receives said animals before said animals are removed from the place of destination above mentioned, or from the place of delivery of the same to said shipper, and before said animals are mingled with other animals.

"(12) When necessary for said animals to be transported over the line or lines of any other carrier or carriers to the point of destination, this contract shall, unless otherwise agreed in writing between such other carrier or carriers and the shipper, constitute the contract between the shipper and each of such other carriers, respectively, for the transportation over so much of its line as said shipment passes over in order to reach destination; and in no event shall one carrier be liable for the transportation of said animals over the line or lines of any other carrier, or liable for the negligence of any other carrier or carriers.

"In witness whereof, the parties hereto have hereunto subscribed their names.

"Louisville & Nashville R. R. Co.,

"By W. C. Silcox, Agent.

"O. S. Smith.

"Witness."

It is observed that this contract does not state the rate for shipment under the common-law liability, nor is there any evidence that this common-law rate was known to the shipper, or that this rate was posted for examination. There is nothing in the record to indicate that his attention was called to this matter, further than may be inferred from the two lines near the beginning of the contract, viz.: "That the carrier will carry live stock at the rates established by it therefor, or, where certain risks, duties, and liabilities are assumed by the shipper, as hereinafter specified, will carry such live stock at greatly reduced rates."

The bill of exceptions reports O. S. Smith as testifying on this subject as follows:

"That he had a considerable amount of experience in shipping live stock, but did not know that the defendant company had two contracts or rates for the shipping of live stock, one the usual shipper's contract, known as the reduced rate and limited liability contract, and the other the full rate contract

with common-law or full liability; that only the contract read in the evidence had been offered to him by the agent of the defendant company at Shelby City, Ky.; that he had not called for any other kind of a contract, but simply said to the agent that he wanted to ship this live stock, and ordered the car, and, when ready to ship them, this contract was offered him, and that he signed the same, and asked no questions whatever; that in fact he knew of no other contract of shipment, and asked about none."

The only other evidence upon this subject is that of Mr. Silcox, the agent of the company at Shelby City, Ky. It was as follows:

"Q. 7. Will you please file as a part of this deposition a copy of the bill of lading issued to O. S. Smith for this shipment? A. Contract only; haven't the original, so couldn't make copy; original to freight account at Louisville, Ky. Q. 8. So was this bill of lading, issued to him, the usual shipper's contract at the reduced rate? A. Yes; at regular reduced car load rate; at \$46 per car. Q. 9. Did the shipper, O. S. Smith, call for any special contract? If so, what contract did he call for? A. No. Shipment on company's contract is always used. [Q. 10 concerns the payment of freight, which is immaterial to the present controversy.] Q. 11. Did you have any other bill of lading for the shipment of horses, live stock, etc.; and, if so, what is the difference in the rate between this bill of lading or contract and the one issued to O. S. Smith? A. No; there was none. Q. 12. For the other contract, or full rate contract, what is the rate per hundred pounds for the shipment of horses from Shelby City, Ky., to Lynnville, Tenn.? A. Car load rates lowest on that number of horses. Q. 13. Please file as a part of this deposition one of the full rate bills of lading or shipper's contract. A. I haven't it, and could not get it, so could not file it. Q. 14. Did O. S. Smith call for the last-named contract; that is, full liability and full freight contract? A. No. Q. 15. Had he called for such contract, were you prepared and ready, as agent of the defendant company, to issue to him such contract for the shipment of the horses? A. Shipment under contract takes rate as billed; if the shipper refuses to ship as ——— to ——— per company's contract, double the rate used applies. Q. 16. Did you offer to Mr. Smith a full rate and full liability contract, and tell him that you had such contract? A. I don't remember. Q. 17. If not, why did you not offer to issue to him such contract? A. I don't remember why I did not."

Cross-examination: "Q. Did you offer to submit any other than the usual yellow [the special limited liability contract] bill of lading and contract? A. I don't remember whether I did or not. Q. 3. Did you ever let on to Smith that you had any other kind? A. I don't remember. Q. 4. Did Smith know

it? A. I don't know whether he did or not. Q. 5. When did you yourself first hear that there was a different contract for shippers than the usual yellow one? A. When I was first agent there at Shelby City. Q. 6. When did you first see a sample copy of this sort of contract? As a part of your deposition, mark it for identification. A. I can't do it. Q. 8. What is the difference between it and the usual one? A. The company's contract is first-class rates, and the other contract is to double the rate used. Q. 9. Did you ever at any time to anybody disclose the readiness of the defendant railroad company to ship on any other than the usual yellow stock contract? I don't remember that."

The foregoing is all of the evidence upon the subject. From this we think it perfectly apparent that, while plaintiff in error's agent knew that the rate would be double that stated in the special contract in case any one should refuse that contract, he had no bills of lading or forms for such a shipment, and was not ready to make a shipment on the basis of the common-law liability of his principal. It is evident that he had no knowledge of any shipment of live stock having been made on that basis. He even shows an ignorant bewilderment concerning that aspect of the company's duties. The standpoint from which the double rate struck his mind was, clearly, that of penalty; that is to say, that if the shipper failed to accept the special contract offered him, he would have to pay double rates. The conclusion to be drawn from this is plain and irresistible of itself; but its force is added to by the fact that no rate for the common-law shipment was mentioned in the contract, or by the agent, or was posted, or was known to the shipper. It is impossible to hold under these circumstances that the shipper was given a fair option. The jury was justified in finding that such option was not given, and the trial judge was justified in instructing them, in effect, that in assessing damages, if they should find the defendant liable, they should disregard the values fixed in the special contract.

It is true, as stated in special request No. 1 and special request No. 4, that the plaintiff below could predicate no relief against the limited contract on the ground that he did not read it, and that, having executed that contract, he was chargeable with notice of its contents, in the absence of fraud or misrepresentation on the part of the railway company whereby he was prevented from reading it. Still these requests were properly refused by the trial judge, because they gave an incorrect construction of the contract. Said contract, as drawn, was not, without more, "notice to the shipper that he might ship either under the full rate contract or the limited rate contract." From the language quoted in the fourth special request the shipper could not be "conclusively presumed to know he could have availed

himself of the reduced rate limited liability contract or the full rate common-law liability contract." The contract should have stated the full rate in its face, as was done in that which was considered in *Railroad v. Stone & Haslett*, supra. Of course, if the evidence had shown that the shipper knew the full rate "established" by the company, and that it had been so established as the price of carriage on the basis of the common-law liability, then the language copied from the contract would have given him notice that the company was willing to ship on those terms; but that language, standing alone, does not convey that suggestion. Moreover, when taken in connection with the evidence of O. S. Smith, above set out, it is clear that it could have had no such meaning to him as that insisted upon in the two requests referred to. Although it is not essential, as we have held that the company shall formally tender to the shipper a contract or bill of lading in keeping with the common-law liability, yet such is the disparity of situation and of potentialities between the shipper and carrier that it should be made plain to the latter that he has the option referred to. It must not be left for him to gather it by dark and uncertain inference. The soundness of this view is abundantly apparent from the evidence in the present case. It is perfectly clear, from the testimony of the company's agent, that he did not regard the "double rate" as within the ordinary run of business at all, but as a bare contingency to arise upon the refusal of some one to accept the "yellow contract" (the special limited liability contract), and that the latter was the customary contract, represented the customary mode of shipment, and that he had no knowledge that any other had ever been used. Within his knowledge it was the only rate within practical use, and the shipper had never so much as heard of the other rate.

Special instructions Nos. 7, 9, and 10, referred to under the fourth assignment, were properly refused. According to the seventh instruction: "If the plaintiff shipped these horses on a declared valuation, securing a lower rate of transportation, the plaintiff would now be prohibited from collecting a larger amount by way of damages than the declared valuation at the time of entering into the contract of shipment." This would depend upon whether he was given the bona fide option already referred to; and so this request, as written, was not correct, and under the well-known rule upon this subject could not have been properly given. What has just been said is also applicable to the ninth instruction. The tenth instruction stated a sound proposition, but, in view of what has been already said, was immaterial. So much of the seventh instruction as refers to the interstate commerce law (Act Feb. 4, 1887, c. 104, 24 Stat. 379 [U. S. Comp. St.

1901, p. 3154]) is immaterial, since that has no bearing upon the right of a state to refuse to enforce a special contract limiting the liability of a carrier, though made in a foreign state. *Pennsylvania R. R. Co. v. Hughes*, 191 U. S. 477, 24 Sup. Ct. 132, 48 L. Ed. 268. We have gone through these several special instructions, notwithstanding the rule that, where the whole charge does not appear in the record, the court will not consider assignments based on special requests refused or given; the ground of the rule being that, in the absence of the charge, the court cannot know how far those refused already appeared, in substance, in the charge, nor to what extent deficiencies were supplied by special instructions given, nor, indeed, the full bearing of any of these matters, without the opportunity of inspecting the charge as a whole, and so cannot say whether there was error or not in the refusal or in the granting of such special charges. We have departed from the rule in the present instance, in view of plaintiff in error's contention that these instructions were so diverse from that portion of the charge which was given that it was not possible to conceive that the trial judge had given such special instructions. Without either conceding or denying this contention, we deemed it best to consider these instructions upon their merits.

One other point remains. The ground on which the case of *Railroad v. Stone & Haslett*, supra, was decided has been vigorously attacked, and we have been asked to overrule that case to that extent. The contract considered in that case contained, among other things, the following: "And it is further agreed that, should damage occur for which the said party of the first part may be liable, the value at the place and date of shipment shall govern the settlement, in which the amount claimed shall not exceed for a horse or mule, \$100; cattle, \$30 each; chickens, ducks, and guinea fowls, 75 cents per dozen; geese, \$1 per dozen; turkeys \$1.50 per dozen; other animals at \$5 each—which amounts it is agreed are as much as such animals herein agreed to be transported are reasonably worth." The property transported consisted of hogs. The court held they came under the language, "other animals at \$5 each." The evidence showed that the hogs were worth two or three times the valuation fixed upon them by the contract, and that such valuation was unreasonable, and the court refused to enforce it, "in view of the fact that the shipper has to accept the contract tendered by the carrier in order to get reduced rates of shipment, and has little to do with formulating the details of the contract;" the parties not standing on equal terms. The shipper "being only one individual in a million, he cannot afford to higgie, and stand out, and seek redress in the court. His busi-

ness will not admit of such a course. He prefers, rather, to accept any bill of lading or sign any paper the carrier presents."

In a recent case decided by the Supreme Court of South Dakota, *Berry v. Chicago, M. & St. P. Ry. Co.* (Jan. 28, 1910) 124 N. W. 859, the same conclusion was reached. In that case horses were shipped under a special limited liability contract, and valued at \$100 each. The evidence showed that they averaged in value over \$250 each, and the court held that this difference was so great as to make the valuation fixed in the contract unreasonable, and refused to enforce it. The court referred with approval to *Hutchinson on Carriers*, § 426, as stating the rule to be that, if the value contained in the shipping contract was fixed without any reference to the real value of the goods, the limitation would be considered as an attempt by the carrier to secure a partial exemption from liability, and, in so far as its validity was concerned, it would stand on the same footing as any other condition intended to secure immunity from the consequences of negligence, and that if a loss should occur, which was attributable to the carrier's negligence, a condition by which it was attempted to fix the amount recoverable at a certain sum, irrespective of the real value of the goods, could not avail the carrier, and the owner would recover the full extent of his real loss. It was said that the rule in some jurisdictions was that the carrier, in order that he might exercise a degree of care and attention commensurate with the risk assumed, was entitled to be informed of the value of the goods intrusted to him for transportation, and that a contract, when fairly entered into with a view of placing a bona fide value on the goods, would be conclusive on the owner, and the carrier would not be liable for a greater sum than that at which the goods were valued, although his own misconduct had caused the loss, citing *Hutchinson on Carriers*, § 426. The court then quoted with approval section 427 from the same learned work, as follows:

"But, while the owner of goods and the carrier may fix a value on the goods beyond which the carrier, in the event of loss, will not be liable, the agreement fixing the value, in order to be conclusive on the owner, must be bona fide and the value reasonable. If, for instance, the value agreed upon should be so far below the real value of the goods that from their appearance the carrier must have known the discrepancy, the agreement fixing the value would not be bona fide, and, depending on no value at all, would amount to an arbitrary limitation upon the carrier's legal liability, which, in the event of loss occasioned by negligence, would not deprive the owner of the right to recover the real value of the goods. While it is true that the owner of goods of great value which are concealed in packages, or otherwise hidden

from view, upon which a very inconsiderable value has been placed by him, will be precluded, in case of loss, from the right to recover a greater sum than the value which he has placed upon them, the reason for this exception is that to charge the carrier with their real value, when by the owner's misrepresentation he has been induced to undertake the employment at a reduced compensation, and to lessen the degree of care and vigilance which he otherwise would have exercised, would be to sanction fraud, and to enable the owner to gain an unfair advantage over the carrier through his own misrepresentation. The knowledge which the carrier has of the real value of the goods tendered to him for shipment would therefore seem to be material in determining the effect of the valuation agreement upon his liability, although a contrary conclusion has been reached by some courts. And it may be stated as the better rule that, where the value agreed upon is so out of harmony with the ordinary values of similar kinds of goods as to indicate that the question of value did not in fact enter into the agreement, and the carrier, under the circumstances, must have known of the discrepancy, the agreement placing a value upon the goods will be considered as a mere attempt by the carrier to secure a partial exemption from liability, and of no effect in relieving him from the obligation of responding for their real value where his misconduct has occasioned their loss. So, in the absence of fraud or concealment on the part of the owner of the goods, whereby the carrier has been misled, the valuation agreed upon, it is said, must be reasonable, regard being had to the real value of the goods; and if such value be unreasonable, the owner will not be estopped from claiming damages on the basis of their real value."

The court then continued:

"When we take into consideration that the undisputed evidence shows that the horses in question were young farm animals weighing about 1,400 pounds each, and averaging in value something over \$250 each, it is very easily discernible that the parties never attempted to fix a bona fide value thereon. The difference between the real value and the value as fixed by the contract is too great, is too unreasonable. The appellant's agents, authorized to receive these horses for transportation, had ample opportunity to know the real or approximate value thereof, and could not by any means have been misled in relation thereto. It does not appear from the evidence that as a matter of fact the value of these horses, or horses of this class, had anything to do with fixing the freight rate thereon. The only reference thereto is in the recitals of the contract, and which would as readily lead one to infer that the freight rate was based on weight rather than value; that all common horses

of the class shipped under this contract go at the same rate, regardless of value. Therefore we are constrained to the view that the limitation of value of \$100 each, mentioned in the terms of said contract, was placed therein without any reference to the real value of the particular horses shipped under this contract, and that under the circumstances of this case such limitation should be considered as an attempt by respondent to secure partial exemption from liability, and stands on the same footing as any other condition intended to secure immunity from the consequences of negligence." *Berry v. Chicago, M. & St. P. Ry. Co.*, 124 N. W. 859, 863, 864.

The same rule is declared in *Southern Railway Company v. Jones*, 132 Ala. 437, 441, 442, 31 South. 501, 502. The court, through McClellan, C. J., said that it was settled in that state (1) that a carrier could not contract against his own negligence; (2) that in consideration of reduced freight charges the carrier could contract that, in case of loss occurring from his own fault or negligence, the value of the property at the time and place of shipment, not exceeding an expressed sum, should be the measure of recovery; and (3) "it has also been declared by this court that under such contract recovery will be limited to the sum so expressed, unless the real value of the property is greatly disproportionate thereto—so much greater than the stipulated maximum of value and liability as to render the contract unreasonable, and therefore not binding on the shipper." In discussing these points the Chief Justice said that he had always entertained doubts of the soundness of the second proposition; but, conceding it to be settled, it was largely sheared of its power to do harm by the third. This he said was based on public policy, and that, in determining whether a stipulation was void as against public policy, there was no reason for inquiry into the knowledge, information, or intention of the parties; that the question was, not what the parties knew or intended, but what was the effect of the stipulation, whether to allow and uphold such contracts would be fraught with wrong and injury to the people of a character from which it was the province and duty of government to protect them. This doctrine has been reaffirmed by the Supreme Court of Alabama in two recent cases: *Southern Express Co. v. Owens* (1906) 146 Ala. 412, 41 South. 752, 8 L. R. A. (N. S.) 369, 119 Am. St. Rep. 41, 9 Am. & Eng. Ann. Cas. 1143; *Southern Express Co. v. Gibbs* (1908) 155 Ala. 303, 46 South. 465, 18 L. R. A. (N. S.) 874, 130 Am. St. Rep. 24.

In accord is *Railroad v. Keener*, 93 Ga. 808, 21 S. E. 287, 44 Am. St. Rep. 197, where in it is said: "The principle which relieves the carrier from liability for more than the agreed value does not apply where the valuation is small, arbitrary, and fixed without ref-

erence to the real value of the goods, and this is understood by the carrier as well as the shipper. In this case there was no inquiry on the part of the carrier as to the value of the goods, and it is clear that a valuation of \$5 per 100 pounds for wearing apparel and household goods indiscriminately could not have been understood to represent their actual value. The contract in question was simply an attempt to limit liability of the carrier, without regard to the actual value of the property, and it follows from what we have said that it was inoperative for that purpose, if the loss was occasioned by negligence on the part of the defendant." See, to same effect, *Central of Georgia R. Co. v. Murphy*, 113 Ga. 514, 38 S. E. 970, 53 L. R. A. 720; *Central of Georgia R. Co. v. Hall*, 124 Ga. 322, 52 S. E. 679, 4 L. R. A. (N. S.) 900, 110 Am. St. Rep. 170.

But it is insisted by plaintiff in error that it is to the interest of shippers and carriers that these special contracts be sustained in their present form, since by putting all on the same footing they protect shippers generally from secret agreements for rebates with special shippers, and carriers from the shipper's fraud arising from overvaluation after loss. We are of the opinion, however, that the better guaranty is to be found along the lines indicated in *Railroad v. Stone & Haslett*, and the authorities which we have cited in accord therewith. It cannot be true that the public interest will be subserved by sustaining contracts which permit the carrier to settle with the shipper for the negligent loss of or injury to his property by the payment of far less than its value, under agreements in form voluntary, but in substance the result of the compulsory force of the shipper's surroundings, the needs of his business, and the necessity he is under to employ the services of the carrier. In the case now before the court, it appears that the general valuation placed upon stallions in the contract was not more than half the market value of one of them, and not more than one-fourth the value of the other. These valuations were not prepared for the special animals in question, but were contained in the printed form of contract, and printed therein when the contract was presented to the shipper for his signature, applying, of course, to all stallions that might be offered for shipment, without any special consideration of the actual values of the individual animals covered by the contract. It is manifest that there was no attempt to ascertain or agree upon the values of the special animals now in question, as distinguishable from other animals.

In what has been said we are not to be understood as holding that the shipper and the carrier cannot make a binding agreement as to the value of property about to be shipped. We hold, however, that the agreement, stating values, must be a fair one, and it cannot

be fair, if the value fixed is unreasonably below the market value, as, for example, at one-half or one-third the market value. Such stipulations are mere pretended agreed valuations, while in fact they are but a cloak for a limitation of the carrier's liability for negligence. Such an agreement may be valid as against the carrier's liability for other than negligence, but it cannot be held valid against that liability. *U. S. Express Co. v. Bachman*, 28 Ohio St. 144.

It may be insisted that where there is a distinct agreement as to values it would be recognized, and enforced by the court, no matter how great the disproportion between such valuation and the market value of the property, and that a decision to the contrary is an invasion of the right of contract; that parties have the right to make their own contracts when they are *sui juris*, and they need no supervision on the part of the courts. The same argument may be made in behalf of a contract by the carrier against his own negligence, yet the policy of the law, as held by the overwhelming weight of authority, will not tolerate such contracts, no matter how great the solemnity with which they are made, and, we may add, no matter under what disguise they may appear. No one could doubt, if a contract were made valuing all horses shipped at \$5 per head, and all cattle at \$1 per head, and providing that in case of loss by the negligence of the carrier settlement should be made on that basis, that such contract was a mere cloak to protect the carrier against the consequences of his negligence, and this result could not be changed, no matter how many authorities were accumulated holding that such contracts were ad-

missible. They would be admissible on the theory that the carrier may contract against his own negligence, but on no other. The same result must logically follow where there is any great departure from the market value. The difference is only one of degree. When such departure is very great, it is conclusive evidence that the contract was not a bona fide one for the ascertainment of values, but one against negligence. The rule indicated is not a hard one against the carrier, in favor of the shipper, but only justice to both. The carrier obtains much by these special contracts, as may be perceived by the form copied into this opinion, aside from any agreement at all as to value. He is relieved of his duty of insurer of the goods, and, as held by the authorities, the burden of proof is cast upon the shipper, in case of loss, to show negligence.

From the foregoing observations it is perceived that we adhere to *Railroad v. Stone & Haslett*, *supra*.

We have not deemed it necessary to consider the question whether the making of the contract in Kentucky would require us to enforce it, on the theory of comity, because it seems such contracts are not enforceable in that state (*Railroad v. Graves*, 52 S. W. 961; *Adams Express Co. v. Walker*, 119 Ky. 121, 83 S. W. 106, 67 L. R. A. 412); and also because we deem it against public policy to enforce such contracts where the valuations contained therein are so far below the market value at the time and place of shipment, as shown by the evidence in the present case.

Our conclusion is there is no error in the judgment of the Court of Civil Appeals, and it must be affirmed.

WHITE v. TOWNSEND et al.
(Court of Appeals of Kentucky. March 3, 1911.)

JUDGMENT (§ 715*)—ISSUES—CONCLUSIVENESS.

Where, in a suit to restrain the closing of a passway, plaintiffs claimed it to be appurtenant to their ground, and also as a public passway, and defendant filed a counterclaim pleading title, and alleging that plaintiffs were trespassers, and had cut timber of the value of \$400, for which he demanded judgment, the court, for lack of evidence, having submitted only the question as to whether there was a public passway, as claimed, which was determined in plaintiffs' favor, a judgment entered thereon was not conclusive, either as to defendant's title to the land, or plaintiffs' right to cut timber.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 1244-1247; Dec. Dig. § 715.*]

Appeal from Circuit Court, Powell County.

Action by William Townsend and another against J. B. White and another. Judgment for plaintiffs, and defendant White appeals. Affirmed.

Jno. D. Atkinson, Kash & Kash, and Hazelrigg & Hazelrigg, for appellant. C. F. Spencer, for appellees.

CLAY, C. Plaintiffs, William Townsend and Jesse Townsend, brought this action against defendants, J. B. White and Kentucky Union Company, to restrain them from closing up a passway running down White's branch, across the land claimed by defendants, to the public road leading down the middle fork of Red river. In their petition plaintiffs charge that they were owners of a certain tract of land and a large boundary of timber thereon, and the highway was necessary for the purpose of getting out the timber. They not only pleaded their right to the passway as appurtenant to the land belonging to them, but also on the ground that it was a public passway, and the plaintiffs and the public had been continuously using the passway for more than 15 years, as a matter of right, and not by permission of the defendants or their grantors.

The defendant White filed an answer and counterclaim, denying all the allegations of the petition. He admitted that plaintiffs owned a boundary of 200 acres of land, but pleaded title in himself to all the land lying on the waters of White's branch and bounded on the north by the lands of the Kentucky Union Company, on the east and south by the lands of E. C. Chenault, and on the west by the ridges between White's branch, Hood's branch, and the waters of the South fork of Red river, and including the lands upon which plaintiffs had cut the timber for ties referred to in the petition. He concluded with an allegation to the effect that plaintiffs were trespassers upon his boundary of land, and that they had cut therefrom timber of the value of \$400. For this sum he asked judgment, and also for an order of injunc-

tion restraining plaintiffs from further entering his land and cutting and removing timber therefrom.

The only question submitted to the jury was whether or not there was a public passway between the points claimed by the plaintiffs, and whether or not this passway had been continuously used by the traveling public, without interruption and as a matter of right, for as long as 15 years prior to the date of the filing of the petition. The jury found for the plaintiffs. Thereupon defendants asked for a judgment notwithstanding the verdict. This motion was overruled. Judgment on the verdict was then entered for the plaintiffs, and the defendant J. B. White appeals.

It is earnestly insisted by appellant that it was the court's duty to submit to the jury the question of appellees' title, as well as the title of appellant; and inasmuch as the only right appellees had to the passway was to remove the timber in question, and as the burden was on appellees to show their right to the timber, appellees failed to make out their case. In this connection it is insisted that the effect of the judgment is to permit appellees to use a passway through appellant's lands for the purpose of enabling them to cut and carry away appellant's timber. While it is true that appellees claimed the passway as appurtenant to their land, they also claimed the passway on the ground that it was a public passway, and they had the right to use it along with the traveling public. If a public passway existed, then appellees as a part of the public had the right to use it. This question was properly submitted to the jury, and, being unable to say that the finding of the jury is flagrantly against the evidence, we see no reason for disturbing the verdict.

We have carefully read appellant's evidence relating to his alleged counterclaim, and nowhere in the record can we find any proof tending to show that appellees cut any timber from lands which appellant claims to own. Appellant testified that certain timber had been cut upon his lands several years before, but he did not know who did the cutting. As there was no evidence, therefore, to sustain appellant's counterclaim, the court did not err in refusing to submit this issue to the jury.

As appellees were entitled to use the public passway, if there was one, without regard to their own title or the title of appellant, and as the question of passway was the only one submitted to the jury, it follows that the judgment is conclusive of that question alone. Appellees' right to use this passway confers upon them no right to cut and take away timber from appellant's land. Should appellees attempt to do so, the law affords appellant ample remedy.

Judgment affirmed.

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

TRAVELERS' INS. MACH. CO. v. TRAVELERS' INS. CO. OF HARTFORD, CONN.

(Court of Appeals of Kentucky. Feb. 14, 1911.)

1. TRADE-MARKS AND TRADE-NAMES (§ 93*)—UNFAIR COMPETITION—INJUNCTION—SUFFICIENCY OF EVIDENCE.

In a suit by the "Travelers' Insurance Company" against the "Travelers' Insurance Machine Company" to enjoin defendant from using the words "Travelers' Insurance" as a part of its name, evidence held to show that "travelers' insurance" is a distinct class of insurance.

[Ed. Note.—For other cases, see Trade-Marks and Trade-Names, Cent. Dig. § 106; Dec. Dig. § 93.*]

2. TRADE-MARKS AND TRADE-NAMES (§ 3*)—CLASS OF BUSINESS—"TRAVELERS' INSURANCE."

The term "travelers' insurance" may properly be applied to that class of insurance business which specializes in the insurance of the lives of travelers, though the insurance company also has other branches of insurance.

[Ed. Note.—For other cases, see Trade-Marks and Trade-Names, Cent. Dig. § 4½; Dec. Dig. § 3.*]

3. TRADE-MARKS AND TRADE-NAMES (§ 3*)—NAMES SUBJECT TO OWNERSHIP—GENERIC NAMES.

The term "travelers' insurance" is a generic term, the exclusive use of which as a part of the name of an insurance company cannot be acquired.

[Ed. Note.—For other cases, see Trade-Marks and Trade-Names, Cent. Dig. § 4½; Dec. Dig. § 3.*]

4. TRADE-MARKS AND TRADE-NAMES (§ 73*)—UNFAIR COMPETITION—SIMULATION OF NAME.

A generic term may be used as a trade-name or a part of a corporate or firm name, unless its use is reasonably certain and calculated to bring about unfair competition, in which case its use will be enjoined.

[Ed. Note.—For other cases, see Trade-Marks and Trade-Names, Cent. Dig. § 84; Dec. Dig. § 73.*]

5. TRADE-MARKS AND TRADE-NAMES (§ 70*)—UNFAIR COMPETITION—SIMILARITY IN NAME.

Plaintiff, the "Travelers' Insurance Company of Hartford, Conn.," is engaged in the accident insurance business, specializing in the insurance of travelers against accident, and defendant the "Travelers' Insurance Machine Company" manufactures automatic machines for the sale and delivery of accident insurance policies, its machines being similar to the ordinary penny in the slot weight machines, and it purposes to organize an accident insurance company known as the "Daily Accident Insurance Company," to which it shall rent its machines upon a royalty. There is no mark on the machine suggestive of plaintiff's business, and the tickets issued by the machine are in the name of the "Daily Accident Insurance Company," and the advertising matter issued by defendant exploits the scheme as being novel, and plainly shows that the machine policies will be issued by the "Daily Accident Insurance Company." Held, in view of the dissimilarity in the names and the businesses of plaintiff and defendant, that defendant will not be enjoined from using the words "Travelers' Insurance" as a part of its name on the ground of unfair competition.

[Ed. Note.—For other cases, see Trade-Marks and Trade-Names, Cent. Dig. § 81; Dec. Dig. § 70.*]

Appeal from Circuit Court, Jefferson County, Chancery Branch, Second Division.

Suit by the Travelers' Insurance Company of Hartford, Conn., against the Travelers' Insurance Machine Company. From a decree for complainant, defendant appeals. Reversed and remanded, with directions to dismiss petition.

D. R. Castleman, W. B. Thomas, and Pryor & Castleman, for appellant. Trabue, Doolan & Cox and Wm. Bro Smith, for appellee.

LASSING, J. The Travelers' Insurance Machine Company was organized to manufacture automatic machines for the sale and delivery of policies of accident insurance. It is proposed by this company to rent its machines upon a royalty to an accident insurance company which its promoters have in process of organization. The accident insurance company is to be known as the "Daily Accident Insurance Company." The Travelers' Insurance Machine Company had been for some time advertising its business and the business of the Daily Accident Insurance Company, when the "Travelers' Insurance Company of Hartford, Conn.," sought to enjoin the Travelers' Machine Company from using the name "Travelers' Insurance" or the word "Travelers'" in connection with the word "Insurance" as a part of its name, or as a part of the name of any company connected with it. The machine company defended upon the ground that the name "Travelers' Insurance" represented a distinct branch of insurance, and that the term "Travelers' Insurance" is a descriptive or generic term, and that no one can acquire an exclusive use of the words as a trade-name. The plaintiff proceeded upon the theory that the term "Travelers Insurance" was not a generic term, but a trade-name, which it had adopted as early as 1863, and that by reason of its long use it had become its exclusive property. The chancellor upon the pleadings and proof offered was of opinion that the plaintiff was entitled to the relief sought, and granted the injunction. The machine company appeals.

It is not contended by appellee that its right to the use of the name "Travelers' Insurance" is protected as a trade-name or trade-mark, as these terms are usually understood, but that the use of the term "Travelers' Insurance" in connection with and as a part of its name by appellant is calculated to injure it in its business by bringing it into unfair competition with appellant; that by long use it has built up a great, if not the greatest, accident insurance business in the world, and that from the similarity in names the casual observer would at once conclude that the business of appellant was in some way connected with, or the outgrowth of, the business of appellee.

If the similarity in names is in fact such

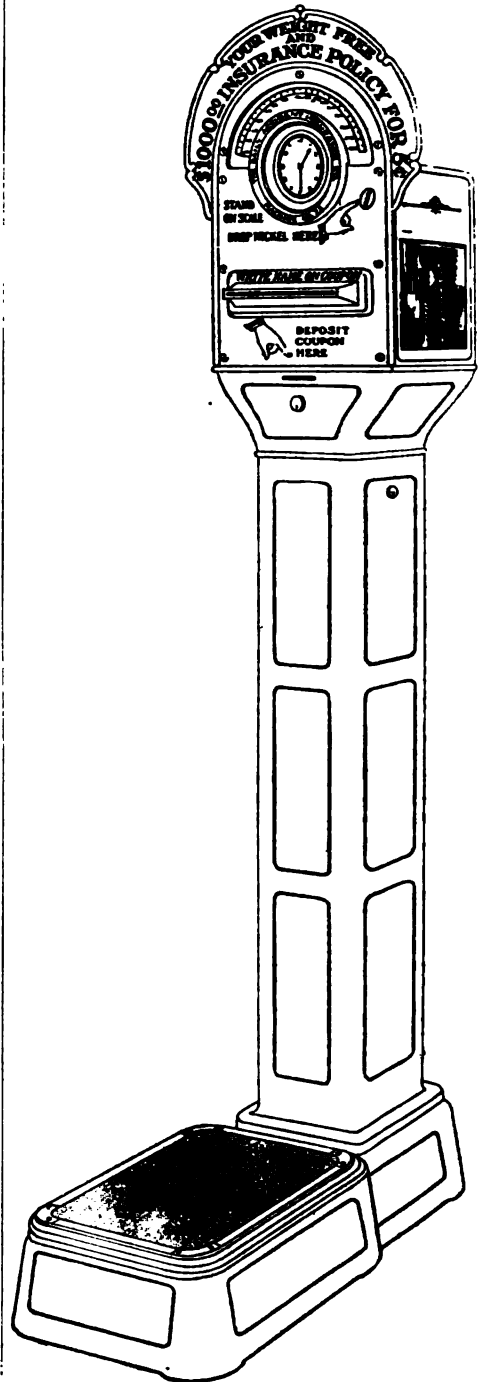
*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

as to produce this result, then, by the weight of authority, appellee's contention is sound; for, as stated in A. & E. Encyclopedia of Law (2d Ed.) p. 350: "The tendency of the decisions now is to make every case turn upon the question whether or not the effect of what was done is to pass off the goods of one person for those of another, regardless of the existence of any technical trade-mark. In other words, the existence of a property right in the reputation and good will of one's business is recognized and protected against invasion, regardless of the particular means of invasion employed." Appellant does not dispute the correctness of this position, but insists that the facts in this case do not bring it within the purview of such a rule. Appellee is engaged in selling accident insurance, appellant in the manufacture of automatic machines to sell insurance; so that their business is as dissimilar as it could possibly be.

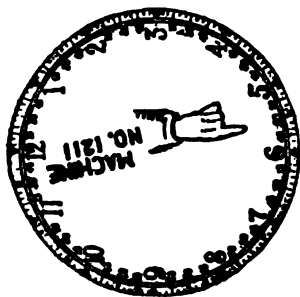
But appellee insists that from the similarity in the name of the machine company with its name the public will be deceived into believing that the insurance company operating these machines is in some way connected with the Travelers' Insurance Company, and in this lies the mischief. No mark or name suggestive of appellee company or its business appears upon the machine, and the tickets calling for the insurance show that it is the "Daily Accident Insurance Company" that is issuing them and assuming the risk. Hence neither the machines nor the tickets that are sold and distributed automatically by it can in the slightest degree tend to produce the impression which appellee seeks to guard against. This being so, the only chance possible for the public to be deceived or misled is through the medium of the advertising matter circulated by appellant. It is pointed out by appellee as significant that in its advertisements laudatory of its business and the enormous profits to be realized out of the accident insurance business by its stockholders the appellant company cited many accident companies whose stocks were worth many times their par value, but failed to make any mention at all of appellee. It is questionable whether its failure to mention appellee in its advertising matter is for or against appellee's contention. If it had cited appellee's company as an evidence of the value of accident insurance company stock as an investment, appellee might have complained that this was calling attention to it in connection with the appellant company, and made it another basis of its ground of complaint. We attach no importance, however, to this fact.

Four different samples of booklets or pamphlets advertising appellant's business are filed with the pleadings. The first may properly be styled a "prospectus," in which the names of the directors, officers, and agents of the appellant company are given, together with a general outline of the business which

it proposes to do, and the manner in which it is to be done. The second and third explain more in detail appellant's business, and that of the insurance company which it is proposing to organize. They also contain pictures of the policies that will be issued, and the machines that will be manufactured and used. The following are sample pictures of the machine and policy taken from one of the exhibits:



POLICY
NO.
296 11
LS.



DAY OF
THE
YEAR

48

THE DAILY ACCIDENT INSURANCE COMPANY

SECOND FLOOR, PAUL JONES BLDG.

LOUISVILLE, KY.

(Combination Accident Policy Insures Females Against Death Only.)

IN CONSIDERATION OF A FIVE CENT COIN, THE WRITING BY THE PERSON OF HIS NAME AND ADDRESS UPON THE STUB ATTACHED HERETO, BEING EVEN NUMBER AND DATE HEREWITH, THE SEVERING OF THE STUB HEREFROM, AND DEPOSITING IT IN THE MACHINE FROM WHICH THIS POLICY IS PROCURED, WHICH SHALL BE A PART OF THIS CONTRACT, INSURE SAID PERSON SUBJECT TO ALL CONDITIONS HEREIN, FOR 24 HOURS FROM DATE PRINTED HEREON. POLICIES TAKEN BY THE SAME PERSON AND NOT EXCEEDING FIVE IN NUMBER SHALL BE IN FORCE CONCURRENTLY. IF MORE THAN FIVE ARE TAKEN THE EXCESS OVER FIVE SHALL BE IN FORCE SUCCESSIVELY AT THE RATE OF FIVE OR LESS IF THE EXCESS BE NOT FIVE, FOR EACH SUCCEEDING TWENTY-FOUR HOURS. UNDER NO CIRCUMSTANCES WHATEVER SHALL MORE THAN FIVE POLICIES BE IN FORCE ON ANY ONE PERSON AT ANY ONE TIME.

A. - If the insured shall sustain, by external, violent and accidental means, bodily injuries which shall, directly and solely, result in death within 90 days from date of accident, the Company will pay \$500 to the beneficiary named on said stub.

The fourth pamphlet exhibit deals primarily with the business of the "Daily Accident Insurance Company," and is aimed to assist the company in the sale of its stock. Besides showing the wonderful profit realized from coin-vending machines in use in various parts of the country, it shows the great increase in value of the stock in four different accident insurance companies, whose business is set out in duplicate form. We have carefully read this literature, and are of opinion that, instead of producing or leaving the impression that appellant's business is in some, or any, way connected with that of appellee, just the reverse is true. It shows that this is a brand-new venture in the insurance world; in an entirely new and novel way; with a company that is being organized for the express purpose; the machine, as the "silent salesman," is to compete with the shrewd, up-to-date insurance agent in all public places in the country. And while, according to its literature, it will expect to sell its policies in the main to travelers, it will sell to any and all who want to buy. In all of this literature it is made plain that these policies are to be issued by the Daily Accident Insurance Company. There is nothing in the literature of which appellee may rightfully complain.

So long as appellant does nothing which is calculated to mislead or deceive the public into believing that its business is in some way connected with appellee's business, no ground of complaint is afforded appellee, unless it is entitled to the exclusive use of the words "Travelers' Insurance," and the very fact that they have been selected by appellant company as a part of its name entitles appellee to the relief sought. There is a sharp conflict in the evidence as to whether or not "travelers' insurance" is a distinct class of insurance. Men of experience in the

insurance world are divided upon this question. Some of the witnesses qualified to speak say that there is a distinct class of insurance known as "travelers' insurance"; while others hold a contrary view. The history of appellee, as disclosed by the record, shows that, as originally organized, its business was primarily to compete with two other companies engaged in placing insurance upon the lives of travelers. In its early life this was its chief, if not its only, line of insurance. It did not, however, long confine itself to this exclusive line of business, but branched out into the broader field of accident insurance, and for many years past it has been engaged in doing a general accident insurance business. The fact still remains, however, that, although it does accident business of almost every character, there has been brought over into all of its insurance contracts a clause for the special benefit of travelers upon the conveyance of common carriers. Not only are special rates made to travelers, but the policies provide that, in case of accident while traveling on a public carrier, the indemnity is much greater than for accidents occurring elsewhere. So that it would seem that the weight of the argument is in favor of the contention of those witnesses who assert that travelers' insurance is a class of insurance by itself. Although most of the companies, and, in fact, all of them, so far as we are advised, write a general line of insurance, they also include in this general insurance a special clause in favor of travelers.

In Joyce on Insurance, § 8, in dealing with the origin of accident insurance, we find the following: "We have already noted under preceding sections cattle insurance, and that form of casualty insurance known as insuring the liberty of persons, but insurance which relates to the loss of life or limb, or

other personal injury by accident, is of modern origin. Accident insurance, in its original form, seems to have comprehended railway accidents only, for which purpose a company was established in London in 1849, known as the Railway Passengers' Assurance Company, but in 1856 it extended its plans to embrace accidents of all kinds, and the first American company was said by a writer in 1873 to have been then only 10 years old." Niblack on Benefit Societies and Accident Insurance, § 363, in speaking of the English system of accident insurance in comparison with the American, says: "Some policies cover all classes of accidents, while others are limited to those of a specified nature, as, for instance, accidents while traveling by public conveyance." A company which made a specialty of insuring travelers against accident had as well be called a "Travelers' Insurance Company," as a life insurance company which made a specialty of insuring bankers is called the "Bankers' Life Association" or "Insurance Company," or an insurance company which makes a specialty of insuring ships is called a "Marine Insurance Company." The fact that companies which make a specialty of one line of business go beyond that line and accept other risks does not make them any the less carriers or insurers of the risks of which they make a specialty; and, if that specialty is the insuring of the traveling public, we see no reason why the term "travelers' insurance" may not properly be said to apply to that class of the insurance business. Our statutes recognize that there are various kinds of insurance that may be written or entered into, as insurance upon the health of persons, or against injury, disablement, or death, or injuries resulting from travel, or general accidents, by land or water. Insurance against injury resulting from travel, it seems, might properly be deemed travelers' insurance, just as insurance against disease might properly be termed a health policy.

Inasmuch as the text-writers, the early history of the appellee company, and our own statutes recognize a line of insurance known as "travelers' insurance," we hold that the term "travelers' insurance" is a generic term, and that no one has a right to the exclusive use of it, or may complain of its use by another, so long as that use is not made to operate to the detriment of its competitor. When appellee adopted the name "Travelers' Insurance Company," it must have had the idea that this was a generic term, for its title is the "Travelers' Insurance Company of Hartford, Conn." If it did not recognize travelers' insurance as a distinct branch or class of business in the insurance world, the necessity for the addition of the words "of Hartford, Conn." is wanting, for its title, "Travelers' Insurance Company," without the use of these words, would have been amply protected if the word "Travelers," as used, was not a generic

term. While the addition of the words "of Hartford, Conn.," to the words "Travelers' Insurance Company," is not by any means conclusive that the appellee company at that time regarded travelers' insurance as a distinct branch of the insurance business, still it lends some color to the claim that it was so regarded.

The conclusion which we have reached is in accord with the opinion of this court in *Industrial Mutual Deposit Co. v. Central Mutual Deposit Co.*, 112 Ky. 937, 66 S. W. 1032, 23 Ky. Law Rep. 2247, in which a question in many respects similar to that under consideration was before the court. There both corporations were doing business in the city of Lexington. They were engaged in the same business. One had been in business but a short time when the other commenced. The older company sought to enjoin the new organization from using the words "mutual deposit" as a part of its name. It was charged in the petition that the defendant company was organized for the purpose of depriving the plaintiff of customers, clientele, and business. The application for an injunction was denied, and upon review this court, in affirming the decision of the lower court, said: "The words which are identical in the names in controversy are 'Mutual Deposit.' But these words designate the business followed by the company, and are generic terms descriptive of that business; * * * and, as the name is descriptive of the business, neither can appropriate it exclusively." In that case the opinion in the case of *Good-year's India Rubber Glove Mfg. Co. v. Good-year Rubber Co.*, 128 U. S. 598, 9 Sup. Ct. 106, 32 L. Ed. 535, was cited with approval. It was there held that names which are descriptive of a class of goods cannot be exclusively appropriated by any one.

The Supreme Court of New York, in the case of *Employers' Liability Assurance Corporation v. Employers' Liability Insurance Co.*, 61 Hun, 552, 16 N. Y. Supp. 397, in reviewing the case upon appeal from the judgment of the lower court refusing to grant the injunction, said: "We are of the opinion that the court below was correct in refusing a general injunction against the defendant in this action prohibiting it from the use of the term 'Employers' Liability' upon the ground that this term is a descriptive term, used generally to designate a certain well-known branch of the insurance business. But it is claimed that, wholly irrespective of any question of exclusive property in the name, the plaintiff was entitled to protection against any such appropriation as would interfere with its business, or induce the public to suppose that a new company trading under the same name was the original plaintiff corporation; that it was not necessary that fraud or evil practice should be shown, if the fact is made to appear that the use of a trade-mark or corporate name lawfully pos-

assed or enjoyed by a trading company is so used by a competitor as to deceive or mislead to the prejudice of the corporation lawfully using the name, equity will protect by injunction. And our attention is called to certain cases, among which are *McLean v. Fleming*, 96 U. S. 245, 24 L. Ed. 828, and *Goodyear Co. v. Goodyear Rubber Co.*, 128 U. S. 598, 9 Sup. Ct. 166, 32 L. Ed. 535. But we think that an examination of those cases is fatal to this claim. The rule is there expressly recognized that exclusive right to use a term descriptive of the character of business cannot be acquired, and the evidence in this case shows that the term 'Employers' Liability' is in common use in respect to this class of insurance." "Employers' Liability" is insurance taken out by an employer to protect him against loss on account of injury to his employes while engaged in his service. It is recognized as a distinct class of the accident insurance business, and yet it is common knowledge that most accident insurance companies carry a line of employers' liability, just as most accident insurance companies make a specialty of travelers' insurance. In *Koehler v. Sanders*, 122 N. Y. 65, 25 N. E. 235, 9 L. R. A. 577, the New York Court of Appeals held that the word "international" in connection with the banking business could not be appropriated by any individual, corporation, or firm to its exclusive use, saying: "The word 'international' is a generic term, pertaining to relations between nations, and, when applied to business or to transactions of private character, it imports dealings of some sort in matters or with people of different nations, or which have some relation to them. It is in common use, and in its nature it is descriptive, and ordinarily characterizes the business to which it pertains, rather than its origin or proprietorship; and, so treated, the use of it cannot be exclusively appropriated by any party."

The decisions draw no distinction between the use of generic terms and that of surnames as trade-names or corporate names, and in the recent case of *Howe Scale Co. v. Wycokoff, Seamans & Benedict*, 198 U. S. 118, 25 Sup. Ct. 609, 49 L. Ed. 972, all the authorities in this country and England were reviewed in an elaborate opinion by Mr. Chief Justice Fuller. In that case it was sought to enjoin the defendant Remington from the use of his name as a part of the trade-name in the manufacture of typewriting machines. In denying the application, the court said: "Remington and Sholes were interested in the old company, and Remington continued as general manager of the new company. Neither of them was paid for the use of

his name, and neither of them had parted with the right to that use. Having the right to that use, courts will not interfere where the only confusion, if any, results from a similarity of the names and not from the manner of the use. The essence of the wrong in unfair competition consists in the sale of the goods of one manufacturer or vendor for those of another, and, if defendant so conducts its business as not to palm off its goods as those of complainant, the action fails." And in reversing the decree of the lower courts and holding that the injunction should not have been granted the opinion concludes: "We hold that, in the absence of contract, fraud, or estoppel, any man may use his own name in all legitimate ways, and as the whole or a part of a corporate name. And in our view defendant's name and trade-mark were not intended or likely to deceive, and there was nothing of substance shown in defendant's conduct in their use constituting unfair competition, or calling for the imposition of restrictions lest actionable injury might result, as may confessedly be done in a proper case."

From the foregoing it is clear that no one will be prevented from the use of any generic term in connection with the conduct of his business as a trade-name, or part of a corporate or firm name, so long as said use is confined to a fair and legitimate purpose. It is only when the use of such term in connection with or as a part of a trade-name is calculated to bring about an unfair competition in business that a court will enjoin its use. It is not enough that the use of such generic term may possibly produce confusion or result in bringing about unfair competition, but, to warrant the court's interference, it must reasonably appear that such will be the result. The appellant, the Travelers' Insurance Machine Company, and the appellee, the Travelers' Insurance Company of Hartford, Conn., are so unlike in name that it is not probable that confusion will arise; and their business is so dissimilar that no confusion can possibly arise in the conduct of their respective businesses. So long, then, as the advertisements of the machine company make it clear that its business is the manufacture of machines, and that these machines, when so manufactured, are to be used by the Daily Accident Insurance Company, or some other company distinct from the appellee company, no just cause of complaint is afforded appellee.

The judgment of the lower court is reversed, and cause remanded, with instructions to enter a judgment denying the application for the injunction and dismissing the petition.

GLOBE REALTY CO. v. LENTZ et al.

(Court of Appeals of Kentucky. Feb. 23, 1911.)

1. REMAINDERS (§ 16*)—SALE UNDER ORDER OF COURT.

Under Civ. Code Prac. § 491, providing that real property in which an infant has a remainder may be sold and the proceeds reinvested in other real property, equity may decree the sale of a house in which infants have a remainder, where its value is yearly depreciating and the sale would be beneficial to the remaindermen.

[Ed. Note.—For other cases, see *Remainders*, Cent. Dig. § 11; Dec. Dig. § 16.*]

2. REMAINDERS (§ 16*)—SALE UNDER ORDER OF COURT—"REINVESTMENT"—STATUTE.

Where a house in which a father had a life estate and his children the remainder was sold, under the provisions of Civ. Code Prac. § 491, authorizing such sales and the reinvestment of the proceeds in other real property, the proceeds could not be used to erect a building on other land in which the father had a life estate, and his children the remainder; that not being a "reinvestment."

[Ed. Note.—For other cases, see *Remainders*, Cent. Dig. § 11; Dec. Dig. § 16.*]

Appeal from Circuit Court, Jefferson County, Chancery Branch, Second Division.

Action by Alfred F. Lentz and another against the Globe Realty Company and others. From a judgment for plaintiffs, the Globe Realty Company appeals. Affirmed.

David W. Edwards, for appellant. Jno. S. Jackman, for appellees.

NUNN, J. Alfred F. Lentz received under the will of his mother, Mary J. Lentz, some real and personal property for life with remainder to his children. We copy the clauses of the will referred to which have application to the questions involved:

"Fourth. I devise to the Columbia Finance and Trust Company, of Louisville, Kentucky, all my real estate and all interest in or claims upon real estate, wherever situated in trust as provided in clause fifth of this will.

"Fifth. The said balance of personalty mentioned in clause third above shall be divided into three parts and one part shall be paid or delivered to my (son) B. Brewster Lentz, the other part shall be held in trust for my sons John T. Lentz and Alfred F. Lentz during their lives and for their children after their deaths, the real estate and interest therein shall be divided in the same way and one third conveyed to B. Brewster Lentz, and the balance held in trust as above provided.

"Sixth. I devise that said Columbia Finance and Trust Company shall have power as executor and trustee to sell and convey any and all my real estate for the purposes of this will.

"Seventh. I recommend said trustee, if there is enough money realized from real and personal property, to invest the shares of

John T. Lentz and Alfred F. Lentz and their children in two small houses in Louisville, Kentucky, as a home for them."

After the will was probated, the trustee received from the personal and real property enough money to purchase a house and lot situated on Woodland avenue and Twenty-Sixth street, in Louisville, Ky., for a home for Alfred F. Lentz and his children. It seems they resided in this house for a while; but it appears that Lentz could not obtain employment in the city to enable him to support himself and family, so he instituted an action in the Jefferson circuit court and obtained a judgment directing the trust company to purchase about 22 acres of land near Beuchels station in Jefferson county. The purchase was made at the price of \$900 cash. This money, as we understand it, was the income of the estate devised to Alfred F. Lentz by his mother. Lentz moved upon this 22-acre tract and began to farm and garden, and it appears made a success of the business. At the time he moved upon the 22 acres, there was an old house upon it, but it was barely habitable. The house and lot in the city produced no income above taxes, insurance, etc., and has become somewhat dilapidated and of considerable less value than when purchased.

The purpose of this action by Lentz and wife against their children, all of whom are under age but over 14, is to have the house and lot on Woodland avenue sold and the proceeds used to repair or erect a building on the farm. The proof was heard. It sustained the allegations of the petition and showed that it would be beneficial to the children. The court directed a sale of the house and lot in Louisville, but reserved the disposition of the proceeds for future orders of the court. The property was appraised at \$500, a sale was had, and the Globe Realty Company purchased it, but filed exceptions to the report of sale, alleging that it could not obtain a good title, as the court had no power to sell the property and reinvest the proceeds in erecting a house upon or improving other real estate belonging to Lentz and his children. The court overruled these exceptions, and rightfully, as it clearly had a right under section 491 of the Civil Code to sell the property when it was made to appear that it was beneficial to the parties in interest. The property was an expense to them and was depreciating yearly in value. The court had a right to order this sale, even though it had no power to reinvest the proceeds in improving other property, and the court was clearly right in overruling the exceptions. Section 491, Civ. Code Prac. which authorized the sale, closes with these words: "Real property may be sold for reinvestment of proceeds in other real property."

Appellees claim this language might be

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

properly construed as authorizing the disposition of the real property in this case and reinvesting the proceeds in repairing or erecting a dwelling on the farm, as this would be a reinvestment in real estate in the meaning of the Code. This court has, however, repeatedly given a different construction to the Code, which we feel bound by and that it is better to adhere. In the case of *Hayes v. Bradley*, 23 S. W. 372, 15 Ky. Law Rep. 387, the guardian sold 16 acres of land for the purpose of obtaining money to erect buildings on the remaining part, and in that case the court used this language: "The attempt to convert this sixteen acres into money, so as to erect a building on the remaining tract, was not authorized by the statute and the chancellor's jurisdiction being statutory, and the guardian by his petition seeking to do that which the statute did not permit, we must adjudge the sale not only erroneous but void." To the same effect is the case of *Falls City Real Estate & Building Association v. Vankirk*, 8 Bush. 459.

Under these authorities, the lower court must reinvest the proceeds of the house and lot in other real estate. But we find nothing in the will to prohibit the trustee from using other funds realized from the property devised to appellee and his children in repairing or erecting a building on the farm.

For these reasons, the judgment of the lower court is affirmed.

BOARD OF COUNCIL OF CITY OF DANVILLE v. FOX.

(Court of Appeals of Kentucky. Feb. 28, 1911.)

MUNICIPAL CORPORATIONS (§ 733*)—TORTS—INJURIES INCIDENT TO PUBLIC IMPROVEMENT.

A city, in the improvement of its streets, acts in its governmental capacity, and is not liable for injuries to one whose horse was frightened by the escape of steam from a steam roller.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. § 1547; Dec. Dig. § 733.*]

Appeal from Circuit Court, Boyle County.

Action by Robert Fox against the Board of Council of the City of Danville. From a judgment in favor of the plaintiff, defendant appeals. Reversed.

Fox & Jackson, for appellant. Robt. Harding and J. W. Rawlings, for appellee.

CARROLL, J. This appeal is prosecuted from a judgment of the Boyle circuit court in favor of the appellee against the appellant.

In his petition to recover damages for personal injuries sustained, the appellee averred that: "He was driving along Lexington street, a public thoroughfare in the city of Danville, in a buggy drawn by a horse, when

the defendant, the board of council of the city of Danville, by its gross carelessness and negligence in having at said time and place in operation, under the conditions then and there existing and without safeguards or warning, a large roller and steam engine, and by its gross carelessness and negligence in the handling, management, and operation of said engine and roller at said time and place, and by its gross carelessness and negligence in causing and permitting said engine to suddenly emit large quantities of steam, and throw and cause same to be emitted and thrown towards the horse plaintiff was driving, as this plaintiff was in the act of passing along said street, and by said engine and roller, caused the horse driven by him to be and become frightened and unmanageable, and to rear and plunge and kick, and to kick the plaintiff, and to break, fracture, and sprain his ankle and foot."

The evidence on behalf of the plaintiff conduced to show that, just as the horse appellee was driving came opposite the steam roller that was being used by agents or employes of the city in the repair of its streets, the employes in charge of it suddenly, and without giving notice or warning of their intention so to do, negligently or carelessly caused or permitted the engine to let off steam with a hissing noise, which struck the ground under and about the horse's feet; or, as said by counsel for appellee, "his injuries were due to and caused by the negligent act of the appellant's employes in throwing this steam under and about this horse, which was going gently by the roller, and would not have been frightened, except for this negligent act."

Conceding that the evidence introduced on behalf of appellee sustained the charge of negligence averred, we are nevertheless of the opinion that the appellee was not entitled to recover, and the court should have granted the request of the appellant to instruct the jury to return a verdict in its favor. We have held in a number of cases that a city, in the absence of a statute authorizing suit, is not liable in damages for the negligence or torts of its employes or agents while they are engaged for it in the performance of a governmental or public duty. *Schwalk's Adm'r v. City of Louisville*, 135 Ky. 570, 122 S. W. 860, 25 L. R. A. (N. S.) 88; *Kippes v. City of Louisville*, 140 Ky. 423, 131 S. W. 184; *Board of Park Commissioners v. Prinz*, 127 Ky. 470, 105 S. W. 948, 32 Ky. Law Rep. 359; *Twyman v. Board of Councilmen of the City of Frankfort*, 117 Ky. 518, 78 S. W. 446, 64 L. R. A. 572, 25 Ky. Law Rep. 1620; *City of Louisville v. Carter*, 142 Ky. 443, 134 S. W. 468; *Hershberg v. City of Barbourville*, 142 Ky. 60, 133 S. W. 985.

The principle announced in these cases is sustained by practically all the authorities,

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

and has been so fully considered in the cases cited, that it seems unnecessary that we should restate the reasons upon which the doctrine rests. In some of the cases it has been difficult to draw the distinction between services performed for the city in its governmental or public capacity and services performed for it in its private or corporate capacity. But we are not met with any difficulty of that sort in this case, because in the improvement and construction of its streets the city was acting in its governmental capacity and performing a duty not only authorized, but imposed, by law.

Wherefore the judgment is reversed, with directions to dismiss the petition.

PELPHREY et al. v. WILLIAMS et al.
(Court of Appeals of Kentucky. March 1, 1911.)

DEEDS (§ 127*)—CONSTRUCTION—ESTATES CREATED—ESTATES TAIL.

Where a grantor, in a conveyance of lands to his daughter, used the expressions to the "sole use and benefit of her and her heirs," and for the "sole use of my daughter and the heirs of her body," and there was nothing showing that the words were not used in their technical sense, they must be taken as words of limitation creating an estate tail, which under the statute is converted into a fee simple.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. §§ 358, 359; Dec. Dig. § 127.*]

Appeal from Circuit Court, Johnson County.

Action by John Pelphey and others against C. W. Williams and another. From a judgment for defendants, plaintiffs appeal. Affirmed.

Vaughan, Howes & Howes, for appellants. Finley E. Fogg and C. B. Wheeler, for appellees.

CLAY, C. On May 20, 1866, R. R. Williams conveyed to his daughter, Amanda J. Williams, a certain tract of land in Johnson county, Ky. On April 18, 1872, Amanda J. Williams conveyed the said land to N. H. Williams, who, on April 18, 1886, conveyed the same to appellee C. W. Williams. Appellants, John Pelphey and others, as heirs of Amanda J. Pelphey (née Williams), brought this action against C. W. Williams and N. H. Williams to recover the land in controversy. They charged in their petition that R. R. Williams, by his deed of May 20, 1866, conveyed to his daughter, Amanda J. Williams, only a life estate in the lands, with remainder to her children, and that, as she died in the year 1895, they became entitled to the land. A demurrer was sustained to the petition, and the petition dismissed. From the judgment John Pelphey and others appeal.

The whole case turns upon the proper construction of the deed of May 20, 1866, from R. R. Williams to his daughter, Amanda J.

Williams. Omitting the description of the land conveyed, that deed is as follows: "Johnson County, Ky., May 20th, 1866. This indenture made and entered into between Robert R. Williams of the first part and Manda J. of the second part, witnesseth: That the said Robert R. Williams hath given for the love and affection that I have for my daughter, Manda J., given and granted and by these presents doth give and grant unto the said Manda Jane one of my daughters a certain tract or parcel of land her portion of the said lands, that I, R. R. Williams, now holds for his part being my second daughter till all the lawful heirs get their portion in equal right of their portion of land then if any over to have equal part, but this land now deeded to her and her heirs for her portion and she to have no claim whatever on my possessions of land till all my legal heirs besides her gets their equal portion, then if any over equal right as and have now his deed given in consideration of her part to have and hold for her and her heirs forever to the sole use and benefit of her and her heirs forever for unto the said Robert R. Williams doth grant and for the love and affection that I have for my second daughter, Manda J. doth forever give and bequeath a certain tract or parcel of land and being for the sum of five hundred dollars to him in hand paid * * * to have and to hold the certain tract of land herein described, containing two hundred acres be the same more or less with all and singular the appurtenances belonging, to wit, the sole use and benefit of said land and tenement to my daughter Manda Jane and the heirs of her body, but never shall stand responsible for her debts in no wise, in no contracts she may hereafter make, but it and its tenements to the use and benefit of the said Manda Jane and the heirs of her body forever whereunto the said R. R. Williams relinquishes all his right, title and claim to the said land, tenements and claims to the same land and tenements and for that purpose the day and date above written, signed, sealed and delivered in the presence of these witnesses this 20th day of May, 1866."

For appellants it is insisted that the grantor used the expression "heirs" in the sense of "children," and that a reading of the whole deed shows that he intended to convey the land to his daughter for life, with remainder to her children. It is evident from the first part of the deed that the grantor meant that the grantee should have no interest in the grantor's estate beyond the tract of land therein conveyed, until his other heirs had received portions of equal value; but, if there should be any estate left over after the others were made equal, she should share equally with them in such remainder. When the grantor comes to speak

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

of the land actually conveyed, the habendum clause is to the "sole use and benefit of her and her heirs forever." Subsequently he uses the expression "the sole use and benefit of said land and tenement to my daughter Manda Jane and the heirs of her body." Again he repeats the expression in the following form: "To the use and benefit of the said Manda Jane and the heirs of her body forever."

It is the settled rule established by innumerable adjudications of this court, and recognized and acted upon in several very recent cases, that the words "heirs of the body," "heirs lawfully begotten of the body," and other similar expressions, are appropriate words of limitation, and must be construed as creating an estate tail, which, by our statutes, is converted into a fee simple, unless there be something else in the deed or will from which a reasonable inference can be drawn that the words were used in a sense different from their legal and technical signification. *Watkins v. Pfeiffer*, 92 S. W. 562, 29 Ky. Law Rep. 97; *Pruitt v. Holland*, 92 Ky. 641, 18 S. W. 852, 13 Ky. Law Rep. 867; *Johnson v. Johnson*, 2 Metc. 333.

The case at bar comes squarely within the rule above laid down; there being nothing in the deed to indicate an intention on the part of the grantor to create an estate for life.

Judgment affirmed.

BOWEN v. WALTON.

(Court of Appeals of Kentucky. Feb. 28, 1911.)

1. CORPORATIONS (§ 121*) — STOCK — SALE — FRAUD — EVIDENCE.

In an action to recover the sum paid for alleged worthless corporate stock, for fraud in inducing plaintiff to purchase, evidence held insufficient to show that defendant made false representations that the stock was paying a dividend.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. § 504; Dec. Dig. § 121.*]

2. CORPORATIONS (§ 121*) — STOCK — SALE — FRAUD — RELIANCE ON REPRESENTATIONS — EVIDENCE.

In an action to recover the sum paid for alleged worthless corporate stock, for fraud in inducing plaintiff to purchase, evidence held to show that plaintiff acted on his own judgment in making the purchase.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. § 504; Dec. Dig. § 121.*]

3. CORPORATIONS (§ 121*) — STOCK — SALE — FRAUD — EVIDENCE AS TO VALUE.

In an action to recover the sum paid for alleged worthless corporate stock, for fraud in inducing plaintiff to purchase, evidence held to show that the stock had a substantial value.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. § 504; Dec. Dig. § 121.*]

Appeal from Circuit Court, Taylor County.

Action by George A. Bowen against Dan C. Walton. Judgment for defendant, and plaintiff appeals. Affirmed.

H. N. Beauchamp and B. A. Rice, for appellant. C. W. Wright and J. T. Moss, for appellee.

CLAY, C. Appellant, George A. Bowen, being heavily in debt, conveyed a certain farm which he owned to his brothers, J. R. and J. L. Bowen, for the purpose of protecting himself and saving his brothers from liability on certain of his debts. The agreement between appellant and his brothers was that they were to pay appellant's debts and turn over the balance, if anything, to him. Appellant and his brothers, through a real estate agent, began negotiations with appellee for the purpose of selling the latter the farm referred to. These negotiations were begun in November, 1908. The sale was finally consummated in January, 1909. Appellee agreed to pay \$7,000 for the farm only on the condition that 58 shares of the Campbellsville Electric Light Company stock, of the par value of \$50 per share, should be taken by appellant at \$3,190 cash, or 10 per cent. above its par value. Appellant agreed to this arrangement, but his brothers declined to make the deed, on the ground that the cash realized from the sale was not sufficient to pay appellant's debts. Upon the insistence of appellant they finally agreed to carry out the trade, provided appellee would loan appellant, upon the electric light stock, the sum of \$2,175. Appellee consented to this arrangement, and the trade was consummated. Some months later, appellant brought this action against appellee to recover the sum of \$3,190, with interest, and charged in his petition that the Electric Light Company stock was worthless, and that he was induced to purchase the same by reason of the fraudulent representations of appellee to the effect that the stock was "gilt-edge," was paying a good dividend, and was worth more than its par value, would sell for a premium of more than 10 cents on the dollar, and that he, relying upon such representations, purchased the stock in question. Subsequently he amended his petition, and charged that appellee was a director in the Electric Light Company, and was familiar with the business of said company, and knew that the representations which he made to appellant were false and untrue. Appellee denied that he made any fraudulent representations, and then set forth all the facts with reference to the transaction. The chancellor denied appellant the relief prayed for, and he appeals.

According to the evidence of appellant, he had a conversation with appellee on January 1st. In that conversation the electric light stock was discussed, and he claims that appellee made the following representations in regard to the stock: "He talked to me at my house about the electric light stock, and he claimed it to be the best thing in Campbells-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

ville, and was the only thing he would be willing to pay above par for, and would rather have the stock than to have the income on the farm if his health would permit, but his health was such that he had to have outdoor exercise." In answer to the question, "Was anything said in that conversation by Mr. Walton about the stock paying a dividend?" appellant replied: "There was something said about the dividend, but don't remember what it was." Later on in the testimony appellant claimed that Walton told him the electric light stock was a dividend paying stock, and that he traded for it on the faith of appellee's words. Appellant admits that appellee declined to purchase the farm unless appellant would take in the electric light stock as a payment of \$3,190 cash. He also admits that he was in Campbells-ville nearly every day from January 1st up until the time the sale was consummated on January 11th. The only evidence which appellant introduced as to the worthlessness of the stock is the fact that he offered it at public sale, accompanied by the announcement that appellee had a lien on the stock to the extent of \$2,175, and no one present would make a bid.

Appellee testified that he refused to buy the farm unless appellant would take in the 58 shares of electric light stock at \$1.10 on the dollar. Upon being asked what dividend the stock paid, he remarked that the stock did not pay any dividend in money; that the company was indebted, and that the profit went to reduce the debt. He also said that the stock was good if the company was properly managed, but he did not like the management. He referred James Bowen, to whom these remarks were addressed, and who was assisting in conducting the negotiations for appellant, to Dr. J. L. Atkinson, president, and B. S. Kinkart, the business manager of the Electric Light Company. Appellant was present during this conversation and heard what was said. Appellee denied that he represented the stock as a good, dividend-paying stock. Other witnesses testified that the stock had sold at from 103 to 106, two sales being made at these quotations. During the year prior to the time the trade was made, the stock had earned from 9 to 10 per cent. but no dividend was paid. The capital stock of the company amounted to \$10,000; its indebtedness amounted to about the same sum; but the plant was worth around \$25,000. One witness also testified that appellant came to him and told him that he had found out that the stock was all right, and asked him to see his brothers and induce them to make the sale.

Even if appellant's account of the conversation he had with appellee is correct, it shows that appellee simply entertained a good opinion of the stock in question. When we consider the fact that appellant first stat-

ed that he did not remember what appellee said about the dividends on the stock, but subsequently stated that he represented that it was a good, dividend-paying stock, in connection with appellee's statement that the stock as a matter of fact was not paying a dividend, but that the earnings were being devoted to the payment of the company's indebtedness, we are inclined to the opinion that appellee made no false representations to the effect that the stock was paying a dividend. Moreover, appellant and appellee were two farmers and were dealing at arm's length. There was nothing in the relations which they sustained to each other which required appellee to go into details as to the amount and character of business done by the Electric Light Company and as to the value of its stock. Nor did he in any way prevent appellant from making an investigation in his own behalf. When we consider the fact that there is testimony tending to show that appellant stated to one witness that he had found out that the stock was all right and asked witness to see his brothers and induce them to make the sale, we conclude that he was acting upon his own judgment in closing the transaction. Furthermore, there is no proof that the stock was, or is, worthless. The fact that no one bid upon it at the time it was offered for sale, is only evidence of the fact that no one present was willing to bid more than 75 cents on the dollar for the stock. That it was reasonably worth that amount is shown by the fact that appellee loaned that sum upon the stock as collateral security. Moreover, if the plant was worth \$25,000, as the evidence tends to show, and was only in debt to the extent of \$10,000, and if the capital stock was only \$10,000, and the corporation was earning more than sufficient to pay the interest on the debt, these circumstances would tend to show that the stock had a substantial value.

Upon the whole case, we conclude that appellant failed to show either that appellee was guilty of any fraud, or that the stock was practically worthless.

Judgment affirmed.

MAYSVILLE TELEPHONE CO. v. FIRST NAT. BANK OF MAYSVILLE. SAME v. MATTHEWS. SAME v. MITCHELL et al. (Court of Appeals of Kentucky. March 3, 1911.)

1. APPEAL AND ERROR (§ 169*)—REVIEW—MATTERS NOT PRESENTED AT TRIAL.

A judgment will not be reversed for a matter not presented to nor passed on by the trial court.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 1018; Dec. Dig. § 169.*]

2. CONTRACTS (§ 221*)—CONSTRUCTION—CONDITIONS.

Where an intending purchaser of the assets and business of a telephone company by means

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

of a new corporation agreed to furnish \$21,000 to pay the debts of the old company, and to give to the owners of the stock of the old company \$29,000 of stocks and bonds of the new company, after the old company's debts were paid, the new company had no right to demand stocks and bonds representing \$21,000 until it had paid the debts of the old company.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. § 1015½; Dec. Dig. § 221.*]

3. PRINCIPAL AND SURETY (§ 184*)—REMEDIES OF SURETY AGAINST PRINCIPAL—PAYMENT OF DEBT BY NEW NOTE—INDEMNITY.

A telephone company borrowed money from a bank on a note on which its principal officers were sureties. On maturity of the note, the sureties executed a new note as makers in payment of the old one, in which the corporation did not join. *Held*, that the sureties could sue the corporation on the old note prior to the maturity of the new one, though the old note was deposited as collateral to the new, under the rule that a surety who has executed his individual note for the debt thereby satisfies the same so far as the principal is concerned, and may sue the principal as for money paid.

[Ed. Note.—For other cases, see Principal and Surety, Cent. Dig. § 546; Dec. Dig. § 184.*]

4. PRINCIPAL AND SURETY (§ 183*)—REMEDIES OF CREDITOR—PAYMENT OF DEBT BY SURETIES—EXECUTION OF NEW NOTE.

Where sureties on the note of a corporation to a bank on maturity thereof executed a new note, in which the corporation did not join, and pledged the old note as collateral security, the bank had no right of action against the corporation until the maturity of the new note and its only right then accruing against the corporation was on the cause of action of the sureties for contribution.

[Ed. Note.—For other cases, see Principal and Surety, Cent. Dig. § 382; Dec. Dig. § 133.*]

5. PARTIES (§ 84*)—DEFECTS OF PARTIES—NONJOINER—WAIVER.

While the pledgee of a note should have been made a party to an action by sureties for contribution for having paid the note, a failure to join such pledgee as a party was waived by failure to object to such nonjoinder.

[Ed. Note.—For other cases, see Parties, Cent. Dig. § 134; Dec. Dig. § 84.*]

6. PRINCIPAL AND SURETY (§ 185*)—REMEDIES OF SURETY—REIMBURSEMENT OF SURETY—INTEREST.

Where sureties on a corporation's note borrowed money to pay its debt from a bank, the sureties were entitled to reimbursement for interest paid on the debt.

[Ed. Note.—For other cases, see Principal and Surety, Cent. Dig. § 536; Dec. Dig. § 185.*]

On motion for rehearing. Denied.

For former opinion, see 140 Ky. 51, 130 S. W. 820.

E. J. Marshall and Bruce & Bullitt, for appellant. Worthington & Cochran and D. L. Pendleton, for appellees.

HOBSON, C. J. In the petition for rehearing several matters are insisted on which are not noticed in the opinion. See *Maysville Telephone Co. v. First National Bank*, 140 Ky. 51, 130 S. W. 820.

1. It is insisted that, if the telephone company pays the debts amounting to \$21,000, appellees should be required to deliver to it the \$21,000 of stocks and bonds which they

were to deliver to Barber when he furnished \$21,000 for the payment of the debts. This matter was not presented to the circuit court in any pleading or otherwise so far as the record shows. It was not suggested to us on the original hearing, and we do not think the judgment of the circuit court should be reversed at the cost of appellees for a matter not presented to it, or passed on by it. The matter will not be concluded by the judgment in these actions, and may thereafter be presented to the circuit court by an appropriate proceeding. The sum of the agreement between Barber and Matthews was that the new company should take over the property free of debt, that Barber would furnish \$21,000 for the payment of the debts, and that Matthews, etc., should get for their property \$29,000 of stocks and bonds of the new company after the debts were paid. The telephone company has no right to demand the \$21,000 of stocks and bonds until it pays the debts. When it furnishes the \$21,000, its right of action to demand the stocks and bonds will accrue. So far as we see from the record before us, Matthews, etc., should not retain the \$21,000 of stocks and bonds after the debts are paid, but should turn them over to the telephone company upon its paying the debts; for in this way they will get what they bargained for, and the new company will get what it bargained for; but this question is not finally determined now, as we do not know what facts may be pleaded or shown when the matter is properly presented. We only determine the matter on the facts now shown, that there may be no further controversy about the matter on these facts.

2. It is insisted that the court erred in giving judgment on three claims, set up against the telephone company. The State National Bank of Maysville held a note for \$5,000 on the telephone company on which Matthews and his associates were sureties. On January 10, 1908, the sureties executed a new note to the bank which the bank accepted; the telephone company not being a party to the new note. The debt and interest then amounted to \$5,278.75, and for this they asked judgment, although they had not paid the note which they executed to the bank, but had only paid the interest on it. The note which the sureties executed to the bank was due in 90 days, and, when the bank accepted this note, it lost its cause of action upon the old note, and had no cause of action against any one until the new note matured. It has been held that the surety who executed his individual note for the debt in this way may maintain an action against his principal as for money paid. *Robertson v. Maxcey*, 6 Dana, 105; *Smith v. Young*, 11 Bush, 395. But it is insisted that the rule does not apply here for the reason

that Matthews, etc., when they gave the new note to the bank, attached to it the old note as collateral security; but this is not material. The new note operated as a payment of the debt. Matthews, etc., then had a cause of action against the Telephone Company for the money they had paid, and this cause of action was all that was assigned to the bank as collateral security for their note. The bank had no right of action of any kind until the maturity of the new note, and its only right then against the telephone company was upon the cause of action of the sureties for contribution. It is true that the State National Bank should have been made a party to the litigation in the circuit court. But that it was not made a party was simply a defect of parties which was waived by the telephone company when it did not make the objection. *Vanbuskirk v. Levy*, 3 Metc. 133; 30 Cyc. 51. If Matthews, etc., are insolvent or any equitable reason exists for apprehending loss by the telephone company, if the money is paid to them, it may yet by proper action obtain an order directing the money to be paid to the bank to the extent of its debt.

After January 1, 1906, Matthews and his associates managed the telephone company until July 1, 1906, for Barber, under an agreement that the new company should be entitled to the earnings from January 1st to July 1st, at which time Barber had perfected his arrangements and by his agents took charge. Matthews and his associates then settled with Barber's agent and paid him the balance found in their hands, charging them with the earnings since January 1st, and crediting them with the operating expenses. They had in the meantime used a part of the money they had received in paying the debts of the company in existence at the time of Barber's purchase, but no part of the money paid on these debts was credited to them. The debts of the company which were created before, but were paid by them after January 1st, amounted to \$1,974.87, and for this they were given judgment against the telephone company. It is clear from the record that Matthews, etc., turned over all the net earnings of the company after January 1st upon the idea that Barber would pay them the \$21,000, and with this they would pay the debts. Barber had not complied with his agreement on July 1st, and so they were going along expecting him to comply with it. The debts of the company were just claims, and, having been paid by them, they should be reimbursed.

Among other notes due by the telephone company was one to the bank of Maysville on which there was \$530.80 of interest due. Walter Matthews borrowed this sum from the First National Bank and paid it. It is said the telephone company did not request

the payment of this interest, but this was interest on its debt, paid to obtain time from the bank, and the sureties should be reimbursed.

The opinion is extended as above indicated. The petition for rehearing is overruled.

SACKETT v. MAGGARD.

(Court of Appeals of Kentucky. March 1, 1911.)

1. CONTRACTS (§ 164*)—CONSTRUCTION—SEPARATE INSTRUMENTS.

Where a contract is contained in two distinct papers, they will be read together in construing the contract.

[Ed. Note.—For other cases, see *Contracts*, Cent. Dig. §§ 746-748; Dec. Dig. § 164.*]

2. EVIDENCE (§ 397*)—PAROL—CONTRADICTING OR EXPLAINING WRITING.

Where contracts are certain in their meaning, they cannot be contradicted or explained by parol testimony in the absence of fraud or mistake.

[Ed. Note.—For other cases, see *Evidence*, Cent. Dig. §§ 1756-1765; Dec. Dig. § 397.*]

Appeal from Circuit Court, Leslie County. Action by F. M. Sackett against James L. Maggard. From a judgment dismissing plaintiff's petition, he appeals. Reversed.

Cleon K. Calvert, for appellant. Greene, Van Winkle & Schoolfield and L. D. Lewis, for appellee.

MILLER, J. The appellant Sackett brought this suit to recover from the appellee Maggard \$481.50, the value of 332 trees which appellant charges Maggard had cut from his land, and for \$1,000 punitive and exemplary damages for the maliciousness of the action of Maggard in connection with the alleged cutting. Martha Maggard, the wife of James L. Maggard, owned a tract of land situated upon the Big Branch of Rockhouse creek of the Middle Fork of Kentucky river. On October 12, 1905, Maggard and wife made the following contract with G. W. Sproul, to wit: "This agreement, mutually made and entered into, on this the 12th day of October, 1905, by and between Martha Maggard and James L. Maggard, of Leslie county, Kentucky, as of the first part, and G. W. Sproul, of Whitley county, Kentucky, as of the second part: Witnesseth, that for and in consideration of the sum of \$5.00 on this day in hand paid to the party of the first part by the party of the second part, the receipt whereof is hereby acknowledged, that said party of the first part offers to sell and agrees to hereafter convey to said party of the second part or his assigns, in consideration of the sum of \$10.00 per acre, by a deed containing a covenant of general warranty of the title thereto, a tract of land in Leslie county, Kentucky, on Big Branch of Rockhouse creek of Middle Fork and abutting: On the north by the lands of James L. Maggard; on the south

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

by the lands of James L. Maggard; on the east by the lands of James L. Maggard; on the west by the lands of Shade Baker. I reserve all the pine that will belt 3 feet and up and twenty oaks, all of which is to be cut from the stump within ten days from this date, and containing 50 acres, be the same more or less. It is expressly understood by the parties to this contract, and agreed to by them, and each and all of them, in consideration of the sum aforesaid, that if the said second party shall elect to purchase said land at said price per acre, he shall on or before the 12th day of February, 1906, pay to the said party of the first part, the sum of \$50.00, which payment, together with the first payment aforesaid, shall constitute and be payment on the deferred purchase price for said land, and which payment when so made shall retain this agreement in full force and effect, and make this agreement a contract mutually binding upon the parties hereto, in all its terms. The party of the second part is to have said land accurately surveyed and the abstracts of title made at his expense, within a reasonable time, and pay first party the price herein agreed upon, and on demand and payment of such purchase money, party of the first part agrees to make party of the second part or his assigns a deed of general warranty to said land. Witness our hands, this the day and year first above written. [Signed] Martha Maggard, James L. Maggard."

Sproul was acting as the agent of the appellant, F. M. Sackett. He had the lands surveyed and the title examined in November; whereupon it appeared that the Maggards could not make a good title to a small portion of the land, which was embraced in what was known as the "Woods patent." The Woods heirs had agreed, several years before, to make a deed to Mrs. Maggard, but had failed to do so, and in the meantime some of the joint owners had died, leaving infant heirs. Some differences arose between the parties by reason of this defect in the title, and the Maggards claim that the contract was abandoned. On the other hand, Sproul, acting for Sackett, elected to carry out the contract, and, on January 29, 1906, tendered the Maggards a deed and the sum of \$50 in gold, as provided by the contract. Mrs. Maggard was willing to execute the deed, but James L. Maggard declined to do so. It appears that he had not removed the timber from the land within the 10 days provided by the contract, or up to the time of the tender; and he gives as his reason for declining to execute the deed that he did not intend to sell the land until he had cut the timber, or excepted the timber by an additional contract. He further said, "I intended to sign the deed as soon as I got the Woods heirs to sign, and after I got the timber off that I had excepted." Sackett again tendered the \$50 and a deed on February 12, 1906, and on March 1, 1906, and the Maggards still

refusing to carry out the contract, Sackett sued them in April for a specific performance of the contract. On May 3d, the parties settled their differences in the following contract, which was dated April 17th, but was not executed and delivered until May 3d, to wit: "This agreement made and entered into on this the 17th day of April, 1906, by and between F. M. Sackett, of Jefferson county, Kentucky, as of the first part, and Martha Maggard and James L. Maggard, of Leslie county, Kentucky, as of the second part; witnesseth, that for and in consideration of the covenants and agreements herein contained, the following things are agreed upon as between the parties hereto: (1) The said party of the first part agrees to buy from the said parties of the second part at a price to be hereafter agreed upon between them, the merchantable pine timber trees from 12 inches in diameter and up, now standing upon the first tract of land described in the deed of conveyance on this day executed to the party of the first part by the parties of the second part, all unmerchantable pine timber upon said land being the property of the party of the first part without payment therefor. (2) That inasmuch as the said parties of the second part have heretofore cut upon said land certain oak and pine timber trees which they have not had opportunity to remove therefrom, the said party of the first part here grants them a free ingress and egress over, through and across said lands for the purpose of removing the same therefrom, until the 1st day of August, 1906, at which time said rights shall expire. (3) No other timber shall be cut upon said land by the parties of the second part after this date. (4) Where any of the timber so cut prior to this date shall be along a public road or passway through or adjacent to said land, the parties of the second part may leave same there until such time as they can remove same, not to exceed sixty days from August, 1906. Executed in duplicate on this the 17th day of April, 1906. [Signed] F. M. Sackett, by Cleon K. Calvert. James L. Maggard."

At the same time, Maggard paid the costs of the suit for a specific performance, and Sackett dismissed it. Sackett subsequently learned, as he charges, that Maggard had, after the making of the contract, gone upon the land, and cut and taken therefrom the 332 trees complained of; whereupon he brought this suit to recover their value, with damages, and for an injunction to prevent the removal of the timber. The circuit judge was of opinion that the contract of October 12, 1905, was modified by the contract of May 3, 1906, so as to allow Maggard to remove all of the down timber on the land at that time, and also that Sackett should pay Maggard for all merchantable pine lumber, twelve inches in diameter, standing on said land. Accordingly, appellant's petition was dismissed with costs, and he appeals.

Appellant contends that the provision in the new contract of May 3d (April 17th), which permitted Maggard to remove from the land the oak and pine timber trees theretofore cut, refers to the 20 oak trees and the merchantable pine timber mentioned in the first contract of October 12, 1905; while the appellee contends that the new contract recites that he had theretofore cut certain oak and pine timber trees upon the land in question, and that he was expressly given leave to remove all that had been cut by the 1st of August, 1906. Under either contract Maggard was entitled to all the merchantable pine timber; the only change made by the second contract being that, instead of requiring Maggard to cut and remove the pine trees, it provided that Sackett should pay him for them. It is well settled that, where a contract is contained in two separate and distinct papers, they will be read together for the purpose of ascertaining the true contract. The last paper may be a mere alteration of the first agreement, or a substitute for it. In the case at bar the two papers, which constitute the contract between these parties, being in no sense doubtful in their meaning, it is not permissible to contradict or explain them by parol testimony. There is no charge of mistake or fraud practiced by Maggard in obtaining either of these contracts; and, that being true, we must confine ourselves to the plain meaning of the language employed. In *Munford v. Green*, 103 Ky. 141, 44 S. W. 419, 19 Ky. Law Rep. 1792, this court laid down the rule governing cases of this character as follows: "It is not alleged that there was any fraud or mistake in the execution of the deed or any vice therein. There is no claim that any language was used in the deed which was not intended by the parties to be used in expressing the contract between the parties. The sole question in this case is whether parol testimony, in the absence of any allegation of fraud or mistake, is admissible to contradict the legal import of the deed. We are of the opinion that this cannot be done. It is a well-settled rule in this state that parol evidence is not admissible to contradict written evidence, except in cases of fraud or mistake, or when there is vice in the contract."

Confining ourselves, therefore, to the text of the contract of April 17th, we find that it permits Maggard to remove from the tract of land he had that day conveyed to Sackett all the oak and pine timber trees which Maggard had theretofore cut upon said land. If the parties had intended to confine Maggard to the removal of the 20 oak trees specified in the original contract of October 12, 1905, it could easily have been so expressed, and should have been so expressed; but in making the terms broad enough to cover all the oak and pine trees that had been theretofore cut, Sackett expressly gave Maggard

leave to carry away, and recognized his title to, the oak and pine timber for which he now sues. As heretofore stated, Maggard was entitled to the pine timber under the first contract, and to its value under the second or modified contract; and in no event, according to the contract as finally made, was Maggard to lose his right to the value of the pine timber. And in giving to Maggard the right to enter and remove it, he was not guilty of a trespass.

It appears, however, from the report of the receiver and the testimony of Hart, whom the receiver employed to count the trees cut from this land by Maggard, that 26 of 292 trees so cut were other than oak or pine trees, and consisted of poplar, walnut, cucumber, locust, beach, and sugar trees. Under the contract these trees belonged to Sackett, and Maggard should account for them. The testimony is not very satisfactory as to their market value while located upon this tract of land which is more or less inaccessible to the market. The receiver says the trees of all kinds, including oak and pine, were worth from 50 to 75 cents per tree, and Maggard puts the value at the same figures. The receiver sold the 292 trees to Maggard for \$140, which is a little less than 50 cents per tree. That, however, was a forced sale, and doubtless represents a low price. Fixing the price at 75 cents per tree, Maggard should account to Sackett for \$19.50, the reasonable value of these 26 trees.

The judgment dismissing Sackett's petition is reversed, with instructions to enter a judgment in his favor for \$19.50, and the costs of the action.

TUTT v. CITY OF GREENVILLE et al. (Court of Appeals of Kentucky. March 2, 1911.)

1. CRIMINAL LAW (§ 90*)—POLICE COURTS—JURISDICTION.

Under Const. § 143, and Ky. St. § 3651 (Russell's St. § 1662), establishing the jurisdiction of police courts in cities, such courts have no jurisdiction of an offense not committed within the city limits.

[Ed. Note.—For other cases, see Criminal Law, Dec. Dig. § 90.*]

2. CRIMINAL LAW (§ 90*)—OFFENSES—PLACE OF COMMISSION—PERSONAL PRESENCE.

It is not essential that a person shall have been personally present within the limits of a city when an offense was committed in order to be guilty of the offense within the city.

[Ed. Note.—For other cases, see Criminal Law, Dec. Dig. § 90.*]

3. MUNICIPAL CORPORATIONS (§§ 631, 636*)—OFFENSES—CITY LIMITS—POLICE COURT—JURISDICTION.

Plaintiff resided outside the limits of a city having an ordinance prohibiting cattle from running at large in the city and making it a misdemeanor to suffer or permit cattle to be at large therein. Held that, where plaintiff permitted his cow to run at large and wander into the city, he was guilty of violating the ordi-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

nance in the city, and was subject to prosecution in the city police court for such misdemeanor, on arrest within the city.

[Ed. Note.—For other cases, see Municipal Corporations, Dec. Dig. §§ 631, 636.*]

4. ANIMALS (§ 65*)—ESTRAYS—IMPOUNDING—SCOPE OF REMEDY.

Where a city estray ordinance provided that a violation thereof should constitute a misdemeanor, that an animal permitted to roam at large in violation of the ordinance might have been impounded and subjected to any fine imposed against her owner did not relieve him from liability, nor did it grant the city authority to subject the animal without giving the owner an opportunity to be heard.

[Ed. Note.—For other cases, see Animals, Dec. Dig. § 65.*]

Appeal from Circuit Court, Muhlenberg County.

Suit by M. Tutt against the City of Greenville and others. From an order sustaining a general demurrer to plaintiff's petition, he appeals. Affirmed.

Ross, Clark & Stroud, for appellant. Campbell Howard, for appellees.

CARROLL, J. The city of Greenville has an ordinance prohibiting cattle from running at large in the city and making it a misdemeanor for any person to suffer or permit his cattle to be at large in the city. The appellant Tutt resides outside of the city limits, and under a warrant issued against him for suffering a cow owned by him to run at large and wander into the city he was arrested and fined in the police court. Thereafter he brought this suit in the circuit court against the city and the police judge, seeking to prohibit them from enforcing the collection of the fine and costs. A general demurrer was sustained to his petition, and he appeals.

The validity of the ordinance is not assailed, but it is insisted that appellant did not commit any offense in the city limits, because he did not in person take his cow into the city and turn her loose; and therefore the police court had no jurisdiction to impose a fine upon him for a violation of the ordinance, although it is conceded that the cow might have been impounded and proceeded against in rem, as it were. In support of the argument that the police court had no jurisdiction over the person of appellant, our attention is called to section 143 of the Constitution, reading: "A police court may be established in each city and town in this state, with jurisdiction in cases of violation of municipal ordinances and by-laws occurring within the corporate limits of the city or town in which it is established, and such criminal jurisdiction within the said limits as justices of the peace have. * * *" And section 3651 of the Kentucky Statutes (Russell's St. § 1662), relating to the class of cities of which Greenville is one, reading: "A police court is hereby estab-

lished in such city, to be held by the police judge of such city. Said police court shall have jurisdiction concurrent with the justices' courts of all actions and proceedings, civil and criminal, except that in criminal cases the jurisdiction shall be confined to cases occurring within the city, * * * and shall have exclusive jurisdiction of all actions for the recovery of any fine * * * and of all prosecutions for any violations of any ordinance. * * *" We have no disposition to question the proposition that unless an offense is committed within the city the police court has no jurisdiction. This being so, the only question presented is: Did appellant, by permitting his cow to run at large and into the city, commit within the city an offense?

As we understand the argument of counsel for appellant, it goes to the extent of insisting that a person cannot commit an offense against an ordinance of a city or town unless he is actually present within the city limits when the offense is committed. But we do not think it necessary that a person charged with committing an offense against an ordinance should be actually within the city at the time of its violation, if in fact through its acts or agents or by or through means or things controlled and directed by him the offense charged against him is actually committed within the city. Suppose a city had an ordinance prohibiting and punishing the throwing of explosive substances on the streets within the city limits, and a person should stand just outside the corporate boundary and throw an explosive substance within the city limits, could it be contended that he was exempt from liability and punishment under the ordinance merely because he was outside of the city when he threw the offending article? Or suppose a city had an ordinance prohibiting the bringing into the city of intoxicating liquors for sale and a person outside of the city sent for sale by his agent intoxicating liquors into the city, would he not subject himself to the penalty provided by the ordinance? Illustrations like this might be multiplied without number, but it is scarcely necessary to use others, as we think there can be no doubt that when any person violates a valid ordinance in person or by or through things, instrumentalities, or agencies that he owns or controls and directs, he is subject to the punishment imposed. It is the act or thing that is done within the city limits in violation of the ordinance that subjects the doer to the penalty. Where the doer in fact is at the time is a matter of no consequence. Possibly in some cases it might be difficult to get jurisdiction of the person of the offender, so that he might be punished, but this fact would not affect his guilt or his liability to punishment if he could be brought to trial. A person need not himself be within the ter-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

ritorial limits of a city in order to commit a violation of one of its ordinances if the act that he commits or the thing that he sets in motion occurs within the city. When appellant permitted his cow to wander at large within the city limits, he as certainly committed an act in violation of its laws as if he had himself driven his cow within the limits and turned her at large. There could be no difference between the legal effect and consequence of appellant's act in standing just outside the city limits and driving his cow into the city to run at large and in leading her into the city and then turning her loose. In both instances it would be through his agency or conduct that she was at large in the city. The fact that the cow might have been impounded, and subjected in a proper proceeding to any fine imposed against appellant, did not relieve him from liability, nor did it grant the city authority to subject his cow without giving him an opportunity to be heard. *Varden v. Mount*, 78 Ky. 86, 39 Am. Rep. 208; *City of Paducah v. Ragsdale*, 122 Ky. 425, 92 S. W. 13, 28 Ky. Law Rep. 1057. The case of *Earle, Mayor, v. Latonia Agricultural Association*, 127 Ky. 578, 106 S. W. 312, 32 Ky. Law Rep. 469, is in no wise in conflict with the conclusion we have reached. In that case it was attempted by ordinance to prohibit and punish the sale of intoxicating liquors outside the limits of the corporation, and it was held that the ordinance in so far as it attempted the punishment of offenses committed outside of the city limits was void, and this for the reason that the act that constituted a violation of the ordinance was not committed within the city. Here the act that constituted a violation of the ordinance was committed within the city. It is therefore obvious that there is no similarity between this case and that.

Wherefore the judgment of the lower court is affirmed.

MODERN BROTHERHOOD OF AMERICA v. PHELPS.

(Court of Appeals of Kentucky. March 2, 1911.)

1. INSURANCE (§ 724*)—DELIVERY OF CERTIFICATE—WAIVER OF PROVISIONS.

After an applicant for a benefit certificate, providing for partial payment in case of the loss of an eye, had passed the medical examination, but before delivery of the certificate, he suffered an injury to his eye. The local agent, having power to waive provision of the certificate, refused then to deliver the certificate, but later, on examination of applicant's eye, and on report that it would get well, delivered the certificate. Thereafter an abscess set in, and applicant lost his eye. *Held*, that the agent had waived the provision in the certificate that it should not be delivered unless the applicant was in good health.

[Ed. Note.—For other cases, see Insurance, Dec. Dig. § 724.*]

2. INSURANCE (§ 724*)—BENEFIT CERTIFICATES—WAIVER OF PROVISIONS—AUTHORITY OF AGENT.

A local agent of a beneficiary society, having complete charge of the local lodge, transacting all its business for the parent lodge, keeping the books, receiving the dues, and forwarding the money, has power to waive a provision of a benefit certificate that it should not be delivered to the applicant, unless in good health.

[Ed. Note.—For other cases, see Insurance, Dec. Dig. § 724.*]

3. APPEAL AND ERROR (§ 1050*)—REVIEW—HARMLESS ERROR—ADMISSION OF EVIDENCE.

Objections to the admission of evidence that an agent had express authority to do a certain act are immaterial, where it sufficiently appears that his apparent authority was sufficient for the act.

[Ed. Note.—For other cases, see Appeal and Error, Dec. Dig. § 1050.*]

Appeal from Circuit Court, Jessamine County.

Action by Thomas Clement Phelps against the Modern Brotherhood of America. From a judgment for plaintiff, defendant appeals. Affirmed.

G. Allison Holland and John H. Welch, for appellant. N. L. Bronaugh, for appellee.

LASSING, J. About November 30, 1907, appellee, Thomas Clement Phelps, made application for membership in the local lodge of the order known as the Modern Brotherhood of America, which was being organized at High Bridge, Jessamine county, Ky. At the same time he applied for a benefit certificate or policy of insurance upon his life in the sum of \$1,000. The medical examination required was submitted to, and the applicant passed a good examination. On the 9th of December following, the Modern Brotherhood of America issued to said Phelps a benefit certificate or policy, wherein it agreed to pay the beneficiaries named therein the sum of \$1,000 upon the death of said Phelps while in good standing. The certificate further provided that "one-fourth the amount the beneficiary would be entitled to in case of death will be paid to said member, should he accidentally lose a hand at or above the wrist, a foot at or above the ankle, or for the total permanent loss of the sight of an eye." After said certificate of membership or policy was issued, it was sent to the local agent at High Bridge to be delivered to Phelps. After he had submitted to his medical examination, but before the policy was issued, he sustained an accidental injury to one of his eyes. Knowledge of this fact was brought home to the local agent, and, upon the advice of the company, he declined to deliver the policy and collect the premiums and dues thereon. Thus matters stood for some weeks, during which time the injured eye of Phelps continued to improve, and the agent, believing that it would get all right, delivered the policy to him, collected the dues thereon, and reported to the

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

company. Before the policy was delivered, however, the local agent caused the applicant's eye to be examined by a competent physician, and not until he had thus satisfied himself was the policy delivered. Subsequently an abscess developed upon the injured eye, and it became apparent that Phelps would lose the sight thereof. Knowledge of this fact was communicated to the company, and the local agent was directed to return the premiums collected from Phelps and have him surrender the policy. This Phelps declined to do. His eye grew worse, and finally he lost the sight thereof entirely. He demanded of the company the payment of the \$250. This was refused. He sued for it, and upon a trial recovered a judgment for this amount. The company now appeals, and seeks a reversal because of errors in the admission of evidence and in instructing the jury.

The application for the insurance contained a provision that the certificate should not become binding upon the company until the policy had been delivered to the applicant in good health. The facts pleaded were to the effect that although the application contained this provision, and the policy was not in fact delivered to the applicant while in good health, still, with the knowledge that he had suffered an injury to his eye, the company had gone ahead and delivered the policy to him, and had thereby waived this provision in the application. Two questions are presented: First, did the agent of the company who delivered the policy have authority to make such a waiver? and, second, if he was clothed with this authority, did he exercise it? He admits that he knew, and that the company knew, that appellee's eye was injured between the date of the medical examination and the delivery of the policy. In fact, this delivery was withheld for several weeks because of this injury to appellee's eye. It is further shown, and not denied, that before the policy was delivered the local agent caused the eye to be examined by a physician. This examination evidently satisfied him that there would be a complete recovery, although the eye was not at that time well. He thereupon delivered the policy, collected the premiums and dues thereon, and continued to collect them and report to the company, until it was ascertained that the eye was not going to get well. Then the company sought to return the premiums and recall the policy.

Undoubtedly the provision in the application that the policy should not become operative and binding until it was delivered to the applicant in good health was waived, if the local agent had authority to bind the company to that extent. What was his authority? It appears that he had complete charge of the local lodge, transacted all of its business for the parent lodge, kept the books, received the dues, forwarded the

money, delivered the policies—in short, transacted all of the business that it was possible for the company to transact with the members of that lodge. An applicant for insurance had no possible means of knowing the extent to which he was authorized to bind the company, but could only judge from appearances, and when the company permitted him to exercise such powers as might be exercised by a general agent or the company itself, and transactions were had with him on the faith and belief that he was clothed with power and authority to represent the company to the extent and in the way and manner in which he undertook to represent it, it will not be heard to deny that he had such power. As was said in *Connecticut Indemnity Ass'n v. Grogan's Adm'r*, 52 S. W. 959, 21 Ky. Law Rep. 717, where it was insisted that a local agent had waived a condition in the application without right or authority: "But this court has often held that an agent has such power. An agent who has authority to take application for insurance and power to collect the premium and remit the same to the company, as was done in this case, clearly has the power to determine as to whether the insured is entitled to receive the policy, and to waive any question as to sound health." In that case the application contained a provision that the policy should not become binding until the premiums were paid and the policy delivered to the insured while in good health. When the policy was delivered the insured was sick of typhoid fever, and this fact was known to the agent, who, in spite of this knowledge, delivered the policy and collected the premium. The company there sought to avoid liability, on the ground that the local agent had no authority to waive the provision of the application referred to.

In our opinion that case is conclusive of the question here under consideration. The agent in this case was clothed with more apparent authority than was the agent in the *Grogan Case*, and the court there held that a waiver by the agent of a similar provision in the application for that policy was binding upon the company. The only possible distinction that can be drawn between that case and the one under consideration is that a stronger case is presented here for the appellee. These pivotal questions were submitted to the jury under appropriate instructions.

The objections raised to the evidence that tended to show that the local agent, in making the delivery of the policy before there was a complete recovery of appellee's injured eye, was acting upon the advice of or under the direction of some one connected with the company superior in authority to him, becomes unimportant, since the local agent, in the absence of such authority, had the power to bind the company in waiving the provision of the application in question.

Upon the whole case, we are satisfied that the judgment of the lower court does justice between the parties; and it is therefore affirmed.

MONTGOMERY COUNTY v. TAYLOR,
Judge, et al.

(Court of Appeals of Kentucky. March 2, 1911.)

1. EVIDENCE (§ 387*)—PAROL EVIDENCE—RECORDS.

A county or fiscal court can contract only by its record; and, in an action to enforce an agreement made with a county through its county or fiscal court, parol evidence cannot be introduced to show what the agreement was.

[Ed. Note.—For other cases, see *Evidence*, Cent. Dig. § 1702; Dec. Dig. § 387.*]

2. COUNTIES (§ 16*)—FISCAL COURT—AUTHORITY.

Where a county court appointed commissioners to confer with commissioners representing another county as to a levy of taxes in a portion of the former county, which had formerly belonged to the latter county, and they reached an agreement, the former county's fiscal court had power to hear evidence and determine what the real agreement was, and to then spread it upon the record.

[Ed. Note.—For other cases, see *Counties*, Dec. Dig. § 16.*]

3. COUNTIES (§ 16*)—ALTERATION OF BOUNDARIES—EXISTING LIABILITIES.

After Montgomery county issued bonds to aid in the construction of a railroad, Menifee county was created by Acts 1869, c. 1872; a portion of the territory being taken from Montgomery county. Section 7 of the statute provided that the citizens and property of the territory included in Menifee county taken from Montgomery county should remain liable for the bonds and interest thereon. Thereafter Montgomery county under authority of Acts April 8, 1880 (Priv. Laws 1879-80, c. 871), refunded some of the bonds, and subsequently, under Ky. St. 1894, § 1852, refunded the balance. The Menifee county court appointed commissioners to confer with Montgomery county in regard to the levy of a tax in that portion of Menifee that formerly belonged to Montgomery, and on a verbal report a commissioner was appointed to receive and receipt for the moneys from the collector, and he was directed to pay over such money to the commissioner of Montgomery county. Subsequently an order was made reciting the former appointment of commissioners, and that they had come to terms with Montgomery county, and proceeded to levy a tax. *Held*, that the court ratified whatever agreement was made with Montgomery county, and the refunding of the indebtedness did not create a new debt, but merely changed the evidence of it, and did not release that part of Menifee county in controversy, and that the Menifee fiscal court should take steps to levy and collect a tax for the purpose of discharging the obligation.

[Ed. Note.—For other cases, see *Counties*, Dec. Dig. § 16.*]

Appeal from Circuit Court, Menifee County.

Action by Montgomery County against W. C. Taylor, as County Judge of Menifee county, and others, for mandamus compelling defendants to levy a tax. From a judgment denying the relief prayed for and dismissing the action, Montgomery County appeals. Re-

versed and remanded for proceedings consistent with the opinion.

O. C. Turner, Robert H. Winn, and A. A. Hazelrigg, for appellant. J. F. Osbon, T. L. Caudell, and B. F. Day & Son, for appellees.

CLAY, C. In 1853 Montgomery county, as then constituted, issued bonds for \$200,000, due in 30 years, to aid in the construction of the Lexington & Big Sandy Railroad. In 1869 the Legislature created Menifee county. See 1 Acts 1869, p. 65. Section 7 of that act is as follows: "That nothing in this act shall be construed to release the citizens and property now subject to taxation within the boundary of the first section of this act from being held liable for the bonds and interest thereon which were issued to the Lexington & Big Sandy Railroad Company as though this act had never been passed. The assessor of tax of Menifee county shall annually assess and take in all taxable property within the boundaries of their counties as existing before the passage of this act for the purpose of being taxed to contribute as heretofore to the payment of said bonds and interest; and the county court of Menifee county shall levy annually on the portions of citizens and property in the parts of Menifee county which are taken from the counties of Bath and Montgomery the same rates of taxation as are levied and collected for the purpose of paying such bonds and interest thereon which are levied and collected in the counties of Bath and Montgomery for that purpose; and the sheriff of Menifee county shall collect the said railroad tax, and so on from year to year, until the bonds and interest shall have been fully paid; and when so paid or otherwise discharged, the power to assess, levy, and collect shall cease; and said sheriff shall pay over to the county judges of the counties of Bath and Montgomery the respective proportions of said counties of said tax at the time he is by law required to pay other taxes, and they shall account and be responsible therefor under existing laws."

In 1883 Montgomery county, pursuant to authority contained in an act of the General Assembly approved April 8, 1880 (Priv. Laws 1879-80, c. 871), refunded \$120,000 of the bonds. In 1893 it refunded the balance of the bonds, then amounting to \$73,000. This action was taken pursuant to section 1852 of the Kentucky Statutes (1894 edition). About the year 1890 Montgomery county instituted an action against the Menifee county court to compel that court to levy upon the taxable property of that portion of Menifee county that was formerly a part of Montgomery county a tax equal to the tax levied by Montgomery county for the purpose of paying the railroad debt represented by the bonds referred to. The lower court sustained a general

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

and special demurrer to the petition. On appeal to this court (see *Montgomery County v. Menifee County Court*, 93 Ky. 33, 18 S. W. 1021, 13 Ky. Law Rep. 891), it was held that the special demurrer was properly sustained because the action should have been against the officers of the county court, instead of the court itself. It was also held that the general demurrer to the petition was improperly sustained. In discussing the matter this court said: "So, in this case, the refunding of the indebtedness and the issue of the new bonds in payment of it did not create a new debt, but the evidence of it was merely changed, which change Montgomery county had the right to make without consulting Menifee county, or that part of the territory embraced therein that once belonged to Montgomery county; for, by the act creating Menifee county, that part of the territory that was taken from Montgomery county was to remain a part of that county for the purpose of being bound for its pro rata of the Montgomery debt and for its payment, but the management and control of the debt, and the provisions for its payment, belonged exclusively to the appellant. And the only power that the appellee possessed under the act creating it was that of an agency to collect the pro rata of the indebtedness that said territory should pay, as ascertained by the appellant. It seems to us that as far as the general demurrer is concerned the petition presents a cause of action; but the court was right in sustaining the special demurrer."

Conceiving that that part of Menifee county which was formerly a part of Montgomery county, and the citizens thereof, were liable for their pro rata share of the railroad debt under the above opinion of this court, the fiscal courts of Montgomery and Menifee counties set on foot certain proceedings having in view a compromise of the matter in controversy. To that end the county court of Menifee county on January 3, 1893, entered the following order: "It is ordered that W. R. Tabor, E. S. Congleton, and Alfred Combs be, and they are hereby, appointed this court's committee to confer with Montgomery county, Ky., as regards the levy of taxes in that portion of Menifee county, Ky., that formerly belonged to Montgomery county, Ky., which was stricken off to Menifee county in the formation of the same. Said levy was made by Montgomery county, Ky., for the purpose of paying the interest on the bonds issued by said county to the Lexington & Big Sandy Railroad and the Lexington & Elizabethtown Company, for the years 1885, 1886, 1887, 1888, 1889, 1890, 1891, 1892."

On February 21, 1893, the Montgomery county court entered an order appointing Louis Apperson, H. Jones, and I. N. Horton a committee to confer with the committee appointed by the Menifee county court as to the tax owing to Montgomery county from Menifee county on account of the railroad debt.

On April 7, 1893, the Montgomery county court entered an order filing the written agreement reported by the Montgomery county commissioners and approving the same. The commissioners appointed by the Menifee county court made a verbal report.

On May 13, 1893, the Menifee county court entered the following order: "Ordered that Alfred Combs be, and he is hereby, appointed county commissioner and receiver to receive and receipt for any and all money from the collector who may hereafter be appointed to collect all moneys due Montgomery county on account of railroad tax due said county on that portion of Menifee county that formerly belonged to said Montgomery county before the formation of said Menifee county for the year 1893 to pay interest railroad bonds." On the same date the following order was also entered by the Menifee county court: "Ordered that Alfred Combs be, and he is hereby, authorized to pay any and all moneys that may hereafter come to his hands as commissioner in and for Menifee county, Ky., for the year 1893, on account of railroad taxes due Montgomery county on that portion of said Menifee county that formerly belonged to said Montgomery county."

On August 14, 1893, the county court of Menifee county entered the following order: "Whereas a former order was made appointing W. R. Tabor, E. S. Congleton, and Alfred Combs commissioners in and for Menifee county, Ky., to confer with Montgomery county, Ky., touching a complete settlement of the railroad tax in that portion of Menifee county, Ky., as formerly belonged to Montgomery which embraces the western portion of said county being a portion of precinct No. 4 of Menifee county, Ky. [Here follows a description of that part of Menifee county taken from Montgomery county.] And said committee having come to terms with a similar committee from Montgomery county, and agreeing to pay said Montgomery county a certain sum of money which is to be collected from above boundary of Fourth precinct or the persons who live therein to be paid yearly, and J. C. Lyons, present sheriff of Menifee county, having heretofore appeared in open court and waived his constitutional and statutory right as sheriff to collect said money or taxes, all of which is shown by the former orders of this court, and said commissioners, Alfred Combs, W. R. Tabor, and E. S. Congleton, recommending the appointment of I. T. Hedger as collector of said taxes, it is therefore ordered that I. T. Hedger be, and he is hereby, appointed collector in and for Menifee county, Ky. He is therefore directed to collect from each citizen and housekeeper entitled by law to pay taxes the sum of 25 cents on each \$100 worth of taxable property in said boundary, as shown by the assessor's books for said year."

On December 15, 1893, Alfred Combs, receiver, E. I. and B. S. R. tax, paid the Mt.

Sterling National Bank, receiver for Montgomery county, the sum of \$125. The sum so paid, it is claimed, was the amount of interest due on the compromise agreement. According to the testimony of Combs, he made shortly after the verbal report was made a written report setting forth the terms of the agreement with the commissioners appointed by Montgomery county, and delivered the same to the county judge. This report, however, is not on file. About four years later, Alfred Combs and E. S. Congleton, two of the commissioners appointed by Menifee county, made a written report setting forth the precise terms of the agreement made with the commissioners of Montgomery county. A motion was made to have this report filed, but the county court of Menifee county declined to permit it to be filed. This written report is substantially the same as the report made by the Montgomery county commissioners to the Montgomery county court, and approved by that court. When this report was made, however, Combs and Congleton had moved away from Menifee county. Other commissioners to confer with Montgomery county with reference to a settlement of the railroad tax had in the meantime been appointed.

In the year 1898 Montgomery county brought this action against W. C. Taylor, then county judge of Menifee county, and John Armitage and others, who were justices of the peace, to enforce the compromise agreement made between Menifee county and Montgomery county, and asked for a mandamus compelling them each year to levy a sufficient tax to pay the interest on the sum of \$2,500, which, it charged, was the amount of the compromise agreed upon. From time to time amendments were filed, making the various members of the Menifee county and fiscal court, as they came into office, parties defendant. The petition and the various amendments thereto contained prayers for all appropriate relief. The numerous defendants took the ground that the Menifee commissioners never made any written report to the Menifee county court, setting forth the terms of the agreement made with the Montgomery county commissioners; nor did the Menifee county court enter any order setting forth the agreement; nor did that court in any way approve the action of its commissioners.

The trial court denied the relief prayed for by Montgomery county, and entered an order dismissing the action. From that judgment, the county of Montgomery appeals.

From the orders of the Menifee county court hereinbefore set out it appears that that court appointed three commissioners to confer with Montgomery county in regard to the levy of taxes in that portion of Menifee county that formerly belonged to Montgomery county. These commissioners made a verbal report to the county court of Menifee county. That court appointed Alfred Combs

county commissioner and receiver to receive and receipt for any and all moneys from the collector who might thereafter be appointed to collect all money due Montgomery county on account of the railroad tax due said county from that portion of Menifee county that formerly belonged to Montgomery county. On the same day an order was entered directing Combs to pay any and all moneys that might thereafter come to his hands as commissioner to Montgomery county. Three months later the Menifee county court entered an order reciting the former appointment of the commissioners "touching a complete settlement of the railroad tax in that portion of Menifee county that formerly belonged to Montgomery county." The order then accurately describes the territory which was taken from Montgomery county in the formation of Menifee county. It further recites: "And said committee having come to terms with a similar committee from Montgomery county and agreeing to pay said Montgomery county a certain sum of money which is to be collected from above boundary," and then proceeds to levy a tax on that territory of 25 cents on each \$100, and appoints a collector to collect the same. While the order of August 14, 1893, does not in terms approve the action of the Menifee commissioners, the action of the Menifee county court in referring to the original appointment of the commissioners, in setting forth the fact that these commissioners had come to terms with the Montgomery county commissioners, in setting out the territory in Menifee county which had been taken from Montgomery county, and in levying a tax thereon and appointing a collector to collect the same cannot be construed in any other light than as an act of ratification. In other words, whatever agreement the Menifee commissioners made with the Montgomery commissioners was approved. However, the county or fiscal court can only contract by its record. In an action to enforce an agreement made with the county through its county or fiscal court, parol evidence cannot be introduced to show what the agreement was. That being true, we cannot in this action determine what the real agreement was; but the Menifee fiscal court has the power to hear evidence and determine what the real agreement was, and to spread that agreement upon its record.

As that part of Menifee county taken from Montgomery county still remained a portion of Montgomery county so far as the payment of the railroad bonded debt is concerned, and as Montgomery county had the right to manage and control the debt, not only for itself as then constituted, but for all the territory that composed Montgomery county when the original bonds were issued, it follows that the refunding of the indebtedness, which did not create a new debt, but merely changed the evidence of it, did not have the

effect of releasing that part of Menifee county in controversy from its pro rata share of the indebtedness. Having the right to act for Menifee county, the action of the Montgomery county court was just as binding on that county as it was on Montgomery county. That being true, the original indebtedness, whether represented by the original bonds or refunding bonds, is a just debt against Menifee county to the extent of the territory involved and to the extent of its proportionate part of the indebtedness. It follows, then, that the Menifee fiscal court will have to take steps to levy and collect a tax upon the citizens and taxable property of the territory involved for the purpose of discharging this obligation. Being liable, it will not be permitted to repudiate its part of the indebtedness.

Upon the return of this case, the trial court will proceed in one of two ways, at the election of the fiscal court of Menifee county: It will permit the members of that court within a reasonable time to meet and hear evidence as to what were the terms of the agreement which we have held was subsequently ratified, then spread that agreement upon its record, and it will then require the members of the fiscal court to levy a tax sufficient to carry out the agreement, and provide for its collection, or, upon its failure to do this, the trial court will appoint a commissioner to hear evidence and report what is Menifee county's pro rata of the indebtedness heretofore paid and to be paid, and will make such parties defendant, and will enter such orders as may be necessary to require the members of the fiscal court to levy a tax sufficient to discharge the amount of the indebtedness found to be due, and to see that such taxes are collected. As said before, the members of the fiscal court of Menifee county may elect which method of procedure shall be adopted. The facts all being before us, and there being in the petition and amended petitions prayers for appropriate relief, we conclude that one method or the other must be adopted. The territory is liable for its share of the debt, and the court should see that it is paid.

Judgment reversed and cause remanded for proceedings consistent with this opinion.

O'REAR, J., not sitting.

GLASS et al. v. CINCINNATI TOBACCO WAREHOUSE CO.

(Court of Appeals of Kentucky. Feb. 28, 1911.)

1. HUSBAND AND WIFE (§ 25*)—AGENCY OF HUSBAND—NOTICE—RIGHTS OF THIRD PARTIES.

Where a husband as agent for his wife sends her tobacco to a company with which he had an arrangement for the purchase of tobacco,

and does not notify them that it is hers, but allows it to be treated as his, the wife cannot recover the purchase price from the company; the fault being in her agent.

[Ed. Note.—For other cases, see Husband and Wife, Cent. Dig. §§ 148, 149; Dec. Dig. § 25.*]

2. BILLS AND NOTES (§ 527*)—ACTIONS—EVIDENCE OF PAYMENT—SUFFICIENCY.

In an action on a note, where it was claimed that the note had been paid by the delivery of crop mortgaged to secure it, evidence held to warrant a finding that the note had not been paid or the crop delivered.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. § 1848; Dec. Dig. § 527.*]

Appeal from Circuit Court, Carter County.

Action by the Cincinnati Tobacco Warehouse Company against J. W. Glass and Pattie Glass. From a judgment for plaintiff, defendants appeal. Affirmed.

Theobald & Theobald, for appellants. G. W. E. Wolford, for appellee.

LASSING, J. On October 6, 1904, J. W. Glass and Pattie Glass, residents of Carter county, Ky., borrowed from the Cincinnati Warehouse Company \$500, and executed a chattel mortgage upon a crop of tobacco supposed to contain about 10,000 pounds to secure same. J. W. Glass had theretofore been purchasing tobacco in the country and prizing it and shipping it to the Cincinnati Warehouse Company upon a contract, by the terms of which, after the payment to the Warehouse Company of certain fees, insurance, and expenses, he received all the profit or made good any loss that arose out of the several purchases made by him. Out of his first year's venture he had made money. About the time this loan was made, he arranged with the Warehouse Company to buy tobacco during the following season upon the same terms. Under this arrangement he bought and the company advanced him money to pay for, more than a hundred thousand pounds of tobacco in the country, and he shipped to the warehouse 82 hogheads of tobacco, weighing something over 88,000 pounds. These were sold and the net proceeds placed to his credit. The result of this last purchase was a net loss to him of about \$2,000. The note remaining unpaid, the Warehouse Company brought suit in the Carter circuit court to enforce its collection. Glass and his wife answered, and pleaded that the note had been paid by the shipment to the Warehouse Company of the tobacco which was pledged to secure it; that the tobacco which was pledged to secure this note was the property of Pattie Glass, wife of J. W. Glass; and that it was reasonably worth \$1,000. And she sought to recover a judgment over and against the Warehouse Company for this \$1,000 less her note, with interest thereon, to the date of the shipment. Glass pleaded that he had bought and shipped a large amount of tobacco to the Warehouse

Company, but that he kept no accounts, and that the company had failed to furnish him with a statement of account, and he asked that the accounts between them be settled and for a judgment for any sum that might be found due him upon a final settlement. The Warehouse Company, in its reply, denied that it had received any tobacco whatever from the defendant Pattie Glass, or for her account, or that the note, or any part thereof had been paid. It denied that it owed J. W. Glass any sum whatever, but pleaded that, upon a settlement of their account, he was indebted to it in the sum of \$2,455.56. The affirmative matter in this reply was traversed of record, and upon motion the case was transferred to equity and referred to the master to hear such proof as was offered by the respective parties in support of their contentions. The master took proof and reported the evidence in writing, together with his findings. Upon the pleadings, proof, report, and exceptions filed thereto, the case was submitted for judgment. The chancellor found in favor of plaintiff on the \$500 note sued on and dismissed the claims of both Pattie Glass and the Warehouse Company upon their open accounts. From that finding and judgment this appeal is prosecuted.

The proof shows conclusively that appellee furnished the money to J. W. Glass to pay for 103,445 pounds of tobacco, and that he shipped to appellee 82 hogsheads of tobacco, weighing 88,320 pounds, and that appellee, on this tobacco sold, received \$1,906.91 less than it paid out for appellant J. W. Glass in its purchase, and this \$1,906.91 together with \$548.55 interest, is the amount which it sought to recover on its counterclaim. This shortage or difference between the number of pounds paid for by appellee for appellant, amounting to more than 15,000 pounds, is wholly unexplained in the record, although appellant testifies that he shipped this tobacco purchased in the country to appellee, and in addition some 10,000 to 20,000 pounds which was paid for by his wife making in the neighborhood of 20 hogsheads additional.

The great difficulty with appellant's case is that he is trying to speak from memory about transactions that took place four or five years prior thereto, and was unable to give anything like an accurate statement as to what he had done. All of the tobacco which he bought in the country and shipped was shipped in his

name, and the Warehouse Company never received any notice from him or his wife that her tobacco had been shipped, or that she was laying any claim to any of it, or was demanding or looking to the company for pay for any part thereof. In this particular the conduct of appellant and his wife rather supports the contention of appellee to the effect that the note has not been paid. All of the other tobacco which appellant bought in the country he paid for by drafts drawn on appellee. We see no reason why he should have made an exception in favor of his wife. When he bought her tobacco, if he did so, he should have paid her as he did any one else, and if, as he claims, the \$500 debt was her debt, he should have deducted this amount and drawn a draft on appellee for the amount of her tobacco less the amount of her note. Instead of doing this, however, he made no mention of the fact that he was shipping her tobacco to appellee, and, in the light of the positive testimony of the president of appellee company to the contrary, we must hold that the record fails to show that the tobacco covered by the mortgage was shipped to appellee at all.

But if we were mistaken in this, and the tobacco claimed by appellant Pattie Glass did in fact constitute a part of the consignment by J. W. Glass to appellee, she would be in no better position, for neither she nor her husband at any time notified the appellee that her tobacco was included in such consignment. Her husband had the handling of her tobacco, and, if he used it to extend his credit rather than extinguish her debt, he, and not appellee, is to blame. But in the light of the evidence that appellee company furnished the money to pay for more than 103,000 pounds of tobacco in the country for appellant J. W. Glass, and received but about 88,000 pounds of it, the conclusion cannot be escaped that J. W. Glass either failed to ship a part of this purchase to appellee, or else did not ship his wife's tobacco to appellee. For, while there would naturally be some loss or shrinkage in weight in rehandling the tobacco, the shortage reported here is entirely too large to be accounted for in this way.

We are of opinion that the proof in this case fully warranted the trial judge in holding that the note in question had not been paid, and his judgment to this effect is affirmed.

LOUISVILLE & N. R. CO. v. HARDY.

(Court of Appeals of Kentucky. Feb. 28, 1911.)

1. MASTER AND SERVANT (§ 185*)—INJURIES TO SERVANT — RAILROADS—FELLOW SERVANTS—VICE PRINCIPAL.

In an action against a railroad company for injury to a brakeman, where the conductor in charge of the train and the switching, to cut out a car violated a rule of the company and opened a switch on a steep grade, letting the car plaintiff was on go down the grade, and he was thrown off and injured, the act of the conductor was the act of a vice principal and not that of a fellow servant.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 385-421; Dec. Dig. § 185.*]

2. APPEAL AND ERROR (§ 1170*)—TRIVIAL ERRORS—INSTRUCTIONS.

Under Civ. Code Prac. § 134, providing that the court must disregard any error or defect which does not affect the substantial rights of the adverse party, and that no judgment shall be reversed or vacated for such error or defect, it was not reversible error for instructions in an action for personal injuries to leave the amount of damages for pain and anguish blank, limiting the recovery for medical services to \$150, in all not to exceed \$10,000, where the evidence showed that the plaintiff was severely injured, and the verdict was for \$4,000.

[Ed. Note.—For other cases, see Appeal and Error, Dec. Dig. § 1170.*]

Appeal from Circuit Court, Bourbon County.

Action by James J. Hardy against the Louisville & Nashville Railroad Company. From a judgment for plaintiff, defendant appeals. Affirmed.

Emmett M. Dickson and Benjamin D. Warfield, for appellant. Robt. B. Franklin, Chas. A. McMillan, and Robt. C. Talbott, for appellee.

HOBSON, C. J. James J. Hardy, a brakeman in the service of the Louisville & Nashville Railroad Company, was thrown from a freight car and injured at Ford, Ky., on April 6, 1909. He brought this suit to recover for his injuries, and recovered in the circuit court \$4,000. The railroad company appeals.

The facts of the case as shown by the proof for the plaintiff are these: The train on which Hardy was employed took a side track at Ford to allow another train to pass. They had in the train a car which was to be put off. There was at Ford a side track leading down to a mill on quite a steep grade, and by a rule of the company cars were not to be turned loose on this track, but should be taken down by an engine on account of the danger of their being unmanageable from the steepness of the grade. After the other train had passed, Hardy's train was pulled out on the main track with the view of cutting off the car that was to be left at Ford. The switch which led into the steep track

referred to was then closed. The engineer pulled up with the car in question attached to the engine, Hardy being on that car. After he got in motion, the engine was checked so as to allow that car to be cut loose from the engine. The engine was then speeded past the switch before the car reached it, the switch was then turned by a brakeman so as to throw the car in on a side track. But while they were doing this the conductor had opened the switch leading into the steep track which was about 100 feet further on; and so the car with Hardy on it went in on this track. By reason of the steepness of the grade Hardy was unable to control the car. Finding that he could not control it he tried to go down the ladder and jump off, but just as he got to the ladder, the car which was going quite rapidly, gave a lurch, and threw him off, breaking both bones of one leg below the knee, injuring his hip and injuring his shoulder. According to the proof for the defendant, the conductor did not turn the switch leading into the steep track, and was not to blame for the car being sent in on this track without an engine being attached to it. But in view of all the evidence and the circumstances, we cannot say that the conclusion of the jury was unwarranted.

It is earnestly insisted on the appeal that if the conductor turned the switch himself, he was in so doing discharging the duty of a brakeman, and was therefore simply a fellow servant of Hardy. But he was the managing agent of the defendant in charge of the train. He was directing the movement of the train, and if he sent the car down on this steep switch, it was the act of the defendant. In *I. C. R. R. Co. v. Coleman*, 59 S. W. 13, 22 Ky. Law Rep. 878, where the same question was made, we said: "The rule is well settled in this state that the master is responsible for the negligence of his superior servant to one under his control for an injury thereby caused him, and we are unable to see that it can make any difference whether the negligent act was done by his own hand or by another under his orders. The reason of the rule is that the superior servant represents the master, and it seems to us to apply with as much force in one case as the other."

Again in *Diebold v. Wollborn*, 122 S. W. 212, we said: "When a foreman for the time being takes a place made vacant by the absence of a laborer who was under him, he does not surrender the duties and obligations of a superior; but the master will be responsible for his negligence if it results in injury to an employé who was also subordinate to the foreman. When Robinson, the foreman, undertook to perform the duties of the absent engineer, he was as much the representative of the master, and the superior of Wollborn, as when the regular engineer was present, and he was the superior of

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

both. If the regular engineer had been present, and had been directed by Robinson not to stop the engine after the stone was swung over the wall, and this instruction had resulted in injury to Wollborn, there could be no doubt that it would have been actionable negligence, in view of the testimony of Robinson that the engine would not be started until a signal to do so was given. This being so, the fact that Robinson in temporary charge of the engine was guilty of a like act of negligence rendered the master liable." To same effect see *Board v. C. & O. R. R. Co.*, 70 S. W. 625, 24 Ky. Law Rep. 1079, and *I. C. R. R. Co. v. Elliott*, 82 S. W. 374, 26 Ky. Law Rep. 669.

A contrary rule was not laid down in *Sinclair v. I. C. R. R. Co.*, 140 Ky. 152, 130 S. W. 978. In that case the section boss, Prewitt, was helping his men to get out a tie, each of them having a pick with which he was pulling at the tie. The section boss's pick slipped and struck Sinclair. It was held that there was no evidence of negligence on the part of the section boss in handling the pick, and that it was not a matter of importance that it was the pick of the foreman, Prewitt, that slipped. The court said: "It may be treated as if the foreman was doing what he would have directed one of the other men to do, or, in other words, as if Sinclair had been hurt by one of the employes, who in connection with Sinclair and the others were pulling out the tie in the manner directed by Prewitt. If the appellee company would not be liable in a state of case like this, clearly they could not be liable merely because Prewitt happened at the time to be doing the work of one of the employes."

In the case at bar if the conductor had ordered one of the brakemen to turn this switch and the car had thus been run on it, the company would clearly be liable for his negligence; and we see no sound reason why it should not be liable when he turned it with his own hand, instead of directing one of his men to turn it. In either case under the circumstances it was an order by him for the car to be run down on a steep track without an engine being attached to it, thus endangering Hardy who was on the car without means of self-protection. If the conductor had done with his own hands something for which the company would not be liable if it had been done under his orders by one of his men, the *Sinclair Case* would be in point.

In instructing the jury as to the measure of damages, the court among other things said this: "If the jury find for the plaintiff, they ought to fix his damages at such a sum as will fairly and reasonably compensate him for the physical pain and mental anguish that he has already endured, if any; for the loss of his time, if any, not to exceed \$——; for the medical services for which

plaintiff became indebted, if any, not to exceed \$150; for the diminution or impairment, if any, of his power to earn money, not to exceed, however, in all the sum of ten thousand dollars, the amount claimed in the petition."

It is insisted that the judgment should be reversed because the blank was not filled in this instruction after the dollar mark. No doubt the blank was left by oversight, neither party calling the court's attention to it. In cases of this sort the maximum amount to be allowed for loss of time should always be stated in the instruction, but whether a new trial should be granted for an omission to fill the blank is a different question. By section 134 of the Civil Code of Practice, the court must in every stage of an action disregard any error or defect which does not affect the substantial rights of the adverse party, and no judgment shall be reversed or affected by reason of such error or defect. We have carefully considered the evidence, and are satisfied upon the whole case that if this blank had been filled it would in no wise have affected the result. The plaintiff sustained serious injuries which were very painful. There was testimony for him at the trial which occurred about a year after he was hurt that his injuries were permanent; while there was proof for the defendant that it was probable that in time his leg would be strong again. He had not been able to do any work to amount to anything since he was hurt, and what the future would do for him was by no means clear under the evidence. The jury evidently took the view that he would never be able to follow his calling any more, and on this ground based their verdict for \$4,000. The instructions given by the court were practically taken from those asked by the parties, and while some verbal criticisms are made, we do not see any substantial error in them. On the whole case we think that the defendant had a fair trial on the merits, and that no error was committed to the prejudice of its substantial rights.

Judgment affirmed.

HALL et al. v. PRATT et al.

(Court of Appeals of Kentucky. March 3, 1911.)

1. BOUNDARIES (§ 47*)—ESTOPPEL—MISREPRESENTATIONS.

Under the maxim that where one of two innocent persons must suffer, he alone should suffer who brought about the condition by his misrepresentation, the owner of land, not knowing its boundaries, who advised its purchase from another, wrote a deed for the grantor, and, as deputy county clerk, certified its acknowledgment, is estopped to claim title thereto as against the purchaser.

[Ed. Note.—For other cases, see *Boundaries*, Cent. Dig. §§ 227-231; Dec. Dig. § 47.*]

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

2. BOUNDARIES (§ 8*)—DESCRIPTION—CONTROLLING ELEMENTS—"CALL PATENT."

Where nothing appeared in a "call patent"—that is, one whose corners are all stakes, or all but one, or whose lines were not run out and marked at the time—except a discrepancy between the figure made by platting the patent calls and the surveyor's plat, it is not proof of a mistake in the patent, and the plat does not control the calls of the patent.

[Ed. Note.—For other cases, see *Boundaries*, Cent. Dig. §§ 3-41; Dec. Dig. § 8.*]

3. QUIETING TITLE (§ 12*)—RIGHT OF ACTION—POSSESSION OF PLAINTIFF.

A bill in equity to quiet title, by parties not in actual possession of the land, will not lie.

[Ed. Note.—For other cases, see *Quieting Title*, Cent. Dig. §§ 8-12; Dec. Dig. § 12.*]

Appeal from Circuit Court, Perry County.

Action by P. W. Hall and others against John Pratt and others. From a judgment dismissing the petition, plaintiffs appeal. Affirmed.

J. J. C. Bach, W. H. Miller, Chester Bach, and Grannis Bach, for appellants. E. E. Hogg, for appellees.

O'REAR, J. Appellants, claiming to be the owners and in actual possession of a tract of land containing 2,500 acres patented to Ezekiel Hall about 1844, brought this suit *quia timet* against appellees. The latter by separate answers denied appellant's ownership and possession, and asserted title in themselves in their respective tracts described in their answers. Appellee John Pratt pleaded an estoppel also, in that appellant P. W. Hall advised him to purchase the land from another, wrote the deed for the grantor, and, as deputy county clerk, took and certified to its acknowledgment. The circuit court dismissed appellant's petition, although the court found, as a matter of fact and law, that appellant's title papers covered the land in dispute. The judgment was rested in part upon the estoppel pleaded, and in part upon the statute of limitations relied on by all the defendants.

The matter in dispute was in the main the true location of certain lines, constituting the eastern boundary of the Ezekiel Hall 2,500-acre patent. The transcript brought to this court is manifestly incomplete. Certain patents, deeds, and a surveyor's report, all shown to have been filed in the court below, are not brought up. The testimony of the witnesses, however, is here. This evidence sustains the plea in estoppel, as well as discloses that some portions of the land in dispute were in the actual possession of the defendants when the suit was brought, and when it was tried.

The plea of estoppel is questioned on the ground that appellants did not then know where the lines were. But the maxim is, where one of two innocent persons must suffer, he alone should suffer who brought about the condition by his misrepresentation.

For, although appellant, in ignorance of his rights, induced a third person to buy the land, the latter being also ignorant of the true state of facts, and relying on the statements and inducements made by the former, will be protected in a subsequent dispute between the two as to whether the land was in fact the property of the one inducing the purchase at the time.

The evidence on the plea of limitation is not satisfactory. It is rather vague, and inconclusive. It deals more with opinions of witnesses and hearsay, than with the facts showing the nature, extent, and continuity of defendant's possession. Whether the judgment could be sustained on that issue, it is not necessary, however, to decide, as we are satisfied that the judgment was correct for other reasons.

The Ezekiel Hall patent had but one natural corner; the others being stakes. Presumably, therefore, the land was not actually run out at the time of the original survey; nor, for the same reason, was its lines marked at that time. The patent calls seem to inclose a body of land, and on the face of the patent there is nothing to indicate a mistake in it. Nor is there anything in the evidence to show that there was a mistake made by the surveyor in transcribing the notes of his work and certifying them to the land office, or that the register made a mistake in issuing the patent, giving in it different calls from those certified to him. The theory of there being a mistake is rested upon the fact that the surveyor's certificate, which had a plat of the land attached to it, as required by law, shows a different figure from that made by platting the calls as they appear in the patent. Appellants cite and rely upon certain opinions of this court, to the effect that the surveyor's certificate and plat may be looked to to correct an error in the patent calls. *Alexander v. Lively*, 21 Ky. 159, 17 Am. Dec. 50; *Patrick v. Spradlin*, 42 S. W. 919, 19 Ky. Law Rep. 1038; *Bell County, etc., Co. v. Hendrickson*, 68 S. W. 842, 24 Ky. Law Rep. 371; *Bruce v. Taylor*, 25 Ky. 163; *Mercer v. Bate*, 27 Ky. 343, and *Morgan v. Lewis*, 92 S. W. 970, 29 Ky. Law Rep. 200. But it must first appear that the mistake is in the patent as issued. If nothing else appears in a "call" patent—that is, one whose corners are all stakes, or all but one, or whose lines were not run out and marked at the time—except a discrepancy between the figure made by platting the patent calls and the surveyor's plat, it is not proof of a mistake in the patent. It is as apt to be a mistake in the surveyor's plat. It is not suggested in this case that the calls in the patent and those in the surveyor's certificate are different. The surveyor's plat is of equal dignity with his other certified work, but not superior. The cor-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

rect running of the patent in such state of case as we have here is to follow its calls, courses, and distances, and closing the last line so as to make a complete boundary. In this view of the case, the eastern boundary of appellant's land (the Ezekiel Hall 2,500 acres) is the one adopted by the court under the plea of limitation, as having been fixed by the adverse possession of the appellees. Further evidencing the correctness of this conclusion in the instant case, is the fact that appellants and the adjacent owners for many years—for 20 or more—have treated that as the true line of that boundary.

For another reason, the judgment should be affirmed. As the evidence disclosed that appellants were not in the actual possession of the territory in dispute, a bill in equity to quiet their title did not lie.

The judgment dismissing the petition must be affirmed.

BARTON v. BARTON'S ADM'R et al.

(Court of Appeals of Kentucky. Feb. 28, 1911.)

1. WITNESSES (§ 160*)—TRANSACTIONS WITH DECEDENT.

On the trial of exceptions to a report of a commissioner, allowing a note against an estate, conversations had between heirs of a decedent and decedent in the presence of claimant are admissible in evidence under the Code.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 696, 697; Dec. Dig. § 160.*]

2. WITNESSES (§ 177*)—TRANSACTIONS WITH DECEDENT—REBUTTAL TESTIMONY.

Where heirs, on the trial of exceptions to the report of a commissioner allowing a note against the estate, testify as to conversations had with decedent in the presence of claimant under Civ. Code Prac. § 606, subsec. 2, the claimant has the right to testify to any statement or conversation with the deceased testified to by the heirs, but cannot testify as to other conversations not had in the presence of the heirs.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. § 718; Dec. Dig. § 177.*]

3. APPEAL AND ERROR (§ 1033*)—ERROR FAVORABLE TO COMPLAINANT—WITNESSES.

A claimant against the estate of a decedent cannot complain of error in being allowed to testify to conversations had with decedent which were not in the presence of heirs contesting the claim under Civ. Code Prac. § 606, subsec. 2, as the error is favorable to claimant.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4054; Dec. Dig. § 1033.*]

4. WITNESSES (§ 406*)—CONTRADICTION—SHOP BOOKS—DOCUMENTARY EVIDENCE.

On an issue as to whether a note filed against an estate had been procured by undue influence in defense of which claimant testified that he had only received as pay, a small amount for two years' work on his father's farm, a small book kept by deceased, entries in which were in his handwriting, and it being the only book kept by him and which contained accounts against all who had worked for him on his farm, is admissible as a shopkeeper's book to contradict claimant's statement.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 1276-1279; Dec. Dig. § 406.*]

5. EXECUTORS AND ADMINISTRATORS (§§ 473, 474*)—ADMINISTRATION SUIT—CLAIMS—EXCEPTIONS—TRIAL—QUESTION FOR JURY.

On the trial of exceptions to the report of a commissioner, allowing a note against an estate, in an administration suit, whether claimant procured the note from decedent by undue influence *held*, under the evidence, for the jury.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. § 2051; Dec. Dig. §§ 473, 474.*]

6. APPEAL AND ERROR (§ 882*)—TRANSFER OF CAUSES—ERROR FAVORABLE TO COMPLAINANT.

A party cannot complain because, on his motion and over the objection of the other party, the cause was transferred from the equity to the ordinary docket to be tried by a jury.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3593; Dec. Dig. § 882.*]

7. EXECUTORS AND ADMINISTRATORS (§ 473*)—ADMINISTRATION SUIT—CLAIMS. AGAINST ESTATE—ISSUE OF FACT.

An exception in an administration suit to the report of a referee allowing a note against the estate, on the ground that the note was procured by undue influence, raises a common-law issue which should be tried by a jury.

[Ed. Note.—For other cases, see Executors and Administrators, Dec. Dig. § 473.*]

Appeal from Circuit Court, Bourbon County.

Administration suit by Joshua Barton's administrator and others against Virgil Barton. From a judgment for plaintiffs, defendant appeals. Affirmed.

Morgan & Darragh and Emmett M. Dickson, for appellant. Talbott & Whitley, Chas. A. McMillan, and Robert B. Franklin, for appellees.

NUNN, J. One Joshua Barton died in the year 1908 at the age of 74 years, and left surviving him his wife, three boys, and two girls, all of whom were over 21 years of age at the time of his death. Barton owned about 760 acres of land worth about \$70 an acre. He was an extensive farmer and stock raiser. He had from 40 to 45 horses and about 75 head of Durham cattle, all pedigreed. Barton owed at the time of his death \$40,000 or \$50,000 which was secured by mortgages on his land and most of his stock. This action was brought by his administrator, widow, two daughters, and two of his sons against Virgil L. Barton, his other son, and his creditors for a settlement of the estate. A reference was made to the master commissioner to take proof of claims against the estate, and appellant, Virgil L. Barton, filed three, one a note for \$500, which is as follows: "\$500.00. Apr. 7th, 1905. One day after date I promise to pay V. L. Barton or order five hundred dollars for his improvements on my farm if I give him the land these improvements are on, this note is null and void. Value received, negotiable and payable at Millersburg Deposit Bank. Otherwise this note stands good for the amount mentioned. Joshua Barton." Another one of the claims filed by him was

an account for labor performed for Joshua Barton from April 7, 1906, to August 7, 1908, at \$1,000 per year, amounting to \$2,333.33. The third claim was a note for \$8,000, and is as follows: "\$8,000.00. Cynthiana, Ky., Apr. 7th, 1906. One day after date I promise to pay to the order of V. L. Barton at the National Bank of Cynthiana, for value received, eight thousand dollars, with five per cent. interest from date until paid. The payee and all subsequent indorsers waive demand, protest, notice of protest, and all legal diligence to enforce the collection of this note. For attending and running the farm for eight years. Joshua Barton." The commissioner filed his report allowing these claims, and appellees filed exceptions to the claim for \$8,000, which are as follows: "(1) They have no knowledge or information sufficient to form a belief whether decedent either signed or delivered said note, and they require proof thereof. (2) If the defendant did sign and deliver said note, there was no consideration therefor. (3) If the decedent did sign and deliver said note, the decedent was not in fact indebted to the payee, and the execution thereof was procured by the exercise of undue influence over the payor by the payee. (4) The decedent was, at the time the said note bears date, very much involved financially, and anticipated bankruptcy, or an assignment, and was old and broken in health, and the payee young and vigorous and his son. And, if the decedent did sign and deliver said note, the payee, his son, procured the execution of said note by the exercise of undue influence over the maker, in encouraging the parental instincts of the maker to provide for the maker's wife and children, even as against creditors, and encouraging and leading the maker to believe that his estate, to the extent of said note, could be thereby saved to the maker's family, including the said payee, his son. (5) Because, if the decedent did sign and deliver said note, the payee, by the exercise of undue influence over the payor, induced the payor to execute such note for the purpose and with the object of saving that much of the maker's estate for the benefit of the maker's family, including the payee, his son, and the payee is now, contrary to such secret trust, undertaking to enforce the said note for his own personal benefit as a debt against the estate, and against the widow and other children of the decedent, when the maker was not in fact indebted to him. And the payment of said note as a debt would be gross injustice to the widow and other children of the decedent." Appellees withdrew the first exception and filed in lieu thereof the following: "(1) Either the decedent delivered the note for \$8,000 to his son V. L. Barton for the purpose of borrowing money for the decedent, and for no other purpose, and the same was not used for the purpose for which it

was intended; (2) or the facts set out in the exceptions 2, 3, 4, and 5 filed March 19, 1909, were and are true."

After the above exceptions were filed, appellees also filed exceptions to the account for \$2,333; but they were not litigated in this action. On March 23, 1909, appellant, Virgil L. Barton, moved the court to grant an issue out of chancery to try the questions of fact raised by the exceptions filed to the master commissioner's report allowing the \$8,000 note. Appellees objected and excepted to this order and afterwards moved the court to set it aside and grant them a trial of the issues in equity, which the court refused to do and appellees excepted. The parties entered into a trial of the case. The evidence was heard, and the jury, upon the instructions of the court, found against the note. At the conclusion of the evidence, the court made an oral statement to the jury telling them, in effect, that the first exception filed by appellees had been withdrawn, and that they would therefore consider no evidence with reference thereto, and that the exceptions filed in lieu thereof to the effect that Joshua Barton had issued this note for the purpose of borrowing money and for no other were not supported by any evidence and should not be considered. The court further told the jury that it should not consider exception No. 5, which was to the effect that the note was executed for the purpose of providing for the family as against other creditors, as there was no proof upon that issue. The court then gave the jury, upon its own motion, the following instructions:

"A. You are instructed to find for defendant, Virgil L. Barton, the sum of \$8,000, with interest thereon at 5 per cent. per annum from the 7th day of April, 1906, until paid, the amount claimed by him on the note in controversy, unless, however, you believe from the evidence that at the time said note was signed and delivered by the decedent, Joshua Barton, that the same was so signed and delivered by him without any consideration therefor, and the meaning of the words, 'without any consideration,' as applies in this case, is as follows: If you believe from the evidence that at the time the said note was signed and delivered, that the decedent, Joshua Barton, was not indebted to the defendant, Virgil L. Barton, for any amount for services which he claims to have rendered, and that he was under no obligation to pay any sum whatever for work and labor and services claimed to have been rendered, then the defendant will take nothing under said note, and your verdict shall be for the plaintiffs.

"If, however, you believe from the evidence that the defendant, Virgil L. Barton, rendered any services to the decedent, Joshua Barton, within the period of eight years prior to the making of said note in the way of attending and running the farm and car-

ing for the stock, for which said decedent, Joshua Barton, had, by contract, expressed or implied, agreed to compensate him, then you will find for the defendant the full amount of the note, as stated by the first paragraph of this instruction.

"B. If the jury believe from the evidence that at the time the said note was signed and delivered to the defendant, Virgil L. Barton, the said decedent, Joshua Barton, was induced to sign and deliver the same to the said Virgil Barton by the exercise then and there of undue influence upon him upon the part of the defendant, Virgil L. Barton, and that but for said undue influence he would not have signed and delivered the same, then you will find for the plaintiffs and against the said Virgil L. Barton.

"Undue influence," as used in these instructions, is defined as follows: The court instructs the jury that influence obtained by modest persuasion and argument addressed to the understanding, or by mere appeals to the affection, cannot be properly termed undue influence in a legal sense; but influence obtained by flattery, importunity, threats, superiority of will, mind, or character, or by what art soever that human thought, ingenuity, or cunning may employ, which would give dominion over the will of the decedent to such extent as to destroy free agency, or constrain him to do against his will what he is unable to refuse, is such an influence as the law condemns as undue, when exercised by any one immediately over the act, whether by direction or indirection, or obtained at one time or another."

Appellant objected to the widow and other children testifying to what Joshua Barton said to him and what he said to Joshua Barton with reference to the issues, as Joshua Barton was dead and they were heirs of his estate. The court did not permit them to testify as to what Joshua Barton said, unless it was said to or in the presence and hearing of appellant. This was clearly competent under the Code and all the authorities with reference thereto, and we deem it unnecessary to cite them. This being so, appellant had a right to testify to any statement or conversation with Joshua Barton which was testified to by appellees. The court, however, did not confine him to these statements, but permitted him to tell other conversations had with his father and all about the execution and delivery of the note when no one was present except appellant and his father. This was error, but it was in favor of appellant. Subsection 2 of section 606 of the Civil Code of Practice provides: "Subject to the provisions of subsection 7 of this section, no person shall testify for himself concerning any verbal statement of, or any transaction with, or any act done or omitted to be done by * * * one who is dead when the testimony is offered to be given except for the purpose, and to the extent, of affecting one who is living, and who, when over fourteen years of

age and of sound mind, heard such statement, or was present when such transaction took place, or when such act was done or omitted, unless * * * (c) the decedent, or a representative of, or some one interested in, his estate, shall have testified against such person, with reference thereto." Many decisions of this state might be cited sustaining this position; but the Code is so explicit it needs no construction.

Appellant testified that prior to 1900 he and his brother Frank raised crops of corn on the farm on the shares; that they gave their father one-half at the time of division; that he and his brother took one-fourth each; that at the beginning of 1900 his father made a proposition to him and the other boys wherein he stated that he was indebted, and as he was old he was unable to pay out; that if they would stay on the farm he would furnish them with everything to live upon if they would work for \$150 or \$200 a year, which would enable him to pay off his indebtedness and leave the property for them and their sisters. Appellant stated that he accepted this proposition but his brothers did not; that he worked under this arrangement for two years and was making arrangements at the end thereof to move to Indiana and take charge of a farm for a man by the name of Vose, who had agreed to furnish him a home for himself and family and all the supplies raised on the farm that he needed and to give him \$500 a year for managing the farm; that upon his return from that state, and after telling his father what he had been offered, he told him that he could not get along without him upon the farm, and if he would stay with him he would do a better part by him than Vose. Appellant testified that he told his father that if he would do that he would remain with him; that he did stay upon the farm with this understanding until his father's death in 1908; that he took charge of the horses, cattle, hogs, and sheep and gave them particular attention; that he managed and helped to raise the crops; that he did not raise any corn after that on the shares, except one year, about 1905, he raised about 80 acres of corn. He further testified that late in the afternoon of April 6, 1908, his father was driving home by his house, and he went out and got into the buggy with him and drove 200 or 300 yards to his father's barn; that while they were on their way he reminded his father that he had promised to arrange with him for his work and do a better part by him than Vose offered to do, and that death was certain and life uncertain; that his father replied, "Blame it, I will fix it to-night"; that the words, "blame it" were bywords of his father's; that on the following morning, April 7th, he saw some one coming towards his house, and he stepped out of the door to see who it was, and he met his father, who handed him a paper, the \$8,000 note, and told him to read

it and see if it would satisfy him. He stated that he read the paper and told his father it was all right if it was written right, and his father said it was; that about an hour after he received the paper a man by the name of Kennedy was passing by, and he showed it to him, and Kennedy said he wished he had not seen it. This was all appellant testified to with reference to the note. Appellees agree with appellant as to his raising crops on the shares prior to 1900, and as to his working for \$150 or \$200 and provisions for himself and family during the years 1900 and 1901, and as to his becoming dissatisfied with his contract and attempting to make arrangements with somebody in Indiana. But appellees testified that upon appellant's return from Indiana he said that he did not like up there and was not going back; that he had rather work the farm at home on the shares, and after that he did work on the shares. Appellant testified that his father had one or two public sales every year; that he took charge of the stock and prepared it for sale and performed services at all the sales. There is not much controversy about this, but the brothers say that they also aided at the sales. One of appellant's witnesses, Dr. Righter, says that at about the time appellant was leaving for Indiana, or while he was there, he heard Joshua Barton say that he could not get along very well on the farm without Virgil, and that he was afraid that his (Virgil's) father-in-law and mother-in-law were influencing him to leave, that after Virgil's return he asked Joshua Barton if Virgil was going to stay with him, and he answered that he had fixed or satisfied Virgil, and that he was going to stay. Appellees testified that soon after the burial of their father they met in Judge Stitt's office in Paris, Ky., for the purpose of agreeing on some one to act as administrator; that while there, appellant being present, they all tried to see to what extent the estate was indebted, and each one gave in all the claims against it that they could think of, but appellant did not mention at that time the \$8,000 note. They met again, four or five days later, at the old home place, and some of them, during the meantime, had heard of this \$8,000 note, and they asked Virgil if he had it and if he was going to present it, and he said, "Yes," he reckoned he would. One of his brothers then said to him that he ought not to, because he knew there were other notes of the same kind out which had been executed by his father. The court sustained an objection to this statement as to there being other notes of the same kind in the hands of the children, and no proof of this character was afterwards introduced or offered to be introduced. Appellee introduced the clerk of the county court and showed that Joshua Barton's mortgaged indebtedness in 1906 amounted to \$35,000 or \$40,000, and the sheriff showed \$4,000 or \$5,000 worth of unset-

tled executions in the early part of 1906 against Joshua Barton. Appellees also introduced the cashier of a bank in Paris, who testified that the bank had loaned Joshua Barton \$4,000 or \$5,000 with which to pay off the judgments, or executions; that the loan was made for six months; that it was hard for Joshua Barton to obtain a loan on account of the previous mortgages covering all that he had; that the bank made the loan upon the following conditions: That is, Joshua Barton was to draw up a deed of assignment making the cashier of this bank his assignee, execute it, and leave it with the cashier to be filed of record in the county court clerk's office if he failed to pay the amount borrowed at the end of the six months. The six months expired about the time the \$8,000 note was executed and delivered. There was a great deal of testimony to the effect that appellant made a valuable hand upon his father's farm, and much to the effect that he continued to work on the farm as he had been in the habit of doing. All the witnesses who testify upon the subject agree that Joshua Barton was active in the control and management of his farm; that he rode horseback over it most every day and directed the work thereon, until his last illness in 1908.

Appellees introduced a book kept by Joshua Barton. The book is not before us; but there is what purports to be a copy in the record of all that the book contained relative to the issues. Appellant testified that his father paid him only \$100 during the two years he worked for \$150 or \$200 a year. The book contradicts this statement, and there seems to be no doubt but what Joshua Barton kept the book and that the entries are in his handwriting. Appellant's counsel objected to this book being introduced and refer to the cases of *Montgomery County v. Bean*, 82 S. W. 240, 28 Ky. Law Rep. 568, and *Little v. Berry*, 113 S. W. 902, as sustaining their position that it was incompetent evidence. The book referred to in the case of *Montgomery County v. Bean* was introduced to show a payment by the treasurer on a lot, and the court decided that it was not admissible to show an absolute sale of the lot by B. to the company. The one referred to in the case of *Little v. Berry* did not purport to be a book of accounts against individuals, but was only a memorandum of certain transactions by the owner as he noted them in the book, and the court decided that the owner of that book could not introduce it as original entries; that it was not the kind of book authorized to be introduced as evidence. The book introduced in the case at bar, it is true, is a small one; but it is shown to be the only one kept by Joshua Barton at that time, and the entries are accounts made therein by himself against all the hands who worked on the farm at that time. In our opinion this was a "shop-keeper's book" in the meaning of the language used in the last opinion referred to

and was competent evidence. Appellant should have been permitted, after it was introduced, to explain it the best he could, which was done, and he simply stated that he knew nothing of the transactions set forth in the book.

There was very little testimony tending to show undue influence on appellant's part in obtaining the note; but this, as well as the issue of no consideration, was succinctly and properly submitted to the jury.

In our opinion, there was more evidence to the effect that Joshua Barton executed and delivered this note for the purpose of giving the members of his family an advantage over his creditors, than there was evidence to support the two issues submitted to the jury. The testimony shows that the note was executed at a time when Joshua Barton was in embarrassed circumstances and at about the time the assignment which he had already executed was to take effect; but the failure to submit this issue was not prejudicial to appellant, but to appellees.

The note stated that the consideration for it was eight years' services, from 1898 to 1906, which would make \$1,000 per year, and, besides this, appellant was furnished with food supplies for himself and family. But few farmers could pay such a price. This fact of itself is suspicious, and, besides, the note was executed for \$1,000 for three years, as all agree that for 1908 and 1909 appellant worked upon the farm with his brother for a part of the crops, and for 1900 and 1901 he worked under a contract price of \$150 or \$200 a year. We cannot understand why Joshua Barton would execute a note agreeing to pay \$3,000 or \$4,000 for these years, unless, as stated, he wanted to give his children an advantage over his creditors. If appellant worked on the farm for a part of the crops until 1906, as shown by appellees' testimony, the note was given without any consideration.

Appellant has no right to complain because this case was transferred from the equity to the ordinary docket in the lower court to be tried by a jury. It was done upon his motion; the order was made over the objection of appellees, and, besides, the exceptions to the report allowing the note raised a common-law issue, which should have been tried by a jury, as was done.

There being no errors prejudicial to the substantial rights of appellant, the judgment is affirmed.

SHAYER'S ADM'R et al. v. EWALD'S EX'R.†
(Court of Appeals of Kentucky. Feb. 28, 1911.)

1. WILLS (§ 657*)—CONDITIONS—LEGATEES—ACCEPTANCE—"ALL THE LEGATEES."

Where a testator left legacies to relatives, with the provision that all the legatees shall ac-

cept such legacies in full satisfaction of all claims against testator or his estate, the words "all the legatees" meant "each" of them, and the legatees who were willing to accept under the will could do so, regardless of the acceptance of the others.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 1551, 1552; Dec. Dig. § 657.*]

For other definitions, see Words and Phrases, vol. 1, pp. 812-835; vol. 8, pp. 7572, 7573.]

2. WILLS (§ 461*)—CONSTRUCTION—DEVICES.

A construction that will sustain a devise is preferred to one that will defeat it, unless the latter is required by the language of the will; and conjunctive words will be read as disjunctive, when necessary to effectuate testator's intention.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 980; Dec. Dig. § 461.*]

3. WILLS (§ 656*)—CONSTRUCTION—CONDITIONS.

Where a will is correctly drawn, the court will not extend by construction a condition beyond the natural meaning of the words used to defeat the estate, by a contingency the testator did not provide for.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 1546-1550; Dec. Dig. § 656.*]

Appeal from Circuit Court, Jefferson County, Chancery Branch, Second Division.

Action by L. P. Ewald's executor against Sophia E. Shaver's administrator and others. From a judgment for plaintiff, defendants appeal. Reversed and remanded.

Kohn, Baird, Sloss & Kohn, for appellants. P. B. Muir, Chas. H. Gibson, and Gibson, Marshall & Gibson, for appellee. Thos. A. Barker, guardian ad litem.

HOBSON, C. J. L. P. Ewald died a resident of Jefferson county, testate, on July 31, 1909. By his will, which was duly admitted to probate, he designated the Columbia Trust Company as executor and trustee. It accepted the trust and brought this suit for a construction of the will and the direction of the chancellor in the administration of the trust.

Ewald left an estate of between \$2,000,000 and \$3,000,000. He had adopted three children, to whom he left the bulk of his estate in trust; and it is alleged that he apprehended that his brothers and sisters might attack the validity of the adoption of the children and might contest the will. His brothers and sisters and their descendants were his heirs at law, and would receive the property if the will was broken. The third paragraph of the will is in these words:

"I give and bequeath to the widow and children of my brother Jacob C. Ewald, of Saint Louis, Missouri, who shall survive me, share and share alike, in the aggregate, the sum of fifteen thousand dollars (\$15,000). I give and bequeath to my sister, Rosa E. Damon, of Saint Louis, Missouri, the sum of fifteen thousand dollars (\$15,000). I give and bequeath to my sister Sophia E. Shaver, wife of Thomas Shaver, of Jefferson county, Kentucky, the sum of fifteen thousand dollars (\$15,000). I give and bequeath to my sister,

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

† Rehearing denied April 14, 1911.

Julia E. Toohoy, of Saint Louis, Missouri, the sum of fifteen thousand dollars (\$15,000). I give and bequeath to my sister, Lizzie Ewald, of the city of New York, the sum of fifteen thousand dollars (\$15,000). I give and bequeath to my sister Ann Ewald, of the city of Saint Louis, Missouri, the sum of fifteen thousand dollars. I give and bequeath to my sister Katherine Ewald, of the city of Saint Louis, Missouri, the sum of fifteen thousand dollars (\$15,000). I give and bequeath to my brother J. Howard Ewald, of the city of Saint Louis, Missouri, the sum of fifteen thousand dollars (\$15,000). I give and bequeath to my brother Henry F. Ewald, of the city of Saint Louis, Missouri, the sum of fifteen thousand dollars (\$15,000). The bequests in this third clause, however, are made on the express condition that all the legatees therein named shall accept these legacies in full and complete satisfaction of all claims or pretended claims against myself, or my estate, or of any interest therein, of every kind and nature whatsoever. In the event of any of the legatees named in this clause should die before me, without leaving any descendants, their legacies shall lapse. This, however, does not apply to the legacy made to the widow and children of Jacob C. Ewald, unless all of them should die before me without issue. My executor hereinafter named is authorized to pay these legacies as soon as it can be conveniently done after my decease."

Four of the legatees under this clause filed their petition in the action, asking that the \$15,000 devised to each of them be paid them. The circuit court sustained a demurrer to their petition, on the ground that the other five had not signified an election to take under the will, and that none of the legacies were payable unless all of the legatees accepted the legacies as provided in the will. The petition of the legatees having been dismissed by the circuit court, they appeal.

The only question presented on the appeal is whether each of the legatees may accept for himself the provisions of the will, and receive his \$15,000, or whether all must accept before any one of them will be entitled to receive anything. In *King v. Grant*, 55 Conn. 166, 10 Atl. 505, the testator bequeathed certain property to his sister and two nieces, one-third to each, as long as they remained unmarried. One of them married, and it was urged that the interests of all were defeated; but the court held that it could not presume that the testator intended to punish all for the marriage of one. In *Rockwell v. Swift*, 59 Conn. 289, 20 Atl. 200, the testator devised certain property to Charlotte Swift and Salmon Swift; this clause of the will closing with these words: "The above devise and bequest to the said Charlotte and Salmon being nevertheless subject to and upon the expressed condition that Charlotte and Salmon remain with and care for me during the remainder of my life, and present no bill and make no charges against

my estate." Salmon presented a bill against the estate. The claim was allowed and paid. Charlotte presented no bill, and remained with him and took care of him during the remainder of his life. It was insisted that, the estate being joint, the act of Salmon in presenting a bill defeated the devise to Charlotte. The court held otherwise. It said: "As the legacy in form is joint, and as the literal language of the condition seems to point to a joint act, the question is suggested whether the testator could have intended that there should be no forfeiture at all, unless both legatees should concur in violating the condition. This is too unreasonable to be entertained for a moment. Any one competent to make a will, who deemed a condition of this kind essential to protect his estate from a double claim, would see that such a condition must defeat his object by the offering of a reward of a double portion to the one who should violate the condition made expressly to protect the estate. On the other hand, did the testator intend by this provision that the act of one alone should defeat the legacy to the other, so that the one faithfully observing the condition should not be able to have either a legacy or compensation for services? This, also, seems to us very unreasonable. The testator must have been fully aware that the services of his cousins Charlotte and Salmon, which were being rendered at the time of the execution of his will, were separate and not joint services, and that each would have a separate claim on that account, and not a joint claim with the other. It seems, therefore, that he could not have intended, on the one hand, that the joint or concurrent act of both should be essential to forfeit the legacy to either; nor, on the other hand, that the separate act of one without the concurrence of the other should defeat the legacy to the one who had conformed to the condition in every respect. It is manifest that the thing to be done, viz., the rendition of services, was the consideration or motive inducing the testator to make the gift. It would therefore defeat the will of the testator, were the condition made to operate so as to avoid the gift where there had been no failure of the consideration." See, also, *Pendleton v. Kinney*, 65 Conn. 222, 32 Atl. 331. In *Dunlap v. Ingram*, 57 N. C. 178, certain property was left to a number of devisees, and it was provided that the executors should not pay the legacies "until each of them applying for his legacy shall execute to them a full release and acquittance" for all demands against the estate. It was held that those who released their demands should be paid, although the others had not released.

In 1 *Redfield on Wills*, 487, it is said: "There are, no doubt, many instances where, to prevent the divesting of a legacy and carry out the manifest intent of the testator, the word 'and' will be construed 'or.'" Upon the same principle "all" may be construed as

meaning "each." A construction that will sustain a devise is preferred to one that will defeat it, unless the latter is required by the language of the will. *Holmes v. Walter*, 118 Wis. 409, 95 N. W. 380, 62 L. R. A. 986. Conjunctive words will be read as disjunctive, and vice versa, when necessary to effectuate the testator's intention; and where, as in this case, the will is carefully drawn, the court will not extend by construction a condition beyond the natural meaning of the words used to defeat the estate by a contingency he did not provide for. *Moore v. Sleet*, 113 Ky. 606, 68 S. W. 642, 24 Ky. Law Rep. 426, and cases cited.

In the will before us the testator clearly intended to make a provision for each of his brothers and sisters and for the children of those that were dead. One of them was in no way interested in the legacies to the others. We cannot presume that the testator intended that all the others should be denied the benefit of his bounty, if one of the legatees refused to accept it. The language which he used does not naturally convey any such meaning. He says the bequests in this third clause "are made on the express condition that all the legatees therein named shall accept these legacies in full and complete satisfaction of all claims or pretended claims against myself or my estate." He does not say that no one of the legatees shall receive his legacy unless all accept. He only says that all the legatees must accept the legacies in full satisfaction of all claims against his estate. The natural meaning of the language used is that all these legatees, if they accept the legacies, must present no claim against the estate. The language of the will does not naturally bear any other construction. The word "all" is used in the sense of "each"; for one legatee was in no manner interested in the legacy to the other. *Sherburne v. Sischo*, 143 Mass. 439, 9 N. E. 797. The legatees who accept the legacies will accept them in full of all interest in the estate, and will have no interest in it, though the will should be contested and held invalid. Each legatee may act for himself. Those who do not accept their legacies will obtain nothing under the will, and be entitled to no part of the estate so long as the will stands.

Judgment reversed, and cause remanded, for further proceedings consistent herewith.

WEIKEL v. STERNS et ux.

(Court of Appeals of Kentucky. March 2, 1911.)

FRAUD (§ 17*)—CONCEALMENT.

Where plaintiff connected the sewer from his building with a pit in the rear thereof, and then built a residence over the pit and covered it with clay, the pit at that time being full of sewage up to about a foot below the level of the cellar of the residence, and sold the residence to plaintiff, telling him nothing about the

pit or sewer pipe, and plaintiff was unable to get tenants to move into the house because of the odor, defendant was liable in damages.

[Ed. Note.—For other cases, see *Fraud*, Cent. Dig. § 15; Dec. Dig. § 17.*]

Appeal from Circuit Court, Jefferson County, Common Pleas Branch, Third Division.

Action by W. A. Sterns and wife against Fred Welkel. From a judgment in favor of plaintiffs, defendant appeals. Affirmed.

Harrison & Harrison, for appellant. Edwards, Ogden & Peak, for appellees.

HOBSON, C. J. W. A. Sterns and wife bought a house and lot in Louisville from Fred Welkel. They afterwards brought this suit against him to recover damages for deceit in the sale of the property. On the trial of the case in the circuit court there was a verdict and judgment in their favor for \$250. Welkel appeals.

Practically the only question made on the appeal is that the court should have peremptorily instructed the jury to find for the defendant under the evidence. The facts shown are these: Welkel owned a lot at the corner of Park and Frankfort avenues, in the city of Louisville. On the front of the lot he built a drug store, with a residence flat overhead. On the rear of the lot he had a stable. The sewage from the drug store and the flat overhead was run into a pit which he had dug at the back of the lot under the stable. After some years he tore the stable away, and erected where it stood a dwelling house; and this was the property which he sold Sterns, about the time the house was finished, and before it had been occupied. The pit referred to, when he tore the stable away, was full. He had it cleaned out about a foot below the level of the cellar which he dug, leaving about eight feet of the pit full of sewage, in the middle of the cellar, and this he covered over with clay; the pipe from the drug store building still emptying into the pit. In this condition of things, he sold the property to Sterns, telling him nothing of the pit or the pipe running into it, which was covered up with the clay which he had put over it. The tenant which Sterns put in the property vacated it in two weeks on account of the odor, and he was unable to get any other tenant to move into the house. Finally, after some months, he discovered the existence of the pit, had it cleaned out, had the pipe disconnected, and had the pit filled with clay. After this he had no trouble, and this action was brought for the damages he had sustained in the meantime.

It is insisted for Welkel that an action for deceit does not lie, unless the fraud was knowingly practiced, or there was an intentional suppression of facts, where the defendant was in duty bound to disclose them.

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

Kerr on Frauds, 382-384; Shive v. Merritt, 104 S. W. 368, 31 Ky. Law Rep. 978. But a man must be presumed to intend the necessary consequences of his own voluntary act. The voluntary doing of an act which necessarily results in injury to another, where the party knows the facts and had reason to know that the injury will result, will sustain an action for fraud. 20 Cyc. 2738. It is not necessary that a misrepresentation in words be made. The house which Welkel had built was built for a residence. He knew, when he sold it to Sterns, that Sterns was buying it to rent to another as a residence. He knew the pit full of sewage was in the cellar, and a reasonable man situated as he was must have known that such a pit, with a pipe running into it carrying in water and more sewage every day in a cellar under a house, would render that house unfit for a residence. To sell such a house without disclosing the situation, when the purchaser would have no means of knowing the facts from the pit being covered up as it was, was to practice a fraud upon him.

It is insisted that Welkel acted in good faith and without knowledge of the real condition of things; but the proof shows that he knew enough facts to put a reasonable man on notice, and when he sold an innocent purchaser the house, causing him a loss by reason of the concealment of the facts, the loss should fall on him, and not on the purchaser. We rest our judgment on the ground that the facts which he knew were sufficient to apprise a man of ordinary prudence of the truth, and to impose upon him the duty to inform the purchaser of the situation which he had concealed from him. Jordan v. Pickett, 78 Ala. 331; Cardwell v. McClelland, 8 Sneed (Tenn.) 150; Minor v. Sharon, 112 Mass. 477, 17 Am. Rep. 122.

Judgment affirmed.

STAFFORD v. PINSON et al.

(Court of Appeals of Kentucky. Feb. 23, 1911.)

1. CONTRACTS (§ 305*)—PERFORMANCE—WAIVER OF DEFECTS.

A party will not be allowed to mislead one with whom he is dealing, and then take advantage of the conditions his conduct has created, and hence a party to an option contract who accepted a check in payment in lieu of currency, and agreed to hold it for four days, cannot declare a forfeiture of the contract either because the payment was by check, or because at the time of giving drawer did not have sufficient funds to cover it.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 1467-1475; Dec. Dig. § 305.*]

2. MINES AND MINERALS (§ 70*)—LEASE—ROYALTIES.

A lease of coal land provided that the lessee, if coal was found in paying quantities, should pay \$1,000 as the first payment of royalty for the leasing of the coal at \$.06 per ton, and the lessee offered a check reciting, "For first an-

nual royalty on lease." Held, that the acceptance of this would not have prevented the recovery of the rest of the royalty, since the words would have to be read in connection with the contract, and could not change its terms.

[Ed. Note.—For other cases, see Mines and Minerals, Cent. Dig. §§ 192, 193; Dec. Dig. § 70.*]

3. MINES AND MINERALS (§ 70*)—COAL LEASE—FORFEITURE.

In a suit where the validity of a mining lease which was to become effective only upon the payment of a certain sum by a stipulated time, evidence held to show that the lessee had not forfeited his rights under the lease because of nonpayment; the lessor having waived the breach.

[Ed. Note.—For other cases, see Mines and Minerals, Cent. Dig. § 195; Dec. Dig. § 70.*]

Appeal from Circuit Court, Floyd County.

Suit by W. B. Pinson and others against F. M. Stafford. From a judgment for plaintiffs, defendant appeals. Reversed.

May & May, for appellant. Harkins & Harkins, for appellees.

CARROLL, J. On November 6, 1908, the appellee Hamilton entered into a contract with the appellant, Stafford, by the terms of which he leased to him 600 acres of land for the purpose of mining coal therefrom. The contract stipulated that Stafford "was to have until the 6th day of January, 1909, under this contract to enter upon said lands for the purpose of making coal entries thereon and for the purpose of exploring and developing said coal, and ascertaining the quantity and quality thereof; then, if in the opinion of Stafford same should be found in such quantity and quality to be a profitable mining proposition, he is to pay on or before the 6th day of January, 1909, the sum of one thousand dollars, which amount is to be the first payment of rent or royalty as a consideration for the leasing under this contract of said coal at the rate of six cents per ton for the coal taken from said land." On January 4, 1909, the time in which Stafford might perform the conditions of the contract was extended for 60 days from that date, and on March 4th Stafford gave to Hamilton in person a check on the Catlettsburg National Bank for \$1,000, reciting in the check that it was "For first annual royalty on lease. 11-6-1908." Stafford testifies that, when he gave this check to Hamilton, he told him that he did not have sufficient money in bank to pay it on that day, which was Thursday, but that if he would hold it until the following Monday, March 8th, it would save him, Stafford, the trouble and expense of making a trip back to Catlettsburg until he returned there Saturday evening, and that Hamilton agreed to do this and accepted the check—not making any objection to the words written in the face of it. On the following day Hamilton telegraphed the bank, inquiring if the check was good, and the bank answered "not to-day," but on March

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

8th the bank sent Hamilton a telegram saying that the check would be paid on presentation. Hamilton did not present the check on March 8th, or at all, and on March 24th he wrote Stafford a letter, inclosing the check, saying: "You remember that I refused to accept the check as payment, explaining to you at the time that I had since the date of our contract sold a half interest in my coal lands to W. B. Pinson and F. C. Scott, and that I could not make any new contracts without their approval; and since you were here last, I have seen them and they do not feel bound in any way to further entertain your proposition, claiming your tender of payment not legal and comes too late. Therefore, your check is returned." In April, 1909, the appellees Pinson and Scott, to whom Hamilton had sold the mineral rights mentioned in the contract with Stafford, brought in connection with Hamilton this suit against Stafford to enjoin him from entering upon or trespassing upon the land described in his lease. After the pleadings had been made up, and the evidence taken, the court adjudged appellees entitled to the relief sought, dismissed the counterclaim of Stafford, and directed a cancellation of the lease made by Hamilton to Stafford which had been put to record. From this judgment Stafford appeals.

Returning now to the facts of the case: It appears that on March 1, 1909, Hamilton entered into a written agreement with Pinson and Scott, by which he leased to them the mineral rights that he had previously leased to Stafford, the contract reciting that it "was subject to the terms, considerations, and conditions, together with such profits and liabilities as might arise from or grow out of a written contract executed on the 6th day of November, 1908, and renewed on the 4th day of January, 1909, between Hamilton and Stafford." It will be noticed that by the extension of the contract Stafford had until March 4th in which to pay the \$1,000 stipulated for in the lease, and that three days before this extension expired Hamilton leased the land to Pinson and Scott. The terms of the lease to Pinson and Scott were more advantageous to Hamilton than the contract he had made with Stafford, and it is very plain from the evidence that he was induced by this fact to attempt to renounce the agreement with Stafford, and was encouraged to do so by Pinson and Scott. Hamilton testifies that he did not accept or agree to hold until March 8th the check given to him by Stafford on March 4th, although he admits that Stafford asked him to do so and assigns as reasons for declining to accept the check that the words "For first annual royalty on lease. 11-6-1908," were objectionable as not in accordance with the terms of the written lease, and that the check was not a payment of the \$1,000. But the letter written by Hamilton to Stafford on March 24th makes no mention of the fact that these words in

the check were objectionable, and this omission in connection with other circumstances leaves the impression that these words in the check did not furnish the true reason for declining to accept it as a compliance with the contract. If we should assume that time was of the essence of the contract, and that a compliance with its terms required a tender in money or currency, and that, in the absence of facts evidencing a waiver of strict performance by Hamilton, the failure of Stafford to tender \$1,000 in money on March 4th, according to the conditions of the agreement, worked a forfeiture of his rights, we would nevertheless be obliged to hold that Hamilton's acceptance of the check on March 4th, with the understanding that it was not to be presented until March 8th, and his retention of it until March 24th, was a waiver of his right to claim a forfeiture on account of the failure of Stafford to pay the \$1,000 on March 4th. If Hamilton did not agree to extend the time for the payment until March 8th, or was not disposed to accept the check in lieu of money, or was not willing to receive it as it was written, he should have declined to take the check when it was tendered on March 4th, or at least should have promptly returned it. His acceptance and retention of the check on March 4th induced Stafford to believe that it was a satisfactory compliance with the contract, and that a payment of the money was not necessary. Asked, "if Mr. Hamilton had not agreed as you have stated to accept the check and hold it until Monday, would you have secured the money and paid him before Monday?" Stafford answered, "Yes, sir; my intention was to go right down on the train and get the money and bring it back, but checks was the way he did business, and I had no thought but what that would be the way to do it." Under these circumstances, it would be manifestly unfair to hold that the contract was annulled by the failure of Stafford to tender in money on March 4th \$1,000. A party will not be allowed to mislead one with whom he is dealing, and then take advantage of the conditions his conduct has created to prejudice the other party. It is true that Hamilton testifies that he offered to return the check on March 9th, and that Stafford declined to receive it; but this is denied by Stafford, who is corroborated by the fact that the check was not returned to him until March 24th. Nor are we inclined to agree with Hamilton that he was induced to decline to accept the check as a performance of the contract because of the words written in it. While we do not intend to construe the contract or to express any opinion as to its true meaning, we feel authorized to say that the words written in the check would not have prejudiced Hamilton in any way or have estopped him from recovering more than \$1,000 for the first year's royalty or rent if he was entitled to more than that under the contract. The contract provided

that Stafford should pay "the sum of one thousand dollars, which amount is to be the first payment of rent or royalty," and the check merely recited that it was "for first annual royalty on lease." These words are to be read and considered in connection with the contract, and could not have the effect of altering its terms. The fact is that Hamilton had placed himself in an embarrassing position by leasing the property to Pinson and Scott before the option he had given Stafford expired. That he was overanxious to find some excuse to avoid the contract with Stafford is apparent in almost every line of the record. It is not at all material whether Stafford had in bank \$1,000 on March 4th, if he was prepared to meet and pay the check on March 8th, and Hamilton agreed to wait until that day before presenting it for payment, which we are disposed to think he did. The answer of Stafford was made a counterclaim, and damages and other relief prayed for, but, as the case seems to have been prepared only upon the question we have disposed of, we will not consider or dispose of the matters set up by way of counterclaim, leaving them to be tried out upon a return of the case when either party may file such additional pleadings and take such evidence as may be necessary to fully present the issues made by the counterclaim.

Wherefore the judgment canceling the contract with Stafford and dismissing the counterclaim is reversed, with directions to enter an order dismissing the petition.

COX v. ILLINOIS CENT. R. CO.†

(Court of Appeals of Kentucky. Feb. 28, 1911.)

1. RAILROADS (§ 305*)—CROSSINGS—DUTY OF TRAINMEN—FRIGHTENING ANIMALS.

A railroad company is not required to remove its engine further from a crossing than is reasonably necessary to permit the free use of it for travel, but, if an engine is standing close to a crossing, the trainmen, upon being notified that its presence renders the crossing dangerous to persons whose horses may be frightened, should remove it as far as can be safely done to the train and persons connected with it.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 968-971; Dec. Dig. § 305.*]

2. RAILROADS (§ 301*)—CROSSINGS—DUTY OF TRAINMEN AND THE PUBLIC.

A railroad company has the right to use its tracks and the public to use the crossing, and each should act with due regard to the rights of the other, the trainmen to accommodate the traveler when it can be done with safety, and the traveler should respect the rights of the trainmen, and not subject them to unnecessary inconvenience.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. § 956; Dec. Dig. § 301.*]

3. RAILROADS (§ 305*)—CROSSINGS—DUTY OF TRAINMEN—FRIGHTENING ANIMALS.

Where an engine is standing close to a crossing, it is the duty of the trainmen, when the safety of persons and property on the train does not require it, to prevent unusual or un-

necessary noises which may frighten horses at the crossing.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 968-971; Dec. Dig. § 305.*]

4. RAILROADS (§ 305*)—CROSSINGS—DUTY OF TRAINMEN—FRIGHTENING ANIMALS.

The presence at crossings of travelers whose horses may be frightened must be anticipated by trainmen, and the liability of the railroad company for injuries resulting from fright of horses from unnecessary noise does not depend on knowledge by the trainmen of the presence of such travelers at the crossing.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 968-971; Dec. Dig. § 305.*]

5. RAILROADS (§ 332*)—CROSSINGS—CONTRIBUTORY NEGLIGENCE—CARE OF HORSES.

When a traveler approaching a crossing near which an engine is standing sees and knows that an engine is unnecessarily letting off steam, he should not attempt to approach the engine or cross the track without notice to the trainmen.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. § 1079; Dec. Dig. § 332.*]

6. RAILROADS (§ 332*)—CROSSINGS—DUTY OF TRAINMEN—CONTRIBUTORY NEGLIGENCE.

Where plaintiff drove up to a crossing, which was blocked by a train, and told a person not connected with the railroad to tell the engineer to clear the crossing, and, when the crossing was cleared, she drove upon the track and the horse became frightened and plaintiff was injured, but she knew the engine was making noise at the time and saw the steam escaping, she was guilty of contributory negligence.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. § 1079; Dec. Dig. § 332.*]

7. APPEAL AND ERROR (§ 1064*)—HARMLESS ERROR—INSTRUCTIONS.

Where a peremptory instruction should have been given for defendant, error in instructions as to the law were not prejudicial to plaintiff.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4219, 4221; Dec. Dig. § 1064.*]

8. RAILROADS (§ 344*)—CROSSINGS—PLEADING—VIOLATION OF STATUTE.

Negligence in violating a statute, prohibiting the standing of trains at crossings for an unnecessary length of time must be pleaded.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. § 1111; Dec. Dig. § 344.*]

Appeal from Circuit Court, Marshall County.

Action by Allie Cox against the Illinois Central Railroad Company. From a judgment for defendant, plaintiff appeals. Affirmed.

Miller & Miller and John G. Lovett, for appellant. Oliver & Oliver, Blewett Lee, C. L. Sivley, and Trabue, Doolan & Cox, for appellee.

CARROLL, J. In July, 1909, the appellant, Mrs. Cox, while driving in a buggy on a public highway, discovered a freight train standing on the crossing over which she desired to pass. Upon making this discovery, she stopped her horse some 300 feet from the railroad crossing, and, getting out of the buggy, walked down to the track for the purpose of getting the men in charge of the train to

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes.

† Rehearing denied April 14, 1911.

"cut it" or move it off the crossing, so she could go on her way. When she reached the train, she discovered on the other side of the cars a person not connected with the railroad, whom she knew, and asked him to tell the engineer to clear the crossing, and then went back to her buggy. When the crossing was cleared, Mrs. Cox got in her buggy, and when she drove down to the track her horse became frightened, and attempted to turn around, when he was caught by a person standing nearby and led off the track. The buggy was not turned over, nor was Mrs. Cox thrown out of the buggy. But, claiming that her back was injured by the act of the horse in turning the buggy partly around, she brought suit against the company to recover damages, charging in her petition that her injuries were caused by the negligent conduct of the agents of the company in charge of the train, who by their failure to use reasonable care caused her horse to be frightened with the result that she was injured as stated. In its answer, after traversing the material averments of the petition, the company pleaded that the appellee was guilty of contributory negligence in attempting to cross the track in front of the engine when she knew that steam and noise were escaping therefrom. A trial before a jury resulted in a verdict in favor of the railroad company, and a judgment was entered accordingly. The errors assigned for reversal are that the court misinstructed the jury.

The only witnesses on behalf of the appellee were herself and her husband. She testified: "I got in my buggy and drove towards the track. When I got near, the engine was making a good deal of noise, and I asked if they were ready for me to pass, and the boy on the engine signaled for me to pass, but the fireman did not get out of his seat. I drove a little way, and the steam frightened my horse, * * * and the engine was puffing, and shrieking, and puffing, and letting off steam it seemed to me at every possible place for steam to be let off. Q. State what noise it was making when it stopped south of the crossing after it had backed over the crossing. A. It was howling and shrieking in every place there is for steam to escape. Q. You say you saw the train back down beyond the crossing? A. Yes, sir. Q. That engine was escaping steam at the time, was it not? A. Yes, sir."

The husband of Mrs. Cox, who at the time in question was a farmer, but had several years before been a railroad engineer, was asked: "What is the proper method with railroad men, if you know, regarding the stopping of an engine at a crossing?" He answered: "An engine should not be allowed to escape steam that way. An engineer can prevent it if he will. Q. Do you mean that an engine can be stopped without popping off? A. Yes, sir; it can be done. Q. Can it be done without putting cold water in it?

A. Well, that is the proper way to do it. Q. Can he do it without reducing the pressure? A. No, sir. Q. When a train is to leave immediately, it is necessary to have steam up all the time? A. Not to the extent that the engine will make unnecessary noise. Q. Can you keep up the pressure without allowing it to pop off? A. Well, when the pressure gets to a certain point, the safety valve will pop off."

The engineer testifies that he had a train of 25 cars, and had been on the side track only a few minutes when some person asked if he would have the crossing cleared, and in answer he signaled his fireman, who was also an engineer, to "back up," and thereupon the fireman backed the engine off of the crossing. He further testifies that the engine was popping off steam from the time he pulled in on the side track, and was only making the usual and necessary noises that an engine that has been pulling a heavy train will make when it is stopped; that there was no steam escaping except the popping off, but that could have been controlled and lessened if he or the person in charge of the engine had noticed that it would cause the horse to be frightened, but that he had no information of this kind until after the fright of the horse was discovered, and it was then too late to regulate the engine.

The fireman testified that some person called to him and told him to clear the crossing, and that he did not see Mrs. Cox or her horse at the time, or know who it was that wanted to cross until after the horse became frightened; that, when signaled to clear the crossing, he backed the engine over it and stopped about 58 feet from it, and that steam was escaping in the same manner from the engine and it was making the same amount of noise from the time it stopped until appellee's horse became frightened; that, when he stopped the engine after clearing the crossing, he went over on his side of the cab, and then for the first time saw Mrs. Cox approaching the crossing from that side of the engine; that, when he first saw her, she was close to the track, and, observing that her horse was frightened, he stepped over to the engineer's side with the intention of putting on the injector to reduce the steam pressure, but, upon reflection, abandoned this purpose because the injector would have caused more steam to escape for a moment, and would have frightened the horse more than did the steam already escaping. He also testified that, when he went over to the engineer's side, he at once looked out, and discovered some person had hold of the horse and he was under control.

From this evidence it appears: (1) That soon after Mrs. Cox got in her buggy for the purpose of driving across the track, and continuously until her horse became frightened, the engine was making the same quantity of noise and emitting the same amount

of steam, and that Mrs. Cox with full knowledge of this fact left a place of safety and attempted to drive across the track without first requesting the persons in charge of the engine to remove it further from the crossing or so adjust it as that it would not make so much noise or emit so much steam. (2) That the fright of her horse was not discovered by the persons in charge of the engine until it was too late to remedy or remove the causes that frightened the horse, and that immediately after the horse became frightened he was caught and put under control. (3) That the noise and emission of steam was not unusual or unnecessary, but could have been lessened if the persons in charge of the engine had been apprised that it was necessary to do so.

But it is insisted that it was the duty of the persons in charge of the engine to have moved it a sufficient distance from the crossing to avoid frightening horses using the public road at or near where it crosses the railroad, or to have so regulated the engine as that it would not have made noises or let off steam in a manner calculated to frighten horses at the crossing. We do not think that a railroad company should be required to remove its engine further from a crossing than is reasonably necessary to permit the free use of it for travel; but, if an engine is standing close to a crossing, the trainmen, upon being notified that the presence of the engine renders the crossing dangerous or unsafe for travel, should remove the engine as far as can be done with safety to the train and the persons on or connected with it. The railroad has the right to use its tracks, and the public have the right to use the crossing, and each should act with due regard for the rights of the other. The trainmen should accommodate the traveler when it can be done with safety, and the traveler should respect the rights of the trainmen, and not attempt to subject them to unnecessary or unreasonable trouble or inconvenience. But, when an engine is standing close to a point where a public road crosses a railroad, it is the duty of the persons in charge of the engine, when the safety of persons and property on the train does not require it, to prevent unusual or unnecessary noises to be made by the engine, whether they see or do not see a traveler with a horse on the public road approaching the crossing; or, if they do see one, without reference to whether his horse is frightened or not. If an engine is standing near a crossing that the public have the right to use, the presence of travelers on it must be anticipated; and, if the engine is permitted by those in charge of it to make unusual or unnecessary noises, unless the safety of persons or property require it, and the horse of a traveler is frightened thereby and injury results, the company will be liable whether the persons in charge of the engine saw the traveler or not, or knew he wanted to cross,

unless it be that the traveler is guilty of such contributory negligence as would defeat a recovery. On the other hand, when a traveler approaching a crossing near which an engine is standing, and before his horse becomes so much frightened as to cause accident or injury, sees and knows that it is making noises or letting off steam, although either or both may be unusual and unnecessary, he should not attempt to approach the engine or cross the track without notifying in some way the persons in charge of the train or engine that he desires to cross, and that his horse is liable to become frightened. If he does this, and the persons in charge of the engine can with safety to persons and property prevent the engine from making noises or letting off the steam that alarmed the traveler and were calculated to frighten the horse, they should do so. But, if they do not or cannot with safety do so, then the traveler must remain in his place of safety or take the risk of attempting to cross. What we have thus said as to the reciprocal duties and liabilities of the traveler and the trainmen is not intended to relieve the company from liability in blocking a crossing for an unreasonable length of time or in violation of the statute. If this is done, the traveler may have an action for the delay occasioned, and the commonwealth a prosecution, but a traveler must not venture into a known or obvious danger, if he does he takes the risk.

Applying the principles laid down to this case, the appellee knew the engine was letting off steam and making noises when she left her place of safety; but, notwithstanding this fact, she attempted to cross. Her statement that she asked if they were ready for her to pass, and was signaled to do so, does not help her case, as she did not ask and was not responded to by any person connected with the train, and, in addition, her request was no notice that the engine would frighten her horse. The person in charge of an engine are not required to keep a lookout on premises or roads adjacent to the track for the purpose of discovering whether or not horses are being frightened by the train or engine, and are only under a duty to use precautions to prevent frightening a horse after they have discovered his fright. But in this case, if the trainmen had been keeping a lookout, they would have seen that the appellee's horse in approaching the track did not become frightened until he came within a few feet of the track upon which the engine was standing, and when it was too late to remove the cause of the fright. *L. & N. R. Co. v. Penrod*, 68 S. W. 1013, 1042, 24 Ky. Law Rep. 50; *L. & N. R. Co. v. Smith*, 107 Ky. 178, 53 S. W. 269, 21 Ky. Law Rep. 357; *L. & N. R. Co. v. McCandless*, 123 Ky. 121, 93 S. W. 1041, 29 Ky. Law Rep. 563; *L. & N. R. Co. v. Street's Adm'r*, 139 Ky. —, 129 S. W. 570.

The instructions the court gave do not in

all particulars conform to the law as we have announced it, but any error in the instructions was not prejudicial to appellant, because we are of the opinion that her negligence in leaving her place of safety and in attempting to drive across the track was the proximate cause of the injury she complains of, and that the trial court should have given as requested by counsel for the railroad company a peremptory instruction to find for it.

The point is made that the train remained an unnecessary length of time on the crossing in violation of the statute, but there is no evidence whatever to support this contention; nor was a recovery sought on account of this alleged negligence.

Wherefore the judgment is affirmed.

COMMONWEALTH et al. v. CAMDEN.
(Court of Appeals of Kentucky. Feb. 21, 1911.)

TAXATION (§§ 99, 357*)—SITUS—PERSONAL PROPERTY IN HANDS OF EXECUTOR—DEDUCTION OF INDEBTEDNESS.

As is the case under Ky. St. §§ 4020, 4023 (Russell's St. §§ 5912, 5915), where the estate of a resident testator is in the hands of his executor for settlement and distribution, the executor of a nonresident testator is to list for taxation, and pay the taxes on, the personal property in his hands, before the estate has been or should have been settled and distributed, at the place of his qualification, without regard to the residence of beneficiaries, whether within or without the state; and this without reference to the extent or character of the debts of the estate.

[Ed. Note.—For other cases, see *Taxation*, Cent. Dig. §§ 199, 597; Dec. Dig. §§ 99, 357.*]

Appeal from Circuit Court, Woodford County.

Proceeding by a revenue agent, on behalf of the Commonwealth and another, against J. M. Camden, Jr. Proceeding dismissed, and plaintiffs appeal. Affirmed.

R. J. O'Mahony, Geo. C. Webb, and Will D. Jesse, for appellants. W. O. Davis, for appellee.

CARROLL, J. This proceeding was instituted by a revenue agent in the name and on behalf of the commonwealth and Woodford county against the appellee, Camden, for the purpose of requiring him to assess as of the 1st day of September, 1908, certain intangible personal property consisting of stocks, bonds, and other evidences of debt devised to him by the will of his father, J. M. Camden, Sr. J. M. Camden, Sr., died in April, 1908, a resident of Parkersburg, Wood county, W. Va., leaving a will which was duly probated on April 28, 1908, in the probate court of the county of his residence. The chief beneficiaries of his will are his widow and two children—Mrs. Spillman and the appellee—the former two being residents of

Parkersburg, W. Va., and the latter a resident of Woodford county, Ky. The testator, who had a large estate, appointed as the executors of his will his children before mentioned, Sprigg D. Camden and the Union Trust & Deposit Company of Parkersburg; and these persons, together with the trust company, were also appointed trustees of the estate under the will. On April 30, 1908, the trust company qualified as sole executor, the other named executors declining to act, and on the date of its qualification took possession of the estate of the testator and retained the full control and custody thereof until December 29, 1908, when, having fully performed all the duties resting upon it as executor, it surrendered the trust and turned over to the trustees of the will all the property that came into its hands as executor. It will be observed that, at the time it was sought to have the appellee list the personal property received under the will of his father, it was in the control and possession of the West Virginia executor for the purpose of settling the estate. And so the question presented is, Should a resident devisee under the will of a nonresident be required to list for taxation at the place of his residence the intangible personal estate devised to him by the will while such personal estate is in the custody and possession of the foreign executor for the purpose of settling and distributing the estate under the will and the laws of the state where the will was admitted to probate? In the consideration of this question, and so that it may be definitely disposed of, we will assume that the resident devisee, Camden, was at the time it was sought to require him to make the assessment the beneficial owner of the estate, subject to the indebtedness of the testator that it is claimed should have been assessed, and that, upon a settlement and distribution of the estate by the executor, he would after the payment of debts against the estate be placed in the beneficial possession of the share given to him by the will. The West Virginia statute (Code 1906, c. 87, § 3322) provides in part that: "A personal representative shall not be compelled to pay any legacy given by the will or make distribution of the estate of his decedent until after a year from the date of the order conferring authority on the first executor or administrator of such decedent. * * * And the will of the testator directed that "no distribution or payment of income shall commence to be made until practically one year from my death." Observing the direction in the statute as well as the will, there was no unreasonable delay on the part of the executor in settling and distributing the estate, as at the date it was sought to assess it the estate had only been in the hands of the executor about four months. But, if the contention of counsel is to be sustained, it is the

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Index.

duty of the resident devisee to assess at the place of his residence his interest in the estate at the first assessing period after probate of the will and the qualification of the personal representative, without reference to whether the personal representative has had time or opportunity to make a settlement or distribution. If the estate in the hands of the personal representative for settlement and distribution is assessable to the devisee before a settlement and distribution has been or should have been made, there is no reason why it should not be assessable to him even before the personal representative has qualified if the assessing period happens to come at a date after the probate of the will and before his qualification. If the duty of the devisee to assess his interest in the estate grows out of the fact that he is the beneficial owner of it, and no other circumstance is to be considered, then the heir is as much the beneficial owner before an executor is qualified as he is while the estate is in process of settlement, and hence the duty to assess arises as soon as his share in the estate falls into his hands by the probate of the will. It would also follow that the same rule should be applied in the case of intestacy, and therefore the heir should be charged with the assessment of his interest upon the death of the person from whom he receives it under the law of descent and distribution. We do not think counsel would say the rule should be carried this far, but, looking to the reason of the thing, there seems to be no material difference in requiring the heir or devisee to assess his share before the qualification of the personal representative and requiring him to do so after the qualification, but while the estate is in his custody for settlement and before a distribution is or should have been made. But we are not disposed to agree with counsel in the insistence that the estate is assessable to the devisee while in the hands of the executor or personal representative for settlement, and before a distribution has or should have been made. On the contrary, our opinion is that the estate of a decedent in the hands of his personal representative for settlement and before a distribution is or should be made is assessable by the personal representative at the place of his official residence. And this is true whether the personal representative resides in this state or out of it. We see no reason why the same rule should not be applied to the estate of a nonresident testator as would be applied to a resident testator. There is no more reason why the devisee of a nonresident testator should be required to list for assessment and taxation his interest in the estate pending its settlement and distribution by the personal representative than there would be for requiring a resident devisee to list for assessment and taxation his interest in the estate of a resident testator while the estate was being settled by the resident personal

representative. The reason is the same in one case as it would be in the other. In both it is rested upon the proposition that while the estate is in the hands of the personal representative for settlement, and before it is or should be distributed, the heir or devisee cannot know with certainty the amount he will receive. And during this period the title is deemed to be in the personal representative for purposes of administration and taxation. It is both convenient and just to the beneficiaries of the estate, as well as the taxing authorities, that the personal representative in whose custody the estate is and who for the time being takes the place of the decedent should list the estate for assessment and taxation at the domicile of the decedent. 1 Cooley on Taxation, p. 664; 2 American Law of Administration, p. 691; Commonwealth v. Peebles, 134 Ky. 121, 119 S. W. 774, 23 L. R. A. (N. S.) 1130. Or, as said by Burroughs on Taxation (section 98): "The personal property of decedents is taxed at the domicile of the decedent to the person having the legal title and not in the name of the deceased person. During the settlement of the estate, it must have a situs somewhere, and none so appropriate as where the decedent lived. When the estate is settled and paid to the heirs and legatees, it is then assessed to such persons at their residence." Section 4023 of the Kentucky Statutes (Russell's St. § 5915) provides that: "An administrator, executor, trustee, committee, curator or agent residing in the state shall not be liable for taxes on intangible personal property, where the real or beneficial owner of such intangible personal property, held by them or any of them, resides outside of the state; but this exemption shall not apply in the case of an executor or administrator in the exercise of his office as personal representative while the estate of a deceased person is in process of settlement and before the share of the nonresident legatee or beneficiary is set apart to him, or before said legatee is entitled to be paid his share. * * * " Under this statute, no matter where the real or beneficial owner of intangible personal property resides, the interest in the estate of the decedent to which he is entitled while the estate is in the hands of the personal representative for settlement and before the share of the beneficiary is set apart to him, or he is entitled to receive it, is assessable at the place where the personal representative qualified. But, after the interest has been set apart to the beneficiary, or after the time he is entitled to receive it, then his interest is not subject to taxation in this state if the beneficiary resides out of the state. And we should say that the situs of intangible personal property for taxation as declared in this statute applies to resident as well as nonresident beneficiaries; and that, while the estate is in process of settlement and before the share of the beneficiary is set

apart to him or he becomes entitled to it, it should be listed by the personal representative at the place of his qualification, and not by the beneficiary at his place of residence.

We think that the paragraph in section 4020 of the Kentucky Statutes (Russell's St. § 5912) providing that the "situation of intangible personal property for purposes of taxation shall be at the residence of the real or beneficial owner, and not at the residence of the fiduciary or agent having the custody or possession of same," has reference to a state of case in which the share of the beneficiary has been set apart to him or he is entitled to receive it, and not to a state of case in which the estate including the interest of the beneficiary is in process of settlement. This has been the uniform construction given by the court to this and similar statutes. Thus in *Boske v. Security Trust & Safety Vault Co.*, 56 S. W. 524, 22 Ky. Law Rep. 181, the court in commenting upon the cases of *Louisville v. Sherley*, 80 Ky. 71, *Baldwin v. Shine*, 84 Ky. 512, 2 S. W. 164, 8 Ky. Law Rep. 496, and *Harting's Ex'r v. City of Lexington*, 43 S. W. 415, 19 Ky. Law Rep. 1829, said: "These cases are not in conflict, but simply mean that while an estate is in the hands of an administrator or executor in process of settlement, and before the distributee or devisee is entitled to be paid his share, the property must be listed by the administrator or executor as of his domicile; but when there is no further need of an administrator or executor, and the distributee or devisee can legally demand his share, the property becomes taxable at the domicile of the owner, whether it be fee or for life." In *City of Lexington v. Fishback's Trustee*, 109 Ky. 770, 60 S. W. 727, 22 Ky. Law Rep. 1392, the principle in the *Boske* Case was approved, and it was further said: "It was a principle of the common law that the title to a decedent's personal estate passed to his personal representative. So long as it is in the hands of the personal representative in process of settlement, the entire title is in the personal representative, and it is not until the estate has been settled and the distributees or legatees can demand their share that they have any beneficial ownership." In *Leavell's Adm'r v. Arnold*, 131 Ky. 426, 115 S. W. 232, the court said: "Complaint is also made that the executor was required to list the property in his hands as of date September 15, 1907, for taxes for the year 1908. We are unable to understand upon what ground this objection is based. The statute lays upon all estate, real and personal, the burden of taxation, except such as is especially exempted.

* * * At the time it was listed for taxation it was still a part of the estate of *Lewis Y. Leavell*, and, being such, the law imposed upon the executor the duty of listing same for taxation without regard to the purpose for which it was to be used after it passed from his hands." In *Spalding v. Commonwealth*, 88 Ky. 135, 10 S. W. 420, 10 Ky. Law Rep.

714, it was held that it was proper for the receiver of a court into whose custody had been committed an estate to list the same, and pay the taxes thereon. In answering the argument that the assessment should have been made and the taxes paid by the heirs or distributees entitled to the estate in the hands of the receiver, the court said: "Here was the estate of a decedent under the control of the court. It was yet to be distributed. It was yet uncertain to whom it belonged, or, at least, what portion, if anything, each heir would finally receive. From the very necessity of the case it was proper for the court to consent that another tribunal might direct its receiver to list the estate in his hands, or, what would have been preferable, it should itself have directed its officer to go and list it and pay the taxes. * * * Even if by reason of the averment in the answer of ownership in the heirs it can be said that the owners were known, yet there had been no distribution of it to each of them—its situs had not changed—and one of them in giving in his list could not take into consideration any of this estate, because he could not tell what he would ever get, if any of it. * * * If the heir alone were proceeded against, he could very well say: 'There has been no distribution of the estate. I do not know the value of my interest, if I have any, or what I will ultimately receive.'" In *Youtsey v. Commonwealth*, 110 Ky. 555, 62 S. W. 262, 22 Ky. Law Rep. 1914, the principle announced in the *Spalding* Case was extended to embrace the estate of an insolvent corporation in the hands of the court's commissioner under an assignment for the benefit of creditors before there had been an order of distribution.

Although, as pointed out in briefs of counsel, the Legislature has more than once changed the revenue laws to conform to or avoid the effect of a decision of this court, it has never disturbed the principle announced in these cases, that, when an estate is in the hands of the court or a personal representative for settlement and distribution, it must be assessed for taxation by the court officer or the personal representative and not the beneficiaries of the fund. The first paragraph in section 4020 of the Kentucky Statutes, providing that "all real and personal estate within this state, and all personal estate of persons residing in this state, and of all corporations organized under the laws of this state, whether the same be in or out of the state, including intangible property, * * * shall be subject to taxation," merely announced a general principle of taxation. It does not attempt to fix the situs of personal property, intangible or otherwise, for the purpose of taxation. This is fixed by other parts of sections 4020, 4023, and other sections of the Kentucky Statutes.

We therefore conclude, first, that when an estate is in the hands of a resident or non-resident personal representative for settle-

ment and distribution, and before the estate has been or should have been settled or distributed, the personal representative should list the estate in his hands for taxation and pay the taxes thereon at the place of his qualification, without regard to the residence of the beneficiaries or whether it be in or out of this state; second, this rule applies without reference to the extent or character of the debts or demands against the estate.

In some instances this rule may impose a heavier burden upon resident beneficiaries than they would be required to bear if their shares were assessable at the place of their residence; in other instances, it may result in temporary loss to the state. But upon the whole it is reasonable and practicable and will insure the payment of the taxes at the place of the domicile of the decedent, while the estate is in process of settlement.

Wherefore the judgment of the lower court dismissing the proceeding is affirmed.

BALTIMORE & O. S. W. R. CO. v. CLIFT.

(Court of Appeals of Kentucky. March 3, 1911.)

1. CARRIERS (§ 215*) — CARRIAGE OF LIVE STOCK—LIABILITY.

A carrier of live stock is an insurer of the safe delivery thereof, except where injury results from an act of God, the public enemy, or from the inherent propensities of the stock.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. § 923; Dec. Dig. § 215.*]

2. CARRIERS (§ 208*)—CARRIER OF LIVE STOCK—CONTRACTS.

A shipper of live stock who intends to charge the carrier with the duty of carrying and delivering the stock graded and classified in the manner in which he loaded them on the cars, must require the insertion of such a stipulation in the contract, and where there is no such a stipulation and it was not omitted by fraud or mistake, the carrier need not, in transporting, reloading, and delivering the stock, maintain the grading and classification made by the shipper in loading them.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. § 924; Dec. Dig. § 208.*]

3. CARRIERS (§ 219*)—CONTRACTS—AGENCY.

The initial carrier is the agent of the connecting carrier in making the contract of shipment of live stock so that the connecting carrier is liable on the contract as if made directly with it.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 950, 951; Dec. Dig. § 219.*]

4. CARRIERS (§ 219*)—CONNECTING CARRIERS—LIABILITY.

A connecting carrier is liable only for damages to live stock occurring on its line, in the absence of a special contract making it liable for damages occurring on a line not controlled by it.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 950, 951; Dec. Dig. § 219.*]

5. CARRIERS (§ 228*)—CARRIAGE OF LIVE STOCK—LIABILITY.

Where, in an action against a connecting carrier of live stock for mixing and unclassifying the stock, the evidence merely showed that the mixing was done in reloading at stock-

yards at which the stock was delivered by the initial carrier, but did not show that the carrier owned or controlled the yards or that the persons who reloaded the stock were its agents, there was a failure to show that the mixing was done by the connecting carrier's agents and it was not liable therefor.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 957-960; Dec. Dig. § 228.*]

6. PRINCIPAL AND AGENT (§ 22*)—EXISTENCE OF RELATION—EVIDENCE.

Agency may not be established by the mere declaration of one claiming to be agent.

[Ed. Note.—For other cases, see Principal and Agent, Cent. Dig. § 40; Dec. Dig. § 22.*]

7. EVIDENCE (§ 258*) — DECLARATIONS — ADMISSIBILITY.

Testimony that persons in charge of stockyards at a city told a shipper of live stock that the cattle were mixed in reloading them on a connecting carrier's cars, was inadmissible as against the connecting carrier in the absence of evidence that such persons were its agents.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 1006, 1007; Dec. Dig. § 258.*]

8. CARRIERS (§ 228*) — CARRIAGE OF LIVE STOCK—DAMAGES—BURDEN OF PROOF.

Where, in an action against a connecting carrier for mixing cattle in reloading, the petition specifically alleged that the mixing was done at stockyards at which the initial carrier delivered the stock, the burden of showing that the mixing of the cattle was done before delivery to the connecting carrier did not rest on it to avoid liability, for it could not be presumed that it owned or controlled the yards.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 957-960; Dec. Dig. § 228.*]

9. CARRIERS (§ 219*) — CARRIAGE OF LIVE STOCK—CONNECTING CARRIERS—BURDEN OF PROOF.

A contract by an initial carrier as agent for a connecting carrier which binds the connecting carrier to safely carry live stock, does not make the connecting carrier liable for any negligence in handling the stock at stockyards at which they were delivered by the initial carrier for transportation by the connecting carrier, in the absence of a showing that it controlled the stockyards or that the stock was reloaded there by its agents.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 950, 951; Dec. Dig. § 219.*]

10. CARRIERS (§ 228*) — CARRIAGE OF LIVE STOCK—DAMAGES—BURDEN OF PROOF.

The liability of a connecting carrier of live stock for damages for mixing and unclassifying the stock cannot be predicated on the fact that it received the stock in the mixed condition and carried the same to the point of destination without grading and classifying them, since it may not be presumed to know that the stock had been mixed or that they were not loaded on its cars as they were loaded by the shipper.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 957-960; Dec. Dig. § 228.*]

Appeal from Circuit Court, Mason County.

Action by B. F. Clift against the Baltimore & Ohio Southwestern Railroad Company. From a judgment for plaintiff, defendant appeals. Reversed and remanded.

Worthington, Cochran & Browning, for appellant. Allan D. Cole, for appellee.

SETTLE, J. Appellee recovered a verdict and judgment for \$247.88, damages against appellant in the court below. The claim for

damages grew out of the alleged violation by appellant of a contract it made with appellee to ship in 1905 over its railroad from Cincinnati, Ohio, to Baltimore, Md., 70 head or 4 car loads of cattle received of the Louisville & Nashville Railroad Company at Cincinnati, after they had been carried by the latter company over its road from Maysville, Ky., to that city. The shipment was made before the enactment by Congress of the Carmack law.

It was alleged in the petition as amended that the cattle in question were what is known as export cattle; that they were bought by appellee as agent for Meyer & Housman of Baltimore under a contract which provided that he was to buy and ship the cattle, graded and classified, consigned to himself at Baltimore; and if upon their arrival at the point of destination Meyer & Housman found the cattle properly graded and classified as required by the contract, they were to receive them, repay appellee their cost price, including freight, and, in addition, pay him a commission of 75 cents per head for his services in purchasing and shipping them; but the contract further provided that if, from any cause, the cattle upon reaching Baltimore were found by Meyer & Housman to be mixed and unclassified, then and in that event they were not to receive them as purchasers, but as commission merchants, and to sell them on the market as the property of appellee and to account to him for the proceeds, less the usual commission, which they would retain.

The petition contains the further averments that the cattle were carried by the Louisville & Nashville Railroad, as graded, classified, and loaded on the cars by appellee, from Maysville to Cincinnati, and there delivered to appellant, whose servants at Cincinnati in reloading them on its cars at the Union Stockyards there failed to grade and classify them, and that in that condition appellant carried and delivered them to Meyer & Housman at Baltimore, who, by reason of their mixed and unclassified condition, refused to receive them as purchasers under their contract with appellee, but instead received them as commission merchants, and as such sold them on the Baltimore market and accounted to appellee for the proceeds, less the freight and their commission; that the market being somewhat off at that time, the appellee sustained a loss upon the cattle of \$247.77, the amount sued for. Appellee first sued the Louisville & Nashville Railroad Company, but later an amended petition was filed, which made appellant a defendant and sought a recovery against it, as well as the Louisville & Nashville Railroad Company. Thereafter the action was dismissed by appellee as to the Louisville & Nashville Railroad Company and prosecuted against appellant alone. Appellant's answer traversed the averments of the petition, which com-

pleted the issues. Appellant contends that it should have been granted a new trial by the circuit court, and that the judgment appealed from should be reversed, because of error committed by that court in instructing the jury and in refusing to grant a peremptory instruction compelling a verdict in its favor; there being, as claimed, no evidence to support the verdict.

The printed contract under which appellant agreed to ship and deliver the cattle is silent as to the manner in which they were to be graded and classified by appellee when loaded on the cars at Maysville; nor does it provide that they were to be delivered by appellant at Baltimore in the precise manner in which they were graded and shipped by him. That they were to be carried by appellant to the point of destination without injury to them was specified in the contract; and as a matter of law a carrier of live stock becomes an insurer of its safe delivery, except where injury or loss results from the act of God, or the public enemy, or from the inherent nature, propensities or viciousness of the animals. *Louisville & Nashville R. Co. v. Pedigo*, 129 Ky. 661, 113 S. W. 116; *Stiles, Gaddie & Stiles v. L. & N. R. Co.*, 129 Ky. 175, 110 S. W. 820, 18 L. R. A. (N. S.) 86, 30 Ky. Law Rep. 429, 33 Ky. Law Rep. 625; *C. N. O. & T. P. Ry. Co. v. Sanders & Russell*, 118 Ky. 115, 80 S. W. 488, 25 Ky. Law Rep. 2333. But if appellee had intended to charge the carrier with the duty of carrying and delivering the stock graded and classified in the manner in which he loaded them on the cars, he should have required such a stipulation to be put in the contract, and it is not alleged in the petition that it was by fraud or mistake omitted from the contract. In the absence from the contract of such a provision, we do not see upon what ground appellant or the Louisville & Nashville Railroad Company could have been expected or required, in transporting, reloading, and delivering the cattle to maintain the grading and classification of them made by appellee in loading them at Maysville.

If, however, it can be said that proof that appellant undertook to carry and deliver the cattle as graded and classified by appellee was admissible, the evidence as a whole failed to show that the mixing and unclassifying of the cattle were not done before they were received by appellant at Cincinnati. The Louisville & Nashville Railroad Company was the initial or first carrier; its agent at Maysville made the contract with appellee under which the cattle were to be shipped, and while by the terms of the contract the shipment of the cattle from Cincinnati to Baltimore was to be made over appellant's line of railroad, it devolved upon appellee to show that the mixing and unclassifying of the cattle was done by appellant's agents at Cincinnati or before their delivery at Baltimore. In *Illinois Central R. Co. v. Curry*,

127 Ky. 643, 106 S. W. 294, 32 Ky. Law Rep. 513, we held that, in the case of a shipment like the one under consideration, "each connecting carrier to the point of destination receiving the freight will be considered as having constituted and appointed the initial carrier its agent for the purpose of entering into the contract of shipment, and will be liable upon the contract made with the initial carrier the same as if it had been made directly with it." But we also held in the same case that, where the action was brought against the several carriers for injuries to live stock, none of the connecting carriers would be responsible for damages occurring on a line not controlled by it, in the absence of a special contract to that effect.

In the instant case the evidence shows that the stock was delivered by the Louisville & Nashville Railroad Company at the Union Stockyards in the city of Cincinnati, but it does not appear from the proof whether the Union Stockyards is owned either by the Louisville & Nashville Railroad Company or the appellant, or whether it was an independent corporation. If it was owned and operated by the appellant, the persons in charge of it who reloaded the cattle upon appellant's cars would be treated as the latter's agents; and if so, and the cattle were mixed by them in reloading and such mixing of them constituted a violation of the shipping contract, it could justly be charged that appellant would be liable for their negligence in the manner of loading. Appellee's evidence shows that the mixing of the cattle was done in reloading them at the Cincinnati stockyards, but it wholly fails to show that appellant owned or controlled the stockyards, or that the persons who loaded the cattle upon its cars were its agents.

It is true that appellee testified that one Wilmoth of Paris, Ky., claiming to be the agent of appellant, approached him after the shipment of the cattle on the subject of the loss he had sustained, and with a view of making some settlement of it with him; but he had only the statement of Wilmoth that he was appellant's agent, and the testimony was properly excluded by the court upon the ground that the agency could not be established by the mere declarations of the person claiming to be the agent. It is further true, that appellee also testified that Wilmoth at the time had in his possession some papers, but he did not explain the character of the papers or testify that they referred to the loss he sustained on the shipment of the cattle. Appellee also testified that persons in charge of the Cincinnati stockyards told him that the cattle were mixed in reloading them upon appellant's cars at Cincinnati, but it

was not made to appear that the persons from whom he obtained this information were the agents of appellant, and therefore appellee's testimony as to what was said to him by them was also properly excluded by the court.

It is apparent, therefore, that appellee did not establish by the evidence the fact that the cattle were mixed by appellant or its servants after their delivery to it by the Louisville & Nashville Railroad Company, and the failure to establish this important fact entitled appellant to the peremptory instruction asked at the conclusion of the evidence. It is, however, argued by counsel for appellee that the burden was upon appellant to show that the mixing of the cattle was done before its delivery to it. There would be some force in this argument but for the fact that the petition, as amended, distinctly alleged that the mixing was done, not on appellant's line of railroad, but at the stockyards at Cincinnati; and we cannot presume that appellant owns these stockyards or has any control over them.

As we view the matter, the Louisville & Nashville Railroad Company contracted, for itself, to carry appellee's cattle over its own line to Cincinnati, and there deliver them to appellant; and at the same time contracted as agent for appellant, that it would after receiving the cattle at Cincinnati carry them safely to Baltimore. Under such a contract appellant would no more be liable for any negligence in handling the cattle in the stockyards at Cincinnati, in the absence of proof showing that it controlled the stockyards, or that the cattle were reloaded there by its agents, than it would be for the negligent handling of them by the Louisville & Nashville Railroad Company before they reached Cincinnati, or before they started from Maysville. Nor can any liability of appellant be predicated on the fact that it received the cattle in that mixed condition and carried them to Baltimore without grading and classifying them, for it would not be presumed to know that they had been mixed or that they were not loaded on its cars at Cincinnati as they were by appellee himself at Maysville.

If appellee's theory of the case had been supported by the pleadings and proof, the instructions given by the court would have been substantially correct, but as only a peremptory instruction directing the jury to find for the appellant would have been proper, those used on the trial should not have been given.

For the reasons indicated, the judgment is reversed and cause remanded for a new trial and other proceedings consistent with this opinion.

LOUISVILLE & N. R. CO. v. COOPER et al.
(Court of Appeals of Kentucky. March 2, 1911.)

CARRIERS (§ 230*)—LIVE STOCK—DELAY—EVIDENCE—QUESTION FOR JURY.

In an action for injuries to sheep, caused by delay in transportation, evidence held sufficient to take to the jury the question of negligent delay.

[Ed. Note.—For other cases, see Carriers, Dec. Dig. § 230.*]

Appeal from Circuit Court, Henderson County.

Action by J. W. Cooper and others against the Louisville & Nashville Railroad Company. From a judgment for plaintiffs, defendant appeals. Affirmed.

Yeaman & Yeaman, Benjamin D. Warfield, and Chas. H. Moorman, for appellant. Clay & Clay and Montgomery Merritt, for appellees.

NUNN, J. Appellees purchased in East St. Louis about 300 sheep, to be shipped to Henderson, Ky. The purchase was made July 31, 1909, when it was very warm weather. The sheep were loaded about 4 o'clock p. m., the lambs on the upper and the sheep on the lower deck of the car, with the expectation that they would be started out by 6 o'clock of the same afternoon and would arrive in Henderson about 8 o'clock the next morning. They were not started, however, until about 11:25 that night, and arrived at Howell, Ind., about 9 o'clock the next day, and were shipped from there to Henderson, according to appellant's testimony, about 1:20 p. m., and arrived in Henderson at 2:15 p. m. of the same day; but according to appellees' testimony they were not shipped from Howell until after 2 o'clock p. m. and did not arrive in Henderson until 3:15 p. m. of the same day. When the sheep reached Henderson and were unloaded, 2 of the lambs were found dead in the car, and all were in very bad condition, according to appellees' testimony. During a period of five weeks from the time they were unloaded, 103 of the lambs and 19 of the sheep died. For the first few days after they were received they died at the rate of 10 or 15 a day; but the rate gradually grew less until they ceased to die at the end of five weeks. Appellees' testimony tends to show that by reason of the negligence of appellant they were delayed in starting from East St. Louis, and were delayed in Howell, Ind., four or five hours; that the sheep were kept in the car in the yards in Howell without any care or attention, by reason of which they were injured, and the number before stated died. Appellees claim \$610 damages for the ones that died and for injury to those that recovered.

The trial in the lower court resulted in a verdict and judgment in favor of appellees

for \$400. Appellant claims that it was entitled to a peremptory instruction, because it showed there was no unreasonable delay in the transportation of the sheep; that there was no train at East St. Louis to take them out before 11:25 p. m., the time at which they did go out; that that train should have started from there at 9 o'clock p. m.; that it did not reach Howell, Ind., until the train due out from that point to Henderson had gone, and there was no other train to take them to Henderson until 1:20 the next afternoon, when they were carried from Howell to Henderson. There was no reason given why the train at East St. Louis was behind time in starting. It was shown that a stock train left East St. Louis at 7 o'clock p. m., which passed through Henderson going south; but it was not scheduled to stop there, and for that reason the sheep were not shipped by that train. Nor is there any reason given why the train was not started from Howell sooner, other than there was no train scheduled to start before 1:20 p. m. It is evident from the testimony that the sheep received most of their injuries from the stop in the yards in Howell, Ind., in midday on the 1st of August, and from 4 to 11 on the last day of July at East St. Louis. The sheep were crowded in the car, so that they could hardly turn around, and the train was still at these times. All the witnesses who testified on the point said that under such circumstances it would not have injured the sheep if the train had been moving, as that would have created a breeze and kept them cool.

Appellant claims there was no testimony as to where these sheep were shipped from to East St. Louis, or that they were healthy when loaded there to be shipped to Henderson; that they might have had some disease before they left East St. Louis, which caused their deaths. A man by the name of Miller, a salesman at the stockyards in East St. Louis, sold the sheep to appellees, and testified that they were shipped to East St. Louis from the states of Illinois and Missouri; that they were in good condition when loaded on the car; that they had been inspected by a government inspector and dipped before shipment. Several other witnesses for appellees testified that they had examined several of the sheep after they had died, and found nothing indicating disease. These facts made a question for the jury to determine. The court told the jury that it was the railroad company's duty to transport and deliver the sheep at Henderson with reasonable promptness and dispatch, and that if it failed to use ordinary care to so transport and deliver them, and by reason of such failure, if any, the sheep or some of them were caused to die, and were thereby injured and depreciated in market value,

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

if any, then they should find for appellees and award them damages; that unless they believed they failed to transport the sheep with ordinary dispatch, or that their death or injury was caused by the negligent delay in transporting them, they should find for appellant. The court submitted the matter to a jury by proper instructions, and it found for appellees. In our opinion, there was evidence to the effect that the manner of transportation caused the injury to and the death of some of the sheep.

For these reasons, the judgment of the lower court is affirmed.

CITY OF BOWLING GREEN v. ROGERS et al.

(Court of Appeals of Kentucky. March 3, 1911.)

1. PRISONS (§ 10*)—KEEPERS—LIABILITY.

The keeper of a prison is liable for damages resulting from his negligent failure to keep it clean and sanitary, and to see that the prisoners conduct themselves in an orderly manner.

[Ed. Note.—For other cases, see Prisons, Cent. Dig. § 12; Dec. Dig. § 10.*]

2. MUNICIPAL CORPORATIONS (§ 745½*)—NEGLECT—LIABILITY OF CITY.

A city is not liable for negligence of its officers in exercising its governmental functions.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 1568, 1569; Dec. Dig. § 745½.*]

3. NUISANCE (§ 3*)—PRISONS.

A prison is not a nuisance per se.

[Ed. Note.—For other cases, see Nuisance, Cent. Dig. §§ 9-25; Dec. Dig. § 3.*]

4. MUNICIPAL CORPORATIONS (§ 734*)—PRISON—LIABILITY TO ADJOINING OWNERS.

A city is not liable to an adjoining owner for damages arising from maintenance of a prison, authorized by Ky. St. § 8290 (Russell's St. § 1307) subsec. 4; that being discharge of a governmental duty.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 1550; Dec. Dig. § 734.*]

Appeal from Circuit Court, Warren County.

Action by Mary H. Rogers and others against the City of Bowling Green. Judgment for plaintiffs, and defendant appeals. Reversed and remanded.

W. W. Mansfield and Grider & Harlin, for appellant. Sims & Rodes, for appellees.

HOBSON, C. J. The city of Bowling Green erected on a lot owned by it a city hall in which were the offices of the mayor and other city officials, the police courtroom, and the city prison. The part of the building set apart for the city prison was on the side next to the lot of Mary H. Rogers, used by her as a family residence. About two years after the erection of the city hall and its occupancy by the city authorities, she brought this suit against the city to recover damages on the ground that the city prison

had rendered the use of her property as a residence less valuable, and in fact destroyed the value of its use as a residence. On a trial of the case, she recovered a judgment for \$1,000. The city appeals.

The only question we deem it necessary to consider on the appeal is whether the court should have instructed the jury peremptorily to find for the defendant. The proof on the trial for the plaintiff showed in substance these facts: The windows of the prison which are covered with bars look to the front and to the rear. There are no windows looking toward Mrs. Rogers' property, but persons in the prison can stand at the windows and see the rear of her lot, thus destroying its privacy; and can also see the front of the lot. The persons confined in the prison are those arrested for the violations of the city ordinances and under the state laws for misdemeanor. Many of the prisoners use very vulgar and indecent language in talking to one another, and this talk, when the windows are up, can be heard in Mrs. Rogers' property. The prisoners are often noisy, especially when brought into the prison intoxicated, and thus disturb the rest of the Rogers family. Foul and disagreeable odors proceed from the windows and these enter the Rogers house. The prisoners can be seen from the Rogers premises through the windows and often they are very scantily clad.

Among other powers conferred on the city by the Legislature is this: "To establish and erect * * * city prisons, workhouses, make regulations for the government thereof." Ky. St. 3290 (Russell's St. § 1307) subsec. 4.

In enacting and enforcing ordinances for the peace and good order of the city, it acts as an arm of the state government, and in establishing a prison in which the prisoners arrested under these ordinances may be confined, it discharges a governmental duty, and is in this simply a part of the state government. It is the duty of the keeper of the prison to use ordinary care to keep it clean and sanitary, to maintain order, and to see that the prisoners conduct themselves in a decent and orderly manner. If the keeper negligently fails to do any of these things, and allows his prison to become a private nuisance, he must answer in damages to any person aggrieved thereby. But this court has held in a long line of opinions that the city is not liable for the negligence of its officers in the exercise of its governmental functions. Thus in *Twyman v. Frankfort*, 117 Ky. 518, 78 S. W. 446, 64 L. R. A. 572, 25 Ky. Law Rep. 1620, the deceased had lost his life it was alleged from having been negligently exposed to inclement weather when removed from a comfortable home to the pesthouse used for smallpox purposes, it being very crowded, poorly ventilated, and

*For other cases see same topic and section NUMRER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

wholly unfit for the purpose for which it was used. A demurrer was sustained to the petition by the circuit court, and this on appeal was affirmed. The previous cases on the subject are collected in that opinion. In *Board of Park Commissioners v. Prinz*, 127 Ky. 460, 105 S. W. 948, 32 Ky. Law Rep. 359, the plaintiff sued to recover for injuries sustained by the negligence of the employes of the city in the operation of a steam roller used by the commissioners in the maintenance of the parks of the city. The authorities on the subject are carefully reviewed in that opinion, where it was again held that no recovery could be had. These cases have been since followed in *Kippes v. Louisville*, 140 Ky. 423, 131 S. W. 184; *Hershberg v. Barbourville*, 142 Ky. 60, 133 S. W. 985.

A prison is not per se a nuisance. In *Clayton v. Henderson*, 103 Ky. 234, 44 S. W. 667, 44 L. R. A. 474, 20 Ky. Law Rep. 87, the city had located its pesthouse in violation of law at a point where it was unlawful to locate one and was so held liable to one who had been damaged by reason of the unlawful location of the pesthouse in the city. In *Paducah v. Allen*, 111 Ky. 366, 63 S. W. 981, 98 Am. St. Rep. 422, 23 Ky. Law Rep. 701, a recovery was allowed in favor of an adjoining proprietor where a pesthouse was located not in violation of law. But the ruling is based upon the ground that a pesthouse works an injury per se, and that when the city by the location of its pesthouse destroys the value of adjoining property, it should recompense the owner for the loss under section 242 of the Constitution. This ruling only applies to things that work an injury per se. In *Pfingst v. Senn*, 94 Ky. 556, 23 S. W. 358, 21 L. R. A. 569, 15 Ky. Law Rep. 325, it was held that a beer garden, bowling alley, and dancing hall were not per se a nuisance. The same rule was followed in *Albany Christian Church v. Wilborn*, 112 Ky. 507, 66 S. W. 285, 23 Ky. Law Rep. 1820, as to a stable erected on a lot adjacent to a church, and in *Boyd v. City of Frankfort*, 117 Ky. 199, 77 S. W. 669, 111 Am. St. Rep. 240, 25 Ky. Law Rep. 1311, it was held that a negro church was not per se a nuisance, though they hold late and sing loud and long. A number of other authorities are collected in these opinions. Whether a prison will be a nuisance or not will depend upon the way in which it is kept. The owner of property holds it under the law, and he cannot complain of a lawful use that is made of his neighbor's property that does not invade his rights. Appellee cannot complain that the city built on its lot the city hall. She held her lot subject to the lawful use that the city might see fit to make of its property. If the county had bought the lot where the city hall stands, and built a courthouse on it, the assembling of many per-

sons at the courthouse from day to day would have had no little effect on the value of appellees' property for residence purposes. But she could not for this have maintained an action against the county; and if the county had built a jail on the lot, it would have been no more responsible to her for the conduct of the prisoners in the jail or for the negligence of the keeper of the jail, than the city is in the case before us. The state may buy land and establish a branch penitentiary, but the state is not liable to an adjoining proprietor for damages because the penitentiary is located near him, even though the state should enter its appearance to the action. The city is no more liable than the county or the state would be in the cases supposed; for being an arm of the state government created for governmental purposes, it is simply discharging one of the functions of the state government by its authority.

We therefore conclude that under the evidence the court should have instructed the jury peremptorily to find for the defendant.

Judgment reversed, and cause remanded for a new trial and further proceedings consistent herewith.

PETRY et al. v. PETRY et al.

(Court of Appeals of Kentucky. March 3, 1911.)

1. PLEADING (§ 234*)—AMENDMENTS—CONDITION OF CAUSE—NECESSITY OF LEAVE OF COURT.

Under Civ. Code Prac. §§ 132, 134, authorizing amendment before answer without leave, and empowering the court to allow amendments to pleadings at any time in furtherance of justice, a petition may not be amended after answer without leave of court.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 594, 599; Dec. Dig. § 234.*]

2. APPEAL AND ERROR (§ 959*)—RULINGS ON AMENDMENTS TO PLEADINGS—DISCRETION OF COURT.

The discretion of the court as to amendments under Civ. Code Prac. § 134, authorizing the court to allow amendments to pleadings in furtherance of justice will not be disturbed on appeal unless abused.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3825-3833; Dec. Dig. § 959.*]

3. PLEADING (§ 276*)—SUPPLEMENTAL PLEADING—ALLOWANCES—LIABILITY OF COURT.

Under Civ. Code Prac. § 135, providing that a party may be allowed on motion to file a supplemental pleading, a supplemental pleading may not be filed without leave of court.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 833, 835; Dec. Dig. § 276.*]

4. COMPROMISE AND SETTLEMENT (§ 15*)—EFFECT AS TO PENDING ACTION.

A valid settlement of a pending suit including an agreement to dismiss the same deprives the plaintiff of the right to thereafter file an amended petition.

[Ed. Note.—For other cases, see Compromise and Settlement, Cent. Dig. §§ 51-53; Dec. Dig. § 15.*]

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

5. PLEADING (§ 253*)—ANSWER—CROSS-COMPLAINT.

Where the filing of an amended petition is improper, the filing of an answer and cross-complaint is also improper.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 744-751; Dec. Dig. § 253.*]

6. COMPROMISE AND SETTLEMENT (§ 21*)—ENFORCEMENT—PREVENTION OF.

A court of equity in the absence of fraud or mistake will not aid a party to an action to violate a settlement of the litigation out of court voluntarily entered into with the other parties.

[Ed. Note.—For other cases, see Compromise and Settlement, Cent. Dig. § 89; Dec. Dig. § 21.*]

7. EXECUTORS AND ADMINISTRATORS (§ 269*)—SETTLEMENT OF CLAIMS—AGREEMENT OF PARTIES.

The court must prevent vexatious litigation involving decedents' estates and protect such estates from unnecessary costs, and the circuit court may refuse to allow a party to subject an estate to commissions, attorney's fees, and other costs, which will result from a repudiation by him of a settlement of his claim made out of court with the personal representative and other parties interested in the estate.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. § 941; Dec. Dig. § 269.*]

8. EXECUTORS AND ADMINISTRATORS (§ 515*)—SETTLEMENT OF ESTATES—VALIDITY.

Where the heirs and administratrix voluntarily and fairly settled the estate out of court, and ascertained the amount of the distributive share to which each heir was entitled, and one of the heirs was paid a greater part of his distributable share, the settlement was binding on him, though the other heirs left their shares in the hands of a third person as agent to keep and invest.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. §§ 2293-2296; Dec. Dig. § 515.*]

Appeal from Circuit Court, Mason County.

Consolidated actions by G. W. Petry and others against Louisa Caroline Petry and others. From a judgment for defendants, plaintiffs appeal. Affirmed.

Allan D. Cole, for appellants. Worthington & Cochran, for appellees.

SETTLE, J. In 1897 F. C. Petry who had theretofore been a prosperous business man of Maysville, Ky., was, by verdict of a jury and judgment of the Mason circuit court, found to be and declared a person of unsound mind and immediately removed to the College Hill Sanitarium, Cincinnati, Ohio, where two years later he died intestate. At the time of the inquest F. C. Petry owned a house and lot in Maysville, worth \$3,500, and bonds and other securities amounting in value to \$48,000. This property was committed to the custody of A. M. J. Cochran, following his qualification as committee for F. C. Petry, under an order of the Mason circuit court appointing him as such.

F. C. Petry was a bachelor, and had for a number of years before his failure of mind provided for his aged parents and four unmarried sisters, all of whom lived with him

in the Maysville residence referred to, and after his removal to the College Hill Sanitarium continued to occupy the property as a residence. At the death of F. C. Petry his entire estate descended under the statutes of the state to his father and mother, J. C. Petry and Mary J. Petry, a moiety to each of them. Shortly after inheriting the property of their son, the parents died, and thereupon the property descended to their four daughters, Anna M. Petry, Louisa Caroline Petry, Fredrica Petry, Mary Josephine Petry, and a son, G. W. Petry, in the ration of one-fifth to each. There appears to have been no administration of the estate of F. C. Petry, but Anna M. Petry was appointed and duly qualified as administratrix of the estate of each of her deceased parents; however, the personal property of F. C. Petry that went into the hands of his committee, A. M. J. Cochran, was after his death, with the consent of the parents who inherited it from F. C. Petry, and after their death, that of their heirs and administratrix, retained and kept safely invested by A. M. J. Cochran as agent, and so much of its income as was necessary for the purpose applied to the support of the parents and daughters. So well did the agent, Cochran, invest and manage the fund in question that by 1907 it had increased from \$48,000 to \$86,000, but during that year tax collectors for the state, county of Mason, and city of Maysville instituted against Anna M. Petry, administratrix of the estate of her deceased parents, proceedings for the recovery of divers years back taxes claimed to be due upon the property, and these taxes, aggregating several thousand dollars, she was compelled to pay out of the fund in the hands of Cochran. On October 6, 1907, the appellant G. W. Petry as an heir at law of J. C. Petry and Mary J. Petry, deceased, for the purpose of compelling a settlement of their estates and obtaining his share thereof, through his attorneys, R. W. Nelson, of Newport, and C. L. Sallee, of Maysville, instituted in the Mason circuit court two actions; one against his sister Anna M. Petry as an heir at law of J. C. Petry and administratrix of his estate; the other against her as an heir at law of Mary J. Petry and administratrix of her estate. The other three sisters, heirs at law, were also made defendants in each of the actions.

After the consolidation of the two actions, appellees filed a joint answer, which admitted appellant's right as an heir at law to one-fifth of the net proceeds of the estates left by J. C. Petry and Mary J. Petry, deceased, contained a showing of the total assets belonging to the two estates received by the administratrix, the amounts paid out by her and the total thereof, and certain other demands against the two estates she would thereafter have to pay. Among the latter were commissions due the administratrix, a

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

fee to her attorneys, the cost of a family monument for which she had contracted, \$1,000 claimed to be due the administratrix in her own right, and a like sum to each of her three sisters, with interest on each of these amounts from January 1, 1907, at the rate of 6 per cent. per annum. It appears from the averments of the answer that the claim of \$1,000 each, asserted by the four sisters, arose out of a gift of a \$1,000 5 per cent. interest-bearing bond made each of them by their brother F. C. Petry, December 25, 1891; which bonds he then delivered to them, but at their request retained for safe-keeping, collecting the interest and reinvesting, when in his judgment necessary, the principal in other securities for them. It was also alleged in the answer that under this agreement F. C. Petry held for each of the appellees her bond and for several years collected and paid to her the interest received thereon semiannually; the last payment of such interest having been made each of them July 1, 1896; that when F. C. Petry was adjudged to be of unsound mind in 1897 the bonds in question, or other bonds or securities of equal value in which he had invested their proceeds, were in his possession, and being held by him for them, and when A. M. J. Cochran as committee took possession of his property, five \$1,000 bonds were a part of it, and four of these bonds or their proceeds A. M. J. Cochran agreed with the consent of appellees and their parents to hold and account for as appellees' property. That he complied with the agreement by so holding for them and keeping invested at 6 per cent. the proceeds of the four bonds after their father and mother inherited the property of F. C. Petry following his death, and is yet so holding such proceeds. After the appellant G. W. Petry had by reply traversed the affirmative matter of the answer, the consolidated causes were referred to the master commissioner for a report as to the assets and liabilities of the two estates and settlement with the administratrix. Appellees took the depositions of numerous witnesses in regard to the gift of the bonds to them by F. C. Petry, and these depositions proved the gift beyond doubt; indeed, no evidence was taken or offered by the appellant G. W. Petry to disprove it.

Before the commissioner filed his report or there was a submission of the case the appellant G. W. Petry and his attorneys became convinced from the showing made by Judge Cochran of the fund in his hands and the soundness of its investment that it had increased greatly in amount and value; and realizing that appellees upon the proof taken by them would recover the \$4,000 claimed as the value of the bonds given them by F. C. Petry with interest from January 1, 1897, proposed to appellees a settlement out of court of the matters in controversy between them, provided they would withdraw their claim for interest on the \$1,000, due each

of them from F. C. Petry's estate. The proposition was accepted by appellees, and the settlement effected upon the terms contained in the following writing:

"Mason Circuit Court. George William Petry, plaintiff, v. Anna M. Petry, as Adm'x of Mary J. Petry, Deceased, etc., Defendants. George William Petry, Plaintiff, v. Anna M. Petry, as Adm'x of J. C. Petry, Deceased, etc., Defendants. These two consolidated actions are settled on the following terms: Out of the funds in the hands of Anna M. Petry, as administratrix of the two decedents, she shall retain the amounts following:

"\$4,000.00 in satisfaction of the bonds mentioned in the pleadings as having been given to the four sisters of F. C. Petry, deceased.

"\$2,500.00 as compensation in full for the attorneys of the administratrix, and her commission.

"\$1,500.00 for a monument.

"George William Petry agrees to convey to his four sisters, parties hereto, by deed, in which his wife joins to release her contingent dower, his undivided interest in the house and lot where they now live, located on Fourth street, opposite Plum street, Maysville, Ky., for the sum of \$700.00—being one-fifth of \$3,500.00. This \$700.00 to be paid to him in cash.

"The administratrix will pay out of said estate the court costs of the consolidated actions.

"The administratrix shall also retain a sum reasonably sufficient to answer the claim against her and A. M. J. Cochran, as garnishees, in the suit now pending in Mason circuit court of R. W. Nelson v. George W. Petry, which claim is for \$1,200.00 and interest and costs, present and prospective, and is in contest in said suit.

"The balance of the estate, after payment of taxes for city, county and state, for year 1908, is to be equally divided between the four sisters and their brother, George William Petry, each to be charged in that division with the amount heretofore distributed by them since the qualification of Anna M. Petry as administratrix of her father and mother.

[Signed] G. W. Petry.

"Attest:

"A. D. Cole,

"Sudie P. Childs."

In pursuance of the foregoing agreement, appellee Anna M. Petry, administratrix, paid the appellant G. W. Petry \$9,800 of the \$11,318.29, to which he was entitled as his share of the fund in Judge Cochran's hands, retaining by agreement \$1,518.29, out of which to satisfy any judgment that might be recovered in an action brought against him by his former attorney, R. W. Nelson, for a fee of \$1,200; that amount having been attached in appellee's hands as going to appellant. Appellees also paid the appellant G. W. Petry the \$700 agreed upon as the consideration of his interest in the house and lot, and receiv-

ed from him a deed of conveyance therefor. The remainder of the fund in Judge Cochran's hands was distributed between the four sisters, each receiving a fifth.

It was a part of the agreement between the parties that the consolidated actions pending in the Mason circuit court should be immediately dismissed, but this was not done because the appellant G. W. Petry did not want his former attorney, Nelson, to know that he had settled the cases; and at the request of his present attorney appellees agreed to let them remain on the docket until Nelson's case against appellant should be tried. After the actions had been thus settled, and while they yet remained on the docket of the Mason circuit court for the purpose requested by appellant G. W. Petry, the appellee Anna M. Petry died, and shortly thereafter he, without notice to appellees, appeared in the Mason county court and caused one M. E. McKellup to be appointed administrator de bonis non of the estates of J. C. and Mary J. Petry, deceased. When appellees learned of the appointment of McKellup as administrator, they sent their attorney to see G. W. Petry's attorney about the matter, and were advised by the latter that the only purpose of McKellup's appointment was to enable him to receive and hold the \$1,518.29, that had been retained by Anna M. Petry out of appellant's share of the estate of his parents to satisfy the attachment of Nelson, if sustained, in his action against the appellant G. W. Petry for the fee. Having no objection to McKellup's appointment for that purpose, appellees made no effort to have him removed by the county court, and paid him the \$1,518.29 held by Anna M. Petry at the time of her death.

After the appointment of McKellup as administrator de bonis non, the appellant G. W. Petry without notice to appellees, filed in the office of the clerk of the Mason circuit court, out of term time, what purported to be an amendment to the petitions in the consolidated actions against appellees. This alleged amended petition ignored the settlement under the terms of which the actions were to be dismissed, set out the appointment of McKellup as administrator de bonis non of the estates of J. C. and Mary J. Petry, deceased, alleged that there were \$29,000 of assets belonging to these estates yet to be distributed, asked a final settlement and distribution of the estates, the allowance of commissions to the administrator de bonis non, and a fee to his attorney.

Shortly after lodging with the clerk the alleged amended petition, appellants' attorney, without notice to appellees, also lodged with him another paper which purported to be an answer and cross-petition of M. E. McKellup, administrator de bonis non of J. C. and Mary J. Petry, which in effect adopted the averments of the amended petition and concurred in its prayer for a settlement, the allow-

ance of commissions to McKellup as administrator, and a fee to his attorney.

The Mason circuit court was in session when the so-called answer and cross-petition of McKellup, administrator, was left with the clerk, and no attempt was then made to file it or call the court's attention to it. After some time had elapsed appellees learned of appellant's lodging with the clerk the so-called amended petition, answer and cross-petition, whereupon they objected to the filing of either in the consolidated actions referred to, and moved to dismiss the actions as settled. In support of the motion to dismiss, appellees filed their affidavits respectively, and that of W. D. Cochran, one of their attorneys. These affidavits set forth the settlement of the two cases made between the appellant G. W. Petry and appellees, the distribution of the property left by J. C. and Mary J. Petry, the payment to him of his part thereof, less \$1,518.29, retained by Anna M. Petry to satisfy the fee of Nelson, and the payment to McKellup as administrator de bonis non of the latter sum. The written agreement by which the consolidated actions were settled was filed with one of the affidavits as an exhibit, as were the receipts showing the payments to appellant of \$98,000 and to McKellup of the \$1,518.29. No counter affidavits were filed, or other proof offered by appellants. When the motion to dismiss the consolidated actions came on for hearing, the circuit court sustained it and dismissed them, as settled; but before doing so it noted of record the filing of the amended petition, then on appellees' motion struck it from the record. At the same time, the appellant McKellup, administrator of the estates of J. C. and Mary J. Petry, was refused permission to file the answer and cross-petition which he had theretofore left with the clerk. Appellants complain of the judgment manifesting these several rulings, and by this appeal seek its reversal.

The refusal of the circuit court to permit the filing of the two pleadings referred to was not error. If, for the purpose of deciding this question, we should leave out of consideration the fact that the consolidated actions had been settled and were to be dismissed, as appellees had filed their answer to the original petitions, the appellant G. W. Petry had no right to file the amended petition without first obtaining of the court leave to do so. Section 132 of the Civil Code of Practice provides: "The plaintiff may, at any time before answer, amend his petition without leave; but, unless the amendment be filed five days before the term at which the defendant is summoned to answer, he shall give to the defendant notice, of one day, of his intention to amend." *Hunt v. Semonin*, 79 Ky. 270.

A petition may, of course, be amended after the defendant has answered, but leave to file the amendment must first be obtained

of the court as provided by section 184 of the Civil Code of Practice, which confers upon the courts a broad discretion in the matter of allowing or refusing amendments, with which this court will not interfere, unless convinced that there has been an abuse thereof. Even if the amended petition would be regarded a supplemental pleading, the filing of which is permitted by section 135 of the Civil Code of Practice, it could not be filed without leave of the court. But it is manifest that the settlement of and agreement to dismiss the actions deprived appellant of the right to file the amended petition, and if the filing of the amended petition would not have been proper the filing of the answer and cross-petition of McKellup, administrator, would likewise have been improper.

The settlement made of the cases was not attacked in the amended petition or the answer and cross-petition on the ground of fraud or mistake; and its terms were fully shown by the writing introduced in evidence on the hearing of the motion to dismiss the cases. In addition to the proof of the settlement furnished by the writing mentioned, the agreement to dismiss the actions and appellees' compliance with the terms of the settlement, were fully shown by the affidavits of appellees and their attorney, and not denied by appellants.

The settlement was fairly effected and its provisions just to all the parties concerned. Indeed, had the rejected pleadings been filed and the cases gone to trial, the circuit court could not have adopted a better or more equitable basis for the adjustment of the rights of the parties than that presented by the terms of the settlement upon which they themselves agreed; therefore, the attempt of appellant to ignore and repudiate the settlement merited the rebuke administered by the ruling of the court in refusing to allow the amended petition, answer, and cross-petition to be filed. A court of equity, in the absence of an allegation and proof of fraud or mistake, will not aid a party to an action to violate an agreed settlement, out of court, of the matter in controversy, which he voluntarily made with the other parties to the action.

It is the policy of the law, and duty of the courts, to prevent vexatious litigation involving decedents' estates and to protect such estates from the payment of unnecessary costs; and the circuit court, for this reason, very properly refused to allow appellants to subject the estates of J. C. and Mary J. Petry to the commissions, attorney fee, and other costs, which would have resulted from the repudiation by them of the settlement made with appellees. Hall, etc., v. Metcalfe, 114 Ky. 886, 72 S. W. 18, 24 Ky. Law Rep. 1600.

The fact that the distributable shares of

appellees in the estates of their deceased parents were left after the settlement with the appellant G. W. Petry in the hands of A. M. J. Cochran did not affect the validity of the settlement or make it any the less final. By the settlement the indebtedness of the two estates was fully ascertained and its payment provided for; the amount left for distribution was likewise determined, as well as the share to which each heir was entitled; and the distribution among the heirs directed. Immediately following the settlement the appellant G. W. Petry was paid his distributable share of the estates, less the small amount retained to meet the attachment of R. W. Nelson, and this was later paid by his direction to McKellup whose appointment as administrator de bonis non he claimed to have procured solely for that purpose. If appellees chose to allow their part of the estates to remain in the hands of Judge Cochran, they had the right to do so; but in leaving it with him they constituted him their agent to safely keep and invest it. In thus placing or leaving it with the agent each knew the amount due her, and whether checks were passed to them by Anna M. Petry, administratrix of the deceased parents, or they executed formal receipts to the administratrix, is not material. The amount due each had been ascertained and agreed upon, and money received by the agent with a knowledge on his part of what sum was due to each of the sisters. If this manner of making a distribution among themselves was satisfactory to appellees, appellants had no cause of complaint, as it was a matter that in no way concerned them.

Being convinced of the correctness of the judgment it is affirmed.

NEW HAMPSHIRE FIRE INS. CO. v. BLAKELY et al.

(Supreme Court of Arkansas. Feb. 13, 1911.)

1. APPEAL AND ERROR (§ 1002*)—REVIEW— VERDICT—CONCLUSIVENESS.

A verdict on conflicting evidence is conclusive on appeal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3935; Dec. Dig. § 1002.*]

2. APPEAL AND ERROR (§ 1026*)—REVIEW— HARMLESS ERROR.

The Supreme Court will reverse only for prejudicial errors.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4029; Dec. Dig. § 1026.*]

3. APPEAL AND ERROR (§ 692*)—RECORD— RULINGS ON EVIDENCE.

To obtain a review of the exclusion of evidence, the record must show what the testimony was, or must show an offer to prove material facts.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2905-2909; Dec. Dig. § 692.*]

4. INSURANCE (§ 375*)—WAIVER OF RIGHT TO AVOID POLICY—AGENTS—AUTHORITY.

Where an agent of a fire insurance company had authority to issue regular and build-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

er's risk policies, and issued a regular policy on a building nearly completed, he thereby waived the incompleteness of the building, and bound the company by the policy.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 948, 956; Dec. Dig. § 375.*]

5. INSURANCE (§ 177*)—CONTRACTS—CONSTRUCTION—TERM OF INSURANCE.

A contract insuring property against fire in a specified amount for a premium of \$1.25 per \$1,000 will be assumed a contract for a time long enough to carry the liability beyond the date of a fire occurring three days after the making thereof.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 372, 373; Dec. Dig. § 177.*]

6. TRIAL (§ 260*)—INSTRUCTIONS—REFUSAL TO GIVE INSTRUCTIONS COVERED BY INSTRUCTIONS GIVEN.

It is not error to refuse instructions fully covered by those given.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 651; Dec. Dig. § 260.*]

Appeal from Circuit Court, Nevada County; Jacob M. Carter, Judge.

Action by R. L. Blakely and another against the New Hampshire Fire Insurance Company. From a judgment for plaintiffs, defendant appeals. Affirmed.

McRae & Tompkins and D. L. McRae, for appellant. Hamby & Haynie, for appellees.

McCULLOCH, C. J. Appellees sued appellant to recover on an oral contract of fire insurance alleged to have been entered into between them and appellant's agent at Prescott, Ark., whereby a certain building and furniture therein were insured against damage or destruction by fire. The policy was not issued, but Blakely, one of appellees, testified that appellant's agent agreed to insure the property in the amount named for a stipulated premium, and to issue a policy in accordance with said agreement. The agent was the cashier of a bank where appellees had money on deposit, and it was the custom of the agent to issue policies to his patrons and present bills for the premiums on the 1st day of the succeeding month. No question is raised in this case as to the failure to pay the premium, nor is there any question raised as to the authority of the agent to issue policies for appellant or to bind appellant by an oral contract of insurance.

The building which was the subject of the alleged contract of insurance was a church house. It had been completed except putting in the windows and doors, which were to be placed in the building in a few days so as to complete it. The pews and furniture, which were also insured, were in the building. Appellees had a policy of builder's risk insurance in another company, which expired on March 24, 1908, and on that date they applied to appellant's agent for a regular policy. The evidence shows that the rate was \$1.50 per annum for builder's risk insurance and \$1.25 per annum for a regular

policy. Blakely testified that Reagan, the agent of the company, first stated that he would not write regular insurance until the doors and windows were put in, but would give him a builder's risk policy at the higher rate, that he told the agent he could get a regular policy elsewhere, and that the agent then agreed to issue the regular policy. Mr. Reagan testified that he did not agree to write the policy, but took a memorandum of the amount of insurance, etc., and agreed to write the policy as soon as Blakely let him know that the windows and doors had been put in the building. This conflict in the testimony must, of course, be treated as settled by the verdict of the jury.

During the course of examination of Mr. Reagan as a witness, appellant's counsel offered to propound the following question, which the court on objection of appellees excluded: "What was your instruction from this particular company, and what was your authority to issue a policy on an uncompleted building, as this was, or did you have any?" The witness was not permitted to answer, and it is not shown here what the answer would have been. No offer was made to prove any specific fact by the witness in response to the question. This court reverses only for prejudicial errors, and, unless prejudice be shown, an erroneous ruling must be treated as harmless. In order to obtain a review of the ruling of a trial court, it must be shown what the testimony was, or at least an offer must be made to prove certain material facts; otherwise, we might reverse a case on account of the refusal of the court to permit a question to be propounded which would not have elicited any material fact. *Meisenheimer v. State*, 73 Ark. 407, 84 S. W. 494; *Boland v. Stanley*, 88 Ark. 562, 115 S. W. 103, 129 Am. St. Rep. 114; *Ætna Ins. Co. v. Little Rock*, 89 Ark. 95, 115 S. W. 960.

But, even if it had been shown by the witness that his instructions were to issue regular policies only on completed buildings, that would not have availed appellant anything as a defense to this action. The agent in question was authorized to enter into contracts of insurance, to issue regular policies and builder's risk policies; the only difference, so far as this case is concerned, being the slight difference in the rate of premium. The building was nearly completed, would be so in a few days; and, if the agent with full authority to issue policies saw fit to waive the incompleteness of the building and the difference in the premium, and entered into a contract for the issuance of a regular policy, the company is bound, notwithstanding the violation of instructions. *People's Fire Ins. Ass'n v. Goynes*, 79 Ark. 815, 96 S. W. 365, 16 L. R. A. (N. S.) 1180.

It is argued that the contract was too indefinite to be enforced, in that it failed to state the length of time the policy was to

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

continue. Blakely testified that the premium was to be \$1.25 per thousand. If we cannot infer that the agreement was for an annual policy, we certainly must assume that it was for a period of time long enough to carry it beyond the date of the fire, which occurred three days after the insurance contract was made. In a very similar case where the point was made, no time having been agreed on, but the parties having spoken of the premiums as so much per cent., without adding "per annum," Mr. Justice Bradley, delivering the opinion of the Supreme Court of the United States, said: "We think it perfectly manifest from all the evidence taken together that the parties meant and intended an insurance for a year, and had nothing else in their minds. This is the inference to be drawn from all their conduct, conversations, and correspondence; and we should be sticking in the bark to ignore it." *Eames v. Home Ins. Co.*, 94 U. S. 629, 24 L. Ed. 298. The instructions correctly submitted to the jury the question whether or not the agent of the company entered into a contract with appellees for the insurance of the property for a definite time on the specified terms. The refused instructions were fully covered by those given, and we find no error.

Affirmed.

HART, J., concurs in the judgment.

BROTHERHOOD OF LOCOMOTIVE FIREMEN & ENGINEMEN v. ADAY.

(Supreme Court of Arkansas. Jan. 30, 1911.)

1. INSURANCE (§ 726*)—MUTUAL BENEFIT CERTIFICATE—CONSTRUCTION.

A contract in a mutual benefit association certificate and the constitution relating to it should be construed according to the plain and obvious meaning of their provisions and with a view to accomplish the purpose for which the association is maintained.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 1870-1872; Dec. Dig. § 726.*]

2. INSURANCE (§ 726*)—MUTUAL BENEFIT INSURANCE—CERTIFICATE—CONSTRUCTION.

A contract for benefits in a mutual benefit association certificate is like any other insurance policy and its provisions, being expressed in language chosen by the insurer, should be construed most strongly against the association, so that construction will not be adopted which will defeat a recovery, if it is susceptible of a meaning that will permit one.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 1870; Dec. Dig. § 726.*]

3. INSURANCE (§ 787*)—MUTUAL BENEFIT INSURANCE—CERTIFICATE—CONSTRUCTION—"EXTREMITIES OF THE BODY"—"EITHER."

The "extremities of the body" are four in number, and "either" is one indifferently, any one of them; and the permanent paralysis of a hand resulting from a cut on the arm brings the plaintiff suing on the policy within the term "permanent paralysis of either extremities" as expressed in the constitution of the association.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 1865; Dec. Dig. § 787.*]

For other definitions, see Words and Phrases, vol. 3, pp. 2324, 2325.]

4. INSURANCE (§ 787*)—MUTUAL BENEFIT INSURANCE—CAUSE OF LOSS—"TOTAL DISABILITY."

"Total disability" is necessarily a relative matter, and must depend chiefly on the peculiar circumstances of each case, and on the occupation and employment and capabilities of the person injured. It does not mean absolute physical disability on the part of the insured to transact any kind of business pertaining to his occupation, and may exist although the insured is able to perform occasional acts, if he is unable to do any substantial portion of the work connected with his occupation.

[Ed. Note.—For other cases, see Insurance, Dec. Dig. § 787.*]

For other definitions, see Words and Phrases, vol. 8, pp. 7010-7012.]

5. INSURANCE (§ 825*)—MUTUAL BENEFIT INSURANCE—ACTION—EVIDENCE.

In an action on a mutual benefit certificate providing for indemnity for total paralysis of either extremity, evidence held to present no question for the jury as to the total paralysis of plaintiff's hand, so that a verdict was properly directed for plaintiff.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 2009; Dec. Dig. § 825.*]

Appeal from Circuit Court, Union County; Geo. W. Hays, Judge.

Action by Arthur S. Aday against the Brotherhood of Locomotive Firemen & Enginemen. From a judgment for plaintiff, defendant appeals. Affirmed.

This suit is on a benefit certificate for \$1,500, numbered A 92592 taken out by appellee, a fireman, in the Brotherhood of Locomotive Firemen & Enginemen when he joined the Brotherhood in 1902. He went delinquent in 1906, but was reinstated, and it was alleged that while he was a member in good standing upon the books of the grand lodge his left hand became permanently paralyzed which permanently and totally disabled or incapacitated him from performing all manual labor which by the terms of his beneficiary certificate entitled him to the payment of the full amount thereof; that he had duly filed his claim as required by the laws of the Brotherhood, and payment thereof was refused. Appellant answered admitting that appellee became a member of the Brotherhood of Locomotive Firemen and Enginemen, and that the certificate sued upon was issued to him; that he was suffering from paralysis of his left hand; denied that it occurred at the time and in the manner alleged; denied that said paralysis totally disabled or incapacitated him from all manual labor; that said paralysis is permanent, and that said paralysis is of either of plaintiff's extremities; denied that it promised to pay appellee \$1,500 or any other sum, and alleged that he obtained said beneficiary certificate upon a false warranty that he did not have paralysis which rendered it void. A copy of the constitution of the Brotherhood of Locomotive Firemen and Enginemen was introduced in evidence, and section 70 provides: "A beneficiary member in good standing upon the

books of the grand lodge becoming totally and permanently blind in one or both eyes; or who may become totally and permanently disabled or incapacitated from performing all manual labor on account of Bright's disease of the kidneys, permanent paralysis of either extremities, locomotor ataxia, or consumption of the lungs in its last stage, shall be entitled to the amount of his beneficiary certificate," etc.

The testimony tended to show that Arthur S. Aday filed his claim for total disability under his benefit certificate in accordance with the constitution of the order, demanding the entire amount thereof on March 16, 1908, on account of permanent paralysis of his left hand; that his hand was not in as bad condition then as at the time of trial when he testified: "The condition of the hand at the present time is four fingers of this hand are dead, no feeling in them at all. I can pierce them with a knife and still have no feeling in them. I am unable to grasp anything. I have no feeling whatever in those fingers. I have no grip with my thumb much, the only little grip that I have in that hand, though, is with my thumb. It is getting worse all the time." He testified that he had worked some in a poolroom within 18 months before the trial racking up the pool balls, and also on the river while in Kentucky as the clerk of a boat, and two or three months on the railroad in Louisiana as a flagman after putting in his claim before he was taken out of the railroad service in August, 1908; that there is nothing the matter with his right hand.

Dr. H. A. Murphy testified that in May or June, 1909, he made an examination of appellee's hand at the request of an official of the Brotherhood of Locomotive Firemen & Enginemen. "Q. State what you found upon your examination, please? A. I found the left hand totally paralyzed. Q. Would you say as an expert that the disability was permanent? A. It is. Q. Can he use and work with that hand? A. Not to perform what I think is manual labor. He could not do hard work."

Dr. L. L. Purifoy testified that in the summer of 1909 he made an examination of the hand of appellee at the instance of appellant, and that he found paralysis in his left hand. "Q. Is it, in your opinion, a total or permanent disability? A. It is, without an operation. I think at this time, without an operation, that it would be permanent. Q. Would he have the use of his fingers? A. He would not at this time."

Dr. J. B. Wharton testified that he was the medical examiner for appellant, and in his official capacity wrote the following letter to the grand medical examiner of the order and that everything in it was true to the best of his knowledge and belief: "Exhibit to testimony of A. S. Aday and Dr. J. B. Wharton. El Dorado, Ark. Sept. 1, 1908. Mr. W. E. Cory, Grand Med. Exam. Locomo-

tive Fire. & Engr., Cleveland, Ohio—Dear Sir: This is to certify that after a very careful examination of the conditions existing at present in the case of A. S. Aday, locomotive fireman on the Louisiana Division, show that his left hand has atrophied and contracted to such an extent that it renders him disqualified to do any further train service or any manual labor. This condition did not exist in the least at the time I examined him twelve months ago this last June for position on the Louisiana Division. At that time his hand had its natural full strength and did not show any signs of weakness whatever, and has not until within the last two or three months. There has been a steady weakening of the muscles of the hand and wrist. In my opinion condition was brought about as a result of loss in the nerve supply of the hand. In 1903 he sustained a deep cut on the anterior surface of the arm and lower third, severing a part of the main nerve supply ligaments of muscles of the arm and forearm. I claim that this injury received at that time has brought about the present existing condition of the hand. This injury he received was done while on duty on an engine on the Illinois Central Railroad during a wreck. He was thrown through a cab window, cut his arm, and I wish to recommend that he be paid the full amount of his insurance in the Brotherhood, in order that he may be able to go to some eminent specialist and try to have his hand and arm saved before it is too late, and unless he receives this money he will be unable to get the attention he necessarily must have in order to try to save his hand, and have it restored to anything like its normal condition again. He has not the necessary funds in sight to receive the proper attention that he should have. On account of this injury and loss of strength in his hand, he has been forced to retire from any further service of the railroad company, so you can readily see the position it places him in. Now I take the liberty to recommend to you and the officers of the Brotherhood of Locomotive Firemen & Enginemen that he be paid the full amount of his policy, and if I did not think it justifiable, I would not as your medical examiner recommend this done. Yours very truly, Dr. J. B. Wharton, Med. Exam. for Pine Hill Lodge, No. 618, El Dorado, Arkansas. Med. Exam. O. R. C. B. of L. F. & E., and B. of R. T. Subscribed and sworn to before me this the 1st day of September, 1908. James Carroll, Notary Public. I solemnly swear that the statements made in this letter are the facts. [Signed] A. S. Aday. Subscribed and sworn to before me this 1st day of September, 1908. [Seal.] Jas. Carroll, Notary Public."

The court directed the jury to find a verdict for plaintiff for the amount sued for and from the judgment defendant appealed.

It is contended, first, that the court erred

in giving a peremptory instruction for plaintiff. The undisputed testimony showed that Aday's left hand was paralyzed; that the four fingers of it atrophied and are dead—no feeling in them at all, as he expressed it; that he was unable to grasp anything; that he had very little grip in his thumb; and that his hand was getting worse all the time, and because of it he was unable to perform, and compelled to retire from, any further railroad service. Two of the three experts employed by appellant to examine him testified that the left hand was paralyzed and the disability permanent, and the other that without an operation it was permanent paralysis, and the proof was undisputed that his condition was such that he could not procure the service of such an eminent specialist as would be able to perform the operation that might result in preventing the disability from continuing permanent.

R. L. Floyd, for appellant. Mahoney & Mahoney and Powell & Taylor, for appellee.

KIRBY, J. (after stating the facts as above). It is contended first that if appellant had permanent paralysis of his hand, that it was not "permanent paralysis of either extremities" within the meaning of the constitution of the order; second, that he was not thereby "permanently and totally disabled or incapacitated from performing all manual labor" and entitled to the amount of his beneficiary certificate; third, that the court erred in giving a peremptory instruction in favor of plaintiff. The contract, and constitution relating to it, should be construed according to the plain and obvious meaning of their provisions, and with a view to accomplish the purpose for which the Brotherhood is maintained and persons become members thereof, and as this court said in *Industrial Mutual Indemnity Co. v. Hawkins*, 127 S. W. 457: "The contract sued on is like any other insurance policy, and its provisions should therefore be construed most strongly against the insurer. As the language employed is that of the defendant, a construction will not be adopted which will defeat a recovery if it is susceptible of a meaning that will permit one. *American Bonding Co. v. Morrow*, 80 Ark. 49, 96 S. W. 617, 117 Am. St. Rep. 72; *Title Guaranty & Surety Co. v. Bank of Fulton*, 89 Ark. 471, 117 S. W. 537."

1. The extremities of the body are four in number, and "either" is one indifferently, any one of them; and the permanent paralysis of a hand resulting from a cut on the arm brought appellant within the meaning of the term "permanent paralysis of either extremities" as expressed in section 70 of the constitution.

2. The purpose of the Brotherhood, and the object of the contract, was to protect the beneficiary from the loss of time and wages caused by disease and injury, and provide a fund for his support if the injury "totally

and permanently disabled him from the performance of all manual labor;" in other words, from earning a livelihood. "Total disability does not mean absolute physical disability on the part of the insured to transact any kind of business pertaining to his occupation. Total disability exists although the insured is able to perform occasional acts if he is unable to do any substantial portion of the work connected with his occupation. It is sufficient to prove that the injury wholly disabled him from the doing of all the substantial and material acts necessary to be done in the prosecution of his business," etc. *Kerr on Insurance*, §§ 385, 386; 4 *Joyce on Insurance*, § 3031. Our court said in *Industrial Mut. Ind. Co. v. Hawkins*, supra, "Total disability is necessarily a relative matter, and must depend chiefly on the peculiar circumstances of each case. It must depend largely upon the occupation and employment and the capabilities of the person injured."

The testimony shows that appellant was a locomotive fireman and engaged in the railroad service; that he took this beneficiary certificate to indemnify him in case of loss of time and wages occasioned by injury from the hazard of his employment or the diseases specified in the contract that might destroy his ability to continue therein. The undisputed evidence shows that because of this permanent paralysis of his hand he is no longer able to perform any railroad or train service whatever, and has been compelled to retire from such service because of said injury. It incapacitated him, not only from some of the duties incident to his service in some lines of railroad employment, but from the performance of all the duties of every kind in that service—the only one to which he was trained and accustomed, and in which he was employed at the time of taking membership in this Brotherhood, whose purpose was to protect him while engaged in such service. It was evidently the intention of the parties to protect the beneficiary and permit him to recover the full amount of his certificate upon the occurrence of any one of the causes specified when it permanently and entirely incapacitated him from all service of any kind whatever in the railroad employment. Section 69 of the constitution of this order lends weight to the correctness of this view and construction, since it allows a beneficiary member sustaining the loss of a hand or a foot by actual separation to receive the full amount of his beneficiary claim; and we can see no difference between the total incapacity of the member by the loss of a hand by actual separation and its absolute loss and usefulness by paralysis thereof, and hold that it was such a permanent and total disability as was in the contemplation of the parties in the making of this contract.

3. That the court erred in directing a verdict for appellee. The undisputed testimony

showed that his left hand was paralyzed, that the four fingers of it were atrophied or "dead—no feeling in them at all," as he expressed it; that he was unable to grasp anything; that he had very little grip in his thumb, and that his hand was getting worse all the time; and that because of it he was unable to perform, and compelled to retire from, any further railroad service whatever. Two of the three experts employed by appellant to examine him testified that the left hand was paralyzed and the disability permanent, and the other that without an operation it was permanent paralysis; and the proof was undisputed that his condition was such that he could not procure the service of such an eminent specialist as would be able to perform the operation that might result in preventing the disability from continuing permanent. There was no conflict in this testimony. It was undisputed that his left hand was permanently paralyzed unless, as one expert thought, it might possibly be cured by an operation by such an eminent specialist as the undisputed testimony showed he had no means to employ.

Under our view of the case, there was no question for the jury, and the court did not err in directing their verdict. Judgment affirmed.

GREEN et al. v. MADDOX.

(Supreme Court of Arkansas. Jan. 30, 1911.)

1. JUDICIAL SALES (§ 50*)—COMMISSIONER AS TRUSTEE FOR PURCHASER.

The rule that, when a contract for sale of land has been made, the vendor becomes a trustee for the purchaser, applies to a judicial sale, where it has been confirmed, and the purchaser's equitable title thus acquired has not been lost by foreclosure or resale; the commissioner, representing the court, becoming the vendor and holding the legal title for the benefit of the purchaser.

[Ed. Note.—For other cases, see Judicial Sales, Dec. Dig. § 50.*]

2. TRUSTS (§ 95*)—CONSTRUCTIVE TRUST.

Where, after the confirmation of a judicial sale, another than the purchaser, with knowledge of the commissioner being trustee for the purchaser, pays the purchase money to the commissioner, and takes the deed to himself, he becomes a constructive trustee for the purchaser and his heirs.

[Ed. Note.—For other cases, see Trusts, Cent. Dig. §§ 145-147; Dec. Dig. § 95.*]

3. MORTGAGES (§ 27*)—EQUITABLE MORTGAGE—NATURE OF TRANSACTION.

After a judicial sale was made to H. and confirmed, J. petitioned the court, alleging death of H., leaving two sons as his heirs, that he was their guardian, that decedent's estate had no funds with which to pay the purchase money of the lot, and asking an order directing the commissioner to make the deed to him, which order was made, expressly providing that there was reserved to said heirs the right to redeem by paying to the commissioner the purchase money and interest within a certain time, and all this was shown by the deed executed to him by the commissioner. Held,

that the deed was, in effect, an equitable mortgage, from which the heirs might redeem.

[Ed. Note.—For other cases, see Mortgages, Dec. Dig. § 27.*]

4. VENDOR AND PURCHASER (§ 230*)—BONA FIDE PURCHASER—NOTICE.

A purchaser is chargeable with notice of anything affecting his title in a deed through which he must trace title, though such deed be not recorded.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. § 505; Dec. Dig. § 230.*]

5. MORTGAGES (§§ 199, 203*)—MORTGAGES IN POSSESSION—ACCOUNTABILITY OF GRANTEEES—RENTS AND IMPROVEMENTS.

Though the unrecorded deed to J., was, as disclosed thereby, an equitable mortgage, from which plaintiff was entitled to redeem, and J. was a mortgagee in possession, and would be accountable for all rents issuing from the land while he held it, and such rents would be applied to the payment of the purchase money of the land advanced by him for plaintiff, yet the persons to whom J. deeded the land as his own, and defendants who received a deed thereof from such grantees, having believed in good faith in the title under which they occupied, defendants are not chargeable with the rents and profits from the time of the deed to J., but are within the betterment act (Kirby's Dig. § 2754 et seq.), providing that "any person believing himself to be the owner * * * under color of title, (who) * * * shall peaceably improve any land which on judicial investigation shall be decided to belong to another," shall be entitled to its benefits, except that, in addition to the rents and profits for three years next preceding the commencement of the suit, for which alone the act makes them liable, they are accountable for the rents during the occupancy of J., provided they do not, with said three years' rents and profits, exceed the amount of the purchase money advanced by him; and defendants cannot recover the value of permanent improvements made by J., but only the cost of ordinary repairs made by him on existing improvements.

[Ed. Note.—For other cases, see Mortgages, Cent. Dig. §§ 513-525, 539-543; Dec. Dig. §§ 199, 203.*]

Appeal from Greene Chancery Court; Edward D. Robertson, Chancellor.

Action by Hayden Maddox against R. J. Green and others. Decree for plaintiff. Defendants appeal. Reversed and remanded, with directions.

B. H. Crowley, for appellants. Huddleston & Taylor, for appellee.

FRAUENTHAL, J. This was an action instituted by Hayden Maddox, the plaintiff below, seeking, in effect, to establish his title to an undivided one-half interest in a house and lot situated in the city of Paragould, the legal title to which was in the defendants, and to obtain an accounting of the rents and profits issuing therefrom. On November 17, 1888, the commissioner of the Greene chancery court, by virtue and in pursuance of a decree rendered in a proceeding pending in that court, sold the land in controversy to one Henry Maddox, who executed his note for the purchase money thereof. That sale was duly reported by said commis-

sioner to said chancery court and was confirmed by said court at its regular March term, 1889. The testimony tends to prove that under said purchase Henry Maddox went into possession of and either built or commenced the erection of a house upon said lot. Thereafter and prior to the maturity of the note which he had executed to said commissioner for the purchase money of said lot, Henry Maddox died leaving surviving him as his heirs at law the plaintiff and an elder brother, named Donald. At the February term, 1890, of the Greene chancery court, one J. D. Maddox presented to that court a petition in which he alleged that he was the uncle and guardian of said heirs of Henry Maddox, deceased, and that there were no funds of said decedent's estate out of which to pay the commissioner for the purchase money of said lot sold to Henry Maddox, and that he had paid same out of his own funds. He asked an order of said court directing the commissioner for that reason to execute to him a deed for the lot. The chancery court thereupon made an order directing that the commissioner execute a deed for the lot to said J. D. Maddox, but therein it was expressly provided that there was reserved to said Hayden and Donald Maddox the right to redeem said land by paying the amount of said note executed by their father to said commissioner therefor with lawful interest at any time before they arrived at the age of 24 years. Thereupon the commissioner executed to said J. D. Maddox a deed for said lot, in which it was recited that the lot had been sold to Henry Maddox, who died before the maturity of the note given for the purchase money thereof, leaving the plaintiff and his brother as his minor heirs, and that J. D. Maddox, their guardian, had paid the purchase money therefor out of his own means; and, after making specific reference to the page of the record containing the order of the court directing the execution of a deed to J. D. Maddox with the rights of said minors reserved, the deed further recited that the commissioner executed the deed to said J. D. Maddox "with the privilege granted said minors to redeem said lot within three years after their majority on paying the purchase money on said lot with lawful interest." This deed was dated on May 27, 1890, but was never filed for record until May 11, 1908, and after the institution of this suit.

It appears that on December 30, 1890, the lot was levied upon, as the property of J. D. Maddox and sold by the sheriff of said county to satisfy an execution in favor of a judgment creditor of said J. D. Maddox, and that a sheriff's deed was executed in pursuance of said sale to the purchaser of said lot thereunder. The defendants claim, title to the lot by mesne conveyances running back to the said purchaser at said sheriff's sale, and under said deeds they and their grantors

made valuable and permanent improvements on the lot. At the time of the institution of this action, Hayden Maddox was less than, and his brother was more than, 24 years old, and this suit proceeded solely in the name of said Hayden Maddox. The chancery court entered a decree declaring the plaintiff to be the owner of an undivided one-half interest in the lot and entitled to an accounting as to the rents and profits issuing therefrom. It thereupon appointed a master to make and state an account between the plaintiff and the defendants and directed that therein the plaintiff should be charged with the amount necessary to pay his portion of the purchase money advanced by J. D. Maddox with interest and the value of all improvements placed upon the land by the defendants and those under whom they claimed title, together with legal interest thereon, and with all taxes and assessments paid by them, together with interest thereon; and also directed that the defendants should be charged with all rents and profits issuing from said land from the date of said deed to said J. D. Maddox, together with interest thereon. The master made a report in accordance with said directions, which was by the court approved, and a decree entered in conformity with such findings. From this decree, the defendants have appealed to this court.

The title of the parties to the land involved in this suit depends upon the rights and interests which the plaintiff and J. D. Maddox acquired under the sale thereof made by the chancery court and the deed executed by the commissioner therefor to said J. D. Maddox, because the title of plaintiff is derived from the sale made under the decree of said court and said deed, and that of defendants is deraigned through said J. D. Maddox, who held under said deed. When the commissioner made a sale of said land under the decree of said chancery court to Henry Maddox, and that sale was duly confirmed by that court, a binding contract for the sale and purchase of said land was entered into, and the relation of vendor and vendee was constituted. The commissioner, representing, it is true, the court, became a trustee of the title for the purchaser, for, after the confirmation of the sale, Henry Maddox had the equitable title to the land as a purchaser thereof, which could be lost only by a reversal of said order of confirmation upon appeal or by a foreclosure of the lien for the purchase money agreed to be paid by him, or by an order directing a resale of the land on account of its nonpayment. 24 Cyc. 49. In the case of *Stubbs v. Pitts*, 84 Ark. 160, 104 S. W. 1110, it is said: "The moment that a contract for the sale and purchase of land is entered into and the relation of vendor and vendee is constituted, the vendor becomes a constructive trustee for the purchaser." This is founded on the principle that equity treats

that as done that ought to be done. By the terms of the contract the purchase price ought to be paid to the vendor, and the land ought to be conveyed to the vendee. Equity therefore regards this as done." This applies equally to a judicial sale, where such sale has been properly confirmed, and the equitable title thus obtained by the purchaser has not been lost by foreclosure or resale. In such case the commissioner, representing the court, becomes the vendor and holds the legal title for the benefit of the vendee; and one who, with full knowledge of such trust, pays the purchase money and takes the deed to himself, will be held a trustee for the vendee and his heirs. When therefore J. D. Maddox paid the purchase money to the commissioner after the sale of the lot was made by him to Henry Maddox and that sale was duly confirmed, he thereby became a constructive trustee for the heirs of Henry Maddox to whom his rights descended. But, in addition to this, J. D. Maddox, by order of the chancery court, and by the terms of the deed under which he alone could claim any title to the land, obtained only a defeasible title thereto. By the very terms of the deed, it was provided that his title would be defeated by the repayment to him within a specified time of the money which he had advanced. The effect of that order and the provisions of the deed was the same as if Henry Maddox or his heirs had procured J. D. Maddox to agree to take the title to the land in his name for their benefit and accommodation, with the further agreement that he should hold the title until repaid within a certain time for the money advanced by him and then to convey it to them. This constituted the transaction and conveyance in effect an equitable mortgage which the heirs of Henry Maddox had the right to redeem. This interest and right of the heirs of Henry Maddox to the land was specifically provided for and recited in the deed to J. D. Maddox, and he and all those who claimed title under the deed were bound by those recitals. As is said in the case of Stees v. Kranz, 32 Minn. 313, 20 N. W. 241: "No rule is better settled than this: That one is bound by whatever affecting his title is contained in any instrument through which he must trace title, even though it be not recorded and he have no actual notice of its provisions." Every purchaser who holds under a conveyance through which he must trace his title is bound by whatever is contained in it. It is his imperative duty to obtain and examine all the instruments which constitute essential links in his chain of title, and he is conclusively presumed to know all the recitals and matters contained therein affecting the title or the estate, whether they are recorded or not. 2 Devlin on Deeds, § 1001; 2 Pomeroy, Eq. Jur. § 626; Blake v. Tucker, 12 Vt. 39; Robbins v. McMillan, 26 Miss. 434.

It follows that the defendants are affected with notice of the provisions and recitals that were contained in the deed made by the commissioner to J. D. Maddox through which they deraign title to the land, and that they obtained no better title thereto than was held by him, although they were ignorant of the defeasible estate which he had in the land. The court was therefore correct in declaring that the plaintiff was the owner of an undivided one-half interest in the land subject to the payment of the purchase money which had been advanced therefor for him.

But we think the court was in error in holding that the defendants were chargeable with rents and profits issuing from said land back to the time when the purchaser obtained title thereto under the deed of the sheriff selling the estate of J. D. Maddox therein. J. D. Maddox was, it is true, a mortgagee in possession, and he would be accountable for all rents which issued from the land during the time he held it, and such rents should be applied to the payment of the purchase money advanced by him; and, if it did not pay same in full, then the plaintiff would be chargeable with the remainder of said purchase money. But we think that the facts of this case occurring after the purchase of the land under said sheriff's sale bring it within the terms of the betterment act. That statute (Kirby's Dig. § 2754 et seq.) provides that "any person believing himself to be the owner, either in law or equity, under color of title, (who) has peaceably improved or shall peaceably improve any land which upon judicial investigation shall be decided to belong to another," shall be entitled to its benefits.

In the case of *Shepherd v. Jernigan*, 51 Ark. 275,¹ it was held that a party who improved lands in good faith under the belief that he was the owner was entitled to the benefits of the betterment act even though notice of the imperfection of his title might be gained from the registration of a deed in the chain of his title. In *Bloom v. Strauss*, 70 Ark. 483, 69 S. W. 548, 72 S. W. 563, we held that a bona fide occupant who held under a last will which was defective upon its face could claim the benefit of this statute. And in *McDonald v. Rankin*, 92 Ark. 173, 122 S. W. 88, we said: "He (the occupant) may know the facts which prove the invalidity of his title, yet if, through mistake of law, he still believes that title good, he can hold in good faith within the meaning of the betterment act."

In the case at bar the evidence clearly shows that the defendants and those under whom they claimed title to the land back to J. D. Maddox believed in good faith in the title under which they occupied the land, and, though their title to the undivided one-half interest was imperfect, yet they occupied the land under color of title and in

¹ 10 S. W. 765, 14 Am. St. Rep. 50.

the honest belief in that title. It follows that, in accordance with the betterment act, the plaintiff was entitled to recover the rents and profits of the land which accrued within three years next before the commencement of this suit; and, in addition to this, he was only entitled to the value of the rents during the period that J. D. Maddox owned the land, in event those rents do not exceed the amount of the purchase money advanced by him. J. D. Maddox being in effect a mortgagee in possession, the defendants cannot recover the value of any permanent improvements made on the lot by him, but only the cost of any ordinary repairs which he may have put on any improvements which were on the lot while he had possession thereof. In all other respects we think the decree of the chancellor was correct.

The decree is reversed, and this cause is remanded, with directions to refer the matter to a master, if necessary, for further accounting, and to enter a decree not inconsistent with this opinion.

FLOYD v. NEWTON et al.

(Supreme Court of Arkansas. Feb. 6, 1911.)

1. EXECUTORS AND ADMINISTRATORS (§ 537*)—FINAL SETTLEMENT—IMPEACHMENT—COMPLAINT.

A complaint on an administratrix's bond and to impeach the final settlement held insufficient to charge fraud, accident, or mistake.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. §§ 2549, 2551; Dec. Dig. § 537.*]

2. EXECUTORS AND ADMINISTRATORS (§ 513*)—ACCOUNT OF ADMINISTRATOR—CONCLUSIVENESS.

Final settlements by administrators of decedents' estates, showing receipts and deductions duly proved and confirmed by the probate court, are judgments which are conclusive unless appealed from.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. §§ 2267-2291; Dec. Dig. § 513.*]

3. EXECUTORS AND ADMINISTRATORS (§ 537*)—ADMINISTRATRIX'S BOND—EVIDENCE.

In an action on administratrix's bond, evidence held insufficient to show fraud, accident, or mistake in the accounting of the principal before the probate court.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. §§ 2567, 2568; Dec. Dig. § 537.*]

Appeal from Union Chancery Court; James M. Barker, Chancellor.

Action by R. L. Floyd, administrator, substituted for Raymond Hudson, deceased, against Mrs. S. E. Newton and others. From a judgment for defendants, plaintiff appeals. Affirmed.

This suit was originally brought by Raymond Hudson against his mother, Mrs. S. E. Newton, and the sureties on her bond, to surcharge and falsify her settlements as the administratrix of the estate of her husband,

John B. Hudson, deceased, father of Raymond Hudson. On March 3, 1909, the death of Raymond Hudson was suggested to the court, whereupon R. L. Floyd was appointed administrator ad litem, and at the same time the death of Colonel H. P. Smead was suggested, whereupon Mrs. Anna F. Smead and Mrs. Sula H. Powell, executors of his estate, were substituted as defendants.

The complaint alleges: That the claims of all creditors against the estate have been satisfied in full. That the administratrix has made final settlement and been discharged. That she failed to charge herself through accident or mistake with the appraised value of the personal estate, but deducted, without authority or right, therefrom the sum of \$1,520.41. That she charged herself with 88 bales of cotton not appraised a certain sum, and that its true value was greater than said sum. That she took credit for a difference in the appraised value of 286 bales of cotton and the selling price, amounting to \$2,059.20, without right. That she took sundry credits on many vouchers, giving their number, aggregating \$1,269.37, without right in law or equity. That said sums were not paid on claims lawfully or justly chargeable against the estate. That the same were never probated. That she has committed a waste of said estate in paying said sums and has paid them as the result of gross and reckless errors. That all said failures to charge herself and said unlawful payments were done in fraud or through accident or mistake or were gross or reckless errors.

The answer admits the appointment of administratrix and the giving of bond as alleged. Denies that the administratrix has omitted to charge herself through accident, mistake, or otherwise with any matters she was in law bound to charge, that she failed to charge herself with the appraised value of the estate or deducted without right or authority the sum of \$1,521.40 as alleged. Admits that 88 bales of cotton were charged and not appraised, not being in her possession, having been shipped to New Orleans for sale, as was customary, and sold at its cash value and the sale reported and approved by the court. Admits that the 280 bales of cotton was sold for \$2,059.20 less than she is charged in the appraisement. Says that said cotton was in New Orleans and in transit there for sale, as was customary, when the appointment was made; that it was sold in due course of business for said amount less than the appraisement, all of which was submitted to the probate court, approved, and the credit properly allowed. Admits taking credit for \$1,267.37 in first settlement as alleged and shown in the numbered vouchers and in the second settlement as charged. Says they were for payments of claims justly chargeable against the estate and all submitted to the probate court and passed upon

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

and allowed and are just and correct. Denies having committed any wrong by any carelessness or error, and "further states that these matters were all just claims against the estate of John B. Hudson, deceased. They were considered in due course by the probate court of Union county, by it passed upon and allowed, and that its judgment is final." Also claimed Raymond Hudson was indebted to her in sum of \$500 for board and clothing and asked judgment therefor.

The testimony showed: That the stock of goods and merchandise was appraised at \$1,524.30, less amount due on same, \$546.72, and the administratrix charged with only the balance, \$977.66. That the 286 bales of cotton was appraised at \$6,475, less amount due on same, \$973.77, and the administratrix charged with the difference, \$5,501.23. That 88 bales were never in her possession or appraised, but that they were sold in New Orleans at the market price, and all the money realized therefrom charged to the administratrix.

One of the appraisers testified: That these deductions were made by the appraisers and the amount of same arrived at from the books of the deceased and from statements made by the manager and bookkeeper at the time, who was a brother of the appraiser, that Cliff Dearing had paid a debt of \$150 to the estate in cotton, and that the administratrix could not remember where it was accounted for in the settlement. That the amounts for which the vouchers showed credit had been taken in the settlement as charged in the complaint were all charged in the settlements against the estate and credit taken therefor by the administratrix and passed upon and allowed by the probate court.

There was some testimony tending to show that an examination of the probate court records disclosed that no claims had been regularly probated and filed against the estate. The inventory and appraisement of the estate were duly filed and approved by the probate court. The settlements were made showing the credits claimed with the vouchers for the amount paid out. No exceptions were filed to either settlement, and each was duly and regularly approved and confirmed, and the administration closed, and the administratrix regularly discharged on July 28, 1902. The court found that plaintiff failed to establish any of the allegations of the complaint and dismissed it for want of equity, and he appealed.

R. L. Floyd, for appellant. Powell & Taylor, for appellees.

KIRBY, J. (after stating the facts as above). The complaint to impeach the settlement charged fraud, accident, or mistake in such vague, indefinite, and general terms, without specifying in what it consisted, that

no cause of action was stated. *Mock et al. v. Pleasants*, 34 Ark. 63; *Riley v. Norman*, *Adm'r*, 39 Ark. 158; *McLeod v. Griffiths*, 51 Ark. 1, 8 S. W. 837. Having been answered, however, and proofs introduced, we will examine the contention made here to ascertain whether there was such proof as would sustain specific charges amounting to a cause of action.

Appellant insists that the settlement is impeached because the administratrix failed to account for all the assets of the estate and deducted two large amounts, \$546.72 and \$973.77, the sum of \$1,520.49 in all, from their sales as shown in the appraisement, and that she also failed to account for a collection of \$150 from Cliff Dearing.

The appraisement on its face shows that the appraisers valued the assets, deducting said amounts due thereon, as follows:

Goods, wares and merchandise....	\$1,524.30	
Less amount due on same.....	546.72	\$ 977.66
286 bales of cotton at \$22.50.....	6,475.00	
Less amount due on same.....	973.77	\$5,501.23

It was filed and approved by the court, and the administratrix charged herself in the first settlement with the value of the stock of goods and the cotton after deducting the amounts due thereon as in the appraisement. T. W. Williams, one of the appraisers, testified that these deductions were made by the appraisers in the appraisement as shown after an examination of the books of the deceased, and a statement from the appraiser's brother, Jim Williams, now dead, who was manager for deceased and kept the books, disclosed that the said amounts were due and owing on the stock of merchandise and the cotton when the appraisement was made. The administratrix testified that she did not know why these deductions were made, that she could not explain them, that she did not know of these conditions, that she had charged herself with all the assets coming to her hands, that Cliff Dearing paid what he owed in cotton, although she could not remember just where it was charged in the settlement, and her settlement shows 88 bales of cotton charged as having been received after the appraisement was made. She was not able to explain for what money certain amounts were paid for which she took credit and filed vouchers, but claimed they were just and correct and properly chargeable against the estate as they were charged in her settlements with the vouchers showing the payments duly exhibited with the settlement. Closing her testimony, she said: "My attorney has the vouchers, and he is not here, and I have no books to refer to, and it has been several years since these things occurred. There were a great many transactions that I did not understand anything about. I depended upon the manager of the business. Jim Williams was manager until his death, then Garland Williams took charge, and, when Garland got so he couldn't look after

it, I took Mr. McMath. In changing hands there was some loss each time."

Those amounts were shown to be indebtedness of the estate deducted in the appraisalment from its value, which could have been, and doubtless were, paid to the various creditors to whom they were owing upon the sale of the property, and this accounts for the fact that none of the claims composing it were probated against the estate, and, in any event, there was no allegation nor any proof whatever that said amounts so deducted or any part of either of them was ever allowed or paid by the administratrix out of the assets with which she was charged. The administratrix should, of course, have been charged in the probate court with the entire estate and the debts due upon the goods and cotton, and all others regularly probated, allowed and paid in due course of administration, instead of the deductions being made and these debts paid as they were.

The settlements showing all these matters, however, were made and duly approved and confirmed by the probate court, and are judgments of that court which could have been appealed from if incorrect. *McLeod v. Griffiths*, 51 Ark. 1, 8 S. W. 837; *Jones et al. v. Graham*, 36 Ark. 333; *Dyer et al. v. Jacoway*, 42 Ark. 186.

"The complaint contains no averment that the allowances made to the administratrix upon her settlement were obtained by any misrepresentation or deception practiced upon the court. The facts, so far as anything to the contrary appears, were all before the court and understood by it, and its decisions fairly made." *Mock et al. v. Pleasants*, 34 Ark. 72.

In *McLeod v. Griffiths*, supra, at pages 10-11 of 51 Ark., at page 840 of 8 S. W., the court said: "It is plain, however, that whatever matter the probate court has passed upon cannot be assigned in the chancery court as fraudulent or as the result of accident or mistake, unless upon the statement of some fact or circumstance not considered by the court. The identical issues decided by the probate court cannot be retried and reversed by the chancery court in this proceeding, and where this is manifest the court should refuse to take jurisdiction. The difficulty is almost peculiar to judgments confirming administrators' accounts. Those settlements are necessarily divided into numerous items of debit and credit, and the items have no necessary connection with each other; but an examination and confirmation of the settlement is the judgment of the probate court as to each separate item as much as it is to the settlement as a whole. We are not prepared to say that the chancery court would not have jurisdiction to set aside as a whole the settlement accounts of an administrator; but it would be only upon an im-

peachment of the settlements as a whole. It must be upon fraud or accident going to or affecting the entire action of the probate court and in which the court has been the victim of the fraud or the accident." See, also, *Mock v. Pleasants*, supra; *Scott v. Penn.* 68 Ark. 492, 60 S. W. 225; *Jones et al. v. Graham*, 36 Ark. 391.

The proof failed to show any fraud, accident, or mistake that would sustain specific charges amounting to a cause of action as held by the chancellor, and the decree is affirmed.

BEEBE et al. v. OLENTINE

(Supreme Court of Arkansas. Jan. 30, 1911.)

1. PARTNERSHIP (§ 5*)—CREATION BY AGREEMENT.

Such being the intention, a partnership is formed by the agreement of the persons that they shall purchase jointly for purpose of speculation numerous tracts of land, each to pay an equal amount of the purchase price, and to have an equal share of the final profits arising from resale.

[Ed. Note.—For other cases, see *Partnership*, Cent. Dig. §§ 15, 16; Dec. Dig. § 5.*]

2. PARTNERSHIP (§ 98*)—FRAUD OF PARTNER ON COPARTNER.

Where S. and O. formed a partnership to speculate in certain lands, S. promising at the time to advance to O. all the money he needed in excess of the \$1,000 paid by O. on the contract of purchase, and S. then entered into a secret agreement with B. to furnish the money to complete the purchase and to take the title to the lands, and divide with him the profits from a resale, and thereafter S. told O. that B. had agreed to advance the money for the purchase and charge interest thereon, but that B. desired to take title to the land in his own name as security, whereby O. was induced to direct the deed to be made to B., and thereafter O., when he offered to repay his share of the purchase money, was told by S. that he had no interest in the transaction, there was a fraud on O. by his partner, which cannot prevail to deprive O. of his right to half of the profits as between him and S.

[Ed. Note.—For other cases, see *Partnership*, Cent. Dig. § 152; Dec. Dig. § 98.*]

3. FRAUDS, STATUTE OF (§ 76*)—PARTNERSHIP AGREEMENT AS TO LANDS.

A partnership agreement for investment in lands, executed except as to division of profits, is not within the statute of frauds.

[Ed. Note.—For other cases, see *Frauds, Statute of*, Cent. Dig. §§ 135-139; Dec. Dig. § 76.*]

4. APPEAL AND ERROR (§ 882*)—PARTY ENTITLED TO COMPLAIN OF DECREE.

A defendant who, admitting by his answer that the profits of the transaction in question were to be divided equally between him and the other defendant, admits that he is entitled to only half of the profits, cannot complain, half the profits being awarded to him, that the other half is awarded to plaintiff.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 3591-3610; Dec. Dig. § 882.*]

Appeal from Pike Chancery Court; James D. Shaver, Chancellor.

Suit by Charles Olentine against L. V. Beebe and another. From the decree, defendants appeal; plaintiff taking a cross-appeal. Affirmed.

About the 1st of January, 1905, Charles Olentine and Elmer E. Shock conceived the plan of buying up certain timber lands in Pike county, Ark., from various persons and selling them for a profit. According to the testimony of Shock, each was to pay half of the purchase price and each to have half of the final profits. In furtherance of their plan, they entered into the following written agreement with Jeff and Wallace Hughes on January 31, 1905: "This agreement made this day by which Jeff Hughes and Wallace Hughes, of Rock Creek, Ark., are to deliver to Charles Olentine and Elmer E. Shock, their administrators or assigns, perfect titles to the following tracts of land south of Rock Creek post office, Ark.: W. S. Bullard, 520 acres; J. P. Farmer, 160 acres; A. S. Herring, 200 acres; W. D. Fuller, 160 acres; G. O. Doster, 160 acres; A. Doster, 320 acres; Geo. Fuller, 80 acres; Geo. Spears, 160 acres; Pat Baker, 120 acres; Frank Baker, 160 acres; Bill Baker, 120 acres; John Thornton, 160 acres. The price to be \$6 per acre. The receipt of \$2,000 is hereby acknowledged, the balance to be paid May 1, 1905, or as soon thereafter as perfect title can be made. In case if for some unforeseen and unavoidable event it should be impossible to perfect title to a particular tract in the above, that tract shall be deducted from the total amount. It is understood and is made a part of this contract that the timber on this land is to remain in its present condition unless changed by Providence." On the day this contract was executed, Olentine gave a check for \$1,000 payable to Wallace G. Hughes, and it was paid. On the 7th day of February, 1905, Elmer E. Shock assigned his interest in the contract with the Hughes brothers to L. V. Beebe in consideration that Beebe should advance the money to purchase the lands, and divide equally the profits of a resale with him. On the 10th day of April, 1905, Jeff and Wallace made a contract with one Fuller to purchase 160 acres of land from him, and the deed was made to Charles Olentine and E. E. Shock jointly. The remainder of the land purchased by Jeff and Wallace Hughes was conveyed to L. V. Beebe and comprised about 1,039 acres. Beebe paid therefor \$7,214 by check. The first check is dated February 7, 1905, for \$1,000 payable to E. E. Shock. The second check is dated April 18, 1905, for \$480 payable to Wallace Hughes. The third check is dated June 2, 1905, for \$2,000 payable to Wallace Hughes. The fourth check is dated June 12, 1905, for \$2,380 payable to Wallace Hughes. The fifth check is dated July 26, 1905, for \$1,354 payable to Wallace Hughes. In 1908 the lands were sold to the Caddo River Lumber Company for a profit. The above facts are undisputed.

This suit was instituted in the chancery court by Charles Olentine against Elmer E. Shock and L. V. Beebe, in which he claimed to be equitable owner of a half interest in the lands conveyed to Beebe. The prayer of his complaint was that his interest in the lands be declared and fixed, and that he have judgment for one-half the amount agreed to be paid by the Caddo River Lumber Company for the lands less the amount due Beebe for advances of purchase money made by him. The Caddo River Lumber Company paid the balance of the purchase money due by it into the registry of the court. Subsequently Olentine filed an amendment to his complaint, in which he alleges that he is entitled to one-half of the profits arising from the sale of the lands, and that Beebe and Shock are endeavoring to defraud him out of his share thereof. He prays judgment for his share of the profits. The defendants Shock and Beebe filed a joint answer, in which they state that Olentine abandoned his contract, and that Beebe subsequently purchased the lands for his own use and benefit with an agreement on his part to divide equally the profits of the sale thereof with Shock. They also interposed the plea of the statute of frauds.

Elmer E. Shock testified that, after making the transfer of his interest to Beebe, he acted for Beebe. He said that he had numerous conversations with Olentine about the purchase money for the lands. We quote the following from his testimony: "Q. What were the circumstances of your having the titles made to Mr. Beebe, and what was your agreement with him at the time? A. I sold Mr. Beebe my interest in the contract. Mr. Olentine could not pay his part of the money, and the rest of the titles were taken in Mr. Beebe's name; he paying for them. Q. Under what sort of agreement? A. What do you mean? Q. What was the agreement with Beebe? A. Well, Mr. Beebe—Mr. Olentine could not get up his money and Mr. Beebe suggested that he take the title—Mr. Olentine said he was expecting some money from the East, and he failed to get it on account of a bank up there failing, he said. Mr. Beebe said he would take up the titles himself, and, when Mr. Olentine got his money, he could follow and take up the lands—other lands—as it commenced with. I believe that was the understanding with Mr. Beebe. That was the purport of the conversation between Mr. Beebe and myself."

Charles Olentine testified that he first suggested the arrangement to purchase these lands to Mr. Shock; that he told Shock that he could raise \$1,000, but it would be later before he could have any more money; that he had some money coming to him in Ohio, but would not get it for a few months; that Shock told him not to worry about the money, that he had a party who would furnish the money; that at different times Shock

told him that he could get the money from various parties, but that about the last of May he told him that he had made arrangements with L. V. Beebe to furnish the money; that, instead of taking a mortgage on the lands, Beebe preferred to have the title to the land made to him to secure him, and, when it was satisfied, he would reconvey to us; that he told Shock that this was perfectly satisfactory, and, relying on these statements and representations of Shock, he joined with him in directing that the title to the remaining lands should be taken in the name of Beebe; that Shock told him he should pay 8 per cent. interest; that Shock did not inform him that Beebe was advancing his (Shock's) part of the purchase money of the land too; that he got his money from the East in the fall, and that in March, 1906, he went to Shock to pay his part of the purchase money, and stop the interest; that Shock then informed him that he had made a contract with Beebe by which Beebe was to share half of the profits, and that he could not take the money; that he replied that he never understood it that way; that he could have done better than that in the East.

Wallace Hughes testified that Charles Olentine paid him \$1,000 on the timber contract when it was executed; that subsequently he had a talk with Shock with reference to an agreement between him and Beebe about the latter furnishing the balance of the money on the timber contract. Shock said that Beebe had agreed to furnish him and Olentine with enough money to finish paying for the timber, and that Beebe wanted the deeds made to him as security; that he never had any conversation with Beebe about furnishing the money; that he heard Shock tell Olentine that he had made arrangements with Beebe to furnish them money to pay for the timber, and that Beebe wanted the deeds made to him to secure him for the money loaned; that, when the contract was first entered into, he heard Olentine tell Shock that he did not have money enough to carry it out at that time, but would receive sufficient money to do so later; that Shock replied that he had plenty of money, and would furnish what was necessary until Olentine could get his money from Ohio.

Wallace Hughes' testimony was corroborated by that of E. C. Hughes.

L. V. Beebe testified that he purchased the lands for himself, and that at the time he did so he understood that Olentine had abandoned and given up his contract, and had dropped out of the deal.

The chancellor entered a decree quieting the title of the Caddo River Lumber Company in the lands, and giving to the plaintiff, Olentine, one half of the net profits arising from the sale thereof, and the other half to Beebe. The defendants Shock and Beebe have duly prosecuted an appeal to this court,

and the plaintiff, Olentine, has taken a cross-appeal.

J. C. Pinnix and T. D. Crawford, for appellants. McRae & Tompkins and D. L. McRae, for appellee.

HART, J. (after stating the facts as above). Did the original agreement between Shock and Olentine create a partnership for the purchase and sale of lands?

In the case of *Lacotts v. Pike*, 91 Ark. 26, 120 S. W. 144, 134 Am. St. Rep. 48, the court held: "(1) In order to constitute a partnership, it is necessary that there shall be something more than a joint ownership of property. (2) While an agreement to share in profits is not a test of partnership, it is an essential element in one." And in the case of *Buford v. Lewis*, 87 Ark. 412, 112 S. W. 963, the court said: "To determine whether a given agreement amounts to a partnership between the parties themselves is always a question of intention."

About one month before the contract of the date of January 31, 1905, between Jeff and Wallace Hughes and Olentine and Shock was entered into, Olentine had proposed to Shock that they purchase the lands designated in that contract. The testimony shows that the lands were valuable chiefly for the timber that was on them, and that they were to be purchased for the profits to be derived from a sale of the timber and of the lands themselves. The lands, the purchase and sale of which was contemplated, comprised in the aggregate some 2,000 acres, and they were owned by various persons. Shock himself testifies that each was to pay one-half of the money and each to share one-half of the final profits. Thus we see they entered into a contract to purchase jointly for the purpose of speculation, numerous tracts of land, and each was to pay an equal amount of the purchase price, and to share equally in the final profits arising from future sales, and, in furtherance of this purpose, they made the contract with Wallace and Jeff Hughes to purchase lands for them. It was evidently their intention to form a partnership for the purchase and sale of timber lands in Pike county, and we so hold. Each owed to the other the utmost good faith and openness of dealing with regard to the carrying out of their joint venture. Neither had a right to secure any secret advantage over the other out of the transaction, and such acts would be a fraud upon his associate, which equity will defeat.

It is apparent that Shock did not act in good faith towards Olentine. The testimony of both Olentine and Hughes shows that at the very inception of their enterprise Shock deceived Olentine. Shock promised him that he would furnish him all the money he needed in excess of \$1,000, which Olentine at the time paid, yet in one week thereafter he entered into an agreement with Beebe to take the title in the lands, and

divide with him the profits arising from a resale of the lands, and this agreement was kept secret from Olentine. Later on in May, in furtherance of his fraudulent design, he told Olentine that Beebe had agreed to advance the money for the purchase of lands and charge 8 per cent. interest thereon; but that Beebe, instead of taking a mortgage on the lands to secure himself, desired to take the title to them in his own name as security. Olentine knowing that he would receive his money from Ohio in time to pay out his interest readily agreed to this, and joined with Shock in directing Hughes to have the deeds to the lands made to Beebe. Shock had told Olentine that he represented Beebe in making him the loan, and, when Olentine received his own money from Ohio, he went to Shock to pay the money advanced by Beebe and the accrued interest. Shock for the first time told him that he had no interest. It is perfectly apparent that Shock from the beginning formed the design to defraud Olentine. Shock told him that he represented Beebe, and that the latter was advancing Olentine the money to pay for his interest in the lands, and was merely taking the title in himself as security. Equity will not permit Shock to hold the fruits of his fraud. The case as between Shock and Olentine then stands as if Shock had advanced the money and taken the title in his own name for the benefit of both; and Olentine is entitled to one-half of the net profits. The amendment to his complaint asks for an equal share of the profits, and, the relation between Olentine and Shock being that of partners, the statute of frauds does not enter into the case. *McClintock v. Thweatt*, 71 Ark. 323, 73 S. W. 1093. See, also, *Chester v. Dickerson*, 54 N. Y. 1, 13 Am. Rep. 550; *Richards v. Grinnell*, 63 Iowa, 44, 18 N. W. 668, 50 Am. Rep. 727; *Hulett v. Fairbanks*, 40 Ohio St. 233; *Newell v. Cochran*, 41 Minn. 374, 43 N. W. 84; *Davenport v. Buchanan*, 6 S. D. 376, 61 N. W. 47; *Heard v. Wilder*, 81 Iowa, 421, 46 N. W. 1075.

Beebe admits that Shock acted as his agent in the purchase and sale of the lands, but states that he told him that Olentine had abandoned the contract, and he says that, acting upon this representation, he purchased the lands for his own use and benefit; but he filed a joint answer with Shock in which they admitted that the net profits were to be divided equally between them. Having admitted that he is only entitled to one half of the profits, he cannot complain that the other half was awarded to Olentine. It will be noted that the decree of the chancellor divided the net profits between Beebe and Olentine.

We find the issues against the appellee on the cross-appeal, and think that the decree of the chancellor dividing the net profits between Beebe and Olentine was right.

WILLIAMS v. HUMPHREY et al.

(Supreme Court of Arkansas. Feb. 6, 1911.)

1. MECHANIC'S LIENS (§ 61*)—RIGHT TO ENFORCE—OWNERSHIP OF LAND.

One suing to enforce a lien for a building erected by him under agreement for a division of the net profits on a sale of the property cannot complain of the devolution of title to the lots, where he failed to show title in the person with whom his agreement was made.

[Ed. Note.—For other cases, see *Mechanics' Liens*, Cent. Dig. § 77; Dec. Dig. § 61.*]

2. MECHANICS' LIENS (§ 61*)—RIGHT TO ENFORCE—OWNERSHIP OF LAND.

That the trustee of land knew of a contract by the cestui que trust's brother, under which plaintiff built a house on the land under an agreement for division of the net profits on a sale of the property, did not preclude the trustee from conveying at the beneficiary's request, to plaintiff's exclusion.

[Ed. Note.—For other cases, see *Mechanics' Liens*, Dec. Dig. § 61.*]

Appeal from Pulaski Chancery Court; John E. Martineau, Chancellor.

Action by H. M. Williams against C. J. Humphrey and others. Decree dismissing the complaint, and plaintiff appeals. Affirmed.

J. H. Harrod, for appellant. Rose, Hemingway, Cantrell & Loughborough, for appellees. Carmichael, Brooks & Powers, amici curiæ.

MCCULLOCH, C. J. H. A. Bowman owned two lots in the city of Argenta, and on December, 4, 1906, conveyed them by proper deed to C. J. Humphrey, "as trustee," without naming the cestui que trust. Iona Foley furnished the money with which to make the purchase, and a few days subsequent to the date of the deed Humphrey executed to her a declaration of trust in her favor, showing that he had purchased the lots for her. Subsequently J. F. Foley, brother of Iona, entered into a written contract with plaintiff, H. M. Williams, whereby they agreed that plaintiff should build a house on one of the lots, and that thereafter that lot should be sold for not less than \$2,000, and that the proceeds of sale, after paying J. F. Foley \$750 for the lot and paying the plaintiff the cost of building the house, should be equally divided between them. After the completion of the contract, Humphrey, at the request of both of the Foleys, J. F. and Iona, sold both lots to J. H. McCarthy, and paid the proceeds to Iona Foley, after deducting certain expenses, including an agreed fee of \$50 to Humphrey as trustee, and the amount of a mortgage debt due to a building and loan association.

Williams instituted this suit against Humphrey, the two Foleys, and McCarthy, seeking to enforce a lien on the lot described in his contract with J. F. Foley, and on which he built the house. He also seeks a personal

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

decree against Humphrey for the amount he would have realized if his contract with J. F. Foley had been carried out in the manner specified therein, by sale of the property and division of the proceeds. The chancellor rendered a decree dismissing plaintiff's complaint, and he appeals to this court. It is conceded that McCarthy purchased the property without any notice of the plaintiff's claim.

Counsel for plaintiff contend that the deed to Humphrey is void, because it fails to mention the cestui que trust, and that a trust cannot be ingrafted on it by parol. There is no attempt here to ingraft an express trust upon the deed by parol testimony, as Humphrey's declaration of trust in favor of Iona Foley is in writing. But, if it be conceded that the words "as trustee" are merely descriptive of the person, that does not aid the plaintiff's case, as McCarthy holds under a valid deed from Humphrey. If there was in fact a valid trust, then its terms have been satisfied, because the conveyance of Humphrey to McCarthy was executed upon express instructions from Iona Foley, the cestui que trust. Wherever the title may now rest, the plaintiff is not in a position to complain, for he has failed to establish title in J. F. Foley, the only person against whom he is entitled to a lien.

On the other branch of the case, the evidence adduced by plaintiff tends to show that Humphrey knew of the contract between the plaintiff and J. F. Foley; but mere knowledge on his part of the contract did not make him a party to it, or bind him to its terms. The evidence is not sufficient, as contended by plaintiff's counsel, to show that Humphrey deceived the plaintiff, or that he entered into a conspiracy with Foley, and paid over the proceeds of the sale of the lot for the purpose of defrauding the plaintiff. Plaintiff has not shown himself entitled either to a lien on the lots or to a decree against Humphrey.

Iona Foley is out of the jurisdiction of the court, and no personal decree could have been rendered against her. J. F. Foley, it seems, is insolvent, and plaintiff is not insisting on a decree against him.

So the decree of the chancery court is affirmed.

MITCHELL v. FISH.

(Supreme Court of Arkansas. Jan. 23, 1911.)

1. APPEAL AND ERROR (§ 1010*) — REVIEW — FINDINGS—PARTNERSHIP.

Where the finding of a chancellor that there was a partnership was not contrary to the weight of the evidence, the finding will be sustained on appeal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3970-3982; Dec. Dig. § 1010.*]

2. PARTNERSHIP (§ 26*)—ILLEGALITY—IMMORALITY—EXECUTED CONTRACT.

In an action by a woman who had left her husband and gone with defendant and lived with him as his wife, while she was trying to get a divorce, and they accumulated property together and sold it, and the evidence showed that they agreed on a certain division, the fact that it was tainted with immorality did not make it illegal, as it is not a question of public policy, but whether one partner, having received profits of partnership property, is liable to another for an agreed division thereof.

[Ed. Note.—For other cases, see Partnership, Cent. Dig. § 12; Dec. Dig. § 26.*]

3. CONTRACTS (§ 138*)—ILLEGALITY—EXECUTED CONTRACT.

Though a contract may be illegal, where it has been fully executed, the parties to it may have an accounting as to the profits and losses which have resulted from it.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 681-700; Dec. Dig. § 138.*]

Appeal from Lawrence Chancery Court; Geo. T. Humphreys, Chancellor.

Bill for accounting by C. J. Mitchell against A. Fish. From a judgment for defendant, plaintiff appeals. Reversed and remanded.

C. J. Mitchell instituted this action in the chancery court against Al Fish to recover the profits due her from an alleged partnership between them. The facts are substantially as follows: The plaintiff states: That in 1899 she was living with her husband in Leadville, Colo. That they did not get along well together, and on August 5, 1899, she left her husband without securing a divorce from him, and went to Wardner, Idaho, in company with the defendant, Al Fish. That neither of them had any money or property at the time they left together, and that they made an agreement whereby she was to live with defendant as his wife until she could secure a divorce from her husband, and that in the meantime they would manage their affairs as a partnership, each to contribute his labor and property in the joint enterprise and to share equally the profits and losses. That they carried out the terms of this agreement, and in 1902 homesteaded a tract of land in the state of Washington. That up to this time they had accumulated practically nothing. That from the time they moved on the homestead until they sold it in September, 1908, she stayed on it and helped to improve it. That she helped to clear it, to put in crops, and to build and erect improvements on it. That she also kept boarders, took in washing, and did everything to help get along. That during this time the defendant worked a part of the time in the mines and spent the remainder on the homestead, both working and expending what they had separately earned in improving the place. That the homestead was proved up in the defendant's name as the head of the family. That they sold the land in September, 1908, and she signed the deed as the wife

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

of the defendant. That the net amount received for it and the personal property they had accumulated on the place, after deducting the commission of the agent who sold it, was \$6,100. That each of them took \$500 out of the proceeds of sale. That it was further agreed that she was entitled to and could draw up to \$2,500 of the remainder. She, however, left the money in his hands, and told him to do the best he could with it in investing it. It was understood between them that he should come South and invest the money for them jointly in other lands. The plaintiff remained in the West for the purpose of securing a divorce from her husband, and when that was accomplished it was understood that she and defendant were to marry. The defendant came South, and purchased the land described in the complaint with a part of the proceeds arising from the sale of the homestead in Washington.

The defendant for himself admitted that plaintiff left her husband and lived with him as his concubine during the time testified to by her. He also admits the sale of the homestead in Washington for the price named by her, and that he gave her \$500 out of the proceeds of the sale thereof. He denied, however, that there was any agreement of partnership between plaintiff and himself. Says that he gave her the \$500 out of the proceeds of the sale of the homestead because she was poor and needed it, and he was going to leave her. Defendant admits that he came South and invested \$1,600 of the money from the sale of the homestead in Washington in the lands described in the complaint, taking the title thereto in his own name. He says that he has spent most of the remainder of it. He kept up a correspondence with plaintiff until he came to Arkansas and married. He claims that the improvements on the Washington homestead were worth only about \$250, and denies that plaintiff performed much service in helping to improve it. Plaintiff, however, in rebuttal, introduced several of their old neighbors in the state of Washington, who testified that the improvements on the homestead were worth \$1,500 or \$2,000; that plaintiff was a hard-working industrious woman, and performed the greater amount of the labor in improving the homestead; and that she remained on it constantly, working, looking after it, and taking care of it while defendant was away. After the defendant left Washington, plaintiff secured a divorce from her husband, and on her way to this state to see defendant and look after her interest met a man, whom she subsequently married.

The decree of the court in part recites: "And, plaintiff requesting that the court make its findings of fact as to whether or not there was a contract of partnership between the parties and a community of interest between them in the proceeds of the sale of the property in the hands of the defend-

ant, the court finds that there was a partnership between the parties and a community of interest between them in the funds arising from the sale of the property, but further finds that said contract of partnership was so tainted with immorality that the court will not enforce said contract of partnership or sustain plaintiff's action for a division of the proceeds of said sale of said property in the hands of the defendant. It is therefore considered, ordered, and decreed that plaintiff's action herein be and hereby is dismissed for want of equity; that defendant have judgment against her for his costs herein." The plaintiff has duly prosecuted an appeal to this court.

A. S. Irby, J. H. Townsend, and L. B. Poindexter, for appellant. J. F. Gautney, for appellee.

HART, J. (after stating the facts as above). In the case at bar, the court found that a partnership had existed between the plaintiff and defendant, and that there was a community of interest between them in the funds arising from the sale of the property, but refused to give plaintiff the relief prayed for because the contract of partnership was tainted with immorality.

The finding of the chancellor that there was a partnership was not contrary to the weight of the evidence, and, according to the settled rule in this state, his finding in that regard will be sustained. We are of the opinion, however, that he was wrong in dismissing plaintiff's complaint for want of equity. Her suit was not brought to enforce the contract of partnership or any of its stipulations. The partnership was ended when the property was sold. All of the partnership property consisted of the homestead in the state of Washington and the personal property situated on it. According to the testimony of the plaintiff, the partnership enterprise in which she and the defendant had been engaged had been fully completed, and they had voluntarily agreed upon a division of the profits. That pursuant to this agreement of division she had \$2,500 as her share of the profits, which she permitted defendant to keep for her for reinvestment. It is true that defendant denies this; but we think that, when the conduct of the parties and the circumstances in connection therewith are duly considered, the testimony of the plaintiff is entitled to more credence than that of the defendant. In this view of the case, the question of whether the contract of partnership at the time it was formed was void as against public policy is not the controlling question in the case, but the question is whether or not one partner, having received the profits of the partnership and having voluntarily agreed with his copartner to a division thereof, is liable to such other for his share of the profits.

"Although a contract may be illegal, it

does not follow that it is illegal or immoral for the parties to it, after its completion, to fairly settle and adjust the profits and losses which have resulted from it. The vice of the contract does not enter into such settlement." *De Leon v. Trevino & Bro.*, 49 Tex. 88, 30 Am. Rep. 101.

The court said, in the case of *Brooks v. Martin*, on a bill in equity, by one partner against the other, to set aside a contract of sale of his interest in the partnership venture, the Supreme Court of the United States held that "after a partnership contract confessedly against public policy has been carried out, and money contributed by one of the parties has passed into other forms, the results of the contemplated operation completed, a partner in whose hands the profits are cannot refuse to account for and divide them on the ground of the illegal character of the original contract." 2 Wall. 70, 17 L. Ed. 732. Now, surely, if the court will lend its aid to compel an accounting, and enforce the payment of the amount found to be due by one partner to the other, it cannot be that it should interpose to relieve one of the parties from his voluntary accounting on the ground of illegality of the original partnership enterprise, which, after completion, had been thus voluntarily settled and adjusted.

In the case of *Planters' Bank v. Union Bank*, 16 Wall. 483, 21 L. Ed. 473, the court again says: "Nor should the court have charged that, in the circumstances of this case, no action would lie for the proceeds of the sales of confederate bonds which had been sent by the plaintiffs to the defendants for sale, and which had been sold by them, though the proceeds had been carried to the credit of the plaintiffs and made a part of the account. It may be that no action would lie against a purchaser of the bonds, or against the defendants, on any engagement made by them to sell. Such a contract would have been illegal. But when the illegal transaction had been consummated; when no court has been called upon to give aid to it; when the proceeds of sale have been actually received, and received in that which the law recognized as having had value; and when they have been carried to the credit of the plaintiffs—the case is different. The court is then not asked to enforce an illegal contract. The plaintiffs do not require the aid of any illegal transaction to establish their case." See, also, *Pfeuffer v. Maltby*, 54 Tex. 461, 38 Am. Rep. 631; *Wegner Bros. v. Biering & Co.*, 65 Tex. 511; *McBlair v. Gibbes*, 17 How. 232, 15 L. Ed. 132.

In discussing the principles of law applicable to a state of facts similar to those presented in the record, the court in the case of *Morgan v. Morgan*, 1 Tex. Civ. App. at page 319, 121 S. W. at page 156, said: "Applying these principles to the case at bar, if

it be conceded that the relations of John E. Morgan and appellant were illegal, and that their contract to live together and divide the property they might accumulate would not sustain an action in behalf of either of them if brought thereon, still we believe it cannot be said that after the contract has been voluntarily executed by both, and the property has been acquired, the courts will refuse to recognize their respective interests therein."

In this view of the case, it is not necessary to decide whether the relation of concubinage between the parties to this suit was incidental and was not the motive and cause of them living together as husband and wife, and forming the partnership; for we hold that, although the partnership may have been illegally formed on account of the consideration for it being the living together of the parties illegally as husband and wife, yet when the contract has been executed without the aid of the courts by the voluntary acts of the parties, and a division of the profits has been agreed upon, such division of profits forms a new contract, which is collateral to and not contaminated by the original contract, and that the partner entitled to a share of such profits may enforce his right thereto in the courts.

It follows that the court erred in dismissing the complaint, and the decree will be reversed, and the cause will be remanded, with directions to the chancellor to enter a decree not inconsistent with this opinion.

D. S. CAGE & CO. v. BLACK et al.

(Supreme Court of Arkansas. Feb. 13, 1911.)

1. CONTRACTS (§ 24*)—OFFER AND ACCEPTANCE.

While a binding contract may be entered into by letters and telegrams, it does not exist until both parties have agreed to the same proposition.

[Ed. Note.—For other cases, see *Contracts*, Cent. Dig. §§ 100-106; Dec. Dig. § 24.*]

2. SALES (§ 22*)—OFFER AND ACCEPTANCE—QUALIFICATIONS.

Any qualification of, or departure from, the terms of an offer to sell, invalidates the offer, unless agreed to by the person making it.

[Ed. Note.—For other cases, see *Sales*, Cent. Dig. §§ 39-43; Dec. Dig. § 22.*]

3. SALES (§ 22*)—CONTRACT—ELEMENTS—PRICE.

A contract of sale is not complete until the price has been agreed on.

[Ed. Note.—For other cases, see *Sales*, Cent. Dig. §§ 39-43; Dec. Dig. § 22.*]

4. SALES (§ 53*)—OFFER—CONSTRUCTION—QUESTION FOR JURY.

Where an alleged custom of selling rice by the barrel was not shown to have existed for such a length of time as to have been generally known, an offer by wire to sell rice, viz., "Have 200 sacks left, second year, highly graded, \$5.75 f. o. b. here. Wire quick, Very scarce"—did

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

not constitute an offer to sell at \$5.75 "per barrel" as a matter of law.

[Ed. Note.—For other cases, see Sales, Dec. Dig. § 53.*]

5. SALES (§ 22*) — OFFER AND ACCEPTANCE — PRICE.

Defendant offered 200 sacks of rice at \$5.75 f. o. b. point of shipment, to which plaintiffs replied: "Ship 170 sacks rice. Instructions in letter"—in which they directed shipment of that quantity, and added: "You understand this is all Honduras rice, second year, highly graded, at \$5.75 per sack." Held, that plaintiffs' acceptance by wire did not constitute an acceptance at \$5.75 "per sack."

[Ed. Note.—For other cases, see Sales, Dec. Dig. § 22.*]

6. SALES (§ 22*) — OFFER AND ACCEPTANCE — TIME OF CONTRACT.

Defendant offered plaintiffs 200 sacks rice "\$5.75 f. o. b." Plaintiffs answered directing shipment of 170 sacks, and in a letter the same day stated their understanding to be that it was to be highly graded and the price "\$5.75 per sack." Defendants on the same day replied to plaintiffs' wire confirming a sale at \$5.75 per barrel, and two days later acknowledged shipping instructions, to which plaintiffs replied that they presumed defendant's quotation at \$5.75 per barrel was a mistake for "sacks." Plaintiffs claimed they received no reply to this letter, whereupon the rice was shipped and billed with bill of lading attached at \$5.75 per barrel. Plaintiffs attempted to have this changed by wire, but, being unable to do so, paid the draft, took the rice, and sued defendant for the difference. Held, that there was no meeting of minds as to the price until plaintiffs accepted a delivery of the rice from the carrier and paid the draft, which operated as a contract at \$5.75 a barrel, and that they were therefore not entitled to recover.

[Ed. Note.—For other cases, see Sales, Dec. Dig. § 22.*]

Appeal from Circuit Court, Monroe County; Eugene Lankford, Judge.

Action by J. T. Black and others against D. S. Cage & Co. to recover an excess on the price of rice sold and delivered. Judgment for plaintiffs, and defendant appeals. Reversed and dismissed.

G. Otis Bogle and Manning & Emerson, for appellant. C. F. Greenlee, for appellees.

FRAUMENTHAL, J. This was an action instituted by J. T. Black and others as partners, the plaintiffs below, to recover an amount which they had paid to defendants, under protest, in excess of the sum that was due for the purchase money of a shipment of rice which it was alleged they had purchased from them. The plaintiffs resided at Brinkley, Ark., and the defendants were dealers in rice, residing at Houston, Tex. The plaintiffs, learning that defendants were engaged in the business of selling rice, sent to them a telegram on March 5, 1909, in which they asked them to "name price on car load Honduras rice." On the same day the defendants replied by wire from Houston, as follows: "Have 200 sacks left, second year, highly graded, \$5.75, f. o. b. here. Wire quick, Very scarce." On March 6, 1909, the

plaintiffs, learning that a sack of rice contained 4 bushels, and that it required 170 sacks containing 4 bushels each for their purposes, sent the following telegram to defendants: "Ship one hundred and seventy sacks rice. Instructions in letter." On the same day plaintiffs wrote a letter to defendants, in which they stated that they had received defendants' telegram and had answered by wire for them to ship 170 sacks and to wait for letter. In this letter they also stated that they preferred that shipment be made about the 15th of March; and also stated: "You understand this is all Honduras rice, second year, highly graded, at \$5.75 per sack. Make sight draft on us, bill of lading attached, through Monroe County Bank, Brinkley, Arkansas."

On the same day, March 6th, the defendants wrote to plaintiffs as follows: "In accordance with telegrams exchanged between us, we confirm sale to you 170 sacks Honduras seed rice, highly graded at \$5.75 per barrel." And on March 8th defendants wrote to plaintiffs as follows: "Respecting your appreciated favor of the 6th we note your instructions to ship you 170 sacks Honduras rice to Forrest City about March 15th. The same will have our best attention." On receipt of the above letter from defendants stating that they confirmed sale to plaintiffs of 170 sacks of rice at \$5.75 per barrel, the plaintiffs at once wrote to defendants, stating, in substance, that they were not familiar with the rice business and did not know what a barrel meant and presumed that barrels and sacks meant the same. To this letter the plaintiffs testified they received no reply. On March 17, 1909, the defendants delivered the rice to a common carrier at Houston consigned to Forrest City, and the bill of lading therefor was attached to a draft on plaintiffs for \$1,214.44 and sent to the bank at Brinkley, Ark., with instructions to turn same over to plaintiff on payment of draft. Accompanying the draft the defendants sent an invoice or bill as follows: "170 sacks Honduras seed rice 31,500 lbs. equal 195 Bbls. at \$1,121.25. Freight prepaid at 29½ c. per 100 lbs." On March 19th plaintiffs wrote to defendants as follows: "Your bill for 170 sacks of Honduras rice received to-day, and was much surprised to find it carried out 195 barrels, at \$5.75 per barrel. Your telegram stated you had 200 sacks of rice left, highly graded, at \$5.75 f. o. b. here. 'Wire quick, Very scarce.' We were all present when the telegram came, and not knowing anything about barrels of rice, figured the cost of this rice per sack at \$5.75 and wired you for 170 sacks. In your confirmation to this, you speak of 170 sacks at \$5.75 per barrel. In my reply to this I stated to you that I was not familiar with rice terms, but presumed that sacks and

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

barrels meant the same. Consequently was expecting sacks and not barrels. Now if you can make any explanation why we are required to pay for 195 barrels at \$5.75 instead of 170 sacks, at \$5.75 per sack, as per your telegram, I would be glad to hear from you at once. Your draft with B-L attached is now at our bank and the money is there ready to pay same as soon as we know the facts in the matter. However we felt that we ordered and bought 170 sacks at \$5.75 per sack, the price of which is \$977.50, while you have made the total price to be \$1,121.25, making a difference of \$143.75, which we think is error." On March 22, 1909, the defendants sent telegram to plaintiffs as follows: "Rice sold by barrel, 162 pounds each; sacks do not run uniform; rate Forrest City 29½." And on the same day wrote to them that their quotations were based at all times on a certain price per barrel. Some further correspondence passed between the parties in which the plaintiffs claimed that they had bought the rice at \$5.75 per sack, and the defendants insisted that they had sold same at \$5.75 per barrel of 162 pounds. On April 9, 1909, the plaintiffs went to the bank at Brinkley and paid off the draft in full and took up the bill of lading and received the possession of the rice thereunder. On the same day they instituted this suit against the defendants for \$164; same being for the difference between the price of the rice at which they claimed to have bought and the amount they were required to pay on the draft in order to get possession of the rice, and also for an alleged overcharge on freight.

The defendants introduced testimony tending to prove that, according to the custom of the trade in buying and selling rice in Texas and Houston, rice of the kind sold to plaintiffs was invariably sold by the barrel of 162 pounds each, and that it is the custom in quoting the price on such rice by wire to state the amount of the price without stating the unit of measurement upon which the price is based; but we do not think that it was proved that this custom was in existence a sufficient length of time to have become generally known, at least there was not sufficient testimony on this point to override a finding of the trial court to the contrary. Upon the trial of the case the plaintiff Black, who carried on all the above negotiations with defendants, was asked if he did not know before he paid the draft with the bill of lading attached that the defendants were expecting the plaintiffs to pay \$5.75 per barrel for the rice; and to this he answered that he "certainly did."

The case was tried by the lower court sitting as a jury, and the defendants asked that it make certain findings of fact and declarations of law in their favor, all of which were refused. The court thereupon made a finding that a contract was entered into between plaintiffs and defendants by which defend-

ants sold to plaintiffs the rice at \$5.75 per sack f. o. b. the cars at Houston, and that they were entitled to recover the difference between the cost of the rice at that price and its cost at \$5.75 per barrel as charged by defendants in their invoice and draft, which plaintiffs under compulsion paid in order to get possession of the rice. It found that this difference amounted to \$143.75 and entered judgment in favor of plaintiffs for that amount. From that judgment defendants have appealed to this court.

The controlling question involved in this case is: When was the time at which the contract for the purchase and sale of the rice actually entered into by the parties? In order to constitute a binding contract of sale, there must be a mutual assent of both parties to the essential terms of the agreement. Before there is a consummation of the contract of sale, both parties must arrive at the same agreement as to the elements of the sale. Mere negotiations between the parties as to the subject-matter or terms of the sale will not be sufficient to make a binding contract. A binding contract of sale may be entered into by letters and telegrams, and so an acceptance by letter or telegram of an unconditional offer made in the same manner will constitute an obligatory contract. *Emerson & Co. v. Stevens Gro. Co.*, 130 S. W. 541. The offer of the one represents the agreement on his part, and the acceptance of the other party represents his agreement; but, before the contract is consummated, each party must agree to the same proposition, and the agreement of both must be mutual to every essential term of the contract. There is no obligation until an offer expressing the terms of the sale has been made and also an acceptance thereof in accordance with such terms.

The Supreme Court of the United States has thus stated the doctrine: "It is an undeniable principle of law of contracts that an offer of a bargain by one person to another imposes no obligation upon the former until it is accepted by the latter according to the terms in which the offer was made. Any qualification of or departure from these terms invalidates the offer unless the same be agreed to by the person who made it. Until the terms of the agreement have received the assent of both parties, the negotiation is open and imposes no obligation upon either." *Ellason v. Henshaw*, 4 Wheat. 228, 4 L. Ed. 556; *Carr v. Duval*, 14 Pet. 77, 10 L. Ed. 361.

One of the essential elements of a contract of purchase and sale is the price, and in order to constitute a sale the price must be agreed upon. As is said in *Tiedeman on Sales*, § 45: "So important an element of a sale is the price that a failure to stipulate or agree upon the price will always prevent the completion of the sale." 1 *Mechem on Sales*, § 209; *Benjamin on Sales*, § 69. Be-

fore there could have been a completed contract of sale in the case at bar the offer to sell and the acceptance thereof must have been made upon the same price. If the parties were mutually mistaken as to the price at which the article was offered and accepted, then the sale was not consummated, because their minds did not meet upon this essential element thereof. As is said in 35 Cyc. 62: "If the offer is stated in such terms that the offeree understands one price, while the offerer means another, the parties are never *ad idem*, and there is no agreement." 1 Mechem on Sales, § 278.

It is contended by the defendants in the case at bar that according to the custom of the trade in buying and selling rice the unit of measurement upon which the price is based is the barrel of 162 pounds, and that therefore when they, on March 6th, made by telegram the offer to sell the rice at \$5.75, it necessarily meant at that sum per barrel. On the contrary, the plaintiffs contend that, on receipt of the telegram from defendants stating that they had 200 sacks of rice at \$5.75, they made inquiry and learned that a sack contained 4 bushels and accepted 170 sacks understanding that it was at the price of \$5.75 per sack. We do not think that the offer can be construed, as a matter of law, to make the price at \$5.75 per barrel, for the reason that the alleged custom of selling this article upon that unit of measurement as the basis of the price was not by the testimony shown to have existed for a sufficient length of time to have been generally known. *Merchants' Gro. Co. v. Ladoga Canning Co.*, 89 Ark. 591, 117 S. W. 767. Nor do we think that the plaintiffs' acceptance by wire can be construed to have made the price at \$5.75 per sack, for the reason that it does not distinctly state the price on that basis. Their telegram requested defendants to ship 170 sacks of rice, and its evident intention was to purchase it at the price named by defendants. But defendants had not quoted the price at \$5.75 per sack. They stated in their telegram that they had 200 sacks of rice and named the price at \$5.75; but this cannot be construed to mean at \$5.75 per sack when it does not distinctly state that the quotation was based on the sack as the unit of measurement. In naming the number of sacks, they only stated the quantity of rice which they had on hand. It was the same as if they had stated that they had a car load or ton of rice; and, if they had done that and quoted the price at \$5.75, it could not be said that they meant at that price per car load or per ton. The telegrams show clearly that the parties intended to actually name a price, and the law therefore will not import a price therein. The parties did not in definite terms expressly name the basis of the price, but each understood the price differently. The parties were in good faith mutually mistaken as to

the price at which the one offered the article and the other accepted it, and they therefore did not agree upon this essential element of the contract. The sale was not consummated on this account when plaintiffs sent the telegram of March 6th accepting the 170 sacks.

On March 6th, the plaintiffs sent letter to the defendants in which they definitely stated that they were buying at \$5.75 per sack, and on the same day defendants sent letter to plaintiffs definitely stating that they were selling at \$5.75 per barrel, and these letters were received by the respective parties about the same time. They then knew that there was a mutual misunderstanding as to the price of the article. All correspondence from that time until the shipment constituted only negotiations and not a contract, because there was at that time no express or implied assent by the parties to the same price, and therefore neither was obligated thereby. On March 17th the defendants shipped the rice taking bill of lading therefor and attaching same to a draft which they sent to a bank at Brinkley with instructions to turn same over to plaintiffs only on payment of the draft. At the same time they sent an invoice and bill of the rice to plaintiffs in which it was shown that the rice was sold or offered at \$5.75 per barrel. The amount of the draft and an inventory accompanying it showed also that this was the price at which defendants then offered or sold the rice to plaintiffs. Up to that time there was no mutual assent of the parties to the price, and therefore up to that time there was no sale. Neither party up to that time was obligated by any or all of the telegrams or letters that had prior to that time passed between them because these amounted simply to negotiations looking to an assent by both parties to a price. When therefore the bill of lading was presented by the bank at Brinkley to plaintiffs with the invoice of the rice attached showing that it was offered at the price of \$5.75 per barrel, the plaintiffs had the right to pursue one of two courses; either to take the rice upon the terms at which it was then offered, or to refuse to purchase it. Having taken the property knowing that the defendants were demanding therefor the price named in their bill, the plaintiffs thereby became bound for the rice at that price. As is said in the case of *Estey Organ Co. v. Lehman*, 132 Wis. 144, 111 N. W. 1097, 11 L. R. A. (N. S.) 254, 122 Am. St. Rep. 951: "The defendants having received and retained the property with knowledge of the price plaintiff expected to receive, and without any agreement express or implied for a different price, they cannot escape payment of the price stated in the invoice."

The court therefore erred in finding that there was a binding contract of sale of the rice entered into between the parties prior to the receipt of the bill of lading by plaintiffs

and their payment of the draft therefor, and in rendering judgment against defendants.

The judgment is, accordingly, reversed, and the cause dismissed.

LEMOINE v. SULLIVAN.

(Supreme Court of Arkansas. Feb. 13, 1911.)

1. APPEAL AND ERROR (§ 1002*)—VERDICT—EVIDENCE.

A verdict on conflicting evidence will not be disturbed on appeal where there is any substantial evidence to support it.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3935-3937; Dec. Dig. § 1002.*]

2. DAMAGES (§ 132*)—PERSONAL INJURIES—EXCESSIVE DAMAGES.

Where a dentist negligently spilled ammonia in plaintiff's eyes, held, that a verdict of \$750 was not excessive.

[Ed. Note.—For other cases, see Damages, Dec. Dig. § 132.*]

Appeal from Circuit Court, Pulaski County; F. Guy Fulk, Judge.

Action by R. M. Sullivan against Arthur Lemoine, doing business as the Union Painless Dentists. From a judgment for plaintiff, defendant appeals. Affirmed.

R. M. Sullivan brought this suit against Arthur Lemoine, doing business as the Union Painless Dentists to recover damages for physical injuries received by him on account of the alleged negligence of defendant in spilling a part of the contents of a bottle of ammonia in his eyes. The defendant answered denying negligence.

The plaintiff testified substantially as follows: On the 19th day of June, 1909, he was suffering from toothache, and went to defendant's dental office in the city of Little Rock, Ark., for treatment. The tooth was a back one, and the attending dentist examined it, told plaintiff that it was badly ulcerated, and should be extracted. The dentist injected some medicine in the gum, which he told plaintiff was cocaine. After the tooth was extracted and while plaintiff was still in the operating chair, he fainted. When he regained consciousness, he was on the floor, and the dentist told him that he had spilled some ammonia in his eyes. Plaintiff asked that Dr. Vinsonhaler be sent for, but the dentist assured him that it was not necessary, that the strength of the ammonia was only 10 per cent. He then asked that Dr. Miller, his family physician, be sent for, and says the dentist would not do that. Plaintiff states that, as well as he remembers, he was rubbing his face and trying to get his breath when he regained consciousness. The dentist bathed his face, and sent for a bottle of vaseline and rubbed it around his eyes, mouth, and nose. In about 15 or 20 minutes, plaintiff got on a street car and went home. When he arrived home, his wife telephoned for Dr. Vinsonhaler, who came out and treat-

ed him. Cracked ice was put on his eyes for nine days. Dr. Miller was also called to see him. Plaintiff was absent from his work for 23 days. He was a boiler maker, aged 42 years, and earned \$3.42 per day. He paid out \$10 for drugs and \$23 for medical attendance. Plaintiff says that he suffered greatly. He never wore glasses prior to the injury except when reading; but since has had to wear them almost continually. Plaintiff further stated that his eyes had troubled him since the injury, and did at the time he was testifying. On cross-examination, plaintiff stated that he did not know of his own personal knowledge how the injury was received, and was only testifying as to what the attending dentist told him after he regained consciousness.

Drs. Vinsonhaler and Miller both were witnesses for the plaintiff. They testified that while they did not use ammonia for the purpose of restoring a fainting person to consciousness, it was proper to use it for that purpose. Dr. Vinsonhaler testified that he was called to treat plaintiff for the injury; that both eyes were inflamed, the right one more severely, and that the lids were swollen; that the clear part of the eye, called the cornea, was burned and abraded—that is, the portion of the front part of the eye was gone; that there was a burn on the outer surface of the lids and on the upper portion of the cheek; that he does not know whether plaintiff's eyes are permanently injured because he has not examined them to ascertain. We quote from his testimony, on cross-examination, the following: "Q. Doctor, what would be the effect of a small portion of 10 per cent. solution of ammonia in a man's eye, splattered up? A. It would burn it. Q. Would it permanently injure the sight of the eye? A. That would depend on how long it remained in contact."

Dr. R. C. Cailleteau for the defendant testified: He was a partner of Dr. Arthur Lemoine, and graduated from the dental department of the Tulane University. He is a regularly licensed and practicing dentist and attended plaintiff at the time he was injured. He told plaintiff that it was better to extract the tooth without any medicine in it, and denies that he injected cocaine or any other substance into plaintiff's gums. When plaintiff fainted, he laid him down on the carpet so that the blood might rush to his head. He then got a small bottle of ammonia of about 10 per cent. strength, and after plaintiff took two or three whiffs he all at once regained consciousness. He further said that "he (referring to plaintiff) was kind of angry over the matter, I guess, and he knocked the bottle that way (indicating), and then I got a bowl of water and washed his eye, and got a little vaseline and rubbed it on his eyes." He denied that plaintiff asked that either Dr. Vinsonhaler or Dr. Miller be

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

called, or that he advised plaintiff not to have them. He said the ammonia was only 7 to 10 per cent. strong. He administered the ammonia right under plaintiff's nose, and said plaintiff was conscious when he knocked the bottle and caused the ammonia to spill in his eye. He says that only a drop or two was spilled in plaintiff's eye, and that this amount could not permanently injure his eye. He says he had worked for two years in a hospital, and had seen hundreds of people faint, and that he administered to plaintiff the proper restorative in the proper manner.

Drs. H. H. Kirby and C. R. McCormick testified that Dr. Cailleteau used the proper restorative and administered it in the only way it should be administered; that ammonia of 10 per cent. strength would cause smarting and burning in the eye, but would not permanently injure it.

Mrs. Belle Caviness was called in after plaintiff's eyes were injured. She corroborated Dr. Cailleteau as to what occurred after she got there as to his manner of treating the injured eyes. She also stated that she did not hear plaintiff ask for either Dr. Vinsonhaler or Dr. Miller. Other testimony will be stated or referred to in the opinion.

The jury returned a verdict for \$750, and, to reverse the judgment rendered upon the verdict, this appeal is prosecuted.

J. B. Webster, for appellant. Pittard & Brickhouse, for appellee.

HART, J. (after stating the facts as above). No objection is urged here to the instructions, and we are first asked to reverse the judgment because the evidence did not warrant the verdict. It is conceded that plaintiff fainted after Dr. Cailleteau pulled out his tooth, and that Dr. Cailleteau laid him on the floor and administered to him two or three whiffs of ammonia from a small bottle to restore him to consciousness. The undisputed evidence shows that some of the ammonia got into plaintiff's eyes and burned them. The complaint alleges that defendant's agent negligently spilled the ammonia in plaintiff's eyes. The court told the jury that the degree of care and skill required of defendant in using the ammonia to restore plaintiff to consciousness was ordinary care and skill. Plaintiff says he was unconscious when the injury was received, and does not know how it occurred; but that Dr. Cailleteau told him that while unconscious he threw his arms out and struck the bottle, thereby causing the ammonia to spill in his eyes. On the other hand, Dr. Cailleteau denies this, and says that plaintiff struck the bottle after he became conscious, seeming at the time to be angry; that plaintiff took two or three whiffs of the ammonia, and became conscious all at once. Dr. Vinsonhaler stated that persons come out gradually, as a rule, from fainting. He was asked this question: "Would a man throw his

arms up in coming to?" and answered, "Yes; sometimes they do. Sometimes they have convulsions." Of course, if plaintiff, after regaining consciousness, knocked the bottle and thereby caused the ammonia to spill in his eyes, his own willful act was the direct cause of his injury, and he cannot recover. If, however, he involuntarily struck the bottle while yet unconscious, he was not guilty of contributory negligence, and the court properly submitted to the jury the question of whether Dr. Cailleteau exercised ordinary care and skill in administering the ammonia to restore plaintiff to consciousness in that he should have anticipated that plaintiff while unconscious might involuntarily throw out his arms and thereby cause the ammonia to be spilled in his eyes, and should have taken precautions to guard against such contingency. On the undisputed issues of fact, the jury found in favor of the plaintiff.

It is the settled rule of the court that a verdict will not be disturbed on appeal where there is any substantial evidence to support it. That the plaintiff's eyes were burned by the ammonia being spilled in them, and that he suffered severe pains in them for several days thereafter is unquestioned. Plaintiff himself not only testified to this fact, but Dr. Vinsonhaler, who treated his eyes, says: "He was bound to have suffered intensely under the circumstances." The trial was had a year after the injuries were received, and plaintiff testified that his eyes were still red, and that they troubled him; that he had been compelled to wear glasses almost continually since he sustained the injury. From this and the other evidence, the jury might have inferred that the injury to the eyes was permanent. Hence it cannot be said as urged by counsel for defendant that the verdict is excessive. It is only when it is apparent that the verdict is the result of passion and prejudice that this court has a right to set aside the verdict as being excessive.

Plaintiff had a bottle of ammonia at the trial and testified that he bought it that morning asking for a 10 per cent. solution, and was informed by the druggist that the bottle purchased was of that strength. Counsel for defendant insist that his testimony on this point was hearsay, and ask for a reversal of the judgment on that account. Conceding the admission of the testimony to be error, it was not prejudicial. Indeed we cannot see what place the testimony had in the case. The sole ground of negligence relied upon to recover as alleged in the complaint was "negligently spilling the contents of said bottle (referring to the ammonia) in the eyes of the plaintiff." The court in its instructions submitted only that issue to the jury. It could have made no difference whether the bottle of ammonia exhibited by the plaintiff was a stronger or weaker solution than that used by Dr. Cailleteau because the undisputed evidence showed that

the ammonia that was spilled in plaintiff's eyes burned them, and that he suffered severe pain as a consequence thereof. We have repeatedly held that this court will not reverse a judgment for errors that are not prejudicial.

The judgment will be affirmed.

JENNINGS v. BOULDIN et al.

(Supreme Court of Arkansas. Feb. 13, 1911.)

1. LIS PENDENS (§ 13*)—ACTUAL NOTICE—EFFECT.

A purchaser with actual notice of the pendency of a suit against his vendor for the land may not avail himself of the failure of plaintiff therein to give the lis pendens notice required by Kirby's Dig. § 5149.

[Ed. Note.—For other cases, see *Lis Pendens*, Cent. Dig. § 23; Dec. Dig. § 13.*]

2. PLEADING (§§ 194, 367*)—DEFECTS—MOTION TO MAKE MORE SPECIFIC.

A defect in the pleading by a purchaser pending a suit against his vendor for the land, which alleges that plaintiff therein failed to file a lis pendens as required by Kirby's Dig. § 5149, and that he purchased from the vendor in possession, without notice, in that it was not alleged that he purchased without notice, actual or constructive, and that he paid the price, before getting any actual notice or any notice by lis pendens, can only be reached by motion to make the pleading more specific, and not by demurrer.

[Ed. Note.—For other cases, see *Pleading*, Cent. Dig. §§ 444-446, 1173-1193; Dec. Dig. §§ 194, 367.*]

3. LIMITATION OF ACTIONS (§ 19*)—RECOVERY OF LAND—JUDICIAL SALE.

The plea of the five-year statute of limitations against recovery of land sold at a judicial sale by a purchaser at a probate sale to pay debts is unavailing, where the sale was wholly void for the insufficiency of the description of the land sold in the petition; such insufficiency depriving the court of jurisdiction, and rendering the sale and confirmation wholly void.

[Ed. Note.—For other cases, see *Limitation of Actions*, Cent. Dig. §§ 73-85; Dec. Dig. § 19.*]

Appeal from Circuit Court, Lawrence County; Charles Coffin, Judge.

Action by Annie Bouldin and others against W. S. Jennings, in which C. A. Rankin was made a party and permitted to answer. From a judgment for plaintiffs, defendant appeals. Reversed, with directions.

This is the second appeal. The case is reported in 92 Ark. 299, 122 S. W. 639. It is an action of ejectment in which appellees seek to recover the possession of certain land from appellants. The complaint and exhibits and parts of the answer are set out in the former opinion.

The appellees claim the land as the widow and children of James Tillman, who they alleged died seised and possessed of the land, and while occupying same as his homestead. The appellant claimed the land by virtue of a sale made by order of the probate court. The appellees here, who were appellants before, claimed on the former appeal that the order of the probate court directing a sale

of the land was void because of imperfect description. We so held, saying: "The sale made described no land; the description in it not being sufficient to designate any." We further held that the attempt by the probate court to correct the description after the land had been sold under the insufficient description was void, saying: "The order amending the latter [the report of the administrator making the sale] was a new order, and was of no effect." The former opinion concluded as follows: "The court erred in directing the jury to return a verdict in favor of the defendant when the pleadings showed that he had no title to the land in controversy, but, on the contrary, it belonged to the plaintiff and there was no evidence to the contrary." The cause was then reversed and remanded for new trial. On the second trial C. A. Rankin was made a party and he was permitted to answer and set up "that he purchased the lands sued for from W. S. Jennings as shown by copy of deeds hereto exhibited as exhibits, and after the judgment of the circuit court had been entered awarding the same to W. S. Jennings, and that he paid therefor the sum of ——— dollars; that his codefendant was in actual open adverse possession of the same, claiming to have an indefeasible title thereto; that no lis pendens or other notice as required by law had been filed with the clerk as required by law, and that he dealt with said Jennings without notice and as an innocent purchaser, and that, as between him and the plaintiffs, the proceedings had in this suit prior to the time he was served with notice of the pendency of said suit should not in any way affect his rights hereunder." He further answered adopting substantially the answer of Jennings, and, in addition, denied that plaintiffs were the heirs of James Tillman, and that Tillman was the owner of the land, and denied that the boundaries of the tract were laid with sufficient certainty to be located by a surveyor. The answer of Jennings, after setting out the proceedings in the probate court by which the lands were alleged to have been sold and claiming under that sale, then set up the five-year statute of limitations for judicial sales, and the seven-year statute of limitations. He further set up "that these plaintiffs, after being fully advised of all the facts and circumstances in and about the sale, filed a suit in the circuit court of Lawrence county for its eastern district against B. A. Morris for the purchase money paid for the land sued for in this case, and defendant pleads such acts as an estoppel against plaintiffs in this suit."

A demurrer was interposed to these answers, general and special, which the court sustained, and appellants have duly prosecuted this appeal from final judgment entered in favor of appellees.

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

W. A. Cunningham, for appellant. W. E. Beloate, for appellees.

WOOD, J. (after stating the facts as above). On the former appeal the only question decided by this court was that the order of the probate court directing a sale of the lands and the sale thereunder were void for want of sufficient description to designate any land. The petition for the sale containing such imperfect description gave the court no jurisdiction of the subject-matter, and the consequent order of sale and sale were void, and the new order attempting to correct the description was likewise void. The question was decided upon the undenied allegations of the complaint, as explained by the exhibits thereto. This court did not pass upon the sufficiency of the demurrer to the answer. It did not get to that. Although there was a demurrer to the answer on the first trial which was overruled, and although the plaintiffs stood on their demurrer, and appealed from the judgment on a verdict directed in favor of the defendant, still, when the cause reached us, we only decided, as we have stated, that the probate court was without jurisdiction to confirm a sale of lands that was void by reason of an insufficient description of the land alleged to have been sold. We did not pass upon the demurrer to the answer then, and that is not res adjudicata now. Moreover, the answer of Rankin presents the new issue of innocent purchaser from Jennings after the circuit court had rendered a judgment in his favor for the land in controversy. He alleged that no lis pendens or other notice had been filed with the clerk as required by law, and that he dealt with said Jennings without notice and as an innocent purchaser.

The allegations of the answer of Rankin that appellees had failed to comply with the lis pendens statute (section 5149, Kirby's Dig.), and that he purchased the land from Jennings without notice, state a defense, but state it is imperfectly. The answer should have alleged that he purchased without notice either actual or constructive, and that he paid the purchase money setting up the facts before getting any actual notice or any notice by a compliance on the part of appellees with the requirements of the statute supra as to notice of the lis pendens. One who purchases, having actual notice of the pendency of the suit, cannot avail himself of the failure to give the lis pendens notice required by the statute. But the defects in the answer could and should have been reached by motion to make more specific, and not by demurrer, for the answer did set up a defense, but one defectively stated. Jennings was in possession, and he could transfer that possession with what rights he had thereby in the land, if any, to Rankin. *Wilson v. Rogers*, 134 S. W. 318. Whether he

did so for value and without notice, actual or constructive, to Rankin of appellees' rights in the pending suit, were questions of fact which were raised by the answer, and which should have been submitted to the jury. The denial, also, that the land claimed was the homestead of James Tillman in his lifetime, presented an issue that should have gone to the jury. The answer presented no defense on the five and seven years' statutes of limitations as applicable to appellant Jennings. He purchased at a sale where the court did not have jurisdiction of the subject-matter by reason of the imperfect description of the land he claimed to have purchased. The confirmation for that reason was void; there being in fact no sale and no confirmation.

This is not in conflict with *Cowling v. Nelson*, 76 Ark. 146, 88 S. W. 913; for in that case the court had jurisdiction of the parties and subject-matter—the portion of lands—but went beyond its jurisdictional limits in ordering part of the land sold for costs. The answer on its face shows its death wound so far as the seven-year statute of limitation is concerned as to Jennings; for the “defendant admits that at the January term of the court, 1901, the sale of the land under which he held possession was approved and confirmed in January, 1901,” and this suit was instituted in October, 1906. Seven years had not intervened these dates.

For the error of the court in sustaining the demurrer in the particulars mentioned, the judgment is reversed, with directions, in these respects to overrule the demurrer as to Rankin.

ST. LOUIS, I. M. & S. RY. CO. v. WATSON et al.

(Supreme Court of Arkansas. Feb. 13, 1911.)

1. DEATH (§ 42*)—PARTIES—HEIRS OF DECEASED.

In the absence of a personal representative, all the heirs of deceased are, under Kirby's Dig. § 6290, properly joined as parties plaintiff in an action for death, and hence it was error to dismiss as to part of them.

[Ed. Note.—For other cases, see Death, Cent. Dig. § 58; Dec. Dig. § 42.*]

2. APPEAL AND ERROR (§ 187*)—OBJECTIONS—PARTIES.

An objection to the right of a portion of the heirs of a deceased to sue for his death under Kirby's Dig. § 6290, made for the first time on appeal, comes too late.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1184–1189; Dec. Dig. § 187.*]

3. CARRIERS (§ 820*)—NEGLIGENCE—JURY QUESTION.

In an action for death of a person struck by an engine at a station while seeking transportation, evidence as to negligence of the trainmen held insufficient to go to the jury.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. § 1167; Dec. Dig. § 320.*]

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

4. CARRIERS (§ 344*)—INJURIES TO PASSENGERS—BURDEN OF PROOF.

In an action for death of a person at a station while he was crossing the track in front of the approaching train to get to a place where he could board the train, caused by his being struck by the engine, deceased being negligent, the burden of proof was on plaintiff to show that the employés of the train discovered his perilous position in time to have avoided injury, and negligently failed to use proper means to avoid injuring him after discovering his peril.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. § 1390; Dec. Dig. § 344.*]

Appeal from Circuit Court, Boone County; Brice B. Hudgins, Judge.

Action by Belle Watson and others against the St. Louis, Iron Mountain & Southern Railway Company. From a judgment for plaintiffs, defendant appeals. Reversed, and cause remanded for new trial.

W. E. Hemingway, E. B. Kinsworthy, Horton & South, and Jas. H. Stevenson, for appellant. Guy L. Trimble, G. J. Crump, and E. G. Mitchell, for appellees.

McCULLOCH, C. J. This is an action instituted by the children of William Watson, deceased, as heirs at law of said decedent, to recover damages resulting from the killing of said decedent by one of defendant's passenger trains at Bergman, Ark., on June 27, 1907. The plaintiffs alleged in their complaint that Watson was a widower at the time of his death, that he died intestate, leaving them as his only heirs at law, and that there has been no administration on his estate. Watson intended to board a passenger train at Bergman, and, as it came to the station, he attempted to cross the track in front of the approaching engine so as to get to the place where he could board the train when it stopped. The cowcatcher or pilot of the engine struck him as he attempted to pass in front of it, and he fell over on it and was carried along a considerable distance—probably 100 or 150 feet—when he rolled off, and was drawn under it and carried about 30 feet further. The train came to a stop and the engine was backed, so as to get him out, and he was found to be badly injured, and died in about two hours. The surgeon who was called, and saw him immediately after the engine was moved from over him, described his injuries as follows: "I found a dislocation of the right hip, and the femur pushed up into his bowels, a dislocation of the exterior end of the clavical, and it pushed up into his throat, contusions and lacerations about the face and head, and a laceration in the thick muscle part of the thigh, the muscles being torn loose. It was simply a mashing and tearing of the muscles, like you would take a board and saw across the leg, and the openings were filled with cinders, which were ground in until I could not wash them out." During the progress of the trial, the action was dismissed as to all the plain-

tiffs except Annie and Lee Watson, this being done, according to the recitals of the record, by agreement of all the parties. The trial resulted in a verdict for the plaintiffs, their damages being assessed separately; and judgment was rendered accordingly, from which this appeal is prosecuted.

The action as originally instituted properly joined as plaintiffs all the heirs at law of the decedent. There being no personal representative of decedent's estate, the action could under the statute be brought in the name of the heirs at law. Kirby's Dig. § 6290. But all of the heirs should have been continued as parties. *McBride v. Berman*, 79 Ark. 62, 94 S. W. 913. The defendant, however, consented to the dismissal of the action by the other plaintiffs, and raised no objection to the right of the remaining plaintiffs to sue. The objection is raised here for the first time, and comes too late. *Pettigrew v. Washington County*, 43 Ark. 33; *Driver v. Lanier*, 66 Ark. 126, 49 S. W. 816; *Hadley v. Bryan*, 70 Ark. 197, 66 S. W. 921.

There was no evidence which would have authorized the jury in finding that the trainmen were guilty of negligence in striking deceased as he attempted to cross the track. The court by giving an instruction requested by defendant took that question from the jury. The language of some of the other instructions seems to indicate a submission of that question, but, when considered with the instruction plainly taking that question away from the jury, the language is, we think, referable to the question of negligence in failing to exercise care to prevent injuring Watson after he fell on the pilot, and before he rolled off and was drawn under it. The evidence is that he was uninjured at that time and was carried about 150 feet, and that the trainmen were aware of his perilous position. If there had been any testimony tending to show negligence in failing to stop the engine before Watson rolled off the pilot, there should have been a submission to the jury of the question of negligence in that respect; but we fail to discover any evidence of negligence in that particular. The undisputed evidence is that the train, though approaching the station, was going at an unusually rapid rate of speed, and that, as soon as the perilous position of Watson was discovered, all possible means were employed to stop the train. No effort was made on the part of plaintiffs to show that the train while going at that rate of speed could have been stopped in the space Watson was carried along on the pilot. It was therefore error to submit that question of negligence to the jury.

The other ground of liability set out in the complaint was that the trainmen were negligent in moving the train after it had been stopped over deceased, so as to cause it to strike him and inflict the fatal wound.

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

There was testimony tending to show that, as the engine was moving back over Watson's prostrate body, he was struck by a rod or bolt under the pilot, and that additional wounds were thereby inflicted. In view of the fact that the judgment must be reversed on other grounds, we deem it unnecessary to decide whether or not the evidence was legally sufficient to sustain a finding that the additional injury caused the death of Watson or contributed to it. On this point the evidence is so close that on another trial there may be enough difference to change its effect.

The court gave the following instruction over defendant's objections: "The burden of proof is upon defendant to show that it used reasonable care, caution, and skill to avoid injuring deceased after his peril was discovered by its employes." This was error. We have held in several cases that, where the injured person has been guilty of contributory negligence, the burden of proof is upon the plaintiff to show, in order to recover damages, that the employes in charge of the train discovered his perilous position in time to have avoided injury, and negligently failed to use proper means to avoid injuring him after discovering his peril. *St. L. & S. F. R. Co. v. Townsend*, 69 Ark. 380, 63 S. W. 994; *C. R. I. & P. Ry. Co. v. Bunch*, 82 Ark. 522, 102 S. W. 369; *Jones v. St. L. I. M. & S. Ry. Co.*, 131 S. W. 958.

We find it unnecessary to pass on the other assignments of error; but for the errors indicated the judgment is reversed, and the cause remanded for a new trial.

CRAWFORD v. OZARK INS. CO. et al.

(Supreme Court of Arkansas. Feb. 13, 1911.)

1. INSURANCE (§ 8*)—MUTUAL FIRE COMPANIES—BONDS—LIABILITY OF SURETIES.

The liability of sureties of insurance companies under Act April 24, 1905 (Laws 1905, p. 492) § 4, providing that, before a mutual insurance company shall do business in the state, it shall file a bond conditioned for the payment of claims, is that the company shall promptly pay all claims arising and accruing to any person during the term of their bond, regardless whether the policies under which such claims arise were issued during the life of the bond or not.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 7, 8, 23; Dec. Dig. § 8.*]

2. INSURANCE (§ 8*)—MUTUAL FIRE COMPANIES—BONDS—TERM.

Laws 1905, p. 492, § 4, provides that, before a mutual fire insurance company shall do business, it shall file a bond conditioned for the prompt payment of claims. Kirby's Dig. § 4348, provides that bonds of mutual insurance companies shall be renewed every two years. *Held*, that a bond to secure claims, obligating the sureties for only one year, covered claims accruing during two years.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 7, 8, 23; Dec. Dig. § 8.*]

3. BONDS (§ 50*)—STATUTORY BONDS—CONSTRUCTION.

Statutory bonds executed in the form prescribed by the statute must be construed as though the statute were written in them as respects the rights of principal and surety.

[Ed. Note.—For other cases, see Bonds, Cent. Dig. § 53; Dec. Dig. § 50.*]

4. BONDS (§ 50*)—STATUTORY BONDS—PRESUMPTIONS.

Obligors in a statutory bond are presumed to have known the terms of the statute, and to have bound themselves in reference thereto.

[Ed. Note.—For other cases, see Bonds, Dec. Dig. § 50.*]

5. INSURANCE (§ 8*)—MUTUAL FIRE COMPANIES—BONDS—CONSTRUCTION.

Under Laws 1905, p. 492, § 4, providing that, before a mutual fire insurance company shall do business, it shall file a bond conditioned for payment of claims "accruing" to any person during the term of the bond, a bond filed by an insurance company, conditioned "for the prompt payment of all claims arising and accruing to any person or persons, during the term of said bond by virtue of any policy issued by said company," etc., will be construed so as to make the phrase "by virtue of any policy issued by said company" parenthetical, and to make the phrase "during the term of said bond" qualify the participle "accruing" and not the verb "issued," and hence to be within the statute and to cover claims accruing during the term of the bond, though the policy is issued without the term.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 7, 8, 23; Dec. Dig. § 8.*]

Appeal from Circuit Court, Sebastian County; Daniel Hon, Judge.

Action by W. D. Crawford against the Ozark Insurance Company and others. From a judgment for plaintiff against the individual defendants only, he appeals. Reversed, and judgment rendered.

Appellant held a policy of fire insurance in the Ozark Insurance Company, a mutual fire insurance company, for the sum of \$1,000. The policy was in force from the 8th day of September, 1904, to the 8th day of September, 1907. On the 15th day of April, 1907, the property insured was destroyed by fire. The appellant sued the insurance company, alleging its failure to pay the policy, and also joined in the suit the following individuals, to wit: A. J. Ingle, Geo. W. Moss, Houston J. Payne, J. K. Kimmons, James B. Moore, and I. R. Arbogast, alleging that they had on the 28th day of February, 1906, executed a bond in the sum of \$15,000, which bond was approved by the Auditor of the state of Arkansas March 7, 1906, and which was in full force on the 15th day of April, 1907 when the loss occurred; that the bond was conditioned "for the prompt payment of all claims arising and accruing to any person or persons during the term of said bond by virtue of any policy issued by said company upon any property in Arkansas," etc.; that the insurance company and the bondsmen named had not paid the appellant the amount of his policy, which claim accrued

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

to him during the term of said bond. Appellant prayed for judgment against the insurance company and the sureties named in the sum of \$1,000, with interest. The insurance company denied liability, setting up various alleged defenses. The sureties adopted the answer of the company, and for further answer alleged that the policy of insurance was not executed during the time that the bond of February 28, 1906, which they signed, was in force; that by the terms of said bond the makers undertook to become liable only for claims arising and accruing to any person or persons by virtue of any policy by the said company during the term of the said bond; and that by its terms the said bond was in force and applied to the business transacted by said insurance company for a period of one year ending March 1, 1907, and that the policy herein sued on was executed September 8, 1906, and the loss alleged to have occurred to plaintiff was on April 15, 1907, by reason of which defendants are in no measure liable to plaintiff, on account of the alleged loss under and because of said alleged bond of February 28, 1906. After the evidence was adduced, the court directed a verdict in favor of appellant against the insurance company, and also to return a verdict in favor of the appellees. The verdict was returned in favor of appellant against the company in the sum of \$900, and the verdict was also in favor of appellees. The judgment was entered according to the verdict. The company has not appealed. The appellant seeks by this appeal to reverse the judgment in favor of the appellees.

J. M. Parker and W. H. Dunblazier, for appellant. C. E. & H. P. Warner, for appellees.

WOOD, J. (after stating the facts as above). The only question is were appellees liable under the following clause of their bond, to wit: "They shall promptly pay all claims arising and accruing to any person or persons, by virtue of any policy issued by said company, during the term of this bond, upon any property situated in the state of Arkansas when the same shall become due." In the recent case of *American Insurance Company v. Haynie*, 91 Ark. 43, 120 S. W. 825, we held (quoting syllabus): "The liability of sureties of insurance companies under the act of April 24, 1905, is that the company shall promptly pay all claims arising and accruing to any person or persons during the term of their bond, regardless of whether the policies under which such claims arise were issued during the life of the bond or not." Section 4348 of Kirby's Digest provides that the bonds of mutual fire insurance companies shall be renewed every two years.

There is nothing in the Acts of 1905, p. 489, inconsistent with the above provision; nothing repealing it. Section 4339, Kirby's Digest of the general insurance laws, providing for the renewal of bonds annually, especially provides that "this is not to apply to assessment companies as provided in sections 4347 and 4348." Therefore the bond of appellees executed February 28, 1906, was in force till February 28, 1906. Hence the loss of appellant which occurred April 15, 1907, was during the term of the bond. Appellees contend that the policy itself must have been issued during the term of the bond; that the express language of the bond excluded losses that occurred during the life of the bond on policies that were issued before the bond was executed. In other words, appellees contend that by the express language of the bond, unless the policy was issued during the term of the bond, the sureties were not liable for a loss that occurred during such term.

We must presume that it was the intention of the bondsmen to execute the bond in compliance with the requirements of the statute, and, unless it would be doing violence to the language of the bond itself, it is our duty to so hold. *M., T. & F. & G. Co. v. Fultz*, 76 Ark. 415, 89 S. W. 93; 5 Cyc. p. 753, note 56; *Id.* 751, 752, 756, and note. Statutory bonds executed in the form prescribed by the statute must be construed as though the statute were written in them as respects the rights of principal and surety. *Zellers v. National Surety Co.*, 210 Mo. 86, 108 S. W. 548. The clause of the bond under consideration should be construed and read as follows: "Shall promptly pay all claims arising and accruing to any person or persons, during the term of this bond, by virtue of any policy issued by said company, upon any property situated in the state of Arkansas, when same shall become due." This arrangement is according to the punctuation and grammatical construction, and, while punctuation should not control, neither should it be ignored in considering what the makers of the instrument meant by the language employed. The commas after "persons" and "company" show that the phrase, "by virtue of any policy issued by said company," is parenthetical. Their effect is to make the prepositional phrase, "during the term of this bond," relate and qualify the participle "accruing," and not the verb "issued." When thus construed, the bond conforms to the law as interpreted in *Insurance Company v. Haynie*, supra, by which this case is ruled.

The judgment is therefore reversed, and judgment is entered here in favor of appellant against appellees in the sum of \$900, with interest.

ALEXANDER v. STATE.

(Supreme Court of Arkansas. Feb. 6, 1911.)

1. CRIMINAL LAW (§ 829*)—TRIAL—INSTRUCTIONS—REQUEST—INSTRUCTIONS ALREADY GIVEN.

There is no error in the refusal to give instructions already fully covered in the charge of the court.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 2011; Dec. Dig. § 829.*]

2. CRIMINAL LAW (§ 586*)—CONTINUANCE—ABSENCE OF WITNESSES—DISCRETION OF COURT.

After full presentation of the facts affecting the question whether defendant exercised proper diligence to obtain the presence and testimony of witnesses, the granting or refusal of a continuance is within the sound discretion of the trial court.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1311; Dec. Dig. § 586.*]

Appeal from Circuit Court, Clay County; Frank Smith, Judge.

Walter Alexander was convicted of seduction, and he appeals. Affirmed.

F. G. Taylor and J. L. Taylor, for appellant. Hal L. Norwood, Atty. Gen., and Wm. H. Rector, Asst. Atty. Gen., for the State.

KIRBY, J. Appellant was indicted August 5, 1910, for the crime of seduction of "Maddie Williams." On the 8th day of August another indictment was returned against him for the seduction of "Mattie Williams," the latter indictment being found for the purpose of correcting the error in the name of the person seduced. On the 10th day of August the case was called for trial, having been set down on the 5th, and the defendant filed a motion for continuance to procure the attendance of witnesses James McClintock and James Wilcock, one of said witnesses being at Walnut Ridge and the other at Pochontas, Ark. He alleged that these witnesses would, if present, testify that the prosecutrix, Mattie Williams, told each of them at different times that she and defendant were never engaged to be married, that they had quit keeping company with each other, and that she would not permit him to come to see her any more; "that this defendant cannot prove said facts so fully by any other witness that he can now produce;" that subpoenas were issued for these witnesses on the 9th day of August, etc.

Testimony was introduced upon this motion which tended to show that the case was set down with the consent of the defendant on the 5th day of August, the date the first indictment was returned for trial on the 9th day; that subpoenas for the absent witnesses were issued on the 9th. One of the attorneys for the defendant testified that he was spoken to about the case on Friday, but not employed until Monday; that he did not know on Friday that the case was set for Tuesday, and did not learn

that fact until Saturday before his employment Monday; that he had been very busy in court with other matters, and did not talk to the defendant about his witnesses until "yesterday morning" (meaning Monday), and had some witnesses subpoenaed in the morning, and the others in the afternoon after he got out of court. He heard the announcement in open court on Saturday that the trial was set for Tuesday, with defendant's consent, but only learned on Saturday that it was set, and was busy in other cases at that time.

Defendant's attorneys were notified on the 8th day of the month before the second indictment was returned that it would be brought in, but that it was only to correct the error in the name of the prosecuting witness, and charged the same offense. One of the witnesses was said to be at Pochontas and the other at Walnut Ridge, and the court said the witness could be gotten from Walnut Ridge that evening. The time of the arrival of trains from Walnut Ridge was shown, and the court announced that it was not a showing of diligence to wait until the case was called for trial before having witnesses subpoenaed, and said: "I will appoint a special officer, and if you gentlemen know where these two witnesses are, I will hold the case over until tomorrow morning, and do everything we can to get them here for you. The motion for a continuance is overruled."

The testimony at the trial of the case showed that Mattie Williams lived in Corning and was acquainted with Walter Alexander, appellant, for two years; that he commenced "keeping company" with her in October more than a year before the trial of this case, and visited her about twice a week during the year; that after several months of this association he proposed marriage to her, the first time about the middle of June and later in July, which latter proposition she accepted. "He just asked me to marry him, and I told him all right. The 5th of July was fixed for our wedding. He had sexual intercourse with me twice. These are the only times. We had intercourse two or three days after we were engaged. I did not keep company with any other person while I was going with him, and the child was born on the 29th of April before the trial"—is her way of expressing it. She testified further that the defendant quit coming to see her of his own accord; that he refused to fulfill his promise of marriage; and that he was married to another before Christmas. Her testimony was corroborated by her brother, Ed Williams, who stated that he had had a conversation with appellant about three months before the trial in which appellant said he intended to marry his sister, "but that this other trouble had come up," and so he had to

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

marry the woman that he did marry; that he knew the condition that his sister, Mattie Williams, was in, and that he knew he was the father of the child. This conversation occurred in March before his sister's child was born.

James Hollis testified that he was married before Christmas; that he had known Walter Alexander, the appellant, for several years, and was friendly with him. "We married sisters and were married at the same time. He talked to me some about Mattie Williams. He told me that he promised to marry her, and he did not know what to do about it, but that he had decided to marry this other girl."

Defendant admitted having associated with the prosecuting witness and visited her regularly for some months, but denied that he had ever made any proposition of marriage or agreed to marry her, or that he had ever had sexual intercourse with her. He admitted that he had been acquainted with her for about two years, and that he commenced going with her then and went to see her once or twice a week for nearly a year, but denied that they had ever been engaged or that he had had sexual intercourse with her. "I never proposed marriage to her, we were never engaged, and I never had sexual intercourse with her," was his statement. He stated that he quit going with her in the fall before he was married, because she gave him orders to quit, and told him not to come any more; that he went to her house and tried to talk to her, and she turned him down again; that after that he commenced to go with Effie Johnson, and was married to her on the 24th of October, 1909; that at this time he did not know that Mattie was in a family way; that he did not tell James Hollis that he was engaged to Mattie Williams or had her in a family way; admitted the conversation with Ed Williams, but denied that he told him he intended to marry his sister or had promised to do so. Two or three witnesses testified that they had heard Mattie Williams, the prosecutrix, say that she would never go with Walter Alexander again, and that she did not expect to have anything to do with him. The court instructed the jury, and they returned a verdict of guilty and fixed his punishment at one year in the penitentiary, and appellant appealed.

It is insisted here that the court erred in giving certain instructions and in refusing to give certain other instructions requested by the defendant. But the instructions given clearly and correctly stated the law of the case, and fairly submitted the issues to the jury for trial. All the instructions requested by defendant that were correct were fully covered in the charge of the court, and there was no error in refusing to give them a second time.

No instruction was given defining an express promise of marriage, nor was one asked by defendant nor any specific objection made by him to any instruction given because of it not being defined. He was convicted after a fair trial of his cause, and the evidence amply supports the verdict.

The question of whether or not he had exercised proper diligence to obtain the presence and testimony of the absent witnesses was passed upon adversely to his contention by the court, overruling the motion for a continuance, after the facts were fully developed before him. This was a matter within the sound discretion of the court, and we do not find that this discretion was abused in refusing to grant the continuance.

The judgment is affirmed.

ROBINSON et al. v. CROSS.

(Supreme Court of Arkansas. Feb. 13, 1911.)

1. JUDGMENT (§ 743*)—RES JUDICATA—TITLE TO LAND.

A levee district by decree in 1894 in chancery obtained title to land under forfeiture for taxes. In 1896 it proceeded against one B. to collect delinquent taxes on this same land, and by decree in chancery the title to land was declared to be in B., and plaintiff, in ejectment, transferred to chancery, to quiet defendant's title, deraigned title through a purchaser at a sale on this decree. Defendant, in ejectment relied wholly on possession. *Held* that, since the decree of 1896 was unappealed from, it was conclusive that the title to the land was in B.

[Ed. Note.—For other cases, see Judgment, Dec. Dig. § 743.*]

2. QUIETING TITLE (§ 10*)—SUFFICIENCY OF TITLE.

The purchaser at the sale in 1896 got a prima facie title which in the hands of his grantee was good as against the possession of defendant in ejectment, seeking to quiet his title as against plaintiff.

[Ed. Note.—For other cases, see Quieting Title, Dec. Dig. § 10.*]

3. QUIETING TITLE (§ 10*)—SUFFICIENCY OF TITLE—TAX SALES.

A contention that the sale of land by the levee board was in effect an illegal sale of the land of the levy district would not avail defendant in ejectment, who was seeking to quiet his title in chancery as against plaintiff in ejectment, since the district not complaining and it having title, if B. did not, the district, by electing to treat the title in B., gave him a sufficient prima facie title against defendant.

[Ed. Note.—For other cases, see Quieting Title, Dec. Dig. § 10.*]

Appeal from Mississippi Chancery Court; Edward D. Robertson, Chancellor.

Suit by Ida Cross against Clyde Robinson and others. From the decree rendered, defendants appeal. Affirmed.

This is an action by Ida Cross against defendants Robinson and Johnson to recover the N. E. $\frac{1}{4}$ of S. E. $\frac{1}{4}$, section 2, township 15 N., range 12 E. It was an action of ejectment originally commenced in the circuit court, and then transferred to the chancery court

upon motion of defendants to have their alleged title quieted. The appellee derails title from the government to the St. Francis levee district. Then, in a suit by the levee board against Charles Bowen, the land in controversy, with two other 40's, was sold for taxes. Geo. Cross was the purchaser, and by partition decree among his heirs the land in suit was allotted to appellee. She also set up title by adverse possession. Appellants deny that appellee acquired any title by adverse possession. They stand on their possession, having no title themselves, and challenge appellee to show title. The documentary and record evidence tended to prove the allegations of the complaint as to appellee's title. The court rendered a decree quieting the title in appellee and directing the ouster of appellants, if possession was not given to appellee within 30 days from the date of the decree. Appellants were granted an appeal by the clerk of this court, which they are duly prosecuting.

J. T. Coston, for appellants. W. J. Lamb, for appellee.

WOOD, J. (after stating the facts as above). The appellants admit that the levee district obtained title to the land in controversy through tax forfeiture and decree of the chancery court in 1894. The appellants admit, also, that a decree was rendered in 1896 against Charles Bowen purporting to condemn the land in controversy to be sold for levee taxes. These admissions put appellants out of court; for it is alleged, and not denied, that appellee obtained the title she here asserts through one who purchased at the sale under the decree of 1896. A bona fide purchaser at the sale under that decree certainly procured, at least, a prima facie title and one good against all the world until overcome by some one who could show a better title. It was such a title as would enable her to maintain a suit for possession as against one who had no title, as affirmatively shown by his exhibits. The record shows that the levee district by decree of chancery court in 1894 obtained title to the land under forfeiture of same for the taxes of 1870. Whether the levee district after 1894 sold the land to Charles Bowen the record nowhere discloses. But the presumption is that it did; for the levee district, as we have stated, proceeded against him to collect delinquent taxes, and had the land in controversy condemned and sold for the payment of these taxes. The levee district thus treated the land as the land of Charles Bowen in 1896. The court in the decree found "that the land belonged to Charles Bowen." The decree was regular on its face. The court had jurisdiction to decree a sale of the lands of Charles Bowen for delinquent taxes. The levee board could proceed by

adversary suit against the owner to collect the taxes, and could have the taxes declared a lien on the land, and have same sold to satisfy such lien. See Acts 1893, pp. 31, 32, §§ 11, 12, 13, amended by Acts 1895, p. 88. That was the proceeding as appears from the undenied allegations of the complaint. The decree of the chancery court was not appealed from, and has not been set aside by any direct proceeding. It cannot be impeached in the collateral way attempted by appellants.

Learned counsel contend that the decree of the chancery court in 1896 condemning the land to be sold as the lands of Charles Bowen for alleged delinquent taxes was but in effect an illegal and unauthorized sale of the land of the levee district by the levee board. If learned counsel were correct, still appellee's title would be good except as against the levee district, or some one derailing title through it. The levee district is not complaining, even if it could do so, and appellants do not claim any title from it, while it is true that a sale in a personal action binds only the parties thereto and their privies. *Wilson v. Gaylord*, 77 Ark. 477-479, 92 S. W. 28. Yet in this case the levee board had the title if it was not in Bowen, and the levee board elected to treat it as in Bowen, and that gives appellee the prima facie title as we have shown through the decree. But there is nothing in the record to warrant the above contention of counsel. The record shows that it was a proceeding to collect taxes on the lands of another, and not a sale of the land of the levee district. The decree is correct.

Affirmed.

THOMPSON et al. v. JACOWAY.

(Supreme Court of Arkansas. Feb. 13, 1911.)

1. PLEADING (§ 217*)—DEMURRER—OPENING UP RECORD.

A demurrer at any state of the pleading opens up the whole record, and goes back to the first defective pleading.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 540-548; Dec. Dig. § 217.*]

2. PLEADING (§ 403*)—COMPLAINT—ERROR CURED BY ANSWER.

A complaint which set up the nonpayment of a note executed by a principal and surety and requested the foreclosure of a mortgage given to secure it, and further alleged that the surety was not to be liable until the mortgage had been exhausted, but failed to state that the mortgage had been exhausted, was cured by an answer which alleged that a prior mortgage had exhausted the mortgaged property.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 1343-1347; Dec. Dig. § 403.*]

3. SALES (§ 283*)—WARRANTY OF TITLE—BREACH.

Where personal property was sold with a warranty of title, that the seller did not have the title, but merely owned stock in a corporation having the title constituted no breach, the buyer having remained in undisturbed possession.

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

sion for four years and until the property was sold to satisfy a mortgage given by him upon it, as to constitute a breach of warranty of title, an actual deprivation of the possession is necessary.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 799-802; Dec. Dig. § 283.*]

Kirby, J., dissenting.

Appeal from Yell Chancery Court; Jeremiah G. Wallace, Chancellor.

Action by H. M. Jacoway against John S. Thompson and another. From a judgment for plaintiff, defendants appeal. Affirmed.

Bullock & Davis and Jno. M. Parker, for appellants. Sellers & Sellers and Brooks, Hays & Martin, for appellee.

FRAUENTHAL, J. This was a suit brought by H. M. Jacoway, the plaintiff below, to recover upon a note which the defendants had executed to him and to foreclose a mortgage given to secure the payment thereof. It was alleged in the complaint that both defendants had executed the note sued on and that the defendant Thompson had executed the mortgage to secure the payment thereof upon certain real and personal property which was therein described. It was also alleged that in the mortgage it was provided that all the property therein described should be sold and the proceeds thereof applied upon the debt before the defendant Collier should be required to pay any part of the note. The complaint alleged default in the payment of the note, but did not allege that the property described in the mortgage had been sold and the proceeds applied towards the payment of the note.

To this complaint the defendants filed answers and subsequently amended answers in which the execution of the note and mortgage was admitted. In said amended answers it was, in substance, alleged that the note was executed for the purchase money of the personal property described in the mortgage, which consisted of articles constituting a printing plant, which plaintiff had sold to defendant Thompson, and that defendant Collier had executed the note as surety only. It was alleged that plaintiff had sold to said Thompson said printing plant for \$2,647.50 for which he had executed two notes—one for \$2,000 to one John Grace, who had advanced that amount to plaintiff, and the other for \$647.50 to plaintiff, which is the note sued on—and that defendant Collier had executed both notes as surety. To secure these notes Thompson executed two mortgages on the property described in the complaint, one to said Grace and one to plaintiff, in which it was provided that the mortgage to said Grace should be prior and superior to the mortgage executed to plaintiff. In both mortgages it was also provided that the property therein described should be sold and the proceeds applied to the pay-

ment of the notes before said Collier should be required to pay any part thereof. It was further alleged that at the time of the sale of the said personal property to Thompson, plaintiff represented himself to be the owner of said personal property and warranted his title thereto but that the title to said property was not in plaintiff. It was averred that said John Grace had brought suit upon said note and mortgage executed to him, and in that suit it was decreed that the plaintiff was only the owner of a large portion of the stock of a corporation in which was the title to said personal property. The defendants claimed that on this account the note and mortgage were executed without consideration and were void; and they asked that they be canceled. To the amended answers the plaintiff filed a demurrer which was sustained, and the defendant Collier then, by leave of the court, filed an amendment to his amended answer in which he alleged "that all of the property has been exhausted under the sale under the former or prior mortgage executed by said J. S. Thompson and Collier to John Grace." And to the amended answer as thus amended the court sustained a demurrer interposed by plaintiff. The defendants thereupon refusing to plead further the court entered a decree in which it is recited that it found that defendants were indebted to the plaintiff in the amount of the note and "that the property described in said mortgage has all been sold under prior mortgage foreclosed by a decree of this court," and rendered judgment against defendants for said debt. From this decree defendants have appealed to this court.

It is urged by counsel for defendants that the complaint herein was defective as to defendant Collier and was itself subject to a demurrer; and that the demurrer filed to the answer related back to the complaint, and that the demurrer being thus taken to the complaint should have been sustained. It is claimed that in the complaint it was alleged that the mortgage upon which this suit is based, provided that the property therein described should be sold and the proceeds thereof applied to the note sued on before defendant Collier should be required to pay any part thereof, and that it was not alleged in the complaint that this had been done. It is true that when a demurrer is filed to the answer its effect is to search all prior pleadings and it operates not only against the answer to which it is interposed but it is also taken as a demurrer to the complaint upon which the action is instituted, and if that pleading contains a fatal defect it should be sustained as a demurrer to such complaint. *Carlock v. Spencer*, 7 Ark. 12; *Wade v. Bridges*, 24 Ark. 569; *Yell v. Snow*, 24 Ark. 555; *Wood v. Terry*, 30 Ark. 385; *Bruce v. Benedict*, 31 Ark. 305.

But a defect in the complaint may be aid-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

ed and cured by an answer. If a complaint is defective because it does not make sufficient allegations then it is aided by an answer which itself makes the allegations, in which the complaint is deficient; and this cures the complaint. As is said in the case of *Choctaw, O. & G. Rd. Co. v. Doughty*, 77 Ark. 1, 91 S. W. 768, "A defect in pleading is aided if the adverse party plead over to or answer the defective pleading in such a manner that an omission or informality therein is expressly or impliedly supplied or rendered formal or intelligible." *Knight v. Sharp*, 24 Ark. 602; *Pindall v. Trevor*, 30 Ark. 249; *Davis v. Hare*, 32 Ark. 386; *Webb v. Davis*, 37 Ark. 551; *Ogden v. Ogden*, 60 Ark. 70, 28 S. W. 796, 46 Am. St. Rep. 151; *Hess v. Adler*, 67 Ark. 444, 55 S. W. 843. In the amendment to the amended answer the defendant Collier alleged: "This defendant further states that all the property has been exhausted under the sale of the former or prior mortgage executed by the defendants Thompson and Collier to John Grace." This allegation in the answer supplied the omission thereof in the complaint, and in effect was an averment that all the property described in the mortgage had been sold and the proceeds thereof properly applied; because it was also alleged that the mortgage provided that the proceeds of the sale of the property should be applied first to the payment of the debt secured by the mortgage given to Grace.

It is alleged in the answer that the plaintiff warranted the title to the property for the purchase money of which the note was given and that the warranty had been broken, and it is urged that this set forth a good defense. But the answer did not allege that the defendant had lost or been dispossessed of the property which he purchased from plaintiff by reason of such alleged failure of title. There is no breach of a warranty of title merely because such title is disputed. The mere existence of a right to the property by a third person is not sufficient. There must be an actual deprivation of the possession of the purchaser by one holding a superior title before there is a breach of the warranty of title. As is said in the case of *Hynson v. Dunn*, 5 Ark. 395, 41 Am. Dec. 100: "Where a vendee relies on the warranty of title, whether express or implied, there must be a recovery by the real owner before an action can be maintained for a breach of contract. This is in the nature of an eviction, and it is necessary in such a case for the pleading to show that the vendee had been evicted or lawfully deprived of the use and possession of the property; and in omitting to do this it discloses no breach of warranty." 35 Cyc. 416.

In the case at bar it sufficiently appears from the allegations of the pleadings that the property was sold by the plaintiff to the de-

fendant in 1905, at the date of the execution of the note, and the possession thereof turned over to defendant and that he remained in possession thereof until 1909 when same was sold under the mortgage executed to Grace. Under the allegations of the pleadings, therefore, there was never a deprivation of the possession of the defendant until he was lawfully dispossessed of the property by virtue of the mortgage given to Grace. This was in full compliance with the terms of the mortgage sued on in this case, and there was no breach of the warranty of title under these allegations.

It follows that the court did not err in sustaining the demurrer to the amended answer of defendant Thompson or the demurrer to the answer of defendant Collier as amended. The decree is affirmed.

KIRBY, J., dissents; HART, J., disqualified.

HEADRICK v. H. D. WILLIAMS COOPERAGE CO.

(Supreme Court of Arkansas. Feb. 13, 1911.)

1. APPEAL AND ERROR (§ 927*)—REVIEW—PRESUMPTIONS—PROBATIVE FORCE OF EVIDENCE.

On appeal from a judgment in favor of defendant, after a peremptory instruction in its favor, at the close of plaintiff's case the testimony must be given its strongest probative force to determine whether it is sufficient to sustain a verdict in favor of plaintiff.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3748, 4024; Dec. Dig. § 927.*]

2. APPEAL AND ERROR (§ 1133*)—AFFIRMANCE—DEFECT IN RECORD.

A judgment in an action for injuries in which a verdict was directed for defendant at the close of plaintiff's case would not be affirmed because there was not contained in the bill of exceptions a diagram concerning which plaintiff testified, where it was not formally introduced in evidence, and it appeared that the testimony of plaintiff was sufficiently complete to understand it without the aid of the diagram.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4450-4452; Dec. Dig. § 1133.*]

3. MASTER AND SERVANT (§ 190*)—INJURIES TO SERVANT—NEGLIGENCE OF FOREMAN—PROXIMATE CAUSE.

Where a servant was called upon by his foreman to perform a service which required him to pass by a hole which was hidden by being covered with sawdust, and he was injured by stepping into the hole, and it was the duty of a fellow servant to keep the hole clean, the foreman was guilty of negligence in failing to have the hole cleaned out, which was the proximate cause of plaintiff's injury.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 457; Dec. Dig. § 190.*]

4. MASTER AND SERVANT (§ 289*)—INJURIES TO SERVANT—ACTIONS—QUESTION FOR JURY.

Where a servant employed in a stove mill, who knew of a certain hole, was injured by stepping into it when it was covered with sawdust, when he could have performed his duties without passing the hole, it was a question for

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

the jury whether he was guilty of contributory negligence.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 1110; Dec. Dig. § 289.*]

5. MASTER AND SERVANT (§ 233*)—INJURIES TO SERVANT—CONTRIBUTORY NEGLIGENCE—CHOICE OF WAYS.

Though there may be two ways open to a servant in which to perform his work, one of which turns out to be less dangerous than the other, and he adopts the other, yet if that way is not so dangerous that a person of ordinary prudence would not have undertaken it, it cannot be said that the servant was guilty of negligence because he chose the way which was reasonably safe but which was not the safer.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 702; Dec. Dig. § 233.*]

6. MASTER AND SERVANT (§ 220*)—INJURIES TO SERVANT—ASSUMPTION OF RISK—COMPLAINT TO MASTER.

A servant does not assume the risk of danger from a defect, when he has complained of it, and is relying on the express promise of the master to repair the defect, unless the danger is so imminent or obvious that no prudent man would have continued to work.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 641; Dec. Dig. § 220.*]

Appeal from Circuit Court, Independence County; Charles Coffin, Judge.

Action by J. T. Headrick against the H. D. Williams Cooperage Company. From a judgment in favor of defendant, plaintiff appeals. Reversed.

See, also, 159 Fed. 680, 86 C. C. A. 548.

Oldfield & Cole, for appellant. Gaughan & Sifford and McCaleb & Reeder, for appellee.

MCCULLOCH, C. J. Defendant, while operating a stave mill in Stone county, Ark., employed plaintiff to work at the equalizer saws. He received personal injuries while in the discharge of his duties, and sues his employer for damages, alleging negligence on the part of his foreman in failing to box the equalizer saws and to keep the hole underneath the saws free from sawdust and blocks. Defendant in its answer denied negligence, and pleaded contributory negligence on the part of plaintiff, and also assumption by him of the risk. The trial court after plaintiff had concluded his testimony, gave a peremptory instruction in favor of defendant and judgment was accordingly entered against plaintiff.

We must, therefore, in testing the correctness of the court's ruling, give the testimony its strongest probative force, to determine whether or not it is legally sufficient to sustain a verdict in plaintiff's favor. His injury occurred August 23, 1906. Plaintiff's work, as before stated, was at the equalizer saws, so as to make the stave bolts of equal lengths; and it was also a part of his work to go to the rear of the table and check or steady the barrel saw and strike the teeth of that saw at certain intervals. He worked under the immediate supervision of Shaver, the foreman, who was the defendant's vice principal. There were egg-shaped holes un-

der the equalizer saws, about 2 feet long and 18 inches wide, to receive the sawdust and blocks from the saws. It was the duty of Arnold, another workman, to keep the holes clear of accumulated sawdust and blocks. When the holes were full, it was difficult to discern them, as there was also an accumulation of sawdust on the floor, so that the edges of the holes could not be seen. About two feet to the left of the equalizer saws there was a table or bench on which the bolts were laid after being equalized, and the barrel saw was about 10 inches to the left of this table. The afternoon before the injury occurred the plaintiff complained to Shaver that the saws should be boxed, and that the holes should be cleaned out so as to make the place about the saws safe. Shaver promised to see that this was done, and asked plaintiff to continue work. The exact language in which the promise of the foreman was couched is, as testified to by plaintiff, as follows: "Headrick, if you will work on I will box the holes up, and I will see that John Arnold keeps the dust out of the holes. I can't hardly run without you. If you quit I will have to stop until I get another hand." No time was specified when the promise should be complied with. Shaver did not box the saws, and did not have the holes cleaned out as promised. The next day after the promise was made, plaintiff, in passing between the saws and the table in order to get to the barrel saw to steady it as he was commanded to do, stepped on the edge of the hole, his foot slipped in, and was struck by one of the saws. Shaver was standing at the barrel saw and signaled plaintiff to go to that saw and steady it. Plaintiff testified that the holes were full, and that he could not see the edges on account of the sawdust. He also testified that there was not sufficient room to permit him to pass between the table and the barrel saw, and that it was not practical to go around the barrel saw so as to avoid going between the table and the equalizer saws.

It is insisted by counsel for defendant in the first place that the bill of exceptions does not contain all the testimony, and that for this reason the judgment should be affirmed. The only omission suggested is a diagram concerning which plaintiff testified. This was not formally introduced in evidence, but it appears to have been produced by counsel for defendant, and, while testifying in response to questions, the plaintiff indicated his explanations by pointing to the diagram and referring to it. The witness, however, testified fully as to the relative positions of the saws, holes, table, etc., and his testimony is complete and can be readily understood without the aid of the diagram. It would add no additional light on the subject, and does not strengthen the case either way so far as concerns the legal sufficiency of the evidence.

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

If plaintiff's testimony as set forth in the bill of exceptions is found to be legally sufficient to make out a case which should have gone to the jury, the absence of the diagram does not weaken it nor leave room for a presumption that its presence in the bill of exceptions would establish facts to contradict or overcome his positive statements.

The evidence was legally sufficient to warrant a finding that defendant's foreman was guilty of negligence in failing to have the holes cleaned out, and that this was the proximate cause of plaintiff's injury. It was the duty of Arnold, a fellow servant, to keep the holes clean; but plaintiff was working in the presence and under the immediate supervision of the foreman, who promised to see that the holes were cleaned out and assumed the duty of doing so. He called on the plaintiff to perform a service which required him to pass along by the hole, and it was then his duty as vice principal of the master to exercise ordinary care to make the place reasonably safe. *Archer-Foster Const. Co. v. Vaughn*, 79 Ark. 20, 94 S. W. 717.

We cannot say as a matter of law that the danger from going between the table and the saws with the hole beneath was so obvious that an ordinarily prudent person would not have undertaken it. It was a question for a jury to determine whether or not it constituted negligence under the circumstances for plaintiff to pass between the table and the saws, and to place his foot so close to the edge of the hole as to permit it to slip into the hole. Different minds may reasonably reach different conclusions from these facts, and under such circumstances it is the duty of the trial court to submit the question to the jury.

Nor should it be said that because plaintiff went between the table and the saws when it was possible for him to have chosen a safer route around the table and barrel saw, he was, as a matter of law, guilty of contributory negligence in failing to choose the safer route. The federal Circuit Court of Appeals for this district have announced that rule in several cases. *Gilbert v. Burlington & R. Co.*, 128 Fed. 529, 63 C. C. A. 27. That court did so in this case when it was pending there. *H. D. Williams Cooperage Co. v. Headrick*, 159 Fed. 680, 86 C. C. A. 548. But we have declined to adopt that rule, as we think it makes the employé the absolute insurer of his own safety. *C. O. & G. R. Co. v. Thompson*, 82 Ark. 11, 100 S. W. 83; *K. C. So. Ry. Co. v. Henrie*, 87 Ark. 443, 112 S. W. 967. Even though there may be two ways possibly open to an employé in which to perform his work, one of which turns out to be less dangerous than the other, and he adopts the other way, yet if that way is not so dangerous that a person of ordinary prudence would not have undertaken it, the court should not say that the employé was guilty of negli-

gence because he chose that way which was reasonably safe, but which was not the safer. We think, as said in our former cases, that to adopt that rule would be to make the employé the insurer of his own safety in choosing between two methods of doing his work, either of which might be reasonably safe.

The testimony of plaintiff in the trial below tended to show that while it was possible for him to go around on the other side of the barrel saw so as to avoid the narrow path between the equalizer saw and the table where he was injured, yet it was not convenient to do so in a manner to respond promptly to his master's signal and perform his duty expeditiously. The jury should therefore have been allowed to say whether or not he was guilty of negligence.

The plaintiff may not be said to have assumed the risk of the danger where he has complained of a defect and danger and is relying on the express promise of the master to repair the defects, so as to obviate the danger, unless the danger is so imminent and obvious that no prudent man would have continued to work in it. *St. L., I. M. & S. Ry. Co. v. Mangan*, 86 Ark. 507, 112 S. W. 168; *Marcum v. Three States Lumber Co.*, 88 Ark. 28, 113 S. W. 357; *St. L., I. M. & S. Ry. Co. v. Holman*, 90 Ark. 555, 120 S. W. 146.

While the unfulfilled promise of the master is outstanding—that is to say, during the period in which compliance with the promise may reasonably be expected—he, the master, and not the servant, is deemed to have contracted to bear the risk of the danger, unless the danger is so obvious that no prudent man would continue in the work under the circumstances. 2 *Labatt on Master & Servant*, § 425.

After a careful consideration of the testimony adduced, we are of the opinion that the case should have been submitted to the jury under appropriate instructions of law, and that the circuit court erred in giving a peremptory instruction.

Reversed and remanded for new trial.

LINDSEY v. BLOODWORTH.

(Supreme Court of Arkansas. Feb. 13, 1911.)

1. LANDLORD AND TENANT (§ 291*)—FAILURE TO PAY RENT—ACTION FOR UNLAWFUL DETAINER—COMPLAINT.

A complaint alleging the renting of a farm by plaintiff to defendant, that plaintiff was unlawfully deprived of his one-third share of the crop of oats, and that defendant has refused to pay rent to plaintiff, and has appropriated the entire crop of oats to himself, is sufficient to show that defendant had raised an oat crop on the land, one-third of which was due plaintiff for the use of the land, and had not given plaintiff his one-third, but had appropriated it to his own use, and so by necessary inference that plaintiff's rent, represented by the portion of the crop he was to receive, was due, and that defendant had refused to pay or deliver it to plaintiff, within Kirby's Dig. § 3630, pro-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

viding that, where the tenant refuses to pay rent when due, the landlord may maintain an action of unlawful detainer against him, if he refuses to quit possession after the landlord has given him three days' notice to quit, and made written demand on him for the possession.

[Ed. Note.—For other cases, see *Landlord and Tenant*, Cent. Dig. §§ 1238-1245; Dec. Dig. § 291.*]

2. PLEADING (§ 311*)—USE OF EXHIBITS.

The description in the complaint of the land rented by plaintiff to defendant may be aided by the written notice which the complaint alleges was served on defendant demanding possession of "said premises," and is attached to, and made part of, the complaint as an exhibit; the description in the latter not being contradictory of, but merely completing and explaining, that in the complaint.

[Ed. Note.—For other cases, see *Pleading*, Cent. Dig. § 945; Dec. Dig. § 311.*]

3. EVIDENCE (§ 41*)—JUDICIAL NOTICE.

The court will take cognizance that there are two judicial districts in a certain county created by statute, and of sections, townships, and ranges according to federal surveys, and of the particular judicial district in which these are located.

[Ed. Note.—For other cases, see *Evidence*, Cent. Dig. §§ 56-60; Dec. Dig. § 41.*]

Kirby, J., dissenting.

Appeal from Circuit Court, Clay County; Frank Smith, Judge.

Action by C. T. Bloodworth against J. C. Lindsey. Judgment for plaintiff. Defendant appeals. Affirmed.

Omitting the caption the complaint is as follows: "Comes the plaintiff herein, and for cause of action against said defendant states that on the 18th day of November, 1909, he rented to the defendant, J. O. Lindsey, for the crop season of 1910 certain parts of his farm in section 16, township 21 N., of range 5 E., in Clay county, Ark., as evidenced by a written contract herewith attached marked 'Exhibit A,' and made part of this complaint; that the said J. C. Lindsey agreed to sow a certain portion of said land in rye and timothy; that the said Bloodworth purchased timothy seed to sow said land according to said contract, but the defendant has failed, refused, and neglected to sow said land in compliance with his contract as aforesaid; that, under the terms of the said contract, the said defendant herein agreed to ditch the field west of the house on said farm and which he agreed to cultivate in corn, peas, and oats, with a good scraper ditch leading into Cypress creek; that he has failed, refused, and neglected to ditch same before the crop season, as contracted; that the said J. C. Lindsey in said contract agreed to cultivate said land in corn, peas, and oats; that, instead of cultivating the land as contracted, he has put in a small portion of same in sunflowers; that he has sowed about six acres of oats and has wrongfully, unlawfully, and without any right or authority whatever pastured his stock on said oats until the same is eaten up and

destroyed, thus depriving this plaintiff of his one-third share of said crop; that he has wrongfully, unlawfully, and in willful violation of his contract failed, neglected, and refused to plant any part of said land in corn; that instead of cultivating said land, as he contracted to with this plaintiff, he wrongfully and unlawfully pastured his horses, cows, and goats on said fields, thus depriving this plaintiff of his one-third share of said crops as rent of said lands; and that said defendant is allowing a great portion of said lands to lay idle and uncultivated, and is using the same for pasture of his stock; and that the defendant, J. C. Lindsey, has failed, refused to pay rent to this plaintiff, but has appropriated the entire crop of oats to his own use. Plaintiff further states that the rental value of said land is \$200. Plaintiff further states that, by reason of defendant neglecting, failing, and refusing to comply with his contract and sow the five acres around the main dwelling house in timothy, he is damaged in the sum of \$50; that, by reason of his failure to ditch land as aforesaid, he has suffered damages in the sum of \$50. Plaintiff further states that he has caused a written notice to be served on said defendant, J. C. Lindsey, more than three days before the commencement of this action, demanding possession of said premises, and said notice is hereto attached marked 'Exhibit B,' and made a part of this complaint. Plaintiff further states that he is lawfully entitled to the possession of said lands and tenements mentioned herein, and that said defendant unlawfully detains the same after he has made lawful demand therefor. Wherefore plaintiff prays that a writ of possession issue, that he have judgment against said defendant for the possession of said premises and for damages as aforesaid in the sum of \$300, and for all proper relief. C. T. Bloodworth. Subscribed and sworn to before me this 3rd day of June, 1910. W. O. Irby, Clerk, by J. M. Curtis, D. C."

The notice to quit, which is made Exhibit B to complaint, is as follows: "To J. C. Lindsey: You are hereby notified to quit the premises on which you are now living to wit: North half of the Northwest quarter and S. E. $\frac{1}{4}$ of N. W. $\frac{1}{4}$, section 16, township 21 North of Range 5 East, and deliver possession thereof to C. T. Bloodworth within three days of the date of the service of this notice upon you or steps will be taken to dispossess you. C. T. Bloodworth." Indorsement: "State of Arkansas. County of Clay—I, have this 23rd day of May, 1910, duly served the within notice by delivering a copy and stating the substance thereof to the within named J. C. Lindsey. Joe M. Copeland, Sheriff, by T. L. Fowler, D. S. Fees: Service 50 cents. Mileage 10 cents. Filed this 4th day of June, 1910. W. O. Irby, Clerk, by J. M. Curtis, D. C."

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Index

The judgment is as follows: "Now, on this the 11th day of the term of this court, comes the plaintiff, C. T. Bloodworth, in person, and the defendant, though called, comes not, but makes default, and it appearing to the court from the complaint filed herein that this is a suit in unlawful detainer for the possession of the north half of the northwest quarter and the southeast quarter of the northwest quarter of section 16, township 21 N., range 5 East, and that the defendant, J. C. Lindsey, has been duly served with summons more than ten days prior to the first day of the present term of this court, and no answer having been filed or appearance entered by said defendant, and all claim for damages being waived by the plaintiff, the court finds for the plaintiff, C. T. Bloodworth. It is therefore considered by the court, ordered, and adjudged that plaintiff, C. T. Bloodworth, have and recover of and from the defendant, J. C. Lindsey, the possession of the north half of the northwest quarter and the southeast quarter of the northwest quarter of section 16, township 21 N., range 5 East, for which writ of possession shall immediately issue, and that said C. T. Bloodworth have and recover of and from the defendant, J. C. Lindsey, all his proper costs in this suit expended, for which execution may issue."

F. G. Taylor, for appellant. Moore & Bloodworth, for appellee.

WOOD, J. (after stating the facts as above). Under Act Feb. 5, 1891, where the tenant refuses to pay rent when due, the landlord may maintain an action of unlawful detainer against him, if he refuses to quit possession after the landlord has given him three days' notice to quit and made written demand upon him for the possession. Section 3630, Kirby's Dig.; *Parker v. Geary*, 57 Ark. 303, 21 S. W. 472. The allegation in the complaint that the plaintiff was unlawfully deprived "of his one-third share of the crop of oats," and that "defendant has refused to pay rent to this plaintiff and has appropriated the entire crop of oats to his own use," is sufficient to show that the appellant had raised an oat crop on a portion of the place, one-third of which was due appellee for the use of the land, and that appellant had not given to appellee this one-third, but had appropriated it to his, appellant's, own use. The necessary inference from this allegation is that the appellee's rent, represented by the portion of the crop he was to receive, was due, and that appellant had refused to pay, or deliver it to appellee.

The other allegations of the complaint
134 S.W.—61

show that the appellant had violated the obligations of his contract with appellee in such manner as to evince an intention on his, appellant's, part not to pay the rents as stipulated for, and, in fact, to abandon the contract. The complaint is crude, but, taken as a whole, it certainly states facts to show that appellant had wholly abandoned the contract which created the tenancy, and that his holding thereafter was unlawful.

The cause of action was stated inartisticly and defectively, but it was nevertheless stated, and called for some response from appellant, which he having failed to make must suffer the consequences. As was said in *Buckner v. Warren*, 41 Ark. 534: "If the facts as set out in the complaint are true, the defendant had himself abandoned the contract, thus authorizing the plaintiff to disaffirm it, and to regain possession of his land by this summary process." The allegation of the complaint that "plaintiff has caused a written notice to be served on the defendant more than three days before the commencement of the action demanding possession of said premises, and said notice is hereto attached marked 'Exhibit B' and made part of this complaint," was sufficient to describe the lands when taken in connection with the further allegation that plaintiff had "rented to the defendant certain parts of his farm in Sec. 16, Township 21 North of Range 5 East, in Clay county, Arkansas." With the description of the land given in the complaint and the reference made to the "said premises," possession of which was demanded in the notice that was made an exhibit to the complaint, the court could readily identify the land. The notice could be referred to, not to contradict or control, but in explanation of the allegations. This is not in conflict with *Euper v. State*, 85 Ark. 223, 107 S. W. 179, where we held that the exhibit could not be used to control the averments of the complaint. Here it is used not to control, but to complete and explain the allegations of the complaint. *Bouldin v. Jennings*, 92 Ark. 299, 122 S. W. 639; *Abbott v. Rowan*, 33 Ark. 596.

The court will take cognizance that there are two judicial districts in Clay county, created by act of the Legislature, and will also take notice of sections, townships, and ranges according to surveys of the United States government, and of the particular judicial district in which these are located. *Bittle v. Stuart*, 34 Ark. 224. See, also, *Rachels v. Stecher Cooperage Works (Ark.)* 128 S. W. 348.

There is no error, and the judgment is affirmed.

KIRBY, J., dissents.

CUNNINGHAM et al. v. TOYE.

(Supreme Court of Arkansas. Feb. 13, 1911.)

1. APPEAL AND ERROR (§ 1009*)—FINDINGS—CONCLUSIVENESS.

The findings of the chancellor will not be set aside on appeal unless there is a clear preponderance of the evidence against them.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3970-3978; Dec. Dig. § 1009.*]

2. BILLS AND NOTES (§ 525*)—BONA FIDE PURCHASER—EVIDENCE.

Evidence held to support a finding that a purchaser of notes was not an innocent purchaser for value.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. §§ 1832-1839; Dec. Dig. § 525.*]

3. BILLS AND NOTES (§ 335*)—RIGHTS OF PURCHASER—NOTICE.

A purchaser of notes given by the maker to the payee for the price of land to be conveyed with good title, with notice that the maker is under obligation to pay notes he has given to get a good title, takes the notes burdened with the obligation of the payee to procure a good title, which must be fulfilled before he may collect the notes.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. § 817; Dec. Dig. § 335.*]

Appeal from Pulaski Chancery Court; Jno. E. Martineau, Chancellor.

Suit by Mrs. Mary Toye against J. C. Cunningham and another. From a decree for plaintiff, defendant named appeals. Affirmed.

Appellee bought of L. A. Dunn lot 4, block 1, Ferndale addition to Little Rock, under a contract of sale which provided that appellee should pay for the lot the sum of \$550, of which \$50 was to be paid in cash and the balance in 50 notes of \$10 each, payable monthly, with 8 per cent. interest. Upon payment of the purchase money Dunn agreed to convey the lot "by a good and sufficient deed." The several notes were in form as follows: "\$10.00. Little Rock, Ark. January 29, 1908. On or before sixty days after date, I promise to pay to the order of Luther Dunn, at his office in Little Rock, Ark., the sum of ten dollars, with interest at the rate of eight per cent. per annum from date until paid, all of said interest payable (at) maturity, being one of the deferred payments for the following described property, to wit: Lot 4, block 1, Ferndale addition. This note is a lien on the property above mentioned. No. 1. Due 2-29-1908. [Signed] Mrs. Mary T. Toye." Immediately after the sale of the lot, about February 1, 1908, Dunn sold the entire series of Toye notes to appellant. The consideration was an automobile and a graphophone. Dunn had purchased the lot from Ratterree & Son for the sum of \$400, paying the sum of \$50 in cash, and executing his notes in sums of \$10 each payable monthly for the balance. At the time he contracted to sell the lot to appellee, he owed 22 or 23 of the monthly notes. He had paid on the lot the sum of \$170. It was understood be-

tween appellee and Dunn at the time of the sale of the lot by him to her that he would pay his notes for the lot every month, and turn them over to her before she paid her notes to him. Ratterree, the owner of the lot, sold the notes Dunn had executed to him to Ben Cox. The appellee continued to pay the notes executed by her until she had paid the sum of \$190, leaving notes to the amount of \$360 unpaid. She ceased to pay in May, 1909, because Dunn was not paying his notes according to contract. She brought this suit, alleging substantially the above facts, and that appellant purchased her notes from Dunn with full knowledge of the fact that Dunn had not paid his notes to Ratterree, and with full knowledge of the incumbrance upon the lot. She made appellant Dunn, Ratterree, and Cox defendants. She alleged full compliance with her contract to date, and offered to pay the balance of \$360. She prayed "that a decree be entered in favor of the plaintiff specifically enforcing the agreement made by said L. A. Dunn with plaintiff, and that all title, legal and equitable, to said lot, be divested out of the defendants, each of them, and invested in this plaintiff, and for all other and such further relief as may seem proper to this court." Appellant answered alleging that he purchased the notes for a valuable consideration without notice and before maturity, and denied that he purchased with knowledge of any incumbrance upon the lot. He prayed that, if specific performance be granted, no decree be entered impairing in any manner his lien on the lot and for all proper relief. Ratterree answered, alleging that the sum of \$200.26 was still due on the purchase money, and that he was ready to execute warranty deed when same was paid. Cox answered that he held notes executed by Dunn to Ratterree, that the amount unpaid was \$200.26, including interest unpaid.

The court, after hearing the evidence, entered the following decree: " * * * That the plaintiff, Mary Toye, pay into the registry of the court the sum of \$360, the balance due on said property; that out of this amount the sum of \$200.26 and interest be paid to Ben Cox upon his canceling and surrendering the notes held by him; that the balance of the \$360.00 be, after all of the costs of this action are paid, turned over to J. C. Cunningham, and the said J. C. Cunningham is hereby ordered to cancel and deliver to Mary Toye all of the notes against her held by the said J. C. Cunningham, and is further ordered, adjudged, and decreed that the said J. R. Ratterree make and deliver to the said Mary Toye a good and sufficient deed to lot four (4), in block one (1), of Ferndale addition to the city of Little Rock, Ark., that defendant J. C. Cunningham pay all costs of this action for which

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

execution may issue as upon a judgment at law."

The defendant Cunningham duly prosecutes this appeal.

J. B. Webster, for appellant. Ben D. Brickhouse, for appellee.

WOOD, J. (after stating the facts as above). The only question necessary to decide is whether or not appellant was an innocent purchaser for value. Appellant testified that he purchased the notes in the ordinary course of business, giving in payment therefor an automobile worth \$500 or \$600; that at the date of the purchase he knew nothing about Dunn's outstanding notes for the purchase of the lot from Ratterree. He further testified that Dunn offered to sell him the lot before he sold same to Mrs. Teye, but that he wanted something on which he could realize immediately. He considered the automobile as good as the lot. Dunn, on the other hand, testified that he told appellant at the time the notes were assigned to him that he still owed his notes on the purchase price. He further testified that the automobile that he received in payment for the notes was worth from \$125 to \$200, that he could not sell it for \$200. It was purely a question of fact as to whether appellant purchased the notes from Dunn without notice of the equities between Dunn and appellee. Unless there is a clear preponderance of the evidence against the findings of the chancellor, this court will not set them aside. *Hinkle v. Broadwater*, 73 Ark. 489, 84 S. W. 510; *Brown v. Wyandotte & Southeastern Ry. Co.*, 68 Ark. 134, 56 S. W. 862; *Farmer v. First National Bank*, 80 Ark. 132, 115 S. W. 1141, 131 Am. St. Rep. 79. The testimony seems to be evenly balanced. In such case the finding of the chancellor must be sustained. *Letchworth v. Vaughan*, 77 Ark. 305, 90 S. W. 1001. The preponderance must be against the finding of facts by the chancellor or else such finding must be upheld. *Norman v. Pugh*, 75 Ark. 52, 86 S. W. 833; *J. H. Magill Lumber Co. v. Lane-White Lumber Co.*, 90 Ark. 426, 119 S. W. 822. See, also, *Goerke v. Rodgers*, 75 Ark. 72, 86 S. W. 837. The chancellor therefore did not err in holding that appellee was not an innocent purchaser.

It is suggested that appellant should be believed in preference to Dunn because Dunn is seeking to shift his legal liability on appellant. But Dunn was under the same liability after he gave his testimony as he was before. His testimony did not tend to relieve him of any liability. He was still liable for the unpaid purchase-money notes he had executed. Taking the testimony of Dunn as true, as the chancellor found, then appellant knew when he purchased the notes from Dunn that the latter was under obli-

gation to pay off the notes he had given in order to get a title himself, and that he was bound to make appellee a title. He took the assignment of the notes for the purchase money, knowing that the assignor and payee was under obligation to make title to the lot when the notes were paid. As assignee, with notice, he took the notes burdened with this obligation, and had to fulfill it before he could collect the notes. See *Smith v. Henry*, 7 Ark. 213, 44 Am. Dec. 540; *Sorrells v. McHenry*, 38 Ark. 133. This was in effect the chancellor's decree.

No affirmative relief is asked by appellant against Dunn.

The decree is affirmed.

WILSON v. WILSON.

(Supreme Court of Arkansas. Feb. 6, 1911.)

1. DIVORCE (§§ 128, 129*)—EVIDENCE—SUFFICIENCY—ADULTERY—PHYSICAL CONDITION.

Finding by the chancellor in favor of the defendant in an action for divorce, alleging adultery and the contraction of a venereal disease by the defendant, *held* supported by the preponderance of the evidence.

[Ed. Note.—For other cases, see *Divorce*, Cent. Dig. §§ 410-454; Dec. Dig. §§ 128, 129.*]

2. DIVORCE (§ 27*) — GROUNDS — CRUELTY—FALSE CHARGES IN PLEADING.

Where the plaintiff's complaint for divorce charges the defendant with having committed adultery and with contracting a venereal disease in consequence, and such charges are not sustained by the evidence, the falsity of the charges is sufficient ground for granting the defendant's cross-action for divorce, as constituting the cruel treatment and indignities charged by the defendant.

[Ed. Note.—For other cases, see *Divorce*, Cent. Dig. §§ 62-83; Dec. Dig. § 27.*]

Kirby, J., dissenting.

Appeal from Greene Chancery Court; W. S. Luna, Special Chancellor.

Action for divorce by L. A. Wilson against Margaret Wilson and cross-action for divorce by the defendant. Plaintiff's action dismissed for want of equity, and defendant granted a divorce, and the plaintiff appeals. Affirmed.

This is an action for divorce instituted by L. A. Wilson against Margaret Wilson. The plaintiff alleges that the defendant had committed adultery subsequent to their marriage, and as a consequence thereof, had become affected with a contagious venereal disease called "syphilis." The defendant filed an answer and cross-complaint. She denied that she had committed adultery, and denied that she had syphilis. She asked for a divorce on the ground of cruel treatment and indignities offered her. Plaintiff and defendant became acquainted through a matrimonial agency, and were married on the 23d day of December, 1904, in the city of St. Louis. They came to plaintiff's residence at Para-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep't Indexes

gould, Ark., and lived there until their separation about the middle of October, 1908. This action was commenced on December 11, 1908. Plaintiff is 39 years old, and testified substantially as follows:

Some time after they were married, defendant confessed to him that she had syphilis. She said that she caught it in a closet, and for 2½ years plaintiff believed her story. He got some medical books and tried to treat her for it, but she grew worse. She also went to Hot Springs and stayed 3 months for treatment. Plaintiff does not state what time defendant went to Hot Springs for treatment, but leaves the inference that it was something more than one year after she first became inoculated with the disease. The trip cost plaintiff \$60 to \$65. She took the mercury rubbing treatment and baths. She also corresponded with a patent medicine company at Atlanta, Ga., advertising a remedy called S. S. S. as a specific for syphilis. She took \$75 worth of it. He exhibits to his deposition a letter purporting to have been written by the Swift Specific Company to his wife in answer to one from her, in which they extolled the virtues of S. S. S. and advised her how to use it to cure syphilis. The letter was very lengthy, and diagnosed her disease as syphilis, and gave directions as to treatment. The date of the letter was November 9, 1907. Plaintiff gave her \$25, and defendant went to Memphis and stayed 2 weeks, where she was treated by Dr. Carter, who plaintiff thinks was a specialist on the disease of syphilis. At that time, her throat was sore, and she could not swallow solid food. When she returned, she brought a prescription, which plaintiff had filled several times in Paragould. It was one usually given for syphilis. Defendant had sores on her sides, and plaintiff bought her some caustic to burn the sores. He had sexual intercourse with her during the whole of their married life, and did not contract the disease. Plaintiff, on cross-examination, stated that he had been married three times, and in answer to the question, "Do you remember what charges you preferred against your wives?" he said, "Adultery and general indignities." Plaintiff stated that a few nights before their separation defendant confessed to him that she had committed adultery subsequent to their marriage with one Smith, and caught the disease from him. Plaintiff then made up his mind not to live with her longer, and called in his brother to hear her confession. Defendant again made the confession to plaintiff in the presence of his brother. On several occasions past prior to their separation, defendant cursed and abused plaintiff, calling him vile names. He also states that she on one occasion asked him to get a cook, stating that she did not care if he slept with the cook. She also advised him to visit a bawdyhouse. During a part of their married life, defendant traveled as a

hair dresser. At one time she was in the sanitarium at Paragould, being treated for appendicitis. He does not remember whether or not she was taking S. S. S. at that time.

Plaintiff's brother testified about hearing a conversation between plaintiff and defendant in which defendant first said she caught syphilis in a closet, and afterwards admitted that she had caught it from a man named Smith. The confession took place about 8 or 9 o'clock at night. He also stated that he had heard her complaining about having syphilis before she went to the sanitarium to be treated for appendicitis.

Joseph Reynolds testified that at one time he went to plaintiff's house to pay his rent, and defendant received him. She told him that she had been informed that he could cure syphilis, and wanted him to treat her for that disease. This conversation occurred in October or November, 1905 or 1906. Witness was only slightly acquainted with defendant.

Another witness testified that she had a conversation with defendant in which she admitted that she had syphilis, and asked her if Reynolds could cure her. She said this was the first time she met defendant, and never had any further acquaintance with her. Witness refused to answer if she had ever had sexual intercourse with men, and witness Reynolds refused to answer whether or not he and his wife ran a bawdyhouse while they lived in Paragould. Other testimony of this witness and of Reynolds leads to the inference that he ran a bawdyhouse in Paragould, and that she was a woman of easy virtue.

Tom Lindle, for plaintiff, testified that he went to plaintiff's house with Joe Reynolds, who went to pay some rent; that defendant handed him a note in which she invited him to have sexual intercourse with her; that he had never seen her before, but that he did have intercourse with her there in the house, and as a result caught syphilis; that this happened three years ago; witness was testifying November 3, 1909; that he left there and never saw defendant again until the day he gave his testimony, and in the meantime had been going from place to place.

Dr. McKenzie, for the plaintiff, upon being shown the prescription of Dr. Carter referred to by plaintiff in his testimony said that it was one of the best prescriptions he knew for syphilis; that it is sometimes used for gonorrheal rheumatism. On cross-examination he said that the prescription is sometimes used for rheumatism and the blood, and is all right for the blood.

The plaintiff being recalled testified that three or four months after their marriage, defendant went into her trunk which was open, and grabbed out a handful of papers. She dropped a certificate and plaintiff stooped over to pick it up, she grabbed it from his hand, and threw it with several others into the stove. She overlooked one, and

plaintiff picked it up. It purported to have been a certificate from a physician of Detroit, Mich., stating that he had on that date examined Margaret Thunnahan and that she did not have any venereal disease. Defendant's maiden name was Thunnahan, and she resided in Michigan before her marriage. Plaintiff says that defendant then confessed to him that she had been an inmate of a bawdyhouse before her marriage, and had made money as a prostitute. Plaintiff kept the certificate and made it as an exhibit to his deposition. On cross-examination, we quote from his testimony as follows: "Q. You had intercourse with her and did not catch the disease? A. Only between taps. Q. But you did have intercourse? A. Well, it was after the chancres were gone."

The defendant testified for herself. She denied that she had ever committed adultery or that she ever had syphilis. She denied that she had ever been the inmate of a bawdyhouse, or that she had been examined by any one for a venereal disease. She denied categorically all the statements attributed to her by her husband and the other witnesses as to her acts of adultery, confessions of adultery, or admissions of having syphilis. She denied cursing and abusing her husband, and testified to acts of ill treatment from him. Other witnesses for her testified as to her good character and conduct since she came to Paragould. From the abstract of appellant, we quote the following:

"Dr. H. N. Dickson testified for defendant that he treated defendant the first time for barrenness, and examined her womb, carried out the treatment by opening the womb. In this examination we found no evidence of venereal disease; did not notice any symptoms or signs. We treated her afterwards for what we thought was appendicitis and ovarian troubles, removing the ovaries. The treatments were two years apart I think. We failed to notice any evidence of venereal disease in either treatment, and if any such disease had existed we would have been reasonably certain to have noticed it. I am willing to stake my reputation that syphilis will show in a physical examination, and can support it by any kind of evidence. Occasionally it does not show. I never made any special examination as to whether she had ever had the syphilis. I am a regularly licensed physician and surgeon, graduated from Vanderbilt in 1890, Tulane in 1895, and the Chicago post graduate school 1900, and in the Chicago Polytechnic in 1907. Syphilis is divided into three stages, and the first and second are contagious. The symptoms are sores on the body and mucous membranes. Sexual intercourse between husband and wife when one or the other is infected without contracting the disease is possible, but not probable. Some people are immune from the disease. The Carter pre-

scription is used for a good many diseases, and in other similar combinations. It is used in a majority of chronic skin diseases, not syphilis. It is prescribed for liver and brain diseases, not syphilis. It is regarded as one of the very best remedies for syphilis. I examined the vagina when she was being treated for barrenness, which treatment lasted three or four weeks. Chancres leave no scars, but leave sores which often heal up, and leave no sores, or signs."

Defendant introduced testimony showing that plaintiff was a spiritualist, and became angry when his wife wished to attend church instead of spiritualistic meetings. That he, to divers persons, charged her with adultery and with having syphilis. It was admitted by counsel in open court that Mrs. Wilson was treated by Drs. Dickson & Dickson for womb trouble in May, 1906, and had no venereal disease at said date. And was also treated by said physicians for appendicitis and ovarian trouble and operated upon September 30, 1907. Other facts will be stated or referred to in the opinion.

The chancellor dismissed the complaint of plaintiff for want of equity, and granted defendant a divorce on her cross-complaint. The plaintiff has duly appealed to this court. Since the appeal was granted, plaintiff has been adjudged insane, and the appeal is being prosecuted by his guardian.

W. W. Bandy, for appellant. Block & Kirsch, for appellee.

HART, J. (after stating the facts as above). Plaintiff seeks a divorce from defendant on the ground that she had committed adultery subsequent to the marriage, and, as a consequence, a venereal disease called "syphilis" was communicated to her. The parties to the action lived together as husband and wife about 3½ years, during 2½ years of which plaintiff says that defendant was afflicted with this loathsome disease. He says that she told him that she had been accidentally inoculated with it, and he believed her until just before their separation, when she confessed first to him alone and later in the presence of his brother that it had been communicated to her by sexual intercourse with one Smith. He claims she had on her person syphilitic chancres, and he assisted her in burning them off; and that as long as he believed the disease was accidentally communicated, he endeavored in every way to assist her in effecting a cure; but that as soon as she confessed that it was the result of sexual intercourse, he determined to leave her. His testimony is inconsistent and improbable. He admits that he found out on the first night of their marriage that she was not a virgin, and within 3 or 4 months she admitted that she had been an inmate of a house of ill fame prior to her marriage; that she confessed that she had syphilis, but claimed it had been com-

municated from a closet. According to his statement, although he knew the disease was usually communicated by sexual intercourse, he accepted her bare statement that it had been accidentally communicated to her. There was no discussion as to the time, place, or circumstances of its occurrence. The plaintiff was a man of means, and yet no attempt was made to have a physician to treat her. It cannot be said that they refrained from calling in a physician from a sense of shame, for in the spring of 1906, both desiring that she might be able to bear children, they called in Drs. H. N. and A. G. Dickson, local physicians to treat her for womb trouble. Nothing was said about her having syphilis, and although the physicians made a physical examination of her, and she remained under their care for four or five weeks, no apprehension was felt that they would discover that she had syphilis. Nor does any apprehension appear to have been felt that if she did bear children that they would be afflicted with the dread disease. The physicians carried out their treatment by opening her womb, and suggested a special apparatus to further this treatment and talked with both parties about it. Again in September, 1907, these same physicians treated her, and removed her ovaries. This operation was performed at their sanatorium. During the course of neither treatment did they discover any trace of a venereal disease. Plaintiff attempts to corroborate his testimony with that of Joe Reynolds and another witness. Aside from the improbability of defendant confessing to each on separate occasions on first meeting that she had syphilis, both these witnesses are shown to be immoral. It is reasonably certain from their testimony that the former ran a bawdyhouse and that the latter was not a woman of virtue. Again plaintiff proves by Tom Lindle that the first time he saw defendant she invited him to have sexual intercourse with her, and that she communicated syphilis to him. He states that he only had intercourse with her one time, and places the time as the year 1906. He says he went there with Reynolds, and the latter testified that he met defendant first in October or November, 1905, or 1906. Aside from the improbability of the truth of the witness' story, he is admittedly the associate of immoral persons, and is a wanderer on the face of the earth.

It will be noted that plaintiff fixes the time at which syphilis was communicated to her as 2½ years before their separation in October, 1908. He states that she grew worse, and had syphilitic chancres. Plaintiff's brother testifies that she had been taking S. S. S. and admitted having syphilis before she went to Dr. Dickson's sanatorium. If the statements of these witnesses and the statements attributed to her by the S. S. S. letter are to be believed, she must have had syphilis in a virulent form when she was treated and operated upon by Dr. Dickson.

If this was true, it seems incredible that Dr. Dickson did not find it out, or that her husband should have escaped infection. It is possible that her husband may have been immune from the disease; but it is not probable.

We do not attach any importance whatever to the letter from the S. S. S. people. It was dated November 9, 1907. Plaintiff and his brother state that they put this letter together from pieces found in her trunk. Defendant denies that she received the letter. The S. S. S. company is located at Atlanta, Ga., and the letter purports to have been in answer to one from defendant. It will be remembered that she was operated on by Dr. Dickson on September 30, 1907. He says that he is reasonably certain that she did not have syphilis then. He was asked, "This disease might have existed and you not observe it?" and answered, "Possibly, but not probably." The S. S. S. letter was one of the company's stereotyped letters, and it is probable that plaintiff himself placed defendant's name on it. If she had syphilis in the form described in the letter, she had it in a virulent form when she was operated on by Dr. Dickson, and it seems hardly probable that he could have performed an operation to remove her ovaries and not have discovered it.

Again it is shown that plaintiff in 1908 had filled for defendant a prescription which is generally used by reputable physicians for syphilis; and Dr. McKenzie says that it is a most excellent one for that disease. This is a circumstance to be considered in connection with the other evidence tending to show that she had the disease. However this prescription is shown to be used by physicians for other blood diseases. The prescription referred to is the one written by Dr. Carter of Memphis. He refused to testify claiming his professional privilege. No inference can be drawn against defendant from his failure to testify; for he places his refusal on the fact that he never testifies about any of his cases. He was out of the jurisdiction of the court, and could not have been compelled to testify even if defendant had waived his privilege to do so. Then, too, his treatment of her was in 1908, and his prescription was filled and used in that year. It will be noted that plaintiff claimed she had been afflicted with the disease for 2½ years. He does not claim that the disease was communicated to her during the year 1908. His contention is that she admitted to him before she was treated by Dr. Dickson that she had it. It is reasonable to infer then that the Carter prescription was used for some other blood affection. No attempt is made by either side to introduce the physicians who attended defendant at Hot Springs. Plaintiff says he does not remember who they were although he was there during two weeks of the time. It is difficult to determine even at what time she went there; but it is inferable from plaintiff's testimony that it was more than

one year after she first confessed having it. He states that he first tried to treat her and she grew worse.

The burden of proof in the whole case was upon the plaintiff. He had sufficient means to prosecute his suit and to obtain testimony wherever it was to be had. He had been divorced from two other wives, charging each of them with adultery. He charges that his wife had syphilis during 2½ years of their married life. She must then, according to his testimony, have had it during the time she was treated by Dr. Dickson both in 1906 and 1907. He examined her both times and says that he is reasonably certain that she did not have it. He treated her for four or five weeks in 1906. According to plaintiff's testimony this was soon after she became inoculated with the disease. There is no escaping the fact that according to the testimony of plaintiff and his witnesses that defendant had syphilis for 2½ years prior to their separation, and that she had it in an acute form when examined by Dr. Dickson in May, 1906. If the testimony of his witnesses be given a wider range, and it be insisted that she did not have the disease until after this time, still, according to plaintiff's testimony, she had it in a very virulent form in 1907, when Dr. Dickson operated upon her. It seems incredible under either view, that he should not have discovered traces of the disease. Then, too, although they continued to have intercourse during the whole of their married life, she did not communicate it to her husband. It must be admitted that the Carter prescription is a suspicious circumstance of strong probative force; but if we are correct in holding that she did not have syphilis in 1907, this testimony is all that is left to show that she had the disease; and of itself is not sufficient. In our opinion when taken in connection with all the facts and circumstances in the case, it does not outweigh the testimony of Dr. Dickson and the circumstances corroborating his testimony. He is admitted to be a skilled and experienced physician, and from aught that appears to the contrary is a man of the utmost probity. When all the facts and circumstances introduced in evidence are considered together, we do not think a preponderance of the evidence establishes the allegations of the complaint. On this issue the chancellor found for the defendant, and it cannot be said that his finding is against the weight of the evidence. We have repeatedly said that the findings of fact made by a chancellor will not be disturbed unless they are against the preponderance of the evidence.

On the cross-complaint but little need be said. The married life of the unfortunate couple was unhappy, and as we have already seen, the facts are conflicting, but the finding that the defendant was not guilty of adultery

after the marriage leads to the inevitable conclusion that the prayers of her cross-complaint should be granted. No greater indignity could be heaped upon a woman than to falsely charge her with adultery, and as a consequence thereof of having become inoculated with one of the most dreaded and loathsome diseases known to medical science. The witnesses for defendant testify that she conducted herself well during her residence in Paragould.

The decree will be affirmed.

KIRBY, J., dissents.

TOMBLER v. SUMPTER.

(Supreme Court of Arkansas. Feb. 6, 1911.)

1. ESCROWS (§ 10*)—CONTRACTS IN GENERAL—DELIVERY OF ESCROW.

Where a deed has been delivered in escrow subject to a condition which has been fulfilled, equity has jurisdiction to compel the delivery thereof to the person entitled to its possession.

[Ed. Note.—For other cases, see Escrows, Dec. Dig. § 10.*]

2. SPECIFIC PERFORMANCE (§ 106*)—PROCEEDINGS—PARTIES—IN GENERAL.

As a general rule, the parties to a contract to convey property are the only necessary parties to the suit to enforce its specific performance.

[Ed. Note.—For other cases, see Specific Performance, Cent. Dig. §§ 342-351; Dec. Dig. § 106.*]

3. SPECIFIC PERFORMANCE (§ 106*)—PROCEEDINGS—CONVEYANCES ENFORCEABLE AS CONTRACTS—PARTIES.

A devisee under a will executed a deed to part of the testator's estate, and placed it in escrow pending litigation involving the validity of the will, under an agreement that it would be delivered to the grantees when the will was declared valid. After the dismissal of an appeal from a decree allowing the will, the grantees sued for specific performance of the contract to deliver the deed. Appellant appealed from the probate of the will and the devisee in settlement with him agreed to convey the lot in terms granted by the deed in escrow, and the probate appeal was dismissed, and in the action for specific performance the appellant petitioned to be made a party and to file an answer. Kirby's Dig. § 6006, provides that any person may be made defendant who claims an interest in a controversy adverse to the plaintiff or who is a necessary party, and section 6011 empowers the court to order other parties who may be affected by the judgment to be brought in. *Held*, that the appellant was not a necessary or a proper party to the suit, as his rights under his agreement would not be affected by the decree for delivery of the deed in escrow to plaintiffs.

[Ed. Note.—For other cases, see Specific Performance, Cent. Dig. §§ 342-351; Dec. Dig. § 106.*]

Appeal from Garland Chancery Court; Alphonzo Curl, Chancellor.

Appeal by M. C. Tomblér from an order refusing to permit him to become a party to a suit by John J. Sumpter against certain defendants for specific performance of a contract to deliver an escrow. Affirmed.

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

Greaves & Martin and Moore, Smith & Moore, for appellant. C. Floyd Huff, for appellee.

FRAUENTHAL, J. This was an action instituted in the Garland chancery court by the plaintiffs below against Annie E. Little and G. G. Latta, the defendants therein, seeking to obtain the specific performance of an alleged contract to deliver to plaintiffs a deed executed by said Annie E. Little to them for a lot in the city of Hot Springs, and which was held by said Latta in escrow. The complaint amongst other things, in substance, alleged that one Loretta E. Tombler, who was the sister of the said Annie E. Little and the aunt of the plaintiffs, was the owner of the lot mentioned in said deed and other real and personal property, and that she died leaving a will by which, after making certain specific bequests, she devised the remainder of her property to said Annie E. Little. The above will was duly filed in the probate court of said county, and by that court was admitted to probate. An appeal was taken from said order of the probate court admitting said will to probate by M. C. Tombler, the husband of said Loretta E. Tombler, to the circuit court. During the pendency of said appeal, the plaintiff and said Annie E. Little entered into a written agreement, whereby it was provided that, in consideration of making a settlement between them of their rights in the property of said Loretta E. Tombler and also of all matters of controversy between them growing out of and involved in said will, the said Annie E. Little would execute a deed to plaintiffs for said lot, which would be accepted by them in full settlement of all their interest in the property of said estate; and it was further provided that said deed would be held by said Latta in escrow pending the litigation involving the validity of said will, and if said will was declared by the courts to be the last will and testament of said Loretta E. Tombler, and the action of said probate court in admitting the same to probate be affirmed, then the said Latta would turn the possession of said deed over to said plaintiffs. In pursuance of said agreement, said deed was executed by said Annie E. Little, and placed in escrow in the hands of said Latta. It was further alleged that subsequently the appeal from said order of the probate court admitting said will to probate was by the circuit court dismissed upon the motion of M. C. Tombler, the party who prosecuted said appeal, and that, by reason thereof, said will was finally established, and the action of the probate court in admitting it to probate in effect affirmed. Thereafter the plaintiffs demanded from said Latta the possession and delivery of said deed which was refused; and this suit was brought for the purpose of requiring him to deliver to them said deed. The defendants Annie E. Little and said Latta interposed a demurrer to said com-

plaint, which was by the court overruled; and, the defendants refusing to plead further, a decree was entered against them granting the relief asked for in said complaint; and from this decree no appeal has been taken.

During the progress of the proceedings in this case in the lower court, M. C. Tombler filed a petition in said court asking that he be permitted to intervene in said suit, and that he be made a party thereto and allowed to file an answer, and at the same time tendered that pleading. In that pleading he alleged, amongst other things, in substance, that he had taken the appeal to the circuit court from the order of the probate court admitting said will to probate in good faith because he had rights in the property of the estate of Loretta E. Tombler adverse thereto; that during the pendency of said appeal in the circuit court he and said Annie E. Little made a compromise of their respective claims in the property of said estate, under which the said Annie E. Little conveyed to him certain lands belonging to said estate, amongst which was the lot mentioned in the deed, the possession of which plaintiffs were endeavoring by this suit to obtain; and that thereupon, by virtue of the terms of said compromise agreement with Annie E. Little, he dismissed his appeal from the order probating said will. He further alleged that, under the terms of the written agreement made between the plaintiffs and said Annie E. Little, the plaintiffs were not entitled to the delivery and possession of said deed held by said Latta in escrow. He alleged that he was the legal owner of said lot, and, in event it was declared that he was not the owner thereof, he claimed that he had equitable rights therein which he asked to be enforced. The court refused to permit him to be made a party to the suit and to intervene therein, and from that order he has appealed to this court.

The question involved in this appeal is whether or not M. C. Tombler was a necessary or proper party to the determination of the matter involved in the litigation instituted by the plaintiffs. By section 6006 of Kirby's Digest it is provided that "any person may be made a defendant who has or claims an interest in the controversy adverse to the plaintiff, or who is a necessary party to a complete determination and settlement of the question involved in the action"; and by section 6011 of Kirby's Digest it is provided that "the court may determine any controversy between parties before it, when it can be done without prejudice to the rights of others or by saving their rights. But when a determination of the controversy between the parties before the court cannot be made without the presence of other parties the court must order them brought in." These provisions furnish a criterion for determining when the court will proceed to a settlement of the matter

in controversy between the parties actually before it, and when it must bring in other parties before proceeding to a final decree. If the parties before the court are the only persons who have an interest in the controversy that is actually involved in the suit, or if a final decree can be made without affecting the rights of others in the matter actually in controversy, then other persons are not necessary parties to such suit. *Apperson v. Burgett*, 33 Ark. 328.

This suit was instituted by the plaintiffs for the purpose of obtaining the specific performance of an alleged contract to deliver to them a deed which had been deposited in escrow. It was in effect a suit for the possession of the deed, as if the plaintiffs had brought replevin therefor. It is well settled that the exercise of equity jurisdiction extends to suits to compel the delivery of deeds in favor of persons who are legally entitled to them. Where a deed has been delivered in escrow subject to a condition which has been fulfilled, a court of chancery is a proper forum in which to compel the delivery thereof to the person entitled to its possession. 1 Pom. Eq. Jur. § 185; 4 Kent, Com. *454; *Tharaldson v. Everts*, 87 Minn. 168, 91 N. W. 467; *Stanton v. Miller*, 65 Barb. (N. Y.) 58.

Where the enforcement of a contract is sought in the courts, as a general rule, the parties to the agreement are the only necessary parties to the suit; and therefore in a suit for the specific performance of a contract it is necessary to join as parties only those persons who are parties to the contract. The matter actually in controversy in such suits is the contract and its fulfillment. The estate itself is not actually involved in the controversy, and persons who claim an interest in the estate, but who are wholly unconnected with the contract which it is sought to have performed, are not necessary parties to such suit. Where the possession of the property is not sought by the proceeding, but simply the performance of a contract which it is alleged was made relative thereto, strangers to the contract itself are not necessary parties to such suit. In the case of *Willard v. Tayloe*, 8 Wall. 571, 19 L. Ed. 501, the Supreme Court of the United States says: "The general rule is that the parties to the contract are the only proper parties to the suit for its performance." In that case the case of *Tasker v. Small*, 3 Myl. & C. 63, is quoted with approval, wherein it is said: "When a bill for specific performance is filed by a person who has contracted to purchase the absolute legal and equitable interest in a mortgaged estate from the supposed owner of the equity of redemption, neither the mortgagee nor a person who claims an interest in the equity of redemption but has not joined in the contract can be made a defendant." In the case of *Crook v. Brown*, 11 Md. 158, it is held that: "In suits for specific perform-

ance the general rule is that it is necessary to join as parties only those persons who are parties to the contract, and it is multifarious to unite in such bill a prayer for relief against third persons who claim an interest in the estate, but are unconnected with the contract." In the case of *Moulton v. Chafee* (C. C.) 22 Fed. 20, it was held that strangers to the contract cannot properly be made parties in a suit for its performance upon the theory that, in determining the question of title, it is proper to join all parties who claim any interest in the estate, and thus bind them by the decree. And in the case of *Ashley v. Little Rock*, 56 Ark. 391, 19 S. W. 1053, it was held that in a suit seeking specific performance of a contract adverse claimants in possession of the property were not proper parties.

The effect of our Code provisions is that all persons should be made parties who have an interest in the controversy that is actually involved in the suit of such a nature that a final decree cannot be made without affecting their interest or leaving the controversy in such a condition that a complete determination thereof cannot be made without their presence; otherwise, such persons are not necessary parties. 20 Ency. P. & P. 412. In the case at bar, the bill seeks to require the party holding a deed in escrow to deliver the same to one claiming to be entitled thereto under and in pursuance of a contract made to that effect. The appellant Tombler was not a party to that contract, and whatever rights or equities he may have in the property covered by that deed cannot be affected by a decree to which he is not a party, and solely involving that contract to which he was a total stranger. He cannot be affected by that decree requiring the delivery of the deed to the plaintiffs by the person holding it any more than he could be affected by the delivery thereof if it had been made voluntarily and without such decree. He has still the right in any litigation to which he may be properly a party involving said lot to question the legality of the right of plaintiffs to a vestiture of title by virtue of said deed, on the ground that it was not completely executed and delivered, and he has also the right to assert any legal claim or equities which he may possess in the property or to seek to have the deed removed as a cloud upon his title. He cannot be and is not by virtue of said decree barred from questioning plaintiff's vestiture of title to the lot by virtue of said deed or from asserting any claims or equities he may have in the lot or to enforce any remedies to which he is entitled. He was therefore not a necessary party to the suit between the plaintiffs and defendants which sought only a specific performance of the contract for the delivery of the deed, and in which a complete determination of that controversy could be had without his presence.

We do not think, therefore, that the decree involved in this appeal should be reversed for the refusal to join the appellant as a party to the suit.

The decree is affirmed.

ST. LOUIS SOUTHWESTERN RY. CO. v. STATE.

(Supreme Court of Arkansas. Feb. 6, 1911.)

1. RAILROADS (§ 58*)—LOCATION OF STATION—POWER TO REGULATE.

In the exercise of its power to require a railroad company to establish and maintain a depot at a given point, the Legislature must act reasonably, and not arbitrarily, and there must be a real necessity for the depot to serve the public needs and convenience.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 130, 131; Dec. Dig. § 58.*]

2. CONSTITUTIONAL LAW (§ 70*)—LEGISLATIVE QUESTIONS—LOCATION OF STATIONS—POWER OF COURTS.

The Legislature has primarily the right to determine whether public necessity and convenience require the establishment of a depot at a given point, and the courts will not disturb that determination, unless it is clearly shown that the requirement is unreasonable and arbitrary.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. §§ 129, 130; Dec. Dig. § 70.*]

3. RAILROADS (§ 58*)—LOCATION OF DEPOT—POWER TO REGULATE.

The mere fact that the establishment and maintenance of a depot as required by a legislative act would greatly exceed the revenues that might be derived from the business at the place will be considered, but is not controlling on the question of the reasonableness of the requirement.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 130, 131; Dec. Dig. § 58.*]

4. RAILROADS (§ 58*)—LOCATION OF STATION—POWER TO REGULATE.

Acts 1909, p. 986, requiring the establishment of a depot at a station where there are 3 storehouses and about 20 families in the immediate vicinity, with fully 100 families within 6 or 7 miles, and where there are a post office and a flag station, and where the monthly receipts from freight are \$70.72 and from passengers \$77, and the cost of the depot would be \$900, and the monthly expense of maintaining it about \$75, will not be held invalid on the ground that the Legislature acted without reason and arbitrarily.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 130, 131; Dec. Dig. § 58.*]

5. STATUTES (§§ 76, 75*)—GENERAL AND SPECIAL LAWS—REGULATION OF RAILROAD.

Acts 1909, p. 986, requiring a railroad to erect a depot at a certain station, enacted while Act May 17, 1907, amending Act April 5, 1907 (Acts 1907, pp. 356, 821), giving the Railroad Commission power to require the establishment and maintenance of depots at places designated by the commission, was in force, does not violate Const. art. 5, § 24, providing that in all cases where a general law can be made applicable no special laws can be enacted, nor shall the operation of any general law be suspended for the benefit of any particular individual, corporation, or association.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. §§ 77-78½; Dec. Dig. §§ 76, 75.*]

6. STATUTES (§ 76*)—GENERAL OR SPECIAL LAWS—APPLICABILITY OF GENERAL LAW AS AFFECTING VALIDITY OF SPECIAL LAW.

In determining the validity of a statute under Const. art. 5, § 24, providing that, in all cases where a general law can be made applicable, no special law can be enacted, the sole question is whether a general law can be made applicable, in which case no special law should be enacted, whether a general law has been passed or not.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. §§ 77½-78½; Dec. Dig. § 76.*]

7. CONSTITUTIONAL LAW (§ 70*)—LEGISLATIVE QUESTIONS—GENERAL OR SPECIAL LAWS—APPLICABILITY OF GENERAL LAW.

The Legislature is the exclusive judge of the question whether a general law will serve the purpose as well as a special act.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. § 130; Dec. Dig. § 70.*]

8. CONSTITUTIONAL LAW (§ 70*)—LEGISLATIVE QUESTIONS—ENACTMENT OF SPECIAL LAWS—NOTICE OF ENACTMENT.

The Legislature is the sole judge whether the requirements of Const. art. 5, § 23, that notice of the introduction of a proposed bill be given, has been complied with.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. § 130; Dec. Dig. § 70.*]

9. COMMERCE (§ 58*)—MEANS OF REGULATION—REQUIRING MAINTENANCE OF DEPOT.

Acts 1909, p. 986, requiring a railroad to erect a depot at a particular station, is an exercise of the police power, and is not a regulation of interstate commerce, in violation of Const. U. S. art. 1, § 8.

[Ed. Note.—For other cases, see Commerce, Cent. Dig. § 81; Dec. Dig. § 58.*]

Appeal from Circuit Court, Ouachita County; Geo. W. Hays, Judge.

The St. Louis Southwestern Railway Company was convicted of failing and refusing to establish a depot at Ogama in Ouachita county, and appeals. Affirmed.

Sam H. West and Gaughan & Sifford, for appellant. Hal L. Norwood, Atty. Gen., and Wm. H. Rector, Asst. Atty. Gen., for the State.

FRAUENTHAL, J. This is an appeal by the St. Louis Southwestern Railway Company, the defendant below, from a conviction upon an indictment charging it with unlawfully and willfully failing and refusing to establish and keep open a depot at Ogama, in Ouachita county. The Legislature enacted a law, which was approved May 31, 1909, by which it was provided that the defendant should within 60 days after the passage of the act establish and keep open a depot at said Ogama, and that upon a refusal, failure, or neglect so to do it should be guilty of a misdemeanor. Acts 1909, p. 986. The defendant having failed to establish and keep open a depot as required by the provisions of said act, the grand jury of said county returned an indictment against it charging it with a violation of the provisions thereof. To this indictment the defendant interposed the following pleas: (1) It alleged that it was a common carrier

engaged in interstate commerce, and that the act of the Legislature in question was a regulation and burden on interstate commerce contrary to section 8 of article 1 of the Constitution of the United States, and therefore void. (2) That the said act was violative of the fourteenth amendment of the Constitution of the United States because it in effect amounted to depriving the defendant of its property without due process of law. (3) That the said act is violative of section 24 of article 5 of the Constitution of the state, providing, in effect, that in all cases where a general law can be made applicable no special law shall be enacted. (4) That said act was void because in violation of section 25 of article 5 of the Constitution of the state, in that the act in question is a special act, and notice that same would be introduced was not given prior to its introduction in the Legislature. (5) It was also alleged that at the time of the passage of said act and continuously since there was no public necessity for said depot, and that, if defendant was required to comply with the provisions of the act, it would amount to a confiscation of its property. The state interposed a demurrer to the first, third, and fourth pleas above made by defendant, which was by the court sustained. The court thereupon heard testimony relative to the other pleas made by defendant, and, finding that they were not sustained by the evidence, overruled same. The court then proceeded by consent of the parties to try the case upon the testimony introduced upon the hearing of the above pleas, and made a finding against defendant, and rendered judgment accordingly, from which the defendant has appealed.

The questions involving the validity of the above act of the Legislature requiring the defendant to establish a depot at Ogamaw have been either expressly or in effect settled by the case of *Louisiana & Ark. Ry. Co. v. State*, 85 Ark. 12, 106 S. W. 960. In that case it was held that the Legislature in the exercise of its constitutional powers had the right to supervise railroads within the state, and to require them to establish and maintain depots at given points upon their lines. It was also held that such legislative power must not be exercised arbitrarily or unreasonably, and that it became a judicial question for the courts to determine under the facts of each case whether or not by such requirement the Legislature had exceeded its constitutional power. In the exercise of its power to require a railroad company to establish and maintain a depot at a given point upon its line, the Legislature must act reasonably, and not arbitrarily; in other words, there must be a real necessity for such depot in order to serve the public needs and convenience. The Legislature has primarily the right to determine whether the public necessity and convenience require the establishment of the depot at the given point, and the courts will not disturb that determina-

tion unless it is clearly shown that such requirement is unreasonable and arbitrary. In that case (*L. & A. Ry. Co. v. State*, supra) it was said: "The legislative determination should be and is conclusive, unless it is arbitrary and without any foundation in reason and justice. * * * The utmost force must be given to the legislative determination of the necessity for a station and the reasonableness of requiring the company to erect and maintain one." In determining from the testimony adduced in any given case whether or not the requirement is reasonable, the primary question to be considered is whether or not such depot is needed in order to serve the public convenience and wants. The mere fact that the establishment and maintenance of such depot would greatly exceed the revenues that might be derived from the business at such place should be considered, but this would not be controlling. Viewing the testimony that was adduced upon the trial of this case, in the light of these principles, we cannot say that there was no public necessity for this depot or that the requirement that it be established was unreasonable and arbitrary. We do not think that it would serve any useful purpose to set this testimony out in detail. It is sufficient to say that the testimony tends to prove that there are 3 storehouses at Ogamaw, and that there are about 20 families living within its immediate vicinity. Fully 100 families live within 6 or 7 miles of the place, all of whom would be served by the erection and maintenance of a depot at this place. There is a post office there and a flag station, and freight and passengers have for some time past been received and delivered at the place. The average monthly receipts at this point for freight for 14 months next prior to the finding of the indictment was \$70.72, and the average monthly income from passengers for the same period was \$77. The only expense to the defendant in erecting such depot would be the actual cost thereof. The evidence tends to prove that the cost of such a depot would be about \$900, and the monthly expenses in maintaining same would be about \$75. Under this proof, we cannot say that the Legislature acted without reason and arbitrarily in determining that there was a public necessity for the establishment and maintenance of a depot at this place.

It is claimed by defendant in one of said pleas, and it is now urged, that said act of the Legislature is invalid because it is violative of section 24 of article 5 of the Constitution of the state, which provides: "In all cases where a general law can be made applicable, no special law can be enacted; nor shall the operation of any general law be suspended by the Legislature for the benefit of any particular individual, corporation or association; nor where the courts have jurisdiction to grant the powers or the privileges or the relief asked for." It is

contended that the Legislature of the state passed an act which was approved May 17, 1907, which was amendatory of an act approved April 5, 1907 (Acts 1907, pp. 358, 821), by which the Railroad Commission of Arkansas was given the power upon proper conditions to require the establishment and maintenance by railroad companies of depots at places designated by the commission upon their lines, that this was a general law applicable to the establishment of a depot at Ogamaw, and that the Legislature was on this account inhibited by said constitutional provision from passing this special act. This question we think was in effect decided by the case of *L. & A. Ry. Co. v. State*, supra. While the prosecution in that case was under an act of the Legislature passed prior to said above act empowering the Railroad Commission of Arkansas to require the establishment by railroad companies of depots at designated places on their lines, nevertheless, if a general law could be made applicable to the establishment of a depot required by the act under which this prosecution is had, a general law could also have been made applicable to the establishment of a depot required by the act under which the prosecution was made in the case of *L. & A. Ry. Co. v. State*, supra. Under the above constitutional provision, the question is not whether the special act was passed after or before the enactment of a general law that might be applicable to the case, but the question is solely whether or not a general law can be made applicable to such case. In that event, no special law should be enacted, whether the general law has or has not been actually passed by the Legislature. But, in addition to this, the question is, Who shall determine whether or not the general law will subserve the purpose as well as a special act? This court has held that the Legislature is the exclusive judge to determine this question. The Constitution has vested the Legislature with the power over the subject involved in this enactment and in matters over which it has the power to act it becomes the duty as well as the right of the Legislature to determine whether or not a general law can be made applicable to accomplish the purpose, and whether or not it is necessary to put in force a special law to secure the object desired. In the case of *Davis v. Gaines*, 48 Ark. 371, 3 S. W. 184, this court said: "According to the adjudged cases, the Legislature is the sole judge whether provision by a general law is possible, except in the enumerated cases of changing the venue in criminal cases, changing the names of persons, adopting, and legitimating children, granting divorces, and vacating roads, streets, or alleys. The provisions are merely cautionary to the Legislature." *Carson v. St. Francis Levee Dist.*, 59 Ark. 513, 27 S. W. 590; *Boyd v. Bryant*, 35 Ark. 69, 37 Am. Rep. 6; *Powell v. Durden*, 61 Ark. 21, 31 S. W. 740; *Cooley on Const. Lim.* (7th Ed.) 184; 8 Cyc. 851; *State v. Hitchcock*, 1 Kan.

178, 81 Am. Dec. 503; *Richman v. Supervisors*, 77 Iowa, 513, 42 N. W. 422, 4 L. R. A. 445, 14 Am. St. Rep. 308. And the Legislature is likewise the sole judge of whether or not the requirement of the Constitution (article 5, § 26) that notice of the introduction of a proposed bill be given has been complied with. *Davis v. Gaines*, supra.

It is claimed by defendant in its first plea that the act in question in its practical effect tends to regulate and burden interstate commerce in which defendant is engaged as a common carrier, and that on this account the act is violative of section 8 of article 1 of the Constitution of the United States, and therefore invalid. But we think that the requirement of the establishment of a station at a given point upon the line of a railroad company which is determined to be a public necessity is but the exercise of the police power by the Legislature for the safety, convenience, and welfare of its citizens. The state has the right in the exercise of its police power to make all those regulations which have for their object the protection of the health, safety, and welfare of its citizens, and, although such regulations may incidentally affect interstate commerce, they do not constitute a regulation or burden thereof within the inhibition of the above constitutional provision of the general government.

In the case of *Sherlock v. Alling*, 93 U. S. 99, 23 L. Ed. 819, the Supreme Court of the United States said: "In conferring upon Congress the regulation of commerce, it was never intended to cut the states off from legislating on all subjects relating to the health, life, and safety of their citizens, though the legislation might indirectly affect the commerce of the country. Legislation in a great variety of ways may affect commerce and persons engaged in it without constituting a regulation of it within the meaning of the Constitution." And in the case of *Gladson v. Minnesota*, 166 U. S. 427, 17 Sup. Ct. 627, 41 L. Ed. 1064, the same court said: "Even when its road connects, as most railroads do, with railroads in other states, the state which created the corporation may make all needful regulations of a police character for the government of the company, who is operating its road in that jurisdiction. It may prescribe the location and plan of construction of the road, the rate of speed at which the trains shall run, and the places at which they shall stop, and may make any other reasonable regulations for their management, in order to secure the objects of the incorporation, and the safety, good order, convenience, and comfort of all the passengers and of the public. All such regulations are strictly within the police power of the state." In the exercise of the state police power it has been held that the states may pass laws requiring railroad companies to fence their right of way, providing for the quarantine of cattle car-

ried in interstate commerce, requiring certain conveniences and facilities at its stations, requiring guards and guard posts on bridges and trestles and their approaches, and in requiring many other observances which will subserve the safety, life, health, and convenience of the citizens of the states. 2 Hutchinson on Carriers (3d Ed.) § 953; Reid v. Colorado, 187 U. S. 137, 23 Sup. Ct. 92, 47 L. Ed. 108; New York, etc., R. Co. v. New York, 185 U. S. 628, 17 Sup. Ct. 418, 41 L. Ed. 853; Mo. Pac. Ry. Co. v. Kan., 216 U. S. 262, 30 Sup. Ct. 330, 54 L. Ed. 472; Smith v. Alabama, 124 U. S. 465, 8 Sup. Ct. 564, 31 L. Ed. 508; Kansas City So. Ry. Co. v. State, 90 Ark. 343, 119 S. W. 288.

Upon a consideration of the whole case, we find no error in the trial thereof or in the judgment that was rendered; and the judgment is accordingly affirmed.

PULASKI COUNTY et al. v. HILL et al.

(Supreme Court of Arkansas. Jan. 30, 1911.)

1. TAXATION (§ 699*) — DELINQUENT TAX SALES—RIGHT TO REDEEM.

The right given by Kirby's Dig. § 7095, providing that lands of insane persons may be redeemed from a tax sale within two years from the expiration of the disability, inheres in the land, and is not personal to an insane owner, and where he dies his heirs may redeem within two years after his death.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. § 1403; Dec. Dig. § 699.*]

2. TAXATION (§ 816*)—ACTION FOR POSSESSION — RES JUDICATA — QUESTIONS CONCLUDED.

A judgment for the possession of land, rendered for a claimant under a tax sale against the owner in possession, determines that the holder of the tax title is entitled to the possession, but not the right of the owner to redeem, and does not bar a subsequent action to redeem by the heirs of the owner, who was under disability at the time of the tax sale and so continued until his death.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. §§ 1615, 1616; Dec. Dig. § 816.*]

3. JUDGMENT (§ 713*)—CONCLUSIVENESS.

A judgment is conclusive on every question distinctly put in issue and directly determined, and on matters properly belonging to the subject of the controversy and within the scope of the issues.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 1234-1241; Dec. Dig. § 713.*]

4. INSANE PERSONS (§ 1*)—WHO ARE INCOMPETENT—"UNSOOUND MIND."

Where mental incapacity renders one unable to conduct the ordinary affairs of life and leaves him in a condition to be the victim of his misfortune, he is of "unsound mind" within Kirby's Dig. § 7812, providing that a person of unsound mind includes one who is a lunatic, idiot, or deranged.

[Ed. Note.—For other cases, see Insane Persons, Cent. Dig. §§ 1-3; Dec. Dig. § 1.*]

For other definitions, see Words and Phrases, vol. 8, pp. 7212-7217; vol. 8, p. 7825.]

5. EVIDENCE (§ 478*)—OPINION EVIDENCE—MENTAL CAPACITY.

Opinions of nonexperts are competent to prove mental capacity or incapacity, when the

facts on which the opinions are founded are disclosed.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 2242-2244; Dec. Dig. § 478.*]

6. TAXATION (§ 699*)—REDEMPTION FROM TAX SALES—"INSANE PERSON."

One mentally incapable of understanding and acting rationally in the affairs of life and in the management of his property is an "insane person" within Kirby's Dig. § 7095, providing that lands of insane persons may be redeemed from tax sales within two years after the expiration of the disability.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. § 1403; Dec. Dig. § 699.*]

For other definitions, see Words and Phrases, vol. 4, pp. 3635-3644; vol. 8, p. 7688.]

7. APPEAL AND ERROR (§ 880*)—PARTIES ENTITLED TO COMPLAIN.

A defendant who has appealed from an adverse decree may not base any right on an outstanding title in codefendants, which the chancellor has decreed is not valid; the codefendants not appealing.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3584-3590; Dec. Dig. § 880.*]

Appeal from Pulaski Chancery Court; John E. Martineau, Chancellor.

Suit by Abbie Hill and others against Pulaski County and others. From a decree for plaintiffs, defendants appeal. Affirmed.

J. C. Marshall and Harry Hale, for appellants. Geo. L. Basham, for appellees.

FRAUENTHAL, J. This was an action originally instituted for the purpose of removing certain deeds as clouds upon the plaintiffs' title to the land involved in this suit. Subsequently, the complaint was so amended that the sole remedy sought by this action was to redeem said land from a tax sale. The plaintiffs below were the widow and heirs of one John Hill, who acquired the land in controversy by purchase in 1878, and died in 1906. The land was sold on June 11, 1888, for the nonpayment of the taxes of 1887, to one R. W. Martin, and the defendants, who are appellants herein, claim title to the land under conveyances from his heirs. In 1891 the above tax sale of said land was confirmed by a decree of the chancery court, and in 1893 a complaint was filed by said John Hill to set aside said decree, and upon the hearing thereof it was dismissed for the want of equity. In September, 1892, the heirs of said R. W. Martin instituted an ejectment suit against said John Hill for the possession of said land, and in 1898 obtained a judgment for the recovery of the possession of all said land, except 3½ acres, which were adjudged to the Little Rock Granite Company, one of the appellants herein, and subsequently the heirs of R. W. Martin conveyed the land adjudged to them in said ejectment suit to the other appellants.

In the complaint it was alleged that John Hill was an insane person in 1887, the time when said land was forfeited for the non-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

payment of taxes thereon, and that he labored under said disability continuously from that date until his said death in 1906, during all of which time he owned and resided upon said land. Deriving their right to the land as the widow and heirs of John Hill, the plaintiffs instituted this suit within one year after his death to redeem same from said above tax sale, on the ground that he was laboring under the disability of insanity at the date of said tax sale and up to the date of his death, and that the right to redeem said land descended to them, which they could enforce at any time within two years after his disability was removed by his death.

A great mass of testimony was taken relative to the question as to whether or not John Hill was during said above time of unsound mind; and upon the hearing of this case the chancellor found that during said time he was insane, and declared that his heirs had the right to redeem said land from said tax sale. A decree was entered by the chancery court in accordance with said finding of fact and conclusion of law, and from that decree the defendants, claiming under said tax title have appealed to this court.

The right of the plaintiffs to redeem the land from the above tax sale, as a matter of law, depends upon whether or not the right to redeem, which is by the statute granted to insane persons, is descendible to their heirs. That statute, which was in force at the time of the forfeiture, provides that: "All lands, city or town lots belonging to insane persons, minors or persons in confinement and which have been or may hereafter be sold for taxes, may be redeemed within two years from, and after the expiration of such disability." Kirby's Dig. § 7095. It is urged by counsel for defendants that this statutory right to redeem is a mere personal privilege, to be enjoyed solely by those laboring under the disabilities mentioned in the statute, and that such privilege ceases with the death of such persons. But the statute makes this right of redemption inhere in the land itself, and does not grant it as a privilege personal only to the owner who labors under the disability. The statute provides that the land itself may be redeemed, and not simply that the owner laboring under the disability may redeem it. The statute does not confine the right to redeem to any person, but grants the right as an interest running with the land for the period mentioned therein, after the expiration of the disability of the owner. As is said in the case of *Neil v. Rozier*, 49 Ark. 551, 6 S. W. 157: "This provision does not profess to make the right of redemption personal to the minor who owned the land at the time of the forfeiture. It is not specified in this or any other of the provisions of the law governing this case that the power must be exercised by the minor more than another, whom it may concern at the time of redemp-

tion. It is not provided simply that the minor may redeem, but that the lands may be redeemed. The power is not appended to the person of the minor but is impressed upon the land as an incident to the estate." The law casts upon the heir every right and interest in the land which his ancestor possessed at the time of his death; the interest and right therein descends to him just as it was in the ancestor, and can be maintained in his behalf just as it could have been asserted by the ancestor. The owner who labors under the disability mentioned in the statute could assert the right of redemption for the period therein named, and his death, while still laboring under such disability, would not abridge that right in his heir, upon whom the law casts the estate and every right incident thereto. In the case of *McNamara v. Baird*, 72 Miss. 89, 16 South. 384, it was held that, where an infant having until one year after majority to redeem land from tax sale dies, his heir has the same right and time in which to redeem, and that giving to the heir this right to redeem is but giving effect to the right existing in the ancestor, which by operation of law is cast upon the heir. It is urged, however, that in the case of *Bender v. Bean*, 52 Ark. 132, 12 S. W. 180, 241, it is held that the right of redemption given by this statute to a minor is only a privilege personal to him. That was a case in which the minor was endeavoring to redeem, and the question involved therein was whether or not the holder of the tax title was liable for rents prior to the time that the redemption was effected in the manner provided by law. It was there only decided that the title to the land passed by virtue of the tax deed, subject to be defeated by the redemption, and that until the minor did assert his right to redeem in the manner provided by law, the holder of the tax title remained the owner of the land and could not be made to account for rents thereof. To the extent of asserting his right of redemption for himself while living, it was held that the privilege was personal to the minor; but it did not hold that one standing by law in his place could not assert this right to redeem, or that his right of redemption was not vendible or descendible. But we think that this question is settled by the case of *Smith v. Thornton*, 74 Ark. 572, 86 S. W. 1008. That was a suit seeking to redeem land forfeited and sold for the nonpayment of taxes. The plaintiff in that case inherited the land from her son, who was insane at the time of the tax sale and up to the date of his death, and the action to redeem was commenced within two years after his death. In that case it was held that the plaintiff did have the right to redeem the land from said tax sale and thereby it was necessarily ruled that the right to redeem was descendible. It is true that in said case it was also held that a decree of confirmation of said tax sale would

not cut off the right to redeem which was granted by section 7095 of Kirby's Digest. But that decision also necessarily held that not only was the owner, who was laboring under the disability named in the statute, not cut off from the right to redeem, but that others standing in his stead were not cut off, and that by virtue of said statute the owner laboring under such disability, and the person succeeding to his right as heir, had the right to redeem for the period named therein. The evidence adduced in the case at bar conclusively proves that John Hill was the owner of the land at the time of the tax sale, and if at that time he was insane and remained under that disability to the date of his death, then his heirs had the right to redeem the land from that tax sale within two years after his death.

It is urged that the question of the right to redeem the land from the tax sale is concluded by the judgment which was obtained in 1898 by the holder of the tax title against John Hill in the ejectment suit which was instituted for the recovery of this land. But that was a suit whose purpose was to recover the possession of said land. The holder of the tax deed, if the tax sale was valid, was entitled to the possession of the land as against the owner, even though he was laboring under disability at the time of the tax sale. Until the owner made redemption in the manner prescribed by the law, the holder of the tax title had the right of possession of the land. But the owner laboring under the disability had the right to make such redemption at any time during the period named in the statute, and he did not have to assert that right at the time of such ejectment suit; nor did he lose the right to assert it after such suit and before the expiration of such period. *Bender v. Bean*, 52 Ark. 132, 12 S. W. 180, 241; *Danenhauer v. Dawson*, 65 Ark. 134, 46 S. W. 131, 44 L. R. A. 193. His right to redeem was not involved in the ejectment suit and was not an issue in that action. The true test of whether or not a particular point, question, or right has been concluded by a former suit and judgment is whether such point, question, or right was distinctly put in issue, or should have been put in issue, and was directly determined by such former suit and judgment. It is true that the judgment is also conclusive of "all matters properly belonging to the subject of the controversy and within the scope of the issues." It is not the recovery, but the matter actually alleged by the parties, and upon which the recovery proceeds, which creates the estoppel; and the judgment does not conclude rights or matters which were not put in issue and which it was not necessary to put in issue in the suit. *Cromwell v. Sac County*, 94 U. S. 351, 24 L. Ed. 195; *Fourche River Lumber Co. v. Walker*, 132 S. W. 451; 23 Cyc. 1300. In said ejectment suit the right of John Hill to redeem said land from the tax sale was not

put in issue, nor was he called upon to put that right in issue. He had the right to make redemption after the recovery of said judgment, and until the right of redemption was asserted and perfected he was not required to put it in issue. The ejectment suit determined that the holder of the tax title was entitled to the possession of the land, but it did not determine that Hill was not entitled to redeem the land from the tax sale. Neither John Hill nor his privies in blood or estate were concluded by said judgment in ejectment from asserting and perfecting the right of redemption.

It is earnestly contended by counsel for defendants that the finding of the chancellor that John Hill was an insane person at the time of the tax sale, or at any time thereafter, is contrary to the weight of the testimony adduced upon the trial of this case. It is difficult to define with accuracy the limits of that mental incapacity which under the law renders one insane. An insane person is one who is of unsound mind, and our statute provides that a "person of unsound mind includes every person who is a lunatic, idiot or deranged." Kirby's Dig. § 7812.

But at last the law furnishes no definite enumeration of the mental powers and no exact measure by which to determine the degree of their exercise, in order to decide whether or not an individual is of sound or unsound mind. There are numerous civil proceedings where insanity or mental incapacity may be shown, and the rule for establishing the degree of the insanity necessarily depends upon the purpose for which the insanity is to be proved. It may be that the object of proving insanity is to annul a contract, or to defeat the execution of a will, or to appoint a guardian to take charge of the estate of the insane person. The rule for establishing the degree of insanity in these various cases varies with the case. But the question in all such cases, where incapacity arising from defect of the mind is alleged, is not whether the mind is itself diseased or the person is afflicted with any particular form of insanity, but, rather, whether the powers of the mind have become so affected, by whatever cause, as to render him incapable of transacting business like the one in question. As a general rule, it may be stated that, in order to have that measure of capacity required by law to be of sound mind, a person must have capacity enough to comprehend and understand the nature and effect of the business he is doing, and where it is clearly made to appear that the mental incapacity and imbecility is of such a degree as to render the person unable to conduct the ordinary affairs of life and leaves him in a condition to be the victim of his misfortune, then such person is, in contemplation of law, not of sound mind. Weakness of understanding is not alone sufficient to show mental unsoundness, if capacity remains to see things in their true relations,

and where the individual has a moderate comprehension of his immediate duties and of the value and use of his property. But, as is said by Marshall, J., in the case of *Prather v. Naylor*, 1 B. Mon. (Ky.) 244, the criterion in determining whether or not the individual is of sound mind "rests upon the question whether the individual is mentally competent of rational government of himself and his affairs." 1 Clevenger on Med. Jur. of Insanity, § 244; *Young v. Stevens*, 48 N. H. 133, 2 Am. Rep. 202, 97 Am. Dec. 592; in *re Storick*, 64 Mich. 685, 31 N. W. 582; *Hamrick v. Hamrick*, 134 Ind. 324, 34 N. E. 3; *King v. Cummings*, 60 Vt. 502, 11 Atl. 727; *Snyder v. Snyder*, 142 Ill. 60, 31 N. E. 303; *Kelly's Heirs v. McGuire*, 15 Ark. 555; *Beller v. Jones*, 22 Ark. 92. And the opinions of witnesses, not expert, are competent to prove mental capacity or incapacity, when the facts or circumstances are disclosed upon which they found their opinions. *Beller v. Jones*, supra; *King v. Cummings*, supra; *Kilgore v. Cross* (C. C.) 1 Fed. 578.

In the case at bar the matter involved related to the payment of taxes upon property. That was one of the matters attending the transaction of ordinary business. The object and purpose of proving insanity in this case would be to show that John Hill did not have the mental capacity to understand and appreciate the fact that the taxes should be paid upon his property, which was a transaction of ordinary business; in other words, the true and proper test of whether or not he was of sound mind, under the testimony and nature of this case, was whether or not he had the mental capacity to transact ordinary business and to take care of and manage his property. If he was mentally incapable of understanding and acting rationally in the ordinary affairs of life and in the management of his property, then he was not of sound mind, within the meaning of the statute granting him time, until such disability should be removed, in which to redeem his land from tax forfeiture.

We do not deem it desirable to set out in any detail the testimony relative to the mental condition of John Hill. The testimony discloses that almost from his infancy he was a mental imbecile, and on this account was the sport and plaything of his associates.

He was not totally incapable of taking care of himself, but he was wholly incompetent, on account of his mental unsoundness, to rationally manage his affairs or to care for and protect his property in a rational manner. He did not understand the ordinary affairs of life in their true relations, and was unable to form correct conclusions as to them. He was mentally incapable of transacting business, or to comprehend the nature and effect of the business of paying or failing to pay taxes on his property. Upon an examination of all the evidence, we feel a conviction that he did not have that mental capacity which is found in a sound mind, although he was not technically an idiot or lunatic. This was his mental condition at the time of said tax sale and continuously from that date to his death. He was therefore an insane person, within the meaning of the statute which granted to him the right to redeem his land from tax sale within the period named therein.

It is also urged by defendants that John Hill in 1889 executed a deed for a part of the land involved in this suit to one of the defendants, who is a nonresident. This defendant has not appealed from the decree of the lower court. The plaintiffs in their complaint allege that John Hill was not of sound mind at the time of the alleged execution of this deed, and that it was therefore ineffective to convey title. The lower court found that John Hill was of unsound mind in 1887, and was of unsound mind continuously from that date until his death. He was therefore mentally incapable of executing a binding contract for the conveyance of his land at the time of the execution of this deed, and the chancellor entered a decree in accordance with that finding. We cannot say that this finding of the chancellor is against the preponderance of the evidence, and the defendants claiming under that deed have not appealed from this finding or decree. The defendants who have appealed cannot base any right upon an outstanding title in others, which the chancellor has decreed is not valid and is without merit, and which decree we do not find cause to reverse.

Upon an examination of the whole case, we think that the decree of the chancellor should be affirmed, and it is so ordered.

Ex parte BROCKMAN.

(Supreme Court of Missouri. Feb. 9, 1911.
Rehearing Denied March 2, 1911.)

1. DEPOSITIONS (§ 52*)—MOTIVE OF LITIGANT—DETERMINATION BY COMMISSIONER.

A justice of the peace, notary, or special commissioner charged with the duty of taking depositions has no jurisdiction to determine the motive or good faith of the action, before compelling a witness to answer questions or proceeding against him for contempt because of his refusal.

[Ed. Note.—For other cases, see Depositions, Cent. Dig. § 86; Dec. Dig. § 52.*]

2. AMICUS CURIAE (§ 1*)—APPEARANCE.

Where, after suit brought, proceedings were instituted to take petitioner's deposition before a commissioner and he refused to testify, whereupon contempt proceedings were instituted against him, and on being convicted he obtained habeas corpus, and plaintiff's counsel appeared both in the contempt proceedings and in resistance of the writ as amici curiae, such appearance was a mere matter of grace concerning the court alone.

[Ed. Note.—For other cases, see Amicus Curiae, Cent. Dig. § 1; Dec. Dig. § 1.*]

3. DEPOSITIONS (§ 71*)—HABEAS CORPUS (§ 51*)—CONTEMPT PROCEEDINGS—RIGHT TO APPEAR.

Where a defendant was subpoenaed to give a deposition before trial and, on refusing to testify, was committed for contempt and sued out a writ of habeas corpus, the commissioner in the contempt proceedings having moved in the premises at the instance of the plaintiffs, they had such an interest as authorized them to appear therein in support thereof, and also in resistance of the writ of habeas corpus.

[Ed. Note.—For other cases, see Depositions, Dec. Dig. § 71; Habeas Corpus, Dec. Dig. § 51.*]

4. HABEAS CORPUS (§ 83*)—ILLEGAL COMMITMENT—ISSUES.

Rev. St. 1909, § 2442, provides that a petitioner for a writ of habeas corpus shall state the facts entitling him to discharge on his best knowledge and belief, and section 2456 requires that the officer shall make a return which shall be responsive to the writ, and produce the warrant by virtue of which he holds the petition, the return being taken as true, if no issue is made thereon by denial. *Held* that, since the officer's return is taken as true if no issue is made by a denial, and this without reference to the allegations of the petition, where neither the petition nor the reply charged that the commitment was defective and raised no issue of fact or law with reference thereto, defendant was not entitled to his discharge on objection made at the hearing that the commitment was invalid, because it was directed to the "sheriff and jailer of the city of St. Louis," and directed one of them to attach the body of petitioner and confine him in jail, etc.

[Ed. Note.—For other cases, see Habeas Corpus, Cent. Dig. § 75; Dec. Dig. § 83.*]

5. HABEAS CORPUS (§ 89*)—RETURN—DEFECTIVE WARRANT—REMEDY.

Where, on the filing of a return to a writ of habeas corpus exhibiting a defective warrant as the authority for holding petitioner, his remedy is by motion for discharge.

[Ed. Note.—For other cases, see Habeas Corpus, Cent. Dig. § 79; Dec. Dig. § 89.*]

6. DEPOSITIONS (§ 64*)—SWEARING WITNESSES.

Where a witness on being subpoenaed to testify before a commissioner was sworn and

then refused to testify, it was not necessary that he be again sworn before being required to testify on a later occasion in the same matter before the same commissioner, after an amendment of the pleadings.

[Ed. Note.—For other cases, see Depositions, Dec. Dig. § 64.*]

7. HABEAS CORPUS (§ 83*)—ISSUES AND PROOF.

Where a petition for a writ of habeas corpus, to obtain petitioner's release from commitment for contempt in refusing to testify before a commissioner, alleged that the commissioner was appointed by the court and had taken on himself the burden and powers of such appointment, and the recital of the commitment that the commissioner had been so appointed was not denied by petitioner's reply or answer to the sheriff's return, which answer reiterated the same allegation, the authority of the commissioner was an admitted fact which did not require proof; and hence petitioner could not successfully claim his discharge, because there was no proof that the commissioner was appointed to take testimony.

[Ed. Note.—For other cases, see Habeas Corpus, Cent. Dig. § 75; Dec. Dig. § 83.*]

8. DEPOSITIONS (§ 21*)—STATUTORY PROVISIONS—NATURE OF REMEDY.

Rev. St. 1909, §§ 6356, 6384, and 6404, authorizing the taking of depositions de bene esse, provides a practice in the nature of the chancery practice by a bill of discovery, and entitles the party to sift the conscience of his adversary.

[Ed. Note.—For other cases, see Depositions, Dec. Dig. § 21.*]

9. DEPOSITIONS (§ 71*)—STATUTORY PROVISIONS—REFUSAL TO TESTIFY—CONTEMPT.

In proceedings to examine a party before trial by taking his deposition de bene esse, as authorized by Rev. St. 1909, §§ 6356, 6384, and 6404, the witness, on being brought before a duly appointed commissioner at the time and place specified, was advised by his counsel to refuse to testify. His testimony had been previously taken in part, and on his then refusing to testify, the commissioner discharged him; but, being of the opinion that such order was erroneous, caused him to be resubpoenaed on two days' notice, when he again refused to testify on the advice of counsel, and was committed for contempt. To show the materiality of the proposed testimony, counsel, while the witness was in the room, started to propound to him a question, but in the middle of it the witness left the room. *Held*, that the witness was guilty of contempt, and was properly committed thereafter.

[Ed. Note.—For other cases, see Depositions, Dec. Dig. § 71.*]

In Banc. Original application by Frederick W. Brockman for a writ of habeas corpus. Writ dismissed, and petitioner remanded.

Chas. B. Stark, for petitioner. George Safford, for respondent.

LAMM, J. Brockman (in the custody of Nolte, sheriff of St. Louis) sued out a writ of habeas corpus. By virtue of the order of FOX, C. J., he was admitted to bail pending hearing. The writ commanded said sheriff to produce his body at our bar, together with the time and cause of his imprisonment. By stipulation he waived the production of his body, agreeing to hold himself ready and

willing to submit to our orders in the cause and to be dealt with according to law. The sheriff made return and petitioner answered. Subsequently, on his motion, John A. Blevins, Esq., of the St. Louis bar, was appointed special commissioner to take testimony, make a finding of fact, and report on a day certain. He, having qualified, obeyed our order, and the cause is submitted upon the petition (including exhibits), the return, answer, report of our special commissioner, petitioner's exceptions thereto, arguments ore tenus by counsel for petitioner, and on behalf of certain parties designated as intervenors, and on briefs.

The case seeks the gist of the pleadings and exhibits, viz.: The petition alleges that in May, 1910, there was a corporation doing business in St. Louis named the Lightning Lunch Company; that one McGregor with Gregg and Brockman were its directors—Brockman, president; Gregg, vice president, and McGregor, secretary—that McGregor and Link brought suit against Brockman, Gregg, and the lunch company, in the St. Louis Circuit Court, the petition not stating facts sufficient to constitute a cause of action (a copy thereof being annexed to show that fact); that presently McGregor and Link gave notice to defendants of an application for a preliminary injunction, restraining Brockman and Gregg from discharging their duties as directors and officers; that the latter appeared thereto, whereat the application was postponed. Presently McGregor and Link served notice to take depositions before a notary public, and sued out a subpoena for Gregg and Brockman to appear and testify; that upon counternotice by Brockman, Gregg, and the lunch company, the court appointed Leighton Shields, Esq., special commissioner to take depositions; that thereupon defendants filed their separate answers (which answers are attached); that the depositions of petitioner and Gregg were taken in shorthand, and petitioner was "discharged" by the commissioner, he ruling on question of evidence, so as to confine the examination within the issues on the pleadings as he interpreted them; that presently, on June 7th, Link and McGregor filed an amended petition, joining Selleck as coplaintiff (said amended petition is annexed); that defendants filed a motion to strike out the amended petition (which motion is annexed); that said motion is undisposed of; that after said events the special commissioner issued a new subpoena for Brockman and Gregg, upon demand of plaintiffs, to appear, for the purpose of having their depositions taken; that no application was made to the circuit court and no cause shown to said court or the special commissioner for the taking of said depositions and no leave was obtained therefor from either; that plaintiffs proceeded on the theory they had the right to compel the attendance of petitioner before said commissioner as often as their

"whims and caprices dictated"; that petitioner, having freely and willingly submitted in the first instance to the taking of his deposition and believing his duty was done, unless some reason be assigned to the court as a basis for requiring him to leave his business and submit to further examination, disobeyed the subpoena; and that thereupon the special commissioner, upon plaintiffs' application, issued an attachment for said petitioner to the sheriff of St. Louis, which attachment was issued over the protest of petitioner's counsel and is attached as an exhibit. Thereat the sheriff brought petitioner before the special commissioner on the attachment, and the latter ruled that the plaintiffs could retake the deposition of petitioner without first obtaining leave from the circuit court or from the special commissioner; that petitioner refused to submit to the retaking of his deposition without a reason having been given to or leave obtained from the court or commissioner, whereupon the commissioner issued to the sheriff of the city of St. Louis a warrant of commitment, commanding that petitioner be arrested and be committed to jail until he shall submit himself to the "unlawful order of the commissioner," which warrant of commitment is also annexed; that petitioner is unlawfully deprived of his liberty by Nolte, sheriff aforesaid; that his imprisonment is illegal in this: That the special commissioner is permitting plaintiffs in that suit to grossly abuse the process of the law and of said court, and in so doing has exceeded his jurisdiction and authority; that the suit in which the depositions were being taken was brought after McGregor had demanded of petitioner that he buy McGregor's stock in the lunch company; that on the refusal to buy such stock McGregor notified him he would apply to the circuit court to have him removed from all participation in the affairs of the company as director and president, and the suit was subsequently brought, pursuant to such threat, to vex and annoy petitioner into submitting to McGregor's demand; that the taking of the depositions of petitioner and Gregg at first and the attempt to retake them is not for the purpose of obtaining evidence to be used in said cause, but for the purpose of vexing, annoying, and harassing petitioner and Gregg, and to try to secure information on which plaintiffs hope to make a case under some future amendment of their pleadings; that it is an unlawful attempt to use the law applicable to taking depositions in the place of a bill of discovery, and is a gross abuse of process, in that the process is misused for the private ends of McGregor to force petitioner to purchase stock of McGregor, Link, and Selleck; the said Link being McGregor's brother-in-law and the said Selleck his attorney.

The original petition in the suit of Link et al. v. Brockman et al., attached, as said, as an exhibit, shows the Lightning Lunch Company has a capital stock of \$30,000, divided

into 300 shares, and is governed by a board of three directors, and complains of the acts committed by Gregg and Brockman at a certain annual election, and more particularly of the acts of Brockman committed at said election, and subsequently; that on or about the time of said election Link owned 82 and McGregor 53 shares of stock; that of the 165 remaining shares the corporation itself held 35 of them in trust, and Brockman owned 130 shares; that for a long time McGregor and Link, by virtue of owning said 135 shares, had a controlling voice in the company's affairs and in the election of three directors; that at a former time McGregor, Brockman, and one Kroeger were directors; that some time in 1907, Finch, the owner of 15 shares, surrendered them to the company in consideration of the sum of \$700 paid him out of the corporation's funds, and his shares were thereby canceled; that in September, 1908, one Stevens owned 20 shares and at that time surrendered them to the company, on the payment to him out of the funds of the company of about \$1,100, and the said 20 shares were thereby canceled; that Link purchased Kroeger's shares in 1909, who then resigned from the directorate, and such vacancy was never filled; that subsequently, in December, 1909, Brockman as president and director, without any authority from the board and without the knowledge or consent of plaintiffs, attempted to sell to Gregg the 35 shares of Finch and Stevens' stock, aforesaid, and did sell them to him, and unlawfully transferred them upon the books of the company to Gregg, for the purpose of obtaining control of the election of officers of said corporation, then to be held in a few days; this without the knowledge or consent of the other stockholders or members of the board of directors and in disregard of their rights; that thereupon Brockman and Gregg with unknown parties, stockholders related to Brockman, conspired to deprive Link and McGregor of control of the company, and in pursuance thereof, at a stockholders' meeting held January 3, 1910, elected Brockman and Gregg as directors, and at said election Gregg voted said 35 shares of stock so unlawfully and fraudulently transferred to his name on the company's books, against the will of plaintiffs and without their consent; that Brockman, acting with Gregg and with other related stockholders, conspiring unlawfully and without authority to usurp the powers and duties of McGregor, secretary of the lunch company, and as a member of the board refused to permit stockholders to examine the corporation books, and willfully and maliciously disregarded plaintiffs' right and withheld the seal of the corporation and its books; that the annual meeting of the stockholders aforesaid was illegal, because Gregg voted 35 shares of stock never legally transferred or sold to him; because he is not a stockholder and is not eligible to hold an office in the corporation. The

prayer of the petition was directed to declaring the sale and transfer of the 35 shares of stock to Gregg null and void; and that Brockman be suspended from the board of directors and as president, on account of said abuse of his power as president and director; that the stockholders' election be set aside and a new one held at a time designated by the court; and that a temporary restraining order be granted against Brockman to enjoin him from performing the duties of a director or president, or from using the corporate seal, and against Gregg, restraining him from acting as director, and for such further relief as the circumstances and justice of the case seem to require, in accordance with the provisions of sections 1338 and 1340 of article 9, Rev. St. 1899 (Ann. St. 1906, pp. 1075, 1076), and other provisions of the statute.

The Lightning Lunch Company filed answer (also an exhibit) making certain formal admissions and denying all other allegations. Brockman's answer (also an exhibit) admitted the ownership by himself and his friends of 130 shares, the division of the capital stock into 300 shares; that McGregor and Link owned 135 shares. In substance, he then alleges that Gregg owns 35 shares and that at the corporate election in January, 1910, Brockman, Gregg, and plaintiffs participated therein, that 300½ votes were cast for Brockman at said election as director, the same number for Gregg, and 299 for McGregor, and none for any other person; that McGregor voted 53 votes for Brockman and 53 for Gregg; that prior to that time both Link and McGregor knew "whence" Gregg derived his title to his stock, and suffered him to participate in the election as a voter without objection or challenge. He denies that plaintiffs, as stockholders, or any other stockholders, were refused permission to examine the books, or that he has disregarded their rights as stockholders, or has refused to deliver to McGregor the seal of the corporation or any of its books. He avers that Link and McGregor had free access to the books and took copious notes from and copies thereof; that McGregor, as secretary, was entitled to the possession of the seal and books of the corporation pertaining to his office, but he demanded the right to take and remove the books from the general office of the corporation, and defendant had refused to permit that to be done. Gregg's answer to the original suit, also attached as an exhibit, among other things alleges that on December 4, 1909, he bought his stock from his codefendant Brockman in good faith, with no notice of any infirmity in the title, and paid \$1,500 to Brockman, being the full market value, and since that time had been in possession of said stock, enjoying the rights and privileges thereto appertaining. He then reiterates the averments of the answer of his codefendant Brockman relating to the stockholders' election in January, 1910, his

participation therein without objection from Link and McGregor, and his election therein as director.

The amended petition, also attached as an exhibit, pleads title of the new plaintiff, Selleck, to 15 shares of stock by purchase in part from McGregor and in part through one Weller in May, 1910; said Weller having purchased from McGregor. It makes allegation of the incorporation of the Lightning Lunch Company and the ownership of stock therein, barring Selleck's stock, the same as in the original, and renews the allegations pertaining to the purchase by the lunch company of 35 shares of stock from stockholders prior to December, 1909, alleging that said stock thereby became and was held thereafter as "treasury stock." It then alleges, as in the original petition, the sale of said stock by Brockman to Gregg for \$1,500, paid to the Lightning Lunch Company; that said sale was fraudulent and without authority; that Brockman without authority delivered to Gregg certificates of stock, signed by him as president and a man by the name of Taylor as secretary; that Taylor was not secretary, but had been appointed secretary by Brockman without authority; that Gregg accepted his certificates and shares of stock represented thereby with knowledge of the facts that Brockman was acting without authority to transfer the same to him and for the purpose of putting Brockman in control of the corporation, to the exclusion of McGregor and Link; that Gregg did not buy his stock in good faith, for the purpose of a bona fide ownership, but for the purpose of holding the same in trust for Brockman and enabling Gregg to appear to be the true owner and become a director; that Taylor was appointed secretary unlawfully and wrongfully by Brockman without any authority on his part, and acted as secretary in and about the transfer of stock and execution of stock certificates, through Brockman's fraudulent and wrongful permission. The petition then goes on in detail to make allegations, giving dates, to the effect that Brockman wrongfully, unlawfully, and fraudulently refused McGregor, as secretary of the corporation, to possess and inspect the books of the company, although McGregor during business demanded the same of Brockman, who had the books in his custody and control, and makes a similar allegation to the effect that Brockman denied Selleck, a stockholder, under similar circumstances the right to inspect the books and corporate papers on demand. It charges unlawful and fraudulent conduct upon Brockman and Gregg in voting and permitting the voting of the 35 shares of treasury stock; charges that Gregg and Brockman knew that Gregg was not a lawful stockholder; that they wrongfully and fraudulently caused and permitted Gregg to be elected, so that Brockman, through his close friendship, might control and manage the company's business, against the wishes and

contrary to the interests of plaintiffs. It charges that the stockholders' meeting was void, because Gregg voted the said shares of stock, and because he was elected a director when he was not a stockholder; that subsequently Brockman wrongfully and fraudulently caused to be paid to himself \$250 a month, without consideration, out of the company's funds; that, subsequently and before the suit, Gregg unlawfully and wrongfully and fraudulently returned to Brockman the said 35 shares of stock for a consideration of \$1,500; that said Gregg, though never a stockholder, continues to act as a director; that at the annual meeting in 1909 of the directors Brockman was elected president, and at said void election of 1910 was elected director, and at a void election subsequently was re-elected president. The prayer of the amended petition is substantially the same as in the original.

Other exhibits attached to the petition for a habeas corpus, are the motion to strike out the amended petition and the attachment issued by Commissioner Shields, commanding the sheriff to attach Brockman's body and have him before the commissioner on the 14th day of June, 1910, to testify in the case. We do not consider the contents of either material. The warrant of commitment under which petitioner was arrested, also attached as an exhibit, is long and need not be set forth. The only question made in regard to it in petitioner's brief will be considered presently.

By the return to our writ, the sheriff justifies his arrest and custody of Brockman under a warrant of commitment issued by Commissioner Shields on June 14, 1910, commanding the attachment of the body of Brockman, his commitment to the jail of the city of St. Louis and safe-keeping, without bond, until he should give evidence required of him before said commissioner, or until discharged by due process of law; that on June 15th, he took Brockman into custody, and thereupon Commissioner Shields suspended the warrant until the forenoon of the 16th day of June, in so far as it required the prisoner to be put to jail; that on June 16th, while Brockman was thus in custody, he was released on bond by virtue of our order. Setting forth Brockman's stipulation, waiving the production of his body at our bar, the sheriff submits the matter, holding himself subject to our orders in the premises. To that return petitioner filed a voluminous answer or reply, justifying his new pleading on the theory the facts showing his unlawful detention "do not appear sufficiently upon the face" of the sheriff's return. He then, to show his right to a discharge, undertakes to restate the allegations of his original petition. We find nothing substantially new in this reply or answer, beyond explaining a little more fully the facts and circumstances leading up to the warrant of commitment and characterizing the conduct of plaintiffs

by epithets more inflamed and biting than those in the original petition; the substantive facts remaining the same. There is, however, a denial of one recital contained in the warrant of commitment, viz., a recital to the effect that petitioner had refused to be sworn as a witness and had failed and refused to answer questions propounded to him by plaintiffs' counsel. He avers that he did not refuse to be sworn, and that said questions were simply "talked" into the record after petitioner had left the presence of Commissioner Shields, and were not propounded to or heard by petitioner.

With pleadings in the fix outlined, we appointed John A. Blevins, Esq., our special commissioner to take proof and report the testimony with his finding of fact. He took testimony, including that taken before Commissioner Shields (also submitted here), covering, say, 600 pages of typewriting, and reported his finding of fact. On the coming in here of his report, petitioner filed a score of exceptions thereto. On the argument at our bar we had these exceptions, the pleadings and their exhibits, the return, report, etc., together with a paper writing labeled, "Suggestions in reply to petition for writ of habeas corpus," filed by attorneys for plaintiffs in the principal suit, and who intervene on behalf of their clients; also a manuscript brief by petitioner's counsel. After argument and submission, we were furnished with exhaustive printed briefs by petitioner's attorney and by said attorneys in the principal suit. Petitioner's brief makes 19 points against the validity of his arrest and detention.

Attending to the report of our special commissioner, he found many facts germane to the principal suit and tending to prove or disprove the allegations of the petition and answers in that suit, all of which we omit for reasons presently given. He found the suit of Link et al. v. Brockman et al. was pending in the circuit court of the city of St. Louis on a petition containing the allegations hereinbefore outlined; that answers were filed of the character we have stated; that notice was given of the taking of depositions, and that such proceedings were had as resulted in the appointment by the circuit court of Leighton Shields, as special commissioner, to take them; that he, under that authority, proceeded in due course with the taking of the depositions; that petitioner, among others, was called as a witness by plaintiffs, was examined, and his examination taken in shorthand; that at the close of his examination plaintiffs' counsel announced he was through with the witness for the present, but that he wanted to examine him further, as soon as he could prepare and file an amended petition; that counsel for Brockman then insisted that Commissioner Shields should discharge the witness, and he did so; shortly thereafter an amended petition was filed in the cause (an

abstract of which has been heretofore given); that a motion was then filed to strike it out, which motion is pending; that afterwards plaintiffs applied verbally to Commissioner Shields for a subpoena for Brockman, which was issued and served, requiring him to appear at a place and time certain; that Brockman disobeyed the mandate of this subpoena and an attachment was issued for him; that he was arrested thereon by the sheriff and brought before the commissioner, who then required him to testify as a witness in the cause and to be sworn for that purpose; that Brockman refused to be sworn, refused to testify or answer any questions put to him, and, over the objections of Commissioner Shields, left the room while a question was being asked of him by plaintiffs' counsel, saying he had important business; that Brockman's refusal to remain in the presence of the commissioner prevented him from hearing the completion of the question then being asked, and prevented him from hearing the other questions following, which were incorporated into the record to show the character of the questions counsel desired to ask; that afterwards, on plaintiffs' application, Commissioner Shields issued a commitment, committing Brockman to jail for contempt until he shall appear and testify in said cause, or until he be discharged by the courts; that no application was made to the circuit court for permission to re-examine Brockman as a witness; that at the time Commissioner Shields had Brockman brought before him and required him to be sworn and to testify, he (the commissioner) was in regular session on the day and at the place to which he had regularly adjourned, and the parties and their attorneys were present before him at the time; that he was acting in good faith in taking evidence at the time for use at the trial, and not for the purpose of harassing or annoying defendants, or either of them; that Mr. Safford was employed as plaintiffs' counsel in the principal suit and had charge of that case, and that his actions had been fair and without cause for criticism, and that the principal suit was being prosecuted in good faith. Any other facts necessary to the determination of any vital question will appear in the opinion in connection with the consideration and determination of the question itself.

1. Of the Scope of the Investigation (and herein of matter not germane).

(a) The vast volume of this record bespeaks a foreword by way of preliminary ruling. Nearly all the testimony taken by Commissioner Blevins, as well as that taken by Commissioner Shields (also here, as said), and many of the findings of Commissioner Blevins, go directly to the merits of the principal suit and were leveled at proving or disproving the issues in that suit. The same is true of the majority of the exceptions made to the report of our commissioner.

The same is true of some of the propositions advanced in petitioner's brief and argument. The principal suit is not here on its merits. To draw those merits into this controversy, to comment on them or adjudicate them, by way of parenthesis or anticipation, upon a petition for a habeas corpus to discharge a witness committed for contempt for refusing to testify in that case, would be untimely and prejudicial; it would make ducks and drakes of orderly procedure. Such course would tend to foreclose the issues and embarrass the proper disposition of the principal case when its merits are reached for final disposition below. Hence it would be highly improper to pass directly or indirectly at this time on the merits of that suit, or to be drawn prematurely into deciding even, what the testimony tended to prove or disprove in that regard. The precept is: Nothing is permitted to a court, except what is legally submitted to the court. Applying that precept, when the great writ of right goes down, commanding any person charged with wrongful interference with the liberty of another to bring the body, with the time and cause of imprisonment, the controlling issue is the fact of detention and custody, and (if found to exist) the lawfulness of it.

In the petition are allegations that the original suit was brought in bad faith for sinister purposes, viz., to press a spur in petitioner's side and force him to buy his peace by taking over the shares of stock in the Lightning Lunch Company held by recalcitrant shareholders, "recalcitrant" being a learned term (allowed to those using the venerable language of the law), interchangeable with the colloquialism "kicking," and literally meaning "kicking back." Our learned special commissioner permitted much testimony pro and con on the question of good faith, evidently on the maxim, Abundant caution injures no one. In the absence of any directions from us on what allegations in the petition for the writ we deemed vital, he took the cautious course of treating each and every of them as vital. To that end he let testimony in, and left it for us to determine its materiality and probative force.

Attending to that phase, the good faith—the motive of a litigant—is not a subject of inquiry in a suit, to the extent that a justice of the peace, a notary, or special commissioner, charged with taking depositions, has a call to determine the good faith of the action before he can compel a witness to testify or commit him for refusal to answer competent questions. To rule otherwise would be to inject an anxious and extraneous question in the taking of depositions, to be sprung by every witness or party at any time, at his own motion. Doubtless, there are cases where the matter of good faith may guide the trial court to a just judgment on the merits, when the question arises on the whole proof, though the general doctrine is that a court has to do with legal liability alone, and not

with the mere motive actuating a litigant in invoking the judgment of the court on that legal liability, so long as the parties are adverse and the suit is not feigned. We are cited to no authority, and know of none, permitting a witness to refuse to answer a question at the taking of his deposition by springing the question of good faith in the suit. That would be an easy, self-made road of escape, when hard pressed, from giving testimony on a tender point; a road hitherto untraveled, unsurveyed, and not laid down on any known legal chart; one peremptorily halting the investigation in the main matter by injecting a wholly collateral one for preliminary determination. Accordingly, we rule that petitioner's case must stand or fall on the commitment and on facts constituting the *res gestæ*, viz., the facts directly leading up to the issuing of that commitment. This ruling cancels out the factor of good faith in the original suit.

Constrained by the rulings and reasons given, we put away from us all testimony, all findings of our commissioner, all exceptions to his report, and all propositions advanced bearing only upon the merits of the principal suit, using the term "merits" in a sense broad enough to include the *bona fides* of that suit.

(b) There is one other preliminary matter. Before Commissioner Blevins, also here, attorneys for plaintiffs in the original suit were allowed to appear and take a substantial part in the proceeding. Below, as here, petitioner's counsel unavailingly objected to such appearance and now invites a ruling thereon. *Cui bono?* But waiving the view implied by that question, it is clear that appearance was either of grace or of right. On such premise we rule: (1) If such appearance was as *amicus curiæ*, and as a matter of grace, then that grace alone concerns us. Grace doth not abound through consent of one's adversary. It droppeth, withal, like mercy—as the gentle and refreshing dews of Heaven. It goeth where it listeth. (2) If that appearance below or here is because plaintiffs in the original suit are interested of right in this proceeding as auxiliary to and in aid of the principal suit (and counsel plant it on that theory), we can see no objection to it in reason. *Erat lux* is a motto of universal and wholesome use. Commissioner Shields moved in the premises at the instance of the plaintiffs. They were interested then. When did that interest cease? Furthermore, over the objection of petitioner, made orally at our bar, we permitted such counsel to argue against petitioner's discharge and file briefs. For good or ill, the thing is done. How could we now, by any psychological twist known to man, wring from our minds the effect of that argument and those briefs? Yet nothing less than that impossible thing would benefit petitioner a whit. The incident must be taken as closed. The point is ruled against petitioner.

2. Of the Commitment.

(a) After the venue and title of the cause, the caption of the commitment reads: "The State of Missouri, to the Sheriff of the City of St. Louis and to the Jailer of the City of St. Louis, Greeting." Then follows sundry whereases, reciting facts leading up to and descriptive of the contempt; the writ concluding as follows: "Now, therefore, we hereby command you, the said sheriff of the city of St. Louis, and jailer of the city of St. Louis, to attach the body of the said Frederick W. Brockman and commit him the said Frederick W. Brockman to the jail of the city of St. Louis and the body of him there safely keep, without bail, within the said jail of the city of St. Louis, at the expense of the said Frederick W. Brockman, until he, the said Frederick W. Brockman, gives such evidence or until he be discharged by due course of law." Learned counsel for petitioner argues in his brief that the writ is "strange to the law"; is in "hideous form," and cannot justify his client's detention, particularizing in this fashion: The writ is directed to the sheriff and jailer of the city of St. Louis; its commands run to those two officers. Among them is one to "attach" the body; hence the writ is bad, because dual in form, containing both an attachment, a capias, and a mittimus (the office of the one being to arrest and bring in the prisoner, and the other to take him to jail); and dual in being directed to two instead of one, in that, in the city of St. Louis, the sheriff is one officer, the jailer another and independent one; that it commands the jailer to usurp the functions of the sheriff, thereby committing a trespass on the person of Brockman, and commands the sheriff to usurp the functions of the jailer. Under the general statutes (Rev. St. 1909, §§ 1573, 1574), the sheriff is ex officio jailer. By the scheme and charter of St. Louis, the sheriff and jailer are not the same officer; one is elected, the other appointed, and the jailer does not hold under the sheriff. Article 4, Scheme and Charter, § 2; 2 Rev. St. 1899, p. 2490.

The propositions advanced are refined to a degree. It is obvious at a glance that the jailer of the city of St. Louis had neither the warrant nor the prisoner. Our writ did not run to him. He did nothing and threatens nothing at this time. He has not usurped the office of sheriff, nor has the latter usurped his. Petitioner seized the psychological moment when he found himself not in jail, but in the sheriff's hands, not the jailer's. Therefore, even if the warrant were too broad (which we do not rule), its mere breadth has hurt no one at this time, for our writ halted the matter by a challenge to the sheriff's, not the jailer's, right to custody. The question, then, whether the jailer could justify under the writ on his physical incarceration of the prisoner, or the question whether the sheriff could justify if he, not

the jailer, held the prisoner actually in jail, is not before us. On the record of this particular case, because of what follows, we need not say whether the writ is defective in "some matter of substance," for that statutory ground of discharge (Rev. St. 1909, § 2474) is not properly before us. Observe, we are not proceeding without pleadings by the prisoner, as we have statutory power to do in an emergency. Rev. St. 1909, § 2445. Such a case as that can take care of itself when we have it. In this case issues are made up by pleadings filed. Petitioner's custody is in aid of a civil right. Petitioner created the situation. He invoked his own remedy. He pitched his own battle. He presided over the facts giving birth to the warrant with deliberation and of set purpose. He was not inops consilii, but acted at every step on the advice of learned counsel of his own choice. Hence we may not allow the case to ride off on the theory the commitment is defective in substance; as to that we say neither aye nor nay. Something could be said pro and con on that head. But we decline the task of weighing and applying the nice learning advanced by petitioner's counsel. This for the reason there is no such issue in the case.

In habeas corpus it is the duty of the petitioner to state the facts entitling him to discharge on his best knowledge and belief. Rev. St. 1909, § 2442. He must show in what the illegal restraint consists and probable cause why the writ should issue. If he state no ground for relief, the writ will be denied. *Ex parte Roberts*, 166 Mo. 207, 65 S. W. 726. The return of the officer must be responsive to the writ. Among other things, the officer must produce the warrant by virtue of which he holds the prisoner. *Id.*, § 2456. The return is taken as true, if no issue is made by denial. This, without reference to the allegations of the petition. *Ex parte Durbin*, 102 Mo. 100, 14 S. W. 821. In the case at bar the sheriff justified under the writ. In neither the petition nor in the reply to the return of the officer did petitioner ask a discharge because the writ was defective, nor did he raise any issue of law or fact of that sort. He did deny certain recitals of fact in the body of the writ presently to be considered. That was all he had to say against the writ at that time—a time appointed by the law for him to speak and let his wants be known. The contention that the writ was strange to the law and in bad form appears in print first in petitioner's brief, filed November 21, 1910, nearly a month after submission. In the absence of such issue in the pleadings, the contention comes too late. In the eye of the law what did not appear there as reasons for a discharge, absent amendment as here, did not exist; what did appear there is all that existed (*expressio unius, etc.*).

We are relieved from serious anxiety about the foregoing disposition of the matter, be-

cause, had petitioner thought to stand on the point as one of substance, he should have moved for his discharge as a matter of law on the coming in of the return and the exhibition of the alleged defective warrant of commitment. He did not do that and thereby prove his faith in his works. To the contrary, he took another road. By implication he adopted the theory the warrant was not defective on its face. Accordingly, he made reply, and then applied for and got a special commissioner to take evidence on controverted facts. If the writ were void, as now contended, then the vast volume of testimony pouring into the case through the opening of that appointment was not only a costly and idle mummery, but laid an onerous and thankless burden on the court and counsel. We conclude the contention is an afterthought, by way of makeweight, or, if not an afterthought, the position was abandoned when the door was open to challenge the warrant instantan on its exhibition here in the return. He voluntarily closed that door by impliedly repudiating his right to enter.

(b) By his reply to the return, petitioner averred there was a false recital in the warrant, to the effect that he refused to be sworn as a witness and failed and refused to answer questions propounded to him by plaintiff's counsel. He denies that he refused to be sworn, and avers that the questions were talked into the record after he left Commissioner Shields' presence, and were not propounded to or heard by him. In disposing of that issue, we find the report of our commissioner to be sustained by the testimony. Petitioner was already under oath. He had been sworn in the cause. Once was enough, and we shall not rule it was necessary for him to be sworn twice; but the recital in the warrant that he refused to be sworn at the time is literally true. His counsel assumed to advise him to take that course, and he took it, not because he had been sworn before, but because he denied the commissioner's right to go on with the testimony. If that were all of the alleged contempt, we would have a different case to deal with. The other issue of fact raised by the reply, to the effect that petitioner heard no question, and that any questions appearing in the warrant were "talked" into the record after he left the presence of the commissioner, we will consider presently.

3. It is contended there is nothing to show that Commissioner Shields was appointed to take testimony; therefore, absent a warrant of authority, a discharge must go. There is no substance in the proposition, because: The very petition runs on the theory Commissioner Shields was appointed by the circuit court and had taken upon himself the burden and powers of such appointment. It so alleges. The warrant recites his appointment, and that recital is not denied by peti-

tioner's reply or answer to the sheriff's return. The answer or reply reiterates the same allegation. It is a mistake to suppose that admissions count for nothing, or that the formulation of a proposition in a brief lodges a question in a case contrary to the solemn admissions of the pleadings. It is not the office of a brief to formulate the issues for the first time; that office belongs to the pleadings, and, as said, in habeas corpus the grounds of discharge must appear there. We have been furnished, since the submission, with a certified copy of the appointment of Leighton Shields as special commissioner in the form of a commission, but we brush it aside. Admitted facts need no proof. The point is ruled against petitioner.

4. This brings us to the main question: Was the detention of the petitioner unlawful? We have read every line of the testimony and find it substantially sustains the facts reported by our commissioner. This petitioner, brought before a duly appointed commissioner at a time and place regularly appointed, was advised by counsel to refuse to testify. His testimony, in part, had theretofore been taken. At that prior time, under protest of adversary counsel and upon the insistence of his own, the commissioner let him go. This action of the commissioner is called a "discharge." Subsequently the commissioner was of mind he had erred in such discharge as a finality. He caused him to be resubpoenaed, giving two days' notice. Mr. Brockman saw fit to disobey that subpoena. On a showing made by affidavit, an attachment issued and he was brought in willy nilly. The commissioner was in session with a witness on the stand. That examination over, petitioner was directed to take the witness stand. There was a pother, a dramatic scene, the incidents of which may as well be left to oblivion. The upshot was that he contemptuously refused to become a witness, and contemptuously, against the protest of the commissioner, left the room. He said he had business on some exchange, but we cannot shut our eyes to the fact that his business elsewhere was not a controlling factor. If he had asked in a proper way for a mere accommodating postponement of his testimony under spur of a business emergency, doubtless the commissioner would have respectfully considered that request. He planted himself on no such ground, but, having disobeyed the subpoena by advice of counsel, his counsel then and there denied the power of the commissioner to make him testify at all, and petitioner's refusal was but carrying out his counsel's advice. To show the materiality of the proposed testimony, adversary counsel, while the witness was in the room, started to propound to him a question. In the middle of it witness left. We find the question material and proper, and we shall not rule that petitioner's inability to hear it completed, by fleeing the room, has any virtue whatever. If that were so, might

a witness put a finger in each ear and justify his refusal to testify because he did not hear? I remember but one instance of that kind allowed as valid, viz., when Nelson, in the heat of battle and on the edge of victory, put his hand over his only good eye and said of the signal of retreat fluttering from the masthead of his commanding admiral's ship, "I can't see it." But that case is no precedent of any value in jurisprudence.

It is said that the filing of an amended petition required some order of the circuit court in the premises. We find no authority for that. We see no reason for it. The cause was pending, the court had appointed a commissioner to take testimony, and that order was not restricted to one petition or another. The commissioner stood informed of the filing of the amended petition. His order to go on stood in full vigor, and petitioner was without any power to break up the commissioner's court. For aught we can see, the commissioner proceeded in strict compliance with the statute. Rev. St. 1900, §§ 6350, 6384; *Id.*, § 6404. The provisions of the statute relating to the taking of depositions de bene esse are in the nature of the old chancery practice relating to a bill of discovery, entitling the party to sift the conscience of his adversary. *Eck v. Hatcher*, 58 Mo., loc. cit. 239; *Larimore v. Bobb*, 114 Mo., loc. cit. 453, 21 S. W. 922.

There are other questions in the case we deem immaterial.

We think the prisoner should be remanded to the custody of the sheriff. To rule otherwise would countenance disrespect to an officer, an arm of the court, performing his proper duty, and would strike down the good purposes of the statutes. It is our order that petitioner pay the costs of this proceeding and be remanded to the custody of the sheriff. On this record he can get relief by testifying, not by habeas corpus. All concur, except VALLIANT, J., who is absent.

RYAN v. KANSAS CITY et al.

(Supreme Court of Missouri. October Term, 1910.)

In Banc. For majority opinion, see 134 S. W. 566.

KENNISH, J. I cannot concur in the opinion of the court, or in the concurring opinion, delivered in this case, for the reason that the law, as declared therein, is not only in conflict with the former decisions of this court and the current of authority upon that subject, but also because, under the facts of this case, the law as thus announced deprives a traveler upon a sidewalk in a city of the benefit of a principle of law, the existence of which both opinions concede. *Heberling v. Warrensburg*, 204 Mo. 604, 103 S. W. 36; *Perrette v. Kansas City*, 162 Mo. 238, 62 S. W. 448; *Hitt v. Kansas City*, 110

Mo. App. 713, 85 S. W. 669; *Langan v. Railway Co.*, 72 Mo. 392; *Porter v. Railway Co.*, 60 Mo. 160; *Mathews v. City of Cedar Rapids*, 80 Iowa, 459, 45 N. W. 894, 20 Am. St. Rep. 436; *Earl v. City of Cedar Rapids*, 126 Iowa, 361, 102 N. W. 140, 103 Am. St. Rep. 361; *Kaiser v. Hahn*, 126 Iowa, 561, 102 N. W. 504; *Ryan v. Foster*, 137 Iowa, 737, 115 N. W. 595, 21 L. R. A. (N. S.) 969; *Lerner v. Philadelphia*, 221 Pa. 294, 70 Atl. 755, 21 L. R. A. (N. S.) 614, and authorities cited and reviewed in the annotation of that case; *Elliott on Roads & Streets*, p. 678.

The importance of the subject and the conviction that the court has taken an erroneous view of the law requires, and is my apology for, a brief discussion of this case and the cases relied upon and referred to in the majority opinion.

The facts of this case, as well as the instructions given on behalf of the city and of which complaint is made on this appeal, are stated fully and fairly to the appellant in the opinion of the court herein. However, as appellant complains of error in the giving of four separate instructions, and as defendant's instruction numbered 10 D more sharply presented to the jury the alleged error complained of, I shall set that instruction out and use it as a basis for what is here said, rather than instruction numbered 4 D, which is taken as typical and set out in the opinion of the court. It is as follows: "The jury are instructed that it was not necessary for the plaintiff to have had actual knowledge of the excavation in the street, if any, for such knowledge to be imputed to her. Although the plaintiff may not have known of the excavation, if any, yet, if she should, by the exercise of ordinary care, have discovered the condition of the street at the point in question and should, by the exercise of ordinary care, have avoided the same, then the jury will find for the defendants."

It is conceded by all that it is the duty of the city to keep its sidewalks in a reasonably safe condition for travel, and that the pedestrian has the right to rely upon the presumption that the city has done its duty and that the sidewalk is in a reasonably safe condition. Notwithstanding the foregoing presumptions of the law, recognizing on the one hand the duty of the city and on the other the presumption in favor of the footman, under which, as said, he may "walk by a faith justified by law," this court approves an instruction which told the jury that, although the plaintiff did not know of the excavation in the sidewalk, "yet if she should, by the exercise of ordinary care, have discovered the condition of the street at the point in question," and by like care could have avoided the same, the jury should find for the defendants.

It is apparent, upon a mere statement of this proposition, that the presumption upon which plaintiff was entitled to rely was en-

tirely ignored, and she stood before the jury not protected by the presumption that the walk was safe, but, as a condition to her right of recovery, was required to have used ordinary care to have discovered the pitfall which the city had negligently permitted to remain in the sidewalk in the nighttime, unguarded by signal or barrier. This instruction, when considered in connection with the presumption upon which plaintiff had the right to rely, leads to the unreasonable result that the plaintiff might travel the street, relying upon the presumption that it was in a reasonably safe condition while, at the same time and place, she was required to use ordinary care to discover whether or not it was in fact in a reasonably safe condition. The answer to such an anomalous doctrine was well stated in the unanimous opinion of division No. 2 of this court in *Perrette v. Kansas City*, 162 Mo., loc. cit. 250, 62 S. W. 451, in which Burgess, J., speaking for the court, said: "It is asserted that the action of the court in refusing the sixth instruction asked by the defendant was reversible error. The argument is that, although defendant may have been guilty of negligence in failing to keep its sidewalk where the accident occurred in a reasonably safe condition for travel, yet, if plaintiff failed to use ordinary care in discovering the condition of the sidewalk, and by reason of such failure he was hurt, he was not entitled to recover. The law, however, did not impose upon plaintiff the duty of looking for defects in the sidewalk, which, in the absence of knowledge of its dangerous condition, he had the right to assume was reasonably safe for travel; hence no error was committed in refusing this instruction."

And in the case of *Hitt v. Kansas City*, 110 Mo. App. 713, 85 S. W. 669, in discussing the same subject, the court said: "It is insisted that plaintiff had ample opportunity for knowledge of the condition of the sidewalk to have avoided the injury. If the fact that the place was well lighted is to be taken as conclusive evidence against her, then defendant's contention is correct; otherwise, it is not. That is all the evidence in the case that would have justified the jury in finding that the plaintiff was not in the exercise of ordinary care. If she had looked for the defect, she would undoubtedly have seen it. But she was not required to do this. She had the right, in the absence of knowledge to the contrary, to feel secure, presuming that the city had performed its duty in keeping its sidewalks safe; and the fact that the place was well lighted was no evidence of itself, unsupported by any other fact, showing want of care or of negligence on her part. * * * If she had had knowledge of the condition of the sidewalk before she stepped into the hole, there would have been no such presumption. But, so long as it was shown that the defect was there and unknown to plain-

tiff, she had the right to presume that it was safe."

In *Langan v. Railway Co.*, 72 Mo. 392, in discussing the question of alleged contributory negligence upon the part of the plaintiff, this court said: "Negligence is not imputable to a person for failure to look out for a danger, when, under the surrounding circumstances, the person sought to be charged with it had no reason to suspect that danger was to be apprehended."

In the case of *Heberling v. Warrensburg*, 204 Mo. 604, 103 S. W. 36, Judge Gantt, voicing the unanimous opinion of division No. 2 of this court, condemned an instruction containing the same identical doctrine as is approved in the opinion in this case, and upon facts, so far as the principle of law is concerned, not at all dissimilar from the facts of this case. As concisely stated in the syllabus of that case, the court held: "It is not the duty of a person traveling on a public street to examine the street for defects; but he may act upon the presumption that it is reasonably safe so long as he conducts himself as a reasonably prudent person would do under like circumstances." And the court quoted, with approval, from the *Perrette Case*, supra, that: "The law, however, did not impose upon plaintiff the duty of looking for defects in the sidewalk, which, in the absence of knowledge of its dangerous condition, he had the right to assume was reasonably safe for travel."

The opinion in this case concedes that there is a conflict between the law as therein declared and the *Heberling Case*, but holds that the latter case is not in harmony with *Wheat v. City of St. Louis*, 179 Mo. 579, 78 S. W. 790, 64 L. R. A. 292, *Coffey v. Carthage*, 186 Mo. 585, 85 S. W. 532, and *Woodson v. Met. St. Ry. Co.*, 224 Mo. 685, 123 S. W. 820. An examination of these cases will show that so far as they announce a different doctrine from that of the *Heberling*, *Perrette*, and *Hitt Cases*, supra, they are founded mainly upon what is a pure dictum in the *Wheat Case*, and upon an Iowa case which, it is respectfully submitted, lends no support to the correctness of the defendant's instructions in this case. The Iowa case (*Yahn v. City of Ottumwa*, 60 Iowa, 429, 15 N. W. 257), cited and relied upon as authority in the *Wheat Case*, supra, and again in this case, has been commented upon and distinguished in the later case in that court of *Mathews v. Cedar Rapids*, 80 Iowa, 459, 45 N. W. 894, 20 Am. St. Rep. 436, which will be found to be express authority against the law as announced by the court in this case.

The law, as announced by the Supreme Court of Iowa in that case, is affirmed by that court in the three later cases cited at the beginning of this dissenting opinion, in one of which, namely, the *Earl Case*, it is said: "Of course one cannot close his eyes and walk blindly and heedlessly into a place

of danger. On the other hand, he is not bound to be on the lookout for hidden dangers. All that is required of him is that he walk with his eyes open, observing his general course, and in the usual manner."

In view of the fact that both the Heberling Case and the opinion in this case, which admittedly hold opposing doctrines, claim to be in accord with the Coffey Case, I shall not discuss the latter case further than to say that upon an examination thereof it will be found to require not alone an absence of ordinary care upon the part of the plaintiff, as constituting contributory negligence, but, in addition, the affirmative conduct that she "proceeded carelessly and without paying any attention to where she was walking." It was not held in the Heberling Case, nor is it now claimed to be the law, that a footman may go along the sidewalk carelessly, paying no attention to where he is walking, so that he would fail to see plain and obvious obstructions and when injured thereby not be guilty of contributory negligence; but there is a wide gulf between that character of conduct of a footman and that which requires him to use ordinary care to discover defects in a sidewalk which he has the right to assume is safe.

The cases relied upon by the majority opinion go back, for authority to uphold the doctrine of defendant's instructions, to the case of Wheat v. St. Louis, supra. It is shown by the facts of that case that the plaintiff in the daytime drove upon an elevation in the street around a manhole, without noticing the obstruction; that his wagon was turned over, and the plaintiff was injured; and that "plaintiff knew all about the manhole and had seen it and had driven around it every day for a year." Upon that state of facts, this court, in holding that the plaintiff was not entitled to recover, outside of the facts of the case in judgment, said it was the duty of the citizen to use his "God-given senses and not to run into obstructions that he was familiar with or by the exercise of ordinary care he could discover and easily avoid." It is obvious that the clause which the writer has italicized sought to state the law upon facts not before the court, and that the decision to that extent is not binding upon this court as a precedent. A number of cases cited in that case support the doctrine that, where a person knows of a defect or obstruction in the highway, he must use ordinary care to avoid it; but, as it is not held in any of the cases relied upon and cited in this dissent that the presumption of the safe condition of the sidewalk ever obtains in favor of a person who has actual knowledge of its unsafe condition, the use of the Wheat Case and the cases therein cited, as a foundation for the doctrine of the court in this case, is like building a house upon the sand.

The instruction in Yahn v. City of Ottumwa, supra, cited in the decision herein, and

hereinafter set out, will be found widely different from the instructions in this case. Reviewing the Yahn Case, the Iowa Supreme Court, in the case of Mathews v. Cedar Rapids, supra, in which the former case was cited by one of the parties as sustaining the principles of law announced by the court in this case, said: "Appellees cite with much confidence the case of Yahn v. City of Ottumwa, 60 Iowa, 429 [15 N. W. 257], to support the instruction given; but there is a clear distinction. In that case the plaintiff and his wife were just starting with their team on a street in the defendant city, when the wheel of the wagon struck a stone, and the wife was injured by falling from the wagon. The court refused an instruction to the effect that 'it was the duty of the plaintiff's husband to use care in driving, and look where he was driving, and to avoid all obstacles which were plainly visible, and not obscured; and if he failed to do so, and the plaintiff was thereby injured, then she cannot recover.' This court held that the instruction asked, or some other applicable to the view of the facts stated, should have been given, and said: 'When an obstruction is in the street, in plain view of the driver of a vehicle, and his attention is in no manner diverted so as to excuse him from seeing the obstruction, and he drives against it or into it, he is clearly guilty of contributing proximately to any injury which may result.' It was a case of an obstruction on the surface of the street, against which there is no presumption. All persons know that temporary obstructions occur on streets and sidewalks; and it is not an unreasonable rule to hold that if in plain sight, and there is nothing to divert the attention of the traveler, he must notice them. The distinction is this: Such obstacles as are known to be present—as, for instance, boxes and barrels on a sidewalk, and vehicles, building material, and rubbish in the street—challenge the attention of the traveler; and if, without excuse, he fails to observe them, and encounters them to his injury, the judgments of men would agree that he is negligent. But matters which he may not anticipate, as likely to occur, do not challenge such attention; and a failure to observe and avoid them is not, as a matter of law, negligence. It is also true that what might, as a matter of law, be diligence on a sidewalk, would not be in driving a team on a public thoroughfare in a city. Greater watchfulness to avoid accident in the latter case is certainly demanded, and for manifest reasons. * * *

The two special findings to the effect that the light was sufficient to enable a person to see the opening, and that, if plaintiff had looked, he could have seen it, do not change the result; for we have considered the case upon the theory of such being the facts."

Applying the law of that case to the facts of the case before us, we find that, instead of requiring the plaintiff to use ordinary care

to discover a defect in the sidewalk, it is held that, even if the plaintiff could have discovered the defect had she looked, it would not follow that she was guilty of contributory negligence for not having done so, and for the reason that she had the right to rely upon the presumption that the sidewalk was safe. Reliance upon that presumption does not mean that a person may go along the street, as the plaintiff in the Coffey Case, proceeding carelessly and without paying any attention to where she is walking, and be free from negligence, for persons in all relations of life are required to use care and caution; but it does mean that the multitudes who every day and night travel the sidewalks of our cities are not required, as a condition precedent to a recovery for an injury received, to use ordinary care to discover defects in the sidewalk. If they are going about their business, not looking for or thinking about dangers, relying upon the belief that the walk is safe, looking where they are going and seeing and avoiding obstructions which are plainly obvious, they shall not be held at fault and denied redress merely because they did not use ordinary care to discover an unguarded excavation into which they may have fallen, and which, under the law, they had a right to presume did not exist.

It was stated at the outset of this dissent that the opinion of the court is opposed to well-considered former decisions of this court and the current of authority upon the subject, and it is now submitted that an examination of the many cases cited in support of the law as herein contended for will fully bear out that statement.

WOODSON, J., concurs in this opinion.

SHELTON v. HORRELL et al.

(Supreme Court of Missouri. Feb. 9, 1911.)

1. APPEAL AND ERROR (§ 837*)—REVIEW—PLEADING.

In reviewing the sufficiency of a bill the appellate court may resort to the pleadings, but not to the evidence.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3262; Dec. Dig. § 837.*]

2. QUIETING TITLE (§ 7*)—EQUITY JURISDICTION.

Equity has inherent jurisdiction of a bill to remove a cloud on a land title.

[Ed. Note.—For other cases, see Quietting Title, Cent. Dig. §§ 14-33; Dec. Dig. § 7.*]

3. QUIETING TITLE (§ 34*)—REQUISITES OF BILL.

A bill to remove cloud from a land title must allege what title or interest plaintiff has in the property.

[Ed. Note.—For other cases, see Quietting Title, Cent. Dig. § 73; Dec. Dig. § 34.*]

4. QUIETING TITLE (§ 34*)—BILL—SUFFICIENCY.

A bill to remove a cloud from a land title must show title in plaintiff when suit was

brought; allegation of legal title several years before being insufficient.

[Ed. Note.—For other cases, see Quietting Title, Cent. Dig. § 73; Dec. Dig. § 34.*]

5. TAXATION (§ 809*)—QUIETING TITLE AGAINST TAX DEED—BILL—REQUISITES.

A bill to quiet title against a tax deed as against subsequent purchasers under the tax sale purchaser, was bad for failing to aver notice to them of irregular acts of the sheriff in selling the land, or that they took under a quitclaim deed.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. §§ 1600-1604; Dec. Dig. § 809.*]

6. TAXATION (§ 805*)—QUIETING TITLE AGAINST TAX DEED—LACHES.

Plaintiff is barred by laches from suing to quiet title against a tax deed as against subsequent purchasers from the tax sale purchaser, where he ceased to regard the land as an asset, knew of the tax sale for 10 years, and is prompted to sue because of the land's enhanced value.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. §§ 1593-1597; Dec. Dig. § 805.*]

7. DEEDS (§ 121*)—QUITCLAIMS—TITLE ACQUIRED.

A quitclaim deed gives no better title than the grantor had.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. §§ 394-400; Dec. Dig. § 121.*]

8. EQUITY (§ 71*)—LACHES—DETERMINATION.

Laches is measurable by conduct of the parties and equities, rather than by limitations.

[Ed. Note.—For other cases, see Equity, Cent. Dig. §§ 204-211; Dec. Dig. § 71.*]

9. TAXATION (§ 790*)—IRREGULAR TAX SALES—REMEDIES.

A remedy against an irregular tax sale is a direct motion or timely bill to set it aside.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. §§ 1570, 1572, 1573; Dec. Dig. § 790.*]

Valliant, C. J., and Brown, J., dissenting.

In Banc. Appeal from Circuit Court, Ste. Genevieve County; Chas. A. Killian, Judge.

Action by William Shelton against J. A. Horrell and another. Judgment for defendants, and plaintiff appeals. Affirmed.

The following is the opinion of Graves, J., in Division No. 1:

"The sufficiency of the petition and the character of this action are in dispute. Plaintiff in the brief styles it 'a suit in equity * * * for the purpose of removing a cloud from the title to one hundred and sixty acres of land.' The substantive charges of the petition are: (1) That on and prior to September 11, 1897, plaintiff owned in fee the land in dispute, which is 160 acres of land in Pemiscot county. (2) That on September 11, 1897, the then sheriff of Pemiscot county sold said land at execution sale under tax judgment, and delivered to the purchaser thereof a tax deed which was recorded in that county, and that such deed is a cloud upon plaintiff's title. (3) That said tax deed should be canceled, set aside, and for naught held, because (a) that the sheriff failed to divide the land into subdivisions, but sold it in solido in violation of law.

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

whilst said land was susceptible of four subdivisions, either of which would have brought more than the whole taxes, interest, and costs; (b) that said land was at date of sale worth \$1,200, and had the sheriff complied with the law and sold only one subdivision plaintiff would have had left 120 acres of the value of \$900; (c) that plaintiff had no knowledge of such sale or pretended sale until a few months prior to — day of February, 1905, at which time suit was brought for its recovery, but which suit was dismissed in November, 1905; (d) that plaintiff never directed that said land be sold in solido, but had he known of the sale he would have directed it to be sold in the smallest legal subdivisions; (e) that plaintiff has never received any of the surplus funds from the sale nor authorized any one to receive them for him; (f) that said tax deed fails to state the taxes due for the different years for which it was sold; (g) that the land in question, with accrued taxes of only \$9.87 was sold to pay a judgment for \$39.66, which was rendered for taxes on this and other lands, which lands, taken together, did not constitute one tract, but lie in three separate tracts; (h) that no levy was ever made prior to the sale; (i) that no special execution was ever issued by the circuit clerk authorizing the sale by the sheriff.

"The foregoing is a complete and full analysis of the petition. Following that part of the petition thus above analyzed is a paragraph offering to pay the amount of the bid at the sheriff's sale, and all taxes with interest, subsequently paid, and a further paragraph averring the nonresidence of defendant Mrs. A. Horrell. Then follows the prayer in this language: 'Wherefore, plaintiff prays that said deed be canceled, set aside, and for naught held, and that the court try, ascertain, and determine the estate, title, and interest of the plaintiff and the defendants herein respectively in and to the real estate aforesaid, and for such other and further relief as to the court may seem meet, just, and proper in the premises.' Defendants' answer makes certain admissions and states their defense. The admissions are (1) that plaintiff owned the land on September 8, 1897, and that on said day it was sold for taxes, but aver that the sale was by order of court and under a special execution duly issued commanding the sheriff to sell the same or so much thereof as was necessary to discharge the state's lien for taxes; (2) admit that the land was sold under a judgment of the Pemiscot circuit court, but aver that the judgment was valid and regular, and was for past-due taxes owing to the state.

"Following these are numerous allegations going to make up the charge and defense of laches, and then follows a plea of former adjudication. After these, the defendants admit the sale, and aver that they own the

land in fee simple. All other allegations of plaintiff's petition not specifically mentioned are denied. Such is, in substance, the answer. Judgment was for defendants, and plaintiff has appealed.

"The constitutive allegations in the defense of laches and former adjudication we have left to be taken with the evidence bearing thereon. These and the evidence can best be discussed in the opinion under the points made. This sufficiently states the case.

"1. The insufficiency of this petition as a bill in equity to remove cloud upon title is attacked in this court. It might be added here that not only does plaintiff call his pleading a bill in equity in the brief filed in this court, but in entitling his cause in the court below he so denominated his action. Considering the instrument to be such as plaintiff denominates it to be, how stands it as to sufficiency? In determining the sufficiency of a bill, resort may be had to the pleadings in the case, but not to the evidence. We say the pleadings in the case, because, after judgment and on attack in this court, the doctrine of *alder by answer* may be invoked. The petition was filed in the court nisi on April 12, 1906. There is not an allegation in the instrument which avers that plaintiff either had the equitable or legal title to this land at the date this suit was brought. The only averment is that he had the legal title September 11, 1897. If it can be said that the succeeding allegations show that on that date his legal title was changed to an equitable one or to a clouded title, by reason of the sale and accompanying circumstances yet there is no allegation that plaintiff retained this equitable or clouded title from September 11, 1897, to the date of filing his suit. We are left to infer that he had not parted therewith in all these years. If this bill states a cause of action at all it states a cause of action to remove a cloud from the title. In 17 Encyc. of Plead. and Prac. p. 278, such bill is thus defined: 'A bill to remove a cloud is a bill to procure the cancellation, delivery up, or release of an instrument, incumbrance, or claim constituting a cloud on the plaintiff's title, and which may be used to injure or vex the plaintiff in the enjoyment of his title.' Of such a bill equity has inherent jurisdiction, independent of statutes. The same authority at page 279, thus speaks: 'Equity has inherent original jurisdiction of bills and complaints to quiet title and to remove clouds. Indeed this is an independent head or source of equitable jurisdiction, not requiring any accompaniment of fraud, accident, mistake, trust, account or other basis. Such bills are merely an illustration of the ancient *quia timet* jurisdiction exercised by courts of chancery. The jurisdiction is exercised with great caution.' One of the prerequisites of such bill is that it must allege what title or

interest the plaintiff has in the property. If such allegation is absent, the bill is demurrable. 17 Encyc. of Plead. and Prac. p. 327. This bill fails to allege that the plaintiff had any interest in the property at the time he brought his suit. It can be taken as true that he had the legal title in 1897, yet without some further averment as to the condition of the title at the institution of the suit the bill is bad. Plaintiff should aver that he had some interest at the time he invokes equity.

"The petition is bad for another and further reason. It fails to aver that the defendants had notice of the irregular or unlawful act of the sheriff. From the bill it may be deduced that the defendants are subsequent grantees of the tax sale purchaser. On this question the bill says: 'Plaintiff here and now offers to pay to the defendants, William Hunter and J. A. Horrell, the amount paid by them or their grantor for said lands at said sheriff's sale, together with what taxes they have since paid on said lands, with interest thereon since the date of said pretended sale.' The use of the phrase 'or their grantor' indicates that the pleader meant that they were subsequent grantees. Such is the fact in evidence, but the evidence should not be considered in weighing the sufficiency of the bill. It appears by the evidence that defendants bought from one Stacy, the purchaser at the tax sale, and took from him a quitclaim deed. The bill should have averred that they took with notice of the act of the sheriff, or it should have alleged that they took by quitclaim deed. The failure to make such an allegation is fatal to the bill. The bill must be measured by its own allegations, and not by the facts in evidence. *Shelton v. Franklin*, 224 Mo. 342, 123 S. W. 1090; *Griffin v. Franklin*, 224 Mo. 667, 123 S. W. 1096. To our mind this bill fails to state a cause of action against the defendants.

"In the *Shelton Case*, *supra*, which case received as much consideration from this court as any case of recent years, we said: 'From the cases we take the rule to be: (1) That the statute is directory; (2) that by it some discretion is allowed the officer; (3) that an abuse of this discretion may be and should be reviewed by the court either upon motion or direct attack by a bill in equity; (4) that this attack should be made in seasonable time; (5) that the abuse of the sheriff's discretion by a sale in *solido* is only an irregularity which may render the sale and deed voidable and not void. To these conclusions may be added that the attack by bill in equity is good as against a subsequent purchaser with knowledge or notice of the unwarranted violation of the sheriff's discretion and knowledge or notice of the injury done the execution debtor thereby. So that, under these authorities, the deed in question is not void upon its face for the reason now under discussion, but is

only voidable. To make a case the plaintiff would have to show: (1) A sale in *solido*; (2) that such was abuse of the discretion lodged with the sheriff; (3) consequent damage and injury to the judgment debtor; (4) a seasonable application for redress; and (5) if against a subsequent grantee knowledge and notice upon his part of the things mentioned in the preceding paragraph and reiterated in the first three numbered subjects in this paragraph.' What must be shown must likewise be properly brought to an issue by proper pleadings.

"2. Nor does it state a good cause of action under our old section 650. Under that statute the plaintiff must state his interest in the property. Such interest must be a present rather than a past interest. This pleading does not undertake to state a present interest in the lands involved. To say that this instrument stated a cause of action either under the statute or in equity would be to wipe out the rules of pleading. If I bring a suit in replevin and say that 3 years ago I was entitled to the possession of certain chattels, it is not equivalent to saying that I am now so entitled. So, too, if I aver that 10 years ago I owned certain real estate, that is not equivalent to saying that I now have some interest therein. Plaintiff must prove an interest at the date he filed the suit and what must be proven must be pleaded, where it goes to the essence of the case.

"3. But even if it be granted that the scantily worded petition states a cause of action, yet the plaintiff has been guilty of such laches as should debar his recovery in this case. According to the sheriff's deed this land was sold September 8, 1897, to W. L. Stacey. These defendants bought of Stacey March 18, 1900, or two years and a half thereafter. They paid \$800 and took a quitclaim deed. The plaintiff's deposition was read in evidence. On examination in chief he said: 'My name is William Shelton; age, 82 years; and reside now at Sanford, Kentucky. I bought 640 acres of land in Pemiscot county, Missouri, from J. B. English of Bowling Green, Missouri. I don't remember exactly the year I bought the land. After the purchase I paid taxes on the land for many years for which I received tax receipts. Owing to the fact that the tax continued increasing from year to year, and to the fact that I had so many other uses for the money I had, I stopped paying the taxes, and the lands were sold for the taxes. Owing to the fact that the value of the lands increased, and to the fact that more of the land was sold to pay the tax than was necessary, I authorized Messrs. Duncan & Bragg to bring suit for the recovery of the land. All the land was not sold for the taxes. Some of the tax receipts are now in the possession of my attorneys, Messrs. Duncan & Bragg, of Caruthersville, Missouri. All of

the land was not sold for taxes.' As a part of his cross-examination he further said: 'Q. When did you hear from Messrs. Duncan & Bragg in regard to this land? A. About five or six years ago, I think. Q. When did you first hear when the lands were sold for taxes? A. I think about ten years ago. Q. You never authorized the bringing of a new suit? A. (Plaintiff declined to answer.) I paid very little attention to the Pemiscot county lands and I do not remember. Q. You did not consider your Pemiscot county lands as assets of your estate? A. That was about the way of it.' The judgment in this case was entered April 30, 1907, and whilst the record does not show the time this deposition was taken, it must have been before the trial. If, as plaintiff says, he knew this land was sold for taxes 10 years before the taking of his deposition, he knew that fact 2 years or more before the defendants bought. Defendants swear they had no actual knowledge of the alleged misconduct of the sheriff.

"In *Shelton v. Franklin*, supra, we said: 'To make a case the plaintiff would have to show (1) a sale in solido; (2) that such was abuse of the discretion lodged with the sheriff; (3) consequent damage and injury to the judgment debtor; (4) a seasonable application for redress; and (5) if against a subsequent grantee, knowledge and notice upon his part of the things mentioned in the preceding paragraph, and reiterated in the first three numbered subjects in this paragraph.'

"Under this evidence is this application seasonable? Does it not show that the defendant had in effect abandoned his property and did not even reckon it as an asset of his estate? He waits practically 10 years after he acquired knowledge of the fact that his property had been sold for taxes, and then 'owing to the fact that the value of the lands increased' he concludes to disturb the title of the defendants, who without actual knowledge had paid \$800 for the property. Defendants took under a quitclaim deed it is true and stand in no better shoes than their grantor, the purchaser at the tax sale, but that is only a circumstance to be considered in applying the beneficent doctrine of laches, if indeed it could be said to be even a circumstance. Plaintiff with this knowledge stands by and permits them to pay their money and afterward to pay taxes on the land without taking a seasonable step to assert his rights.

"Speaking to the question of laches, through Lamm, P. J., in the very recent case of *Rutter v. Carothers*, 223 Mo., loc. cit. 640, 122 S. W. 1059, this court said: 'Laches gives rise to an equitable doctrine, free from artificial or fixed rules, having regard to the relations of the parties to each other and to the subject-matter to be applied to each case in accordance with its own particular circumstances in order to reach substantial justice—for instance where plaintiff lies by an

unreasonable length of time awaiting a rise in land or some future event to determine his course, or where by acquiescence or by sleeping upon his rights he creates the belief in others that those rights are abandoned whereby he influences them to act on such belief or where something has intervened whereby the party asking relief would obtain an unconscionable advantage if the relief was given. Under these or like conditions, where there is some natural justice behind the claim, the defense of laches is allowed independently of the statute of limitations. *Cockrill v. Hutchinson*, 135 Mo., loc. cit. 75 et seq. [36 S. W. 375, 58 Am. St. Rep. 564]; *Stevenson v. Smith*, 189 Mo., loc. cit. 446 et seq. [88 S. W. 86]; *Landrum v. Bank*, 63 Mo., loc. cit. 56 et seq.; *Bucher v. Hohl*, 199 Mo., loc. cit. 330 [97 S. W. 922, 116 Am. St. Rep. 492].'

"It was the doctrine herein announced that prompted the rule of 'seasonable application' in the *Shelton v. Franklin* Case, supra. A person should not be permitted to abandon his property as to the payment of taxes and the discharge of tax liens, and then after the state has enforced its lien wait for years to question the act of a sheriff, who has some discretion as to the manner of sale. In this case the plaintiff admits that owing to increased tax rates he had in effect abandoned his property to the state. He admits that he only concluded to question the sale after the land had advanced materially in value. He forgets that by timely efforts he could have prevented defendants from expending their money for the land, if his contention now is good. He stands to one side for nearly 10 years, knowing that his land had been sold for taxes. During this time the defendants were permitted to expend their money for the land, and thereafter to pay the taxes thereon. In the meantime by reason of the construction of a public levee, the price of the property greatly increased. This character of conduct should be condemned, and the doctrine of laches reaches it. Laches as we understand the rule is not measured by the yard stick of the statute of limitations, but rather by the conduct of the parties and the equities of the situation. The plaintiff in this case has introduced no evidence showing that he was injured by a sale in solido. On the other hand, the defendants offered evidence to the effect that there was no injury by reason of the sale having been made in solido.

"Applying the doctrine of laches to cases of this kind, the federal courts have announced some salutary rules. In the case of *Lemoine v. Dunklin County*, 51 Fed. 487, 2 C. C. A., loc. cit. 347, Justice Caldwell for the United States Circuit Court of Appeals said: 'Laches is imputed independently of the statute of limitations. Courts of equity apply the doctrine on principles of their own, and time is only one of the circumstances to be considered in its application. It is set-

tled, say the Supreme Court, "that laches is not, like limitations, a mere matter of time, but principally a question of the iniquity of permitting the claim to be enforced—an iniquity founded upon some change in the condition or relations of the property or the parties." *Gallher v. Cadwell*, 145 U. S. 368, 12 Sup. Ct. 873 [36 L. Ed. 738]; *Godden v. Kimmell*, 99 U. S. 201 [25 L. Ed. 431]; *Mackall v. Caslear*, 137 U. S. 536, 11 Sup. Ct. 178 [34 L. Ed. 776].

"The distinction drawn is that there should be a changed condition of the property or the parties. That in this case there has been a changed condition of the property there can be no question. Plaintiff so testifies. That the parties were misled by the inaction of the plaintiff likewise appears from the record. Had plaintiff brought an action when he first learned that his land had been sold, the defendants might have been saved the worry of this suit. Under the law plaintiff had two remedies: (1) A motion in the original case to set aside the sale, and (2) a timely bill in equity to set aside the same. Upon these rights he slept for nearly 10 years. Under the evidence which shows that the land had materially advanced in value, and to some extent through the efforts of the defendants, it will hardly do to say that there has not been a changed situation, which was occasioned by the laches of the plaintiff. He says that he abandoned his property to the lien of the state for taxes. He says that he voluntarily quit paying taxes, because he thought he could put his money to a better use. He says that he knew that his property had been sold for taxes shortly after the sale. He says further that he authorized this suit because after the sale the property had advanced in value.

"Mr. Justice Brewer, in the case of *Naddo v. Bardon*, 51 Fed. 493, 2 C. C. A., loc. cit. 337, has aptly and justly said: 'No doctrine is so wholesome, when wisely administered, as that of laches. It prevents the resurrection of stale titles, and forbids the spying out from the records of ancient and abandoned rights. It requires of every owner that he take care of his property, and of every claimant that he make known his claims. It gives to the actual and longer possessor security, and induces and justifies him in all efforts to improve and make valuable the property he holds. It is a doctrine received with favor, because its proper application works out justice and equity, and often bars the holder of a mere technical right, which he has abandoned for years, from enforcing it when its enforcement will work large injury to many.'

"Touching the question, *Hall, C. J.*, in the Supreme Court of Arkansas in the case of *Turner v. Burke*, 81 Ark. 352, 99 S. W., loc. cit. 77, has said: 'He concluded that the lands were not worth their tribute to the state, but the appellees had more faith in

their future and discharged the duties of landowners to the state; and whose equity is the stronger? The statement of the case answers it. The appellants are seeking to reap where they have not sown and to gather where they have not straved, and this is not the first time such conduct has caused loss. *Matt. xxv, 15-30.*'

"The learned judge then quotes from Judge Brewer as hereinabove quoted. Farther on the same judge says: 'So, if the title being beyond challenge, during these years he pays no taxes thereon, makes no effort to improve or increase its value, and by the labor and efforts of others, under the protecting powers of the state, large value has been given to it, the state may properly say to him, as may also the individuals who have thus wrought this change in value: "You abandoned the property when it was comparatively valueless. You have taken no share in the burdens of taxation or the support of the state. Others have tolled, paid taxes, and made the property valuable. Therefore, because of your shirking of duties and obligations, you shall not, whatever may have been the nature of your title in the first instance, be permitted to appropriate the value thus produced by others."'

"So in this case, the plaintiff's evidence shows that he abandoned this property when it was comparatively worthless. He left the state to take the property for the taxes. Having so done, he should not now be allowed to assert his claim of title. Especially is this true where he admits that he knew that his land had been sold some two years or more before the defendants acquired title. It was his duty after he acquired knowledge of the sale to make a timely application for relief. If he could not proceed by motion in the original case, there was open to him a timely application to a court of equity. This latter right he refused to exercise for years. To our mind, under the case law, the doctrine of laches precludes the right of the plaintiff to recover.

"4. There are but slight differences between this case and the *Shelton-Franklin Case*, supra. In the *Franklin Case*, the subsequent grantors took by warranty deed. In this they took by quitclaim deed. Taking title in that way, the subsequent grantee takes the title subject to all the equities existing between the owner of the land and the purchaser at the tax sale. In other words the subsequent purchaser under a quitclaim deed stands in no better situation than the original purchaser. The knowledge of the one is the presumptive knowledge of the other. This because of the character of the conveyance. But however this may be, it does not affect the doctrine of laches, if in fact the plaintiff has been guilty of laches. In the *Franklin Case*, supra, there was no quitclaim deed, nor was there evidence that the land was sold in solido. In this case we have both. In other words, the record shows

that defendants deraign title through a quitclaim deed, and there is some evidence as to the manner of sale. Yet this evidence is not very satisfactory or convincing. Whilst it seemingly appears from this record that no injury was done to the plaintiff by reason of the action of the sheriff, yet all these questions were for the court nisi. Upon what theory the court acted, we are unable to determine. But be this as it may, with the views we have upon the petition and the question of laches, the matter becomes immaterial. If the petition states no cause of action the judgment is not out of line. If the plaintiff is precluded by his laches the judgment is still correct. This, therefore, obviates a further discussion of the question as to what effect the quitclaim deed, and proof of a sale in solido, would have upon the case. As stated above the proof is very scanty upon the question of a sale in solido. What view the trial court took of this question is rendered immaterial in view of what we have concluded upon other points.

"Under the facts, excluding the question of the insufficiency of the petition, the judgment is for the right party. Upon the whole the judgment should be and is affirmed."

Sam J. Corbett, Duncan & Bragg, and Shepard & Shepard, for appellant. Oliver & Oliver, for respondents.

GRAVES, J. The foregoing opinion written in Division 1 is adopted as the opinion of the court in banc.

LAMM, WOODSON, and FERRISS, JJ., concur. VALLIANT, C. J., and BROWN, J., dissent. KENNISH, J., does not sit in the case. VALLIANT, C. J., has leave to file dissenting opinion hereafter.

WALTHER v. NULL.

(Supreme Court of Missouri. Feb. 9, 1911. On Motion to Modify Judgment, March 2, 1911.)

1. APPEAL AND ERROR (§ 893*) — SUIT IN EQUITY—REVIEW.

A suit in equity is tried anew on appeal; and the question on appeal is whether the chancellor on the legal evidence did equity.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3626-3666; Dec. Dig. § 893.*]

2. APPEAL AND ERROR (§ 1071*)—HARMLESS ERROR—FAILURE TO MAKE FINDINGS OF FACT AND CONCLUSIONS OF LAW.

The failure of the trial court in a suit in equity to make findings of fact and conclusions of law is not prejudicial to the party demanding the same, for they are merely advisory to the court on appeal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4239; Dec. Dig. § 1071.*]

3. TRIAL (§ 394*)—APPEAL AND ERROR (§ 1010*)—FINDINGS—CONCLUSIONS—STATUTES.

Rev. St. 1909, § 1972, requiring the court on request to make findings of fact separately

from the conclusions of law, applies only to actions at law, and the findings are in the nature of a special verdict which may not be interfered with on appeal, where there is substantial evidence to support them.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 924-926; Dec. Dig. § 894;* Appeal and Error, Cent. Dig. §§ 3979-3982; Dec. Dig. § 1010.*]

4. APPEAL AND ERROR (§ 1047*)—HARMLESS ERROR—ERRONEOUS RULINGS ON EVIDENCE.

In a suit in equity, rulings on evidence are of little or no controlling force on appeal as a general rule, for improper evidence received may be rejected by the court on appeal, and proper evidence offered and excluded and preserved in the record may be considered by the court on appeal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4132, 4133, 4146-4152; Dec. Dig. § 1047.*]

5. EXECUTORS AND ADMINISTRATORS (§ 241*)—ALLOWANCE OF CLAIM—CONCLUSIVENESS—MANNER OF ATTACKING.

A judgment of the probate court allowing a demand against a decedent's estate is conclusive except as against a direct attack by bill in equity or by a proceeding under Rev. St. 1909, § 220, authorizing a proceeding for the vacation of improper allowances against decedents' estates.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. § 849; Dec. Dig. § 241.*]

6. JUDGMENT (§ 445*) — DIRECT ATTACK — FRAUD.

Fraud justifying the setting aside of a judgment on direct attack is fraud arising on extrinsic and collateral matters, and not on the very issues presented in the pleadings, and passed on at the trial.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 841-844; Dec. Dig. § 445.*]

7. EXECUTORS AND ADMINISTRATORS (§ 238*)—JUDGMENT ALLOWING CLAIMS—VACATION—REMEDY.

Rev. St. 1909, § 220, authorizing proceedings within four months after the allowance of a demand against a decedent's estate for the vacation of the allowance, and the trial of the matter anew, does not oust equity of jurisdiction to set aside a judgment allowing a demand on the ground of fraud.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. §§ 844-848; Dec. Dig. § 238.*]

8. FRAUDULENT CONVEYANCES (§ 8*) — ACTS CONSTITUTING FRAUD.

Where a conveyance by a grantor operated as a fraud on an existing creditor subsequently obtaining a judgment establishing after the grantor's death his demand, and the grantee knew of the creditor's demand and accepted without pay at the time a deed reciting a false consideration, and the arrangement by which the grantee should support the grantor was kept a family secret and withheld from the creditor, and the grantee paid out nothing either for support or for repairs on the premises, the deed was fraudulent as against the creditor.

[Ed. Note.—For other cases, see Fraudulent Conveyances, Cent. Dig. §§ 8, 9; Dec. Dig. § 8.*]

9. FRAUDULENT CONVEYANCES (§ 80*)—ACTS CONSTITUTING FRAUD.

An agreement for future support is not a sufficient consideration to support a conveyance as against existing creditors of the grantor; since, to uphold such a conveyance, an owner

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

might take his property from his creditors, and subject it to his own use.

[Ed. Note.—For other cases, see *Fraudulent Conveyances*, Cent. Dig. §§ 206-209; Dec. Dig. § 80.*]

10. EQUITY (§ 67*)—"LACHES."

"Laches" is an equitable doctrine applied independently of the statute of limitations to assist in reaching an equitable result.

[Ed. Note.—For other cases, see *Equity*, Dec. Dig. § 67.*]

For other definitions, see *Words and Phrases*, vol. 5, pp. 3969-3972; vol. 8, p. 7700.]

11. FRAUDULENT CONVEYANCES (§ 249*)—SUIT TO SET ASIDE—LACHES.

A son-in-law who fails to press his claim against his father-in-law in the lifetime of the latter, and who allows a grandchild of the father-in-law to hold title for four years under a deed whereby the father-in-law conveyed his entire property, is not guilty of laches precluding a suit to set aside the conveyance, as fraudulent as against creditors, especially where the grandchild was not actually injured by the delay.

[Ed. Note.—For other cases, see *Fraudulent Conveyances*, Cent. Dig. §§ 735-737; Dec. Dig. § 249.*]

Woodson, J., dissenting.

In Banc. Appeal from Circuit Court, Jefferson County; Jos. J. Williams, Judge.

Action by Ferd Walther against William H. Null, Jr. From a judgment for defendant, plaintiff appeals. Reversed and remanded.

Kleinschmidt & Reppy, for appellant.
Byrns & Bean, for respondent.

LAMM, J. From a decree dismissing his creditors' bill, plaintiff on due steps comes up by appeal. The cause, once submitted in division, came into banc because the Brethren disagreed.

Shortly, the case on the pleadings is this: The petition is in the nature of a creditor's bill. It charges that one John W. Null in 1901, then the owner of a farm in Jefferson county, Mo., of 362 acres, and then indebted to plaintiff on a promissory note for \$478.42, conveyed said farm to defendant with the intent to hinder, delay, and defraud his creditors, among them plaintiff, by a deed put of record; that the express consideration in the deed, \$10,000, was false and feigned; that no consideration passed, but the conveyance was voluntary; that thereby the grantor was made wholly insolvent and stripped of ability to pay his debts; that grantor died in 1905, and his estate was in charge of the public administrator and in process of administration; that he left no landed estate, and was so poor in worldly goods that his chattels were insufficient to pay funeral expenses and costs of administration; that plaintiff's said claim had been allowed by the probate court of Jefferson county for \$744.10, and thereby merged into a judgment for that sum and placed in the fifth class of demands; and that, unless said real estate can

be reached and subjected to such judgment, it will remain wholly unpaid. Wherefore, a decree was prayed that the conveyance be set aside as void through fraud and be certified to the probate court in order that the land might be dealt with there as a debt-paying asset of decedent's estate. Defendant answered, admitting the execution of the note and deed, denying all other allegations, averring, furthermore, that he bought the land in the ordinary course of business in good faith for full value, without any knowledge of the existence of a debt to plaintiff; that, if there ever was a debt, it had long since been paid and satisfied; that, moreover, it was barred by the statute of limitations; that, if any credits appear on the note, they had been put there for the purpose of keeping it alive, and were not made by decedent; that defendant, in possession of the land ever since his deed in 1901, had been to a large outlay in making permanent improvements; that plaintiff knew of defendant's purchase and acquiesced in the sale and transfer to him, in that grantor, after the transfer, lived in the village of Hematite (a village hard by the land) until his death; that plaintiff was his son-in-law and from the time of the transfer until his death made no claim on account of said note until grantor's death, either to him or defendant, nor did he ever claim or pretend to have a charge on or claim against said land until the death of grantor. The cause was heard below at the May term, 1906, of the Jefferson circuit court, and the chancellor took time to consider. At the January term, 1907, he refused to make a finding of fact and state his conclusions of law on the parol request of plaintiff, but entered a bald judgment dismissing the bill, plaintiff saving his exceptions. Presently, on the same day, plaintiff filed a written request for a finding of facts and conclusions of law, stated separately, which request was refused and plaintiff excepted. Error is assigned, first, on the foregoing rulings; and, second, on the decree, in that it was for defendant, and not for plaintiff.

1. There is no substance in the first assignment. The cause, being in equity, is here for consideration anew. Therefore the controlling question is, Did the chancellor, on the legal evidence in the record, seek equity and do it?—not whether he made a finding of fact. If he had made a finding and incorporated it into the record, its office would have been merely advisory. It would have been put as to us on the foot of a finding of a jury to him if he had asked one's advice on an issue of fact in an equity case. So runs the law. *Pitts v. Pitts*, 201 Mo. 356, 100 S. W. 1047. How could plaintiff be hurt on the merits ultimately by a failure of the court below to give the upper court mere advice (whether good or bad) by way of a finding of fact and conclusions of law? It has been

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

soundly ruled that the statute requiring a written finding of fact and conclusions of law (Rev. St. 1909, § 1972) on request pertains to lawsuits, and not to equity cases pure and simple. *Fitzpatrick v. Weber*, 168 Mo., loc. cit. 572, 68 S. W. 913. This ruling is grounded on the theory that in a lawsuit proper a finding of fact is of substance, it fills a due office, viz., it is in the nature of a special verdict which we may not interfere with on appeal if there be substantial evidence to support it. By and large the point has been considered newly and fully by our learned Brother Graves in a late case (*Miller v. McCaleb*, 208 Mo. 572, 106 S. W. 655 et seq.), and the above doctrine again promulgated on a review of the leading precedents. The student in jurisprudence, curious in that behalf, may find there such learning on the matter that it would seem to attempt to add anything of value would be to carry coal to Newcastle or owls to Athens. We rule the point against plaintiff.

2. Of the second assignment. Before disposing of the main question—that is, whether the decree did equity—there is a preliminary matter material to a statement of the facts (which this assignment necessarily seeks) to which we pass.

(a) The answer, *inter alia*, pleads matters going to the bona fides of plaintiff's debt. It charges that the debt was outlawed. There being certain life giving credits on the note, it alleges, in effect, that those credits were put there for a sinister purpose to toll the statute of limitations, and were not genuine. Further, it states that the debt had been paid and had gone out of existence in that way as well as by the flux of time. This assault in the pleadings on the standing of plaintiff as a creditor, discrediting the basis on which his right to relief rests, was followed by an elaborate attempt at the trial to prove the allegations of the answer. At the outset plaintiff objected to this line of investigation, but his objection was overruled. At other stages of the trial he protested against testimony tending to show that he had no debt against decedent; that it had been paid; that the credits were simulated, and the statute of limitations had barred his claim. But his objections were ineffective, and a great mass of testimony was introduced, much of it hearsay, loose talk, mere inferences, et cetera, having for their purpose proof of those allegations of the answer. In an equity suit rulings on evidence are of little or no controlling force on appeal as a general rule. That rule is founded on the doctrine that the appellate court tries such case *de novo* in a certain sense. Therefore, if improper evidence go in, we can reject it and no harm results. If proper evidence is offered and excluded, we can consider it when preserved in the record, and thus permit ourselves, sitting as a court of conscience, to reach a final and just conclusion despite rulings nisi on the admission of tes-

timony. But in a close case, or where a mass of irrelevant and prejudicial proof is allowed, we may never know what insidious effect the improper testimony had upon the mind of the trial chancellor. Such evidence tends to create an atmosphere about the case inimical to judicial and intellectual robustness and serenity of judgment. It puts the discriminating powers of the chancellor to a dangerous and unnatural test. It puts an enticing and alluring color in the case that tends to seduce the mind of the chancellor aside from the main-traveled road to ultimate justice. It puts a mote in his mind's eye. It may put a question mark after his decree. This plaintiff's debt was merged in a judgment—the most sacred form of obligation known to civilized man, one buttressed by those cardinal precepts of the law that forbid a man to be vexed twice on the same cause of action, that announce it to be to the interest of all the people that a legal controversy should be set at rest once for all—in one suit, with one day in court, not two. The allegations of the answer we are now considering, in view of the live judgment of the probate court, each and all finally passed thereby in *rem judicatam*. They are in a sealed book, whose leaves may not be opened and turned over for investigation by a collateral attack on that judgment; for, so long as it stands, it stands four square against every wind that blows. A legal assault on such a judgment can proceed along only two roads: (1) That of direct attack by a bill in equity, charging facts constituting fraud in the very concoction of the judgment itself; or (2) by a proceeding under the statute for setting aside improper allowances against estates pending in the probate court. Rev. St. 1909, § 220, *quod vide*. We may not think (to use the phrase of a wise judge) behind the judgment when we dare not go behind the judgment. To think where we dare not go is by innuendo to hoot a man out of his rights. We need not say whether the proper parties were before the court to set aside the judgment of allowance for fraud, because a proposition dispositive of the case on that head is that there are no allegations whatever in this answer charging fraud in its concoction. No facts constituting fraud are alleged, and no issue of that sort was raised, and therefore no evidence of that kind was admissible. By section 220, *supra*, if a litigant does not desire to go into equity to set a judgment aside on the only grounds permitted by equity rules, viz., fraud in its very concoction, by which is meant fraud arising on extrinsic and collateral matters and not on the very issues presented in the pleadings and passed upon at the trial (*Howard v. Scott*, 225 Mo., loc. cit. 713, 125 S. W. 1158 et seq.), he may choose the statutory method there marked out, viz., any executor, administrator, heir, or creditor, within four months after an allowance of a demand, may file in the office of the pro-

bate court the affidavit of himself or some credible person, stating that affiant has good reason to believe and does believe that such demand has been improperly allowed and shall furnish satisfactory evidence of that kind to the court, having given due notice to the opposite party, whereupon the court shall vacate the order of allowance and try the matter anew. That course was not pursued, although at the time this suit was brought, to wit, in time for trial at the May term, 1906, we take it the four months allowed by that statute for such application had not then run. But, whether the time had run or not, defendant had still left another arrow in his quiver, a suit in equity to annul the judgment. *Fitzpatrick v. Stevens*, 114 Mo. App. 497, 89 S. W. 897. These statutory remedies, absent preclusive words, do not oust the ancient jurisdiction of courts of chancery. *Arnett v. Williams*, 226 Mo., loc. cit. 118, 125 S. W. 1154 et seq. A probate court has jurisdiction to allow claims against estates of dead men and to marshal their assets. Hence a judgment rendered allowing the claim and assigning it to a class is as impregnable to attack collaterally as a judgment of a superior court. Those rules of law that clothe the one with a warm frock of protection clothe the other, and the very point up has been so ruled. *Clark v. Thias*, 173 Mo. 628, 73 S. W. 616. See, also, *Johnson v. Beazley*, 65 Mo. 250, 27 Am. Rep. 276; *Desloge v. Tucker*, 196 Mo., loc. cit. 601, 94 S. W. 283. On such premises, we take the mass of evidence tending to prove those allegations of the answer under discussion had no place in the case. Therefore we pass to the pertinent facts, omitting such irrelevant matter.

(b) The facts, summarized, are these: John W. Null, an old man, on the 2d day of October, 1901, owned the land in question, a farm of 362 acres, close by the village of Hematite, in the county of Jefferson. His wife died in 1900 and he had no homestead or other exemption as against creditors. On that day he conveyed the land by a warranty deed to defendant, his grandson, and within two months the deed was spread of record in the office of the recorder of deeds of that county. Among others, it contains the following recitals: " * * * That the said party of the first part, in consideration of the sum of ten thousand (\$10,000) dollars, to him paid by the said party of the second part, the receipt of which is hereby acknowledged, does by these presents grant," etc. And this in the habendum clause: "Subject to a deed of trust of \$2,500 dated July 12, 1900, given to Theodore Walther." The grantee was a young man, unmarried, about 23 years old, of no settled employment, partly depending on odd jobs of manual labor to get on in the world and partly on his father, Dr. Null, with whom he resided as a member of his family in St. Louis; and the grantor, the father of Dr. Null, also lived with the doctor at the time. Grantee had no means

worth while. Not a dollar of that express consideration was paid at the time or was intended to be paid, and the recital in the deed to that effect was false. The case is put to us by defendant on the theory the consideration mentioned was not the true one, but that there was another, presently to be considered. Defendant was not present when the deed was drawn and acknowledged. The grandfather, grantor, dictated the recitals to the scrivener, and the grandson afterward accepted the deed in its completed form. However, the idea of a swollen and simulated consideration for "speculative purposes" had been suggested by the grandson to the grandfather in prior conversations in the family, and the deed was written with a feigned and swollen consideration at the grandson's instance. Grantor left a family of children of mature years, and plaintiff was his son-in-law, married to one of them bearing the fireside name of "Lou." Grantor died in 1905. Plaintiff was a miller by trade, and for several years before grantor's death had resided continuously in Indiana, plying his trade. During that time he had not resided in Missouri, but had made visits to his wife's people—one at the death of his mother-in-law in 1900, one during the World's Fair and one when his father-in-law died in 1905. The record shows he was out of touch with the Null family affairs, was a stranger to the negotiations leading up to the conveyance questioned, and was not consulted about them. All he knew at the time was from casually reading in a Jefferson county paper an item of local news, noting the record of the deed and its purported consideration of \$10,000. At that time he held a live note against grantor, which, after grantor's death, was merged in a judgment of allowance by the probate court of Jefferson county for \$744.10, and which is in full vigor and wholly unpaid. There is persuasive testimony tending to show that Dr. Null in 1899, because of old age and business complications, took charge of grantor's affairs as his adviser and business manager. Just when he ceased to fill the confidential office of such adviser and manager is not clear. From the time the deed was made in 1901 until 1903, grantor resided with Dr. Null as a member of his family in St. Louis. There is inferential testimony that he continued to supervise grantor's affairs after the deed was made. Be that as it may, it was publicly known and recognized on all sides that grantor's affairs were in a bad way; that he was not managing them; and that the doctor had taken charge. In the line of that duty he hovered over the negotiations leading up to the deed in question, took an active part in bringing about the conveyance, and continued thereafter apparently with grantor's consent to supervise his affairs and speak for him in the matter of paying his debts. At the time of the conveyance and long before, it is of significance

that Dr. Null well knew of the existence of plaintiff's note as outstanding, and, what is more to the point, defendant himself knew of it. The allegations in his answer to the contrary are not sustained by the record. By the conveyance grantor beggared himself as to his creditors. This land was his only debt-paying asset. He still owned a trifle of personal property, which he died possessed of, appraised at \$34 and some cents, and knocked down for a dollar or two the rise of that by public vendue at the administrator's sale. We infer plaintiff is a man of modest means. He had a brother, Theodore, living in the neighborhood of Hematite. A year or more before the conveyance to defendant, Theodore and Dr. Null were either jointly interested in a plan for selling this land for \$10,000 to some mine promoters and exploiters, or else the plan was Dr. Null's, and was being developed with Theodore's knowledge. The scheme advanced to the stage that a deed was put in escrow for delivery on the payment of \$10,000. But that plan flashed in the pan and was abandoned. During its pendency, Theodore had custody of plaintiff's note for collection, and, as near as we can gather, this note was to be paid out of the proceeds if the deal had been consummated. Theodore, it seems, retained possession of the note. He had nothing whatever to do with the transfer to the grandson, and had no notice of its true consideration or aim, except from the record of the deed after it was an accomplished fact. The testimony satisfies me that, while plaintiff took no "legal" steps to collect the note, yet he desired Theodore, either before, after, or during the pendency of the abandoned plan, to talk to grantor, the maker of the note, about paying it, and was assured by him that he need not "worry," that the note would be paid. After the deed to the defendant, Theodore called Dr. Null's attention to the note as the manager of his father's affairs, and the doctor assumed to say the money would have to be borrowed to pay it, and that, as he was taking care of the business now, "Ferd don't need to worry about it. I will see it is paid." At another conversation later, he spoke to Theodore to the same effect. The disclosures of the record are of such a sort that the case may be taken as submitted on the theory that Theodore did not "want to sue the old gentleman," and did nothing more towards collecting the paper. In 1903 the grandfather ceased to live in the family of his son, Dr. Null, in St. Louis, and, as said, came to Hematite, and resided there for two years, until he died. When plaintiff came to his funeral, estate matters were brought up by Dr. Null. He suggested that plaintiff help himself to the few personal effects of decedent. Plaintiff declined to do that, and wanted to know what had become of the \$10,000 consideration paid for the land, which, deducting the deed of trust it was subject to, would leave

\$7,500. He was told by Dr. Null that no \$10,000 was paid; that "\$1 would make the sale legal." The question of paying plaintiff's note was then broached, and the doctor said: "When Will (meaning thereby, defendant) makes a sale, he will donate you something, or to Lou." The theory of a donation was repudiated by plaintiff with some heat, and the next step was the appointment of an administrator, the merging of the claim into a judgment, and finally the bringing of this suit to open the conveyance and let in plaintiff as a creditor.

As to the value of the land the evidence is in conflict, as usual, where estimates are indulged. About 60 acres is bottom plow land, worth \$40 per acre for farming purposes. We infer the rest of it is upland, somewhat broken; some of it, say, 30 acres, in cultivation; some of it fit only for pasture; and from some of it the timber had been cut and sold, but whether it could be cleared and broken for the plow is dark. The estimates of the witnesses vary from \$3,500 to \$8,000. There are traces in the evidence that it was a likely farm for a dairyman. It had a fine spring, but poor improvements in fences, houses, and outbuildings. It lies close to a railroad shipping point. Before, at, and since the conveyance the farm rated as mineral land, was thought to have mineral, lies, we take it, in a mineral belt, had been prospected for lead, and the show for mineral added to its prospective value. Ever since his deed defendant has held the farm at not less than \$10,000, and had been asking \$60,000. Prior to the conveyance a real estate firm in St. Louis for three years had it on their books for sale at \$4,000. Doing the best we can, by striking an average, we put its reasonable actual value at, say, \$5,500. In the year 1900 John W. Null borrowed \$2,500 on his farm and paid the bulk of his debts. In that year or the next he sold \$600 of timber off the land, which went the same way. We think it satisfactorily shown that at that time he had no other outstanding obligations, except to his son, Dr. Null, to his granddaughter, Izella Null, and to plaintiff. The answer alleges, and defendant's own testimony tends to show, that he put some improvements on the land chiefly in the way of fences and repairs on the house—the latter, to the extent of \$80. He has rented the land at \$300 a year and got \$200 from the sale of timber, say, \$1,400 in all up to grantor's death. We are not impressed with the extent of these improvements, and conclude from the testimony that the sale of the timber more than paid for them. Dr. Null testified that the betterment to the house, a new roof, was paid out of grantor's own money. There is testimony indicating that it was expected that the farm would be sold to mineral prospectors, that the conveyance to the grandson was for that purpose, and that the large consideration was put in

the deed as a lure to such a sale. At once grantee organized a mining corporation, the Joachim Lead Company (named after a creek that meanders through the farm), with a capital stock of \$500,000. We take it its capital stock was also fictitious, that it was a mere paper corporation, and that its chief or only asset was a mineral lease, running for a term of one year and a half, on the land in question.

There is a hard and flippant note running through some of the testimony on behalf of defendant, not calculated to impress a court of conscience favorably. For example, his main witness and the chief actor in this whole matter, his father, on cross-examination testified in part: "Q. How much did you capitalize that corporation at? A. Five hundred thousand dollars. Q. And the farm is worth only \$4,000? A. Yes, sir. But that don't make any difference, if you can get a sucker on your line and sell it to him for that amount. Q. You have been after suckers, have you? A. Generally. I haven't a gentleman talking to me now, that I know of. Q. Do you think I am a sucker? What makes you think so? A. Because you look it and smell like it." To sustain the allegations in his answer that he bought the land in good faith and for full value, defendant was permitted to show that, instead of the cash consideration recited in the deed, the estimate of value between him and his grandfather was \$4,000; that it was assumed between them, though not so narrated in the deed, that he would pay off the \$2,500 deed of trust; that his grandfather owed \$100 to his granddaughter, Izella, and about \$260 to his son, Dr. Null, and as part of the consideration defendant "assumed" verbally to pay these debts; and that he also agreed to support his grandfather during his lifetime. He introduced testimony tending to show he performed the latter agreement. Whether he performed it while his grandfather was living with Dr. Null in St. Louis is hard to make out in the fog of the record, but, after the grandfather moved to Hematite in 1903 up to his death in 1905, defendant testified he supplied his grandfather with food, raiment, etc., and a house to live in at an outlay of \$25 per month, and buried him at a cost of \$65 or \$75. There was some loose talk in the presence of the scrivener at the time the deed was drawn relating to debts, but, taking the scrivener's examination in chief with his cross-examination, we can make little out of it. There was no written assumption of any debt whatever and no written assumption of the support of the grandfather during his lifetime. If we construe the scrivener's testimony correctly, the agreement to support was not mentioned, and the assumption of debts was purposely omitted from the deed. These several agreements, thus resting in parol, were to all intents and purposes a secret family arrangement of which the world at large and the

neighbors at Hematite knew nothing. There is nothing to show that Theodore or Ferd Walther ever heard of such an arrangement until the disclosures of the trial. The case is submitted on the confessed fact that defendant had paid his cousin, Izella, only \$10.75 on her debt of \$100. He made an arrangement with his father to turn over stock in the \$500,000 mining corporation in payment of his debt, and, although the father still retains the original obligation, he has the stock, and is satisfied with it. It creeps into the case that defendant had paid off the \$2,500 deed of trust by making a new loan.

The question is: Did the judgment entered below do equity in the light of such a record? We think not, because: Assuming, as we do, that plaintiff's judgment is not open to collateral attack, then this case must be disposed of on the theory he was a creditor of John W. Null at the time of the conveyance to his grandson and at the time of his death. We see no possible way to escape the conclusion that full force and vigor must be given to that judgment, as already ruled, and this conclusion carries with it another proposition, viz., that the conveyance in question whether intended as a fraud or not, operated as a fraud in law as to existing creditors under the peculiar facts found to exist in the case at bar; for defendant had knowledge of plaintiff's claim, he did not stand in the shoes of a preferred creditor of his grandfather, he paid nothing down, he made no valid legal assumption of the debts to his father and his cousin, he accepted a deed with a false consideration, itself a badge of fraud. In view of the fact that in five years he paid his cousin, Izella, a mere pittance, and paid his father in chips and whetstones, the whole transaction seems colorable, unnatural, and an afterthought. This view of it is fortified by the fact that no writing was entered into binding the grandson to support his grandfather, and the whole arrangement was kept a family secret and withheld from plaintiff and the world at large until the trial. At \$25 per month the support of the grandfather would merely absorb the current rents of the land, \$300 per year—a singular coincidence—so that if we were to hold that a conveyance, supported by the consideration of the future support of the grantor, would be good as to existing creditors, yet in this case defendant is out nothing, either for support or for repairs. The income of the farm and the timber sold made one hand wash the other, and the result of the conveyance is plainly a gift of the equity in the land. The maxims are that one must be just before he is generous, that clandestine gifts are looked on with suspicion. But we are not willing to rule that an agreement for future support is a consideration sufficient to support a conveyance as against existing creditors. Such ruling would be tantamount to holding that an owner could cover or tie up his property, take it from his creditors,

and subject it to his own use—a doctrine we cannot subscribe to. The homestead and other statutory exemptions are forbidden fruit to the creditor. He may neither pluck nor eat thereof. This results from a statutory change in the policy of our law taking such specific exemptions out of the general property rule, viz., that the owner or those upon whom descent is cast holds property subject to the payment of debts. If a man owe nothing, he may do with his property as he pleases to do so long as his disposition of it does not contravene good morals or fly in the face of settled public policy. It will be time enough for the courts to rule that property may be conveyed away from existing creditors on a consideration for future support, secret or otherwise, when by constitutional or other valid enactment that disposition of property is permitted.

The case of *Jones v. Geery*, 153 Mo. 476, 55 S. W. 73, is relied on as authority to the contrary. That case is scantily reported, and there are remarks, *arguendo*, made in the course of the opinion that might give color to defendant's contention, but in that case there were equitable features quite absent from the case at bar. Not only so, but the main proposition ruled by the court, on which that case must rest as a sound judgment, is that the evidence showed there was no gift whatever, and that, absent fraud, the grantor sold his farm to his sons at a reasonable value in order to pay his debts, which they had done. That case does not rule that an agreement for future support is such a consideration as will alone support a conveyance against the rights of existing creditors. Observe in that case there was no actual fraud. The creditor, a son-in-law, was not able to buy the land. We infer from that finding that the option had been open to him to take the land on the terms the sons afterwards took it. At any rate, the son-in-law had knowledge of the whole transaction and the true consideration, and with such knowledge stood by and saw the sons take it at a reasonable value, viz., the amount of certain outstanding debts. Observe further, these debts were of a character that threatened at once to sweep away the property. The son-in-law, armed with full knowledge, saw the debts paid by the sons, and the contract for support put in force without protest and under circumstances indicating acquiescence. Not only so, but at that very time this son-in-law had in his hands more money of his father-in-law than would have paid his own debt. After the conveyance, he voluntarily paid it over to the old gentleman. On such circumstances this court concluded plaintiff's suit was an "afterthought"; that the object of it was to upset a settlement he had acquiesced in. That course did not commend itself to this court as in accordance with equity and good conscience. We have no bone to pick with that decision when properly analyzed and re-

stricted to the facts held in judgment. Illustrations and remarks, *arguendo*, in the course of a decision may be persuasive, but are not of the essence of a holding. In determining what a court actually holds, the facts in judgment must be kept in mind. In the case at bar there is evidence of a gift of a substantial amount—a gift stripping the grandfather of all ability to pay his debt to plaintiff. Furthermore, there is evidence of bad faith and fraud and defendant is impaled on the horns of a dilemma; for either proposition invalidates the conveyance.

It was argued at our bar and in the brief of defendant's learned counsel that the delay of plaintiff to press his claim in the lifetime of his father-in-law and in allowing defendant to hold the title for four years without question creates an equitable bar to a decree in his favor. The argument is somewhat elusive and difficult to classify. The best we can make of it is a plea of laches or possible estoppel. If plaintiff had resided in the neighborhood and had not been misled by the swollen and false consideration in the deed and tolled on by promises that his claim would be settled, if he had had full knowledge of the fact that certain debts were assumed by the grantee, and that the support of the grandfather had been assumed, and, so knowing, had seen and acquiesced in defendant's taking possession and making improvements on the farm and supporting the grandfather, thereby changing his condition with reference to it to his detriment, we say if such things were true, and plaintiff had remained silent, lifting no finger and making no claim, then we do not say that estoppel would arise; but it might arise and we might have a different case to deal with. Laches is an equitable doctrine applied independently of the statute of limitations to assist in reaching an equitable result. But here there are no laches. We are not willing to rule that a son-in-law residing in a distant state may not rest, as this one did for a spell, on the good faith and honesty of a deed made by his father-in-law and spread of record, nor are we willing to rule that he is obliged to briskly sue him, and crowd him to the wall, in order to escape a charge of laches. If that were the law, it would be a hard saying, much murmured against. It is not clear how either justice or the amenities of life would prosper through such a doctrine. It is bad form for the defendant to plead mere laches, in view of the fact that he concealed the true consideration of the deed and the secret family arrangement from his relative. Defendant is hurt only in anticipation, not in pocket. There is no danger that plaintiff's claim will be superior to the mortgage put on the land to pay the former mortgage.

The premises considered, the judgment was for the wrong party. Accordingly it is reversed and the cause is remanded, with directions that the circuit court enter a decree finding the issues for plaintiff and an-

nulling the deed from John W. Null to defendant, and certify the decree to the probate court.

GRAVES, KENNISH, FERRISS, and BROWN, JJ., concur. WOODSON, J., dissents in opinion filed. VALLIANT, C. J., absent.

WOODSON, J. (dissenting). This cause, having been transferred to court in banc and reargued, was assigned to LAMM, J., to write the opinion therein.

After having seen, read, and considered his opinion, I dissent therefrom, and adhere to the views expressed by me in divisional opinion, which is as follows:

"Statement.

"This is a bill in equity instituted in the circuit court of Jefferson county by the plaintiff against the defendant to set aside and cancel a certain warranty deed, conveying to the latter 362 acres of land, situated in said county, particularly described in the petition, for the alleged reason that it was executed by John W. Null, Sr., and accepted by defendant, John W. Null, Jr., in fraud of the former's creditors. A trial was had before the chancellor, and the findings of fact and decree of the court were for the defendant, and the plaintiff duly appealed to this court.

"The following facts are undisputed: John W. Null, Sr., owned the land in controversy and resided upon it. He departed this life on October 24, 1905, at the age of 80 years. The defendant was a grandson of the deceased. Dr. W. H. Null was a son of the latter, and the father of the defendant. The plaintiff was a son-in-law of John W. Null, Sr., having many years previous to the transactions here involved married Lou Null, his daughter. The deed of conveyance assailed by this proceeding was executed October 2, 1901, for the expressed consideration of \$10,000, and was promptly and duly recorded in the office of the recorder of deeds of said county. That on July 19, 1892, John W. Null, Sr., and one J. F. Null executed to plaintiff their joint and several promissory note for the sum of \$478.42, due 12 months after date, bearing 8 per cent. interest per annum. Various payments were made on the note at different dates by J. F. Null, the last the 13th day of November, 1896. This note was presented to the probate court of Jefferson county for allowance against the estate of John W. Null, Sr., deceased, and on December 23, 1905, said note was allowed for the sum of \$744.10, and assigned to the fifth class. Prior to the death of John W. Null, Sr., to wit, in the year 1900, he borrowed of the plaintiff's brother Theodore Walther the additional sum of \$2,500 with which to pay his debts, gave his promissory note therefor, and secured the same by a deed of trust on the land involved in this

case. That, in addition to the indebtedness before mentioned, John W. Null, Sr., at the time of the execution of the deed to defendant, was indebted to his son, Dr. W. H. Null, in the sum of \$260, evidenced by two promissory notes, and to Izella Null, his niece, in the sum of about \$90, also evidenced by a promissory note. At the date of his death John W. Null, Sr., owned but little of this world's goods, which was inventoried and appraised, as shown by the records of the probate court, at \$34.35.

"The plaintiff's evidence tended to show that the land in controversy was worth \$6,000 at the date of the conveyance, and that defendant paid John W. Null, Sr., no consideration whatever therefor.

"The evidence introduced by the defendant tended to show: That the land in question was not worth more than \$3,500 or \$4,000 at most at the time it was conveyed to him. That John W. Null, Sr., had for several years prior to this conveyance endeavored to sell it for those figures, but was unable to secure a purchaser. That he was old and infirm, and had no one to support and take care of him. That shortly prior to the time conveyance was made to defendant said John W. Null, Sr., offered to convey the land in controversy to his son, Dr. W. H. Null, in consideration that he would assume the \$2,500 deed of trust thereon due the plaintiff, release him from the \$260 he owed him (Dr. Null), and assume the \$90 he owed his niece, Izella Null, and support him during the remainder of his life. That offer Dr. Null refused. That shortly thereafter he made substantially the same proposition to the defendant, and that after consultation with his father, Dr. Null, he accepted the same; that is, upon these terms. They valued the land at \$4,000, which was covered by a deed of trust securing the note before mentioned for \$2,500. That he assumed the payment of the \$260 due his father and the \$90 due his cousin, Izella Null, and agreed to support his grandfather, John W. Null, Sr., during the remainder of his life, but not assuming the \$2,500 deed of trust, but agreed, however, to accept the conveyance of the land subject to said deed of trust. That the \$10,000 consideration expressed in the deed was agreed upon and inserted in the deed so as to assist the defendant in speculating with the land. That, in pursuance to that agreement, the deed was executed and delivered, and that defendant immediately undertook to and did support and maintain the grantor from the date of the deed to the date of his death, which was a few days over four years, at a cost of about \$25 per month. That at the same time defendant took possession of the land, made some valuable and lasting improvements thereon, namely, placed a new roof on the house and new fences practically around the entire farm, and leased it for a rental of \$300 per annum. That subsequently he paid on the Izella Null note \$10-

75, and paid off the notes for \$280 due his father in stocks in a corporation organized by the defendant. That at all times the plaintiff had personal knowledge of the conveyance to defendant and the terms upon which it was made, and that he was supporting the grantor in pursuance thereof. That, notwithstanding that knowledge, plaintiff took no steps to collect the note presented and allowed by the probate court from John W. Null, Sr., during his lifetime, and then not until he presented it to the probate court for allowance. The defendant's evidence also tended to show that John W. Null, Sr., had subsequently to the execution of the note by him and J. F. Null to plaintiff during the latter's financial stress supported and clothed his wife and two sons almost two years, and that he considered and repeatedly stated that said support and clothing had more than satisfied the note, the same being the note allowed by the probate court, and for that reason that plaintiff never attempted to collect it of John W. Null, Sr., during his lifetime. The plaintiff in rebuttal introduced evidence tending to show that prior to John W. Null's death he sent the note to some relative in Jefferson county for collection; but it seems that no further steps were taken in that direction. Also that plaintiff knew nothing of the terms upon which the land was conveyed to defendant.

"Opinion.

"1. While there was no objection made to the introduction of the evidence by respondent tending to show that the note allowed by the probate court had been paid by John W. Null, Sr., by the support and clothing of the appellant's wife and children, nevertheless it is insisted here that, since the note was allowed by the probate court, it passed into judgment, which cannot be questioned in this collateral proceeding. The pleadings in this case do not assail the validity of the judgment of the probate court for fraud or otherwise, but simply allege that the note had been paid by John W. Null, Sr., during his lifetime. Not stopping to discuss the law which would have governed the case had the pleadings charged the procuring of the judgment by fraud, we will proceed directly to the discussion of the question, Can that judgment be successfully assailed in this, a collateral proceeding? Clearly not. This identical question was presented to this court in the case of *Clark v. Thias*, 173 Mo. 628, 73 S. W. 616. Our late lamented brother, Judge Fox, in the discussion of that question, in speaking for the court, on page 643 of 173 Mo., on page 619 of 73 S. W., said: 'The first contention of the appellants is that the court committed error in striking out that portion of the answer which alleged that the note executed by Mary Larkin was executed without any consideration whatever. This proceeding is not an action upon the note to

the end of reducing it to a judgment, but the suit is to cancel and set aside a certain conveyance executed by Mary Larkin; and it is alleged in the petition, and it is admitted, that this note was duly allowed in the probate court of Franklin county. If the position taken by appellants is to be maintained, the effect of this answer is to go behind this judgment, and thereby destroy the force and power of the judgment rendered. This contention must be ruled against appellants. The allowance of this note by the probate court has the force and effect of a judgment.'

"The next insistence is that a voluntary conveyance without consideration made by a debtor in embarrassed circumstances, or by one whom the conveyance itself renders insolvent, is fraudulent and void as to existing creditors. Numerous authorities are cited in support of that proposition. As an abstract legal proposition we suppose no one will question its soundness, but in its application to the case at bar counsel for appellant has totally ignored all the evidence introduced by the respondent tending to show that he purchased the land in controversy in good faith, and paid therefor an adequate consideration. That evidence tended to show the land was not worth over \$4,000, that it was conveyed to respondent subject to a \$2,500 deed of trust. That left the equity in the land worth only \$1,500. In consideration of that equity, the respondent, the evidence tended to show, assumed the payment of three promissory notes which were owing by the grantor, amounting to \$350, and agreed to support him the remainder of his life, which was reasonably worth \$300 a year, and that he lived something over four years after executing the conveyance to respondent, which at \$300 a year amounted to \$1,200; and, if we add to that the debts assumed by the respondent, it shows that the equity in the land above mentioned actually cost respondent \$1,550, or \$50 more than it was actually worth. In addition to that, the grantor might have lived much longer, which chance respondent assumed when he accepted the conveyance under the agreement; and, had he done so, it would have cost him more. According to appellant's own evidence, there can be no serious doubt but what respondent supported the grantor from the date of the deed to the date of his death, four years. We say this, for the reason that his evidence shows that the grantor had no other property at the time of the conveyance, and the record is totally barren of any evidence tending to show that he was supported by any one else, except the respondent.

"The case of *Jones v. Geery*, 153 Mo. 476, 55 S. W. 73, is more like this case in both law and fact than any two cases my attention has been called to during my 35 years' experience at the bench and bar. In the case *Gantt, P. J.*, in speaking for the court, on page 477 of 153 Mo., on page 73 of 55 S. W., said: 'The farm involved is variously esti-

mated to be worth from \$3,000 to \$4,000. Robert Geery, the grantor, was an old man in his eighty-fifth year. When an old man and a widower, he married a second time, and conveyed his farm to his second wife and her children. They afterwards separated, and he brought suit to set aside his deed, and that action resulted in setting aside the deed, but giving the wife judgment for \$1,300. Attorney's fees and other charges swelled the total of the old gentleman's indebtedness to about \$2,300. At the solicitation of the old man's counsel, his two sons, Andrew and Robert, Jr., were induced to assume his indebtedness and undertake to provide for his support the remainder of his life, and upon these terms he conveyed the land to them. They borrowed enough on the land to liquidate his debts above mentioned and paid them. Thereafter the plaintiff, who is a son-in-law, brought suit against the old man and recovered judgment for \$250 for board alleged to have been furnished the old man, and now seeks to have the deed set aside as voluntary, and the farm subjected to the payment of said judgment for board. The circuit court found for defendant, and plaintiff appeals. There is no pretense whatever that the conveyance was the result of any actual fraud. Indeed, it appears that it was executed with the knowledge of plaintiff, and, if not with his full consent, certainly without any objection at the time. Nor is the claim made that it was a voluntary conveyance, but only that it was partially so. The proposition is that, as the proof shows the farm to be worth \$3,000, there was a gift of \$700 by Robert Geery, Sr., to his sons Andrew and Robert, that being the difference between the \$2,300 of debts they assumed and paid and the value of the farm. These figures, however, ignore the further undertaking of the sons to support and care for their father the remainder of his life. The value of such services plaintiff has fixed at \$250 a year. At that rate, it will not take many years to absorb the supposed difference. As a matter of fact, however, there is no evidence of a gift. Robert Geery, Sr., in the absence of fraud, had a right to sell his farm to his sons in order to pay his debts, and, if the price agreed upon was not grossly inadequate, the good faith of the transaction is not open to an attack like this. It appears that plaintiff was not able to buy the farm, but is not satisfied with the trade the old gentleman made for himself. Plaintiff testifies that he voluntarily paid over to the old man \$285 which he had been keeping for him, after the deed was made to the sons. Plaintiff's effort to set aside this deed under all the evidence smacks strongly of an afterthought, and does not commend itself to the conscience of a court of equity. We see no reason for interfering with the conclusion of the circuit court, and its judgment is affirmed.

"In the case at bar, independent of the

agreement to support the grantor for life, the trial court was warranted in finding that the conveyance was based upon a sufficient consideration, especially in view of the bill which charges that the deed as executed was voluntary and wholly without consideration and in fraud of creditors. There is absolutely no evidence whatever contained in this record which tends remotely to show that there was any actual or intentional fraud perpetrated upon any one by the grantor or grantee in this transaction. Both of them believed the note probated had been discharged by the support the grantor had furnished to the wife and children of appellant; and, in order to pay the rest of his debts, the grantor borrowed an additional \$2,500 from the appellant's brother Theodore Walther, which was used for that purpose, but, instead of paying all of the debts, there was left unpaid the \$260 due Dr. Null and \$90 due Izella Null, his son and niece. And in order to pay them, and to provide for his support and care in old age, he executed the conveyance in question. Instead of trying to defraud his creditors, the evidence shows he was at all times doing all in his power to pay all of them in full; and doubtless to his dying day he thought he had done so. The chancellor found there was no fraud, and dismissed the bill for want of equity. In our opinion that finding was well supported by the evidence; and, under the pleadings and evidence, we are unable to see how he could have done otherwise. This court in such cases will defer largely to the findings of the trial court. *Huffman v. Huffman*, 217 Mo. 182, 117 S. W. 1; *Miller v. McCaleb*, 208 Mo., loc. cit. 573, 106 S. W. 655.

"3. It is finally insisted by counsel for appellant that the chancellor erred in refusing to make special findings of fact and giving separate conclusions of law, although requested to do so. This question was expressly passed upon by this court in the case of *Blount v. Spratt*, 113 Mo., loc. cit. 53, 20 S. W. 967, and affirmed in *Miller v. McCaleb*, 208 Mo., loc. cit. 573, 106 S. W. 655. It was there held that such refusal was not reversible error.

"Finding no error in the record, the judgment should be affirmed; and it is so ordered."

On Motion to Modify Judgment.

PER CURIAM. Respondent files a motion to modify the directions given the lower court. It is sustained in part. The last paragraph of the opinion is stricken out, and the following is made the concluding paragraph in lieu thereof, viz.:

The premises considered, the judgment was for the wrong party. Accordingly, it is reversed and the cause is remanded with the following directions: The circuit court shall enter a decree finding the issues for plaintiff and annulling the deed (describing it) from John W. Null to defendant as to the

claim of this plaintiff, including interest thereon, and as to the costs of this proceeding and that of administration in the probate court. The court is further directed to take an accounting of the amount of the allowance in the probate court in favor of plaintiff, principle and interest, and decree a lien therefor in favor of plaintiff against the land (describing it) conveyed by the deed of said Null to defendant, and for all costs in this proceeding, the cost of administration to date to be ascertained and also made a lien. The court also shall decree the foreclosure and enforcement of said lien, and the land must be ordered sold to satisfy the same, defendant to have a reasonable time to pay off and satisfy the lien, not to exceed four months, with stay of execution to the date given for payment. If the amount of said lien be paid to the clerk of the circuit court on or before said date, then the judgment shall be satisfied. If not so satisfied, special execution shall issue and the land be sold as in due statutory course of sheriff's sales of real estate.

MILLER et al. v. CONTINENTAL ASSUR. CO. OF AMERICA et al.

(Supreme Court of Missouri. Dec. 17, 1910.
Rehearing Denied March 2, 1911.)

1. ATTORNEY AND CLIENT (§ 70*)—AUTHORITY OF ATTORNEY—PRESUMPTION.

Where a duly licensed and practicing attorney appears in a court of record as the representative of a party, there is a strong presumption that he is authorized so to appear, and he may not in general be required to establish his authority to do so, except at the instance of the court or his client.

[Ed. Note.—For other cases, see Attorney and Client, Cent. Dig. § 95; Dec. Dig. § 70.*]

2. ATTORNEY AND CLIENT (§ 71*)—AUTHORITY OF ATTORNEY—RIGHT TO CONTEST.

Where no judgment was rendered against certain personal defendants in proceedings for the appointment of a receiver for a corporation from which an appeal would lie, they had no personal interest in an appeal from an order denying a motion to discharge the receiver which would authorize them to contest the authority of the attorneys for the corporation to present a motion to dismiss the appeal.

[Ed. Note.—For other cases, see Attorney and Client, Cent. Dig. §§ 97-101; Dec. Dig. § 71.*]

3. ATTORNEY AND CLIENT (§ 72*)—SUPREME COURT—AUTHORITY—PROOF—RECORD.

Where attorneys claiming to represent a corporation moved to dismiss an appeal from an order denying a motion to discharge a receiver appointed for the corporation, and their authority to represent the corporation for the purposes of such motion was denied by certain individual defendants, the Supreme Court was authorized to receive proof of the appointment of such attorneys, and of their authority to appear for the corporation, consisting of certified copies of proceedings of the corporation's directors, though such proof was not preserved in the record sent up from the circuit court.

[Ed. Note.—For other cases, see Attorney and Client, Dec. Dig. § 72.*]

Lamm and Graves, JJ., dissenting.

In Banc. Appeal from St. Louis Circuit Court.

Suit by Walter J. Miller and others against the Continental Assurance Company of America and others. From an order denying a motion to set aside an order appointing a receiver for defendant corporation, certain individuals, claiming to be officers of the corporation, appeal. On motion to dismiss. Granted.

This suit was instituted in the circuit court of the city of St. Louis by the plaintiffs and against the defendants. The defendant company was duly organized and incorporated under the laws of this state for the purpose of engaging in the business of life insurance. Three of the plaintiffs were stockholders in said defendant company, and the remaining three were directors and stockholders therein. The defendant Gardner was secretary of the company, but not a stockholder. Thompson was a stockholder and treasurer thereof, but had been removed as treasurer shortly before this suit was brought; and Gillespie was selected as general counsel of the company, and was a party to said mismanagement, hereinafter mentioned. The capital stock of the company was \$500,000, and was divided into 50,000 shares of the par value of \$10 each. Gardner was also employed as commissioner to sell the stock of the company, and most of which had been sold and was in the hands of Gardner, and not in the coffers of the treasurer, at the time this suit was begun. The petition charged the defendants with mismanagement and misappropriation of the funds of the company, and asked that they be enjoined from further abuse of power, and that a temporary receiver be appointed to take charge of and hold the assets of the company until the condition of the company could be ascertained; and, if found to be insolvent, then it prayed that the affairs of the company should be wound up, debts paid, etc. The circuit court appointed the receiver as prayed for, and from that order the defendants appealed to this court.

When the cause reached this court, Henderson, Marshall & Becker, purporting to be attorneys for the company, filed the following motion to dismiss the appeal, to wit (formal parts omitted): "Now comes the Continental Assurance Company of America, and respectfully moves this honorable court to dismiss the appeal heretofore taken on July 25, 1910, from the interlocutory order of the circuit court of the city of St. Louis, overruling the motion to revoke the order appointing a temporary receiver for the Continental Assurance Company of America, and assigns the following grounds for this motion, to wit:

"First. Because said appeal, so far as the Continental Assurance Company of America

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

is concerned, was taken without the knowledge, consent, or authority, and against the wishes of said company by Harry B. Gardner, Grant Gillespie, and W. H. Thompson, who had no authority from said company to do so.

"Second. Because the affidavit for the appeal is wholly insufficient in law, in this: That it recites that the affidavit for an appeal was made by Harry B. Gardner, Grant Gillespie, and W. H. Thompson, 'acting on behalf of said company,' but does not state that the affiants are the agents of said company for the purpose of taking such appeal, nor that they had any authority from the company to take such appeal.

"Third. Because the board of directors of said company has expressly repudiated the action of said Harry B. Gardner, Grant Gillespie, and W. H. Thompson in taking said appeal, and has directed its counsel, Henderson, Marshall & Becker, to dismiss said appeal.

"Fourth. Because said company desires the receivership of said company to be continued, and the appeal herein ties the hands of the circuit court pending the appeal, under the decision of this court in the case of *State ex rel. v. Gates*, 143 Mo. 63 [44 S. W. 739], and embarrasses the receiver and the company in the preservation and collection of the assets of the company, and seriously jeopardizes the said assets.

"Fifth. Because the appeal so far as Harry B. Gardner, Grant Gillespie, and W. H. Thompson individually are concerned is not authorized by law, for the reason that no receiver was appointed for them, but only as to the company, and the appeal was taken from the order refusing to revoke the order appointing a temporary receiver for the company, and, further, because no judgment has been entered against Gardner, Gillespie, or Thompson from which they could appeal. Wherefore this company asks that the appeal herein be dismissed."

Counsel for the plaintiffs, the respondents here, are acting in conjunction with counsel for the company, and insist upon the dismissal of the appeal. Counsel for the personal appellants strenuously oppose this motion, and assign many reasons therefor, among others, that the firm of Henderson, Marshall & Becker have no legal authority to represent the appellant company. The foregoing statement briefly, but sufficiently, outlines the facts and the respective contentions of counsel to enable us to apply the law applicable to the case.

Selden P. Spencer, Hough, Hough & Walker, R. H. Stevens, Grant Gillespie, and Arthur N. Sager, for appellants. Henderson, Marshall & Becker, for other appellants. John S. Leaby, for respondents.

WOODSON, J. (after stating the facts as above). 1. It is contended by counsel for the

personal appellants that the firm of Henderson, Marshall & Becker have no authority to represent the appellant company.

There are several valid reasons why that contention is unsound.

First. Because there is a strong presumption that, where a party appears in a court of record by a duly licensed and practicing attorney, the attorney was duly authorized to appear and represent such party in said court. In 4 Cyc. p. 928b, the following rule governing this question is stated, as follows: "Although it is necessary that an attorney be specially authorized to act for a client, his position as an officer of the court makes it unnecessary for him, in the ordinary case, to show this authority in any way, there being a firmly established presumption in favor of an attorney's authority to act for any client he professes to represent. It follows, therefore, that he will not be required to show his authority unless it is properly called for." In support of this rule many cases are cited by the author, one or more from almost every state in the Union. The same rule has been announced by this court in the following cases: *Cochran v. Thomas*, 131 Mo. 258, 33 S. W. 6; *Scott v. Royston*, 223 Mo. 568, 123 S. W. 454. The record contains no evidence which tends to overthrow that presumption; and in the discussion of this question this court in the case of *State ex rel. v. Crumb*, 157 Mo. 545, loc. cit. 557, 57 S. W. 1030, 1033, said: "Neither was it necessary to prove his (the attorney for plaintiff) employment by the records of the state board of education, for he had a right to appear in his official capacity as an attorney and officer of the court in all cases except those specially provided for by law. Nor was he accountable to the defendant in this kind of a case for his right to appear. The party for whom he appeared could alone question his right to appear in this and ordinary litigation." It is also laid down in 4 Cyc. p. 931b, that, even in those cases where the authority of an attorney may be properly challenged, "the burden of proof is on the side denying the attorney's authority, but, after the party the attorney professes to represent has denied his authority, the burden of showing authority is on the attorney."

Second. Because it is wholly immaterial to the personal appellants whether the firm of Henderson, Marshall & Becker have authority to represent the appellant company or not. They have no personal interest in the appeal, as no judgment was rendered against any of them, from which an appeal would lie.

Third. Because certified copies of the proceedings of the board of directors of the appellant company, duly adopted, have been filed in this court showing that said attorneys are duly authorized to represent it in this court, and repudiating the authority of all others to so act for it. Counsel for the personal appellants insist that this court has no au-

thority to consider said copies of the proceedings of the board of directors, for the reason that they are not preserved in the record. It is not only true that said copies of said proceedings are not preserved in the record sent up from the circuit court, but it is also true that said proceedings had not taken place at that time, nor until some time subsequent to the date when the appeal in this case was taken; consequently it was a physical impossibility for said copies to have been preserved in the record. But, notwithstanding that fact, that is no reason why this court should not consider said copies of said proceedings of the board. Unquestionably the corporation has the legal right to speak through its record regarding its business transactions, including the employment and discharge of legal counsel. This is academic, and is not questioned here. But the contention here is that this court has no authority to consider such records if not preserved in the record of the case. Generally speaking that is true, and is universally true as regards all matters which constitute a part of the proceedings in the trial court, but that rule does not apply to any matter which settles or disposes of the case after it reaches this court.

The rulings of this court and that of the Court of Appeals are uniform upon that question. *State ex rel. v. Phillips*, 97 Mo. 331, 10 S. W. 855, 3 L. R. A. 476; *State ex inf. v. Standard Oil Co.*, 218 Mo., loc. cit. 387-393, 116 S. W. 902; *Railroad v. Bridge Co.*, 215 Mo. 287, 114 S. W. 1084. These cases involved the settlement of the causes after they reached this court. We have also held in a number of cases that where an appeal is taken from a judgment of the circuit court to this court, and thereafter the appellant has been adjudged a bankrupt, this court will order his discharge and the appeal dismissed upon a plea to that effect filed in this court, accompanied by a certificate of bankruptcy. *Haggerty v. Morrison*, 59 Mo. 324; *Marx v. Hart*, 166 Mo., loc. cit. 517, 66 S. W. 260, 89 Am. St. Rep. 715; *Dulaney v. Bufum*, 173 Mo., loc. cit. 13, 73 S. W. 125; *Wait v. Railroad*, 204 Mo., loc. cit. 506, 103 S. W. 60. The theory upon which this class of cases rests is that, where a cause has been settled or finally disposed of after an appeal has been taken, that fact, as before stated, cannot appear in the record; but, in the absence of an agreement of parties, such fact must be called to the attention of this court either by a proper plea or some appropriate motion, and supported by competent evidence. The books are full of cases holding that this practice is proper in all cases where matters in litigation have been disposed of either by the parties themselves or by operation of law, but not admitted in this court. If this court may properly entertain such pleas and motions of the character just mentioned, hear evidence in support of and in contradiction thereof, and decide the questions so

presented, and dismiss the appeal or writ of error, as the case may be, then how much stronger should the reason be for holding that this court has the power to hear evidence and decide the question by what authority an attorney of this court acts for the clients he professes to represent. In 4 Cyc. p. 930, 4, the general rule is stated that the court in which the case is brought or pending, and in which the attorney appears, "is the proper tribunal to pass upon the question of authority" of the attorney professing to represent a party to said suit. In discussing that question, this court in the case of *Clark v. Holliday*, 9 Mo., loc. cit. 714, said: "There was another point raised concerning the authority of the agent to appear, and file a motion to quash the execution; and authorities have been cited to show that after a party has been absent from the state for a great number of years, and without having been heard from, the court may require the agent or attorney to produce some evidence of his authority to act in the case. This case bears no analogy to those, and if the circuit court was satisfied with the evidence produced, as the appearance was in his own court, we see no reason upon which an objection could be made here." The same rule is announced by the Supreme Court of Iowa in the case of *Krause v. Hampton*, 11 Iowa, 457. In spite of the strong presumption that an attorney is duly authorized to act for the party for whom he professes to represent, there is a well-recognized discretion resting in the court in which a cause is pending to call for proof of an attorney's authority when it sees fit to do so. 4 Cyc. p. 929. In support of that rule, cases are cited from the Supreme Courts of Arkansas, California, Colorado, Delaware, Kentucky, Louisiana, Maine, Mississippi, New York, South Carolina, Tennessee, and Ohio; also the following cases from the federal courts: *King of Spain v. Oliver*, 2 Wash. C. C. 429, Fed. Cas. No. 7,814; *Standefer v. Dowlin*, Hemp. 209, Fed. Cas. No. 13,284a. We are clearly of the opinion, based upon reason and authority, that this court has the power to investigate and determine by what authority an attorney acts for a client in this court whom he professes to represent, whenever that question is properly raised, or by the court of its own motion whenever it has reasonable grounds to apprehend that such authority does not exist. To hold otherwise would be to establish a precedent which would be fraught with dire results in many cases.

In the case at bar we have carefully examined the record, and find that the firm of Henderson, Marshall & Becker are duly authorized by the appellant company to represent it in this court, and that it has revoked the authority of all other attorneys to represent it in this cause in this court. We are, therefore, of the opinion that the motion to dismiss the appeal should be sustained. It is so ordered. All concur, except BURGESS,

C. J., absent, and LAMM, and GRAVES, JJ., who dissent in separate opinion by GRAVES, J.

GRAVES, J. I cannot concur with my learned Brother WOODSON in the views he has taken on the motion to dismiss the appeal in this case. This motion was filed in this court by the firm of Henderson, Marshall & Becker, attorneys, on August 15, 1910. With it are filed two exhibits. The first is claimed to be a copy of a resolution adopted by the board of directors of the Continental Assurance Company on August 10, 1910, and is certified to by C. J. Lang, who signs himself as secretary of the corporation. The other is a conglomeration of resolutions, elections, and conversations, signed and certified to by nobody. However, there is a form of an affidavit thereto signed by one William H. Corcoran, but no oath was ever taken by Mr. Corcoran and no official name or jurat follows his signature. Mr. Corcoran does not purport to be an officer of the company in charge of the records thereof, nor an officer at all. By reading this conglomerated mass, one would get the idea that he was a stenographer who took down all that was done and said whilst some of the directors of the company were together on the 29th day of August, 1910. The purported resolution first mentioned says that the firm of Henderson, Marshall & Becker are authorized to dismiss the appeal in this case. This is all that appears on file on the part of the movants to sustain the right of these attorneys to represent the company. On the same day there were filed objections in opposition to this motion. These suggestions cover some 10 typewritten pages, and are signed by Selden P. Spencer, as attorney for the Continental Assurance Company and by Grant Gillespie as "General Counsel of Continental Assurance Company," together with counsel for the individuals. These suggestions and the facts therein contained are sworn to by three persons; i. e., H. B. Gardner, W. H. Thompson, and Grant Gillespie. These suggestions protest against the right of Henderson, Marshall & Becker to represent the Continental Assurance Company. These sworn suggestions challenge the several meetings of the directors,* and the things done thereat, including the authority claimed to have been given Henderson, Marshall & Becker, on the ground, among others, that there was no legal quorum at such meetings, and as to one of the meetings on the further ground that it was a called or special meeting, and only a part of the directors were notified of the meeting. Thus stands the record on this motion. The motion itself is set out in Judge WOODSON'S opinion.

1. Both Selden P. Spencer and Henderson, Marshall & Becker appeared in this court. Each claimed to represent the company. Each challenged the authority of the other.

As to the presumption which accompanies the appearance of a regular licensed attorney in this court as representing a client, the presumptions are equal in this case. Messrs. Henderson, Marshall & Becker so recognized the law, and, to turn the scales to their side, filed the two instruments above described in our short statement of facts. Mr. Spencer retorts with the affidavit of three persons to the effect that there was no quorum at the meetings at which this authority was given to Henderson, Marshall & Becker and at which Mr. Spencer was claimed to have been discharged. Under this state of the record, it is unfair to counsel for this court to say that one has the authority and the other has not, without the taking of testimony upon the disputed fact. In oral argument it was so contended by Judge Spencer. The purported transcript of the alleged meeting of July 29th, at which time Judge Spencer is said to have been discharged, and Grant Gillespie as general counsel, is said to have been discharged, cannot be considered at all, because it is neither certified nor verified. So that upon this ground the motion should not be sustained without further proof of the facts. This is the third ground of the motion as set out in Judge WOODSON'S opinion.

2. The only other ground of serious moment is the second ground wherein the sufficiency of the affidavit is questioned. In this connection we only desire to submit the affidavit, because it speaks for itself. The affidavit reads: "State of Missouri, City of St. Louis—ss.: Harry B. Gardner, fiscal agent and secretary of the Continental Assurance Company of America, acting on behalf of said company, W. H. Thompson, treasurer of said Continental Assurance Company of America, acting on behalf of said company, Harry B. Gardner, W. H. Thompson and Grant Gillespie, each being duly sworn, makes oath and says, that the appeal prayed for in the above-entitled cause from the order refusing to revoke the interlocutory order appointing a receiver is not made for vexation or delay, but because the affiants believe that the appellants are aggrieved by the said action, judgment and decision of said court. Harry B. Gardner, Secretary and Fiscal Agent Continental Assurance Company of America. H. B. Gardner. Grant Gillespie. W. H. Thompson, Treasurer of Continental Assurance Company of America. W. H. Thompson. Subscribed and sworn to before me, this 20th day of July, 1910. My term expires December 20th, 1912. Shepard R. Evans, Notary Public within and for the City of St. Louis, Mo." The point made is that the affidavit does not aver that the affiants are the agents of the company. A reading of the foregoing shows that the contention is not well founded. It shows that both the secretary and treasurer of the company made the affidavit for the company. Not only so, it shows that the fiscal agent

made the affidavit for the company. As to this ground the motion should be overruled.

3. As to the first and fourth grounds of the motion, they are dependent solely upon proof, and sufficient proof is not here in support thereof. These two points under present conditions should be overruled. Going to the fifth ground, it is sufficient to say that it does not attack the appeal of the company, and we will not at this time discuss the rights of the individual defendants.

Being satisfied that my Brother WOODSON is in error in his opinion, I respectfully dissent therefrom for the reasons aforesaid.

LAMM, J., concurs in these views.

MILLER et al. v. INTERNATIONAL FIRE ASSUR. CO. OF AMERICA et al.

(Supreme Court of Missouri. Dec. 17, 1910.
Rehearing Denied March 2, 1911.)

In Banc. Suit by Walter J. Miller and others against the International Fire Assurance Company of America and others. From an order denying a motion to set aside an order appointing a receiver for defendant corporation, certain individuals claiming to be officers of the corporation appeal. On motion to dismiss. Granted.

Selden P. Spencer, Hough, Hough & Walker, R. H. Stephens, Grant Gillespie, and Arthur N. Sager, for appellants. Henderson, Marshall & Becker, for other appellants. John S. Leahy, for respondents.

WOODSON, J. This case is substantially the same as that of Walter J. Miller et al. v. Continental Assurance Company of America et al. (the opinion in which has just been handed down) 134 S. W. 1003. While tried separately, and separate appeals were taken therein, however, counsel for all parties have treated them as one case, and have briefed and argued them as such. It will therefore be unnecessary to write a separate opinion in this case. What has been said and ruled in that case is controlling here.

The motion to dismiss the appeal is therefore sustained. All concur, except BURGESS, C. J., absent, and LAMM and GRAVES, JJ., who dissent.

STATE ex inf. MAJOR, Atty. Gen., v. KANSAS CITY.

(Supreme Court of Missouri. Feb. 9, 1911.
Rehearing Denied March 2, 1911.)

1. CONSTITUTIONAL LAW (§ 32*)—SELF-EXECUTING PROVISIONS.

Const. art. 9, § 16, providing that city charters may be amended by adoption of the proposed amendment by three-fifths of the qualified voters of the city voting at the election at which it is submitted, is self-executing, prohibitive, and not subject to change either by charter amendment by the city or by act of the General Assembly.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. § 33; Dec. Dig. § 32.*]

2. MUNICIPAL CORPORATIONS (§ 46*)—POWERS—CONSTITUTION—CONSTRUCTION—CHARTER AMENDMENTS.

Const. art. 9, § 16, providing that a city charter may be amended by proposal duly accepted "by three-fifths of the qualified voters of such city voting at a general or special election, and not otherwise," limited the power of the city, so far as the requisite number of votes to adopt a charter amendment was concerned, to three-fifths of the qualified voters voting at the election at which the amendment was submitted, and the provision of Kansas City Charter, art. 1, § 7, requiring a vote of three-fifths of the voters of the city was invalid.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 123-125; Dec. Dig. § 46.*]

3. MUNICIPAL CORPORATIONS (§ 46*)—CHARTER AMENDMENT—PARTIAL INVALIDITY.

Const. art. 9, § 16, provides that a city charter may be amended, if, after publication of a proposed amendment for 30 days, it shall have been accepted by three-fifths of the qualified voters of the city voting at a general or special election. Kansas City Charter, art. 1, § 7, provided for the submission of amendments, requiring that they be accepted by three-fifths of the qualified voters of the city. *Held*, that the fact that the charter provision, so far as it required three-fifths of all the voters in the city as distinguished from three-fifths of the voters voting at the election, was invalid, did not invalidate the other provisions in the section.

[Ed. Note.—For other cases, see Municipal Corporations, Dec. Dig. § 46.*]

4. QUO WARRANTO (§ 57*)—CITIES—EXTENSION OF LIMITS—REASONABLENESS—OBJECTIONS—WAIVER.

An objection that the court in a quo warranto to review the validity of the extension of the limits of a city had no power to determine whether the extension was reasonable was waived, where not raised by a motion to strike the information by answer and return, or by exception to the findings.

[Ed. Note.—For other cases, see Quo Warranto, Dec. Dig. § 57.*]

5. MUNICIPAL CORPORATIONS (§ 29*)—LIMITS—EXTENSION—REASONABLENESS.

A city may reasonably extend its limits so as to take in contiguous lands, when they are platted and held for sale as town lots; whether platted or not, if they are held to be sold as town property when they reach a value corresponding with the views of the owner; when they furnish an abode for a densely settled community, or represent the actual growth of the town; when they are needed for any proper town purposes, or for the extension of needed police regulations, and when such additional territory is valuable by reason of adaptability for prospective town uses; but the limits may not be extended to take in contiguous lands when they are used only for agriculture, or are valuable on account of such use, or when they are vacant and do not derive special value by adaptability for city uses.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 74, 75; Dec. Dig. § 29.*]

6. QUO WARRANTO (§ 57*)—CITY LIMITS—EXTENSION—PROCEEDINGS BY STATE.

In a quo warranto, on relation of the Attorney General, to determine the validity of an extension of the limits of a municipality, the only question reviewable is whether the city has acted within the law in accomplishing such extension.

[Ed. Note.—For other cases, see Quo Warranto, Dec. Dig. § 57.*]

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

7. CONSTITUTIONAL LAW (§ 278*)—DUE PROCESS OF LAW—DEPRIVATION OF PROPERTY—EXTENSION OF CITY LIMITS.

Imposition of higher special and general taxes on property within the limits of a city does not constitute a valid objection to proceedings to extend the city limits, on the theory that such taxes constituted a taking of the owner's property without due process of law.

[Ed. Note.—For other cases, see Constitutional Law, Dec. Dig. § 278.*]

8. MUNICIPAL CORPORATIONS (§ 29*)—EXTENSION OF LIMITS—REASONABLENESS.

Facts held to sustain the finding of a commissioner in quo warranto proceedings that an ordinance extending the limits of Kansas City from 26.70 square miles to 57.75 square miles, taking in surrounding territory, deriving a large part of its value from its contiguous location to the city, was reasonable.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 74, 75; Dec. Dig. § 29.*]

Graves and Woodson, JJ., dissenting.

In Banc. Information in the nature of quo warranto by the State on the information of E. W. Major, Attorney General, against Kansas City, Missouri. Writ of ouster denied.

This is an original proceeding in this court, instituted by the Attorney General, as relator, on the 5th day of February, 1910, by the filing of an information in the nature of quo warranto against the respondent, Kansas City.

The purpose and object of the suit, as shown by the prayer of the information, is that this court may adjudge illegal and void an alleged amendment to the charter of Kansas City seeking to include within the limits of the municipality a large body of contiguous territory, and that the respondent be ousted of all power, rights, and jurisdiction in and over the territory attempted to be annexed by the said pretended extension of its limits.

The facts alleged in the information as entitling the relator to the relief prayed for, briefly stated, are: That Kansas City is a municipal corporation, organized and existing under sections 16 and 17 of article 9 of the Constitution of this state. The territory over which it is alleged that Kansas City now legally exercises municipal power, also the territory sought to be included within its limits, as claimed under the pretended extension thereof, are particularly described by metes and bounds. Facts are alleged to show that at a special election, called for and held on the 6th day of April, 1909, for the purpose of voting upon a proposed amendment to the city charter extending the limits of said city, such amendment failed to receive the majority of votes necessary for its adoption as provided by section 7 of article 1 of the charter of said city, and that therefore the proposed amendment was not legally adopted. The relator then sets forth at length the facts showing the extent of the territory over which Kansas City now exer-

cises jurisdiction as a municipal corporation, and the extent and character of the territory attempted to be included by the extension, and alleges: "That a great deal of the land thus attempted to be included within the limits of the city contained no habitation, and was so situated that it could not by any possibility be used for any city purposes, and was not in any way necessary for the conduct and administration of the affairs, business, control, and jurisdiction of said city." Specific tracts of land within the territory included by the proposed extension are described, which, it is alleged, are used as agricultural lands, and are not suited for nor adapted to city uses. Other facts are pleaded to show the alleged unreasonableness, and therefore the invalidity, of the action of the respondent in seeking to extend its limits, as attempted by the said proposed amendment to its charter.

The grounds upon which relator assails the alleged amendment are set forth as follows: "(1) Because the said proposal of the law-making authorities of Kansas City, to extend the limits thereof, was not accepted by the requisite number of the qualified voters of said city, as fixed by the charter of said city. (2) Because of the condition and locality of vast portions of the land sought to be included within the limits, said lands being unsuitable for city purposes, disconnected with said city, and not divided into lots and blocks, and not suitable for such subdivision, the attempted incorporation of the same into the limits of the city was beyond the power of the city, and was unreasonable, illegal, and void. (3) Because by reason of the condition and locality of vast portions of land sought to be included within the extended limits, said lands were given no additional advantages whatever by reason of said proposed extension, and the burden of licenses, and general and special taxes, which the city is now attempting to enforce, would be without any compensating advantages whatever, and would be depriving the owners of said property of their property, rights, and privileges without just compensation." The relator further challenges the alleged amendment on the ground that it is in contravention of sections 21 and 30 of article 2 of the Constitution of this state, and of article 5 of the amendments to the Constitution of the United States.

The respondent filed its answer and return to the information, in which it joined issue upon all of the facts alleged attacking the validity of the amendment of its charter. The respondent further pleads affirmatively the facts, showing, as alleged, a compliance with all of the legal requirements necessary to be taken by respondent in the proposal of the amendment, the submission of the question to the qualified voters of the city at a special election held for that pur-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

pose, the legal adoption of the amendment by the qualified voters of the city, and that respondent ever since said election has exercised and is now exercising municipal power, authority, and control over the territory so included within its limits. Respondent further alleges facts showing the adaptability and necessity of the territory so annexed for city purposes, and also facts showing generally the reasonableness of respondent's action in amending its charter so as to bring within the municipality the territory in controversy. The relator denied each and every allegation of the answer and return.

The cause being thus at issue upon the pleadings, this court made an order appointing Kimbrough Stone, Esq., of Kansas City, as a special commissioner to take the testimony on the issues joined, and to report the testimony, with his findings of fact thereon, together with his findings as to the law, and to state his conclusions of law in his final report. It was provided in the order that exceptions to the findings of fact and law should be made by either party so desiring within 10 days after the filing of the commissioner's report. A hearing was had before the commissioner, and many witnesses testified on behalf of the respective parties upon the issues presented by the pleadings. In due time the commissioner filed his report, as directed by the order of this court, finding for the respondent upon the issues of the case and recommending that judgment be entered in its favor and against the relator. Relator filed exceptions to the report of the commissioner, and the case is now before this court for decision upon said report and relator's exceptions thereto.

The testimony, as reported to this court by the commissioner, is largely directed to the issue of the reasonableness of the amendment of the charter in seeking to bring into the municipality for city purposes lands of the character of those included by such amendment. Aside from such issue, there is little conflict in the testimony, and even upon that issue many facts are not controverted. These facts, as found by the commissioner and upon which there is substantial agreement, may be summarized as follows: Kansas City was incorporated and now exists under a special charter, framed and adopted by authority of the provisions of sections 16 and 17 of article 9 of the Constitution of this state. Upon the 6th day of April, 1909, pursuant to a proposal made by the lawmaking authorities of Kansas City, a proposed amendment to the charter, extending the limits of the city so as to include a large body of contiguous territory, was submitted to a vote of the qualified voters of said city, at a special election held for that purpose. At this election 13,601 votes were cast, of which number 12,560 were in favor of the amendment and 1,041 were against it. The amendment was declared adopted, the limits declared extended in accordance with the proposal

submitted, and the respondent has ever since been exercising municipal authority in all of the territory thus sought to be annexed. At the date of the special election there were approximately 50,000 qualified voters in Kansas City.

The territory included within the limits of Kansas City prior to the alleged amendment of its charter, and the territory included after the limits were so extended, are described in the information with particularity and at considerable length, but, for the purpose of this statement of facts, the more concise description and outline of the commissioner is deemed sufficient. It is as follows: "The old city was bounded on the west by the Kansas state line and on the north partially by the Missouri river and partially by lowlands extending southward from the river. The most easterly line included some two miles of the valley of the Blue river, extending south from a point a short distance south and west of where the Blue river enters the Missouri. The remainder of the eastern boundary is rather a southeastern boundary, extending irregularly west and south to within two miles of the state line, from which a fairly regular southern boundary extends to the state line. The new limit begins at the state line several miles south of the old boundary, runs, with one single jog, directly eastward to the southeastern corner of Swope Park, and thence northward in an irregular line, including that park and the Blue valley, to the Missouri river, and up that river to the old northern boundary. The old limits held an area of 26.70 square miles, or 17,088 acres. The new limits inclosed 57.75 square miles, or 36,960 acres, an increase of 18,872, or a little better than as much again as was in the old city. Viewed from the standpoints of the location, nature, or uses of the land, the new territory logically and naturally divides itself into three sections: The 'East Bottoms,' the 'Blue Valley,' and the 'Southern Territory.' Of this added territory, the 'East Bottoms' comprises all of that land bounded by the Missouri river on the north and east and by the old limits on the west and south. The 'Blue Valley' includes the territory along the Blue river between the old limits at Eighteenth street on the north to Swope Park on the south, and from the new limits on the east to Cleveland avenue (from Swope Park to Twenty-Seventh street) and the old limits on the west. It also includes a narrow oblong strip between the old and new limits, and just south of the mouth of the Blue river. The 'Southern Territory' lies between the old and new southern limits and between the state line on the west, and Swope Park and Cleveland avenue (south of Forty-Ninth street) on the east. Outside of these three general sections is Swope Park and a small tract of land adjoining and southeast of the old limits." It is shown by exhibits introduced in evidence by respondent that electric railways extend into the an-

nexed territory, and by other exhibits that 40 additions have been surveyed and platted as residence property, 31 of which are in the "Southern Territory," 8 in the "Blue Valley," and 1 in the "East Bottoms."

The population of Kansas City at the following dates, as shown by the United States census reports, was as follows: In 1890, 132,716; in 1900, 163,752; and in 1910, 248,318.

The testimony upon the controverted issue as to the reasonableness of the amendment of respondent's charter will be reviewed at length further on in this opinion.

The exceptions to the report of the commissioner, filed by the relator, contain 10 separate grounds of objection. We shall not set out these objections at length, for the reason that the contentions of the relator may be more concisely stated as they appear in the briefs on file and as made at the oral argument in this court. They are as follows:

"(1) The extension ordinance was not ratified by the requisite number of qualified voters of Kansas City, as provided by the Constitution of Missouri. (2) Whether the vote on the extension came up to the constitutional requirement or not, it was clearly not in accord with the charter requirement of the respondent. (3) The city extension in this instance is unreasonable and illegal in attempting to include 42 square miles of territory, because the farming and timber land adjacent to the Blue river on the east, and the 2,600 acres in the east bottom of the Missouri river, are not needed for proper city uses, and are not adaptable for prospective city purposes."

The foregoing statement of facts is deemed sufficient for the purposes of this opinion, except upon the issue of the reasonableness of the charter amendment, which, as above stated, will be dealt with later on.

E. W. Major, Atty. Gen., Dana, Cowherd & Ingraham, R. E. Ball, and Edw. J. White, for informant. Jno. G. Park, F. F. Rozelle, and John T. Harding, for respondent.

KENNISH, J. (after stating the facts as above). The first question presented by the record in this case is as to whether the proposed amendment to respondent's charter was accepted by the required number of the qualified voters of Kansas City.

No question is raised as to the regularity of the proceedings in the proposal of the amendment, or as to the regularity of the special election held pursuant thereto. Neither is there any controversy as to the facts upon which the question of law is raised as to the sufficiency of the vote upon the proposed amendment. As found by the learned commissioner, "the vote in favor of the extension of the corporate limits did not equal three-fifths of the total number of voters who were qualified to vote at that election, but it was more than three-fifths of those actually voting at the election." The information challenged the validity of the amend-

ment, so far as the vote necessary for its legal adoption is concerned, only on the ground of its failure to be accepted by three-fifths of the qualified voters of Kansas City, as required by the charter of said city. But the question has now broadened, and relator attacks the validity of the amendment under both section 7, art. 1, of respondent's charter, and section 16, art. 9, of the Constitution of this state.

Sections 9703 and 9704 of the Revised Statutes of 1909 (enabling act) also contain provisions bearing upon the vote necessary for the amendment of a charter of a city organized under said section 16, and are referred to in the briefs herein, but as these provisions are identical with the Constitution so far as the vote is concerned, except the presence of a comma not found in the statutes and which does not affect the meaning, they will receive no further consideration.

Section 16 of article 9 of the Constitution of this state and section 7 of article 1 of respondent's charter, so far as applicable to the question under consideration, are as follows:

"Sec. 16. * * * Such charter so adopted may be amended by a proposal therefor, made by the lawmaking authorities of such city, published for at least thirty days in three newspapers of largest circulation in such city, one of which shall be a newspaper printed in the German language, and accepted by three-fifths of the qualified voters of such city, voting at a general or special election, and not otherwise; but such charter shall always be in harmony with and subject to the Constitution and laws of this state."

"Sec. 7. * * * Before such proposed amendment to the charter shall be of any force and effect, it shall be submitted to and accepted by three-fifths of the qualified voters of Kansas City at a general or special election provided by ordinance for such purpose."

The language of the charter providing that before the proposed amendment shall be of any force and effect, "it shall be accepted by three-fifths of the qualified voters of Kansas City at a general or special election," must be construed, under the decisions of this court, as requiring three-fifths of all the qualified voters of the city, and not three-fifths of those voting at the election. *State ex rel. v. Sutterfield*, 54 Mo. 391; *State ex rel. v. Francis*, 95 Mo. 44, 8 S. W. 1; *School District v. Oellien*, 209 Mo. 464, 108 S. W. 529. Upon the assumption of the foregoing construction of the charter, the relator advances the proposition that, even though the language of the Constitution be held to mean three-fifths of the qualified voters who vote at the election, it was within the power of the respondent to provide higher requirements for the amendment of its charter than that prescribed by the Constitution, and that if the Constitution be construed as requiring a less number of votes than required by the city charter, "it would be held to be a

mere limitation upon the legislative power of the respondent, in no manner affecting its right to adopt a higher requisite." This contention assumes that it was the purpose of the framers of the Constitution to fix a minimum vote, below which the charter could not be amended, but left the city free to go as far in the other direction in raising the vote as in its discretion it might choose to go, however difficult or even impracticable it might thus become to amend the charter.

The following question is thus presented, namely: Where the organic law of a municipality prescribes the conditions and requirements under which an act may be done, is it competent for the city to add other conditions and other requirements? In discussing this question it may be assumed that a city existing under a charter provided by general law sustains substantially the same relation to the act under which it is organized, and from which it derives its powers, as a city organized by special charter under section 16 of article 9 of the Constitution sustains to the latter instrument.

In the case of *State ex rel. v. Gordon*, 217 Mo. 103, 116 S. W. 1099, it appears from the facts stated that the city of Carthage, through its legislative body, had submitted a proposition to the voters, authorizing the incurring of an indebtedness. The statute authorizing the indebtedness provided that 15 days' notice of the election ordered to test the sense of the voters upon the proposition should be given by publication in a newspaper in such city. The ordinance ordering the election provided for notice as provided by the statute and in addition, "by notices posted in three public places in each ward of the city." The notice was published in the newspaper as required by the statute, but notices were not posted in public places as required by the ordinance. Passing on the question of the sufficiency of the notice thus given, this court, following the authority of the case of *Hamilton v. Village of Detroit*, 83 Minn. 119, 85 N. W. 933, said: "As section 6351, supra [Rev. St. 1899 (page 3185, Ann. St. 1906)] only requires 15 days' previous notice of the election, by publication in a newspaper published in the city, which was done, that part of section 5 of said ordinance, requiring notices to be posted in three public places in each ward of the city, was unauthorized and invalid, and the notice, as published, well enough." Discussing the same question, in the case of *State ex rel. v. Denny*, 4 Wash. 135, 29 Pac. 991, 16 L. R. A. 214, the court said: "The position of the relator is that this constitutional provision is a limitation upon the powers of the municipality in amending its charter; that the framers of the Constitution intended to surround freeholders' charters of cities of the first class with safeguards; and that, as one of these safeguards, this provision was placed in the Constitution as a limitation upon the power of the city in relation to the amendment of

its charter. He maintains that it was not intended to prohibit the people constituting the municipality from requiring and placing upon themselves further limitations and restrictions in the matter of amendment. Therefore, while the Constitution adopts a liberal method of procuring amendments, it is entirely within the power of the city itself, by its original charter, to adopt a strict method, such as is supposed to be involved in the word 'thereat.' * * * The framers of the Constitution went out of the usual way of making such instruments to insert a provision therein, looking to the possible solution of a perplexing modern problem—the government of large cities. It granted to certain cities the right to govern themselves, subject only to general laws of the state. The grant was made in the shape of power to enact a charter law and to amend it afterwards. Just how far this grant was independent of legislation we are not called upon to say; but it may be safely said that, wherever in this grant it is declared that a thing may be done in a certain way, when it comes to be done, the doing of it in that way will be sufficient. 'Wherever the language contains a grant of power, it was intended as a mandate. Wherever the language gives a direction as to the manner of exercising power, it was intended that the power should be exercised in the manner directed, and in no other manner.' *Varney v. Justice*, 86 Ky. 596 [6 S. W. 457]. 'When the Constitution defines the circumstances under which a right may be exercised, or a penalty imposed, the specification is an implied prohibition against legislative interference to add to the condition, or to extend the penalty to other cases.' *Cooley, Const. Lim.* (5th Ed.) p. 78. The power to amend is in this instance as important as the power to enact."

A further citation of authorities as to the power of a municipality to add conditions to those prescribed by its organic law should not be necessary in this case, when the exclusive and prohibitive character of the language of the Constitution is considered. This language provides that the charter adopted, pursuant to the provisions of the first part of the section, may be amended by a proposal therefor, made by the lawmaking authorities of the city and "accepted by three-fifths of the qualified voters of such city, voting at a general or special election, and not otherwise." Whatever the construction may be as to the vote required by the language quoted, it leaves no room for doubt that by the vote there prescribed—neither more nor less—can the charter be amended. By expressly providing for the manner of amending the charter, the acceptance of the same by the requisite number of qualified voters, and by the addition of the words "and not otherwise," this constitutional provision is made self-enforcing, prohibitive, and not subject to change or modification, either by charter enactment of the city or by act of the Gener-

al Assembly. The law as to prohibitions in Constitutions is stated in American and English Encyclopedia of Law (2d Ed.) vol. 6, p. 913, as follows: "It is the prevailing doctrine, though there is contrary authority, that prohibitory constitutional provisions are self-executing without regard to legislative sanction, and that their scope and purpose cannot be restricted by adverse legislation."

Under the decisions of this court, the power of the respondent to amend its charter and the vote necessary therefor, like the power to adopt the charter in the first instance and the vote required for that purpose, is derived directly from the Constitution, and no charter or legislative provision was necessary in either case. Discussing the question as to the necessity of legislative authority by the respondent in another case, in order to exercise the power of eminent domain, this court, in the case of *Kansas City v. Oil Company*, 140 Mo., loc. cit. 466, 41 S. W. 945, said: "The authorities cited by the learned counsel for the defendant as to the necessity of a grant of power have no application to a city charter which derives the power of condemnation of lands for public purposes directly from the organic law of the state in such unequivocal terms. It is not a matter of inference, but a direct grant of the necessary power. But that there might not be the semblance of a doubt of the power of the city to exercise eminent domain for such purposes the General Assembly of this state passed an enabling act which was approved March 10, 1887 (Laws Mo. 1887, p. 42). Upon legal principles it cannot be seen what efficacy there was in this legislative act. The power with its limitations had been previously conferred by the people of the state, and it was not within the power of the Legislature to curtail it." And in the case of *Westport v. Kansas City*, 103 Mo. 148, 15 S. W. 69, in discussing the same constitutional provision, the court said: "That part of section 16 of article 9 of the Constitution, before quoted, declares in plain terms that these charters may be amended by a proposal therefor, made by the lawmaking authorities of such city and accepted by three-fifths of the qualified voters, voting at the election, and not otherwise. Thus it will be seen that the method by which the city itself can make the amendment is not only pointed out, but the city is denied the right to amend its own charter in any other way."

Two points are earnestly urged in relator's supplemental brief which are entitled to consideration in this connection. It is contended that: "In this state the per cent. of voters ratifying the extension, required by the Constitution, in no manner affects the right of the city to adopt a higher requisite, or a greater number of votes to amend its charter." And the case of *State ex rel. v. White*, 162 Mo. 533, 63 S. W. 104, is confidently relied upon as sustaining relator's position. The point decided in the *White Case* was

that, where the Constitution (Const. art. 9, § 2), provided that "no county seat shall be removed unless two-thirds of the qualified voters of the county, voting on the proposition at a general election, vote therefor," such constitutional limitation did not render invalid a statute requiring a higher vote than that named in the Constitution, to authorize such removal. The ground upon which that statute was held not inconsistent with the constitutional provision on the same subject was that "if the Constitution was silent on the subject, the General Assembly would be absolute in its power. That power the Constitution silently recognizes and merely puts limitations upon it. * * * But in all other respects the subject is within the discretion of the Legislature, which can, if it sees fit, require a larger proportion of the voters to give their approval than the minimum limit prescribed by the Constitution." 162 Mo., loc. cit. 541, 542, 63 S. W. 106. It is made clear in that case that, in the absence of any constitutional provision on the subject, the General Assembly had full power in the matter of the removal of county seats, even without the formality of a submission of the question to the qualified voters of the county. The constitutional limitation merely took from the General Assembly the power to remove a county seat and required that such removal should be provided for by general law, and further provided that no county seat should be removed, unless two-thirds of the qualified voters of the county voting on the proposition should vote therefor. It was held that this limitation left the General Assembly with all of its former power over the subject, except in so far as it was expressly limited by the Constitution; that being possessed of general legislative power, it was competent for the General Assembly to provide any conditions not in conflict with the Constitution, and therefore to require a higher vote. The doctrine of the *White Case* is not applicable to the case at bar, for the reason that the city is without any power to amend its charter, save as conferred by the Constitution, and the same provision of that instrument which gave the city power to amend not only prescribed the vote necessary for that purpose, but said it should not be amended otherwise. Therefore the same source, to which alone the city must look for its power to amend, "denied the right to amend its own charter in any other way." *Westport v. Kansas City*, supra.

The other point made in the supplemental brief is that "the ordinance extending the limits is based on section 7, art. 1, of the charter, and if it is found that this section of the charter is void, the whole ordinance and extension would fall with it." There is no merit in this point. Section 7, art. 1, of the charter makes provision in detail for the several steps necessary to be taken in amending the city charter so as to extend the limits of

the city, including the passage and publication of an ordinance, the holding of a special election, canvassing the vote and declaring the result, upon all of which the Constitution is silent, very properly leaving the same for charter regulation. This section also contained a provision as to the vote necessary for the adoption of the amendment, but as that vote was already definitely fixed by the Constitution, no charter provision was required, and that part of the section attempting to prescribe a different vote may be treated as void, without in any manner affecting the validity of the many other and independent provisions of the section. No proposition of law is better settled than that, "when the provisions of an act or ordinance are separable, if the act or ordinance, excluding the unconstitutional parts is capable of being exercised in conformity with the legislative intent, the whole act will not be declared void," and no case can be instanced more aptly illustrative of this doctrine than that of said section 7 of respondent's charter. For the reasons given we approve the finding of the commissioner upon this question of law, and hold that it was not within the power of respondent, by any charter provision, to require a different or greater vote for the amendment of its charter than that prescribed by section 16, art. 9, of the Constitution of this state.

The point is made in relator's brief that the charter of respondent, under which the said election for the extension of the city limits was held, has the force of a legislative act within the corporate limits of the city, and that therefore the city is estopped from denying the validity of any of the provisions of its charter with reference to the requisite number of votes prescribed for the adoption of an amendment thereto. It is recognized law that the doctrine of estoppel is available as an issue in a case only when it has been made such by proper pleading, and, as that issue has not been made by any pleading in this case, it is not properly before the court, and therefore need not be considered. Besides, the finding of the commissioner on the question of estoppel was against relator, and no exception was filed to the report upon that finding.

The next question for determination is whether the words, "accepted by three-fifths of the qualified voters of such city, voting at a general or special election, and not otherwise," as found in said section 16 of the Constitution, mean three-fifths of all the qualified voters of the city, as maintained by relator, or three-fifths of the qualified voters who vote at the election, as contended by the respondent and as found by the commissioner. If relator's contention be correct, then, under the undisputed facts, the proposed amendment was not legally adopted, and the finding of the commissioner cannot be sustained. It has been the policy of this state, as indeed, of republican forms of gov-

ernment generally, to refer certain matters chiefly of local concern to the determination of the qualified voters of the locality particularly interested and which is to receive the benefits and bear the burdens. Because of this policy, constitutional and statutory provisions have existed since the early history of this state, and now exist, authorizing the qualified voters, as therein prescribed, to decide as to the location or removal of a county seat, as to the adoption by counties of township organization, the law restraining animals from running at large, or the law prohibiting the sale of intoxicating liquors; also as to the incurring of indebtedness for specified purposes by counties, townships, municipalities, and school districts, and the adoption or amendment of municipal charters, as in the case in hand. Many cases involving the construction of such constitutional and statutory provisions have been before the courts of last resort of this state, and a few have been decided by the highest court of the land. So that, although there may not be entire harmony in the decisions, or a decision exactly in point, there is no lack of authority to guide to a correct conclusion upon the question before us.

The constitutional provisions and statutes providing for the exercise of certain powers or the doing of certain acts by local subdivisions of the state, when authorized by a prescribed number of the qualified voters of the locality affected, in so far as the required vote is concerned, may be divided into three classes: First. Those in which the vote required is of the qualified voters of the locality, without restriction, and of which the following may be cited as an example, namely: "The General Assembly shall have no power to remove the county seat of any county, unless two-thirds of the qualified voters of the county, at a general election, shall vote in favor of such removal." Section 30, art. 4, Const. Mo. 1865. Second. Those in which the vote required is of the qualified voters, voting at the election at which the question submitted is to be determined, and of which the following is an example, namely: "The General Assembly may provide, by general law, for township organization, under which any county may organize whenever a majority of the legal voters of such county, voting at any general election, shall so determine. * * *" Section 8, art. 9, of the Constitution of 1875, as it existed prior to its amendment in the year 1902. Third. Those in which the vote required is of the qualified voters voting on the proposition, and of which said section 8, art. 9, of the Constitution of 1875, as amended in the year 1902 and as it now exists, is an example, namely: "The General Assembly may provide, by general law, for township organization, under which any county may organize whenever a majority of the legal voters of such county, voting upon that proposition, at any general election,

shall so determine. * * * The language used in the third class is so clear and explicit that no question can arise as to its meaning, and therefore it need not be considered further.

The language of the constitutional provisions and statutes falling within the first class named, ever since the case of *State ex rel. v. Sutterfield*, 54 Mo. 391, has uniformly been held by this court to mean that the proposition submitted must be accepted or approved by the prescribed proportion of the qualified voters of the county or other subdivision to which the question is submitted, and not merely by such proportion of those who vote at the election. *State ex rel. v. Sutterfield*, 54 Mo. 391; *State ex rel. v. Brassfield*, 67 Mo. 331; *Webb v. La Fayette Co.*, 67 Mo. 353; *State ex rel. v. Walker*, 85 Mo. 41; *State ex rel. v. Francis*, 95 Mo. 44, 8 S. W. 1; *State ex rel. v. Harris*, 96 Mo. 29, 8 S. W. 794; *Russie v. Brazzell*, 128 Mo. 93, 30 S. W. 526, 49 Am. St. Rep. 542; *State ex rel. v. White*, 162 Mo. 533, 63 S. W. 104; *State ex rel. v. Gibson*, 195 Mo. 251, 94 S. W. 513; *State ex rel. v. Russell*, 197 Mo. 633, 95 S. W. 870; *School Dist. v. Oellien*, 209 Mo. 464, 108 S. W. 529. On the other hand, where the assent of the requisite proportion of the qualified voters, as in the second class, is followed by the words, "voting at an election," or words of similar import, the decisions hold, with equal uniformity, that all that is necessary for the adoption of the proposition is that it be accepted or approved by such proportion of the qualified voters who vote at the election. *State ex rel. v. Brassfield*, 67 Mo. 331; *Webb v. La Fayette Co.*, 67 Mo. 353; *State ex rel. v. Mayor*, 73 Mo. 435; *State ex rel. v. Walker*, 85 Mo. 41; *State ex rel. v. Harris*, 96 Mo. 29, 8 S. W. 794; *State ex rel. v. McGowan*, 138 Mo. 187, 39 S. W. 771; *State ex rel. v. Gibson*, 195 Mo. 251, 94 S. W. 513; *State ex rel. v. Russell*, 197 Mo. 633, 95 S. W. 870; *School Dist. v. Oellien*, 209 Mo. 464, 108 S. W. 529; *State ex rel. v. Wilson*, 129 Mo. App. 246, 108 S. W. 128.

An examination of the decisions, and of the various constitutional provisions and statutes construed therein upon this question, makes it clear that the word used to differentiate the one class from the other is the word "voting." Omitting that word from a provision of the second class, the requisite proportion of all the voters qualified to vote upon the proposition, as in the first class, is at once required. We have, then, such a provision as the courts have always construed as contended for by relator in this case. It thus becomes apparent that, under the contention of the relator, the word "voting" is rendered redundant and of no effect in the constitutional provision governing the amendment of respondent's charter. The courts have not so regarded the use of that word in the cases cited, and it may be safely asserted that in no case decided by this

court has it ever been held that, where the word "voting" is used, as in the language of said section 16 under consideration, a majority of all the voters entitled to vote was intended. If there was one subject more than another upon which the learned men who framed the Constitution of 1875 were capable of speaking with precision, and so as to convey the exact meaning intended, it was in providing for submitting to the voters questions for their determination by majorities prescribed in matters of local concern. And the word "voting" found in so many different places in that connection was evidently intended to have a well-defined meaning, a meaning which the courts have always recognized and given effect.

In the case of *State ex rel. v. Gibson*, 195 Mo. 251, 258, 259, 94 S. W. 513, 514, 515, the court had before it for consideration section 8, art. 9, of the Constitution, as it existed prior to the amendment of 1902, namely, "whenever a majority of the legal voters of such county, voting at any general election, shall so determine," and it is said: "It will be observed that the Constitution authorizes the Legislature to provide for the adoption of the township organization law by the vote of a majority of the legal voters of the respective counties voting at any general election, while the statute quoted provides for the adoption of such law by the vote of a majority of those voting at the election on the question of the adoption of the law. It is clear from the provisions of the statute that, however small the number of votes cast at any general election upon a proposition authorizing the adoption of the township organization law, so that a majority of the legal votes cast on that proposition be in favor of its adoption, that is all that is necessary for its adoption. It is not so, however, under the Constitution, which, in order to the adoption of such a proposition, requires that a majority of all the votes cast at such election be in favor of its adoption." The court thus held the statute which required a majority of those voting at the election on the question of the adoption of the law invalid, because in conflict with the Constitution, which required a majority of all the votes cast at such election, and not a majority of all the qualified voters of the county.

Having before it for consideration the same section of the Constitution, and the same statute enacted pursuant thereto, this court, in the case of *State ex rel. v. McGowan*, 138 Mo., loc. cit. 194, 39 S. W. 772, said: "The general power of the Legislature to frame a statute for township organization is clearly limited by the terms of the organic law above quoted. Hence section 8427 (Rev. St. 1889), cannot be accepted as authorizing the adoption of such a proposal by a vote of less than the majority of the legal voters of the county who happen to vote at the election in question." Referring to the language

thus quoted, the commissioner in this case pertinently comments as follows: "The language there interpreted is not only in the Constitution, but is a part of the same article of that instrument in which is found the clause now in question. It is fairly assumable that language so nearly identical, used in such similar connections, had the same meaning in the minds of those who used both. Such was evidently the idea of the court in this case, for (page 194 of 138 Mo., at page 772 of 39 S. W.) it is said: 'On the other hand, some sections of the Constitution require majorities of the qualified voters, voting at an election, to adopt certain measures. See sections 16 and 22 of article 9.'" And in the case of *State ex rel. v. Wilson*, 129 Mo. App. 242, 246, 108 S. W. 128, 129, the language construed was, "if a majority of the qualified voters of said township, voting at any general or special election, shall vote in favor of so restraining such animals." Construing this language, the court said: "As the law now stands, the stock law may be adopted in a county by a majority vote of those voting on the proposition, but when it is sought to adopt it in townships, there must be a majority voting for it of the voters who vote at the election."

But in no case has this court more clearly distinguished between the language in the first and second classes above given, and the majority required, than in the recent case of *School Dist. v. Oellien*, 200 Mo. 464, 108 S. W. 529. The language there construed was: "And whenever a majority of the qualified voters of any school district, at any annual or special meeting called for that purpose, shall determine that it is necessary to have additional grounds for school purposes, then the board of directors may proceed to condemn and pay for any amount of land adjacent to the schoolhouse site, as provided in this section." One of the parties in that case maintained that a majority of those voting at the meeting only was necessary to the validity of the action taken, while the other maintained that a majority of all the qualified voters of the district, whether voting or not, was necessary. Upon the contentions thus advanced this court said: "It was not intended by the Legislature that, if there were only three present out of forty voters and taxpayers, the majority of those present at such meeting could fix this burden upon the school district. If such had been the intent, it could have been easily and plainly expressed by saying that the result should be determined by a majority of those present and voting at such meeting." The court held that a majority of all the qualified voters and taxpayers of the district was required. In view of the fact that under the school district law no voter can legally vote on the proposition to be decided, unless present at the annual or special meeting at which

it is submitted, the word "present" in the foregoing quotation may well be omitted without affecting the sense, and when so omitted the inference necessarily follows that if the word "voting" had been used in the language under review, preceding the words "at any annual or special meeting," as it is used in the charter amendment provision of said section 16 of the Constitution, then a different result would have been reached by the court in that case.

The conclusion of the commissioner upon the question raised by the relator as to the sufficiency of the vote in favor of the adoption of the charter amendment is: "That section 16, art. 9, of the Constitution requires only three-fifths of the qualified voters voting at the election to adopt amendments to municipal special charters." We approve such finding, and hold that it is fully sustained by the decisions of this court.

There remains to be considered the question, Was the amendment of the charter reasonable? Upon this issue the contest before the commissioner, and at the oral argument in this court, was mainly waged. It is the important question in the case and is entitled to full and serious consideration.

Respondent has interposed a preliminary question of law to which reference should be made. In its brief in this court respondent has, for the first time, challenged the right of the court to pass upon the reasonableness of its action in amending its charter, for the reason that in so doing the qualified voters of Kansas City were acting under authority directly conferred by the Constitution of this state, and therefore were engaged in a legislative act not subject to judicial review. This question we regard as different from that of the unreasonableness or oppressiveness of an ordinance or resolution enacted by the lawmaking body of a city in the exercise of a delegated legislative power. In the latter case the right of judicial review is recognized law. This contention of respondent is not without support, but the question was not raised by striking at the information, or by the answer and return, or by exception to the finding of the commissioner against respondent upon that issue, and therefore it is not properly in the record for decision.

The evidence bearing upon the issue of the reasonableness of the amendment to respondent's charter has been so ably and fairly reviewed in the report of the commissioner, and his conclusions of law are so well fortified by the authorities cited, that we shall adopt that part of the report in this opinion, omitting such parts as set forth the testimony of the witnesses and, in part, the decisions of the courts upon questions of law, for the reason that, while entirely proper and commendable in the report, their inclusion would unduly lengthen this opinion. It is as follows:

"Was the Extension Reasonable?"

"Relator challenges, with much force, this extension, alleging that it is unreasonable and cannot stand. Necessarily the range of inquiry involved in the question of the 'reasonableness' of any act must be rather wide. Obviously this range is very broad when the question is the reasonableness of the extension of the limits of a great city, involving, as it must, the numerous considerations which can and do enter into the element of 'reasonableness' and the almost countless facts which bear upon the existence of those considerations. The problem for the court is to examine the circumstances bearing upon the extension, and, in the light of that investigation, declare that the extension is or is not, so unreasonable that it should or should not be allowed to stand. It is no province of the court to substitute its own judgment of what would be the best or most advisable line for the extended limits; it is not its province to subtract or add to the territory selected by the municipality to be annexed; its sole duty is to examine the extension as actually attempted and to say whether it should remain. In short, the court is passing, in a purely judicial manner, upon the validity of an act legislative in its nature. It would be casually evident that many different considerations might bear upon this question of reasonableness, and that the relative value—even the presence—of each would vary with every case. Later in this report will be set forth some of the different considerations which have been deemed of appreciable weight in cases involving questions of this character, and an application of such of them as are pertinent to the circumstances of this case will be attempted. It is from the facts of each individual case that the court must determine what considerations are involved, and what weight shall be given each. The facts of each case, therefore, are the primary consideration.

"Without now weighing the contentions of the parties, but as an aid and guide in considering the facts of this case, a general statement of the positions of the parties will be outlined.

"The respondent contends that all of the added territory is adaptable to city uses (residential, industrial, or both); that it is worth, and is held at, city values because of this adaptability; that all is needed for the systematical development of the city along intelligent and economical lines; that some portions of this territory are occupied by the growth of the city beyond its old limits; other portions are platted as additions to the city; other portions needed for present and prospective city residence or industrial purposes; other portions are needed for the sanitary or police welfare of the city, of the included territory, or of both; and some portions are deriving the benefits and advantages of the city.

"The relator contends that only a minor portion of the added territory should have been included; that the greater part is not at present utilized for any city purpose, but is being used for farming, grazing, and gardening, or is barren land not used at all; that the greater portion is sparsely settled and does not need or want city improvements or facilities; that the greater portion is not needed for city uses or purposes; that much of it is unsuitable to city purposes; that the greater portion would receive no benefit from annexation, but would be subject to city taxation, which, in many cases, would amount to confiscation; that a large part of the land cannot be made available for city uses without diking and filling, which would cost more than the land is worth and would be vastly more expensive than if done according to the present plans of the owners; that there is much vacant land within the old limits; and that, outside of a small part of the included territory, no additional territory is needed for the growth of the city.

"Findings of Fact.

"While the bulk of evidence is large and the field covered by it is wide, yet the inquiry has developed along certain fairly well defined lines. The most important of these are the location and extent of the annexed territory, its natural characteristics, its present uses, its adaptability for city uses, the necessity of its inclusion, its values, and the benefits or detriments either to the city or to it. * * *

"Of this added territory the 'East Bottoms' comprises all of that land bounded by the Missouri river on the north and east and by the old limits on the west and south. The 'Blue Valley' includes the territory along the Blue river between the old limits at Eighteenth street on the north to Swope Park on the south, and from the new limits on the east to Cleveland avenue (from Swope Park to Twenty-Seventh street) and the old limits on the west. It also includes a narrow oblong strip between the old and new limits, and just south of the mouth of the Blue river. The 'Southern Territory' lies between the old and new southern limits and between the state line on the west, and Swope Park and Cleveland avenue (south of Forty-Ninth street) on the east. Outside of these three general sections is Swope Park and a small tract of land adjoining and southeast of the old limits.

"The Southern Territory: This section lies adjacent to the old southern boundaries and is fairly rectangular in outline. It extends north and south about $3\frac{1}{2}$ miles, east and west about 4 miles, and contains between 9,500 and 10,000 acres. It is, for the most part, gently rolling land. Along the entire distance and roughly following the boundary of this section a small stream named Brush creek runs eastward, finally emptying into

Blue river. The southern watershed of Brush creek extends southward to the crest of a divide running generally from the corner of Sixty-Seventh street and Cleveland avenue, in a southwesterly direction to Seventy-Fifth street and the state line. South of this divide the territory naturally drains easterly and southeasterly into the Blue river—some of the drainage entering the Blue within the new limits—a larger amount passing outside the new limits before reaching that stream.

"The northern slope of the Brush creek watershed is closely built with dwellings and the southern slope is being rapidly filled with a nice class of city homes. Outside of one tract of about 130 acres of ground and occasional small parcels, this territory is not now used for agricultural purposes. Its character is essentially urban and close suburban. Much of the greater portion is platted as additions to Kansas City, and much of that not occupied has been sold to city home builders on time payments.

"The sewage of this territory is cared for by private cesspools or is emptied into Brush creek, which thus becomes an open sewer. A pressing necessity exists for the installation of a sewer system which will care for the sewage of this section and keep it from flowing into Brush creek.

"Relator admits the propriety of the extension over that part of this territory embodied within the Brush creek watershed. He denies the propriety of that south of the divide. Little of this property lying south of the divide is in large tracts, and by far the greater part of it is platted as city additions into blocks and lots. Some of it built upon; some of it paved, with sidewalks; some of it supplied with water from the Kansas City municipal plant through mains laid by the property owners; some of it receives electric lighting current from the same plants which supply the city. Practically all of it is reached by three street car lines, which are extensions of the city street railway system.

"The values of this land, while varying widely, are in excess of any possible usage, except as city property or for high class suburban homes, and such homes demand and should have conveniences which must be supplied by and from the city. This section, as well as that immediately north on the south slope of the Brush creek watershed is essentially city and close suburban residential property, is being used as such, and will be increasingly so used. The growth of this southern section as a residence quarter has been rapid and is continuing so.

"Swope Park is a large public park belonging to and being improved by the city. It contains about 1353 acres. It is connected with the city by a street car line and boulevard, and is a popular resort for people of the city.

"Blue Valley: The Blue river is a stream of some size, lying east of Kansas City and

running in a northern direction into the Missouri river. It twists in and out along a valley varying in width from one-fourth to one mile, and containing between 3,000 and 4,000 acres of land. The valley is generally flat bottom land near the stream, with slopes or bluffs upon the border. Some of these bluffs are abrupt, and they range from a few feet up to over 40 feet in height. This valley extends for about $7\frac{1}{2}$ miles from Swope Park to the Missouri river. Of this distance, two miles toward the Missouri River lie within the old limits. Its present use is varied, but predominatingly a country use. It contains a number of manufacturing industries of various kinds. Most of these are located within or near that part of the valley lying within the old limits. One witness testified to having located forty industrial plants in the Blue Valley (almost entirely within the old limits), within five years. During the past few years the growth of industries in this valley has been considerable. Nearly all of this development has been within the old limits. The general character of those industries located in the Blue Valley, either within or very near the old limits, may be gathered from the partial list following: A large nut and bolt works; automobile works (owning 30 to 40 acres); a large radiator manufacturing plant, and brass works. A few such industries are scattered in the valley between the old limits and Swope Park. At Leeds, a small unorganized settlement of two hundred or more people about two miles south of the old limits, is located a distillery, a food plant, a rice mill (not in operation) and a lumber yard. In other parts of the valley, outside the old limits, are located a creosoting plant, where railway ties and timber are treated, a rock crusher, several quarries, a brickyard and plant, starch works, and a stock food factory. Some of the witnesses think not over 10 per cent. of the land in the valley, outside the old limits, is used for manufacturing purposes. North of Swope Park, on the highlands west of the river and between the river and Swope Parkway, the land is platted and largely built on. * * *

"Outside of the above places the land, with the exception of some tracts not in use, is being, and has for years, been utilized for truck gardening, dairy farms, small pastures, and small farms, has no city improvements, and many of the owners and occupants want none. Within the $5\frac{1}{2}$ miles between the old limits and Swope Park there are five river crossings (bridge or ford) and the connection with the city is by rock or dirt wagon roads, some of which bear the names of city streets. The gardeners, dairymen, and farmers occupying this land for the most part drive in to the city, which is their market. That part of the valley within the old limits is fairly well supplied with street car service, having one line which crosses the valley at about Fourth street, and another which comes to within three blocks of the Blue river on Fif-

teenth street. The new territory is served by street cars as follows: The Fifteenth street line, above mentioned, parallels (three blocks inside of) the old limits; nine blocks south of this line another runs as far east as Brighton and Twenty-Fourth streets, ending about a mile from the nearest point of the Blue river; three blocks south of this last line another ends at Twenty-Seventh and Spruce streets, about one and one-quarter miles from the nearest point of the Blue river; four blocks south of this last line two lines end at Thirty-First street and Indiana avenue, something over $1\frac{1}{2}$ miles from the nearest point on the Blue; from Forty-Ninth street to Sixty-Third street (the northern boundary of Swope Park) the Swope Park car line parallels the general direction of the river at a distance to the westward of one-half mile to one mile from the winding thread of the river. From Forty-Ninth street and Swope Parkway a line, running cars hourly, extends down into the Blue Valley. Along the entire length of the valley on the east side and south of the old limits an interurban line has been projected, but, so far, has not been built. There are two railroads (the Missouri Pacific and the St. Louis & San Francisco) running the length of the valley; one other (Chicago, Rock Island & Pacific) which runs up almost to Leeds before leaving the valley, and a fourth (Kansas City Southern) which runs some distance south of Leeds. A portion of the valley on the west side of the river extending some distance south from the old limits is not at present connected with any railroad, and could be connected only by bridging the Blue river or by running trackage northward or southward from where the railways cross the river to the south and north. The Kansas City Southern has a switch built across the river to some abandoned coal mines just south of the William Vineyard land. Streets are not extended into the valley east of Topping avenue.

"The market value of the lands along the valley varies according to the location, the character of the land, and the witness. For farming and gardening purposes, they are estimated to be worth from \$100 to \$125 an acre, some is probably worth more than this; the highest rental mentioned being \$30 per month for a tract of 33 acres. That located in the bottom is for all purposes more valuable than that upon the slopes or highlands. That accessible to switches is more valuable. The market valuations placed by the witnesses are based sometimes upon large areas and sometimes upon particular tracts. In some instances the divergence of value is wide. The evidence upon this point was by those who owned or were interested in the tracts in question, or real estate dealers with a more or less intimate knowledge of values in that vicinity. * * * In spite of the wide divergence in the estimates of the value of land in the Blue Valley, one fact stands out

prominently: The land has a value outside of and beyond any use for farming, dairying, or gardening purposes. Its real value is founded upon its adaptability as city industrial property in the not distant future. This fact is well covered by the testimony of Allen L. McCoy, agent for the large McCauley tract, who testified that the value of that land was based upon its usefulness for factory and switch property.

"Brush creek, itself an open sewer serving a large and increasingly populous territory, flows into the Blue river about two miles north of Swope Park. At a point within the old limits a four-foot sewer, spoken of as the Goose Neck sewer, empties into the Blue, draining an area of four and three-fourths square miles. It also receives the sewage and drainage from the factories, farms, and dairies in the valley and on the valley slopes. The Blue is sluggish, and in times of low water becomes well-nigh closed at its mouth, caused by the filling at that point of both the Missouri and Blue rivers. At such times the water becomes stagnant and so foul from sewage and filth that it is very offensive and unhealthy, particularly in the lower part of the river. The Blue is the natural drainage-way for the greater part of the area of the city, old as well as new limits, thus caring for about twenty-three square miles. There was a pressing, increasing, and immediate need, at the time of the extension, for some alleviation of and control over this sewer situation. There seems no dispute that Brush creek should be relieved of the sewage poured into it by the construction of a sewer large enough to serve the area of its natural drainage and extending from the state line on the west to at or near the junction of Brush creek with the Blue. There also seems no question that some disposition should be made of the sewage from this Brush creek and the Goose Neck sewers to prevent it entering the Blue. This is demanded for the health of the city at large, with particular reference to that part within the old limits (below Eighteenth street) through which the Blue flows, and also for the health of those who live in the Blue valley. * * *

"While railways do enter the city from the south and east at other points, the Blue Valley is naturally a railway gateway into the city, and, as said above, is at present occupied for its entire length by the main line tracks of two large systems and part of its length by the main line tracks of two other large systems. To bridge the Blue would require bridge work of some character for distances of around 200 feet. Naturally the engineers differ as to the expense and character of the bridging necessary. The present free switching limit on the south is Twentieth street, although one plant located south of there has made arrangement to secure this free service.

"The bottom land traversed by these rail-

roads is flat, and varies in width from one-fourth of a mile to one mile. It is free from overflow, except that portion lying near the Missouri river and small isolated tracts which are somewhat lower than the average surrounding bottom land. * * * The popular name 'East Bottoms' is an index to the character of this land. It is an alluvial formation of the Missouri river created within the past 20 years. It is low and practically level. The differences in elevation are usually occasioned by some slough bed and at the extreme do not exceed 10 feet. The general level of the land is about 10 feet above low-water stage. Most of it is subject to annual overflow, and all of it is overflowed in unusual rises of the river. The Missouri river has at times washed away considerable of this land, in 1883 taking 400 acres of the Kanoky property, but in late years has been adding to it. The receding overflows leave deposits averaging eight inches. The soil is generally sandy, mixed in places with gumbo and clay. Considerable of this land is covered with a thriving willow growth and a good-sized area with a medium growth of cottonwood timber. Some of the higher stretches are used for truck gardening, but the annual overflow has prevented much of it being used at all. These overflow conditions do not now ordinarily apply to that portion (about one-third) of the land south of the Kansas City Southern Railway Company track embankment, shown in Exhibit 3, which forms a barrier to any but exceptionally high water. This railway embankment is higher than the surrounding land. It is a substantial protection to the land south of it when the river reaches a stage of 27 feet. In 1908, with the use of sand bags on its top, it withstood 30 feet, though the situation becomes dangerous beyond 27 feet. The ordinary annual rises bring the river to from 21 to 24 feet. In 1903 it reached 35 feet; in 1908, 30 feet; and in 1909, about 30 feet. The land so protected is used for factories, elevators, mills, railway yards, and truck patches. North of the Kansas City Southern embankment, the land west of the Chicago, Milwaukee & St. Paul Railway Company track, has a few houses and one elevator on it, but east of that track there are scarcely any houses of any character (one witness estimating the total number at twelve)—the few there being termed 'shacks' by the witnesses. None of it has ever been platted, except one small portion, the plat of which was afterward vacated. No streets or city improvements of any character are on this land. There is one small schoolhouse which has been there a number of years. There are no roads regularly laid out and maintained as such. The nearest street car line comes to the old limits on the west and runs north a quarter of a mile along the old limit line. The Kansas City Southern Railway Company, the Missouri Pacific Railway Company,

and the St. Joseph & Grand Island Railroad Company, have main line trackage and yards; and the Chicago & Alton Railroad Company and the Chicago, Milwaukee & St. Paul Railway Company have main line trackage and land for yards on this land. The Atchison, Topeka & Santa Fé Railway Company passes near the southeast corner of this land. The Missouri Pacific Railway Company has about 150 acres of yardage property. The Kansas City Southern main line track is built upon an embankment, as said above, and the Chicago, Milwaukee & St. Paul Railway Company track is also upon an embankment, which gradually rises until just before it reaches that company's bridge over the Missouri river it attains considerably more than 30 feet in height, the average being from 10 to 20 feet. * * *

"At present the land has no value for residential or agricultural purposes, its only reasonable present use being the growth of willows and cottonwood timber, with precarious truck gardening on a few of the higher ridges. J. P. Kanoky testified he had received no rentals and was not using his land (over 1,000 acres), and H. M. Meriwether testified he derived no income from his more than 600 acres, except from one sale of willows. Its present value springs entirely from its location near Kansas City and its adaptability, with flood protection, for railway yardage, factory, manufacturing and commercial usages. Its real value is in a sense prospective. Its certain usage is as industrial city property.

"Various estimates have been made both of the present and prospective (with flood protection) value of this land. These different values are as follows: J. P. Kanoky, owner of something over 1,000 acres of this land, did not place any estimate upon the property, except to say that he had been offered the Chamberlain tract for \$350 an acre, and he believed it could be bought for less; that three years ago he bought part of the William H. Brown tract for from \$100 to \$175 per acre. John A. Moore testified that the present value of the property was \$500 to \$2,500 per acre; that the part that does not overflow is worth \$200 an acre for gardening purposes, and if this entire property was protected from overflow, it would be worth \$5,000 an acre. * * * It would require flood protection to make this land attractive for city industrial uses. The city officials now have under consideration the formation of a drainage district in the East Bottoms to construct a levy which will protect all of this land. This district also includes East Bottom land within the old limits and embraces a total of 3,700 acres above low-water mark and 437 acres below low-water mark, but within the harbor line. The estimated cost of such a levee is \$1,750,000. If a levee were built, a drainage and pumping system would have to be in-

stalled to care for seepage and surface water in flood time. * * *

"In the western portion of this territory and in that part included within the railway yards there is need of police protection, both for the territory itself and also for the city. The tracks are a rendezvous and lurking place for vagrants and police characters who get on and off trains there, or rob freight cars which halt in the yards. Brawls requiring police interference are not infrequent, and the police have found gambling in the cars. The police have had occasion to go quite far out into this territory (testimony of R. L. James). There is a police station inside the old limits. For a short distance outside the old limits the police had, before the extension, exercised some control. Two motor cycle men have been added to this station. * * *

"General Findings:

"There are certain lines of evidence which can be best treated in relation to the entire subject rather than piecemeal in connection with each of the three sections of added territory already discussed. Such are the boulevard and park system, the sewer system, the growth of the city, and the need of additional territory for industrial development.

"Boulevard Plan: The city is planning a system of boulevards which contemplates in the near future east and west boulevards in the new 'South Territory' along Sixty-Third and Seventy-Third streets from state line to Swope Park; and north and south boulevards through the same territory along the Paseo from Forty-Seventh street to the new southern limits and another parallel with the Paseo and nearer the state line. Besides these, other boulevards, now in existence to the old limits, will be extended. Ultimately, a boulevard or driveway on both sides of the Blue river, from Swope Park to the Missouri river, and thence following the proposed levee around the large bend of the Missouri river. The advantages of an early establishment of boulevards in growing territory are that it can be done at much less cost, and that it helps shape the growth of the city along systematical and economical lines, placing the residential, business, and factory portions of the city in the best and most economical relations to each other. I do not find, however, that the use of a boulevard upon the top of the proposed levee is a proper reason for including the East Bottoms within the extension, or that the desirability of municipal control over the Blue river, so as to make it, in time, a pleasure and recreation spot for the city dwellers, is more than a cumulative reason for the inclusion of the Blue valley at this time.

"Sewer Plans: Exhibit 1 shows a comprehensive and far-sighted plan for handling the city sewage. This plan, while not finally determined upon by the city—in fact, being

rather the description of the tentative idea of the city engineer—has been made the basis of expert opinions dealing with the sewer problems of Kansas city. Whether the best or most economical plan or not, it is true that the immediately present sewer necessity for including the Blue Valley could, so far as concerns the Brush creek and Goose Neck sewage, be obviated by disposal plants at the mouth of the Goose Neck and contemplated Brush creek sewers. But it is equally obvious that it will be only a few years until there will be a sewage draining directly into the Blue which will have to be cared for by an interceptor, large or small, along the west banks of that stream, and that interceptor must form a natural link in the city sewer system. It could not rationally be treated as a separate proposition, as would be the case in the East Bottoms. So that, while that sewage does not demand particular attention to-day, it seems so certain in the near future that it will have to be cared for that it cannot be said to be entirely unreasonable to include this Blue Valley territory for sewer purposes. As to the east side of the Blue, it may be said that only sufficient territory has been taken to include the immediate drainage area of that stream. In short, sewage necessity alone would not be great enough to require or justify the inclusion of the Blue Valley, but it might be a partial or cumulative reason for so doing.

"City Growth: The growth of Kansas City within recent years has been exceedingly rapid. No large residential tracts remain unoccupied, and practically all within the old limits has been platted and most of it built up. The population has flooded out into the added 'south territory' beyond the old limits and is rapidly building up that entire section with homes. As an index of the commercial growth, it has been shown in the testimony that within the past 5 years 25 large office buildings, several 12 or 14 stories high, have been erected, and that within the same period 17 new banks have been established. Bounded as it is on the west by the state line and on the north by the Missouri river, the growth of the city must for some time be in the southern and eastern directions.

"Industrial Land in the Old Limits: Part of the city is upon the highland stretching back from the bluffs which border the bluffs of the Missouri and Kaw river valleys. That business activity requiring proximity to railway facilities is, from the standpoint of topography, confined to the Kaw river or 'West Bottoms'; the strip of ground called the 'Belt Line,' situated in a depression or 'draw' from the West Bottoms to near the junction of the East Bottoms and the mouth of the Blue Valley, and through which runs the Kansas City Belt Railway; Brush and Mill creek bottoms, the West Bottoms, the

belt line, a portion of the East Bottoms (the western end) and a part of the Blue Valley (between Eighteenth street and the East Bottoms). Of these within the old limits the condition at the time of the limit extension seems to have been about as follows: The Mill and Brush creek bottoms were practically filled with residences and were surrounded by one of the nicest residence districts in the city. There was no railway in Brush creek bottom and only a switch ran up into Mill creek. The West Bottoms were practically entirely filled with railway yards, freight houses, stockyards, factories, and wholesale houses. Of the available vacant space all was high-priced, being worth from \$60 to \$300 a front foot or from \$10,000 to \$40,000 per acre. There has been practically none sold even at the prices which are prohibitive for most businesses. There will soon be approximately one hundred acres of new filled ground near the Missouri river put upon the market which is worth from 75 cents to \$2 a square foot, or some of it as much as \$75,000 an acre. The belt line is only partially occupied. Some of its space cannot be utilized, because too far above or below grade for short switches to be run from the tracks. It is also probable that with the completion of the new Union Station, with six passenger tracks running through the belt line, it will not be as attractive for switch property as heretofore. One witness, C. D. Parker, a real estate man and a former president of the Commercial Club, testified that it was the design of the terminal company to shift the freight terminals to the East Bottoms on the north side of the city. While the space along the belt line is fairly well filled as far east as Elmwood avenue, the witnesses seem agreed that the larger part of the available space is yet vacant. This vacant property is also high-priced, being worth from \$1.25 to \$4 a square foot; an acre contains 43,560 square feet.

"The Blue Valley within the old limits has contained industries for quite a period, but during the past few years this section has had a very rapid growth until now 40 per cent. of that space is occupied. There is no freight station in this section, and the industries which have located there are for the most part those doing a car load business, and requiring several acres for their plants and shops. Several hundred acres of this area, near the mouth of the Blue, is low ground and subject to overflow, and therefore undesirable for commercial purposes as long as it remains unprotected. The prices of land here are what might be termed medium, ranging from \$3,000 to \$8,700 an acre.

"That part of the East Bottoms within the old limits was a long triangular strip, the base running for over a mile along the bluff line from Broadway to Grand avenue eastward, with a perpendicular side, somewhat

shorter than the base, running northward and to the river, which, curving rather sharply inward, formed the hypotenuse. Excluding a small marshy plot, it contained about 726 acres. Of this a tract of about 400 acres belong to a syndicate and is known as the Armour-Swift land. This Armour-Swift land has recently been filled to above flood level. It has never been put upon the market; is in litigation which has covered several years; is involved in several different suits, and is yet in the trial courts. Of the remaining 326 acres quite a good part is occupied by factories, elevators, railway yards, and small residences, although a considerable portion is yet unoccupied except by truck patches. Parts of this land have been on the market for some time. One piece of several acres, partly owned by H. M. Meriwether, was held at \$1,000 an acre and has recently been held at \$1,500 without sale. Many of the witnesses think that much of this land, like the most of the East Bottoms, would have to be protected from floods by dikes or filling before it would be attractive or available.

"Industrial Needs: As one of the main grounds for justifying the extension over the new territory in the East Bottoms and Blue Valley is the need of this added land for industrial growth, and as it has been sharply questioned whether or not inclusion within city limits tends to attract or repel industries, it is made necessary to find upon that point. While there is seeming conflict in some of the testimony, yet that disappears when the point of view of the witness is gained. The gist of the testimony seems to be that, as a general rule, industries require or desire some of the facilities which a city furnishes, such as water, gas, light, fire, and police protection, street car service, and nearness to labor. Those which do a car load business, either in raw material or output, require switching facilities. Those which do less than car load business must be within hauling distance of freight stations. Some, like brickyards, are influenced chiefly by proximity to raw material, while some, like hay warehouses and powder magazines, require only railway facilities, and are safest where most isolated. All of them desire cheap ground, and this is especially true of the smaller ones, which usually have limited capital, and the larger ones which require considerable space. Where an industry can procure outside a city limit everything desirable to it which it could obtain inside those limits, it prefers to be outside to escape city taxation, in some instances, city regulation. To my mind the strongest argument in favor of the view that most industries desire, if they do not require, city conveniences, and that the city limits hold no terrors for them, is the fact that the very great percentage of those which have located in the Blue Valley have stopped within the

city limits. It would seem unnecessary to add that practically all industries avoid locations subject to overflow.

"Both the East Bottoms and the Blue Valley offer the most attractive factory locations near Kansas City. The Blue Valley is at present preferred, although served by fewer railways and lacking the extent of territory of the East Bottoms, because most of it is free from overflow. The Blue will be made more attractive shortly through the working out of the plans for the new terminal service, which will extend as far up as Leeds. The East Bottoms is shortly to have as part of the same terminal plans a sub-freight station, which will enormously increase the attractiveness of that section, if freedom from flood be secured.

"Conclusions of Law.

"The factors which have been regarded by courts in determining the 'reasonableness' of city boundary extensions are many. Sometimes one factor alone is of importance; sometimes several combine their weight to determine the matter. Each case must rest upon its own facts. *Plattsburg v. Riley*, 42 Mo. App. 18, 22. Some of these factors which have received the consideration of courts, either standing alone or in connection with other elements, are as hereafter set out. This list is not intended to be complete, but rather as suggestive, in addition to the cases cited upon the points hereinafter discussed. Some of the following cases were under statutes and the cases from Kentucky, Iowa, and Nebraska are upon questions not of the validity of annexation of territory, but of the right to levy municipal taxes upon agricultural land inside a city limits. In those three states is held the unique doctrine, everywhere else denied, that land can remain within the corporate limits of a city and not be subject to municipal taxation, if its use is purely agricultural. The above cases are helpful, however, and are here cited.

"The leading case is *Vestal v. Little Rock*, 54 Ark. 321, 329, 15 S. W. 891, 16 S. W. 291, 11 L. R. A. 778 (adopted and approved in *Copeland v. St. Joseph*, 126 Mo. 417, 29 S. W. 281, and *Parker v. Zeisler*, 73 Mo. App. 537). The rule there laid down is as follows: 'Before considering them directly, we will state what we conclude from the many authorities to be the correct rule to guide in determining an application for annexation: 1. That the city limits may reasonably and properly be extended so as to take in contiguous lands (1) when they are platted and held for sale or use as town lots; (2) whether platted or not, if they are held to be brought on the market and sold as town property when they reach a value corresponding with the views of the owner; (3) when they furnish the abode for a densely settled community, or represent the actual growth of the town beyond its legal boundary; (4) when they are needed for any proper town purpose, as for

the extension of its streets, or sewer, gas or water system, or to supply places for the abode or business of its residents, or for the extension of needed police regulation; and (5) when they are valuable by reason of their adaptability for prospective town uses; but the mere fact that their value is enhanced by reason of their nearness to the corporation would not give ground for their annexation, if it did not appear that such value was enhanced on account of their adaptability to town use. 2. We conclude, further, that city limits should not be so extended as to take in contiguous lands (1) when they are used only for purposes of agriculture or horticulture, and are valuable on account of such use; (2) when they are vacant and do not derive special value from their adaptability for city uses.' In 28 Cyc. 188, is the following statement of factors which may be of importance in determining the reasonableness of city annexation of territory: '(a) Annexed territory has advantages of city; (b) will make limits regular; (c) secures uniform grade and alignment of streets in added territory; (d) required by public convenience and health; (e) necessary for enforcement of police ordinances; (f) necessary to foster growth and prosperity of city; (g) necessary for extension of gas, water, sewer, street, or police systems; (h) more adequate school facilities.' * * *

"Relator contends rightfully that the addition of an undue amount of land not used for city purposes would render the extension unreasonable. He says that condition is present here. The old limits held an area of 26.70 square miles or 17,088 acres. The new limits inclosed 57.75 square miles, or 36,960 acres, an increase of 18,872, or a little better than as much again as was in the old city. Of these 18,872 additional acres, about 10,000 are included in the so-called 'Southern Territory,' the propriety of the inclusion of which the relator admits. Swope Park, a municipal park, connected with the city by boulevard and street car service, and a great popular resort for the people of the city, is certainly properly included, because it needs care and policing and serves a very useful city purpose (*Parker v. Zeisler*, 73 Mo. App. 537). It accounts for 1,353 acres. North of Swope Park and west of Elmwood avenue to the old limits lie approximately 2,500 acres. Most of this, except the Vineyard property of 360 acres, is platted or built upon and is being rapidly settled up. Some of it, north of Swope Park, needs and desires police protection. In the East Bottoms the land south of the Kansas City Southern embankment is being occupied by factories, elevators, railway yards, and roundhouses. Much of this territory, if not all of it, should have police protection for its own, as well as the city's welfare. As said in *Clark v. Kansas City*, 176 U. S. 114, 20 Sup. Ct. 284, 44 L. Ed. 392, in deciding that railway property might be

included under conditions not justifying the inclusion of agricultural lands: 'Besides, such uses or manufacturing uses adjacent to a city may, for its order and health, need control.' Also see *Kansas City v. U. P. Ry. Co.*, 59 Kan. 427, 53 Pac. 468, 52 L. R. A. 321 (1898). Two of the members of the police board, and the officers in command of the station including that territory, all testified as to the necessity of active police control over a great part of this area south of the Kansas City Southern embankment. Outside of any testimony, the existing conditions would suggest the need of surveillance. Such a necessity is a well-recognized ground for including territory. *Parker v. Zelsler*, 73 Mo. App. 537; *New Orleans & N. W. R. Co. v. Vidalia*, 117 La. 561, 42 South. 139; *Forbes v. Meridian*, 86 Miss. 243, 38 South. 676; *Catterlin v. Frankfort*, 87 Ind. 45; *Paul v. Walkerton*, 150 Ind. 565, 50 N. E. 725; *Langworthy v. Dubuque*, 13 Iowa, 86. The case of *Lake Erie & W. R. Co. v. Alexandria*, 153 Ind. 521, 55 N. E. 435, was a case where police protection was required because of men frequenting a railway yard. The territory south of the Kansas City Southern embankment includes approximately one-third of the added land in the East Bottoms, or something over 1,000 acres, according to one estimate, and about 800 acres according to another. Thus over 12,000 acres of the added 18,872 are accounted for and their inclusion justified. The remaining 6,800 acres are largely located in the Blue Valley (3,000 to 4,000 acres) and the East Bottoms north of the Kansas City Southern embankment (about 2,400 acres).

"The grounds urged by respondent to justify including the Blue Valley and this part of the East Bottoms are that there is need of this land for the future industrial growth of the city; that the land has, beyond its present uses, a much enhanced value because of its adaptability for industrial plants and railway usages; that there is need of police protection for the good both of the city and of the included territory; that there is need of sanitary protection both for the city and the land, and that the land is needed for its own protection by sewers or for use in constructing a sewer system for the city. As to this part of the East Bottoms, the sewer and sanitary arguments have no weight, as no menacingly unsanitary conditions exist there, and the land neither needs a sewer system itself at this time nor is it necessary that the city should now include it in the sewer system of the city. The police protection argument, also, has little force, for there are scarcely any people living on this land and no necessity for police protection requiring the inclusion of this large body of land has been shown. The police, sanitary, and sewer arguments in reference to the Blue Valley have already been considered. While those considerations are of more force in the case of the Blue Valley than in that of the

East Bottoms, they are not of sufficient importance to be decisive. On the point that this land is needed for the industrial development of the city, the law seems clear that land beyond the immediate city needs may be included to provide for future growth and development. *Bradshaw v. Omaha*, 1 Neb. 16; *Ferguson v. Snohomish*, 8 Wash. 668, 36 Pac. 969, 24 L. R. A. 795; *Merritt v. State ex rel.*, 42 Tex. Civ. App. 495, 94 S. W. 372; *State ex rel. v. Merchant*, 38 Tex. Civ. App. 226, 85 S. W. 483 (1905); *Yancy v. Fairview (Ky.)* 66 S. W. 636 (1902); *Catterlin v. Frankfort*, 87 Ind. 45.

"None of the decisions define what is meant by 'growth,' or how far into the future the city may look. The life of the city—the characteristics which distinguish it from a rural population—is its industrial establishments. Clearly, then, if the city can provide for its growth at all, it can do so in connection with its industries. It would be difficult, if not impossible, to state even a general rule which would be useful in determining how far into the future a city may look in laying down the boundaries for its development. The size of the city, the character of its surroundings and its industries, the rate of its progress, and many other considerations might properly enter into the equation and be of different values in every case as it arose. On one hand, it may be said that limit extensions are, and should be, infrequent, and therefore the city should be permitted to look ahead and provide for the development of several years at least. On the other hand, the city should not be permitted to reach out and subject lands which are not clothed with any city uses to city burdens long before the city gives in return any substantial benefit. It has seemed to me that the fairest way to test such a proposition is to take the combined opinion of those in the city and of the owners of the land, as voiced in the value of the land. If land near a city is being held for prices far above any rural use, and men in that city are willing to pay for it prices far in excess of any rural use, that land is as fairly within the future development of the city as the judgment of those who are most interested can place it.

"But aside from this test which will be hereinafter applied in another connection, What was the need of land for the industrial growth of Kansas City? The facts found show that little really cheap factory land was within the old limits, and that cheap land is always a consideration in the location of industries, especially of the larger and of the smaller kinds. The West Bottoms and the belt line are as effectually closed by high prices to a great many desirable industries as though they did not exist. The Blue Valley land, within the old limits and not subject to overflow, is filling up rapidly and prices are rising. Flood and litigation have effectually barred the great-

er part of the East Bottoms within the old limits. Locations within city limits are desired by most industries. The East Bottoms (with flood protection) and the Blue Valley are ideally located and situated, have good railway facilities, and are the natural sites of Kansas City's industrial growth.

"It may be said that too much land for industrial growth was taken. There may well be a difference of opinion upon that point, but the rule, as declared in *McCleskey v. State ex rel.*, 4 Tex. Civ. App. 322, 23 S. W. 518 (1893), is that the inclusion becomes unreasonable only 'if the excess be such as, in effect, to evidence an attempted fraud upon the law.' The last extension of the limits of Kansas City was 12 years ago. When one witness testified to locating 40 industries in the Blue Valley within the past five years, and all agree that the general growth of the city is rapid, how can we say that this extension is so excessive as to suggest an attempted fraud upon the law, which requires such extension to be reasonable? Another consideration in this connection affecting the East Bottoms is that, to make that territory useful for industrial or any purpose, it must be protected from the river. A glance at the map will show that any general plan contemplating river protection for any considerable portion of the East Bottoms must rationally and economically comprehend the entire bottoms.

"Nor does the fact that the land is subject to overflow have any bearing upon the question, for, as said in *Ford v. North Des Moines*, 80 Iowa, 626, 45 N. W. 1031, in discussing a similar objection: 'If it is a valid objection, then, whenever a city or town is located on both sides of a river, the bottom lands should not be included in the municipality, because the land may be subject to overflow. There was no unreasonable or even improper extension of the limits of the town. This is apparent from subsequent events.

* * * The appellants have no more right to exemption from municipal taxes and assessments than property owners in East Des Moines had before the bottom land from Capitol Hill to the river was reclaimed from overflow.' In speaking of an objection to the inclusion within the city limits of a tract of vacant low land, flat and wet and covered with timber, the court, in the famous case of *Vestal v. Little Rock*, 54 Ark. 321, 329, 15 S. W. 891, 16 S. W. 291, 11 L. R. A. 778, said: '* * * it may have been needed for town purposes, and it may have needed organized, local government to reclaim the low, wet parts, and fit it for town uses. Such places are thus reclaimed in the ordinary course of town improvements, and become centers of population and business activity.' Also see *New Orleans & N. W. R. Co. v. Vidalia*, 117 La. 561, 42 South. 139; *Merritt v. State ex rel.*, 42 Tex. Civ. App. 495, 94 S. W. 372; *State ex rel. v. Merchant*, 38 Tex. Civ. App. 226, 85 S. W. 483 (1905).

"The final reason for inclusion urged by respondent is that the included lands of the entire district were adapted to some city usage, residential or industrial, and had values far above any purely rural employment. The mere fact that land near a city is worth more than it would be if away from the city is of no importance. Farming, gardening, and dairy land is more valuable if near its market, the city. The value which comes from mere proximity of agricultural or pasture land to a city is not taken account of. *Courtney v. Louisville*, 12 Bush (Ky.) 419 (1876). But if beyond and above this mere 'proximity value' of agricultural or pasture land, the land has a value which is far in excess of that of any agricultural or pasture land no matter how favorably situated, then the land has lost its character as country land. The city has given it a position which the city gives solely to its own. It has become valuable as city property and as such property it must share the burdens of the city. The rule as laid down in the leading case of *Vestal v. Little Rock*, 54 Ark. 321, 329, 15 S. W. 891, 16 S. W. 291, 11 L. R. A. 778, is that lands may be annexed 'when they are valuable by reason of their adaptability for prospective town uses; but the mere fact that their value is enhanced by reason of their nearness to the corporation would not give ground for their annexation, if it did not appear that such value was enhanced on account of their adaptability to town use. We conclude, further, that the city limits should not be so extended as to take in contiguous lands (1) when they are used only for purposes of agriculture or horticulture, and are valuable on account of such use; (2) when they are vacant and do not derive special value from their adaptability for city uses.'

"In *Vogel v. Little Rock*, 55 Ark. 609 [19 S. W. 13], the court said: 'The last contention is that the judgment is wrong, because it brings within the city 240 acres of land of Ratcliffe and others. The court might have found from the testimony of Ratcliffe and the agreed state of facts that a part of this land represented the city's growth outside of its limits, and from the testimony of Adams that all the land derived its value from actual or prospective use for town purposes. Upon such finding of fact the court might have concluded, under the rule established in *Vestal's Case*, that it was right and proper to annex it. Nor does it matter that a considerable part of the land is at present used for agriculture; as its value is derived from its prospective town use, and not from its present country use, it might be properly included within the city. This is not the case where the value of the use of the land for agriculture is enhanced by proximity to a town, but where the enhancement arises from prospective town uses. Adams' testimony is corroborated by the agreed statement that the land is worth \$300 and up-

wards per acre, and that the improvements at the time have extended to and in fact penetrated or spread over the land.'

"In *Woodruff v. Eureka Springs*, 55 Ark. 618, 19 S. W. 15, the court said: 'We think the court was warranted in finding that it was right and proper to annex the lands ordered to be annexed, under the rules established by this court in *Vestal's Case*, 54 Ark. 321 [329, 15 S. W. 891, 18 S. W. 291, 11 L. R. A. 778]. It appears to have had but little value for country uses, and to have had great value for prospective city uses, and was therefore proper for annexation.' Also see *Brooks v. Polk Co.*, 52 Iowa, 460, 3 N. W. 494; *Kelly v. Pittsburg*, 85 Pa. 170, 27 Am. Rep. 633; *Borough of Duquesne*, 147 Pa. 58, 23 Atl. 339; *City of Jackson v. Whiting*, 84 Miss. 163, 38 South. 611; *Paul v. Walkerton*, 150 Ind. 565, 50 N. E. 725; *McCoy v. Trustees of Cloverdale*, 31 Ind. App. 331, 67 N. E. 1007; *Durant v. Kauffman*, 34 Iowa, 199; *Abbott's Munic. Corpor.* § 36. *Contra*, *Ewing v. State ex rel.*, 81 Tex. 172, 16 S. W. 872.

"The language quoted from the *Vestal Case* fits the facts of the case at bar as though spoken concerning them. Some of the land here (in the Blue Valley) is now being used for agriculture, gardening, and dairying purposes; some (practically the entire East Bottoms and some of the Blue Valley, including the Vineyard tract), is vacant. There is not an acre of it which is not properly valued at much more than it is worth for any country usage to which it is or could be put. Land which rents at \$12 per acre for the year is held at \$350 and estimated to be worth from \$450 to \$1,000 an acre. Scarcely an acre in the Blue Valley is worth less than \$300, while much of it is worth nearer \$1,000 an acre, and some has sold for even more. In the East Bottoms the owners are deriving no income at all from over 1,500 acres, yet that land is valued in its present unprotected condition, when its value is merely a potentiality, at hundreds of dollars an acre, and we find one of the owners buying similar ground nearer the river and paying therefor from \$100 to \$175 an acre. Such values are not sand bar values, nor even prospective agricultural or gardening values. They are city values, based upon the prospective use of that land for city purposes and its adaptability for such uses. Such land fall directly within the rule of the *Vestal Case*, which has been expressly adopted by the appellate courts of this state.

"There is another reason why much of this land should be included. If land contiguous to a city is being held by its owner to be brought on the market and sold as town property when such land reaches a value corresponding with the owner's ideas, it is city property and can be included. In the *Vestal Case* the second ground for annexing land was: 'Whether platted or not,

if they are held to be brought on the market and sold as town property when they reach a value corresponding with the views of the owner.' In *Durant v. Kauffman*, 34 Iowa, 199, where the question (under the Iowa rule) was whether alleged agricultural land included within the city limits should bear municipal taxes, the court said: 'In determining the benefits accruing to such lands, a controlling fact to be considered is the purpose for which they are held. If held as city property, to be brought upon the market as such whenever they reach a value corresponding with the views of the owner, they ought to be taxed as other city property. There would neither be reason nor justice in permitting a proprietor of a large tract of land within a city to hold it for an opportunity to bring it into the market as city lots, and for no other purpose, under the pretense that it is agricultural lands, thus escaping taxation for the general improvement of the city, the very thing which will bring his lands into the market, and thus add greatly to their value—a direct benefit to the owner.' Practically all the Blue valley land is being so held. While the East Bottoms land in its present condition is scarcely marketable for its ultimate use, yet its owners can have but one object in holding it at all—to dispose of it as city property.

"Regarding some of the Blue valley land, there is another reason mentioned in some of the decisions. Those owners of Blue valley land who use it for gardening, agriculture, or dairy purposes drive into Kansas City and dispose of their products in that market. In *Windfall Mfg. Co. v. Emery*, 142 Ind. 456, 41 N. E. 814, in discussing the grounds alleged for annexation, the court said: 'It was proper, under the issues in this case, to give evidence concerning the location of appellant's factory with reference to the corporate limits of the town; its size and capacity; where its office was kept, whether in town or at the factory; whether the town was a market for any part of its products; and to what extent, if any, the appellant and its customers used the streets of the town in the delivery of its products and in the transaction of its business. * * *'

"As to the East Bottoms, this additional reason may be cited. An inspection of the map will show that the old limits of Kansas City, starting from the Missouri river on the north and west and extending to the low ground near the mouth of the Blue river within a short distance of the Missouri river on the south and east, almost completely surrounds this property on the land side. While a slight opening is left, yet it is in the low ground at the Blue's mouth. This condition might make applicable the cases which hold that, if the land included is so situated that it cannot be reached except over the streets of the city, it may be included. In *re Borough of Duquesne*, 147 Pa. 58, 23 Atl. 339;

McCoy v. Trustees of Cloverdale, 31 Ind. App. 331, 67 N. E. 1007.

"The contention of relator that the extension of the city limits over some of the added territory deprives the owners of that territory of their property in violation of the federal and state Constitutions is not well taken for two reasons: First, this is a proceeding by the Attorney General in his official capacity. The only concern of the state is that the municipal corporation act within the law in extending its limits. It will not permit its creatures to act outside the laws of their being. It has no concern in the losses of any private individual. Any such individual has his ample remedy in the statute. Second, the only taking of property possible under this annexation would be for city taxes, either special or general. Special taxes are in the law's eye for direct benefits. City taxes for general purposes do not constitute a violation of those constitutional provisions, as was directly decided in *Kelly v. Pittsburg*, 104 U. S. 78, 28 L. Ed. 658. When the *Kelly* Case was before the state Supreme Court of Pennsylvania, 85 Pa. 170, 27 Am. Rep. 633, the court quoted with approval from the referee's report as follows: 'Mr. Kelly's land was up to consolidation, in close proximity to the city. Its value therefore depended on the growth and prosperity of the city. As the city grew and prospered, the value of this land increased until it became very great. It was then brought into the city and made a part of it, but its value still continued to depend upon the growth and prosperity of the city. To arrest the prosperity of the city would be to seriously affect the value of the land; to destroy that prosperity would be to destroy to a great extent that value. The prosperity of the city depends on its streets being kept in repair, and its water and gas and educational facilities being ample. Without these it would fall into decay, and the value of all the real estate in it, including Mr. Kelly's, would be incalculably reduced. The city cannot keep the streets in repair and furnish an adequate supply of water and gas and educational facilities without money, and the only way it can raise money for those purposes is by taxation. It seems to me, therefore, that the idea that Mr. Kelly is not interested in the objects to which the taxes are to be applied, and that he receives no benefit in return for the taxes, is a mistaken one, even if he receives no special benefit from the application of the taxes; and the idea that taxing unproductive property according to its market value is confiscating it, or taking it for public use without compensation, I think is equally a mistaken one.'

"In conclusion I find for the respondent upon the issues of the case, and recommend that judgment be entered in its favor and relator's bill be dismissed. * * *

In confirmation of the foregoing, we make the following general observations: It must be admitted that a first impression, upon

learning of the large extent of territory sought to be added to the city by the charter amendment before us, is that of doubt as to the reasonableness of the action of the city in attempting to bring about that result. And if we were considering the question with reference to a city which had required a century or more to reach the present high rank of respondent in population and commercial importance, a city which gave indications of having reached the culmination of its growth, it would be difficult, under the law as applied in such cases, to justify the bringing within the limits of the city such a large area of contiguous lands. But we must approach the determination of this question, giving due appreciation to the fact that we are passing upon the right of a city to expand in territorial extent, which in half a century has advanced from a small village to a metropolis of a quarter of a million people, and which has become one of the great commercial centers of the world. In the last decade it has increased its population at an average of between eight and ten thousand persons a year; its increase in industrial and business activities keeping pace the while, or rather, accounting for its phenomenal growth in population. As a promise of its future, we recognize the fact that it is situated in the heart of a most fertile and productive region rapidly becoming densely populated; that great railway systems, having their terminals there, radiate into the surrounding territory and make of this city one of the most important traffic centers of this country. Neither can we leave out of consideration, in contemplating the future needs of respondent, the present reawakening interest in the restoration of traffic and navigation upon the Missouri river, along which a large part of the territory annexed by the charter amendment has frontage.

It is not our purpose again to review the evidence of this case, nor to discuss the several grounds upon which the respondent seeks to justify the reasonableness of its action. We have called attention to these general conditions and surroundings in order to show that the reasonableness of the territorial expansion of respondent should not be approached with any narrow or restricted view of its needs, but that it should be considered broadly and in a manner commensurate with respondent's history, its present necessities, and promise of future greatness.

Coming now directly to the question in hand, we have these few suggestions to make, supplementary to what has been so well said by the commissioner. The one important, controlling, and dominant fact which has been proven beyond question by the evidence before us is that all of the lands annexed, whether in the Southern Territory, the Blue Valley, or the East Bottoms, have a largely increased value by reason of, and solely by reason of, their adaptability to present or

prospective city uses. No possible explanation on the theory of the prospective tillage of these lands can account for their present high values. The testimony, photographic exhibits, and plats show that, scattered through the Southern Territory and Blue Valley, additions have been laid out and platted; streets and boulevards have been laid out, graded, and constructed; electric railways have been built and are being operated; residences have been built and are now occupied as homes; industries have been established; and whether the extension of the city limits shall stand or fall, this territory in reality, and to all intents and purposes, is now and will continue to be used and dealt in as city property.

It would indeed be a short-sighted policy which would preclude the city from bringing within its limits, exercising control over, and giving direction to, the building of what must inevitably soon become a part of the municipality. And that is not the policy of the law, for, as heretofore shown, one of the recognized rules of the right of the city to annex contiguous lands, as laid down by this and other courts, is that such lands may be added "when they are valuable by reason of their adaptability for town uses." Tested by this rule, there can be no doubt as to the reasonableness of the charter amendment in bringing within the city limits the Southern Territory and the Blue Valley.

The tract of land called the "East Bottoms," consisting of between 3,000 and 4,000 acres, as shown by the evidence, is now practically uninhabited and unused. But this level tract of land, skirting the city on the north, lies between the river front on one side and the terminals of four great railway systems on the other. And here again we are confronted with the fact that this waste and unused land is worth from \$300 to \$1,000 an acre, and if protected against the flood waters of the river, its value would be greatly increased. What gives to these unproductive lands such remarkable values? Is it because of their prospective use for tillage or for city purposes? If the latter, then under the settled law the city has a clear right to include them within its limits, and for that reason alone. If the former, then why have they not been reclaimed under existing levee and drainage laws, when lands far from a city and worth from \$10 to \$20 per acre throughout the state are being so reclaimed? It is not a satisfactory answer to the inquiry as to the high value of this land to say, as said by relator in the information, "that the said tract of land is valuable for the production of cottonwood and willows." The high values placed upon this unused land, as a result of the judgment of the investing public, is the most satisfactory evidence which could be submitted, as to its prospective use for city purposes. Will land

worth from \$300 to \$1,000 an acre ever be reclaimed from the effects of water for agricultural purposes? That it is practicable to protect it from the overflow waters is shown by the evidence. That it will be so protected, we do not entertain a doubt. It is not probable that this will be done by private enterprise, but under the authority and direction of the city. And when this land, now covered with willows, shall be protected against the ravages of the river, it is not a rash prediction that, at a time not far distant, it will become the commercial front of this great city.

After a careful reading of the testimony reported by the commissioner and an examination of the law applicable thereto, we are of the opinion that the report of the commissioner, finding for the respondent upon the issues of law and fact, is fully supported by the record.

The report of the commissioner is therefore confirmed, and the writ of ouster denied.

LAMM, FERRISS, and BROWN, JJ., concur. GRAVES and WOODSON, JJ., dissent.

MISSOURI, K. & T. RY. CO. v. MORRIS.

(Kansas City Court of Appeals. Missouri.
Feb. 13, 1911.)

ATTACHMENT (§ 209*)—GARNISHMENT (§ 124*)
—SERVICE BY PUBLICATION—ORDER OF PUBLICATION—SUFFICIENCY—NAME OF DEFENDANT.

Where an order for service by publication of a nonresident defendant in attachment stated merely his initials, and he did not personally appear, the court acquired no jurisdiction to render judgment sustaining the attachment; and a garnishee summoned in the case, by failing to appear and defend the garnishment, is not estopped to claim that the judgment rendered against it is void.

[Ed. Note.—For other cases, see Attachment, Dec. Dig. § 209;* Garnishment, Cent. Dig. § 249; Dec. Dig. § 124.*]

Appeal from Circuit Court, Pettis County; Louis Hoffman, Judge.

Replevin by the Missouri, Kansas & Texas Railway Company against Melvin H. Morris. Judgment for defendant, and plaintiff appeals. Reversed and remanded.

Montgomery & Montgomery, for appellant. W. D. Steele, for respondent.

BROADDUS, P. J. This is an action of replevin to recover certain lumber belonging to plaintiff, which had been sold under an execution issued against the plaintiff by a justice of the peace, upon a judgment which the defendant had obtained against plaintiff as garnishee. The defendant, in May, 1904, brought a suit by attachment before a justice of the peace against one W. E. Seifer upon a promissory note. The ground relied on in the attachment suit was that Seifer

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

was a nonresident of the state. The appellant herein was garnished, and thus made a party to the proceedings. On April 28, 1905, an order of publication was made for the defendant under the name of W. E. Seifer to appear and answer to the cause on May 20, 1905. The defendant not appearing at that date, judgment was rendered sustaining the attachment.

A summons was issued for the garnishee to appear on April 28, 1905, to answer interrogations, upon which the constable made the following return: "I hereby certify that I delivered a true copy of the within summons to J. F. McDougall, agent of the Missouri, Kansas & Texas Railway Company, at Sedalia, Missouri, on the 17th day of April, 1905, in the city of Sedalia, county of Pettis, and state of Missouri." On April 21st the garnishee, the appellant herein, submitted its answer to the interrogations filed, in which it denied all indebtedness to Seifer, or that it had in its possession any money or property belonging to him, and, further, that it was not subject to garnishment for the demand under the provision of section 3447, Rev. St. 1899 (page 1981, Ann. St. 1906). On April 28th Morris filed his denial of the garnishee's answer. On the following day judgment was rendered against the garnishee by default. On this judgment the execution was issued, under which the constable seized the lumber, the property replevined. The judgment was for defendant and plaintiff appealed.

We have stated enough of the facts for the purposes of the case. The appellant's principal contention is that the justice under the service by publication acquired no jurisdiction to render judgment sustaining the attachment, for the reason that the order of publication did not give the Christian name of the defendant, but issued against him as W. E. Seifer. It is held: "Where, in an action against a nonresident, the order of publication against the defendant gave his name as Q. R. Noland, instead of Quinces R. Noland, and there was no personal appearance under the order of publication, the court acquired no jurisdiction." *Skelton v. Sackett*, 91 Mo. 377, 3 S. W. 874. And to the same effect is the holding in *Turner v. Gregory*, 151 Mo. 100, 52 S. W. 234. And the rule is also recognized in *Vincent v. Meana*, 184 Mo. 327, 82 S. W. 96.

But defendant insists that the plaintiff, as garnishee, by its failure to appear and defend the garnishment, is estopped, and cannot at this time claim that the judgment rendered against it is void, and relies to support its position upon *Fletcher v. Wear*, 81 Mo. 524. But the effect of the holding does not go to sustain defendant's position, but, on the contrary, to overturn it, and sustain the theory of plaintiff.

Other questions are raised by the appel-

lant; but as the record shows, in any light it may be considered, that the judgment sustaining the attachment is void for the reason stated, any further discussion of the case would not be profitable.

The cause is reversed and remanded. All concur.

GINNOCHIO-JONES FRUIT CO. v. MISSOURI, K. & T. RY. CO.

(Kansas City Court of Appeals. Missouri. Feb. 13, 1911.)

1. CARRIERS (§ 89*)—PERISHABLE FREIGHT—REFUSAL TO ACCEPT—CONVERSION.

Where plaintiff made certain shipments of fruit, with a memorandum to notify one, K., and the fruit arrived, and K. was notified, but refused to take the fruit, and defendant served written notice that, unless the fruit was removed within a time fixed, the same would be sold as perishable freight, and it was so sold, the railroad company was not liable for a conversion; Comp. Laws 1909, § 455, authorizing a sale of perishable freight where a consignee has been notified of its arrival and refuses and neglects to receive the same.

[Ed. Note.—For other cases, see *Carriers*, Dec. Dig. § 89.*]

2. CARRIERS (§ 87*)—PERISHABLE FREIGHT—DUTY OF CONSIGNOR.

A consignor of fruit to his order is bound to have some one at destination to receive it.

[Ed. Note.—For other cases, see *Carriers*, Cent. Dig. § 323; Dec. Dig. § 87.*]

3. CARRIERS (§ 86*)—FREIGHT—DELIVERY.

A shipper has the right to designate to whom freight shall be delivered, and the carrier must observe such direction.

[Ed. Note.—For other cases, see *Carriers*, Cent. Dig. §§ 316-322; Dec. Dig. § 86.*]

Appeal from Circuit Court, Jackson County; Hermann Brumback, Judge.

Action by the Ginnochio-Jones Fruit Company against the Missouri, Kansas & Texas Railway Company. Judgment for plaintiff, and defendant appeals. Reversed and remanded, with directions.

Lee W. Hagerman and Ellison A. Neel, for appellant. Stewart Taylor, for respondent.

ELLISON, J. This action was begun before a justice of the peace, and is for the alleged conversion of a lot of apples, valued at \$38.40, shipped over defendant's road from Kansas City, Mo., to Muskogee, Okl. The judgment in the trial court was for the plaintiff for that amount. The ground of conversion stated in plaintiff's complaint is: "That said defendant, after receiving said shipment, carried the same on its line of railroad to Muskogee, Okl., and there, without the consent of the plaintiff, as the shipper of said shipment, and without the production of the bill of lading, and without any order from the plaintiff, wrongfully converted the said shipment to its own use, and disposed of and transferred the same to others, and the

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

said shipment has been, by reason of such wrongful appropriation, wholly lost to the plaintiff."

It appeared in evidence that plaintiff is engaged in the wholesale fruit business in Kansas City, Mo., and that one Christ Kooris is engaged in the sale of fruits by retail in Muskogee, Okl., and that defendant's road runs between the two points; that Kooris ordered 12 boxes of apples from plaintiff, and the latter, after some delay, shipped them to him on the 23d of December, 1907, by delivery to defendant and taking a bill of lading, consigning the fruit to themselves, but containing the memorandum written therein: "Notify Christ Kooris." The fruit arrived in Muskogee on the afternoon of December 25th. A bill of lading, with a draft on Kooris attached for the price, was sent by plaintiff to a bank in Muskogee. The next morning after arrival, defendant's agent notified Kooris, but he refused to take them. Again defendant notified him, and again he refused to take them. Then, on December 28th, the agent gave him this written notice: "You are hereby notified again that, if the apples shipped to your order from Kansas City on December 23, 1907, are not removed by 12 noon to-day, same will be sold a/c perishable freight and to protect the interest of all concerned." Kooris testified that he ordered the apples for the brisk trade which obtains just prior to Christmas, and, as they arrived too late, he did not want them, and would not take them. The fruit not being taken, defendant's agent sold it late that afternoon for \$10.75. It had begun to rot, and that was the best price obtainable. The agent testified that he had a great deal of trouble in disposing of them; that, on account of being after the holiday season, buyers were very scarce; and that he "made every possible effort to get their full value."

The statute of Oklahoma was introduced in evidence, permitting the sale of perishable freight by the carrier when not taken by the consignee after notice of arrival. It reads as follows: "Perishable property which has been transported to destination and the owner or consignee notified of its arrival, or being notified, refuses and neglects to receive the same, and pay the legal charges thereon, or if upon diligent inquiry the consignee cannot be found, such carrier may, in the exercise of reasonable discretion, sell the same at public or private sale without advertising, and the proceeds, after deducting the freight charges and expenses of sale, shall be paid to the owner or consignee upon demand." Comp. Laws 1909, § 455. It further appears that plaintiff did not ship until the 23d of December. It further appears that the bank to which plaintiff sent the bill of lading with the draft on Kooris was careless in acting for plaintiff. It was shown by the bank of-

ficers that they received the draft on December 26th, which signifies that either plaintiff delayed mailing it, or it was delayed in the mail somewhere. It appeared in evidence given for plaintiff that the bank in Muskogee neglected to notify it of Kooris' refusal of the draft for nearly two weeks.

Taking the entire evidence, it affords no support for the verdict and judgment. There were delays and refusal to take the freight, all acts of plaintiff and its agents, and for which defendant is in no way responsible. It was plaintiff's duty to have some one at Muskogee to receive the apples when they arrived. *Freeman & Hinson v. Railway Co.*, 118 Mo. App. 528, 93 S. W. 302. Plaintiff had the right to designate to whom the freight should be delivered, and defendant was bound to observe the direction. *Marshall v. Ry. Co.*, 176 Mo. 480, 491, 75 S. W. 638, 98 Am. St. Rep. 508. It did designate Kooris by requiring that defendant notify him, and this it did repeatedly.

The case seems to us to be an effort to saddle the carelessness or refusal of plaintiff's own agents onto the unoffending defendant. The only question in the case is as to whether any liability was incurred by defendant in disposing of the apples, and that must be answered in the negative. The law of Oklahoma, already quoted, permits a carrier, after notice of the arrival of perishable freight, "in the exercise of a reasonable discretion," to sell it at public or private sale without advertising. The evidence is undisputed that every effort was made to sell it to advantage and that \$10.75 was the best price obtainable; it being just after Christmas, when, as was shown, such articles were dull sale. There is no just ground to say that defendant did not comply with the law and act with reasonable discretion in making the sale. The freight charges were \$4.03, and the sale money was \$10.75, which leaves due plaintiff the sum of \$6.72.

The judgment is reversed, and the cause remanded, with directions to enter judgment for that sum. All concur.

KIMBLE v. McDERMOTT et al.

(Kansas City Court of Appeals. Missouri.
Feb. 13, 1911.)

FORCIBLE ENTRY AND DETAINER (§ 4*)—ACTS CONSTITUTING.

Where a lease provided that the lessee should cut hay and deliver one-half to the lessor, and the lessor, believing that the lessee was not cutting the crop as it ought to be cut, sent her husband and hired man into the field where plaintiff was cutting the hay, and the husband and hired man proceeded to cut also, against the lessee's protest, there being no interference, and the husband and the lessee both hauling what they had cut, there was no forcible entry and detainer, Rev. St. 1909, § 7656, providing that one forcibly entering upon the land of another and detaining same shall be

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

guilty of forcible entry and detainer, and there being no apparent intent to take possession of the premises; but whatever wrong the lessor and her agents committed was merely a trespass.

[Ed. Note.—For other cases, see *Forcible Entry and Detainer*, Cent. Dig. §§ 5-22; Dec. Dig. § 4.*]

Appeal from Circuit Court, Bates County; C. A. Denton, Judge.

Action by George R. Kimble against Maud R. McDermott and others. Judgment for plaintiff, and defendants appeal. Reversed.

Thomas J. Smith, for appellants. J. S. Briery, Chas. W. Sloan, and D. C. Chastain, for respondent.

ELLISON, J. This is an action of forcible entry and detainer. It was brought in Cass County before a justice of the peace, and was removed to the circuit court by certiorari. A change of venue was granted, and the cause sent to Bates county, where it was tried, and a judgment given for plaintiff.

It appears that the defendants McDermott are husband and wife, and the defendant Keith is employed by them as a farm hand; that Mrs. McDermott is the owner of farm lands in Cass county, which she leased in writing to plaintiff from March, 1909, till February, 1910; that 23 acres of the land was timothy and clover meadow, and it is that part of the premises which is in controversy. It was provided in the lease that plaintiff was "to cut the first crop of hay in proper season, and properly care for same, and shall deliver in alternate loads direct from the field the one-half of same by weight to said McDermott in barn on her premises as directed." It appears that Mrs. McDermott (who lived near by), noticing that the meadow was not being cut at the time she thought it ought to be, gave plaintiff notice on the 20th of June that he should cut it. She notified him again on the 25th of that month. It seems that plaintiff had begun cutting the grass, but was slow about it. In a day or two Mr. McDermott (acting for his wife) told plaintiff that, if he did not finish cutting at once, he would go into the field and cut the hay himself. Then, on the 1st or 2d of July, he and Keith, as his employé, went in the field and cut that part of the hay not cut by plaintiff. Plaintiff was in the field cutting at the same time, and protested, and objected to McDermott's cutting. They gathered up what each had cut and hauled it away. There was no interference with plaintiff, or collision between the parties. Each of them proceeded about the work without any trouble, save the objection made. McDermott cut Saturday and hauled away Monday, may not have taken it all until next day, and that was the extent of the acts which are claimed to constitute a forcible entry and detainer. This action was begun

before McDermott got the hay off of the premises.

The statute (sections 7655, 7656, Rev. St. 1909) provides that if any person shall forcibly enter upon the lands of another, "and detain and hold the same," he shall be guilty of forcible entry and detainer. It is manifest that there was no intention to take and detain the possession of the premises. Whatever wrong defendants may have committed was merely a trespass. *Rouse v. Dean*, 9 Mo. 301; *Bell v. Cowan*, 34 Mo. 251; *Powell v. Davis*, 54 Mo. 315.

The judgment is reversed. All concur.

PATTERSON v. EVANS.

(Kansas City Court of Appeals. Missouri. Feb. 13, 1911. Rehearing Denied March 6, 1911.)

1. LIBEL AND SLANDER (§ 100*)—AMBIGUOUS LANGUAGE—PLEADINGS—ISSUES.

Where libelous language is ambiguous, the meaning ascribed thereto by plaintiff in his petition is binding on him.

[Ed. Note.—For other cases, see *Libel and Slander*, Cent. Dig. §§ 246-272; Dec. Dig. § 100.*]

2. LIBEL AND SLANDER (§ 100*)—LIBELOUS LANGUAGE.

To charge one with being delinquent or on the black list or unworthy of credit does not charge dishonesty; and in an action based on the charge there can be no recovery on the theory that dishonesty was charged.

[Ed. Note.—For other cases, see *Libel and Slander*, Dec. Dig. § 100.*]

3. LIBEL AND SLANDER (§ 6*)—LIBELOUS WORDS.

To publish in a commercial credit paper the false statement that a boarding house keeper is delinquent or is unworthy of credit is libelous per se as causing a loss of credit, a necessity or convenience in the business.

[Ed. Note.—For other cases, see *Libel and Slander*, Cent. Dig. §§ 8-16; Dec. Dig. § 6.*]

4. LIBEL AND SLANDER (§ 100*)—SPECIAL DAMAGES—ALLEGATIONS.

Where a publication is libelous per se, special damages need not be alleged, and general damages may be proved.

[Ed. Note.—For other cases, see *Libel and Slander*, Cent. Dig. §§ 246-272; Dec. Dig. § 100.*]

5. LIBEL AND SLANDER (§ 110*)—ACTIONS—EVIDENCE—ADMISSIBILITY.

Where a plaintiff suing for a libel affecting her credit testified as to her credit in mercantile establishments and the loss of it, the refusal to allow defendant to show on her cross-examination that she did not have credit in some of the establishments, but that she was required to give chattel mortgages to secure purchases of goods, was reversible error.

[Ed. Note.—For other cases, see *Libel and Slander*, Cent. Dig. §§ 307-314; Dec. Dig. § 110.*]

6. LIBEL AND SLANDER (§ 89*)—PETITION—REQUISITES.

A plaintiff, suing for a libel based on a publication in a commercial credit paper that she was delinquent and unworthy of credit, who bases her claim on the fact that she was engaged in a business in which her credit was an

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

element of value should distinctly plead that at the time of the publication she was engaged in a specified business.

[Ed. Note.—For other cases, see Libel and Slander, Cent. Dig. §§ 213, 214; Dec. Dig. § 89.*]

Appeal from Circuit Court, Jackson County; W. O. Thomas, Judge.

Action by Mary E. S. Patterson against Samuel L. Evans. From a judgment for plaintiff, defendant appeals. Reversed and remanded.

Holmes, Holmes & Page and M. J. Kilroy, for appellant. Lyon & Lyon, for respondent.

ELLISON, J. Plaintiff's action is for libel. She recovered judgment in the circuit court for \$500 actual and \$1,000 punitive damages.

It appears from the allegations of the petition that plaintiff purchased of defendant a ton of coal, which proved to be worthless for fuel; that she informed defendant of that fact, and he refused to allow her to return it, whereupon she notified him that she would not accept the coal, and that it was subject to his order, and refused to pay for it; that defendant, after informing plaintiff that he would do so, had her name published in a paper called "Edgar Merchants' Exchange," established and carried on for the purpose of publishing the names of delinquent debtors. The charge is then made in the petition in the following words: "That said Edgar Merchants' Exchange was and is a journal published in Iola, Kansas, and in common circulation among the business men in Kansas City, Missouri, and Kansas, and all over the country, which journal contains the names of delinquent debtors with the name of the person or firm reporting same, and to report and cause a name to be printed in the delinquent list of said journal means that the person so appearing in said delinquent list is unworthy of credit, and such list is commonly known in the business community as the 'black list.' That the said Edgar Merchants' Exchange has printed in it the following: 'Bradstreet and Dun is the Wholesalers' Bureau of Information, Edgar Merchants' Exchange is the Retailers' Bureau of Information.' 'You are, no doubt, aware that the Merchants' Exchange is published and revised monthly showing all delinquent debtors in 140 different towns in Kansas, Missouri and the state of Oklahoma, and goes into the hands of over 4,000 merchants and doctors monthly.' That the said Edgar Merchants' Exchange has also printed on the first page the following instructions above the names of the towns, creditors and debtors: 'Instructions. The number shown before the names is the town number. The number shown between the first and last name is the month in the year the delinquent was listed. The number shown after the name is the merchant's number. Send out

all notices to be due to list in from 10 to 15 days.' That the said defendant, who is a subscriber to the Edgar Merchants' Exchange, and whose name appears on page 21 of the 1908 May publication, maliciously, wantonly, and wrongfully, without cause and for the sole purpose of injuring plaintiff's credit and humiliating her and unlawfully forcing her to pay him said unjust claim for said coal and knowing the same to be false, caused to be published of the plaintiff in the 1908 May number of the Edgar Merchants' Exchange, on page 25, the following: '82 Patterson 9 Mrs. 3129 Bell K. C. Mo. 2552.' That the number 82, according to the rules of the publication, meant Kansas City, Mo., and the number 2552, according to the rules of the publication, referred to the said defendant whose name appeared opposite that number on page 21 as the subscriber who caused the name of the plaintiff to be published. That the said defendant also caused the plaintiff's name to be put in various numbers prior to the May number, 1908, and in various numbers since up to the filing of this suit."

At the trial two instructions were given, to which defendant excepted. They submitted as 'one of the issues in the case whether plaintiff was dishonest, and whether those reading the paper and finding plaintiff's name in the "delinquent list" would understand that such list "was composed of persons that were dishonest and unworthy of credit." Defendant objected to these instructions on the ground that they introduced the element of dishonesty of plaintiff when that had not been charged as a part of the matter composing the libel, nor had that meaning been ascribed to it. We think the objection well taken. The petition charges that plaintiff's name was published in the "delinquent list," and that to "cause a name to be printed in the delinquent list of said journal means that the person so appearing in said delinquent list is unworthy of credit, and such list is commonly known in the business community as the black list." When the printed language which is charged to be libelous is such that it may have different meanings or is ambiguous, the meaning ascribed to it by the pleading will bind the pleader. Such statement of meaning is a notification to the defendant of what he is charged with and what he must prepare himself to defend. It would violate all rules of pleading, not to say common fairness, to allow the meaning ascribed to the words by the plaintiff himself to be suddenly changed by the submission of another totally different meaning, so different as to amount to a distinct and independent charge. *Smid v. Bernard*, 31 Misc. Rep. 35, 63 N. Y. Supp. 273; *Westbrook v. N. Y. Sun*, 32 Misc. Rep. 37, 65 N. Y. Supp. 390; *Wuest v. Brooklyn Citizen*, 38 Misc. Rep. 1, 76 N.

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

Y. Supp. 706. "He (plaintiff) will not be allowed in the middle of the trial to start a fresh innuendo not in the pleadings. He must abide by the construction put on the words in his statement, or else rely on their natural and obvious import. He cannot during the trial set up a third construction of the words different both from their prima facie meaning and from that pointed out by the innuendo." *Newell on Slander and Libel*, 629; *Odgers, Libel and Slander*, 102. To charge one with being "delinquent" or with being "on the black list" or with being "unworthy of credit" does not imply dishonesty. A man might, by some accident, or misfortune, or mismanagement, become delinquent in payment or unworthy of credit, and thus find his way to a creditors' "black list," and yet be scrupulously honest. It was harmful error against defendant to have the latter element put into the case.

The question is placed before us whether it is a libel per se to publish in a commercial credit paper that a boarding house keeper (giving name), is delinquent, or is unworthy of credit. We have concluded that it is. The law, recognizing the harmful results to business flowing from a bad name or reputation of the proprietor concerning such business, has always guarded the good repute of the innocent tradesman. So a publication as to one's business will be held to be libelous per se, which would not be when applied to the individual. Thus, printing that "the opinion is expressed that a local bank has been secured" by the plaintiff who was a merchant was held to be a libel per se. *Minter v. Bradstreet Co.*, 174 Mo. 444, 73 S. W. 668. So the same was held as to printing that certain merchants "have assigned." *Mitchell v. Bradstreet Co.*, 116 Mo. 226, 22 S. W. 358, 724, 20 L. R. A. 138, 38 Am. St. Rep. 592. And in this court it was held to be libelous per se to print that "Joseph Hermann, brickmaker, is in the hands of the sheriff." *Hermann v. Bradstreet Co.*, 19 Mo. App. 227.

Something was stated in argument tending to disparage an action for libel which affects a business said to be so inconsequential as a boarding house keeper. But it must be borne in mind that the law is not so restricted in its terms and meaning as only to include the ordinary mercantile pursuits. It is familiar learning in the law of libel that it includes the professional man, tradesman, and artist. And it is said by the Supreme Court of Michigan (*Weiss v. Whittemore*, 28 Mich. 366) and by Townsend on Slander and Libel, quoted approvingly by our Supreme Court in *Minter v. Bradstreet Co.*, supra, to include a "trade" or "employment." And *Hermann v. Bradstreet*, supra, involved the libel of a brickmaker. We therefore can see no reason why the law may not be applied to a boarding house keeper. In this case the damage is claimed to have resulted to plaintiff

from a loss of credit, and it is suggested that credit is not necessary to such business. Ordinarily credit is a necessity or convenience to any business which requires purchases, whether it be large or small. At least, it is a right which accompanies a good business reputation, and it should receive the protection of the law.

There were no special damages alleged. But, as the publication is libelous per se, none need be alleged, and general damages may be proven. *Hermann v. Bradstreet Co.*, supra. In proving general damages plaintiff gave testimony as to her credit in certain mercantile establishments and the loss of it. Defendant then, in cross-examination, undertook to show by her that she did not have credit in some of these by showing that she was required to give chattel mortgages to secure purchases of furniture. This the court disallowed, and we think the ruling was error. It was cross-examination on the very subject she testified in chief and tended to explain, or qualify, or contradict, what she had stated as to her credit.

The position of the plaintiff concerning the application of the words published is not sufficiently definite. If it is intended that her claim of damage is to be based upon the fact that she was engaged in a business in which credit was an element of value, she should distinctly plead that at the time of the publication she was engaged in the business of a boarding house keeper.

The judgment is reversed and the cause remanded. All concur.

CITY OF CARUTHERSVILLE v. PALS-GROVE.

(St. Louis Court of Appeals. Missouri. Feb. 21, 1911.)

MUNICIPAL CORPORATIONS (§ 642*)—AFFIRMANCE—INSUFFICIENT PRESENTATION OF APPEAL.

A prosecution for violating a city ordinance being a civil action, a conviction will be affirmed on noncompliance with the statute and rules governing prosecution of civil appeals, which require filing of abstracts, briefs, assignments of or joinder in error, etc.

[Ed. Note.—For other cases, see *Municipal Corporations*, Dec. Dig. § 642.*]

Appeal from Circuit Court, Pemiscot County; Henry C. Riley, Judge.

Willie Palsgrove was convicted of violating an ordinance of the City of Caruthersville by maintaining a nuisance, and she appeals. Affirmed.

J. S. Gosson and Ward & Collins, for appellant. Everett Reeves and Vance J. Higga, for respondent.

REYNOLDS, P. J. This case originated in the police court of the city of Caruthersville, a city of the fourth class, in which court appellant was tried and convicted of maintain-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

ing a nuisance, in violation of the ordinances of that city. She appealed to the circuit court of Pemiscot county, and at a trial there was again convicted, and her punishment assessed at \$5 fine and costs of the cause. She afterwards duly perfected her appeal to this court, filing a full transcript here on the 4th of January, 1910. But appellant has in no other particular complied with the rules of this court governing the filing of abstracts, briefs, and arguments, nor has any assignment or joinder in error, if that is required, been filed in this court. Counsel for the city move to dismiss the appeal or affirm the judgment of the circuit court for failure of appellant to comply with rules 13, 14, 16, and 18 of this court (112 S. W. vi, vii).

Our statute (section 5312, Rev. St. 1909) provides that no assignment of error or joinder in error shall be necessary upon any appeal or writ of error in any criminal cause, but that the appellate court shall proceed upon the return thereof without delay and render judgment on the record before it. This section, in terms, is applicable to criminal cases alone. This court, in the case of *City of Mexico v. Harris*, 115 Mo. App. 707, loc. cit. 711, 92 S. W. 505, following the decision of the Supreme Court in the case of *City of Gallatin v. Tarwater*, 143 Mo. 40, 44 S. W. 750, and other cases cited in the opinion (115 Mo. App., loc. cit. 711, 92 S. W. 505), held that a prosecution for a violation of a city ordinance is not a criminal, but a civil, action. Hence the rules of court applicable to civil actions apply.

For failure to comply with the statute as to prosecution of appeals and the rules of this court above referred to, the judgment of the circuit court in this case is affirmed.

NORTONI and CAULFIELD, JJ., concur.

ROSENBERGER v. PACIFIC EXPRESS CO.

(St. Louis Court of Appeals. Missouri. Feb. 21, 1911.)

APPEAL AND ERROR (§ 367*) — AFFIDAVIT — SUFFICIENCY.

A paper filed in the appellate court, setting out that one of the attorneys, as agent for appellant, and for the purpose of taking an appeal, states that it is not made for vexation or delay, etc., but not signed and attested, leaves the appellate court without jurisdiction.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 1993-1998; Dec. Dig. § 367.*]

Appeal from Circuit Court, Montgomery County; Jas. D. Barnett, Judge.

Action by Emil Rosenberger against the Pacific Express Company. From a judgment for plaintiff, defendant appeals. Stricken from docket.

J. L. Minnis and G. Pitman Smith, for appellant. E. Rosenberger & Son, for respondent.

REYNOLDS, P. J. In this case respondent filed a motion to dismiss the appeal for reasons stated, which motion was sustained, and the appeal dismissed. Afterwards, on application and motion of appellant, that order of dismissal was set aside; leave being at the same time granted respondent to file a supplemental or additional abstract. That was done. It appears by this additional abstract filed by respondent, the facts in which are not controverted, that no affidavit for appeal was ever in fact made or filed. A paper appears to have been filed, in which paper it is set out that one of the attorneys, as agent for appellant, and for the purpose "of taking an appeal herein," states that the appeal "is not made for vexation or delay, but because this affiant and appellant believes that the said appellant is aggrieved by the judgment and decision of the above named court." This form is correct. But the paper itself, as set out in respondent's supplemental abstract, is neither signed by any one, nor is the blank jurat to it signed or attested by the clerk. To all intents and purposes it is a blank piece of paper, which was filed in the case. As we are wholly without jurisdiction of the cause, following the decision of the Kansas City Court of Appeals in *Peters v. Edge*, 87 Mo. App. 283, all that we can do is to strike the cause from the docket as one not in court.

Our Supreme Court, in *Lengle v. Smith*, 48 Mo. 276, under practically the same kind of facts, held that the appeal should be dismissed. But no question was there raised as to the proper order to be made. In *State ex rel. v. Broadbuss*, 210 Mo. 1, 108 S. W. 544, where the question presented to the Kansas City Court of Appeals was whether the affidavit for appeal was sufficient, that court on motion dismissed the appeal. While the Supreme Court, in issuing its writ of mandamus to the judges of the Kansas City Court of Appeals, held that the affidavit which the latter court held insufficient was sufficient and that the appeal was improperly dismissed, this was so held, not because that was or was not the proper form of order to make, but because the affidavit was in itself sufficient. So the form of the order, the proper order to enter, was not discussed or decided. What we have to deal with is that this case is here on the order of the circuit court granting an appeal, and that order unsupported by any affidavit. In the *Broadbuss* Case, however, it is distinctly decided that the order of the court granting the appeal does not confer jurisdiction of an appeal; that the order granting an appeal, in the absence of proper affidavit there-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

for, confers no jurisdiction upon the appellate court. The determination of this point of practice is not very important one way or the other, except with the view of following correct rules of practice. It seems to us, on principle, that the correct order in this case should be one striking the cause from the docket, not one dismissing the appeal, although practically both produce the same result; that is to say, the case goes out of this court as one not properly brought here by appeal. That leaves the judgment of the circuit court exactly where it was at the time of its rendition.

Accordingly the order in this case is that the cause be stricken from the docket.

NORTONI and CAULFIELD, JJ., concur.

**SOUTH SIDE REALTY CO. v. ST. LOUIS
& S. F. R. CO.**

(Springfield Court of Appeals. Missouri. Feb. 6, 1911.)

1. APPEAL AND ERROR (§ 14*)—CROSS-APPEALS.

Where a cross-appeal is taken, the parties may file a joint bill of exceptions and have their transcript prepared bringing up all the exceptions, or they may file separate bills of exceptions in the trial court, and each party may prepare an abstract to be filed in the Appellate Court, but where neither of these courses is pursued and there is no separate abstract of record and no bill of exceptions prepared or filed by the respondent, though he obtained leave to file a bill of exceptions, the cross-appeal was not perfected and will be dismissed.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 48-58; Dec. Dig. § 14.*]

2. RAILROADS (§ 113*)—FRANCHISES—BRIDGES—NEGLIGENCE.

Where a railroad constructs a bridge, it must use ordinary care not to injure the rights of owners of adjacent property.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 351-364; Dec. Dig. § 113.*]

3. WATERS AND WATER COURSES (§ 171*)—INTERFERENCE WITH—NUISANCE.

No one can materially interfere with the waters of running streams, so as to invade the rights of others, any such interference being per se a nuisance.

[Ed. Note.—For other cases, see Waters and Water Courses, Cent. Dig. §§ 216-222; Dec. Dig. § 171.*]

4. WATERS AND WATER COURSES (§ 171*)—INTERFERENCE WITH.

Under Rev. St. 1909, § 3049, permitting railroad companies to build bridges across streams in construction of their road, but requiring them to restore the stream or water course to its former state, or to such state as not unnecessarily to impair its usefulness, a railroad company constructing its road over a water course is bound to leave waterways or openings sufficient as an outlet for all water that may reasonably be expected to flow through such water course, taking into consideration such freshets as might reasonably be expected to occur, in view of the size of the stream, its carrying capacity, and the character of the country contributing to its flow, but it is not liable for failing to provide for a flood which

is not only extraordinary, but unprecedented, and could not reasonably have been foreseen.

[Ed. Note.—For other cases, see Waters and Water Courses, Cent. Dig. §§ 216-222; Dec. Dig. § 171.*]

5. WATERS AND WATER COURSES (§ 171*)—RAILROAD BRIDGES—ANTICIPATING FLOODS.

If at the time of the construction of a railroad bridge over a water course extraordinary inundations have occurred within the memory of men then living, their recurrence should be anticipated and provided against.

[Ed. Note.—For other cases, see Waters and Water Courses, Cent. Dig. §§ 216-222; Dec. Dig. § 171.*]

6. WATERS AND WATER COURSES (§ 179*)—OBSTRUCTION—FLOOD WATERS—BRIDGES—LIABILITY.

In an action against a railroad for damages caused by the obstruction of a stream by placing a heavy iron girder across it impeding the flow of the water during heavy rainfall, thereby flooding plaintiff's land, evidence held to present a question for the jury whether the rainfall preceding the flood was so unusual and unprecedented that it could not have been reasonably anticipated and guarded against.

[Ed. Note.—For other cases, see Waters and Water Courses, Cent. Dig. § 250; Dec. Dig. § 179.*]

7. NEGLIGENCE (§ 61*)—ACT OF GOD—CONTRIBUTIVE ACTS.

If the defendant's negligence commingled with and operated as a contributive element proximate to the injury, it is liable, even though such injury was due to an act of God.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. §§ 74, 75; Dec. Dig. § 61.*]

8. WATERS AND WATER COURSES (§ 171*)—OBSTRUCTION—INJURY—LIABILITY.

Where a railroad company, on complaint that its bridge over a stream was an obstruction to the escape of flood water, promised to remedy the difficulty, and altered the bridge, but did not remove the chief obstruction, an iron girder resting on piling, except to move it from under the bridge and leave it still spanning the stream as before, the railroad was liable for injuries to adjoining lands by floods which otherwise might have passed under the bridge.

[Ed. Note.—For other cases, see Waters and Water Courses, Cent. Dig. §§ 216-222; Dec. Dig. § 171.*]

9. WATERS AND WATER COURSES (§ 178*)—OBSTRUCTION—DAMAGES—EVIDENCE.

In an action for damages to land by flooding caused by the obstruction of a stream, evidence held insufficient to sustain a finding of \$1,000 as the amount of damages to the sale of the property by the flood.

[Ed. Note.—For other cases, see Waters and Water Courses, Cent. Dig. §§ 251-255; Dec. Dig. § 178.*]

10. DAMAGES (§ 20*)—GROUNDS—TORTS.

A wrongdoer is liable for all injuries directly resulting from the wrongful act, whether or not they could have been foreseen by him, if they are the legal and natural consequence of the wrongful act and are such as, by common experience and in the usual course of events, might reasonably have been expected.

[Ed. Note.—For other cases, see Damages, Cent. Dig. §§ 55-57; Dec. Dig. § 20.*]

11. WATERS AND WATER COURSES (§ 178*)—FLOODING LANDS—DAMAGES.

The measure of damages to land by flooding is the difference in the value of the land itself before and after the injury, and the value of improvements injured or destroyed, such value being measured by the amount required to

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

restore the premises to their original condition, and if the injury to houses or other improvements has interfered with the beneficial enjoyment of the premises, the rental value while restoring the improvements may be recovered.

[Ed. Note.—For other cases, see *Waters and Water Courses*, Cent. Dig. §§ 251-255; Dec. Dig. § 178.*]

Appeal from Cape Girardeau Court of Common Pleas; R. G. Ranney, Judge.

Action by the South Side Realty Company against the St. Louis & San Francisco Railroad Company. From a judgment for plaintiff, defendant appeals. Reversed and remanded.

This is an action commenced in Cape Girardeau county for damages caused by three successive overflows of Cape La Croix creek. The claim of the petition is that the defendant maintained a bridge across this stream which dammed up the natural water course of the creek, causing the creek to overflow upon the plaintiff's land. The petition was in three counts, for three successive overflows. The jury found a verdict for the defendant on the first and second counts and for the plaintiff on the third count in the sum of \$1,000, from which the defendant appealed to the St. Louis Court of Appeals. The cause was transferred to this court, and the parties have filed their briefs and argued the case, thus eliminating the question of jurisdiction.

The third count of the petition is, in part, as follows: "Plaintiff further states that said Cape La Croix creek drains a territory extending about ten miles northwest of said crossing; that it flows to the east and south from said crossing by winding course for a distance of five miles, when it empties into the Mississippi river; that at said crossing its direction is east and west, at right angles to the right of way, but that a quarter of a mile west of said crossing it verges to the northwest, and at a point opposite Sulphur Springs crossing is about a half a mile distant. Plaintiff further states that prior to the year 1907, the western railroad bridge of the defendant at the Cape La Croix crossing was supported by a massive iron girder, five feet wide by forty-six feet long, resting upon two bents of piling each sixteen inches thick and driven into the bed of the stream; that said girder extended down between the banks four and one-half feet and reached from bank to bank; that some time during the year 1907, the defendant commenced to alter said bridge and in so doing moved said girder out from under said bridge, but instead of removing the girder from the water course, neither lifted nor lowered it, but negligently left it relatively in the same position it formerly occupied in the water course, except that it stood at the eastern edge of the bridge and had wholly ceased to be a part of it or to furnish it any support or strength; and the defendant negligently wholly failed

to remove said bents of piling, although, after the alteration was made, they wholly ceased to be any part of said bridge; that the said girder, after its removal, still reached from bank to bank, its upper edge lying almost level with the tops of the banks and its body extending down into the water course four and one-half feet; that said piling and said girder so placed constituted obstructions in said water course and when the water rose in the stream acted as a dam and held back the water; that they made the current of the stream, for a great distance above the bridge, much more sluggish and reduced the capacity of the water course to carry off the flood waters about one-half. Plaintiff states that on the — day of February, 1908, while the defendant was maintaining said obstructions, and by reason thereof, the waters of Cape La Croix creek were held back and flowed over its banks and on, over and across the premises of plaintiff, lying on both sides of the creek; that said waters washed the soil thereof and became confined and held back by the embankment of defendant, and remained standing on plaintiff's premises, to the great damage of plaintiff. And plaintiff charges that by reason thereof it has been hindered and delayed in the use, improvement, rental and sale of said premises; that it will be put to great expense in restoring the soil washed away by the water; that it was put to expense in endeavoring to protect the premises from further overflows, to the additional damage of the plaintiff in the sum of \$1,000, for which sum it also prays judgment."

The answer was, besides a general denial, a plea that, if plaintiff was damaged at all, such damage was the result of an unusual flood in the stream mentioned, and that the defendant incurred no liability therefor. The first flood occurred on November 17, 1906, the second about December 27, 1906, and the third about February 14 or 15, 1908.

The evidence tended to show that plaintiff, South Side Realty Company, became the owner of the premises, which it claimed was damaged, about July, 1906. The property extended along the west side of defendant's railroad and the Scott county gravel road for a distance of 900 feet north of the creek and something like 400 or 500 feet south of it. The plaintiff corporation was organized for the purpose of buying and selling real estate, erecting hotels, halls, and other buildings, and to purchase, own and rent buildings, in the city and county of Cape Girardeau. After it became the owner of the premises in question, it subdivided it into blocks and lots—5 blocks and 91 lots. The defendant's railroad paralleled the property on the east. The railroad, after leaving the city of Cape Girardeau, runs in a southwesterly direction, and the property claimed to have been damaged is west of the tracks. At

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

the times mentioned the defendant was operating the railroad and maintaining a bridge across the creek. The track crosses the Sulphur Springs branch, a half mile north of Cape La Croix creek, the former being dry the greater part of the year. These streams run nearly parallel and the water flows from west to east. In its natural state, Cape La Croix creek is narrow—about 15 or 20 feet wide—and has, approximately, two or three feet of water. At the point where the railroad crosses, it flows east. At this point, the distance across the waterway at the tops of the banks is about 50 feet, and the depth of the water course there, at the deepest place near the middle of the stream, will average 15 feet. There had been a wooden bridge at this place, but in the year 1902 it was replaced by a steel girder, 46 feet long and 5 feet in depth. This girder consisted of two stringers girded together with iron bars and they rested on a rock base in the creek on each side, and on the girder ties were laid. The two pieces of iron that constituted the girder were about four and one-half feet apart and sat immediately underneath the rails. Measurements had been made of the depth of the stream from that bridge and the result showed a depth at the deepest place of 10 feet from the bottom of the girder to the bottom of the creek; and on one side it ran up to within 1 foot 9 inches and on the other side within 2 or 3 feet, averaging 6 feet from the bottom of the girder to the bottom of the creek bed. The girder itself extended below the top of the bank 5 feet from the ties down, and all of the girder was within the water course; that is, the top of the girder was even with the top of the bank, and the bottom of the railroad rail was about a foot or a foot and one-half above the top of the bank. A computation was made showing the number of square feet in the space below the girder and the number of square feet in the surface of the girder which was within the banks of the creek. This measurement showed there were 228 square feet in the space below the girder and 230 square feet in the girder included within the banks of the stream; so that the girder occupied about one-half of the space in the creek bed below the ties of the railroad.

Several letters were written by plaintiff to defendant's superintendent in which it complained of the trestle across Cape La Croix creek, notifying defendant that it was so constructed as to interfere with the flow of the water down the creek in its natural channel, and that such obstruction had caused great damage to property along the track by causing it to be flooded. The defendant, in December, 1906, wrote plaintiff that it would immediately place an order for an additional span to the bridge and make an increased waterway sufficient to take care of the water carried by the stream and that plaintiff could be assured such installation would take

place without any more delay. On June 30, 1907, the general superintendent of the defendant was again notified by plaintiff that its failure to improve the bridge as agreed was causing continued damage by reason of the overflow on plaintiff's property; and, on this date, the plaintiff was again informed that defendant had a new structure ordered, and that in a few days it would commence to make the changes so that the bridge could be installed without further delay. Prior to the time of the last flood and some time during the year 1907, the evidence tended to show that defendant did commence to alter the bridge, and in so doing moved the girder out from under the bridge; but, instead of removing this girder from the water course, it neither lifted nor lowered it, but left it in about the same position it formerly occupied in the water course except that it stood at the eastern edge of the bridge and had been separated from the bridge so as not to form any part of it. Also, that defendant had failed to remove the bents or piling, although they had wholly ceased to be any part of the bridge. After the girder was removed, it still reached from bank to bank, the upper edge lying almost level with the tops of the banks and its body extending down into the water course some four and one-half feet so that it constituted about the same obstruction to the flow of the water in the channel of the stream that it had prior to its detachment from the bridge.

The evidence tended to show that the three overflows were caused by unusual floods; that the rainfall on the 17th and 18th of November, 1906, was 2.82 inches; on the 15th of December, 1906, 2.28 inches; and on the 14th and 15th of February, 1908, 3.92 inches; and that the resultant overflows were almost unprecedented in the history of that community. The plaintiff's evidence tended to show that the last overflow causing damage to plaintiff's property was occasioned by the condition of the bridge. At this overflow, there was a difference in the height of the water on the west and east sides of the bridge of as much as four feet.

The evidence showed that the property in question cost plaintiff about \$3,500, but was worth considerably more. After the second overflow, plaintiff expended some \$30 or \$40 in building a levee. The plaintiff had built a four-room frame house on one of the lots and had rented it at \$8 a month, but during the flood of 1908 the water entered the house and was up to within eight inches of the window-sill. The plaintiff sold the lots on easy terms—at four or five dollars a month—for from \$90 to \$200, each, averaging, perhaps, \$125. The evidence tended to show that after the last flood plaintiff was unable to sell any more of the lots, plaintiff's salesman testifying that one of the reasons the lots were not sold as they were before the last flood was on account of the overflow. The evidence tended to show that some 900 cubic

yards of soil was washed away by the overflows, and that it would cost 40 cents a yard to restore the dirt to its original position.

W. F. Evans and Moses Whybark, for appellant. M. A. Dempsey and Frank Kelly, for respondent.

NIXON, P. J. (after stating the facts as above). 1. The plaintiff attempted a cross-appeal, and its purported abstract shows the following state of facts: That on the day the jury returned its verdict the plaintiff filed a motion for a new trial setting up (1) that the court erred in admitting evidence over plaintiff's objections; (2) in excluding evidence offered by plaintiff; (3) in granting instructions requested by defendant; (4) that the jury failed to follow instructions; (5) that the finding of the jury is contrary to the evidence; and (6) that the finding of the jury is contrary to law. That this motion was overruled and affidavit for appeal filed and appeal granted and 90 days given within which to prepare and file bill of exceptions.

When cross-appeals are taken in any case the parties may file a joint bill of exceptions and have their transcript prepared bringing up all the exceptions to this court; or, they may file separate bills of exceptions in the trial court and each party prepare an abstract to be filed in the appellate court. *Jungeman v. Brewing Co.*, 38 Mo. App. 458. Neither of these courses was pursued by the plaintiff in perfecting its appeal. It appears that there is no separate abstract of the record, and no bill of exceptions was prepared or filed by the plaintiff in this case; that while plaintiff applied for and obtained leave to file a bill of exceptions, so far as we know, none was filed. From this statement it appears that no cross-appeal was perfected by plaintiff, and consequently its appeal has no existence in this court, and the only course open to this court is to dismiss the plaintiff's abortive appeal as to the finding on the first and second counts of the petition, which is accordingly done.

2. As is seen from the statement of the facts in this case the damages claimed are for an obstruction of Cape La Croix creek by the construction of a railroad bridge across it whereby the water of the creek was dammed up and caused to overflow to the injury of the plaintiff and other riparian owners. The right of the defendant to construct this bridge was a franchise granted it by law. But in the construction and maintenance of such bridge it was required to use ordinary care so that the rights of the owners of property should not be injured. The law has been long established that unless authorized by appropriate and constitutional statutory enactment, no one can in any material manner or extent interfere with the waters of running streams in such a way as to invade the rights of others. Such an interference is per se a nuisance, as

calculated to produce damage, and it is a maxim of the law in regard to such streams, that the water runs, and ought to run, as it has been accustomed to run, through its natural channel. *Abbott v. Railway Co.*, 83 Mo., loc. cit. 276, 53 Am. Rep. 581. Our statute has expressly authorized railroad companies to build bridges across streams in the construction of their roadbed, but it also expressly provides that such company shall restore the stream or water course to its former state, or to such a state as not unnecessarily to have impaired its usefulness. Section 3049, Rev. St. 1909.

It is claimed by the appellant that it incurred no liability by reason of the damage inflicted by the floods described in plaintiff's petition because they were unusual and extraordinary, and that the law did not require it to anticipate such injuries, and that it was consequently not required to make preparations to avoid them. A railroad company constructing its road over a water course is bound to leave such waterways or openings as are sufficient to afford an outlet for all water that may reasonably be expected to flow through such water course, taking into consideration such freshets as might reasonably be expected to occur in view of the size of the stream, width of its bottom, height of its banks, carrying capacity, and the character of the country contributing to its flow. *Union Trust Co. v. Cuppy*, 26 Kan. 754. It is the duty of a railroad company, in constructing its road across a stream, to provide a passageway sufficient to allow the passage of water from all such floods as may occur in the ordinary course of nature; but it is not liable for failing to provide for a flood which is not only extraordinary, but unprecedented, and could not reasonably have been foreseen. *Houghtaling v. Railroad*, 117 Iowa, 540, 91 N. W. 811. And, in order to determine its liability for obstructing water courses, the history of the country as to the flooding of its streams is to be taken into consideration. If, at the time of the construction of a railroad, extraordinary inundations have occurred within the memory of men then living, their recurrence should be anticipated and provided against. Hence, where lands have been overflowed by reason of the construction of an embankment by a railroad company, it cannot defend in an action to recover damages, on the ground that the damage was caused by reason of an extraordinary flood, where it appears that there was a similar overflow at a time 32 years previous to the one in question, and that there were two similar overflows, one 9 years and the other 19 years before such previous overflow. *Gulf, C. & S. F. R. Co. v. Pomeroy*, 67 Tex. 498, 3 S. W. 722.

The question as to whether the defendant should have anticipated the flood that occurred on the 15th day of February, 1908, is to be determined by the evidence in this

case. The petition is in three counts, each count claiming damages for a certain distinct flood, the first for the flood of November 17, 1906, the second for the flood of December 27, 1906, and the third for the flood of February 15, 1908. Witnesses who had lived in that country many years and who were familiar with Cape La Croix creek for a period of from 20 to 30 years testified in the case. The defendant introduced evidence tending to show that the floods described in the petition were unusual or extraordinary. The only evidence that it is deemed necessary to embody in this opinion and to call attention to is the record evidence of Prof. Shackelford, one of defendant's witnesses. He had maintained a weather record for the years 1905, 1906, 1907, and 1908, showing the amount of rainfall in the vicinity of Cape Girardeau. This record showed the following condition as to rainfall: "On November 20, 1906, 1.80 inches; on November 21, 1906, 3.55 inches—total rainfall, two successive days, 5.35 inches. On January 2, 1907, 2.35 inches; on January 3, 1907, 2.52 inches—total rainfall, two successive days, 4.87 inches. On February 14, 1908, 1.80 inches; on February 15, 1908, 2.12 inches—total rainfall, two successive days, 3.92 inches."

In the face of this testimony as to the quantities of rainfall at times prior to the flood of February, 1908, there is no reasonable ground for the contention of the defendant that the rainfall on February 14 and 15, 1908, was so unusual and unprecedented in amount that it could not have been reasonably anticipated and guarded against by the defendant; and this evidence at least presented to the jury the question whether the defendant should have known that such floods were to be expected prior to February, 1908, and we cannot say as a matter of law that the jury was not reasonably authorized in the inference they drew that the defendant should have anticipated and made due preparations to prevent the injuries arising to the plaintiff from the flood of February, 1908. The question of negligence under the evidence in this case was clearly one for the determination of the jury. *Gulf, C. & S. F. R. Co. v. Holliday*, 65 Tex. 512. In the case just cited it was also held that in an action against a railroad company for damages caused by an overflow as a result of the alleged negligent construction of defendant's roadbed, whether the flood during which the overflow occurred was extraordinary or unprecedented is a question for the jury.

The defendant cannot escape the consequences of its negligence because the flood was an act of God. It is a well-settled principle that, if the defendant's negligence commingled with and operated as a contributive element proximate to the injury, it is liable even though such injury was due to an act of God. In order for the defendant to escape liability under the exemption afforded by law, the act of God must be the sole and only

cause of the injury, and this, too, unmixed with the negligence of the defendant, for if the defendant's negligence commingled with it in the loss as an active and co-operative element, and the loss is proximate thereto, or, in other words, is a reasonable consequence of the negligent act, it is regarded in law as the act of the defendant rather than as the act of God. *H. A. Johnson & Co. v. Springfield Ice & Ref. Co.*, 143 Mo. App. 441, 127 S. W. 692; *Brink v. Railway Co.*, 17 Mo. App. 177; *Standley v. Railroad*, 121 Mo. App. 537, 97 S. W. 244; *Murphy v. Gillum*, 73 Mo. App. 497. This rule of law was again declared by this court in the case of *Booker v. Railroad Co.*, 144 Mo. App. 273, 128 S. W. 1012, as follows: "The rule of law applicable to such cases has been often declared, and is to the effect that if the defendant's negligence concurs with the act of God, in point of time and place, or otherwise so directly contributes to plaintiff's damage that it is reasonably certain that the other cause would not have sufficed to have produced the injury, then the defendant is liable, notwithstanding he may never have anticipated the intervention of superhuman force." See, also, *Pruitt v. Railway Co.*, 62 Mo. 527; *Moffatt Com. Co. v. Railroad*, 113 Mo. App. 544, 88 S. W. 117; *Davis v. Railway Co.*, 89 Mo. 340, 1 S. W. 327. The instructions given by the court in this case substantially declared the law as it is announced in the above authorities.

W. C. Bahn, who was well acquainted with the bridge, testified: "The probability of the girder in this bridge acting as a dam or obstruction to the water would naturally appear to any one looking at the bridge. I computed the number of square feet in the space below the girder and the number of square feet in the surface of the girder which was within the banks of the creek. There are 228 square feet in the space between the girder and the bottom of the creek and 230 square feet in the girder itself included within the banks of the creek." It will be seen from this testimony that this girder obstructed the natural flow of the stream through its channel to the extent at least of nearly one-half of the channel. The evidence is beyond question that the defendant was warned of the condition of its bridge and the extent to which it was obstructing the flow of the stream, and that such bridge was causing injuries to the property owners above the bridge. In a letter written to defendant by plaintiff on November 24, 1906, attention was called to the condition of this bridge across this creek, and defendant was therein notified that the same was so constructed as to interfere with the large volume of water which flows through the creek in its natural course, and that during and after heavy rains, this bridge caused a large amount of damage to property along and near the creek on account of the creek being flooded, caused by the breaking of the water for the want

of a proper outlet across defendant's right of way. And it was further distinctly stated in this letter that plaintiff and other riparian owners had suffered great damage. To this communication the defendant on December 30, 1906, made the following reply: "Referring to your several communications with reference to overflows of La Croix creek, we will immediately place an order for an additional span, and make an increased waterway, sufficient to take care of all water carried by this creek, and will push its delivery to the utmost, and you can be assured of its installation without any more delay than is usual with work of this kind." On June 19, 1907, plaintiff again wrote defendant as follows: "On January 30, 1906, you advised us that you would put another span across Cape La Croix creek. By your failure to do so we have been damaged considerably by rains on our property caused by the overflow, and which in addition has hurt the sale of our property. We have not sold a lot on this property since the overflows to which prospective purchasers find objection." To this defendant on June 30, 1907, replied: "Your favor of June 19th with reference to the Cape La Croix creek situation: We have a new structure ordered, and Mr. Brown will within a very few days commence making necessary changes in the foundations so that the bridge can be installed immediately on its arrival." Yet, notwithstanding these repeated warnings, the defendant failed to afford the plaintiff and other property owners the relief from overflows which it had so often promised.

As the evidence tended to show, the railroad bridge at the Cape La Croix crossing was supported by a massive iron girder, 5 feet wide and 46 feet long; that it rested upon two bents of piling, each some 16 inches thick and driven into the bed of the stream; that the bridge was so constructed that the girder extended down between the banks $4\frac{1}{2}$ feet and reached nearly from bank to bank. After the correspondence between the parties as to the insufficiency of this bridge, during the year 1907, the defendant, pursuant to its agreement, commenced to alter said bridge; in doing this, defendant moved the iron girder from under the bridge, but instead of removing it from the water course, so as to prevent the damming of the water and the injurious results occasioned by the overflows, left it practically in the same condition as an obstruction across the stream. It was neither lifted nor lowered, but was moved a few feet so that it stood at the eastern edge of the bridge, but disconnected from it, and it furnished no support or strength to the bridge as it had been wholly detached from it. And defendant failed to remove the bents of piling after the alteration was made, notwithstanding they were wholly useless as a part of the bridge. The girder, after its removal, still reached from bank to bank, its upper side being about level with the tops of the

banks and its body extending down into the water course $4\frac{1}{2}$ feet, so that it still constituted practically the same obstruction to the flow of the stream as it had prior to its detachment from the bridge; and when the water rose in the stream these obstructions still acted as a dam and caused increased overflows over the land adjacent to the water course.

Under this evidence it is sufficiently demonstrated that the defendant, while exercising the privilege granted by the statute, disregarded the duty the law enjoins and so obstructed this stream as to reduce to one-half its capacity for carrying off the water. Not only that: After the consequences of the construction of the bridge were known to the defendant, it continued to maintain the bridge or girder across the channel of the stream and continued to maintain the obstruction after repeated requests to provide an increased waterway and repeated promises on its part to do so, so as to protect the plaintiff and other property owners. But in this work of changing the bridge it moved the massive girder from beneath the bridge, leaving the same and the bents of piling to remain in the water course for a considerable period of time, and it was in that condition at the time of the flood in February, 1908. The evidence tends to show that there was no reasonable excuse for this delay; that the girder could easily have been raised and supported above the flow of the water, and there is no evidence in the record to show that defendant could not have removed the piling so as not to constitute an obstruction to the flow of the water. We think the liability of the defendant sufficiently appears from the evidence to authorize a judgment for the damage occasioned to the plaintiff. The facts sufficiently show that the defendant acted in disregard of the property rights of the plaintiff. There devolved upon the defendant corporation the fundamental obligation of all ownership which finds its expression in the maxim, "*Sic utere tuo ut alienum non laedas.*" As said by Mr. Justice Field in *Baltimore, etc., R. Co. v. Fifth Baptist Church*, 108 U. S. 331, 2 Sup. Ct. 728 (27 L. Ed. 739): "Grants of privileges to corporate bodies confer no license to use them in disregard of the private rights of other persons. The great principle of the common law, which is equally the teaching of Christian morality, so to use one's property as not to injure others, forbids other application or use of the rights and powers conferred."

3. The appellant, however, contends that the damages awarded plaintiff (\$1,000) are excessive; that in its petition it claims damages in the first count for the overflow of November 17, 1906, in the sum of \$1,000 for restoring the soil washed away and expenses in endeavoring to protect the premises from further overflows; that in the second count of the petition, which was for the overflow of December 27, 1906, the plaintiff

claims damages in the sum of \$1,000 because hindered and delayed in the use and improvement and rental of the said premises and because it would be put to great expense in restoring the soil washed away by the water and had been put to great expense in endeavoring to protect the premises from further overflow; that in the third count plaintiff claims damages for the flood of February 15, 1908, in the sum of \$1,000 for expense it had been put to in restoring the soil washed away by the water, and had been put to great expense in endeavoring to protect the premises from further overflows, and to the use, improvement, and sale of the property. The jury, having found on the first count for the defendant, the plaintiff cannot recover on the third count for damages caused by the flood of November 17, 1906; likewise, the jury having found for the defendant on the second count, the plaintiff cannot recover on the third count for the damage done by the overflow of December 27, 1906.

The general rule of damages is that the person suffering the damage is entitled to be compensated for all loss caused by the wrong or injury; and in actions for tort, the general rule is that the wrongdoer is liable for all injuries resulting directly from the wrongful acts, whether they could or could not have been foreseen by him, provided the particular damages are the legal and natural consequences of the wrongful act, and are such as according to common experience and the usual course of events might reasonably have been anticipated. The general rule as to the measure of damages in actions for injuries to real property is the difference in value before and after the injury to the premises. Some courts have held that where soil has been excavated or carried away by the wrongful act of another, the party injured is entitled to the cost of restoring it to its former condition. In this state it has been held that in actions for damages to real property caused by an overflow, the measure of damages to the land itself is the difference in value of the land before and after the flood by reason of the particular injuries; and, as to houses or fences, their actual value is the measure of damages. Such value is measured by the sum which would be properly expended to restore the premises to their former condition. If the destruction of the houses or fences or other erections on the premises interfered with the beneficial enjoyment of the premises, then, in addition to the value of the property destroyed, the loss of rental value for the time it would take to restore the improvements should be awarded. *Graves v. Railroad*, 69 Mo. App. 574; *St. Louis Trust Co. v. Bambrick*, 149 Mo. 560, 51 S. W. 706.

The evidence herein tended to show that prior to the last flood plaintiff had constructed a levee along the creek in order to protect the land from overflow which cost between

\$30 and \$40; but, as the evidence did not show that the third flood injured this levee to any material extent, no recovery could be had for that. There was evidence tending to show that plaintiff had constructed a four-room frame house on the property costing about \$425 which it rented at \$8 a month. It appeared, however, that the tenant stayed in the house until after the third flood and moved out some time in the year 1908, the plaintiff having sold the house before the tenant moved out. As this house continued to rent at the rate of \$8 a month for some eight months after the third flood, it is not apparent that plaintiff sustained damage by reason of loss of rent on the house. The evidence tended to show also that by reason of the three floods some 900 cubic yards of earth was washed away from plaintiff's land. On examination after the first flood, the evidence showed about 400 cubic yards had been washed away. The second flood increased the depth of the channel that previous floods had washed out, cutting deeper and wider, and washed it out farther north, and this flood washed out some 200 cubic yards or more. The evidence further shows that the third flood caused additional damage to the land; that the ditch on plaintiff's land was washed farther down and farther north and was made wider and deeper, and that possibly 250 cubic yards more of soil was washed away. It further appeared that it had cost the plaintiff 40 cents a cubic yard to restore the earth. The evidence further showed that the plaintiff corporation was organized and engaged in buying and selling real estate and erecting houses; that after it purchased this tract of land, it laid it out in blocks and lots, in all, 5 blocks and 91 lots. This was in July, 1906. Prior to the first flood, plaintiff sold 8 of these lots; between the first and second flood none were sold; between the second and third flood 8 lots were sold; from the time of the third flood to the time of bringing suit no sales were made. The evidence tended to show that after the first flood the plaintiff continued building houses and selling them on the installment plan or renting them; that before the first flood the property was available for building houses thereon and for improvement, and the evidence tended to show that all the houses put up could have been rented and were available for renting purposes. The agent of the plaintiff who was intrusted with the sale of these lots testified as to the effect the flood had upon the salability of these lots and stated that one of the principal reasons the lots quit selling was on account of the floods. He further stated that they had sold no lots after the third flood, but he did not know whether or not it was the flood of 1908 that prevented their sale.

Under the evidence no data is furnished by which, under legal principles, the amount of plaintiff's damages by reason of the failure

to market its lots can be ascertained. Nor is it made to appear to what extent the failure to sell the lots was due to the several overflows, separately, or all combined, much less as to how much of such damage accrued to plaintiff by reason of the third flood to which alone the verdict of the jury limited plaintiff's recovery. It will thus be seen that the evidence offered failed to show the special damages to the sale of the lots caused by the third overflow. From the evidence adduced it does appear that the verdict of \$1,000 was clearly in excess of the damages to which the plaintiff was entitled by reason of the third overflow.

4. Some objections were made by the defendant and exceptions saved to the action of the court in admitting evidence, but a careful review of the whole record shows no material error in this connection.

For the reason above stated, the judgment is reversed and the cause remanded. All concur.

DILLENDER v. LESTER.

(St. Louis Court of Appeals. Missouri. Feb. 21, 1911.)

1. BILLS AND NOTES (§§ 517, 518*)—ACTIONS—EVIDENCE—SUFFICIENCY.

Evidence in an action on a note held to sustain a finding for defendant on defenses of non est factum and want of consideration.

[Ed. Note.—For other cases, see Bills and Notes, Dec. Dig. §§ 517, 518.*]

2. TRIAL (§ 251*)—ABSTRACT INSTRUCTIONS—REFUSAL PROPER.

An instruction on a point concerning which no issue is raised is properly refused.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 587-595; Dec. Dig. § 251.*]

Appeal from Circuit Court, Pemiscot County; Henry C. Riley, Judge.

Action by Kelly Dillender against B. F. Lester. Judgment for defendant, and plaintiff appeals. Affirmed.

J. E. Duncan, for appellant. Ward & Collins, for respondent.

REYNOLDS, P. J. This action was commenced before a justice of the peace by filing a note alleged to have been executed and delivered by defendant to plaintiff; the note being for \$110.50, with 8 per cent. interest. The answer duly verified pleaded, first, non est factum, then that defendant did make a note, but not the one sued upon, averring that the one which he made was for \$99, and that the latter was without consideration. On a trial before the justice there was a verdict for plaintiff, from which defendant duly appealed to the circuit court, where on a trial de novo before the court and a jury there was a verdict in favor of defendant, from which, after filing a motion for new trial, as well as one in arrest, both of which

were overruled, plaintiff has duly perfected his appeal to this court.

While it may be said that the second defense, setting up the giving of a note other than the one in suit, and averring matter in avoidance of the latter, does not have any relevancy to the note in suit, as this second defense is pleaded, yet the whole defense as made really went to the consideration for the note sued upon, and, as no point is made upon this by the learned counsel for appellant, we accept and dispose of the case, it having originated before a justice of the peace, where pleadings are not required, on the theory upon which both parties tried it in the lower court. We are not saying that these defenses are inconsistent. It has been held by our Supreme Court and by this court that the plea of payment is not inconsistent with the plea of non est factum. What we do call attention to is that the matter pleaded in the second defense does not purport to go to the note in suit. In ignoring this in this case we do not intend to approve it nor to hold that it is correct, and by so holding have it serve as a precedent, if a like state of facts occurs in another case. Plaintiff's testimony was very positive that the note sued on was the note which defendant executed. Plaintiff also introduced testimony tending to show that, while defendant had denied that he had ever executed a note on the amount sued on, yet that he admitted giving a note in payment of the premium on a policy of insurance on his own life. On defendant's part there was testimony tending to show that he could neither read nor write. As a matter of fact, the note itself purports to be signed by defendant by his mark, his signature witnessed. He testified positively that he had not made the note in suit; that the one he did make and deliver was for \$99; that he had made and delivered it to plaintiff, who was agent for a life insurance company, on the express condition that a policy was to be issued by that same company on the life of his wife; that, as soon as he was informed that the company had rejected her application for insurance and had refused to issue a policy on her life, he had repudiated the whole transaction, and had refused to accept the policy on his own life as a premium for which the note was given. There was evidence given by plaintiff tending to show that, on the trial before the justice of the peace, defendant had denied that there was any agreement between himself and plaintiff that, if his wife was refused a policy, he was not to take one on his own life, but on the trial of this case in the circuit court defendant contradicted this, and claimed that he had misunderstood the question when he answered it on the trial before the justice. It was in evidence that this note in suit was at one

time in the hands of a bank at Caruthersville, and that defendant was notified of that fact; that, when he went to the bank, he told them he understood the bank held a note of his for \$99, and which amount he said he had with him to pay off the note. But when he was told that the note was not for \$99, but for \$110.50, he denied that it was his note, denied that he had ever executed a note for that amount, claiming that he was only to pay \$99 for the premium on the policy. This looks hardly consistent with defendant's claim that he had repudiated the whole transaction, and had refused to accept the policy. Defendant's contention probably rests upon the fact that plaintiff had told him at the time when he made application for the policy and executed the note that, if he paid it within the time the note was to run, he would allow him 10 per cent. discount. This would bring the amount of the premium down to about \$99. It might well be that while the policy called for a premium of \$110.50, and while defendant apparently knew this, not being an educated, but an illiterate, man, he may have supposed that the note was to be for \$99, instead of the \$110.50, although the latter was the amount of the premium. These, however, were matters for the jury. Assuming, however, that the plea of non est factum which defendant interposed was not sustained, there was the testimony given by defendant in his own behalf that an agreement had been made between himself and plaintiff before any note was executed or delivered, and as the condition for the delivery of the note to the effect that, defendant was not to take out a policy on his own life unless at the same time there was one issued on the life of his wife.

It is not controverted that the insurance company represented by plaintiff refused to insure the life of the wife. There is therefore evidence before the jury in support of the defense of failure of consideration. Whatever view we might take of the evidence and of its weight, we are concluded by the verdict of the jury. That verdict finds support in the action of the learned trial judge who refused to set it aside as contrary to the weight of the evidence. We are bound to hold that there was evidence in the case supporting both defenses of the defendant, evidence from which the jury can be said to be justified in drawing the inference that there was no consideration for the note; even that it was not the note of the defendant. This being so, we cannot say that the jury had no evidence justifying it in arriving at the verdict which it reached.

There is no objection or exception appearing in the abstract before us or in briefs

or argument to the action of the court in giving and refusing instructions for either party, except that error is assigned to the refusal of the court to give two instructions asked by plaintiff. The first was to the effect that on the evidence they should find for plaintiff. In the view that the court took of the testimony and in the view which we take of it, this instruction was properly refused. The other instruction asked by plaintiff and refused was as to the effect of a tender; that, if a party makes a tender, he must be at all times ready to pay the amount tendered, and that if the jury found that defendant tendered the amount of the note, less the 10 per cent. to the bank which held the note for collection, and if they further found that thereafter a demand was made on defendant for the payment of the amount, and that defendant failed and refused to pay the amount, then the tender, if any, made through the bank was no defense to the action. The proposition of law covered by this instruction, abstractly considered, is correct, but we are unable to see its application to the facts in the case at bar. No issue was made that by any possible consideration can be held to have raised an issue of tender. The instructions given by the court at the instance of plaintiff and defendant presented the case to the jury in an absolutely correct and fair manner. If the case was to go to the jury at all, as we hold it should have done under the evidence, they are certainly as favorable to plaintiff as he had a right to ask.

On consideration of the whole case, we find no reversible error, and have concluded that the judgment should be, and it accordingly is, affirmed.

NORTONI and CAULFIELD, JJ., concur.

REMMERS v. SHUBERT.

(St. Louis Court of Appeals. Missouri. Feb. 21, 1911. Rehearing Denied March 7, 1911.)

1. ACTION (§ 45*)—CAUSES OF ACTION—JOINDER.

A petition which sets out a special contract for work and materials, and the price thereof, and which mingles therewith a claim for the value of the work and materials furnished as on an implied contract, is not demurrable for misjoinder of causes of action.

[Ed. Note.—For other cases, see Action, Cent. Dig. §§ 430-448; Dec. Dig. § 45.*]

2. JUDGMENT (§ 238*)—JOINT AND SEVERAL LIABILITY.

Where a petition, in an action against two defendants, susceptible of stating causes of ac-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

tion on a special contract for work and materials, and on an implied contract, was tried as setting forth a cause of action on an implied contract, a verdict and judgment was properly rendered against one of defendants, since, under Rev. St. 1909, § 2769, contracts, express or implied, are joint and several.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 416; Dec. Dig. § 238.*]

3. TRIAL (§ 418*)—DEMURRER TO EVIDENCE—WAIVER.

A defendant who, after the overruling of his demurrer to plaintiff's evidence, puts in testimony thereby waives the demurrer.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 981; Dec. Dig. § 418.*]

4. WORK AND LABOR (§ 28*)—EMPLOYMENT—EVIDENCE.

Evidence held to support a finding that plaintiff performed work and furnished materials, so as to make the defendant liable on an implied contract.

[Ed. Note.—For other cases, see Work and Labor, Cent. Dig. § 55; Dec. Dig. § 28.*]

Appeal from St. Louis Circuit Court; Hugo Muench, Judge.

Action by Harry J. Remmers against Lee Shubert and others. From a judgment for plaintiff, defendant named appeals. Affirmed.

A. M. Frumberg and A. R. Russell, for appellant. D. J. O'Keefe, for respondent.

REYNOLDS, P. J. By his amended petition, upon which this case was tried, and in which amended petition the defendants therein are the Garrick Building Company, a corporation, Lee Shubert, administrator of the estate of Samuel S. Shubert, deceased, Lee Shubert, individually, and Jacob J. Shubert, and C. A. Bird, the defendants were alleged to have employed plaintiff about the 1st of January, 1905, to do certain work and furnish certain materials for the Garrick Theater building, of which, it was averred in the amended petition, that defendants Lee Shubert and Samuel S. Shubert were lessees of the Garrick Building Company, holding the same as subtenants of the Garrick Building Company. It is averred that, in pursuance of the employment and contract with defendants, plaintiff performed the work and furnished materials in accordance with the orders and directions of defendants and their duly authorized agents, "and for the price and amount agreed upon between the plaintiff and defendants, amounting in all to the sum of \$608.43," as set out in an itemized account filed with the petition. It is further averred "that the price charged for said work and labor rendered and materials furnished, as aforesaid, are the fair and reasonable value of said work and labor rendered and materials furnished, and is the agreed price and value thereof." Averring demand and failure and refusal to pay, plaintiff demands judgment against defendants, and each of them, for the above sum, with interest and costs.

The defendant Garrick Building Company for answer filed a general denial. The defendants Jacob J. Shubert, Lee Shubert, and C. A. Bird filed their answer, which answer, denying each and every allegation in the petition and averring that at the commencement of the action Samuel S. Shubert had been dead for a period of about two years, set out that the fact of the death of Samuel S. Shubert was well known to plaintiff at the time, and therefore defendants interposed no answer in regard to Samuel S. Shubert, "but demand of plaintiff to know by way of reply what said Samuel S. Shubert, deceased, had to do with the transactions herein complained of, and also, specifically, what these defendants had to do in the transactions set out in plaintiff's petition, as they are not advised thereby." Further answering, these three defendants set out that the building known as the Garrick Theater is built upon ground formerly held under a leasehold by one Swazey, who built it; that prior to the erection of the theater building or completion thereof, about the 15th of October, 1903, Swazey, as the owner, made a lease or sublease of the premises to Samuel S. Shubert, deceased, and the defendant Lee Shubert; that after the execution of the leasehold, and on a date left blank in the answer, Swazey caused a corporation to be organized to take over the lease from himself to the Shuberts, the corporation being organized under the laws of the state of Missouri; and that thereafter, and to the present time, the corporation known as the Garrick Building Company has owned the lease, the lease being for a term of 21 years, commencing on the 1st day of May, 1904; and that this Shubert lease was thereafter taken over by a corporation organized under the laws of Missouri, known as the Garrick Theater Company, which has ever since operated the theater under the lease acquired by it from Samuel S. and Lee Shubert. In brief, as the answer says, since the opening of the Garrick Theater on a day left blank, the ground upon which the theater is situated has been and is now owned by the George T. Riddle Real Estate Company, the ground lease and building by the Garrick Building Company, the right to operate a theater in the building and occupation and use thereof for a period of 21 years belonging to the corporation known as the Garrick Theater Company, in which defendants say they have no interest, except so far as they may be interested as stockholders. The lease from Swazey to Samuel S. and Lee Shubert is set out in part, the point supposed to be relevant to the case at bar being that, upon the taking possession of the premises by the Shuberts, Swazey contracted that the building should be absolutely complete in every detail, ready for occupancy and operation as a theater; that it should be erected as quickly as

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

possible; that the work on it should be done in a competent and workmanlike manner and within reasonable time; and that the Shuberts are not to be liable or responsible for any injury of whatever nature during the building and construction of the theater building. The answer further avers that plaintiff ought not to have or maintain his action against them, because they have no personal interest in the theater building, and had not promised anybody in writing to assume any obligation whatever in respect to the Garrick Building Company.

The reply was a general denial. The trial was before the court and a jury.

It will serve no good purpose to set out the testimony in detail. It is sufficient to say that the plaintiff, testifying for himself, said that he had no written contract whatever for doing the work sued for with anybody, but that, on the employment of Jacob J. Shubert and C. A. Bird, two of the defendants, he had done the work sued for. He further testified to the value of the work done and materials furnished; that it had all been done and furnished as set out in his itemized account, and was reasonably worth the charges he had made for it. He testified that he did not know the Garrick Theater Company, and that he had made his contract with the defendant Jacob J. Shubert, assuming that he was the agent of Samuel S. and Lee Shubert. He also testified to acts of Jacob J. Shubert in connection with the doing of the work and superintendence and management of the building, and of the fact that it had not been paid for. Other witnesses testified to facts tending to show that the lessees of the building, at the time the work was done by plaintiff, were Samuel S. and Lee Shubert. There was also evidence tending to show that checks paid to parties working at the building were drawn in payment in the name of Samuel S. and Lee Shubert, and that Jacob J. Shubert had held himself out as their agent. The leases referred to were in evidence, as well as an agreement of date April 4, 1904, between the George T. Riddle Real Estate Company and Samuel S. and Lee Shubert, whereby the real estate company consented to the assignment of the lease from Swazey to the Shuberts. There was testimony on the part of plaintiff to the effect that the rent for the theater building during the months of January and February, 1905, when the work was claimed to have been done by plaintiff under his employment by Jacob J. Shubert, was paid to the Garrick Building Company by Samuel S. and Lee Shubert, and, while defendants Jacob J. Shubert and C. A. Bird deposed that they did not know plaintiff, and that neither of them had ever employed him, there was testimony of the most positive kind from witnesses outside of plaintiff himself that, after insisting to an agent of Swazey that it was Mr. Swazey's duty

under the lease and contract to make the additions and repairs required, and upon that being positively denied and all responsibility for them repudiated by Mr. Swazey's agent, Jacob J. Shubert had thereupon asked where he could find plaintiff, and had sent a man to his office, who left a card notifying plaintiff to meet Shubert at the theater building, and that plaintiff, going there in the afternoon of the day that the card was left, had been employed by Jacob J. Shubert to do the work sued for. In brief, there was a direct conflict of evidence as to the fact of agency, but no conflict whatever over the proposition that no express contract as to compensation and, as defendants claim, no written contract of employment was ever entered into between the parties. We may say that this is conceded. Plaintiff dismissed before final submission as to the Garrick Building Company and as to Lee Shubert, as administrator of the estate of Samuel S. Shubert, deceased, and the case went to the jury as to the defendants Lee Shubert, Jacob J. Shubert, and C. A. Bird.

The court gave several instructions at the instance of plaintiff and one of its own motion, and refused an instruction asked by defendants Lee and Jacob J. Shubert. The jury returned a verdict against Lee Shubert for the full amount sued for and interest, but against plaintiff and in favor of the defendants Jacob J. Shubert and C. A. Bird, and judgment followed against defendant Lee Shubert. From this, after duly saving exceptions, that defendant has perfected an appeal to this court.

The learned counsel for the appellant very strenuously contend, and with great ability attempt to sustain their contention, that this is an action upon a special contract, and that contract a joint contract, and, no such contract having been proven, plaintiff cannot recover. It is true that the petition does set out a special contract, both for doing the work and the price, but, as will be seen from the summary of the petition which we have given, it also mingles with this a claim for the value of the services rendered and materials furnished—that is, quantum meruit for work and quantum valebant for labor—as on an implied contract to pay; the work and material having been ordered and contracted for by the defendants. This is not, technically, misjoinder. No such point is here made. No attack was made upon the petition by demurrer or otherwise in the trial court. The learned counsel for appellant, claiming there are two causes stated, now endeavors to hold the plaintiff to an action as one resting wholly upon a special contract. They cannot do that. It is true that the petition is susceptible of construction as one on both a special contract and on an implied one for payment for work and labor done and material furnished. But it was tried by the court as on the latter.

Under our statute, section 2709, Rev. St. 1909, whether an express or an implied one, all contracts, which, by the common law, are joint only, are to be construed to be joint and several.

Counsel argue with very great force that at the close of plaintiff's case the demurrer which was then interposed should have been sustained. However that may be, after that demurrer was overruled, defendants not resting on the demurrer, put in their testimony. That waived the demurrer. Plaintiff introduced testimony in rebuttal, which certainly helped out plaintiff's case as originally made.

After a careful reading of all the testimony, we hold there was testimony, although conflicting and even slight, sufficient and substantial enough to justify the court in submitting the case to the consideration of the jury. The jury had before it that testimony, and on it had a right to draw the inference that the employment was by a duly authorized agent of the defendant Lee Shubert; that the work and labor and materials were put on a building then under his control and that of his brother, and being operated for them by this agent. Thereby defendant Lee Shubert became liable for the value thereof. We find no error justifying a reversal, either for lack of testimony or in the instructions given, or in the action of the court in refusing those asked.

The judgment of the circuit court is affirmed.

NORTONI and CAULFIELD, JJ., concur.

MILLER v. UNITED RYS. CO. OF ST. LOUIS et al.

(St. Louis Court of Appeals. Missouri. Feb. 21, 1911. Rehearing Denied March 7, 1911.)

1. MUNICIPAL CORPORATIONS (§ 705*)—HORSES IN STREET—CARE REQUIRED IN HITCHING TEAM.

The duty devolves upon the driver of a team of horses to exercise ordinary care to hitch them in a reasonably secure manner before leaving them unattended in an uninclosed space adjacent to a public street, and if a team be so left the driver will be liable to a person in the street injured by the horses breaking loose and running away.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 1515-1517; Dec. Dig. § 705; * Highways, Cent. Dig. § 468.]

2. MUNICIPAL CORPORATIONS (§ 706*)—NEGLECTED HITCHING OF HORSES—QUESTION OF FACT.

Whether one has exercised reasonable care in hitching a team of horses near a public street, so as to avoid liability for injuries to one in the street from the running away of the team, is a question of fact for the jury.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 1518; Dec. Dig. § 706; * Highways, Cent. Dig. § 473.]

3. MUNICIPAL CORPORATIONS (§ 706*)—LEAVING TEAM UNHITCHED—ACTIONS—INSTRUCTIONS—"NOT HITCHED."

In an action for injuries to a person on a street from collision with a runaway team, where the petition averred that the team was not hitched, a charge authorizing a recovery for plaintiff against the owner of the team, if the jury should find that the team was left without any person in charge and without exercising ordinary care to securely hitch it while the driver was absent, was not objectionable as authorizing a recovery for negligence not alleged in the pleading, as the law devolves upon the owner the obligation to exercise ordinary care in hitching the team in some reasonably secure manner, and the allegation that the team was not hitched should be viewed in the sense of the law under which, if the team was unsecurely hitched, when considered with respect to the obligation to exercise ordinary care in that behalf, they would be "not hitched" in the eye of the law.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 1518; Dec. Dig. § 706; * Highways, Cent. Dig. § 474.]

4. MUNICIPAL CORPORATIONS (§ 706*)—RUNAWAY TEAMS—ACTIONS—INSTRUCTIONS.

In an action for injuries from a runaway team in a street, where the issue related alone to the act of defendant in hitching the team and as to whether or not it exercised ordinary care in so doing, and there was no evidence tending to show that the team escaped by accident, it was not error to refuse a charge that, under certain circumstances, the running away of the team might be regarded as an accident, and that, if found to be such, defendant should recover.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 1518; Dec. Dig. § 706; * Highways, Cent. Dig. § 474.]

5. NEGLIGENCE (§ 61*)—PROXIMATE CAUSE—CONCURRENT CAUSES.

Where one was injured from separate negligent acts of different persons, a recovery from either one or both of the tort-feasors whose negligence concurred to contribute to his injury may be had, regardless of what the respective rights of the tort-feasors may be as between themselves, depending upon the question as to whose negligence was the proximate cause of the injury.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. §§ 74, 75; Dec. Dig. § 61.*]

6. NEGLIGENCE (§ 61*)—PROXIMATE CAUSE—CONCURRENT NEGLIGENCE.

Where an injury would not have befallen one but for the negligent act of another in the first instance, such negligence is viewed in the law as a proximate and efficient cause of the injury, though it concur with that of another independent actor which may intervene in point of time subsequently thereto.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. §§ 74, 75; Dec. Dig. § 61.*]

7. CARRIERS (§ 316*)—INJURY TO PASSENGER—EVIDENCE—RES IPSA LOQUITUR.

Where the relation of carrier and passenger exists, ordinarily, a presumption of negligence or the doctrine of *res ipsa loquitur* alone will be sufficient as *prima facie* proof on showing the facts of a collision and injury.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 1283-1294; Dec. Dig. § 316.*]

8. MASTER AND SERVANT (§ 329*)—NEGLECT OF SERVANT—PLEADING.

Where a negligent act is charged against a particular servant of defendant, the allegation is regarded as special rather than general, as where the act is charged against defendant in

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

general terms, including all its servants, appliances, etc.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 1268, 1269; Dec. Dig. § 329.*]

9. NEGLIGENCE (§ 119*)—ACTIONS—PLEADING AND PROOF.

Where specific acts of negligence are alleged, they must be proved as laid, and the presumption of negligence may not be invoked.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. §§ 203-211; Dec. Dig. § 119.*]

10. CARRIERS (§ 321*)—INJURY TO PASSENGER—ACTIONS—INSTRUCTIONS.

In a negligence action, the instructions must require a finding upon the negligent acts revealed in the evidence, and where the petition alleged specific acts of negligence of defendant street railway company's motorman as causing the injury, to the effect that he so negligently and carelessly managed the car that he suffered it to be collided with by runaway horses, crossing the track at an intersecting street, which allegations were supported by direct proof, it was error to charge authorizing a recovery against defendant if the jury should find that plaintiff was exercising ordinary care at the time, unless they should find that the collision could not have been avoided by the motorman in charge of the car by the exercise of high care, thus omitting to hypothesize the facts with respect to the alleged negligence of the motorman and permitting the jury to find for plaintiff in the event of other negligence of defendant.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 1226-1237; Dec. Dig. § 321.*]

11. APPEAL AND ERROR (§ 1173*)—DISPOSITION OF CAUSE—REVERSAL—JOINT DEFENDANTS.

Prima facie each of two defendants, sued for injuries alleged to have resulted from their negligence, is to be deemed a joint tort-feasor so as to authorize contribution between them if it should appear inter se that the negligence of the one was as culpable as that of the other in inducing the injury under Rev. St. 1900, § 5431, providing that defendants in a judgment founded on an action for redress of a private wrong shall be subject to contribution and all other consequences of such judgment, the same as defendants in a judgment in an action founded on contract, and hence in such an action both defendants should be permitted to defend throughout, and, where judgment for plaintiff is reversed as to one of the defendants, it will be reversed as to both, though the error in the trial intervened as to one only.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4562-4572; Dec. Dig. § 1173.*]

Appeal from St. Louis Circuit Court; Hugo Muench, Judge.

Action by Albert H. Miller against the United Railways Company of St. Louis and another. Judgment for plaintiff, and defendants appeal. Reversed and remanded.

Russell & Davidson, for appellant American Storage & Moving Co. Boyle & Priest and Glendy B. Arnold, for appellant United Rys. Co. W. R. Gentry, for respondent.

NORTONI, J. This is a suit for damages accrued to plaintiff on account of personal injuries received through the separate negligent acts of the two defendants which concurred in inflicting his hurt. Plaintiff recov-

ered against both defendants jointly, and they each prosecute an appeal from that judgment.

Defendant United Railways Company, incorporated, owns and operates a street railway system in the city of St. Louis, and defendant American Storage & Moving Company, incorporated, owns and operates a storage and moving business in which it employs teams of horses and heavy moving vans in the same city. Plaintiff was a passenger on the street car of defendant United Railways Company operated by it on the Taylor Avenue line, and at the time of his injury was going north on such line on Euclid avenue at its point of crossing with West Pine boulevard. Plaintiff occupied the rear seat, which runs lengthwise along the west side of the car, and, while thus sitting reading a newspaper, a runaway team of horses drawing a moving van owned by the American Storage & Moving Company collided with the rear end of the car adjacent with sufficient force to protrude the forward end of the wagon pole through the side of the car and inflict serious injuries upon him. The wagon pole crushed through the side of the street car and struck plaintiff in the back with sufficient force to throw him out of his seat, break several of his ribs, and inflict serious and painful internal injuries. The suit is prosecuted against both the railways company, of which he was a passenger, and the storage and moving company, who owned the team and van, jointly, on the theory that each defendant was guilty of separate negligent acts which concurred proximately to occasion plaintiff's injury and consequent damage. The specific act of negligence relied upon for a recovery against the storage and moving company is that it left its team of horses not hitched and unattended in an open space near a public street of a great city, thus permitting them to escape and contribute to his injury, while the negligence alleged against the street car company is to the effect that its motorman so negligently managed and ran the car on which plaintiff was a passenger as to permit the collision to occur. And it is averred that these negligent omissions of duty on the part of the two defendants directly concurred and contributed to cause the injury complained of.

We will first consider the arguments advanced for a reversal of the judgment by the storage and moving company, and, second those by the other defendant. It is argued on the part of the storage and moving company that the court should have directed a verdict for it for the reason plaintiff failed to sustain the burden which the law cast upon him to prove the specific act of negligence alleged against it in the petition. But, on consideration of the proof made, we believe the argument to be unsound, for, though

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

the team of horses appear to have been hitched to the hounds of the van, it was for the jury to answer as to whether such hitching was reasonably secure, or, in other words, as to whether ordinary care was exercised by defendant to that end. It appears the employes of the storage and moving company had transported a piano to the Monticello Hotel, located on Kings highway near West Pine boulevard, and upon arriving there drove the team and van into an open space in the rear adjacent to the hotel building. The team is shown to have been facing west and stopped with the horses' heads fronting a stone wall, and when in this position were permitted to stand unattended in the interim the employes were moving the piano from the van into the hotel and conveying it to the second floor. The team was not hitched nor made fast to a post or fence or other fixture, but instead the lines were tied to the hounds of the van, and the inside trace on each horse was unhitched from the singletree. Though the heads of the horses fronted to the westward toward the stone wall or fence referred to, it appears all of the space to the east for a whole block is open and uninclosed. In this situation and without other precautions, defendant's servants entered the hotel with the piano and left the team unattended at a place near West Pine boulevard, a public thoroughfare, which was of open and easy access. During the absence of the employes, the team turned around, entered upon Pine boulevard, and moved homeward in a trot drawing after them the moving van, which is shown to have weighed 4,500 pounds. The horses themselves are large and powerful animals weighing 1,600 pounds each, and as they trotted east on West Pine boulevard collided, as before mentioned, with the rear end of the street car in which plaintiff was sitting, while it was crossing that street on Euclid avenue. No one can doubt that the law devolves upon one having in possession a team of horses the duty to exercise ordinary care to the end of hitching them in a reasonably secure manner before permitting them to stand unattended in an uninclosed space adjacent to a public thoroughfare on which others may rightfully pass in order to prevent probable mischief which may result from the escape of the team. If, therefore, a team of horses be left in such circumstances unattended either in or near the streets of a great city, not hitched or hitched in a manner so insecurely as to breach the obligation to exercise ordinary care in that behalf, the person so remiss in the performance of the duty which the law lays upon him may be required to respond for such damages as the team inflicts upon another in the street while they are running away. *Hill v. Scott*, 38 Mo. App. 370; *Sciter v. Bischoff*, 63 Mo. App. 157; *Ward v. Steffen*, 88 Mo. App. 571; *Groom v. Kavanagh*, 97 Mo. App. 362, 71 S. W. 362; *Turner v. Page*, 186 Mass. 600, 72 N. E. 329;

Zambelli v. Johnson, 115 La. 483, 39 South. 501; *Hensley v. Davidson* (Iowa) 103 N. W. 975. Though plaintiff's proof reveals the horses were hitched by tying the lines to the hounds of the wagon to which they were attached, the question as to whether or not such hitching was reasonably secure in accordance with the precepts of ordinary care for the safety of others was for the jury, and the court did not err in refusing to direct a verdict for defendant. For, though all the evidence is that the horses were thus hitched and the inside traces dropped, the physical facts that they nevertheless trotted away and pulled the van after them is sufficient to constitute substantial evidence tending to prove ordinary care was not exercised in hitching the team in a reasonably secure manner. See *Hunt v. Mo. R. Co.*, 14 Mo. App. 160.

Plaintiff's first instruction authorized a recovery against the storage and moving company alone if the jury should find the team and van were left at the place and in the circumstances referred to without "any person in charge of said team of horses and without exercising ordinary care to securely hitch them while the driver of said team went into the hotel to deliver a piano for said defendant." It is argued this submitted to the jury the matter of insecurely hitching the team as a predicate of liability when the petition averred that the team was "not hitched," and is therefore erroneous in that it authorizes a recovery for a specification of negligence not counted upon in the pleading. We believe the argument to be unsound, for the law devolved upon defendant the obligation to exercise ordinary care in hitching the team in some reasonably secure manner, and the breach of this duty is the precise matter afforded by the instruction as sufficient to authorize a recovery. Though the words of the petition are that the team "was not hitched," the charge thus made must be viewed in the sense of the law and the obligation to perform the duty in respect of that matter which it enjoins. If the team was insecurely hitched when considered with respect to the obligation to exercise ordinary care in that behalf, then they were "not hitched" in the eye of the law. In this view, we believe the averment of the petition touching the matter is sufficiently comprehensive. It is quite certain that if the driver had hitched this team of horses, weighing 1,600 pounds each, with a single strand of common thread to a post, it would be regarded as "not hitched" in the eye of the law; this, too, for the reason he omitted to exercise ordinary care to that end. In such circumstances, the instruction submitting to the jury the question of whether or not defendant exercised ordinary care to securely hitch the team would be within the averment beyond doubt. The same may be said as to the proof of leaving the team unattended with but one trace dropped on either horse

and the lines hitched to the hounds of the wagon attached to the team, for this condition appears to be almost if not quite one of "not hitched" at all. At any rate, the obligation which the law enjoins is to exercise ordinary care to the end of hitching the team in a manner reasonably secure to some fixture of a permanent character, and not to the wagon attached to the team which may be carried forward as it moves along. Though it were better to hypothesize the facts pertaining to the manner in which the team was hitched and submit them to the jury for consideration with reference to the obligation to exercise ordinary care, the instruction is not to be condemned as reversible error in the form it is drafted.

It is argued the court erred in refusing instruction No. 4 as requested by the storage and moving company, which directed the jury that in certain circumstances the running away of the team might be regarded as an accident, and if found to be such the finding should be for it. The court very properly refused this instruction, for, though it may be correct enough as an abstract statement of the law, its doctrine is without influence on the facts of the case for naught appears tending to prove the team escaped by accident. The issue related alone to the act of defendant in hitching the team as above suggested and as to whether or not it exercised ordinary care in so doing.

The court refused to instruct for the storage and moving company at its request as follows: "The court instructs the jury that if you find and believe from the evidence that the servants of the defendant United Railways Company, in charge of the car upon which plaintiff was a passenger, by the exercise of due care as defined in these instructions, could have prevented or avoided collision with the team and van of the defendant American Storage & Moving Company, and that but for such want of care on the part of the said servants of said defendant United Railways Company said collision and consequent injury to plaintiff would not have occurred, your verdict must be for the defendant American Storage & Moving Company." There is evidence in the case tending to prove that the collision of the moving van and street car occurred through the act of the motorman of the street car in slowing it down immediately before the approaching runaway team when he might have gotten the car out of the line of danger by either stopping it before reaching West Pine boulevard or turning on the power after he had done so. It is in view of this proof that the storage and moving company requested the instruction above copied and now argues it should have been given for the reason that it may be the jury would find the negligence of the motorman was as between the negligent acts of the two defendants the proximate cause of the collision which occasioned the plaintiff's injury. It is said, though the

storage and moving company may have been negligent in the first instance in permitting its team to escape and run away, it ought not to be held to respond to plaintiff therefor unless its negligence is found to be proximate to his injury, and, if there be an intervening efficient culpable act on the part of another which more directly occasioned the injury, then the act of the storage and moving company is remote in the chain of causation and that of the other person proximate. Though the matter of the proximate cause of plaintiff's injury as between the two defendants may be important in an action between them for indemnity after the satisfaction of plaintiff's judgment against both, it is certainly immaterial here in so far as the right of this plaintiff is concerned, for the negligence of both directly concurred in operating the proximate and efficient cause of his injury. It is obvious that, had plaintiff not been a passenger on this particular street car which it is said was impeded in progress by the carelessness of the motorman immediately in front of the team, he would not have been injured in a collision with this particular moving van. It is obvious, too, that, had defendant's team not been permitted to run away with the moving van, an injury from that source would not have befallen plaintiff while sitting in his seat in the street car. These propositions being true, it is entirely clear that plaintiff's injury resulted from the separate negligent acts of two independent tort-feasors which concurred in and contributed directly to produce the result complained of, and the negligence of both is proximate in the line of causation so far as he is concerned. Whatever may be the rule of decision in cases between two independent tort-feasors whose negligence concurs in producing an injury to a third person when one of such tort-feasors is seeking indemnity from the other to recoup the amount he has been required to pay to the injured third party, which matter of liability *inter sese* may turn on the question whether the negligence of the one or the other was proximate or remote (*Nashua Iron, etc., Co. v. Worcester, etc., R. Co.*, 62 N. H. 159), it is certain an injured party such as this plaintiff is entitled in every instance to recover from either one or both of the tort-feasors whose negligence concurs in and directly contributes to his injury. (*Hunt v. Mo. R. Co.*, 14 Mo. App. 160; *Taylor v. Grand Ave. R. Co.*, 137 Mo. 363, 39 S. W. 88; *Wabash, etc., R. Co. v. Shacklet*, 105 Ill. 364, 44 Am. Rep. 791; *Carterville v. Cook*, 129 Ill. 152, 22 N. E. 14, 4 L. R. A. 721, 16 Am. St. Rep. 248; *Fleddermann v. St. Louis Transit Co.*, 134 Mo. App. 199, 205, 113 S. W. 1143; *Colegrove v. N. Y. & N. H., etc., R. Co.*, 20 N. Y. 492, 75 Am. Dec. 418; *N. Y., Phila., etc., R. Co. v. Cooper*, 85 Va. 939, 9 S. E. 321; *Central, etc., R. Co. v. Kuhn*, 88 Ky. 578, 6 S. W. 441, 9 Am. St. Rep. 309; *Tompkins v. Clay, etc., R. Co.*, 66 Cal. 163, 4 Pac. 1165; *Kansas City, etc., R. Co. v.*

Stoner, 49 Fed. 209; 1 C. C. A. 231; Shearman & Redfield on Neg. [5th Ed.] §§ 31, 122; Patterson's Ry. Accident Law, § 39). Judge Thompson says: "If the concurrent or successive negligence of two persons, combined together, results in an injury to a third person, he may recover damages of either or both, and neither can interpose the defense that the prior or concurrent negligence of the other contributed to the injury. Thus, A. leaves his horse and cart standing in the street, without any person to watch them, and a passer-by strikes the horse, in consequence of which damage ensues. A. is answerable for such damage." Section 75, Thompson's Com. on Neg. vol. 1. *Illidge v. Goodwin*, 5 Car. & P. 190. See, also, *Griggs v. Fleckenstein*, 14 Minn. 81 (Gil. 62), 100 Am. Dec. 199. When it appears, as in this case, that the injury would not have befallen plaintiff but for the negligent act of either party in the first instance, such negligence is viewed in the eye of the law as a proximate and efficient cause of his hurt, though it concurs with that of another independent actor which may intervene in point of time subsequently thereto. *Carterville v. Cook*, 129 Ill. 152, 22 N. E. 14, 4 L. R. A. 721, 16 Am. St. Rep. 248; *Griggs v. Fleckenstein*, 14 Minn. 81 (Gil. 62), 100 Am. Dec. 199; *Ring v. Cohoes*, 77 N. Y. 83, 33 Am. Rep. 574, Id., 13 Hun (N. Y.) 76; *Taylor v. Grand Ave. R. Co.*, 137 Mo. 363, 39 S. W. 88; 1 Thompson's Com. on Neg. § 56; *Fleddermann v. Transit Co.*, 134 Mo. App. 199, 113 S. W. 1143. The court very properly refused the instruction, for, even though the negligence of the motorman in reducing the speed of the car immediately in front of the horses was the more recent efficient cause in the chain of causation, the injury would not have occurred but for the negligent act of the storage and moving company in leaving its team unattended and not hitched reasonably secure and permitting it to run away and contribute its portion to plaintiff's hurt by protruding the end of the wagon pole through the car against his person. We discover no reversible error in the case so far as the American Storage & Moving Company is concerned.

We come now to consider the appeal of defendant United Railways Company. It is argued the court should have directed a verdict for this defendant; but the case is obviously one for the jury on the specific acts of negligence which the evidence tended to prove against the motorman. As the relation of carrier and passenger exists between these parties, ordinarily a presumption of negligence or the doctrine of *res ipsa loquitur* alone would be sufficient as *prima facie* proof on showing the facts of the collision and injury. *Olsen v. Citizens' Ry. Co.*, 152 Mo. 426, 432, 54 S. W. 470; *Rice v. C., B. & Q. R. Co.*, 131 S. W. 374. But the petition alleges specific acts of negligence against the United

Railways Company, for, after reciting antecedent facts leading up to his injury, plaintiff avers that, while he was in the car traveling north at or near the intersection of West Pine boulevard and Euclid avenue, "the motorman of the defendant United Railways Company of St. Louis, in charge of said car, so negligently and carelessly managed and ran said car that he suffered and permitted the same to be collided with a team of horses and wagon," etc. This is a charge of specific negligence, for it avers the motorman carelessly managed and ran the car and further points out wherein he was negligent in suffering and permitting it to collide with the wagon and team. When a negligent act is charged against a particular servant, the allegation is regarded as specific rather than general, as is the case where the act is charged against the defendant in general terms and thus includes all of its servants, appliances, etc. See *Gibler v. Q., O. & K. C. R. Co.*, 148 Mo. App. 475, 128 S. W. 791; *Beave v. St. Louis Transit Co.*, 212 Mo. 331, 111 S. W. 52; *Price v. Met. St. R. Co.*, 220 Mo. 435, 119 S. W. 932, 132 Am. St. Rep. 588. Where specific acts of negligence are alleged, they must be proved as laid, and the presumption of negligence may not be invoked. *Gibler v. Q., O. & K. C. R. Co.*, 148 Mo. App. 475, 128 S. W. 791; *Orcutt v. Century Bldg. Co.*, 201 Mo. 424, 99 S. W. 1062, 8 L. R. A. (N. S.) 929. The request for an instruction directing a verdict for this defendant was very properly refused at the close of plaintiff's case and properly so again at the conclusion of all of the evidence, for the reason that, though the presumption of negligence was not available under the state of the pleading which set forth a specific charge of negligence against the motorman, the direct proof for plaintiff tended to support the averment. The evidence is uncontradicted to the effect that all of that portion of land lying east of the Monticello Hotel, south of Pine boulevard and west of Euclid avenue—as much or more than an ordinary city block—was vacant and unoccupied and the view in no manner obscured thereabout. It appears, as the street car proceeded north on Euclid from Laclede avenue, passengers, other than plaintiff, saw the runaway team approaching on a trot from the west on Pine boulevard toward Euclid, and defendant's motorman himself says that he saw the team thus approaching 200 feet away before it reached Euclid avenue. At that time the car was about one-half block south of Pine boulevard and proceeding north toward that street. The motorman says he did not notice the team was without a driver until it was within 50 or 60 feet of the car and at that time applied the power with the purpose of crossing the street in front of it and obviating a collision. But a passenger on the car testified that he saw the team approaching 250 feet west of Euclid avenue and discovered it to be without a

driver as though it were running away, and that this fact was open and obvious to all. Plaintiff was sitting with his back to the west reading a newspaper and knew nothing of the approach of the team until he received his injury. Both the motorman for defendant and the passenger who testified for plaintiff say the car was running very slow at the time, and, besides this being conceded, it appears it was stopped within 10 feet after the collision occurred. The passenger referred to says as the car came into Pine boulevard its speed was perceptibly slowed down by the motorman as though he intended to check the runaway horses therewith or prevent them from passing. The collision occurred immediately after the rear end of the car had crossed the center of Pine boulevard by the pole of the moving van coming in contact with the west side of the rear end of the body of the car.

It therefore appears the act of negligence relied upon against the street car company in the petition to the effect the motorman so managed the car as to suffer the collision is supported by direct proof tending to show that he did so in the very face of the approaching danger for the purpose of stopping the runaway team. It is true the motorman says he increased the speed of the car in order to remove it from the path of the team; but, be this as it may, the case made by plaintiff is the specific act of the motorman in checking the speed of the car as though he intended to utilize it as a barrier to prevent the further rampage of the runaway horses. On this state of the proof, the court, at the request of plaintiff, instructed the jury authorizing a verdict against the United Railways Company if it should find plaintiff was exercising ordinary care at the time "unless the jury find from the evidence that said collision could not have been avoided by the motorman in charge of the car by the exercise of high care," etc. The instruction omitted to hypothesize the facts with respect to the matter of the motorman decreasing the speed of the car, but permitted the jury to affix liability against this defendant without compass or chart unless it found from the evidence that the collision could not have been avoided by the motorman exercising a high degree of care. This instruction invokes the full measure of the doctrine of *res ipsa loquitur*, though it is not available under the allegation in the petition and permits a recovery for plaintiff in the most general terms notwithstanding the direct proof of the specific act of negligence on which plaintiff must rely for a recovery against the United Railways Company. It is the accepted rule of decision, even in those cases where general averments are made and the doctrine of *res ipsa loquitur* does not apply, that when it comes to submit the question of liability to the jury thereunder the instructions

must reckon with the facts and require a finding upon the particular negligent acts revealed in the evidence, and, unless they do so, the judgment should be reversed therefor. It is said that instructions under such allegations authorizing a verdict for any kind of negligence the jury believe occurred are unfair, and they should require a finding pro or con on the negligent acts revealed in the evidence, if any. The instruction referred to is therefore erroneous for the reason it omitted to require the jury to find in what respect defendant was negligent, if at all, but authorized a verdict against the United Railways Company if plaintiff was not careless unless it believed the motorman could not have avoided the injury by the exercise of high care in operating the car. Such a general charge as this would seem to authorize the jurors to invoke their imaginations or draw upon mere conjecture to the effect that the motorman might possibly, by exercising high care, have avoided the collision, when they believed his evidence that he applied the power in an endeavor to escape the team and exercised high care in so doing. The instruction should require the jury to find defendant's breach of duty from the facts proved. Authorities are multiplied on the subject. *Allen v. St. Louis Transit Co.*, 183 Mo. 411, 81 S. W. 1142; *Sommers v. St. Louis Transit Co.*, 108 Mo. App. 319, 83 S. W. 268; *Lesser v. St. L. & Sub. R. Co.*, 85 Mo. App. 326; *Mulderig v. St. Louis, etc., R. Co.*, etc., 116 Mo. App. 655, 94 S. W. 801. Though the authorities last cited assert the rule with respect to such instructions when the petition contains a general allegation of negligence, the doctrine obtains alike and with better reason to cases such as this one, where the petition avers specific negligent acts. In such circumstances, no one can doubt that the court should require the jury to find the negligent breach of duty from the facts pleaded and proved, to the end of confining the issue to the charge laid. The Supreme Court condemns the practice of submitting the matter of defendant's negligence in such general terms where specific acts of negligence are relied upon as reversible error, as will appear from the following cases in point: *Beave v. St. Louis Transit Co.*, 212 Mo. 331, 111 S. W. 52; *Davidson v. St. Louis Transit Co.*, 211 Mo. 320, 109 S. W. 583. For the error in this instruction above discussed, the judgment should be reversed, and the cause remanded, as to the United Railways Company.

But the question arises in this case, where the suit is against two independent tortfeasors on account of an injury inflicted through the separate negligent acts of each which concurred in producing the result complained of, should the judgment be reversed as to the United Railways Company only and affirmed as to the American Storage & Moving Company when either is separately

liable for the full measure of the damage done? The matter should be determined, we believe, by reference to the fact as to whether or not contribution, as distinguished from indemnity, may lie in the circumstances of the case. But this is not to be ascertained, for the question has not been litigated between the defendants. Prima facie, each of the two defendants so jointly sued is to be treated as a joint tort-feasor so as to authorize contribution between them if it should appear inter se that the negligence of one was as culpable as that of the other in inducing the injury. In such circumstances, natural justice alone requires that they should both be permitted to defend throughout the entire course of the litigation in order to reduce the amount of the recovery against either or both to the payment of which they may eventually be called upon to contribute in equal parts. Our statute provides: "Defendants in a judgment founded on an action for the redress of a private wrong shall be subject to contribution, and all other consequences of such judgment, in the same manner and to the same extent as defendants in a judgment in an action founded on contract." Section 5431, Rev. St. 1909. It has been determined that this statute intends the allowance of contribution among defendants in a judgment for tort on account of the negligent omission of duty of several independent tort-feasors whose combined negligence concurred and contributed to the same injury in those cases where indemnity is not to be had, and we believe such interpretation to be sound. See *Eaton & Prince Co. v. Mississippi Valley Trust Co.*, 123 Mo. App. 117, 100 S. W. 551. Of course, the matter as to whether or not contribution would lie between these defendants if one were to pay a judgment recovered against both and the other decline to contribute, or as to whether or not one would be entitled to indemnity from the other, is not to be determined now, for the question is not before us, and a decision thereon is expressly reserved. For reference to the doctrine as to both contribution and indemnity and when either prevails, see 7 Am. & Eng. Ency. Law (2d Ed.) 364, 365, 366, 367, and notes. It should be said that prima facie the case may be one where contribution will lie, and, if such is true, the judgment is to be reversed as to both defendants, though the error in the trial intervened as to one only, for the reason both should be permitted to defend throughout. See *Mulderig v. St. Louis, etc., R. Co., etc.*, 116 Mo. App. 635, 94 S. W. 801.

The judgment should be reversed as to both defendants, and the cause remanded. It is so ordered.

REYNOLDS, P. J. and CAULFIELD, J., concur.

GOODMAN et al. v. GRIFFITH.

(St. Louis Court of Appeals. Missouri. Feb. 21, 1911.)

1. APPEAL AND ERROR (§ 1022*)—QUESTIONS REVIEWABLE — FINDINGS — CONCLUSIVENESS.

The court on appeal may determine for itself the correctness of the conclusion of the referee in involuntary reference and the trial court in proceedings for the settlement of an administrator's account, though the action of the referee and of the trial court will not be lightly disturbed.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4015-4018; Dec. Dig. § 1022.*]

2. EXECUTORS AND ADMINISTRATORS (§ 22*)—PRESENTATION OF CLAIMS BY ADMINISTRATOR—EFFECT.

An administrator may assume the attitude of a mere creditor against his decedent's estate without forfeiting his office, and, where he presents a claim, the court must as required by statute appoint a suitable person to represent the estate.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. § 117; Dec. Dig. § 22.*]

3. EXECUTORS AND ADMINISTRATORS (§ 500*)—COMPENSATION—FORFEITURE.

The administrator is not thereby deprived of his right to compensation.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. § 2131; Dec. Dig. § 500.*]

4. EXECUTORS AND ADMINISTRATORS (§ 111*)—ATTORNEY OF ADMINISTRATOR—RIGHT TO COMPENSATION.

An attorney employed by an administrator does not forfeit his right to compensation for services rendered merely because he represents the administrator and his wife in presenting a claim in their favor against decedent's estate.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. § 462; Dec. Dig. § 111.*]

5. PAYMENT (§ 74*)—EVIDENCE—RECEIPTS.

A receipt is prima facie evidence of the payment therein recited and when uncontradicted is conclusive.

[Ed. Note.—For other cases, see Payment, Cent. Dig. §§ 226-231; Dec. Dig. § 74.*]

6. EXECUTORS AND ADMINISTRATORS (§ 504*)—ACCOUNTS—OBJECTIONS.

An objection to the final settlement of an administrator of his mother, which involves his acts as executor of his stepfather, based on his failure to account for his acts as executor of his stepfather, made by the heirs and legatees of the mother after the final settlement of the estate of the stepfather after the death of the mother, cannot be entertained by the court, but the remedy of the heirs is to proceed under Rev. St. 1890, §§ 74-78 (Ann. St. 1906, pp. 362-364), now Rev. St. 1909, §§ 70-74, authorizing proceedings against executors and administrators to discover assets, or to resist the final settlement of the stepfather's estate.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. §§ 2157, 2166; Dec. Dig. § 504.*]

7. EXECUTORS AND ADMINISTRATORS (§ 509*)—SETTLEMENT OF ACCOUNTS—CONCLUSIVENESS.

Mere illegal allowances or omissions of proper debts do not justify the setting aside of a final settlement of an executor or administra-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

tor, nor opening up of matters passed on in approving the final settlement.

[Ed. Note.—For other cases, see *Executors and Administrators*, Cent. Dig. §§ 2199-2200; Dec. Dig. § 509.*]

8. EXECUTORS AND ADMINISTRATORS (§ 513*)—SETTLEMENT OF ACCOUNTS—CONCLUSIVE-NESS.

A final settlement of an administration has the force of a final judgment, and cannot be attacked collaterally, but can only be reached under charges of fraud by a direct proceeding.

[Ed. Note.—For other cases, see *Executors and Administrators*, Cent. Dig. § 2269; Dec. Dig. § 513.*]

9. EXECUTORS AND ADMINISTRATORS (§ 513*)—FINAL SETTLEMENT—RIGHT TO ATTACK BY DIRECT PROCEEDING—PARTIES.

The right to directly attack for fraud a final settlement of administration extends to any person in interest in the estate.

[Ed. Note.—For other cases, see *Executors and Administrators*, Cent. Dig. §§ 2277-2281; Dec. Dig. § 513.*]

10. EXECUTORS AND ADMINISTRATORS (§ 460*)—COMPELLING ACCOUNTING—PARTIES.

The right to call an executor or administrator to account extends to any person in interest in the estate.

[Ed. Note.—For other cases, see *Executors and Administrators*, Cent. Dig. §§ 1975-1985; Dec. Dig. § 460.*]

Nortoni, J., dissenting in part.

Appeal from Circuit Court, Pike County; David H. Eby, Judge.

Proceedings for the final settlement of James E. Griffith, as administrator of Emily Bralley, deceased, in which Clarissa E. Goodman and others appeared and filed objections. From a judgment overruling the objections and settling the account of the administrator, the objectors appeal. Affirmed.

Bail & Sparrow, for appellants. J. D. Hostetter and J. E. Thompson, for respondent.

REYNOLDS, P. J. Guided solely by the amended abstract of the record of the proceedings in this cause, filed by counsel for appellants, it is very difficult to make an intelligible statement of exactly what is included as record proper, and what is covered by the bill of exceptions. More than that, it is not quite clear how much of what is in this amended abstract was either in the record proper or even in evidence before the trial court.

Counsel for respondents attacked the original abstract, and again attack this amended one, filed by leave of court, for various defects and omissions of material matter. They are doubtless correct on some of their contentions; but, to put an end to the matter and endeavor to arrive at the very right of the controversy, we have concluded to ignore these objections.

Those counsel are in error, however, in contending that there is no evidence furnished by the record entries proper showing that the bill of exceptions was filed within due

time. The abstract, as amended, does show this. Counsel for respondent make the further point that there is nothing in this abstract of the record to show that the case was ever in the probate court of Pike county, and appealed from that court to the circuit court. We do, however, find in the amended abstract under the caption of the title of this cause what purported to be of the record of the probate court of Pike county. These entries show that final settlement of respondent, as administrator of the estate of Emily Bralley, deceased, was filed in the probate court on the 23d of November, 1908; that exceptions were filed to it in that court on the 10th of December; that final judgment was rendered on it by the probate court on the 14th of January, 1909, and an appeal taken to the circuit court January 21st, "and cause certified to the circuit court of Pike county, Missouri." Then follow the record entries in the cause which appear in the circuit court. It is true that it does not appear in the same connection what that final settlement was. But the abstract commences by setting out what purports to be the final settlement of respondent, as administrator of the estate of Emily Bralley, deceased, and the objections to that, and we gather enough from the record to be reasonably sure that it is the settlement and objections to it that were before the probate court and before the circuit court on appeal from the probate court. Counsel for appellant have also incorporated in their amended abstract certain entries as record entries of the probate court of Pike county in the matter of the estate of George L. Bralley, deceased, these pertaining particularly to the filing, on the 12th of February, 1906, in that court of the final settlement of James E. Griffith, as executor. By this it appears that publication having been duly made, the matter of his final settlement was heard, the executor having filed in that court his accounts and vouchers, and that court, "having seen, heard, and examined said accounts and being fully advised in the premises, finds that the assets of said estate have been fully administered, and that there remains no funds in the hands of said executor and belonging to said estate, and said settlement is by the court approved and said executor discharged." Along with this is a copy of the last will and testament of George L. Bralley, by which, after making certain bequests of \$1 each to his sisters and their heirs, and a specific legacy of a gold watch and chain to a party named, the testator leaves all the rest, residue, and remainder of his estate to his wife, Emily Bralley, and appoints James E. Griffith as executor. As appellants have inserted this matter in their abstract, we may assume, as against them, that it was in evidence at the trial.

It further appears by the testimony in the

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

case that Mrs. Bralley was the mother of respondent, James E. Griffith, a child by a marriage prior to her marriage to George L. Bralley. George L. Bralley, hereafter referred to as Dr. Bralley, it appears, died on the 5th of April, 1903, and his wife, Mrs. Emily Bralley, died on the 25th of November, 1906. Mr. James E. Griffith appears to have been duly appointed as administrator of her estate. Mrs. Bralley was dead at the time respondent made final settlement as executor of the estate of Dr. Bralley. It further appears that, when respondent filed his final settlement as administrator of the estate of Emily Bralley in the probate court of Pike county, appellants, styling themselves the heirs of the estate of Mrs. Emily Bralley, filed objections and exceptions to the settlement. These are the settlement and objections heretofore referred to, and it is on them that the case is now before us. After objecting to various credits claimed by the administrator, among other items of \$60 allowed Messrs. Tapley & Fitzgerald, as attorneys in a certain partition suit, and \$100 allowed to J. E. Thompson, Esq., as an attorney's fee for services rendered the administrator in connection with the estate, the principal objection, numbered 8, which was made, is as follows: "Eighth. Your objectors and executors [exceptors?] say that James E. Griffith, administrator of the estate of Emily Bralley, deceased, has not charged himself with property that belonged to the estate, and they say that at the time of the death of George L. Bralley he was indebted to said George L. Bralley, evidenced by a note, the exact amount your objectors and exceptors cannot name, but have reason to believe and do believe, and charge the fact to be, that it was something over three thousand dollars (\$3,000.00); that same has not been accounted for in the George L. Bralley estate nor the Emily Bralley estate, and that upon the death of George L. Bralley said note became the property of Emily Bralley, now deceased. Your objectors and exceptors further charge the fact to be that said James E. Griffith, as executor of the estate of George L. Bralley, deceased, in his first annual settlement claims to have paid to Emily Bralley, deceased, the sum of \$1,629.14, and has her receipt therefor, and that in his second annual settlement he claims to have paid said Emily Bralley the sum of \$1,158.10, the two items aggregating \$2,787.24; that said administrator has not charged himself with, but that said money passed into his hands." We are not advised by the abstract as to how many or which, if any, of these objections were overruled in the probate court. On appeal to the circuit court, the cause there coming on to be heard on these objections and exceptions, the court on its own motion referred the whole matter to a referee on the ground that it involved an examination of a long account. The referee was directed to

hear and take the testimony and report it, with his conclusions to the court. The testimony was taken before the referee, who made his report, not sustaining the eighth objection as above, but disallowing the items covering the disbursements by the attorneys, above referred to. It is not important to note his action on other items. On this report of the referee being filed in court, exceptions were filed to it by both parties, heard, considered, and defendants' objection overruled to the disallowance of the \$60 to Messrs. Tapley & Fitzgerald, but sustained as to the disallowance of \$100 to Mr. Thompson and as to certain taxes, and were overruled as to plaintiffs' eighth objection, as well as to other minor objections. Whereupon appellants, objectors below, filed their motion for a new trial in due time, and, that being overruled and exceptions saved, duly perfected their appeal to this court. While in a case of this kind—involuntary reference—we have the right and power, as in cases of equity, to determine for ourselves the correctness of the conclusion arrived at by the referee and by the court, we have held in several cases, following the decision of our Supreme Court, that the action of the referee and of the trial court is always persuasive, and will not be lightly disturbed. See *Reifschneider v. Beck*, 148 Mo. App. 725, 129 S. W. 232. We see no reason to depart from that rule in this case. More especially is that so, as we have arrived at the conclusion that this eighth objection, which is the material one in the case, and the one around which the controversy turns, should not have been entertained. This not only on consideration of facts connected with it, but as a matter of law.

Before entering upon a consideration of the eighth objection, however, it is as well to say now that we have considered the objection which was specifically made to the allowance of a credit to the administrator for a disbursement made by him to Mr. Thompson for legal services in advising the administrator in the matters of his administration, and consider it to have been properly overruled by the trial court. The objection seems to be based on the idea that Mr. Thompson, representing Mr. Griffith and his wife in presenting a claim in the probate court against the estate, assumed an antagonistic position toward the estate, and thereby debarred himself from further employment and forfeited all claim to compensation for services in advising the administrator, and that, therefore, the administrator should not be allowed credit for the amount paid him. The law recognizes that an administrator may assume the attitude of a mere creditor against the estate without forfeiting his office or right to compensation. It provides for the appointment by the court of "some suitable person to appear and manage the defense." The estate is presumptively well cared for

by such suitable person and the counsel he may select to represent him. It recognizes the individual claim as a matter separate and apart from the general administration, to be handled specially by another. But it does not recognize the presentation of the claim as a matter sufficient to disqualify the administrator in proceeding with the administration, nor does its presentation effect his compensation. We see no reason why it should be otherwise with counsel for the administrator. His employment to advise the administrator in the administration of the estate does not extend to representing the administrator *pro hac vice*. The latter may employ his own attorney, if one is necessary. If the presentation of the claim by the administrator is as the statute assumes consistent with his continuance as administrator generally, surely the position of his counsel in representing him as to that claim is no less consistent, and no breach of professional propriety on the part of that counsel, who certainly occupies no higher fiduciary relation toward the estate than does the administrator who employed him. While the attorney may himself present his claim for allowance as against the estate (*Nichols v. Reyburn*, 55 Mo. App. 1), here the allowance is to the administrator for the disbursement. That allowance is proper.

This brings us to the consideration of the eighth objection. That objection goes to two transactions, as will be noted: First, an effort to charge this administrator with a note given by him to Dr. Bralley; second, to disallow him a credit for two sums, aggregating \$2,787.24, claimed to have been paid by him to Mrs. Bralley. The respondent introduced in evidence two receipts by Mrs. Bralley, one dated August 1, 1905, acknowledging the receipt from Mr. Griffith, as executor, of the sum of \$1,158.10; the other for \$1,629.14, dated May 14, 1904. The last, signed by Mrs. Bralley, as legatee under the will of George L. Bralley, deceased. These receipts, it appears, were filed by respondent as executor of the estate of George L. Bralley, deceased. It is claimed by the appellants that this money was never paid Mrs. Bralley. They attempt to sustain this by evidence tending to prove that Mrs. Bralley was never known to have ever had or used any such sum. The evidence does not sustain the claim. The receipts were strong evidence, *prima facie* evidence certainly, that the money had been paid to her (*Ireland v. Spickard*, 95 Mo. App. 53, loc. cit. 64, 68 S. W. 748), and, uncontradicted, are conclusive. There was no evidence in this case which even tended to overthrow them. As to the note, it appears very clearly that it was not for \$3,000, but for \$2,525, executed by Mr. Griffith to the order of George L. Bralley, dated April 6, 1896, payable one day after date, with interest from date at the rate of 8 per cent. per annum, to be compounded annually, that there was in-

dorsed on the back of the note a credit for \$633.64, that credit being January 24, 1899, and "paying interest to that date and reducing the principal to \$2,500." There was also introduced in evidence a letter from George L. Bralley to Mr. Griffith, his stepson, the respondent here, which letter is as follows: "Inclosed please find your note which make to you a present. It may figure in your favor later. Yours sincerely, G. L. Bralley, I want to see you when you come down." Along with the letter was introduced the envelope in which it was claimed it was contained, which is postmarked Louisiana, Mo., July 9, 10:30 a. m., 1902, and is addressed to James E. Griffith, Bowling Green, Mo., and is stamped with the name of the Mercantile Bank of Louisiana, Mo. The letter is on the letterhead of that bank, but is undated, and across the face of the note, as appears by the testimony in the case, is written the word "Paid." Nothing in the way of substantial testimony contradicts the fact that Dr. Bralley returned this note to Mr. Griffith as paid. He did it apparently as a gift, as he had a right to do. These matters which we have above stated, however, we state merely by way of showing that, so far as appears by the testimony in the case, there is no substantial foundation for either of the charges made in this eighth objection in connection with this \$2,500 note or these payments to Mrs. Bralley. The error of law, however, in entertaining or even considering this eighth objection at all lies in this: This eighth objection is made to the final settlement of Mr. Griffith, as administrator of the estate of his mother, Mrs. Bralley. All the transactions involved in this eighth objection, when examined, go to his acts as executor in the estate of Dr. Bralley. He is here charged to have failed to account for matters involved in his administration of the estate of his stepfather, George L. Bralley. But, as admitted, Mr. Griffith made final settlement of that estate in 1906, his final settlement was approved, and he was then duly discharged. It is true that this was after the death of his mother, Mrs. Bralley. That, however, is immaterial in this case. It appears that the objectors were heirs of Mrs. Bralley and apparently legatees under her will, although this latter is not clear; for her will, if she made one, is not in evidence. They were parties in interest in her estate. On her death and between that, and while the administration of Mrs. Bralley's estate was still open and unsettled, they could have proceeded against the executor under what are now sections 70, 71, 72, 73, 74, Rev. St. 1909, formerly sections 74 to 78 of our Revised Statutes of 1899 (Ann. St. 1906, pp. 362-364). These sections have been the law of our state for many years in their present shape, save that by act of June 14, 1909 (Laws 1909, p. 93), what was section 78 of the statutes of 1899 (now section

74) was amended by adding certain words to it not now pertinent. These sections have been very thoroughly considered by this court, Judge Goode delivering the opinion, in *Re Estate of Huffman*, 132 Mo. App. 44, 111 S. W. 848, where the course of decisions on these and kindred laws is fully reviewed. These sections, and particularly section 74, distinctly provide that the proceedings under them may be instituted on the affidavit of any party interested against the executor or administrator. Hence these appellants as the heirs of Mrs. Bralley, she not having instituted the proceedings during her lifetime, had the means at hand and the right in law to bring Mr. Griffith into court as executor of George L. Bralley's estate, and make him account for this \$2,500 note, if it was a fact that he owed it to the estate. Moreover, in addition to the proceeding under these sections, it was open to these appellants, or objectors, to have resisted the approval of the final settlement of Dr. Bralley's estate, and to have attacked the final settlement which Mr. Griffith had made as executor of that estate, as for a fraudulent administration, or for devastavit. The payments to Mrs. Bralley which are assailed were made and allowed as disbursements in the settlement of Dr. Bralley's estate and covered by the final settlement; so, too, it nowhere appeared in Mr. Griffith's settlements that he had charged himself with the \$2,500 note. These matters, if assailable at all, can only be assailed by direct attack on the order of approval and discharge which was entered by the probate court on that final settlement. *Williams, Adm'r, v. Heirs of Petticrew*, 62 Mo. 480, loc. cit. 467. If they were illegal only, mere illegal allowances or even omissions of proper debits are not sufficient to set aside a final settlement, or open up matters necessarily passed on in arriving at and approving the final settlement. *Baldwin v. Dalton*, 168 Mo. 20, loc. cit. 35, 67 S. W. 599; *In re Estate of Judy*, 166 Mo. 13, loc. cit. 19, 65 S. W. 993.

It is settled by such a long and consistent line of decisions in our state, commencing with *Caldwell v. Lockridge*, 9 Mo. 362, decided in 1845, and adhered to down to the latest case of which we have knowledge, *May v. May*, 189 Mo. 485, loc. cit. 501, 88 W. 75, decided in 1905, that a final settlement of an administration has the force and effect of a final judgment and cannot be attacked collaterally, that it would be a work of supererogation to attempt to compile authorities on this proposition. It is elemental in our state, for that matter throughout all the American courts, so far as we are aware, that a final settlement can only be reached under charges of fraud by a direct proceeding. This right of attack as well as the right to call the executor or administrator to account pertains to any person in interest in the estate. Hence the fact

that Mrs. Emily Bralley was dead when final settlement was made by Mr. Griffith of her former husband's estate in no manner whatever affects the consideration of this question. That right of attack was as open to these objectors then as it would have been to Mrs. Bralley, if she had herself been living at the time; they being interested as her heirs in that estate. They have not seen fit to do this, but now virtually attempt, by this collateral attack, to open up the administration of the estate of Dr. Bralley.

Without going into this case any further, it is sufficient to say that the action of the circuit court on the objections made to this settlement, both as to the items approved and to those disapproved, should be and is affirmed.

CAULFIELD, J., concurs in full. NORTONI, J., expresses his views in a separate opinion.

NORTONI, J. (dissenting). I do not concur in so much of the opinion as declares it proper for the attorney representing the administrator in the course of administering the estate to institute a suit against the estate for the administrator, and that such attorney in no manner represents the estate. My understanding of the law is to the contrary of this proposition. The statutes provide that, if an administrator presents a demand against the estate in his charge, he is to step aside for the interim, and the probate court shall appoint an administrator pendente lite to defend for the estate. That was properly done in this case, but the attorney who represented the estate and the administrator throughout the course of administration instituted the suit against the estate for the administrator. In my opinion the just principle reflected in the statute as to the administrator standing aside requires the attorney of the estate to do likewise if the circumstances are such that he may not represent the estate in the litigation which ensues from the filing of the claim against it by the regular administrator. It may be the attorney who had formerly represented the estate and the administrator would not be the proper person to defend the estate when a claim was filed against it by the administrator, but at least he should stand aside, and not assume a position to employ information which came to him in a confidential capacity while representing the estate in the suit of the administrator against it. The statute (section 101, Rev. St. 1909) lays upon the administrator the duty of defending the estate in suits instituted against it, and, of course, authorizes him to employ counsel to advise and represent him about the administration, who may be compensated out of the estate. It has been expressly decided that counsel so employed by the administrator represent

the estate, and are to be compensated by it. *Nichols v. Reyburn*, 55 Mo. App. 1; *Gamble v. Gibson*, 59 Mo. 585. Though the attorney may represent the administrator as well while he is acting for the estate, no one can doubt that he is the attorney of and for the estate for the decisions above cited are directly in point on the principle. This being true, he should stand aloof while litigation is in progress between the administrator who, as the agent of the estate, had employed him and the estate while in charge of an administrator pendente lite, unless the circumstances of the case require him to defend the interests of the estate at the instance and request of the administrator pendente lite. The point I desire to emphasize is that I decline to indorse the proposition that the attorney for the estate may abandon it and institute and prosecute a suit against the estate for the administrator, for this countenances and permits a practice whereby such attorney may employ information obtained by him while enjoying the confidential relation of counselor for the estate to its detriment in the suit he prosecutes for the administrator.

For the reasons stated, I dissent from so much of the opinion as deals with this matter, and believe the item of compensation to the attorney should be denied. Aside from this, I concur in the views of the court expressed as to other questions.

SEDALIA NAT. BANK v. RUDERT et al.
(Kansas City Court of Appeals. Missouri.
Feb. 13, 1911.)

ATTACHMENT (§ 74*)—VALIDITY.

Under Rev. St. 1909, § 1751, subd. 4, authorizing suit against a nonresident in any county, under section 1752, requiring suits commenced by attachment to be brought where the property is located, under section 2306, authorizing attachment after bringing suit, and under section 2314, authorizing attachment writs to issue to different counties, plaintiff having sued a nonresident in the county of plaintiff's residence, where defendant was served, an attachment writ was properly issued to another county to reach property there.

[Ed. Note.—For other cases, see Attachment, Dec. Dig. § 74.*]

Appeal from Circuit Court, Jackson County; W. O. Thomas, Judge.

Action by the Sedalia National Bank against Lillian F. Rudert and another; Thomas J. Stinson, garnishee. From the judgment, plaintiff appeals. Affirmed.

Botsford, Deatherage & Creason, for appellant. M. T. January and Johnson & Lucas, for respondents.

ELLISON, J. This action was brought with an attachment in aid, to recover the

amount of a promissory note, and Stinson was summoned as garnishee. He answered and was discharged, with costs and an allowance of \$25 for answering. When the case was called for trial, the following agreed statement of facts was made, which explains the nature of this action and those connected with it: "That on June 30, 1908, the First National Bank of Nevada, Mo., filed a suit in the Vernon circuit court against defendant, Lillian F. Rudert, and summons was duly served on her in Vernon county. This suit was on a note for \$1,500 and was made by said Lillian F. Rudert as principal and R. A. Lucas as security. The suit was returnable to the October term, 1908, of said court. On September 2, 1908, said First National Bank duly filed an affidavit and bond and sued out a writ of attachment in the suit aforesaid. Said writ was directed to the sheriff of Jackson county, Mo., was dated September 2, 1908, and was duly levied by said sheriff September 3, 1908, on the following described real estate situate in Jackson county, Mo., to wit: * * * That said land was then owned by said Lillian Rudert and was incumbered with a trust deed for \$550 and interest; that at the October term, 1908, of the Vernon circuit court, said Lillian Rudert filed answer and applied for and obtained a change of venue to Henry county, where on the 26th day of January, 1909, the said First National Bank recovered judgment sustaining its attachment and for the sum of \$1,524.50. This judgment was duly assigned to R. A. Lucas, who has ever since been and is now the owner and holder of it. After the attachment aforesaid by the First National Bank, the Sedalia National Bank, plaintiff in this case, filed this suit (in Jackson county circuit court) and sued out a writ of attachment, which was duly levied on the above-described land. Afterwards, on the 27th day of February, 1909, the deed of trust aforesaid for \$550 was foreclosed by Thomas Stinson, the trustee named therein, and the property was sold to R. A. Lucas for \$900. After satisfying the note and paying the expenses of foreclosure, there was left a surplus of \$333.61 which was applied as a credit on the judgment in favor of the First National Bank of Nevada, then owned by said Lucas. A few minutes after the sale and before the trustee's deed had been made, plaintiff garnished the trustee under an alias writ of attachment in this case. Before the sale, it was understood and agreed between Lucas and the trustee, that in the event that Lucas purchased the property, any surplus remaining should be applied as part payment on said First National Bank judgment, which agreement was unknown to plaintiff and other bidders at such sale. That at the time of the commencement of the suit of the First National Bank of Nevada, Mo., aforesaid, the

defendants did not then and have not since resided in said Vernon county, nor in the state of Missouri, but said defendant, Lillian F. Rudert, was temporarily in said Vernon county at the time of the service of summons on her in said First National Bank Case, pending in Vernon county. That no property of defendant, Lillian F. Rudert, was found or levied upon in said Vernon county, Mo., and no attachment writ was issued to the sheriff of said Vernon county, Mo. That defendant, J. B. Rudert, was not a party to the said suit of said First National Bank of Nevada. The First National Bank of Nevada is located in Vernon county. The service on defendants in this case was by publication."

Under the facts of the case, the judgment herein is made to depend upon the validity of the attachment in Jackson county, under a writ issued from the circuit court in Vernon county, in the suit instituted in that county. Plaintiff contends that that attachment was void, while defendant insists it is valid, and both rely on the statute, as they must, since the statute has set down in arbitrary terms the conditions of jurisdiction. In the action begun in Vernon county by the First National Bank of Nevada, Rudert, the defendant therein, was not a resident of this state, but was temporarily in Vernon county, and personal service had upon him. Afterwards an attachment was issued in the case and sent to Jackson county, where it was executed by levy. The statutes (Rev. St. 1909) relating to the place where suits may be brought with and without attachment will be noticed. Section 1751, division 4, provides that an ordinary action, when the defendant is a nonresident of the state, may be brought in any county in the state. It is then provided by section 1752 that: "Suits commenced by attachment against the property of a person, or in replevin or claim and delivery of personal property, where the specific property is sought to be recovered, shall be brought in the county in which such property may be found; and in all cases where the defendant in actions in replevin or claim and delivery of personal property is a nonresident of the county in which the suit is brought, service shall be made on him as under like circumstances in suits by attachment." It is further provided by section 2306 that, when the action has been commenced by summons, and without original attachment, the plaintiff may, at any time pending the suit and before final judgment, sue out an attachment by filing affidavit and giving bond, as in an original attachment. It is also provided in section 2314 that: "When there are several defendants, who reside or have property in different counties, and when a single defendant in any such action has property or effects in different counties, separate writs may issue to every such county."

As an ordinary action, without attach-

ment, the suit in Vernon county was properly brought in Vernon county, for there the plaintiff resided and the nonresident defendant was found. But in one view of the statute, the suit could not be turned into an action by attachment, unless property was also found there; for, in that view the statute is mandatory that actions by attachment must be brought in the county where the property is. In that view you could no more bring an action by attachment in a county where there was no property, than you could bring replevin in such county. The provision as to both is in the same section. In that view section 2306 merely provides for an attachment being taken out after the action has been instituted as an ordinary action, and, it would seem, would confer no additional jurisdiction. So with section 2314; in that view it merely provides for writs to different counties. The suit must be properly brought; that is, in the county where the property to be attached is located. Then, if there are several defendants who reside, or who have property, in other counties, separate writs may issue to such counties; and if there is only one defendant, and he has property not only in the county in which he is sued, but in other counties also, separate writs may be issued. In the view stated, all these provisions should be construed in harmony with what is said to be the primary requirement, that a suit by attachment must be brought in a county where the property is. In our opinion the case of *Magrew v. Foster*, 54 Mo. 238, supports the foregoing construction.

But there is another construction which may be given the statute. It is this: That section 1752 should be qualified by section 2314, which provides for an attachment against property situate in a county in which the action is not brought; and by section 1751, defining how an ordinary action may be brought; and section 2306, authorizing an attachment to be taken out in aid of that action. It is argued that, since an ordinary action may be brought in a county where the defendant resides, or, if he is a nonresident, in any county where he may be found, and since an attachment may afterwards issue in aid of such action, and since writs of attachment may be directed to other counties where the defendant has property, it cannot be meant that in all instances suit must be brought in the county where the property is located. This view finds support in *Carter v. Arbuthnot*, 62 Mo. 582. In that case an attachment suit was against two defendants, and it was brought in the county where one of them resided, but there was no property in that county. The other defendant had property in another county, but he was a nonresident. The court held the action was properly brought in the county where there was no property. It held that the statute requiring suits by attachment to be brought in the county where the property

was situated was applicable where the action was against the property only, or there are no other defendants residing in the same county. Following that statement, the court made use of this language, as applicable to ordinary attachment actions in personam: "Wherever a defendant resides or has property, the suit may be instituted. *Either the one or the other gives the jurisdiction.*" (Italics ours.)

In that case the suit was brought and jurisdiction of the person obtained in the county where one of the defendants resided, while in this case jurisdiction of the person of a nonresident defendant found in plaintiff's county was obtained. But there is no difference, since the statute allows either mode for the proper institution of an action, and we can see no reason why an attachment writ cannot as properly go to another county in the latter case as the former. We therefore hold that the attachment levied in Jackson county in aid of the suit in Vernon county, was valid. The trustee in the deed of trust mentioned in the agreed statement of facts, at the time he sold the land under the deed of trust, knew of the levy of the attachment from Vernon county, and that there was a judgment sustaining the attachment. He agreed that if Lucas, the surety on the note sued on in Vernon county, purchased the property, any surplus of bid over the amount required to satisfy the deed of trust should be applied on the Vernon county judgment. But, at any rate, the judgment and attachment in the Vernon county suit was prior to the attachment and garnishment made by this plaintiff.

The judgment is affirmed. All concur.

CHRISTY v. BUTCHER.

(Springfield Court of Appeals. Missouri.
Feb. 6, 1911.)

1. PLEADING (§ 193*)—DEMURRER—GROUNDS—FAILURE TO SEPARATELY STATE CAUSES OF ACTION.

A petition in one count, alleging that the injury sued for was caused by negligence and by willful act, is properly attacked by demurrer, and not by motion to compel an election, nor to make more definite and certain.

[Ed. Note.—For other cases, see Pleading, Dec. Dig. §§ 428-443; Dec. Dig. § 193.*]

2. NEGLIGENCE (§ 11*)—ORDINARY NEGLIGENCE AND INTENTIONAL WRONGDOING.

A distinction exists between ordinary negligence and intentional wrongdoing, in that when there is willfulness, negligence cannot exist; the former being characterized by advertence, and the latter by inadvertence.

[Ed. Note.—For other cases, see Negligence, Dec. Dig. § 11.*]

3. NEGLIGENCE (§§ 111, 112*)—PETITION—CONSTRUCTION.

A petition in one count, which alleges that defendant, knowing he had smallpox and that it would be communicated to plaintiff, continu-

ed to stay in her house without apprising her of his condition, and in so doing was willfully and intentionally neglectful of her rights, charges willfulness, and not mere negligence; and where it further alleges that defendant failed to observe a city ordinance and that such act was negligence, and also failed to observe a custom, whereby plaintiff's injuries were sustained, the count charges both negligence and willfulness.

[Ed. Note.—For other cases, see Negligence, Dec. Dig. §§ 111, 112.*]

Appeal from Circuit Court, Greene County; Alfred Page, Judge.

Action by L. A. Christy against J. M. Butcher. From a judgment for plaintiff, defendant appeals. Reversed.

A. H. Wear, L. H. Musgrave, and Wright Bros., for appellant. Val Mason and Addison Brown, for respondent.

GRAY, J. This is an appeal by the defendant from a judgment of the circuit court of Greene county, in an action instituted by plaintiff to recover damages from the defendant for communicating smallpox to plaintiff and her family. The defendant filed a demurrer to the petition, and the court overruled the same.

The only issue on this appeal is the action of the court on the demurrer. The petition contains much surplusage and immaterial matter, and would not be attractive to a pleader searching for "a plain and concise statement of the facts constituting a cause of action, without unnecessary repetition," as required by the statute. The petition is in one count, and the appellant charges that it alleges the injury incurred was caused by the negligence of the defendant, and also by the willful act of the defendant. If appellant is correct, then the demurrer should have been sustained. *Waechter v. Railroad*, 113 Mo. App. 270, 88 S. W. 147; *O'Brien v. Transit Co.*, 212 Mo. 59, 110 S. W. 705; *Raming v. Railroad*, 157 Mo., loc. cit. 508, 57 S. W. 268; *Rideout v. Winnebago Traction Co.*, 123 Wis. 297, 101 N. W. 672, 69 L. R. A. 601.

The petition alleges: "That defendant thereafter, well knowing that he was afflicted with said above-mentioned disease and that the same would be communicated to plaintiff and her family and her boarders, and would destroy her business and endanger the health and lives of herself and family, continued for several days to abide in said house without apprising her of the character of the disease, to wit, smallpox, with which he was afflicted, but kept the nature of his ailment a secret; that doing so in such condition and under such circumstances, defendant was willfully and intentionally neglectful of the rights of the plaintiff herein, and was acting in utter disregard of his duty towards her, her family, and members of the community generally."

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

The petition then alleges that a certain ordinance was in force in the city of Springfield, requiring persons to make immediate report to the mayor of contagious or infectious disease of persons, and making it a misdemeanor for a person who has knowledge of the existence of such disease to fail to give such notice; that said defendant well knowing he had the disease, and its contagious character, negligently failed to observe the ordinance, but negligently continued to remain in plaintiff's house and to mingle with plaintiff and the other occupants thereof, without notifying them of the nature of his malady; "that he failed to observe the general and usual custom or precaution exercised under similar circumstances, thereby negligently subjecting them to said disease, in violation of said ordinance and general custom, and of his duty to the plaintiff therein; that plaintiff and her three children, solely on account of the said negligence of defendant in failing to observe said ordinance and custom and duty towards plaintiff on account of his condition, which he well knew, contracted from the said defendant the said disease, and that she and her children were taken to the 'Pest Camp,' which was a place in the outskirts of the city, supplied with none of the conveniences and scarcely any of the necessities of life; that by reason of said premises, and on account of the said willful acts of the defendant in so knowingly and intentionally communicating said infectious and contagious disease to plaintiff and her family and her boarders, the plaintiff has been to great trouble and expense," etc.

It will be noticed the petition first alleges that the defendant, knowing he was afflicted with smallpox, and that the same would be communicated to plaintiff, continued to abide in plaintiff's house without apprising her of his condition, and in so doing, under such circumstances, he was willfully and intentionally neglectful of the rights of plaintiff. It is claimed by the appellant that this is a charge of willfulness, and by the respondent that it is a charge of negligence. We are inclined to agree with the appellant. There is a distinction between ordinary negligence and intentional wrongdoing. When willfulness enters, negligence steps out. The former is characterized by advertence, and the latter by inadvertence; "the one requiring intent, actual or constructive, to injure, and the other being inconsistent therewith. The practice of charging that one caused injury to another by careless, negligent, wanton, and willful misconduct, or of using language of similar import in attempting to state a cause of action, is improper." *Rideout v. Winnebago Traction Co.*, supra; *Bolin v. Railroad*, 108 Wis. 333, 84 N. W. 446, 81 Am. St. Rep. 911. In the *Bolin* Case, the court said: "Inadvertence, in some degree, is the distinguishing characteristic of negligence;

while misconduct of a more reprehensible character, characterized by rashness, wantonness, and recklessness of a person as regards the personal safety of another, has been designated by this court as gross negligence. That involves 'a sufficient degree of intent, at least, to be inconsistent with inadvertence.'"

In this state, where the allegation is confined to a charge of "gross negligence" or "willful negligence," our courts have construed the words "gross" and "willful" as surplusage in such pleadings, and have held the pleading simply stated a case of negligence. *McPheeters v. Railroad*, 45 Mo. 22; *Reed v. Telegraph Co.*, 135 Mo. 661, 37 S. W. 904, 34 L. R. A. 492, 58 Am. St. Rep. 609; *Mueller v. Ins. Co.*, 45 Mo. 84; *Taylor v. Holman*, 45 Mo. 371.

The principle is well illustrated by the language of the court in *Richter v. Harper*, 95 Mich. 221, 54 N. W. 768, as follows: "The word 'willful' is employed in the declaration which charges that the defendants 'willfully, wantonly, negligently, and unlawfully' caused the fire to be set. If the word 'willful' stood alone, or was coupled with other words which implied a purpose to do a direct injury to the property of the plaintiff, this contention would be of more force; but where the word is used in connection with others imputing negligence, it is not the rule that the plaintiff must show the appropriateness of every adjective employed in his declaration."

In *Bindbeutel v. Street Ry. Co.*, 43 Mo. App. 463, the court dealt with the question in the following language: "The defendant assails the judgment on the ground that the court erred in giving the fourth instruction for the plaintiff, which told the jury 'if the gripman intentionally and carelessly ran the defendant's car against the plaintiff's wagon, that this was negligence.' This instruction, in effect, told the jury that 'willfully' and 'intentionally' were convertible terms, and that 'maliciously' meant intentionally and wrongfully. The terms 'carelessness' and 'negligence,' in the law, are synonyms. And so, too, are the terms 'willfully' and 'intentionally.' The instructions complained of declared that 'intention' is a legal ingredient of negligence. The books on negligence are generally agreed that 'intent' is not included in the essentials of negligence. It is too clear for argument that the two terms 'carelessness' and 'willfulness' are not equivalents, the one of the other, in any legal sense; they are repugnant and inconsistent in their signification and meaning. An instruction is not to be tolerated which proceeds upon the idea that it may be good, either for willful injury or for negligence. To say that an injury resulted from negligent and willful conduct of another is to affirm that the same act is the result of two exactly opposite mental conditions."

Our construction of this part of plaintiff's

petition is borne out by the plaintiff's construction, as shown in the latter part of her petition, where it is alleged: "That by reason of said premises and on account of the said willful acts of the defendant in so knowingly and intentionally communicating said infectious and contagious disease to plaintiff," etc. Here the charge is in plain language, that the defendant "knowingly and intentionally" communicated the disease to the plaintiff and her family. Another part of the petition charges the defendant failed to observe the provisions of a municipal ordinance, and that such act was negligence, and that on account thereof the plaintiff's injuries were sustained. It is also alleged in the petition that defendant negligently failed to observe a custom, and on account thereof plaintiff's injuries were received. It is our opinion the petition charges in the one count that plaintiff's injuries were caused by the willfulness of the defendant, and also by his negligence.

The respondent contends that a motion to require the plaintiff to elect was the proper remedy, and that the demurrer was not. Undoubtedly, in some jurisdictions the motion to elect or to make more definite and certain is the proper practice. *Rideout v. Winnebago Traction Co.*, supra (Wis.). But in this state, our courts hold that a demurrer is the proper pleading. *Raming v. Railroad*, supra; *O'Brien v. Transit Co.*, supra.

The judgment will be reversed, and the cause remanded, and permission granted to the plaintiff to amend her petition, if she so desires. All concur.

HAMMAR et al. v. ST. LOUIS MOTOR CARRIAGE CO.

(St. Louis Court of Appeals. Missouri. Feb. 21, 1911.)

1. CORPORATIONS (§ 34*)—APPEARANCE—CORPORATE EXISTENCE.

Where a corporation appears by attorney and defends an action, it cannot deny its own existence, and such an appearance precludes the admission of evidence showing the dissolution of the corporation before the beginning of the action.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 81-96; Dec. Dig. § 34.*]

2. CORPORATIONS (§ 553*)—DISSOLUTION—APPOINTMENT OF RECEIVER—COLLECTION OF ASSETS.

Where a corporation, pending plaintiff's action against it, transferred its assets to another corporation, and the directors appropriated all of the proceeds to their own use, and ceased to act for it, and the corporation had no place of business and no property to satisfy plaintiff's judgment, it was proper to appoint a receiver to compel restitution from the directors.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 2201-2216; Dec. Dig. § 553.*]

Appeal from St. Louis Circuit Court; J. Hugo Grimm, Judge.

Action by Percy F. Hammar and others against the St. Louis Motor Carriage Company. From a judgment for plaintiffs and appointing a receiver, defendant appeals. Affirmed, and cause remanded.

Action for appointment of a receiver. Defendant is a manufacturing company, incorporated under the laws of Missouri. On May 19, 1905, plaintiffs brought suit against it in the circuit court of the city of St. Louis to recover damages for breach of contract, and defendant was duly summoned and appeared therein. Thereafter, about December 8, 1905, and while said suit was pending, the directors of the defendant company, acting unanimously, caused a corporation to be organized under the laws of the state of Illinois and transferred to it all of the property and assets of the defendant company, taking therefor to themselves and in their own names all of the capital stock of the Illinois corporation, except a few shares that went to the secretary, who was a stockholder of the defendant, but not a director. Each took in proportion to his or her holding of stock in the defendant company. Absolutely nothing went to the defendant company in its corporate capacity on account of the transfer. The stock thus received and appropriated by the directors of the defendant corporation was worth, at the time, from \$70,000 to \$100,000 above all the defendant's liabilities. After the transfer the defendant company did not assert any right of ownership in the stock of the Illinois corporation, did no more business, and had no place of business. Its officers and directors abandoned it, held no meetings, and discontinued acting for it, except that the plaintiffs' suit for breach of contract continued to be contested in the name of the defendant. On April 10, 1907, plaintiffs recovered judgment against defendant in said suit, and had execution issued against the corporation. A part of the judgment debt was made on the execution, and it was returned nulla bona as to the residue. There being no property of the defendant to levy upon, plaintiffs demanded of defendant, through its president, that it compel restitution by the directors of property and assets sufficient, at least, to satisfy plaintiffs' judgment, but it refused, and plaintiffs then brought this action in the circuit court of the city of St. Louis, for the appointment of a receiver to compel such restitution. Defendant appeared by counsel and filed its answer, admitting that it was incorporated under the laws of Missouri and that plaintiffs had obtained judgment against it, but denying each and every allegation of the petition not expressly admitted. Said answer attempted to justify the transfer, and stated facts which it relies upon as having

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

accomplished its dissolution before the bringing of this action. By said answer defendant also offered "to cause said shares of stock to be delivered to the sheriff," etc. We may remark that at the time of this "offer" the Illinois corporation had become bankrupt and its shares worthless. Upon the trial the defendant offered, and the court excluded, evidence relied upon by the defendant to show its dissolution before the bringing of this action. The evidence admitted disclosed the pertinent facts to be as we have described them, and the court made and entered its decree appointing the receiver, and defendant has appealed.

Stern & Haberman, for appellant. Carter, Collins, Jones & Barker, for respondents.

CAULFIELD, J. (after stating the facts as above). 1. The defendant's first and chief assignment of error is directed against the action of the trial court in excluding evidence which, defendant contends, would have established that the defendant was dissolved before this action was commenced. We have no hesitation in overruling this assignment. To contend that the defendant was dissolved was to say that it was without officers, directors, or legal existence; dead, and without capacity to appear by counsel. *Ford v. K. C. & I. Short Line Ry. Co.*, 52 Mo. App. 439, 452, 453. The Legislature has recognized this by providing that those who were president and directors at the time of the dissolution should, as trustees, administer the estate of the dead corporation for the benefit of creditors and stockholders. Section 2995, Rev. St. 1909. The defendant's attitude in appearing in court, filing an answer, and offering proof of its own prior demise involved a legal absurdity. Our Supreme Court has declared that, if a corporation appears to a suit, it cannot deny its own existence; that, as against the corporation itself, such appearance is conclusive evidence of its legal existence for the purposes of the pending case. *Seaton v. Chicago, Rock Island & Pacific R. Co.*, 55 Mo. 416.

2. Nor are we able to agree to defendant's contention that it is not a case for the appointment of a receiver. The petition alleges, in effect, and the proof shows, that the defendant, a manufacturing corporation, has transferred all its assets and property to another, and its directors have appropriated the proceeds to their own use, leaving nothing available by ordinary process of law to satisfy plaintiffs' judgment. By reason of such transfer and appropriation the defendant has been incapacitated, and has ceased to transact business, and it has no place of business. Its stockholders and directors have held no meetings, and its officers and directors have discontinued acting for it. They are the very ones from whom restitution

must be sought. The circumstances justified the appointment of a receiver. *Glover v. Bond Inv. Co.*, 138 Mo. 408, 40 S. W. 110.

The judgment is affirmed, and the cause remanded.

REYNOLDS, P. J., and NORTON, J., concur.

McKINSTRY v. CHICAGO, R. I. & P. RY. CO.

(Kansas City Court of Appeals. Missouri. Feb. 13, 1911.)

1. CARRIERS (§ 159*)—CONTRACTS—STIPULATIONS—VALIDITY.

A stipulation in a shipping contract requiring notice of claim for injuries is not contrary to public policy, and is valid when reasonable in its application to the particular facts of the case.

[Ed. Note.—For other cases, see *Carriers*, Cent. Dig. § 669; Dec. Dig. § 159.*]

2. CARRIERS (§ 218*)—CONTRACTS—STIPULATIONS—VALIDITY.

Where a shipper of horses did not give notice of his loss within one day after their arrival at their destination, as required by the contract of shipment, because the extent of the loss was not manifest until several days thereafter, and he could not know on their arrival that one of them would develop a fatal case of pneumonia, the stipulation requiring notice was no defense to an action on the contract.

[Ed. Note.—For other cases, see *Carriers*, Cent. Dig. §§ 669, 938, 947; Dec. Dig. § 218.*]

3. CONTRACTS (§ 144*)—CONSTRUCTION—WHAT LAW GOVERNS.

A contract must be construed by the law of the place where made.

[Ed. Note.—For other cases, see *Contracts*, Cent. Dig. §§ 724-727; Dec. Dig. § 144.*]

4. CARRIERS (§§ 203, 218*)—LIMITATION OF LIABILITY—WHAT LAW GOVERNS.

Under Code Iowa, § 2074, providing that no contract shall exempt any carrier from the liability existing had no contract been made, a stipulation in a contract executed in Iowa for transportation of live stock from a point in Iowa to a point in Missouri, which requires notice of a claim for loss within a specified time, is invalid; the contract being governed by the law of Iowa.

[Ed. Note.—For other cases, see *Carriers*, Cent. Dig. § 938; Dec. Dig. §§ 203, 218.*]

5. CARRIERS (§ 218*)—LIMITATION OF LIABILITY—INTERSTATE COMMERCE ACT.

The stipulation is invalid under the provisions of the amendment to the interstate commerce act known as the Hepburn Bill (Act June 29, 1906, c. 3591, § 7, 34 Stat. 595 [U. S. Comp. St. Supp. 1909, p. 1166]), prohibiting a carrier from contracting with a shipper for interstate transportation of freight, where the contract affects any part of the carrier's common-law liability.

[Ed. Note.—For other cases, see *Carriers*, Cent. Dig. § 938; Dec. Dig. § 218.*]

6. EVIDENCE (§ 544*)—OPINION EVIDENCE—ADMISSIBILITY.

One having experience as a shipper of horses may testify as to the effect of keeping a horse on a train for 57 hours, tied so that it could not eat or lie down.

[Ed. Note.—For other cases, see *Evidence*, Cent. Dig. § 2356; Dec. Dig. § 544.*]

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

7. APPEAL AND ERROR (§ 1050*)—HARMLESS ERROR — ERRONEOUS ADMISSION OF EVIDENCE.

Where there was no attempt by plaintiff to prove a different case from that shown by the exhibits actually produced during the trial, the error, if any, in permitting plaintiff to introduce in evidence the notice to defendant to produce certain documents, was not prejudicial.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4153-4160; Dec. Dig. § 1050.*]

8. CARRIERS (§ 228*)—CARRIERS OF LIVE STOCK—NEGLIGENCE—EVIDENCE.

In an action against a carrier of horses for negligence in their transportation resulting in the death of one of the horses, evidence held to show actionable negligence.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. § 960; Dec. Dig. § 228.*]

Appeal from Circuit Court, Jackson County; E. E. Porterfield, Judge.

Action by A. McKinstry against the Chicago, Rock Island & Pacific Railway Company. From a judgment for plaintiff, defendant appeals. Affirmed.

M. A. Low and Sebree, Conrad & Wendorff, for appellant. Guthrie, Gamble & Street, E. H. Gamble, and James M. Rader, for respondent.

BROADDUS, C. J. This is an action to recover damages for the alleged negligence of the defendant in the shipment of two Percheron stallions on October 15, 1906, by Singmaster & Sons, as agents of plaintiff from Keota, Iowa, to Meta, Mo. The petition of plaintiff is based upon the negligence of the defendant in failing to unload, feed, and water and to allow said horses to rest in transit, and that in consequence of such negligence one of said horses died. The defendant's answer was a general denial of the allegations of the petition, and that under the terms of the contract of shipment plaintiff assumed all risk and expense of feeding, watering, bedding, and otherwise caring for said horses while in defendant's cars, yards, pens, or elsewhere, and that he would unload them at his own expense, and that, as a condition precedent to his right to recover any damages, plaintiff agreed that, as soon as he discovered any loss or injury to said horses, he would give notice thereof in writing to some general officer, claim agent, or station agent of defendant before said horses were removed from the point of shipment, etc., and that such notice should be served within one day after the delivery of the horses at their destination, etc., that plaintiff failed to give such notice within the time provided for in said contract, and that plaintiff agreed that in no event defendant should be liable for more than one hundred dollars for each animal. Plaintiff replied that said provisions in said shipping contract set up by defendant were void under section 2074, Code Iowa, and that there was no

consideration for any of said provisions attempting to limit defendant's liability as a common carrier, that defendant gave plaintiff no opportunity for feeding, watering, and caring for said horses, and that defendant's agent saw the condition of the horses as soon as they were taken off the train at their destination.

The evidence showed that on October 15, 1906, at 6 o'clock p. m., Singmaster & Sons, as agents of plaintiff, in compliance with a telegram sent by plaintiff from Trenton, Mo., shipped the two horses for plaintiff from Keota, Iowa, to plaintiff at Meta, Mo. The contract of shipment provided that plaintiff assumed all risk and expense of feeding, watering, and caring for the horses while in cars, and would load and unload the same at his own expense and risk; that as a condition precedent to the bringing of any suit for damages for any loss or injury to the horses plaintiff would, as soon as he discovered such loss or injury, promptly give notice thereof in writing to some general officer, claim agent, or station agent of defendant before said horses were removed from the point of shipment or place of destination, which should be served within one day after the delivery of the stock at its destination, in order that such claim may be fully and fairly investigated. Singmaster & Sons prepared the car by putting a little hay therein for the horses to stand upon, loaded and tied the horses in each end of the car, the heads towards the center of the car, with two ropes, one from either side of the car, on each horse. Plaintiff in his telegram to Singmaster & Sons directed them to wire him when loaded. He remained at Trenton, intending to meet the horses there, and go with them to Meta, and feed, water, and care for them in transit; but plaintiff failed to receive such notice of the time of the shipment of the horses, and they arrived at and passed through Trenton without plaintiff's knowledge. When he learned that the horses had passed through Trenton, he took the next passenger train, and arrived at Meta about 3:30 o'clock a. m. October 18th. The horses arrived on the 17th of October, at 9 o'clock p. m., when the car was set at the chute for unloading. Meta is a small place, where defendant employed only a station agent and had no yard crew. When plaintiff arrived at Meta, he untied the horses so that they could lie down, watered and fed them, and left for a short time. When he returned, without saying anything about what he intended to do, he took the horses out of the car and to a livery stable, and fed them again. Afterwards he led the horses to a small creek and into eight or ten inches of water four or five times a day for about two or three days. On or about the 20th one of them showed symptoms of

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

lung fever or pneumonia. On the following day plaintiff began to doctor the horse with linseed and castor oil, and the next day gave him ten or twelve drops of aconite every three hours, until he died. He also gave him laudanum. It was shown that the horses were tied in such a manner that they could not eat of the hay put in the car, and that they were so tied that they could not lie down. The plaintiff's evidence tends to show that the horses were not fed or watered during transit, while that of defendant tends to show that they were fed and watered. There was evidence, however, of a positive character that they were fed and watered a short while before they reached their destination. Plaintiff's evidence tended to show that the treatment the horses received while in transit would probably cause them to become diseased, and that lung fever or pneumonia with which one of them died was the probable result of such treatment. The defendant sought to show that the medicine that plaintiff administered to the horse and allowing him to go into water eight or ten inches deep to drink were the procuring causes of the death of one of them.

The distance from Keota to Meta is about 322 miles, and the time in which the horses were in transit was about 57 hours. Plaintiff testified that, when he took the horses from the car, "they were badly shrunk and drawn, * * * and that they were so sore they could not hardly get out to the track. Their heads down. They were in very bad condition."

The shipping laws of the state of Iowa were introduced in evidence over the objections of defendant.

The plaintiff was permitted, over the objection of defendant, to read a notice to produce the waybill of the car described, a copy of which was attached to defendant's answer and other documents and letters alleged to be in defendant's possession. Plaintiff was also allowed over the objection of defendant to prove what effect the keeping of a horse on a train for 57 hours and 40 minutes tied in the position as shown that he was tied, without food and water, based on his experience in handling and shipping horses, would have on it. The witness has stated that he had had experience in shipping horses. The paragraph in the contract in relation to rate and tariff reads as follows: "One car, said to contain two stallions, from Keota station, to Meta, Mo., station consigned to A. McKinstry, Meta, Mo., at the rate of trf. per 100, from — to —, subject to minimum weight and length of cars specified and provided for in the tariff; said rate being less than the rate charged for shipments transported at carrier's risk for which reduced rate and other considerations it is mutually agreed between the parties hereto as follows," etc.

The plaintiff recovered judgment, and the defendant appealed.

We will first consider the preliminary question of the plea in bar interposed by the defendant of the failure of plaintiff to give notice of his loss as provided by the contract. It is held that such stipulations in a contract of shipment are not in contravention of public policy, and are therefore valid, but "that they must be reasonably and justly construed in their application to the particular facts of each case." *Ward v. Mo. Pac. Ry. Co.*, 158 Mo. 226, 58 S. W. 28; *Holland v. Railroad*, 139 Mo. App. 702, 123 S. W. 987. The plaintiff under the circumstances in proof could not have given notice of his loss within one day after the arrival of the horses at their destination, as the extent of such loss was not manifest until several days thereafter. He did not, and could not, know upon their arrival that one of them would develop a fatal case of pneumonia. Therefore such provision in the contract of shipment was no defense to an action thereon. *Burns v. Railway Co.*, 132 S. W. 1. And it is held under the provisions of the amendment to the interstate commerce act, known as the "Hepburn Bill" (Act June 29, 1906, c. 3591, § 7, 34 Stat. 595 [U. S. Comp. St. Supp. 1909, p. 1166]), a carrier cannot contract with the shipper for interstate transportation of freight, whether supported by a good consideration or not, affecting any part of the carrier's common-law liability. *Holland v. Railroad*, 139 Mo. App. 702, 123 S. W. 987; *Blackmer & Post Pipe Co. v. Railroad*, 137 Mo. App. 479, 119 S. W. 1. However, the Springfield Court of Appeals holds that the foregoing rule does not apply to interstate shipments. *McElvain v. Railway*, 131 S. W. 736. As that case is in conflict with the two cases cited, the court has certified it to the Supreme Court.

Whether such conditions are valid when supported by a valuable consideration, it is the well-settled law of this state that notwithstanding the recitation in a contract of shipment that such conditions are made in consideration of a reduced rate, if there is no such reduced rate or other valuable consideration, the carrier is liable just as if the contract had contained no such stipulations. *George v. Railroad*, 214 Mo. 551, 113 S. W. 1099, 127 Am. St. Rep. 690; *Ward v. Railroad*, supra. And the recitation in the contract specifying the price for transportation to be "at the rate of trf. per 100" means that the shipment was at the regular schedule tariff rates, in the absence of evidence that the rate was in fact a reduced rate. *George v. Railroad*, supra. The holding of the Springfield Court of Appeals does not apply to the contract in this case, because it is different from the one there considered, and different from that in the *George Case*, supra.

It is a rule of law that a contract is to be interpreted by the law of the place where made. The law of Iowa introduced in evidence where the contract was made provides that: "No contract, receipt, rule or regula-

tion shall exempt any railway corporation engaged in the transportation of persons or property, from the liability of a common carrier, or carrier of passengers, which would exist had no contract, receipt, rule or regulation been made or entered into." The defendant insists that as the contract was not to be executed in Iowa, but in Missouri, the law of the latter is to control. The case of *Greason v. Railway Co.*, 112 Mo. App. 116, 86 S. W. 722, cited by appellant, has no application to the question. In *Bigelow v. Burnham*, 83 Iowa, 120, 49 N. W. 104, 32 Am. St. Rep. 294, where a note was executed in one state and made payable in another, held, that the laws of the latter governed. And to the same effect is the holding in *Hall v. Cordell*, 142 U. S. 116, 12 Sup. Ct. 154, 35 L. Ed. 956, and such is the conceded law. The rule applicable is otherwise. "A contract of affreightment is governed by the law of the place where it is made, unless it appears it was otherwise intended by the parties." *Otis Co. v. Railway Co.*, 112 Mo. 622, 20 S. W. 676. Whether we apply the law of this state, of Iowa, or the Hepburn bill of Congress, the provision for notice is invalid.

One of the errors assigned in the admission of testimony was in permitting plaintiff to testify as to the effect of keeping a horse on a train for a period of 57 hours, tied as the one in question was shown to have been. Plaintiff was shown to have had such experience as qualified him to testify as to that matter. In our opinion the common understanding of ordinary minds would enable a person to form a reasonable opinion upon the hypothesis. It is reasonable to infer that the horse sickened because of his weakened powers of resistance to disease. *Gilbert v. Railroad*, 132 Mo. App. 697, 112 S. W. 1002.

It is argued that the court committed error in permitting plaintiff to introduce in evidence the notice to defendant to produce certain documents and papers. The notice was read after defendant failed to account for or produce the documents called for therein. It is said that this question has not been passed on by any of the appellate courts of this state. There are some authorities that hold under the circumstances that such is competent evidence. It is said that: "The mere withholding or failing to produce evidence, which under the circumstances would be expected to be produced and which is available, gives rise to a presumption against the party." *Jones on Evidence*, § 17. And similarly in *Clifton v. U. S.*, 4 How. 242, 11 L. Ed. 957. However the law may be, we are of the opinion that defendant could not have been greatly prejudiced thereby, as there was no attempt upon the part of the plaintiff to prove a different case from that

shown by the exhibits actually produced during the trial.

Finally, it is contended that upon the whole record it was not shown that the disease which was the cause of the animal's death was produced by the treatment he received while in transit. It is argued that the expert testimony failed to establish that fact, and that the evidence was to the effect that the disease was the result of taking him to a stream of less than a foot in depth for the purpose of giving him water. If we have read the record correctly, and we believe we have, the preponderance of all the evidence, including that of the experts, tends to show that the disease which the horse contracted from the effects of which he died was traceable to his treatment while in transit. One expert did testify, however, that it was not a proper treatment to let the horse go even in shallow water while he was so afflicted, but none of them testified that the disease was the probable result thereof. And the common understanding of every person who has had much to do with horses is to know full well that letting a horse go into water reaching scarce above his hoofs could have little or no effect upon his health. And there was ample evidence that the horses were deprived of water, food, and rest during their transit.

Finding no material error in the trial, the cause is affirmed. All concur.

BUCKLEW v. PYRON et al.

(Kansas City Court of Appeals. Missouri.
Feb. 13, 1911. Rehearing Denied
March 6, 1911.)

1. EVIDENCE (§ 441*) — PAROL EVIDENCE — VARYING WRITTEN CONTRACT.

Where plaintiff, by an unambiguous written contract, sold his stock and all his claims, rights, and interests in and to a company for a stated sum, to be paid for partly in cash, and partly in notes, in an action on the unpaid notes, defendant could not show in defense other contracts and understandings in addition to the written contract affecting his liability thereunder, including an understanding that the price of plaintiff's interest in the company, recited in the contract, included one of the notes sued on, which it was understood was to be canceled and delivered to defendant, but that plaintiff had refused to so deliver it, which refusal caused a failure of the consideration for the note sued on and for a payment made by defendant under the contract and entitling him to a rescission of the contract and recovery of the payments made.

[Ed. Note.—For other cases, see *Evidence*, Cent. Dig. §§ 2080-2047; Dec. Dig. § 441.*]

2. CORPORATIONS (§ 104*) — ISSUANCE OF STOCK—FAILURE TO COMPLY WITH LAW—EFFECT AS BETWEEN STOCKHOLDERS.

As between consenting stockholders, where an arrangement is made whereby stock is issued as "full paid and nonassessable," though

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

only a small part of the capital had been paid in, one stockholder cannot take advantage of such lack of compliance with the law to the disadvantage of the others; all the stockholders agreeing and all taking part in the executed transaction.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. § 454; Dec. Dig. § 104.*]

Appeal from Circuit Court, Jackson County; A. F. Smith, Special Judge.

Action by Samuel Bucklew against Robert B. Pyron and others. Judgment for plaintiff, and defendants appeal. Affirmed.

Botsford, Deatherage & Creason, for appellants. J. C. Rosenberger and Kersey Coates Reed, for respondent.

ELLISON, J. Plaintiff's action is based on a petition containing nine counts, each for the recovery of judgment on a promissory note executed by defendants. In the first of these counts the note is for \$1,000, and in each of the remaining eight the note is for \$500; the whole aggregating \$5,000. The defendants answered separately. Defendant Pyron's answer to the first count was a general denial; that the note was given without consideration; that it had been fully paid; and that it was given for plaintiff's accommodation only. His answer to each of the other counts was that the notes were given without consideration; that they each had been fully paid, and that the other defendant, the "Bob Pyron Land Company," had been organized in the state of Texas as a corporation dealing in the sale of lands with a capital stock of \$10,000, divided into 100 shares of \$100 each; that defendant, one W. E. Oliver, and plaintiff were the incorporators of such corporation, with Oliver and plaintiff each subscribing for 33 shares and defendant for the remaining 34 shares; that \$500 was actually paid in cash on such subscriptions; that Oliver afterwards "contributed on his stock \$1,283" and defendant "also contributed and paid into the treasury of said company on his stock large sums of money"; that plaintiff was called upon to pay the balance upon his subscription, and that he paid in response the sum of \$1,000, but before making this payment he asked Oliver and the defendants to give and indorse the note to him of \$1,000 which he has sued upon in the first count as an accommodation note for him to use in borrowing the money with which to pay the \$1,000 on his stock subscription, and that this was done solely to favor and accommodate him; that some time after the organization of the corporation defendant bought Oliver's stock, paying him therefor \$1,283, the amount he had paid into the treasury on it, making defendant's total stock to be 67 shares; that shortly afterwards, on the 28th of November, 1906, plain-

tiff and defendant entered into a written contract whereby defendant bought of plaintiff his 33 shares of stock for \$5,000, of which \$500 was paid in cash and a note for \$500 due the 1st of January, 1907, and eight notes, each for a like amount, one due the 1st of each month thereafter; that these notes were secured by the certificates of stock being indorsed by plaintiff and deposited in bank and also by an assignment of certain commissions due defendant amounting to \$2,000; that the cash was paid and the first note falling due was also paid by defendant. But the others are the ones sued upon in this action. It is then pleaded that at the time of making this contract it was understood and agreed that the \$5,000 thus agreed to be paid for the stock included the note for \$1,000 sued on in the first count, and it was to be canceled and delivered to defendant, but that plaintiff has refused to so cancel and deliver it, and in consequence "the consideration for all of said notes in the petition and the \$500 cash paid and the consideration for the \$500 note which defendant paid has failed, in consequence of which defendant has the right to elect and does elect to rescind the contract aforesaid." Wherefore it is alleged that plaintiff has become liable to pay him back the \$1,000 so paid, and for which judgment is asked as a counterclaim, and that the first note be canceled.

The separate answer of the land company was, first, a general denial except it admitted its incorporation; second, want of consideration for any of the notes sued on: third, payment; fourth, that the note for \$1,000 sued on in the first count was given for plaintiff's accommodation, that he might borrow money thereon; fifth, that giving the note by defendant was not within the power of the corporation; sixth, that a certain contract already described in Pyron's separate answer, was made between the parties and that it had been violated by plaintiff and that it had been rescinded, and pleading a counterclaim for \$450 "for money paid to plaintiff"; seventh, the corporation law of the state of Texas is pleaded and it is alleged that the defendant corporation was formed with plaintiff as one of the original subscribers of stock in the sum of \$3,300, on which he had paid \$1,250, leaving still unpaid \$2,050, for which judgment was asked. Plaintiff's reply set up estoppel, in that defendant had joined in the organization of the corporation; had participated in the issue of the stock and stamping it paid and nonassessable, and that he was enjoying the benefit of the sale made by plaintiff to him. The cause was tried by A. F. Smith, Esq., of the Kansas City bar, as special judge. The judgment was for the plaintiff on all of the counts. On the first

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

it was against both defendants; but on the eight other counts it was against defendant Pyron only.

The foregoing statement, though of some length, is much shorter than that made by the parties. We have omitted much detail which could be of no service in stating the reasons for our conclusions. It appears that a land company corporation was formed in the state of Texas with a capital stock of \$10,000, divided into 100 shares of the par value of \$100 each, and that one Oliver, plaintiff, and defendant Pyron were the incorporators; the two former taking 33 shares each and the latter 34 shares; that afterwards defendant Pyron bought Oliver's stock, making his holding to be 67 shares; and that afterwards he bought plaintiff's shares. There was evidence tending to prove that there was dealing between plaintiff and defendant Pyron, not necessary to describe in detail, whereby he was indebted to plaintiff by reason of the latter making advancements to him in addition to a loan made for which the note of \$1,000, sued on in the first count, was given. After a time, plaintiff having grown restive about the affairs of the corporation, which was managed by Pyron, the latter proposed to buy him out. After some negotiation, it was determined that plaintiff would sell to Pyron his stock and his interest and his unsettled claims against the company for the sum of \$5,000. A written contract was thereupon made whereby plaintiff sold his stock and all his "claim, right, title, and interest in and to said company of any kind whatsoever" for \$5,000, to be paid by \$500 in cash and nine notes for \$500 each. The cash payment was made and the first note was paid, while the remaining eight and the note for \$1,000 are the subject of this action.

The defense to the notes, except the one in the first count, for \$1,000, is based on an attempt to investigate and determine the rights of the parties without recognition of the binding force of the written contract between plaintiff and defendant Pyron. That contract is couched in plain and unambiguous language to the effect that for plaintiff's stock and for his advancements to the company Pyron was to pay him \$5,000, of which \$500 was to be in cash and the balance in nine notes, one of which was paid and the others now in controversy. The trial court properly informed the jury that the contract bound the parties, and that there was no defense to the notes. Under the evidence, the court could have done no less than this without committing error against the plaintiff. The whole effort to show other matters, contracts, and understanding outside of, in addition to, or contradiction of, the contract, was in the face of a fundamental rule governing written

contracts. And the same may be said of Pyron's counterclaim for \$1,000, and it was properly disallowed by a peremptory instruction. And the same may be said of the effort to include in the contract the note of \$1,000, sued on in the first count, by insisting that it was sold by plaintiff along with the stock. The same also may be said of the counterclaim for \$2,050, hereinbefore referred to. The note last mentioned, as already shown, was claimed by plaintiff to be for borrowed money, and defendant claimed it was merely an accommodation note to enable plaintiff to borrow money. The issue was submitted to the jury, and the finding is supported by the evidence. The counterclaim of the defendant land company of \$450 "for money paid to plaintiff," to which we have already referred, was properly submitted to the jury on evidence which supports the finding.

This brings us to what is the principal defense. Defendants claim that the issuance of stock in the manner this was issued was contrary to law, against public policy, and therefore void. It appears to be conceded by the parties that under the laws of both Texas and Missouri all fictitious issues or increase of stock of any corporation are void, and that no stock should be issued except for money paid, labor done, or property actually received. Under the laws of Texas a corporation could be formed with a capital as small as \$10,000, and only one-half of the capital need be subscribed, and only 10 per cent. of that need be paid in order to begin business. These parties, it seems, paid \$500. Oliver was made president of the corporation and defendant Pyron secretary, and they as such officers issued to themselves and to plaintiff as the original stockholders these respective certificates of stock, as already mentioned. Across the face of these certificates were the words, "Full paid and nonassessable." The most that can be said for the stock issued in this case is that, if it were not issued without anything being paid, the payment made was far less than its face value. The question is, Shall it be considered valid stock between the parties to this controversy? It will help out an understanding of our conclusion by also stating what is not the question. It is not a question between stockholders and creditors nor between creditors and the corporation. It is not a question between the corporation and nonconsenting stockholders. It is not a question involving an unexecuted contract as to the stock. It is a question between stockholders concerning an executed transaction, in which all agreed and all took part in doing what one of them now seeks to avoid the consequence of doing. The law is that as between the consenting stockholders, if an arrangement is made whereby stock is

issued for less than its value, one cannot take advantage of that lack of compliance with the directions of the law to the disadvantage of the other. *Skrainka v. Allen*, 76 Mo. 384, 391; *Hill v. Coal Co.*, 124 Mo. 153, 166, 25 S. W. 926, 32 S. W. 111; *Woolfolk v. January*, 181 Mo. 620, 634, 33 S. W. 432; *Meyer v. Mining & Milling Co.*, 192 Mo. 162, 191, 196, 90 S. W. 821; *Vogeler v. Punch*, 205 Mo. 558, 571, 103 S. W. 1001; *Scovill v. Thayer*, 105 U. S. 143, 26 L. Ed. 968; *Standard M. M. Co. v. Hills*, 68 Mo. App. 249; *Roll v. Smelting & Mining Co.*, 52 Mo. App. 60.

We cannot undertake to review a long list of authorities cited by defendants, and content ourselves with the statement that far the greater part of them were contests over questions which we have said are not in this case. In *Memphis & L. R. Ry. Co. v. Dow*, 120 U. S. 287, 298, 7 Sup. Ct. 482, 487, 30 L. Ed. 595, there occurs this statement: "The prohibition against the issuing of stock or bonds, except for money or property actually received or labor done, and against the fictitious increase of stock or indebtedness, was intended to protect stockholders against spoliation, and to guard the public against securities that were absolutely worthless. One of the mischiefs sought to be remedied is the flooding of the market with stock and bonds that do not represent anything whatever of substantial value." It will be observed that nothing is said concerning the protection of stockholders against their own acts which have been accomplished.

But it seems clear to us that the defendants are upon other reasons without ground upon which to base their claim of total failure of consideration of the notes. The written contract transferred not only the stock, but all interest in the corporation or claims against it. Plaintiff retired from the corporation, and left it solely in defendant Pyron's hands. Granting it may have been organized in an illegal way, it was in point of fact a going concern, earning money, and defendant was put into possession of all its assets and the possessor and owner of all its earnings which may have been then on hand. He seemed to want to have sole control to manage with a hand untrammelled by the critical or inquiring or restraining hand of other interests, and he finally entered into an agreement whereby he would pay a certain sum to accomplish that desired end. We see no reason why he should now say there was no consideration, when asked to pay the price.

We think the case well tried, and the judgment for the right party. It is accordingly affirmed. All concur.

ZEILER v. METROPOLITAN ST. RY. CO.

(Kansas City Court of Appeals. Missouri.
Feb. 13, 1911.)

1. EVIDENCE (§ 588*)—CREDIBILITY OF WITNESSES—PHYSICAL FACTS.

The testimony of witnesses that a street car which had stopped to permit passengers to alight started with a jerk while a passenger was alighting, throwing her to the ground, and ran from two to four feet and then stopped, contradicted by witnesses that the car did not move, but that the passenger accidentally tripped and fell, cannot be disregarded as a matter of law as contradictory to the physical facts; the claim that, if the car had been started with enough violence to cause the passenger to fall, it could not have been stopped in two or four feet, being but an argument for the jury.

[Ed. Note.—For other cases, see *Evidence*, Dec. Dig. § 588.*]

2. CARRIERS (§ 320*)—INJURIES TO PASSENGERS—NEGLIGENCE—QUESTION FOR JURY.

Whether a street car passenger was thrown from the car while alighting caused by the sudden starting of the car or whether she accidentally tripped and fell while the car was standing, *held*, under the evidence, for the jury.

[Ed. Note.—For other cases, see *Carriers*, Dec. Dig. § 320.*]

3. CARRIERS (§ 303*)—CARRIAGE OF PASSENGERS—CARE REQUIRED.

A street railway company is a carrier of passengers and owes them the highest degree of care to carry them in safety, which duty continues while the passenger himself, in the exercise of reasonable care, is alighting at a place where the car is stopped therefor, and the car must not be started until a passenger has alighted in safety.

[Ed. Note.—For other cases, see *Carriers*, Cent. Dig. §§ 1216, 1218, 1224-1243; Dec. Dig. § 303.*]

4. CARRIERS (§ 321*)—INJURIES TO PASSENGERS—ACTIONS—INSTRUCTIONS.

It is not error to instruct the jury as to the legal relation between a carrier and a passenger, when such information is pertinent to the issues.

[Ed. Note.—For other cases, see *Carriers*, Dec. Dig. § 321.*]

5. CARRIERS (§ 321*)—INJURIES TO PASSENGERS—INSTRUCTIONS.

Where the petition in an action for injuries to a street car passenger alleged that the car was caused "and" permitted to move, throwing the passenger from the car while alighting, a charge authorizing a verdict if the car was caused "or" permitted to move was not objectionable as broadening the cause of action pleaded, the gravamen of which was negligence in allowing the car to prematurely start.

[Ed. Note.—For other cases, see *Carriers*, Dec. Dig. § 321.*]

6. DAMAGES (§ 132*)—PERSONAL INJURIES—EXCESSIVE DAMAGES.

Where a passenger was thrown from a street car and severely injured, causing excruciating pain and resulting in a permanent injury to her leg, but only partially crippling her, a verdict for \$5,000 was excessive, and must be reduced to \$4,000.

[Ed. Note.—For other cases, see *Damages*, Cent. Dig. §§ 178, 872, 377; Dec. Dig. § 132.*]

Appeal from Circuit Court, Jackson County; Jas. H. Slover, Judge.

Action by Mary A. Zeller against the Metropolitan Street Railway Company. From a judgment for plaintiff, defendant appeals. Affirmed on condition of a reduction of recovery.

John H. Lucas, for appellant. Scarritt, Scarritt & Jones, for respondent.

JOHNSON, J. This is an action by a passenger against a common carrier to recover damages for personal injuries caused by the negligence of the carrier in suddenly starting the car in which the passenger was riding while she was alighting therefrom. A trial to a jury resulted in a verdict and judgment for plaintiff for \$5,000, and the cause is before us on the appeal of defendant.

The injury occurred June 3, 1908, on Main street, in Kansas City, at either Eighteenth or Nineteenth streets. The evidence of plaintiff does not fix the place with certainty, while that of defendant shows that the car was at Eighteenth street at a regular stopping place for the reception and discharge of passengers. The car was north-bound, and stopped to let off passengers, among them plaintiff and her two companions, who desired to transfer to a car on another line of defendant. The conductor watched the three women leave the car and states that it was stationary the whole time; that he gave no signal to start while they were alighting; that the car did not start; and that plaintiff in stepping off accidentally tripped or stumbled and pitched forward to the pavement. His statement is supported by the testimony of numerous witnesses. On the other hand, the testimony of plaintiff and her witnesses tends to prove the following facts: When plaintiff, who was 60 years old and weighed 270 pounds, and her two companions, started to leave the car, it had stopped in response to their signal, and remained stationary until plaintiff was going down the steps at the entrance to the rear vestibule, when it gave a violent lurch forward and threw her to the pavement, face downward. She screamed as she fell, and the car stopped after running not more than three or four feet. Plaintiff was preceded by one of her companions and followed by the other. The one in front alighted in safety, and started to the sidewalk, when she was arrested by plaintiff's outcry. She did not see the car move, but observed plaintiff lying prone some distance rearward of the car. The woman following plaintiff testified: "Q. What was the car doing at that time? A. When we got off, the car had stopped and Mrs. Fitch got off and went on across the street, and Mrs. Zeller got off to get down on the first step—in the vestibule, you know, and the car gave an awful lurch—Q. And what happened to Mrs. Zeller? A. It threw her off. Q. In which direction from the car? A. It threw her south at

the back end of the car. Q. The car was going north? A. The car was going north. Q. Where were you at that time? A. I was standing in the door, and I should have fallen if I hadn't been holding on to the side of the door—the car gave such a lurch. Q. After Mrs. Zeller was thrown, as you describe, what did you do? A. I got off as quick as I could. Q. Did the car stop again? A. The car stopped before I got off, when it gave this lurch. Q. Where was Mrs. Zeller then? A. She was lying at the south end of the car. Q. Just tell the jury where she was in reference to the car? A. Well, she was lying out from the car at the back of the car, and I suppose three or four feet from the car, because I got off and went around her—and she fell face foremost—just spreading right out." Another of plaintiff's witnesses, a passenger on the car, testified: "Well, the car stopped—the car was very crowded, the rear portion of it, to the rear platform was crowded—and they were standing around even into the doorway. These ladies started to get off, and, as I thought, they had gotten off, because there was so much of a crowd I couldn't see the steps at all. I was sitting up on this side, on a seat nearer to the front door, and a signal was given to go ahead—in other words, two bells—and the car started, and I heard a scream. I made for the front door, and I stepped down on the step. There were three steps to this car, and the car was just stopping. I went around the front end and found Mrs. Zeller, the lady in question, lying behind the car. Q. How far back of the car, when you got back there, did you find her lying? A. Oh, two or three feet. Q. Was that car moving at the time you got up and rushed out? A. Yes, sir. Q. And it started up just before this scream occurred? A. Yes, sir." He stated further that, after suddenly starting, the car moved four or five feet. Plaintiff states that as she started down the steps she grasped the handhold at the rear of the vestibule with her right hand, and held on until the force of her fall caused her to let go.

The petition alleges "but defendant, disregarding its duty to plaintiff as its passenger, by and through its servants and agents upon and in charge of and managing its said car, carelessly failed and neglected to cause said car to remain stopped a reasonably sufficient length of time for plaintiff to alight therefrom in safety, but carelessly and negligently permitted and caused said car to be moved and started forward suddenly and with a jerk, while plaintiff as such passenger was in the act of alighting from said car, and without any warning thereof to plaintiff, and when defendant's servants and agents upon and in charge of and managing said car saw, or by the exercise of ordinary care might have seen, the situation of the plaintiff while in the act of alighting from said car in time by the exercise of due care

to have so managed said car as to have avoided any injury to plaintiff."

At the request of plaintiff the court gave the following instructions: "The court instructs the jury that defendant and its employees in charge of the car on which plaintiff was a passenger at the time in question owed plaintiff the duty to operate said car at the time and place in question with the highest practical degree of care that a very prudent person engaged in a like business would exercise under the same or similar circumstances to those disclosed by the evidence in this case. The court instructs the jury that if you believe from the evidence the defendant on or about June 8, 1908, was conducting and operating a street railroad and cars thereon in Kansas City, Mo., on which it carried passengers for hire, and that on or about said date plaintiff became a passenger upon one of defendant's cars, the motive power of which was electricity, and paid her fare to be carried as a passenger thereon, and that when said car upon which she was a passenger as aforesaid arrived at Main street at a usual stopping place for letting passengers off at or near Eighteenth street or Nineteenth street, in Kansas City, Mo., it was stopped for the purpose of letting passengers off said car, and that upon the stopping of said car, as aforesaid, plaintiff proceeded to alight therefrom, and that while she was in the act of so alighting the defendant, acting by and through its servants and agents in charge of said car, carelessly and negligently, and without allowing plaintiff a reasonable time to get off said car, caused or permitted said car to be moved and started forward suddenly and with a jerk, whereby plaintiff was thrown from said car to the street pavement and her leg, knee, and body thereby injured, then your verdict should be for the plaintiff." Counsel for defendant insist that their request for a peremptory instruction should have been granted. They argue that the record is barren of any substantial evidence in support of the averment that the car suddenly started. Three witnesses say it did start while plaintiff was alighting, ran from two to four feet, and then stopped, but we are asked to disregard this testimony on the ground that it cannot be reconciled with the plain physical facts of the case. We perceive nothing improbable in the evidence. The nature and direction of plaintiff's fall as described by her witnesses indicates that while she was alighting in the awkward manner characteristic of women—i. e., stepping straight out and using her right hand for support, instead of facing toward the front and grasping the handhold with her left hand—her feet were jerked forward by a sudden lurch of the car, and her body was pitched towards the opposite direction. Doubtless the nature and duration of her grip on the handhold had some influence on

the direction of her fall. We think under all the facts and circumstances disclosed the inference is reasonable that she was thrown by a sudden forward movement of the car.

Counsel contend that, had the car been started by the motorman with enough violence to cause plaintiff to lose her balance, it could not have been stopped in two or three feet. We regard this as an argument exclusively for the consideration of the triers of fact. We shall not declare as a matter of law that the movement in question was physically impossible. The conclusion is reasonable that the motorman at the instant he turned on the power realized he was acting prematurely and immediately reversed the lever and stopped the car. Such spasmodic starts and stops of electric street cars occur often enough to be of common knowledge to patrons of such conveyances. The question of whether the injury occurred in the manner alleged or in the way claimed by defendant was an issue of fact for the jury. The court did not err in overruling the demurrer to the evidence.

Objections are urged against the instructions given at the request of plaintiff, but we find them free from prejudicial error. Street railway companies, being common carriers, owe their passengers the duty of exercising the highest degree of care to carry them in safety. This duty continues while the passenger himself in the exercise of reasonable care is alighting at a place where the car is stopped for the purpose of permitting him to alight. It was the duty of the operators of the car not to start it until plaintiff had stepped in safety to the pavement. *Nelson v. Railroad*, 113 Mo. App. 702, 88 S. W. 1119. It was not error for the instruction to inform the jury of the nature of the legal relation between carrier and passenger when such information was pertinent to one of the contested issues of fact in the case. We consider hypercritical the objection that the instructions broadened the scope of the cause pleaded in authorizing a verdict on the finding that defendant "caused or permitted said car to be moved and started forward," etc., while the petition alleges that defendant "caused and permitted," etc. The gravamen of the action was the negligence of defendant's servants in allowing a car under their control to start prematurely when, had they exercised proper care, it would not have started. The jury, to find for plaintiff, were required to believe that the car started through the negligent agency of the motorman or conductor, and the averment is comprehensive enough to include any act of that nature.

Finally, defendant contends that the verdict was excessive. The injury to plaintiff was severe, excruciatingly painful, and resulted in permanent injury to her left leg that will partially cripple her for life. We think \$5,000 for a permanently and com-

pletely crippled leg is not unreasonable, but we are satisfied the verdict is excessive, since plaintiff is not completely crippled.

If within 10 days plaintiff will enter a remittitur of \$1,000, the judgment will be affirmed without cost. Otherwise it will be reversed and the cause remanded. All concur.

MOSS et al. v. MISSOURI, K. & T. RY. CO.
(Kansas City Court of Appeals. Missouri.
Feb. 13, 1911.)

1. APPEAL AND ERROR (§ 980*)—REVIEW.

A verdict having been for plaintiffs, the Court of Appeals will accept as the facts what their evidence tends to prove.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3755-3761; Dec. Dig. § 930.*]

2. CARRIERS (§ 205*)—LIVE STOCK—DELAY.

That live stock was partly loaded and the remainder placed in the carrier's pens shows delivery to it.

[Ed. Note.—For other cases, see Carriers, Dec. Dig. § 205.*]

3. CARRIERS (§ 228*)—LIVE STOCK—DELAY—EVIDENCE.

To establish negligence, it was proper to show that a carrier, sued for delay in delivering live stock, had never before taken a train out without a shipment, when part of it was loaded and the remainder in process of loading.

[Ed. Note.—For other cases, see Carriers, Dec. Dig. § 228.*]

4. CARRIERS (§ 228*)—LIVE STOCK—DELAY—EVIDENCE—SUFFICIENCY.

Evidence held to sustain recovery for negligent delay in carrying live stock.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. § 980; Dec. Dig. § 228.*]

Appeal from Circuit Court, Vernon County; B. G. Thurman, Judge.

Action by Charles M. Moss and another against the Missouri, Kansas & Texas Railway Company. Judgment for plaintiffs, and defendant appeals. Affirmed.

Lee W. Hagerman, for appellant. Lee B. Ewing and J. R. Moss, for respondents.

ELLISON, J. Plaintiffs' action is to recover damages of defendant for its failure to transport two car loads of hogs from the town of Walker, Mo., to St. Louis, whereby they shrunk in weight, to his damage in the sum of \$108.22. The judgment in the trial court was for the plaintiffs.

The evidence in plaintiffs' behalf tended to prove that they desired to ship, on June 7, 1909, three car loads of hogs over defendant's road to the market in St. Louis. That a day or two before that date they notified defendant's agent at Walker, and in compliance with this request defendant set out three empty cars on a siding leading by its stock pens, and left one of the cars at the chute. Defendant's regular stock train was due at Walker at 10:30 o'clock in the morn-

ing, but on the morning of the 7th of June (perhaps before) it was taken off and a special train, without regular schedule, was put in its place. There was no way to know when this train would arrive, except through the agent at Walker, and neither he nor plaintiffs were notified of its coming until between 20 and 30 minutes before its arrival. As soon as informed, plaintiffs began to load the car at the chute, and could get but that car loaded before the arrival of the train. When the train got in, the conductor saw the situation, and, instead of moving the loaded car out and putting an empty one at the chute, he went to the station house for orders; the engine remaining idle during this time. He returned and ordered the loaded car to be taken out and an empty put in its place for loading. This was done, and plaintiffs got the second car loaded before the train left; but, instead of putting this car in its train with the first, the train left without taking it, or waiting for the third to be loaded. It was further shown that, in consequence of this, it became necessary for plaintiffs to unload the loaded car into the pens, with the hogs intended for the third car, where the two loads were kept in the heat until the next day; the shrinkage complained of resulting. There was evidence in defendant's behalf in many respects differing from that of plaintiffs', but, as the verdict was for the latter, we accept as the facts in the case what their evidence tends to prove.

In showing the stock to be partly loaded in the car and the remainder in defendant's stock pens, there was undoubtedly a delivery to defendant for shipment. *Lackland v. Railway Co.*, 101 Mo. App. 420, 74 S. W. 505; *Mason v. Railway Co.*, 25 Mo. App. 473. "Where cattle have been placed in company's pens for immediate shipment, and part of them have actually been loaded on the cars, the cattle are in the custody of the company as a carrier, and not as a warehouseman." 4 *Elliott on Railroads*, 2183.

In accepting the evidence in plaintiffs' behalf, we are led to an affirmance of the judgment. The instructions presented the issue whether plaintiffs began to load the hogs as soon as told of the time the train was expected. Defendant asked but one, and that was given. It informed the jury that, if plaintiffs had been notified when the train would arrive, in time to have the cars loaded, and did not get them loaded, defendant was under no duty or obligation to wait for the loading thus neglected.

Some objection is made to the sufficiency of plaintiffs' petition, on the ground that it does not state a cause of action. This is said to be for the reason that it states wantonness and negligence, and that these are contradictory. We have examined the plead-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep.'s Indexes

ing in this respect, and have no doubt that it sufficiently states a cause of action for negligence.

Nor do we regard the objection to witnesses stating that, when a part of a shipment was loaded and other parts in process of loading, the defendant company had never before taken the train out without getting the whole shipment. It was objected to on the ground that a custom was not pleaded. We think it was not the purpose to establish a "custom," as that word may be technically understood, but rather as a persuasive mode of establishing the act in this instance as negligent. We think the evidence, in the circumstances, was within the issues. All of the evidence in this branch of the case, including that of the time when plaintiffs began to load, was a proper way to show diligence on plaintiffs' part and negligence on the part of defendant.

We are satisfied from the entire record that no substantial error was committed, and that the judgment was for the right party. It is accordingly affirmed. All concur.

BANKS v. CHICAGO, BURLINGTON & Q. R. CO. et al.

(Kansas City Court of Appeals. Missouri. Feb. 13, 1911.)

1. EVIDENCE (§ 442*)—WRITTEN INSTRUMENTS—PAROL EVIDENCE.

Where a written instrument purports on its face to cover the entire transaction, prior and contemporaneous negotiations are merged therein, and cannot be employed to enlarge, alter, or modify the written contract.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 1874-1899; Dec. Dig. § 442.*]

2. EVIDENCE (§ 450*)—WRITTEN INSTRUMENTS—PAROL EVIDENCE—"STOP TO FILL."

A written contract for the transportation of horses, not a car load, which stipulates for their transportation from a designated point to another point for delivery to a connecting carrier for delivery to the point of destination, with the privilege of "stop" at a city "to fill," is unambiguous, and means that the horses will be held at the city to enable the shipper to fill the car with other horses, and it does not permit the shipper to unload and feed for two weeks, to make the horses more suitable for market, and parol evidence to explain it is inadmissible.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 2081; Dec. Dig. § 450.*]

3. CARRIERS (§ 210*)—CARRIERS OF LIVE STOCK—LIABILITY.

A carrier of live stock, required by contract or by common law to exercise proper care for the preservation of live stock in transportation, need not permit the shipper to unload the stock for two weeks, to improve the stock and make it more suitable for market; and the right of a shipper to such a privilege must be expressed in his contract of shipment.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. § 924; Dec. Dig. § 210.*]

Appeal from Circuit Court, Boone County; N. D. Thurmond, Judge.

Action by H. H. Banks, trustee in bank-

ruptcy of W. H. Leonard, against the Chicago, Burlington & Quincy Railroad Company and another. From a judgment for plaintiff, defendants appeal. Reversed and remanded.

E. W. Hinton, for appellants. N. T. Gentry, for respondent.

JOHNSON, J. This is an action to recover damages on account of the alleged breach of a contract of the defendant carriers for the transportation of a shipment of horses from Unionville, Mo., to the stockyards at East St. Louis, Ill.

W. H. Leonard, a dealer in horses, entered into a written contract with the Chicago, Burlington & Quincy Railroad Company on September 8, 1908, by the terms of which the company received and undertook to transport 15 horses from its station at Unionville, Mo., to Moulton, Iowa, and there deliver them to the Wabash Railroad Company for further transportation to East St. Louis. The horses did not make a car load, but Leonard had other horses near Centralia, Missouri, a station on the Wabash Road, and proposed to the company that the car be stopped at that point, and that he might add 11 other horses to the shipment to make a car load. Accordingly the agent wrote on the shipping contract the words, "Stop Centralia Mo. to fill," and added \$5 to the transportation charges for the privilege thus granted. Leonard intended to sell the horses on the market at East St. Louis, and they were in poor condition for immediate sale, owing to the fact that, being grass fed only, they were poor and shabby looking. His purpose was to unload them at Centralia, take them out to a farm where he had arranged for their reception and care, have them well fed for two weeks, and then reship them on to market, together with 11 other horses. Over the objections of defendants, plaintiff was permitted to introduce testimony tending to show that Leonard had an oral agreement with the agent of the carrier, made at the time of the execution of the shipping contract, that he should be permitted to carry out this plan, and that the extra charge of \$5 was imposed for the privilege of stopping and unloading at Centralia and holding the horses there two weeks for feeding. The Burlington Company carried the horses to Moulton, Iowa, and there delivered them to the Wabash Company, which carried them through to East St. Louis without stopping at Centralia. In consequence of this breach of the alleged oral contract, the horses were prematurely forced on the market and, owing to their poor condition, were sold at a great sacrifice. Leonard presented a claim to the Wabash Company for the damages resulting to him from the breach of the oral contract. That company refused to recognize the validity of that agreement,

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

but stood on the written contract, and offered to compensate Leonard for the damages he suffered on account of the breach of the stipulation to stop at Centralia to receive an addition to the load. The judgment before us is for plaintiff, and is an expression of Leonard's theory of the nature and scope of his contractual relation to defendants. Before the trial Leonard became a bankrupt, and the action is prosecuted by his trustee in bankruptcy as plaintiff.

The issues contested at the trial and argued in the briefs of counsel cover a wider field than we shall cover in the statement of facts and opinion. We think the learned trial judge erred in submitting to the jury the issue of whether or not an oral agreement contemporaneous with the written contract was made by the parties. When a written contract, on its face, purports to cover the entire transaction between the parties, the rule is elementary that all prior and contemporaneous parol negotiations and agreements are merged in the written contract, and afterward cannot be employed by either party to enlarge, alter, or modify the terms of the written contract. Counsel for plaintiff acknowledge this rule, but seek to avoid its application on two grounds, viz., first, that the stipulation in the written contract, "Stop Centralia Mo. to fill," is an obscure expression of the agreement intended to be expressed, which justifies the introduction of explanatory parol evidence, and, second, aside from that stipulation, the written contract omits to make any provision for feeding and watering during the transportation from Unionville to East St. Louis, and, consequently, is incomplete on its face and may be placed out by the oral contract.

The first of these propositions invokes the well-settled rule that, where a stipulation of a written contract is obscure in meaning, oral evidence is admissible for the purpose of ascertaining the meaning intended to be expressed by the language employed. As is said by the Supreme Court, in *Edwards v. Smith*, 63 Mo. 119: "A contract * * * may be obscurely expressed, and a knowledge of the relation of the parties, their antecedent acts, and the subject-matter of the contract may enable a court clearly to understand what otherwise would be ambiguous or obscure." But "that rule never applies, except in cases where the part of the contract which is reduced to writing shows upon its face that it is incomplete, and that it does not purport to be a complete expression of the entire contract." *Koons v. Car Co.*, 203 Mo., loc. cit. 255, 101 S. W. 49. Certainly obscurity in the meaning of a stipulation does not give either party the right to inject into the contract a prior contemporaneous oral agreement as a substitute for the questionable stipulation. To hold otherwise would be to accord to the party offering the parol agreement the right to alter or

vary the terms of his written contract. Evidence may be received to explain, but not to contradict or vary, that which may be obscure.

The words, "Stop Centralia Mo. to fill," standing alone do seem obscure, but, considered in the light of their context and of the nature and circumstances of the transaction, their meaning is clear and certain. They mean that a stop was to be made at Centralia to enable plaintiff to fill with other horses the partly loaded car. No other reasonable meaning can be accorded the words, and the argument that they might be construed to mean that a stop should be made to enable the shipper to unload and feed for two weeks is based on an unnatural and strained construction of what is very plain and simple language. The written contract covered the subject of stopping at Centralia, and did not contemplate that the stop should be made for the time and purpose contended for by plaintiff. To permit plaintiff to recover on the oral agreement would be to permit him to abrogate an important stipulation of the written contract, and to substitute therefor an agreement neither the shipper nor the carrier intended to express.

Passing to the second proposition, we find in the contract the provision: "Said animals are to be loaded, unloaded, watered and fed by the owner or his agents in charge." There is no mention of the place where a stop shall be made to feed and water. We shall concede, for argument, that, in the transportation of horses from Unionville to St. Louis, proper care of the animals requires that a stop for food and water be made en route, and that Centralia was the customary and convenient stopping place. Further, we admit, arguendo, that when a shipping contract is silent on the subject of where such stop shall be made, evidence of an oral agreement to stop at a certain station is admissible under the rule that, "where the instrument of writing does not purport to cover the entire agreement, or a part only of the contract is reduced to writing, then the matter thus left out may be supplied by parol evidence." *Lowenstein v. Railway*, 63 Mo. App. 68.

But these concessions do not aid plaintiff. We are not dealing with a case where the shipper complains of the failure of the carrier to afford him an opportunity to minister to the necessary physical wants of live stock during the course of its transportation, but to a cause of action based on the breach of an alleged agreement to stop the transportation for a long period, in order that the shipper might be enabled to improve the condition of his stock and make it more suitable for the market by a course of feeding and attention. We do not think the duty of the carrier to exercise proper care for the preservation of live stock in transportation—whether such duty be found in the stipula-

tions of the shipping contract or rests wholly on rules of the common law—should be extended to compel a break in the transportation for a period of two weeks, in order that the shipper may improve, instead of merely preserve, the physical condition of his property. The right of the shipper to such privilege must be expressed in his contract with the carrier, and where it is not stipulated for in the written contract, and that contract appears to cover the whole transaction, the privilege cannot be established by proof that it was the subject of a contemporaneous oral agreement.

The judgment is reversed, and the cause remanded. All concur.

BRITT et al. v. SOVEREIGN CAMP OF WOODMEN OF THE WORLD.

(Kansas City Court of Appeals. Missouri. Feb. 13, 1911. Rehearing Denied March 6, 1911.)

1. INSURANCE (§ 748*)—BENEFIT INSURANCE—FORFEITURE—INSTRUCTION.

When a forfeiture is claimed by a fraternal benefit association, forfeiture must be based on the violation by the member of a precise condition laid down in the contract.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 1893, 1894; Dec. Dig. § 748.*]

2. INSURANCE (§ 751*)—MUTUAL BENEFIT INSURANCE—FORFEITURE—DEFAULT AS GROUND OF FORFEITURE.

It is competent for a fraternal benefit association and a member accepting a certificate therein to agree that regular assessments shall be due without special notice, and that default in their payment shall ipso facto suspend the member and void the certificate during suspension.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 1897–1902; Dec. Dig. § 751.*]

3. INSURANCE (§ 755*)—MUTUAL BENEFIT INSURANCE—DUES AND ASSESSMENTS—NOTICE OF ASSESSMENTS—WAIVER OF PROVISIONS.

The certificate and by-laws of a fraternal benefit association provided that a regular monthly assessment should be levied, with additional irregular assessments, and the by-laws provided only for notice of the irregular assessments, but it was the custom of the company to levy the regular assessments with the same formalities as the irregular assessments, and camps of the association carried delinquent members for a time, and such assurance was given the wife of a member before default in his assessments. *Held*, that this conduct amounted to a waiver of the provisions of the certificate, whereby the member upon default in an assessment was ipso facto suspended.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 1907–1916; Dec. Dig. § 755.*]

Appeal from Circuit Court, Jackson County; W. O. Thomas, Judge.

Action by Mattie Britt and others against Sovereign Camp of Woodmen of the World. Judgment for plaintiffs, and defendant appeals. Affirmed.

James W. Garner and Hunt C. Moore, for appellant. E. W. Shannon and Fyke & Snider, for respondents.

JOHNSON, J. Plaintiffs, the beneficiaries of a death benefit certificate issued by defendant May 16, 1906, to Edward Britt, commenced this suit in the circuit court of Jackson county to recover the amount alleged to be due them under the terms of the certificate. It is conceded that Britt died May 6, 1909, and that defendant refused to recognize the demand of plaintiffs as a valid obligation. The cause pleaded in the petition is stated as one founded on an ordinary life policy. The answer admits the defendant issued its beneficiary certificate to Edward Britt, payable to plaintiffs in the event of the death of the holder, but alleges that defendant is a fraternal beneficiary association, incorporated in Nebraska and authorized to do business in this state, and that Britt, at the time of his death, had ceased to be a member of the association, and had forfeited the certificate because of his failure to pay certain assessments levied in accordance with defendant's constitution and by-laws, which constituted a part of the contract of insurance. The answer is voluminous, and we need not comment further on it than to say it was sufficient to raise the issues we shall discuss. The case was tried before a jury, and the cause is before us on the appeal of defendant from a judgment recovered by plaintiffs.

The evidence discloses—and the court so instructed the jury—that defendant, during the period of the transaction in controversy, was a fraternal beneficiary association authorized to do business in this state. It has a lodge system with ritualistic form of work, a representative form of government, and issues benefit certificates in accordance with its constitution and laws. Its head lodge and office is in Nebraska, but it has branch lodges or "camps" scattered over the country, among them "Oakwood Camp No. 82," in Kansas City, of which Britt became a member.

The certificate issued to Britt stated that it was "issued and accepted subject to all of the conditions on the back hereof, and subject to all of the laws, rules and regulations of this fraternity now in force or that may hereafter be enacted, and shall be null and void if said sovereign does not comply with all of the said conditions and with all of the laws, rules and regulations of the Sovereign Camp of the Woodmen of the World, that are now in force or which may hereafter be enacted, and with the by-laws of the camp of which he is a member."

The by-laws gave certain sovereign officers authority to levy assessments to pay death losses, etc., and provided in addition that "every member of this order shall pay to the clerk of his camp each month one assessment * * * which shall be credited to and known as 'Sovereign Camp fund' and he shall also

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes 134 S.W.—68

pay such camp dues as may be required by the by-laws of his camp. He shall pay any additional assessments for the Sovereign Camp fund and camp dues or either which may be legally called." The failure to pay any such dues or assessments on or before the first of the month following ipso facto suspended the member, and the by-laws provided that "during such suspension his beneficiary certificate shall be void." The regular monthly assessment the certificate required Britt to pay was \$2.05, to the Sovereign Camp fund, and dues to the local camp of 25 cents.

The suspension of Britt from membership in the order and the forfeiture of his certificate were and are claimed by defendant to have resulted from his failure to pay regular assessment No. 206, due November 1, 1907. Plaintiffs contend that he paid that assessment, but it is conceded that none of the subsequent monthly assessments were paid. Although such assessments were regular and definite, it appears to have been the custom of defendant to observe the same formalities with respect to them as were provided in the laws for levying other assessments. On October 20, 1907, the Sovereign Clerk was notified in writing by the Sovereign Commander and the Chairman of the Sovereign Finance Committee "that one assessment was necessary to be collected from all members during the month of November, 1907." On receipt of this notice the Sovereign Clerk sent out a notice of the assessment to the clerks of the local camps, including the clerk of Oakwood Camp No. 82. In this notice the clerk was requested "to mail to the last known post office address or deliver to every member of your camp on or before the 5th day of November, 1907, a reminder to pay said Sovereign Camp fund assessment and camp dues." It was the practice of the local clerks to send out notices to the members in obedience to these requests from the Sovereign Clerk. Such was the method followed with respect to the regular assessment for the months intervening between assessment No. 206 for November, 1907, and the death of Britt which, as stated, occurred in May, 1908. The answer pleaded "that the said Edward Britt did fail to pay said assessment for the said month of November on or before the 1st day of December following, and by reason of his failure to pay the same, his certificate became null and void, and he was on that day suspended and is not entitled to recover in this action, * * * and that, although assessments have been regularly made each month since the first day of December, 1907, up to and including the date at which the said Edward Britt died, he has never paid any monthly assessment, nor has any one else paid it for him."

The laws gave a member who was suspended for the nonpayment of assessments

or dues 10 days from the date of his suspension in which to be reinstated, and required the Sovereign Clerk to mail a written notice of suspension to the delinquent member, but provided that "the failure to send such notice shall in no wise affect the legal suspension of such member." The evidence of defendant is to the effect that notices of the assessments from November, 1907, to the time of the death of Britt, were mailed to him and that he received them, and that a suspension notice was mailed and received by him. This evidence is contradicted by that of plaintiffs. Britt was sick during the entire period, and was confined to his bed from January, 1908, to his death. His wife received all his mail, and she states that no notices of assessments and no notices of suspension were received until three days before her husband died. She called at once on the clerk of the camp and offered to pay all arrearages of assessments and dues, but the clerk refused to receive such payment, except on the impossible condition that she produce a certificate of good health from the camp's physician.

The evidence of plaintiffs tends to show that both Britt and his wife supposed—and rightly so—that he had not been and would not be suspended for the reason that his assessments and dues were being paid by his camp during the protracted period of what proved to be his last illness. It appears that one of the vaunted fraternal features of the association was the custom of local camps (known to and approved by the Sovereign Camp) to come to the aid of disabled and distressed members by paying their Sovereign Camp assessments and dues until they could get on their feet. This custom was known to Britt and relied on by him. Early in November, Mrs. Britt went to the clerk of the camp and said to him (so she testifies): "Mr. Werner, I don't know when I will be able to pay any more. Mr. Britt is sick in the hospital, and I would like you to notify your lodge members to that effect. * * * " Mr. Werner replied: "I called in the lodge last Wednesday night, and they will take a vote on it next Wednesday night." Mrs. Britt then continued: "I have my father and mother and little baby to take care of, and I can't possibly take care of these [assessments]." At this time Britt was "sovereign" of the local camp, and the camp records show he remained in that office and was recognized as sovereign until January, 1908, when his successor was elected. There are other facts in the record tending to show that the local camp carried Britt, and that the Sovereign Camp did not move to suspend him until he stood in the shadow of death. All such facts are contradicted by the evidence of defendant, but, as the evidence of plaintiffs is substantial, the two principal questions for our solution are, first, Does the record present issues of fact for the jury

to determine? and, second, If it does, were such issues correctly defined in the instructions of the court?

Our answer to the first question is that the pleadings and evidence do present issues of fact which, if solved in favor of plaintiffs, would entitle them to the judgment before us. Fraternal beneficiary associations are regarded as beneficent in their purposes, and have been the recipients of legislative and judicial favor. Courts recognize prompt payment of assessments and dues as necessary to their existence and the equitable administration of their affairs, and uphold stipulations in their laws imposing the penalty of suspension from membership and forfeiture of all membership rights on the member who fails to pay such charges in the time and manner prescribed by such regulations. But the law never looks with favor on forfeitures, and when one is claimed by a fraternal beneficiary association the law requires the claim of forfeiture to be based on the violation by the member of a precise condition laid down in the contract between the association and the delinquent member. 2 Bacon on Benefit Societies and Life Insurance (3d Ed.) § 377.

The contract between defendant and Britt consisted of the beneficiary certificate issued to him and of defendant's constitution and by-laws, which, by agreement, were made a part of the certificate. This contract contained stipulations that automatically provided for his suspension from membership and the forfeiture of his insurance, if he failed to pay his assessments and dues within a stated and very limited period. He failed to pay such charges for five months, and possibly for six months, and, but for other facts to which we shall refer, we would hold his delinquency ipso facto destroyed his membership and forfeited his beneficiary certificate. The contract contemplated and provided for two kinds of benefit assessments, one a regular monthly assessment, and the other such additional assessments as the sovereign body might find it necessary to impose from time to time for the purpose of paying death benefits and other proper expenses. The by-laws properly provided for giving members timely and proper notice of what might be termed irregular assessments, but contained no express requirement that such notice should be given of regular monthly assessments and dues. Nor was it necessary that the by-laws should require that notice of regular assessments and dues be given. We quote approvingly the following excerpt from the opinion of the St. Louis Court of Appeals, in *Lavin v. Grand Lodge*, 104 Mo. App., loc. cit. 17, 78 S. W. 329: "The regular assessments levied by the defendant order to pay death losses are classified according to the age of the members. They are monthly and payable on or before the 28th day of each month. They are as regular as clockwork; are certain as to amount and time of pay-

ment; hence no special notice of their levy or of the amount or time of payment was necessary. A member holding a beneficiary certificate of the order receives this notice once for all when he receives the certificate which, in effect, incorporates this law of the order into the contract of insurance, and a member, by accepting the certificate, agrees to pay the monthly assessments as required by law 196, as a condition precedent to the continuance of his certificate in force. That it is competent for a beneficiary association and a member thereof to so agree it seems to us admits of no doubt, and that such an agreement is just and fair to all the members of the order holding insurance certificates is self-evident."

But this rule applied to the facts of the case in hand did not relieve defendant of the duty of giving Britt notice of the assessments in question, for the reason that defendant elected to treat such assessments not as regular, fixed charges on its members, but as assessments to be levied by the Sovereign Camp, in the form and manner prescribed for levying irregular assessments. It seems to have been in the contemplation of the head camp that even some regular assessments might be unnecessary, and consequently, on the 20th day of every month, the officers charged with the duty of levying assessments met and made the approaching regular assessment the subject of a special levy, and required the Sovereign Clerk to cause notice of the assessment to be given the members. In other words, they converted regular charges into special charges. This practice was known to the members, and that it was relied on as a settled course of business is made evident in the evidence of defendant, which makes so much of the contention that such notices in full were given to Britt.

In such state of facts, we think defendant should be held to its own characterization of the assessments in controversy, and, since it treated them as special assessments, we should so regard them and hold defendant to performance of the stipulation requiring the giving of notice. "A member of such society is presumed to know its laws, and the contract of insurance is to be construed as having been made under the limitations of those laws. But a member has a right to look to the general conduct of the society itself, in respect of the observance of its laws, particularly those relating to his own duties, and if the society by its conduct has induced him to fall into a habit of nonobservance of some of its requirements, it cannot, without warning to him of a change of purpose, inflict the penalty of strict observance." *McMahon v. Macabees*, 151 Mo. 522, 52 S. W. 384.

And, further, we think the evidence of plaintiffs strongly tends to show that the automatic suspension of Britt and the forfeiture of his certificate were arrested by the undertaking of the local camp to pay his as-

assessments and dues, and that such undertaking was in accordance with a uniform custom known to and approved by the Sovereign Camp, and that defendant did not attempt to violate this custom until it perceived that a loss was impending. These facts bring the case squarely within the doctrine of *Burke v. Grand Lodge*, 136 Mo. App., loc. cit. 459, 118 S. W. 496, where we said: "The subordinate lodge, unlike a stranger, was under the supervision and control of the grand lodge. The grand lodge could interdict the custom and put the local lodge under ban if it disobeyed. It had the power, and exercised it, of regulating and controlling its subdivisions and their members. It would be unjust and inequitable to say that the grand lodge might receive the benefits from a custom in derogation of its laws, and then repudiate the obligations necessarily resulting from such custom. The effect of its approval of the custom was to say to Burke: 'The grand lodge encourages the beneficent practice of your local lodge of preventing suspensions and forfeitures by giving aid from its treasury to its unfortunate but worthy members. You need not fear a forfeiture, if you bring yourself within the pale of this custom.' We have here all the elements essential to a waiver. The course of dealing of the subordinate lodge became the course of dealing of the head lodge. Burke had a right to rely on it and to act on the supposition that he would not be summarily deprived of this important benefit without notice. On the hypothesis of facts presented by the evidence of plaintiff, the automatic forfeiture of the insurance provided in law 197 was destroyed by the custom under consideration, and no suspension or forfeiture could be declared without notice to the member."

If, as plaintiffs' evidence goes to show, the local lodge, pursuant to this custom, assured Mrs. Britt that her husband's assessments and dues would be paid during his illness, it would be shocking to conscience to permit defendant to repudiate that agreement at a time when it was too late for the member to help himself. If, on account of defendant's failure to give notice of assessments and timely notice of a suspension and of the assurance of the local lodge that, pursuant to a custom authorized by defendant, no suspension or forfeiture would be declared during his illness, Britt was lulled into a feeling of security and failed to pay his assessments and dues, defendant could not declare a forfeiture on account of the nonpayment of such charges, at least not until it had notified him of its decision to carry him no longer, and had given him a reasonable opportunity to pay his arrearages.

The court committed no error in sending the case to the jury.

Passing to the second proposition, we find the instructions, which are numerous and

lengthy, correctly define the issues of the case and are in accord with the views just expressed. We do not find it necessary to lengthen this opinion by further reference to them.

The case was fairly tried, and the judgment is affirmed. All concur.

MUNDEN v. HARRIS et al.

(Kansas City Court of Appeals. Missouri. Jan. 30, 1911.)

1. PROPERTY (§ 2*)—NATURE OF "PROPERTY."
Property may consist of incorporeal things consisting of rights common in every man, and the privilege and capacity to exercise a right, though unexercised, is "property" of which one cannot be deprived.

[Ed. Note.—For other cases, see Property, Cent. Dig. § 2; Dec. Dig. § 2.*]

For other definitions, see Words and Phrases, vol. 6, pp. 5693-5728; vol. 8, pp. 7768-7770.]

2. INJUNCTION (§ 96*)—PERSONAL RIGHTS—"RIGHT OF PRIVACY."

The "right of privacy," though an intangible right, is a legal right, for an invasion of which the law gives relief in equity by injunction, and such right extends to the unauthorized use by one person of the picture of another.

[Ed. Note.—For other cases, see Injunction, Cent. Dig. § 167; Dec. Dig. § 96.*]

For other definitions, see Words and Phrases, vol. 7, p. 6228.]

3. TORTS (§ 8*)—PERSONAL RIGHTS—RIGHT OF PRIVACY.

One has the exclusive right to his picture as a property right of material profit, and, unless he has expressly or impliedly consented to its use by others, he may sue at law for damages for the invasion of the right.

[Ed. Note.—For other cases, see Torts, Cent. Dig. § 8; Dec. Dig. § 8.*]

4. TORTS (§ 5*)—DAMAGES—SPECIAL DAMAGES.

Where one's exclusive right to his picture is invaded, special damages, though recoverable, if demanded, are not necessary in an action at law for damages, and general damages are recoverable without a showing of specific loss.

[Ed. Note.—For other cases, see Torts, Cent. Dig. § 5; Dec. Dig. § 5.*]

5. DAMAGES (§ 91*)—EXEMPLARY DAMAGES—GROUNDS.

For the malicious invasion of one's right of privacy by the unauthorized use of his picture, exemplary damages are recoverable.

[Ed. Note.—For other cases, see Damages, Cent. Dig. § 194; Dec. Dig. § 91.*]

6. LIBEL AND SLANDER (§ 16*)—PUBLICATION—CONSTITUTING "LIBEL."

Under Rev. St. 1909, § 4818, defining "libel" as any publication exposing one to public hatred, contempt, or ridicule, the publication, without consent, of the picture of a child five years old, with the false statement that "Papa is going to buy mamma an Elgin watch for a present, and some one (I must not tell who) is going to buy my big sister a diamond ring, so don't you think you ought to buy me something?" as an advertisement in aid to business, is libelous, as exposing the child to ridicule.

[Ed. Note.—For other cases, see Libel and Slander, Cent. Dig. §§ 1-9; Dec. Dig. § 16.*]

For other definitions, see Words and Phrases, vol. 5, pp. 4116-4125.]

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

7. INFANTS (§ 60*)—TORTS—LIABILITY.

An infant is not liable for slander or libel, where he is under the age of seven years, and, where he is over the age of seven and under the age of fourteen years, he is not liable, unless he is capable of entertaining the malice essential in libel and slander.

[Ed. Note.—For other cases, see Infants, Cent. Dig. § 166; Dec. Dig. § 60.*]

8. INFANTS (§ 59*)—TORTS—LIABILITY.

A child of tender years is civilly liable for a trespass, since intent is not material.

[Ed. Note.—For other cases, see Infants, Cent. Dig. § 164; Dec. Dig. § 59.*]

9. INFANTS (§ 59*)—TORTS—LIABILITY.

An infant is not guilty of fraud, unless he has sufficient years of discretion to invent and perpetrate a fraud.

[Ed. Note.—For other cases, see Infants, Cent. Dig. § 161; Dec. Dig. § 59.*]

10. LIBEL AND SLANDER (§ 6*)—PERSONS WHO MAY BE LIBELED.

To falsely charge an infant of tender years with being afflicted with a loathsome disease, or with a private and humiliating physical malformation, is libelous.

[Ed. Note.—For other cases, see Libel and Slander, Cent. Dig. §§ 3-16; Dec. Dig. § 6.*]

Appeal from Circuit Court, Jackson County; John G. Park, Judge.

Action by Onel Munden, by next friend, against P. S. Harris and others. From a judgment for defendants rendered after sustaining a demurrer to the petition, plaintiff appeals. Reversed and remanded.

John C. Nipp, for appellant. Haff & Michaels, for respondents.

ELLISON, J. This action is stated in a petition with two counts, one for damages for disturbing plaintiff's privacy by publishing his picture without his consent, and the other for libel in publishing the picture, along with false statements attributed to plaintiff. In each count punitive damages were asked, but no special damages were alleged. Defendants demurred to the petition, as not stating a cause of action. The demurrer was sustained, and, plaintiff refusing to amend, judgment was rendered against him, and he appealed.

Plaintiff is an infant five years old, and the action was brought through a "next friend," as required by statute. The facts stated in the first count of the petition are that defendants, being jewelry merchants in Kansas City, invaded plaintiff's right of privacy by willfully and maliciously using, publishing, and circulating his picture for advertising their business of selling merchandise, thereby destroying his privacy and humiliating, annoying, and disgracing him, and exposing him to public contempt. In the second count the facts, after certain preliminary allegations, are stated to be that:

"Defendants did wrongfully and maliciously compose, print, and publish and cause to be composed, printed, and published, of and concerning plaintiff, together with his pho-

tograph, the following false, defamatory, scandalous, and malicious libel, meaning thereby, and so understood by persons who saw the same, to impute to plaintiff a falsehood, and attributing to plaintiff in said publication, a statement which was false and malicious, to wit:

'Papa is going to buy mamma an Elgin watch for a present, and some one (I mustn't tell who) is going to buy my big sister a diamond ring. So don't you think you ought to buy me something? The payments are so easy, you'll never miss the money if you get it of

[Picture of Plaintiff.]

Harris-Goar Co.,
1207 Grand Ave.,
Kansas City, Mo.
Gifts for Everybody,
Everywhere in their
Free Catalogue."

The upshot of defendants' position in support of their demurrer to the first count is that there is no right of privacy of which the law will take notice; or, stated differently, their argument is that the law does not afford redress for an invasion by one person of another's privacy, unless it is accompanied by some injury to his property or interference therewith, and that the mere printing and publishing one's picture does not and cannot affect his property. The cases principally relied upon by defendants are those of *Roberson v. Rochester Folding Box Co.*, 171 N. Y. 538, 64 N. E. 442, 59 L. R. A. 478, 80 Am. St. Rep. 828; *Henry v. Cherry & Webb*, 30 R. I. 13, 73 Atl. 97, 24 L. R. A. (N. S.) 991; and *Atkinson v. Doherty & Co.*, 121 Mich. 372, 80 N. W. 285, 46 L. R. A. 219, 80 Am. St. Rep. 507, in the first of which, in the course of an interesting opinion concurred in by a majority of the court, is found a course of reasoning which denies that a right of privacy exists which can be protected by a court of equity. That case was a bill in equity to enjoin a mercantile firm from publishing a young woman's picture as an attraction to an accompanying advertisement of a certain brand of flour. The court, in denying the right of equity to protect a person thus embarrassed, shows its unfriendliness to the claim in the following language: "The so-called right of privacy is, as the phrase suggests, founded upon the claim that a man has the right to pass through this world, if he wills, without having his picture published, his business enterprises discussed, his successful experiments written up for the benefit of others, or his eccentricities commented upon, either in handbills, circulars, catalogues, periodicals, or newspapers, and, necessarily, that the things which may not be written and published of him must not be spoken of him

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

by his neighbors, whether the comment be favorable or otherwise."

The conclusion of the court is based much upon the statement that the case there presented was without precedent, and, while admitting that equity, in the beginning and early part of its administration, was made up of growth, case by case, which was without precedent, being based merely upon the conscience of the chancellor, yet there came a time when its growth ceased, and what was formerly the personal conscience of the chancellor became a "juridical conscience," which would only permit relief to be administered in cases where it had been administered before, save in those instances "where there can be found a clear and unequivocal principle of the common law which either directly or mediately governs it, or which by analogy or parity of reasoning ought to govern it." With such consideration as a guiding thought, the court refused relief, because there was no precedent for it, and it did not appear to be within any recognized legal principle. This view is approved in *Henry v. Cherry & Webb*, which was an action at law in the nature of trespass for damages for an invasion of the right of privacy by using and publishing the plaintiff's picture as an advertisement in aid of the sale of merchandise. In such respect it was like *Roberson v. Rochester Folding Box Co.* Though one was an application in equity for restraint and the other was for damages at law, yet as each, by similar reasoning, denied that there was any such right, both denied any remedy.

The remaining case (*Atkinson v. Doherty & Co.*) was where, after the death of John Atkinson, a celebrated lawyer, the defendants, who were manufacturers of cigars, named a brand of their make the "John Atkinson Cigar," and placed the name, together with his picture, as a label on cigar boxes. His widow sought to restrain such acts by injunction. Her right was denied, and again the reasoning in *Roberson v. Rochester Folding Box Co.* was approved. But it will be observed that, while the *Roberson* Case involved the right of privacy of the plaintiff's own picture, the *Atkinson* Case, like that of *Schuyler v. Curtis*, 147 N. Y. 434, 42 N. E. 22, 31 L. R. A. 286, 49 Am. St. Rep. 671, sought to protect the right of privacy to the name of the deceased relative, a case which did not call for much that was said in the course of the opinion concerning the general right of privacy, except by way of argument or illustration; and what was said beyond the right of privacy, which may be claimed by relatives of a deceased, must be regarded as dictum. The point of agreement in these cases is that no relief can be had by way of protecting a right of privacy, for the reason that it was not a right of property and did not fall within any legal principle.

But courts which refuse assent to those

decisions assert that it is a right of property, and that there is such legal principle, old and well recognized, though they concede the case is new in its facts. The main ground for division of opinion in these courts is at last found to be based upon those conflicting assertions. So, therefore, it appears that, if it can be established that a person has a property right in his picture, those who now deny the existence of a legal right of privacy would freely concede a remedy to restrain its invasion, for all agree that equity will forbid an interference with one's right of property.

Property is not necessarily a taxable thing any more than it is always a tangible thing. It may consist of things incorporeal, and things incorporeal may consist of rights common in every man. One is not compelled to show that he used, or intended to use, any right which he has, in order to determine whether it is a valuable right of which he cannot be deprived, and in which the law will protect him. The privilege and capacity to exercise a right, though unexercised, is a thing of value—is property—of which one cannot be despoiled. If a man has a right to his own image as made to appear by his picture, it cannot be appropriated by another against his consent. It must strike the most obtuse that a claim of exclusive right to one's picture is a just claim. Judge Gray, in his dissenting opinion in *Roberson v. Rochester Folding Box Co.*, supra, said, at page 563 of the report, page 450 of 64 N. E. (59 L. R. A. 478, 89 Am. St. Rep. 828), that: "The proposition is, to me, an inconceivable one that these defendants may, unauthorizedly, use the likeness of this young woman upon their advertisement, as a method of attracting widespread public attention to their wares, and that she must submit to the mortifying notoriety, without right to invoke the exercise of the preventive power of a court of equity." One may have peculiarity of appearance, and if it is to be made a matter of merchandise, why should it not be for his benefit? It is a right which he may wish to exercise for his own profit, and why may he not restrain another who is using it for gain? If there is value in it, sufficient to excite the cupidity of another, why is it not the property of him who gives it the value and from whom the value springs?

It may be admitted that the right of privacy is an intangible right; but so are numerous others which no one would think of denying to be legal rights, which would be protected by the courts. It is spoken of as a new right, when, in fact, it is an old right with a new name. Life, liberty, and the pursuit of happiness are rights of all men. The right to life includes the pursuit of happiness; for it is well said that the right to life includes the right to enjoy life. Every one has the privilege of following that mode of life, if it will not interfere with others, which will bring to him the

most contentment and happiness. He may adopt that of privacy, or, if he likes, of entire seclusion. The face of the majority opinion in *Roberson v. Rochester Folding Box Co.*, supra, while denominating the right of privacy as "a phrase" and "a so-called right," yet concedes that it is a something which to disturb is an "impertinence." The court recognizes the right, but, as has been already said, not considering it a property right, refused it the protection of the restraining power of a court of equity, and thereby confined the beneficent power of equity within too narrow bounds—bounds so limited as will permit the doing of acts which shock the moral sense.

We therefore conclude that one has an exclusive right to his picture, on the score of its being a property right of material profit. We also consider it to be a property right of value, in that it is one of the modes of securing to a person the enjoyment of life and the exercise of liberty, and that novelty of the claim is no objection to relief. If this right is, in either respect, invaded, he may have his remedy, either by restraint in equity or damages in an action at law. If there are special damages, they may be stated and recovered; but such character of damage is not necessary to the action, since general damages may be recovered without a showing of specific loss; and if the element of malice appears, as that term is known to the law, exemplary damages may be recovered.

It ought, however, to be added that though a picture is property, its owner, of course, may consent to its being used by others. This consent may be express, or it may be shown by acts which would be inconsistent with the claim of exclusive use, as if one should become a man engaged in public affairs, or who, by a course of conduct, has excited public interest. And it ought also to be understood that the right of privacy does not extend so far as to subvert those rights which spring from social conditions, including business relations. By becoming a member of society one surrenders those natural rights which are incompatible with social conditions. In the nature of things, man in the social organization must be referred to and spoken of by others, and this may be done freely, so long as it is free from slander. But the difference between that right and a claim to take another's picture against his consent, or to make merchandise of it, or to exhibit it, is too wide for hesitation in condemning the act and granting proper relief. The foregoing views find ample support in thoroughly considered cases decided in recent years. *Pavesich v. New Eng. Life Ins. Co.*, 122 Ga. 190, 50 S. E. 68, 69 L. R. A. 101, 106 Am. St. Rep. 104; *Vanderbilt v. Mitchell*, 71 N. J. Eq. 632, 63 Atl. 1107; *Edison v. Edison Mfg. Co.*, 73 N. J. Eq. 136, 67 Atl. 392; *Foster-Milburn Co. v. Chinn*, 134 Ky. 424, 120 S. W. 364. These cases are supported by the dissenting opin-

ion of Judge Gray, writing for the minority of the court, in *Roberson v. Rochester Folding Box Co.*, supra. And we think the principle they announce is practically conceded in *Schuyler v. Curtis*, 147 N. Y. 434, 42 N. E. 22, 31 L. R. A. 286, 49 Am. St. Rep. 671, hereinbefore cited. Several of these cases make acknowledgment to a very able article in 4 *Harvard Law Review*, 193.

In the *Schuyler Case* a near relative of the deceased, Mrs. Schuyler, sought to enjoin admirers of her many virtues and good deeds from placing her statue in a public place. It was held that relief could not be had on the ground of the deceased's right of privacy, as that right necessarily died with her; and that, so long as no aspersion was intended to be cast upon the dead, so long as the dead were intended to be honored in appropriate manner, and not slurred or defamed in such way as to outrage the feelings and sensibilities of surviving relatives, there could be no cause of complaint by them. That the alleged injury in that case to the sensibility of relatives was fanciful, rather than real, and it was therefore not a subject for interference by the courts.

We will now consider whether a cause of action for libel is stated in the second count. Our statute (section 4818, Rev. St. 1909) declares a libel upon a person to be a thing "made public by any printing, writing, sign, picture, representation or effigy tending to provoke him to wrath, or expose him to public hatred, contempt or ridicule. * * *" The printed matter set forth in the petition is the utterance of falsehoods, of a character tending to incite ridicule.

It was argued that the printed matter published consisted of purported utterances of plaintiff, which were falsehoods, and that to charge one in writing with being a falsifier was libelous per se. We are not inclined to base our decision on that ground, since we believe the statement purporting to have been made by plaintiff was palpably not intended to be understood, and would not be taken to be, a false statement of fact, but rather as an imaginary statement attributed to him by defendants for purposes of advertisement of their goods. But it seems to us clear that, considering the publication of the picture and the printed matter as a whole, it would expose plaintiff to ridicule and contempt, unless his age (to which we will presently refer) would exempt him. It is a public statement of what plaintiff had said about the private affairs of his father in relation to a present for his mother, and is a reference to the private social affairs of his sister. Connecting these statements with his picture and using them as an advertising aid to business was necessarily bound to cause him to undergo the vexation and humiliation of ridicule, though it was not believed he had really made the statements. It does not require any imagination to realize what a suggestive handle it would give to the teas-

ing propensities of his fellows, to be used by them without stint and without regard to his distress. What right had these defendants to thus wrong him? It would be a matter of regret if the law did not afford him a remedy, and such a one as would probably prevent repetition. The extreme to which Judge Parker went on the right of privacy in *Roberson v. Rochester Folding Box Company* did not lead him to say that a party was altogether without remedy. At pages 556 and 557 of the report (64 N. E. 442, 59 L. R. A. 478, 89 Am. St. Rep. 828), he concedes that libel could be maintained.

But we are not left to a mere concession. The case of *Pavesich v. New England Life Ins. Co.*, supra, like that at bar, was instituted by petition in two counts, one for damages for an invasion of the right of privacy by publishing the plaintiff's picture in connection with an advertisement, wherein he was said to have uttered language in advancement of the business advertised, and the other for libel. The opinion of Justice Cobb is not only an able and exhaustive consideration of the remedy in equity for restraint, and at law in damages, for an invasion of the right of privacy, but it includes a distinct and separate affirmation of the right to maintain libel, and that in a case of the kind we have now before us the matter was such that if found by a jury to be untrue, would have been libelous per se, and no special damages need be alleged. So it was determined by the Supreme Court of the United States that the publication of a woman's picture in connection with an advertisement of whisky was a libel which might work serious harm to her standing with some portions of the community. *Peck v. Tribune Co.*, 214 U. S. 185, 29 Sup. Ct. 554, 53 L. Ed. 960, overruling same case in 154 Fed. 330, 83 C. C. A. 202.

The plaintiff is an infant only five years old, which fact brings a subject into the case deserving serious consideration. Can an infant be slandered or libeled? The question is easily answered in the affirmative, yet the answer involves the further consideration whether it should not be qualified by way of exception. It seems well settled that an infant is liable for his torts, among which are libel and slander. *Fears v. Riley*, 148 Mo. 49, 49 S. W. 836; *Jennings v. Rundall*, 8 T. R. 335; *Starkie on Slander*, § 347. But that statement cannot be accepted broadly, for malice and evil intent are necessary ingredients in these torts, and therefore sometimes the age of the infant may become of the highest importance in determining his liability. If he be of such immature and tender years that he cannot form malice or entertain conscious evil intention, he cannot be guilty of either libel or slander. It would be a ridiculous statement to say that a prattling child, two or three years old, could slander or libel another. It would be,

almost, if not quite, as ridiculous to say that an infant 20 years old could not entertain malice, so as to be guilty of these wrongs. Where, then, is the line to be drawn? We think the rule in criminal cases applies, for they and libel and slander have malice for a common ingredient. *Doll incapax* finds place in the consideration of the question. An infant is not liable to an action of slander "until he is *doll capax*—capable of mischief—which, presumptively is not until he is 14 years of age." *Tyler on Infancy*, § 127; *Newell on Slander & Libel*, 370; *Odgers. Libel & Slander* (star page) 353. The rule at common law, in force in this state (*State v. Tice*, 90 Mo. 112, 2 S. W. 269) is that a child under seven years of age is *doll incapax*—incapable of committing a crime—and between that age and 14 he may or may not be; over 14 he is as an adult. And so if he is under seven he should be considered incapable of libel or slander. These wrongs are indictable in this and many other countries as state offenses, and it would be an inconsistency to be avoided, if possible, to say, as a matter of law, in one forum, that the child could be capable of the act, and in the other that he could not.

It is not inconsistent with, nor an objection to, this view that a child of tender years may commit a trespass and be civilly liable for damages. *Doll capax* cuts no figure in that instance; for a trespass does not necessarily imply malice or evil intention. So a boy under seven years was held liable for breaking down shrubbery and destroying flowers. *Huchting v. Engel*, 17 Wis. 237, 84 Am. Dec. 741. And Judge Cowen, in *Hartfield v. Roper*, 21 Wend., loc. cit. 621, 34 Am. Dec. 273, cites a case where an infant only four years old was stated to be liable in trespass. But in such extreme instances it is conceded that punitive damages could not be had; this, on the ground that wantonness or malice could not be imputed.

Though in some degree allied to the point in discussion, it is not necessary for us to say at what tender age, arbitrarily fixed, an infant would not be liable for fraud, but manifestly there is a period of immaturity when he could not be guilty of wrongful deception. Clearly he should be of such years of discretion that such a wrong could be fairly charged to him. In *Watts v. Cresswell*, 3 Eq. Cas. Abr. 515 (9 Vin. Abr. 415), it was said that: "If an infant is old enough to contrive and carry out a fraud, he ought to make satisfaction for it." Which is but another mode of saying that, unless he has sufficient years of discretion to invent and perpetrate a fraud, he could not be held to have committed one.

Though, as thus shown, a child of tender years be incapable of uttering a slander or publishing a libel, it does not follow that he may not be slandered or libeled. The two positions are not dependable upon one an-

other. In some instances and in some stages of infancy, opprobrium could not affect a child. Much would depend upon the nature of the offensive imputation. If an infant at the breast of his mother was charged with being a thief, it probably would not be slander, since it is not possible for him to commit larceny, either in point of fact or point of law. But if such infant should be charged with being afflicted with a loathsome and permanent disease, or with a private and humiliating physical malformation, these are charges which could be true, and, furthermore, they are species of defamation which would grow and the harmful effect of which would increase with the passing of time, and we can see no reason why it would not be slander. It has been decided that the fact that an infant is too young for criminal responsibility will not bar him of his action against his traducer. *Stewart v. Howe*, 17 Ill. 71. By the statute of Illinois the common-law, criminal irresponsibility for crime was raised from seven to ten years in cases of larceny, and a girl, of age between nine and ten, was charged with being "a smart little thief." The defendant sought to escape liability on the ground that she could not commit the crime of theft. The judge delivering the opinion became heated and indignant, and characterized the defendant as a "reputational infanticide," and said that he "would sooner see the action abolished than to read out infancy from the pale of its protection."

The foregoing is sufficient for an understanding of our views in relation to plaintiff's liability to be wronged, or, if it may be so expressed, his capacity to be injured. In our opinion, notwithstanding he was but five years old, he was liable to the ridicule of his fellows. His susceptibility to vexation and humiliation was at hand, and his appreciation of the outrage committed by defendants would grow in greater proportion than would the failure of memory in his associates.

It is well enough to add that a trial may disclose that plaintiff was less than five years old; and so much less as not to be the subject of ridicule or contempt, or public hatred, by any appreciable number of the community (*Peck v. Tribune Co.*, supra). If so, then, under the views we have expressed, he was not libeled. It may be that his years and his intelligence were such that to be a subject of ridicule, contempt, or hatred would be a matter over which persons would differ, in which event the question could not be withdrawn from a jury, but would be for their consideration as to the law and the fact, as is proper in libel.

The result of the foregoing consideration is to reverse the judgment and remand the cause for trial. All concur.

CRAIG, Public Adm'r, v. BRADLEY.

(Kansas City Court of Appeals. Missouri.

Jan. 30, 1911.)

1. HUSBAND AND WIFE (§ 14*)—ESTATE IN ENTIRETY—EXISTENCE.

Estates by the entirety in personal property exist as at common law, unaffected by the married women's statutes.

[Ed. Note.—For other cases, see *Husband and Wife*, Cent. Dig. § 73; Dec. Dig. § 14.*]

2. HUSBAND AND WIFE (§ 14*)—ESTATE IN ENTIRETY—NOTES.

A note payable to husband and wife and arising from a sale of lands held by them in entirety belonged to the estate in entirety; full title vesting in her on his death.

[Ed. Note.—For other cases, see *Husband and Wife*, Dec. Dig. § 14.*]

3. HUSBAND AND WIFE (§ 14*)—ESTATE IN ENTIRETY—DEPOSITS.

Whether bank deposits by a husband alone in the name of both himself and wife are held in entirety depends upon intention; direction to keep the account in both names not being conclusive.

[Ed. Note.—For other cases, see *Husband and Wife*, Dec. Dig. § 14.*]

4. HUSBAND AND WIFE (§ 14*)—DEPOSITS—JOINT OWNERSHIP — EVIDENCE — SUFFICIENCY.

Evidence held to show that deposits in the name of husband and wife were intended to pass to the survivor.

[Ed. Note.—For other cases, see *Husband and Wife*, Dec. Dig. § 14.*]

5. HUSBAND AND WIFE (§ 14*)—TENANCY BY THE ENTIRETY—REQUISITES.

To constitute an estate in entirety, each tenant must have an ownership in the whole estate, and the right to claim by survivorship must be mutual.

[Ed. Note.—For other cases, see *Husband and Wife*, Cent. Dig. § 73; Dec. Dig. § 14.*]

6. HUSBAND AND WIFE (§ 14*)—ESTATE IN ENTIRETY—PROPERTY EMBRACED.

A note to a husband and wife or either for a loan made by joining their separate funds became part of the estate by the entirety which survived to her, being so intended.

[Ed. Note.—For other cases, see *Husband and Wife*, Cent. Dig. § 73; Dec. Dig. § 14.*]

7. HUSBAND AND WIFE (§ 14*)—ESTATE IN ENTIRETY—NATURE OF OWNERSHIP.

Owners of the estate by entirety take by the whole, and not by the moiety.

[Ed. Note.—For other cases, see *Husband and Wife*, Cent. Dig. § 73; Dec. Dig. § 14.*]

Appeal from Circuit Court, Johnson County; Sam. Davis, Judge.

Action by A. M. Craig, Public Administrator, against T. L. Bradley, administrator. From the judgment, both parties appeal. Reversed and remanded.

M. D. Aber and O. L. Houts, for Craig.
J. W. Suddath & Son, for Bradley.

ELLISON, J. William E. Bradley and Julia A. Bradley were husband and wife, without children. They lived to an old age, and died a few days apart, he on the 16th and she on the 29th of March, 1909. He left a will whereby he gave to Julia A. all of

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

his personal property during her life. Defendant was appointed administrator of the estate. Upon Julia's death plaintiff, as public administrator, was put in charge of her estate, and he then brought this action to recover the following personal property claimed by defendant to belong to him as administrator of her deceased husband: One note for \$3,600 payable to William E. and Julia Bradley, indorsed, interest paid to July 7, 1908, \$200 paid on principal. One note for \$2,500 payable to William E. Bradley and Julia A. Bradley or either of them, interest paid to January 4, 1909, \$200 paid on principal. Deposit in the Farmers' & Commercial Bank in the name of William E. and Julia A. Bradley, \$309.36. Deposit in the Bank of Holden in the name of William E. and Julia A. Bradley, \$181.10. The action is based on the claim that the property thus held by these parties was an estate in the entirety, and as such, upon the death of William, it became the sole property of Julia. The evidence showed the note for \$3,600 was given as purchase price of a tract of realty owned by William and Julia as an estate by the entirety. That the note for \$2,500 was given to them for borrowed money and of that sum Julia contributed \$1,083.75, which was drawn by her from the bank out of her separate account; the remainder, \$1,416.25, was drawn by William by check on their joint account. The evidence further showed that the deposits which constituted the joint account were made by William, and all checks on that account were drawn by him, with one exception when Julia drew \$25. The trial court found that plaintiff was entitled to the note for \$3,600, on the theory that, besides being made payable to both, it was the proceeds of the sale of real estate held by entirety, and, as such, was the property of the surviving wife. The court further found that the note for \$2,500 was not held in entirety, but that plaintiff was entitled to \$1,083.75 of it on the ground that that was the sum Julia put in it. The court found for defendant as to the balance of that note, and also for both bank accounts. There were some other findings not necessary to notice, not being in dispute. Both parties appealed.

The defendant's complaint is that William owned one half of the note for \$3,600, and that, therefore, he should have had judgment for one half, instead of plaintiff for all of it. Plaintiff's complaint is that the finding should have been in his favor for all of the note for \$2,500, as well as all of the bank accounts, on the ground of an estate by the entirety in Julia, his intestate. Defendant claims that, while formerly there could be estates in entirety in personal property, such estates have been, in effect, abolished by the married women's statutes which have been enacted in this state in recent years, which, in a property sense, disunite husband and

wife. So that his full claim is that, while the estate in entirety in lands has been preserved to husband and wife, such estate has been destroyed as to them in all personal property. The latter part of this claim is in direct conflict with the views of the Supreme Court. *Frost v. Frost*, 200 Mo. 474, 98 S. W. 527, 118 Am. St. Rep. 689; *Bains v. Bullock*, 129 Mo. 117, 81 S. W. 342. In the latter case it was said that while the statute abolished the legal unity between husband and wife, which gave rise to estates by the entirety, it left the estate itself intact. In the former case it is said that the married woman's statute did not have estates by entirety in view, and did not intend any interference therewith, and that such estates had not been altered in any respect. And to the same effect, considering similar statutes, are the cases of *Boland v. McKowen*, 189 Mass. 563, 76 N. E. 206, 109 Am. St. Rep. 663, and *Pray v. Stebbins*, 141 Mass. 219, 4 N. E. 824, 55 Am. Rep. 462. Therefore estates by the entirety still existing as at common law, the case should be determined unaffected by the married woman's statute.

The note for \$3,600 was not only payable to William and Julia, which alone was sufficient, but it arose from the sale of lands held by them in entirety. Undoubtedly it was an estate in entirety, and the trial court properly ruled that upon his death the full title remained in her.

Both bank accounts were made up of deposits by the husband alone in the name of both. Whether these were held in entirety depends upon the intention. The mere direction of the husband to the bank to keep the account in their joint names is not conclusive, but it has a favorable bearing on the question in the wife's favor. Thus, if a husband buys land with his own money and takes title in his wife, it will be presumed he intended it to be a provision for her. And the same is true where he causes a note to be taken in her name. *Case v. Espenschied*, 169 Mo. 215, 69 S. W. 276, 92 Am. St. Rep. 633. We consider that the evidence and circumstances surrounding these persons in connection with the presumption just stated leave no doubt that it was the intention of the husband, and indeed the wife's also, that the survivor was to have the whole of the accounts. The case of *Platt v. Grubb*, 41 Hun (N. Y.) 447, is much like the one before us, and it was there held that upon the death of the husband the wife took the whole account as survivor. We have given much consideration to the note for \$2,500. We think it is not improper ordinarily in an estate of this kind to test one party's right by the right of the other. May we not say by way of illustration that a test of plaintiff's right, as representing the wife in the capacity of administrator of her estate, is the right the husband would have had in that note had he survived her? For the

right to claim by reason of survivorship should be mutual. The right of each depends upon a corresponding right of the other; for to be an estate by the entirety each must have an ownership in the whole of the estate. Therefore, if the husband could not rightly have claimed the whole of the note, had he survived his wife, she cannot claim it as his survivor. The ground stated as the reason why the husband could not have claimed it as an estate by the entirety is that to allow such claim would be to annul the statute protecting the separate property of married women, to which we have already referred. That statute is that, in order that a husband may legally reduce his wife's personal property to his possession, she must give her express written consent. Section 4340, Rev. St. 1899 (Ann. St. 1906, p. 2382). But we think the husband made no effort to reduce to possession the wife's money which made up a part of that note. The facts show it to be a transaction of the wife's. She invested her money in the note in conjunction with her husband's money, and she, as well as he, had the note taken in the name of both so as to become an estate by the entirety. This undoubtedly she could legally do; for the statutory emancipation of married women, as regards their rights of property, enable them to deal with such property as though they were unmarried. Would the statute, therefore, have stood in the way of the husband's claim of an estate in the entirety had he survived the wife? Do not the facts disclosed in the record leave the statute without application? We do not intend to intimate a decision of a case not before us, and only indulge in these suggestions by way of illustration. But we conclude that at least as to the wife's claim, which is here involved, the note was held as an estate by the entirety; and, when William died, Julia remained the owner of the whole of it, and plaintiff, as her administrator, is now entitled to it.

There have been other grounds suggested to the effect that, where the wife has advanced a part of the money for which a note is given to her and her husband, it is unjust to allow him the whole of it in case he outlives her. The same suggestion could, of course, be made were the positions of the parties reversed. Under the law, it seems there ought not to be given any weight to this suggestion. We cannot see how heed can be given to it without destroying estates by the entirety except in cases of devises or gifts; for, if the consideration given for the property is to be inquired into and each party is to get back the share he or she put in, there could not be an estate by the entirety. There are no words more antithetical than "share" and "entire." The law seems to be well settled that the fact of one of the parties advancing a part or even all of the consideration will not prevent the es-

tate arising therefrom being one in entirety. In *Shields v. Stillman*, 48 Mo. 82, and *Draper v. Jackson*, 16 Mass. 490, the consideration for which a note was given to husband and wife was rent for the wife's separate property; and in *Allen v. Tate*, 58 Miss. 585, the consideration came from the husband. These are cited because immediately at hand; but all the cases on the subject show that the fact of one party or the other advancing all or a part of the consideration out of which the estate arose does not influence its effect as an estate in the entirety. See, also, *Freeman on Cotenancy and Partition*, § 68. In *Frost v. Frost*, 200 Mo. 474-478 et seq., 98 S. W. 527, 118 Am. St. Rep. 689, no question was made that land belonged to husband and wife by estate in entirety without regard to how much of the funds of either went into the purchase money. The only ground where it can be said that the wife or her heirs could reach the estate claimed to be held by the entirety for the amount of her money that went into it would be in the supposition spoken of above, where the husband used her money for the purchase without her consent in writing as provided by the statute to which we have already referred. But, as we have seen, no such case is presented.

It is insisted that the case of *Johnston v. Johnston*, 173 Mo. 91, 73 S. W. 202, 61 L. R. A. 166, 96 Am. St. Rep. 486, stands in the way of the views above expressed. There are some statements in the opinion in that case which cannot be reconciled with the case of *Frost v. Frost*, supra, and in all points of difference we must follow the latter. That case refused to allow an estate by the entirety in favor of the surviving husband in a note taken by him in name of himself and wife where the wife's money made up a part of the consideration and allowed the claim of her heirs to the amount of her money. That conclusion is based on a statement of facts showing that an estate by the entirety was not intended, but, on the contrary, the note and mortgage were taken to secure to each party the sums they respectively, advanced. Passing by the process whereby such intention was ascertained aliunde the note and mortgage, and not considering whether the right existed to find out intentions outside the terms of the papers in the absence of fraud or mistake, yet it will be observed that Judge Marshall laid stress on the terms of the note itself (see pages 103, 104, of the report, p. 205 of 73 S. W. [61 L. R. A. 166, 96 Am. St. Rep. 486]). But, regardless of how the intention of the parties was ascertained, the fact remains that in that case it was considered that the parties did not intend that an estate by entirety should be the result of the transaction; and the decision there rendered was influenced, if not altogether controlled, by that consideration. It must however be admit-

ted that the learned judge in discussing the law of the case shows that his view is that where either husband or wife advance unequal portions of the consideration for a note, or purchase money of land, an estate by the entirety will not be created, but each will be separately interested in the deed or note to the amount contributed. This, it is stated, results from a growing aversion or unfriendliness of the courts to such estates. In proof of this, extended reference is made to many well-known and highly respected authors. But on reading these it will be seen that they are discussing estates in joint tenancy, and have no reference at all to estates by the entirety. There is no question but the text-writers and opinions of judges have shown a disposition to avoid giving effect to joint tenancies on account of the frequent injustice of survivorship, and, when the parties advanced unequal portions of the consideration, they were held not to have intended a joint tenancy with survivorship. In *Rigden v. Vallier*, 2 Ves. Sr. 252, 258, the Lord Chancellor stated that: "It has been said, indeed, that, if two men make a purchase, they may be understood to purchase a kind of chance between themselves, which of them shall survive; but it has been determined that if two purchase, and one advances more of the purchase money than the other, there shall be no survivorship, though there are not the words *equally to be divided*, or to hold as *tenants in common*, which shews how strongly the court has leaned against survivorship, and created a tenancy in common by construction on the intent of the parties." The same thing, in effect, was again said in the same case in 3 Atk. 731, 734. And in *Patriche v. Powlet*, 2 Atk. 54, it was said that: "A joint tenancy is undoubtedly no favorite of a court of equity, tho otherwise at law." These, and other similar cases, are the foundation for the statements made by the text-writers quoted at length in *Johnston v. Johnston*, but it is shown by the cases and by the subject under discussion by the text-writers that they were only referring to joint tenancies and not entireties. The prejudice against joint tenancies came in great part out of the injustice of the survivorship which was the result of such a tenancy; such as where two strangers held such an estate, and one of them died, his interest went to the other by survivorship, and his own next of kin were cut out. But no one is justified in saying that an estate by the entirety is looked upon by the courts with this disfavor. And the statements quoted in *Johnston v. Johnston* from 4 Kent, 360, as being on the latter subject, are said, two pages further on, not to apply to estates by entirety. This reason for aversion to estates in joint tenancy could rarely apply to es-

tates by the entirety between husband and wife, since the next of kin to either are generally their children. Besides, as we have already intimated, the two estates are so fundamentally different in so many respects that what is said of one ought not to be applied to the other. The statute in this state, in recognition of this injustice, has abolished joint tenancies with their incident of survivorship, but it has not touched estates by entirety; on the contrary, out of overcaution, estates to husband and wife are excepted by that statute.

But the law was the same (so far as estates by the entirety are concerned) before that exception was added; for it had been held that the statute abolishing joint tenancies did not apply to estates by entirety. *Gibson v. Zimmerman*, 12 Mo. 385, 51 Am. Dec. 168. And in *Hall v. Stephens*, 65 Mo. 670, 27 Am. Rep. 302, it was said the statute in adding the exception of husband and wife only enacted what was already the law without its aid, and so the same was said of a similar condition in New York. *Bertles v. Nunan*, 92 N. Y. 152, 157, 44 Am. Rep. 361. As already shown, the antipathy to joint tenancies grew out of the resulting incident of survivorship; but, correctly speaking, there is no survivorship in estates by the entirety. The surviving party only remains possessed of the title he had from the beginning. Owners of the estate by entirety take *per tout et non per my*. *Gibson v. Zimmerman*, 12 Mo. 385, 51 Am. Dec. 168; *Garner v. Jones*, 52 Mo. 68; *Bertles v. Nunan*, 92 N. Y. 152, 44 Am. Rep. 361; *Stelz v. Shreck*, 128 N. Y. 263, 28 N. E. 510, 13 L. R. A. 325, 26 Am. St. Rep. 475; *Barber v. Harris*, 15 Wend. (N. Y.) 615. The true nature of estates by the entirety and the distinction between them and joint tenancies is pointed out by Judge Vallant in *Frost v. Frost*, supra, and the statement is made that the case of *Johnston v. Johnston*, supra, is regarded as of that class where a husband uses his wife's money to purchase land, taking the title to himself; that being a fraud against which the law will grant relief.

The judgment will be reversed and the cause remanded that judgment may be entered for the plaintiff. All concur.

WADE v. WILLIAM BARR DRY GOODS CO.

(St. Louis Court of Appeals. Missouri. Feb. 21, 1911. Rehearing Denied March 7, 1911.)

1. MASTER AND SERVANT (§ 30*)—DISCHARGE OF SERVANT—GROUNDS.

One engaged as buyer for a department store, who secretly accepts gifts from those from whom he is buying goods, with intent to be influenced by them into being untrue to his employer, is guilty of misconduct justifying his discharge whether or not he acted dishonestly

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

toward his employer, and whether or not the latter suffered pecuniary loss.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 30-36; Dec. Dig. § 80.*]

2. MASTER AND SERVANT (§ 30*)—DISCHARGE OF SERVANT—GROUNDS.

Where one employed as buyer for a department store secretly accepted gifts from those with whom he negotiated purchases for the store under circumstances justifying his employer, acting reasonably, to lose the confidence, which the nature of the engagement made it necessary for him to entertain toward the employee, the employer might discharge him.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 30-36; Dec. Dig. § 80.*]

3. MASTER AND SERVANT (§ 39*)—DISCHARGE OF SERVANT—ACTION—PLEA—"DISLOYAL."

A plea in an action for the wrongful discharge of an employee, which alleges as a ground for the discharge that the employee was "disloyal" in secretly accepting gifts from the persons from whom he bought goods for the employer, charges that the employee was untrue to his employer's cause, involving a corrupt or improper state of mind, and, if proved, justifies the discharge.

[Ed. Note.—For other cases, see Master and Servant, Dec. Dig. § 39.*]

Appeal from St. Louis Circuit Court; J. Hugo Grimm, Judge.

Action by Ernest H. Wade against the William Barr Dry Goods Company, doing business as the William Barr Company. From a judgment for plaintiff, defendant appeals. Reversed and remanded.

Suit by employee against employer for breach of the employment contract; the breach alleged being wrongful discharge before the expiration of the contract term. The defendant pleaded that the discharge was justified. Plaintiff had judgment for \$2,840.62, and defendant has appealed. It is admitted by the pleadings that on February 1, 1908, defendant, a corporation conducting a general department store in the city of St. Louis, entered into a written agreement with the plaintiff, whereby it employed the plaintiff "as buyer of its house furnishings, pictures, toys and baby carriages, china and bric-a-brac departments for the period of one year beginning February 1st, 1908, and ending January 31st, 1909, at a salary of five thousand dollars per year, payable in weekly installments of ninety-six dollars and fifteen cents." It is further admitted that on July 11, 1908, the plaintiff was discharged from said employment by defendant. Plaintiff alleged that the discharge was wrongful. Defendant pleaded in justification of the discharge that "while in defendant's employ as a purchaser of toys plaintiff was disloyal in accepting and receiving from Hamburger & Co. of New York, from whom he was buying toys for defendant, presents and gratuities of value, without defendant's knowledge or consent." Reply a general denial. Although the contract in suit related only to one year, the evidence showed that plaintiff had entered the employ of defendant as buyer in April,

1903, and continued in that position until his discharge in July, 1908. Defendant each year bought a large amount of toys and most of them were purchased from Hamburger & Co., a corporation. It had been doing this for six or seven years before plaintiff entered its employ. After plaintiff entered the employ of defendant, it was his duty to make such purchases for defendant, going to New York several times a year as the business required. His wife would sometimes accompany him. In doing so they seem to have formed somewhat intimate social relations with the officers of Hamburger & Co. and their wives. The evidence showed that for several years while he was in the employ of defendant as a buyer of toys the plaintiff and his wife had regularly received presents of substantial, but not great, value from the officers of Hamburger & Co. and their wives. The evidence on behalf of plaintiff tended to prove that these presents came unexpectedly and without solicitation, were harmless business courtesies, or social courtesies, due solely to the close social relations existing between the plaintiff and his wife and the officers of Hamburger & Co. and their wives, and were reciprocated by social courtesies extended by plaintiff and his wife to said officers and their wives. The evidence on behalf of the plaintiff further tended to prove that neither the friendly social relations mentioned nor the presents received by him in the slightest degree influenced him in his capacity as a buyer, or caused him to buy from Hamburger & Co., or to give them any advantage in price or otherwise, or to falter in unswerving loyalty to his employer and devotion to its interests. He admitted, however, that he bought all imported toys from Hamburger & Co., justifying such action on the ground of superior quality and advantageous discounts. Defendant also gave evidence tending to prove that the last order given by plaintiff to Hamburger & Co. amounting to about \$6,000, had been cancelled by defendant because investigation disclosed that the prices were higher than another house quoted them at. This was negated by evidence on behalf of plaintiff. The presents were received prior to the execution of the contract sued upon, but while plaintiff was in the employ of defendant, and buying from Hamburger & Co. for defendant. At the time of entering into the contract sued upon, and up to the time of the discharge, defendant and its officers were not aware that plaintiff and his wife had ever received presents from Hamburger & Co., although it does not appear that plaintiff made any effort to conceal that fact from them.

In its first instruction the court directed a verdict for plaintiff upon the finding of certain facts, "unless you find and believe from the evidence that defendant discharged plain-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

tiff for good cause as set out in other instructions." The other instructions, so far as the matter of the receiving of presents is concerned, consisted solely of the following, which was given by the trial court of its own motion: "(4) The court instructs the jury that the law required that the plaintiff as an employé of defendant should be loyal to its interests, and that in making purchases for it he should purchase at the most advantageous prices and terms in his power (subject to any limitations put upon him by his employer as to the person or persons from whom he might purchase), and that in transacting his employer's business he should not derive from those with whom he was dealing any present, gain, or advantage at the expense or loss of his employer. If, therefore, you find from the evidence that plaintiff, while acting as buyer for defendant, received and accepted presents of jewelry or articles of material value from persons from whom he made purchases for the defendant, that he accepted and received such presents without the knowledge or consent of the defendant, and that because of the presents so received by him plaintiff either knowingly bought from said persons at prices and terms less favorable and advantageous to defendant than he could have secured from other importers with whom he was permitted to deal, or because of said presents failed to ascertain the prices at which the same goods could be purchased from other importers with whom he was at liberty to deal, and thereby caused defendant to pay excessive prices for any of the goods purchased for defendant by him, then plaintiff was not loyal to defendant, and if you find that, upon discovering said facts (if you find they existed), the defendant with reasonable promptness discharged plaintiff, your verdict must be for defendant on plaintiff's claim."

Nagel & Kirby, for appellant. Lee Sale, for respondent.

CAULFIELD, J. (after stating the facts as above). Defendant assigns as error the action of the trial court in giving the instruction which we have set forth. Under that instruction, the act of the plaintiff in receiving presents from Hamburger & Co. without the knowledge of his employer could not be treated by the jury as a just ground for discharge without the jury also found in effect that the gifts actually influenced the mind of the plaintiff so as to induce him to act dishonestly towards his employer, and actually caused his employer to pay excessive prices for goods purchased by plaintiff for it. We do not consider this the proper test as to whether plaintiff's conduct in the respect mentioned constituted just cause for discharge. The engagement between these parties was one demanding fidelity upon plaintiff's part and confidence upon the part of the defendant. Any conduct upon plaintiff's part

involving lack of fidelity or reasonably calculated to destroy the confidence of a reasonable employer under such an employment would be inconsistent with plaintiff's continuing as buyer for the defendant and justify his discharge, whether the misconduct caused defendant to suffer actual loss or not. Plaintiff's secret acceptance and receipt of gifts from those from whom he was buying on behalf of his employer might have been just ground for discharge upon either or both of two hypotheses, the finding by the jury of either or both of which would find some support in the evidence in this case, and one of which is within defendant's plea. These hypotheses may be stated as follows:

(1) That the gifts were accepted by the plaintiff without the consent of the defendant and with intent on the part of plaintiff to be influenced by them into being untrue to his employer's cause.

(2) That under all the facts and circumstances shown in evidence the secret acceptance and receipt by plaintiff of these gifts from those with whom he had negotiated or was about to negotiate purchases on behalf of his employer, the defendant, were sufficient to justify a reasonable person occupying the position of defendant as plaintiff's employer and acting reasonably to lose the confidence, which the nature of the engagement made it necessary for the defendant to entertain toward the plaintiff.

If either hypothesis is found by the jury, it, as we have said, is immaterial whether the plaintiff actually acted dishonestly toward the defendant, or that the defendant suffered actual pecuniary loss. In the first case, the misconduct would involve moral turpitude. In both cases the misconduct would be inconsistent with the engagement between the parties.

The second hypothesis is not within defendant's plea. Upon a retrial, if there be one, defendant may amend in that respect if it be so advised. We conclude, however, that the plea, though indefinite, sufficiently covers the first hypothesis. It alleges that the plaintiff was "disloyal" in accepting and receiving the presents. This was equivalent to charging plaintiff with being untrue to his employer's cause. That is the plain inference to be derived from the use of the word. It involves a corrupt or improper state of mind. Defendant's charge that plaintiff was disloyal in accepting the presents means then, as we understand it, that he accepted the presents with intent to be influenced by them into being untrue to his employer's cause. This was the only sense in which defendant pleaded the acceptance of these gifts as a ground for plaintiff's discharge. Under this plea, it was, as we have seen, utterly immaterial whether the gifts actually influenced the mind of the plaintiff so as to induce him to act dishonestly towards his employer, or actually caused financial loss to his employ-

er. As the instruction made necessary a finding of these immaterial matters, it was erroneous.

The judgment is reversed and the cause remanded.

REYNOLDS, P. J., and NORTONI, J., concur.

STATE ex rel. LAWRENCE COUNTY v. GRIER LAND & MINING CO.

(Springfield Court of Appeals, Missouri, Feb. 6, 1911. Rehearing Denied March 7, 1911.)

1. STATUTES (§ 241*)—CONSTRUCTION—PENAL STATUTES.

Rev. St. 1899, § 1017 (Ann. St. 1906, p. 883), providing a penalty for a corporation's failure to make reports to the Secretary of State within a given time, being highly penal in its nature, must be strictly construed.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. §§ 322, 323; Dec. Dig. § 241.*]

2. APPEARANCE (§ 19*)—OBJECTIONS TO JURISDICTION—WAIVER.

The requirement of Rev. St. 1899, § 1017 (Ann. St. 1906, p. 883), providing a penalty for a corporation's failure to make a report to the Secretary of State, that suit for this penalty shall be instituted at the first term after the Secretary of State notifies the prosecuting attorney of the corporation's failure, goes only to the jurisdiction of the person, and hence is waived by appearance and a general denial.

[Ed. Note.—For other cases, see Appearance, Dec. Dig. § 19.*]

Appeal from Circuit Court, Christian County; F. C. Johnston, Judge.

Action by the State, on the relation of Lawrence County, against the Grier Land & Mining Company. From a judgment for defendant, relator appeals. Reversed and remanded.

Elliot W. Major, Atty. Gen., Archie L. Hilpert, Pros. Atty., and Charles L. Henson, for appellant. E. J. White and John L. McNatt, for respondent.

NIXON, P. J. This was an action instituted in the name of the state, at the relation of Lawrence county, to recover of the defendant corporation the penalty imposed by section 1017, Rev. St. 1899 (Ann. St. 1906, p. 883), for failing to report to the Secretary of State "the location of its principal business office, the name of its president and secretary, the amount of its capital stock, both subscribed and paid up, the par value of its stock and the actual value of its stock at the time of making said report, the cash value of all its personal property and of all its real estate within this state on the first day of June immediately preceding, and the amount of taxes, city, county and state, paid by the corporation for the year last preceding the report," as prescribed in section 1013, Rev. St. 1899 (Ann. St. 1906, p. 882).

The petition is in two counts, the first

count for the penalty which accrued on the last day of September, 1909, and the second count for the penalty which accrued on the 1st day of October, 1909. The petition was filed on October 4, 1909, in vacation. The case was tried by the court on an agreed statement of facts, as follows: "That the plaintiff's evidence will show that the defendant is a corporation, as alleged in the petition, of Lawrence county, Mo., and that at the time and times mentioned in the first and second counts of the petition it had not filed with the Secretary of State the report mentioned in said petition, as required by section 1013, Rev. St. 1899. That for the defendant it will show that the officers of the defendant had overlooked the filing of said report, and the same was filed with the Secretary of State about the middle of October, 1909, and that the blank reports required to be furnished by the Secretary of State were received by the officers of the defendant before the middle of October, and were placed in a desk and overlooked until that time, and that there was no intention on defendant's part to violate the law in failing to file said reports." The court made the finding of facts that the suit was not instituted by the prosecuting attorney "at the first court term following the receipt by him of the report from the Secretary of State, nor has the state shown compliance with the conditions named in the statute creating the cause of action. * * * And the court finds that, in failing to comply with the conditions named in the statute creating the right of action, the state is not entitled to recover in this action, and the finding of the court is in favor of the defendant." The following declaration of law was given: "The court declares the law to be that unless it finds from the evidence that the prosecuting attorney, of Lawrence county, in his official capacity, at the first court term after he received the report from the Secretary of State, informing him of the failure of the defendant to file the statement required by section 1013, Rev. St. 1899, instituted proceedings in accordance with section 1017, Rev. St. 1899, to recover the penalties therein provided for, its judgment will be for the defendant." Judgment was entered for defendant, and the relator has appealed.

Section 1017, Rev. St. 1899, provides: " * * * And it is hereby made the duty of the Secretary of State, as soon as practicable after the first day of September in each year, to report to the prosecuting attorney of the county in which any such delinquent corporation may be located, the fact of its failure to make the required report, and the prosecuting attorney shall, at the first court term after he receives the report from the Secretary of State, institute proceedings in the name of the state, at the relation of the county, to recover the fine or

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

fines herein provided for. * * * This section provides that for the failure to make the report the corporation shall be subject to a fine of not less than \$50 nor more than \$1,000 for each offense, and that each succeeding 30 days of such failure shall constitute a separate offense, and be subject to a like fine. That this statute is highly penal in its nature is apparent. This being true, it should, of course, be strictly construed "and applied only to such cases as come clearly within its provisions and manifest spirit and intent." *Cowan v. Telegraph Co.*, 129 S. W., loc. cit. 1067; *Connell v. Telegraph Co.*, 108 Mo. 439, 18 S. W. 883; *Wagner v. Telegraph Co.* (decided at this term of this court) 133 S. W. 91; *Bradshaw v. Telegraph Co.*, 131 S. W. 912; *State ex rel. v. Railroad*, 131 S. W. 161.

Ordinarily a suit is instituted by the plaintiff filing in the office of the circuit clerk his petition and by the clerk issuing a summons. The statute (section 566, Rev. St. 1899 [Ann. St. 1906, p. 595]) provides: "Suits may be instituted in courts of record, except where the statute law of this state otherwise provides, either, first, by filing in the office of the clerk of the proper court a petition setting forth the plaintiff's cause of action, and the remedy sought, and by the voluntary appearance of the adverse party thereto; or, second, by filing such petition in such office, and suing out thereon a writ of summons against the person or of attachment against the property of the defendant. The filing of a petition in a court of record, or a statement or account before a court not of record, and suing out of process therein, shall be taken and deemed the commencement of a suit." The objection that the suit was not "instituted at the first court term, but was instituted in vacation before said term commenced," goes only to the jurisdiction of the trial court over the person of the respondent, and is not now available to it. At the return term or the next term of court respondent appeared and filed the following answer: "Comes now the defendant, and for answer to the petition filed herein admits that it is a corporation organized under the laws of the state of Missouri, but denies each and every other allegation in said petition contained. Wherefore, having answered herein, it asks to be dismissed with its costs." It is to be observed that this answer is in the nature of a plea to the merits, and not to the jurisdiction of the court. By such an answer the defendant voluntarily waived the issuance of any process, entered its general appearance, and the suit became to all intents and purposes thereby properly instituted, and defendant waived the defects as to the manner of instituting the suit. *Lewis v. Nuckolls*, 26 Mo. 278; *Hembree v. Campbell*, 8 Mo. 572; *Brown v. Woody*, 64 Mo. 547.

It follows that the judgment should be reversed and the cause remanded, and it is so ordered. All concur.

THOMPSON v. JOSEPH W. MOON BUGGY CO.

(St. Louis Court of Appeals. Missouri. Feb. 21, 1911. Rehearing Denied March 7, 1911.)

1. APPEAL AND ERROR (§ 882*)—INVITED ERROR—RIGHT TO COMPLAIN.

An appellant is estopped to claim reversible error resulting from the inconsistency of instructions, where he himself invited the error by asking a wrong declaration of law.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3602-3604; Dec. Dig. § 882.*]

2. PRINCIPAL AND AGENT (§ 194*)—AUTHORITY OF AGENT—MODIFICATION OF CONTRACT.

An automobile sales agent on January 26, 1907, obtained from plaintiff a written contract to purchase from defendant 15 automobiles, to be delivered during the spring and summer of 1907 at specified prices, the contract being on a printed blank on which was printed the words, "subject to approval at the home office, St. Louis, Mo." On the succeeding day the agent addressed a letter to plaintiff, releasing plaintiff from the contract, plaintiff, in lieu thereof, to accept the agency for defendant's cars, and should not be obligated to purchase any more than he sold, signing defendant's name by himself as "Sales Mgr." In a suit to recover \$1,000 paid by plaintiff to defendant under the contract, there was no evidence that the agent had any apparent authority to make the modification or that defendant held out the agent as having general authority to make contracts for the sale of motors, or to establish sales agencies, and defendant's president testified that he never heard of or saw the modification contract until some time in November, 1907. Held, that an instruction that if defendant's agent was authorized to make contracts to establish agencies, or was held out to plaintiff and others as having such power, plaintiff could assume that he had authority to bind defendant as to all matters pertaining to the establishment of the agency, and as to terms and conditions of such contracts as he made for defendant, and hence if the modification contract was a part of the agreement made on the preceding day, and was so intended by the agent, then defendant was bound by it unless plaintiff had notice that the agent had no authority to make such modification contract, and that the burden was on defendant to establish by a preponderance of the evidence that plaintiff had any such notice before executing the contract, was inapplicable and erroneous.

[Ed. Note.—For other cases, see Principal and Agent, Cent. Dig. §§ 727-731; Dec. Dig. § 194.*]

3. PRINCIPAL AND AGENT (§ 194*)—AUTHORITY OF AGENT—INSTRUCTIONS.

The court properly charged that unless the jury believed from the evidence that the agent had authority from defendant to modify the original contract, or that defendant afterwards had knowledge of the modification and ratified the same, plaintiff could not recover.

[Ed. Note.—For other cases, see Principal and Agent, Cent. Dig. §§ 727-731; Dec. Dig. § 194.*]

4. TRIAL (§ 329*)—VERDICT—RESPONSIVENESS.

Where the jury were correctly instructed as to what damages they might give and how the

rule of the damages should be applied, a verdict for nominal damages was not objectionable because no instructions were asked or given as to nominal damages.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 774-776, 782; Dec. Dig. § 329.*]

5. TRIAL (§ 329*)—VERDICT—RESPONSIVENESS.

Plaintiff sued for a deposit under an automobile sales agency contract binding plaintiff to purchase 15 cars from defendant, claiming under a modification made by defendant's agent the next day after the signing of the contract relieving the plaintiff of the duty of purchasing any more cars than he sold. Defendant denied the agent's authority to make the modification, and filed a counterclaim for damages for plaintiff's breach of the contract by failing to purchase any of the cars. *Held*, that a verdict for defendant on plaintiff's cause of action and awarding defendant nominal damages should be construed to mean that plaintiff was not entitled to recover anything from the defendant, and that defendant while sustaining its counterclaim suffered no damage or that by retaining the deposit its damage was covered, and was therefore within the issues.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 774-776, 782; Dec. Dig. § 329.*]

Appeal from St. Louis Circuit Court; Eugene McQuillan, Judge.

Action by Alvah M. Thompson against the Joseph W. Moon Buggy Company. Judgment for defendant, and plaintiff appeals. Affirmed.

George B. Webster, for appellant. Wilfley, McIntyre & Nardin, for respondent.

REYNOLDS, P. J. The petition upon which the case was tried contains three counts, the first on a contract of date January 29, 1907, as modified by a memorandum of January 30, 1907, it being averred that \$1,000 had been paid on the price of 15 motor cars contracted for, and that subsequently, on January 30th, "the said contract was modified by the mutual consent of the plaintiff and the defendant so as to release the plaintiff from the obligation to purchase the 15 motor cars above mentioned; that thereafter, to wit, on November 5, 1907, the plaintiff demanded of the defendant the return of the said sum of \$1,000 so paid by him to it as aforesaid, but that the defendant failed and refused to repay the said sum to plaintiff, and now wrongfully withholds the same." Judgment is demanded for this sum and interest and costs. This contract and memorandum will be referred to hereafter. For a second cause of action, it is averred that entering into the contract of the 29th of January aforesaid, and on the faith of it, plaintiff had rented a store in Boston, and at great expense had prepared and furnished suitable quarters therein for the sale, repair, and storage of defendant's motor cars and automobiles; that defendant shipped to plaintiff one automobile of its manufacture, warranted by it to be suitable for the purposes of demonstration, but that it was so defectively constructed that it

could not be operated or made to run, and that by reason of the premises plaintiff had been unable to operate the business of selling automobiles during the season and lost the value of the garage and quarters prepared and furnished by him, to his damage in the sum of \$2,500, for which he demands judgment. There was a third count in the petition, but it was abandoned.

The answer, admitting the execution of the contract of the 29th of January, but specifically denying the execution of the contract of January 30th, or any other modification of the contract of January 29th, and denying plaintiff's right to recover on either count, avers that defendant had complied with the contract of the 29th of January so far as it was required, but that plaintiff violated it and failed to comply with it. As a further answer to the second count, again repeating the averments as to the contract of January 29th and denying all other allegations in the second count, it is averred that the garage referred to by plaintiff was constructed prior to the execution of the contract. It is also averred that defendant complied on its part with the contract, and that whatever loss plaintiff sustained was the result of his own carelessness and the negligent manner in which he conducted and managed his business, and his failure to comply with the terms of the contract. Further answering, and in addition to the two defenses above set out, defendant interposed two counterclaims. The first set up the contract, and averring performance of it on its part, and the failure of plaintiff to take the 15 machines or any part thereof, the readiness of defendant and its offer to deliver the same to plaintiff and his refusal to accept, and, setting out that its profit on each would have been \$200, defendant asks \$3,000 damages. By its second counterclaim defendant set up the contract of January 29th, averred its readiness and willingness to perform, averred that on March 6, 1907, it shipped a car to plaintiff for the agreed price and for which he paid, that afterwards it replaced the car with another with the understanding and agreement with plaintiff at the time that he immediately return the first car to defendant, that he failed and refused to return it, but retained and made use of it until August 5, 1907, after it had been so used as to damage it and render it necessary for defendant to expend upon it a large sum in repairs and sell it as a secondhand car at a loss, and defendant prayed judgment against plaintiff in consequence in the sum of \$1,000. The reply, after a denial of all new matter, set up that as to the second counterclaim the first car shipped was so defective that it could not be operated, and, when the second car arrived, it was also defective; that plaintiff reported this to defendant, who thereupon agreed that

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes
134 S.W.—69

plaintiff might keep the first car shipped until the second could be repaired, and that, as soon as that was done, plaintiff returned the first car to defendant in first-class condition. At the trial of the case before the court and a jury evidence was introduced by the respective parties along the lines of the pleadings. So far as material to the determination of the points now presented, it was substantially as follows: Plaintiff on or about January 29, 1907, entered into a contract with defendant, a Missouri corporation, the latter acting through one Kehew, a salesman, as defendant claims, or sales manager, as plaintiff and Kehew claim, in which contract it is recited that plaintiff, proposing to engage in the sale of motor cars manufactured by defendant in territory designated, desired to buy a certain number of defendant's motor cars which might be resold by plaintiff within that territory upon terms set out in the contract. With the above preamble the contract recites that, in consideration of the mutual promises, plaintiff agreed to purchase of defendant 15 motor cars of a model and at the list price indicated, f. o. b. cars St. Louis, less a discount named, the delivery of the cars to be in March, April, May, and June, 1907, one of the above cars to be shipped as soon as possible, plaintiff agreeing to pay as follows: "\$1,000 shall be paid to first party immediately upon the execution of this contract; the balance due on each car shall be paid on presentation of a sight draft attached to bill of lading for said cars at the time or times above fixed for delivery. This \$1,000 to be applied as a credit upon the shipment of the 15th car." The contract is on a printed blank, and purports to have been entered into January 29, 1907, and is signed in duplicate, "Joseph W. Moon Buggy Company, by Geo. F. Kehew, Sales Mgr." Below the signature, printed at the foot of the blank, appears this: "Subject to approval at the Home Office, St. Louis, Mo." The contract in the abstract and apparently in evidence does not appear to have been signed by plaintiff, but we gather from the evidence that plaintiff did sign the one mailed by Kehew to defendant. In addition to this contract, a typewritten paper was introduced in evidence, addressed to plaintiff, and as follows: "Dear Sir: In consideration of your undertaking the agency of our car under the terms of an agreement of even date we hereby modify the terms of said agreement as follows, to-wit: We hereby release you from any obligation to purchase from us the fifteen (15) cars referred to in paragraph 1 of the agreement, it being the purpose of this modification of the contract that, during the term of the agency, you shall use your best efforts to sell said fifteen or more cars, but that you are not to be obligated to purchase from us any more cars than you are able to sell. Yours truly, Moon Motor Car Co., Geo. F. Kehew, Sales Mgr.

Boston, Jan. 30, 1907." It appears that the Joseph W. Moon Buggy Company also carried on the business of manufacturing motors under the name of Moon Motor Car Company and advertised motors under that name, but that some time after the date of this memorandum letter above referred to, its members organized a separate corporation under the name, "Moon Motor Car Company." Both of these papers were signed at Boston, Mass., where plaintiff had his place of business. Only two motors were shipped to plaintiff by defendant; one only being paid for. The first one sent was held to be unsatisfactory, and a second one was sent to take its place pending the repair of the first. After some delay the first was returned to defendant; the second being retained. No other cars were ever ordered by plaintiff nor sent by defendant, nor did defendant ever offer to send others, nor was the \$1,000 credited on the purchase of the one retained; in fact, plaintiff does not seem to have asked to have that done, but apparently left it for final settlement. The deal between the parties seems to have been abandoned about November, 1907. On the 2d of that month plaintiff wrote to defendant that he had quit the business and leased his garage to another party, and advised defendant that he was drawing on it that day for the \$1,000 deposited. This is the first reference that either party seems to have made in correspondence between them to this \$1,000. It appears from letters of plaintiff introduced in evidence by defendant that, after this notice of plaintiff that he had drawn on defendant for the \$1,000, the parties entered upon some negotiations to the effect that, instead of defendant sending back the \$1,000, it endeavored to induce plaintiff to trade for a car, a runabout, apparently, at \$1,500, and apply the \$1,000 on the trade. Plaintiff declined to take a machine at that price, saying that it was more than he could pay. This seems to have ended the correspondence between them.

Testifying as to his authority and as to the transaction, Kehew stated that he was sales manager of the automobile department of defendant; that his duties consisted in opening and closing agencies in the various cities of the United States which covered soliciting business in the name of the Joseph W. Moon Buggy Company, establishment of agencies and for the sale of Moon cars in the various cities he visited, acting as their representative at the time, and closing deals in their name by his signature as representative for them as sales manager and sole representative. He stated that he had signed the contract of date January 29th, and that the agreement of date January 30th constituted a part of the original agreement; that he had entered into the agreement evidenced by this memorandum with Mr. Thompson (plaintiff) at the office of the latter's attorney in Boston on January 30, 1907.

Asked to state the circumstances under which this latter paper had been executed, he stated that Mr. Thompson said he was afraid he would not be able to sell the 15 cars referred to in the original agreement, and, in order to release him from any liability in regard to the purchase of the 15 cars, this second agreement was drawn up. Asked why he had signed the name, "Moon Motor Car Company," to it, when there was no such company at that time, he stated that defendant was then operating the automobile business under that name. He further testified that he had reported both of these transactions to the Moon Motor Car Company; that after the contract of January 29th was signed he had mailed his duplicate copy to defendant; and, after the modified agreement of date January 30th was signed, he had mailed a duplicate copy of that to defendant, being mailed within 24 or possibly 48 hours of their execution. Asked if he had, before making the modified agreement of January 30th, obtained authority from defendant to make this modification, he said that he had not. Being asked in redirect examination why he did not obtain this authority, he answered that because, as their sales manager, he considered it his duty to close any and all such agencies to the best possible advantage of the Joseph W. Moon Buggy Company, as he had done in this instance. Asked if he had authority from the company to make this agreement, he answered that he had. Plaintiff himself testifying, asked if he knew the position Kehew held as representing defendant, said he knew him as a sales manager and agent of defendant.

Mr. Moon, the president of defendant, testified that Kehew had been engaged by one of the agents of defendant as salesman; that he himself (Moon) was the sales manager at that time of the defendant company, and was its only sales manager; that the form on which the first contract was drawn up was the only one furnished to their sales agents or salesmen, and that there was printed on that form the words, "all contracts are subject to the approval of the home office"; that he had received this contract of date January 29th shortly after that date, and it was accompanied by a check for \$1,000; that it came from Kehew and he had acknowledged the receipt of it to Kehew; that the first time he had heard of this memorandum contract dated January 30, 1907, was some time in February, 1908; that the first time he had heard of plaintiff demanding the \$1,000 was in November, 1907. He testified that the memorandum or letter of date January 30, 1907, did not accompany the contract of date January 29th when received at the defendant's office in St. Louis. Beyond testimony as to the condition of the machine sent on and matters relating to the willingness and ability of defendant to furnish all the 15 machines that it claimed

plaintiff had contracted for, and evidence to support the respective claims for damages, it being admitted that plaintiff had only ordered this one machine and no other, except the one referred to in exchange for it, that he had paid for the one, and that defendant had never offered to ship any other machines to plaintiff, this is practically the evidence in the case.

As the contention of counsel here turns upon two instructions, one given at the instance of plaintiff, the other at the instance of defendant, it is not necessary to notice the other instructions. These two instructions are numbered 5 and 8. That given at the instance of plaintiff is numbered 5, and is as follows. "(5) If you find and believe from the evidence that George F. Kehew was authorized by the defendant to make contracts for establishing agencies for the sale and disposition of its motor cars, or held him out to the plaintiff or others as having such power, then the plaintiff was entitled to assume that he had authority to bind the defendant as to all matters pertaining to the establishment of such agency and as to terms and conditions of such contracts as he made, or may have made, for the defendant. If, therefore, you find and believe from the evidence that the writing of January 30, 1907, was a part of the agreement with the plaintiff dated January 29, 1907, and was so intended by him and Kehew, then you are instructed that the defendant is bound by it unless the plaintiff had notice that Kehew was not authorized by the defendant to make the contract of January 30, 1907, and the burden of proof is upon the defendant to establish by a preponderance of the evidence that the plaintiff had any such notice before executing the said contract." That given at the instance of defendant is numbered 8, and is as follows: "(8) Unless you believe from the evidence that George F. Kehew had authority from defendant to modify the contract of January 29, 1907, or that the defendant afterwards had knowledge of said modification and ratified the same, you will find for the defendant on the first count of plaintiff's petition." The jury returned a verdict in favor of defendant and against plaintiff on both counts of plaintiff's petition, against defendant on its first counterclaim, in favor of defendant on its second counterclaim, awarding defendant one cent damages under that counterclaim.

The assignments of error by counsel for defendant are, first, that the fifth instruction, given at the request of plaintiff, and the eighth instruction, given at the request of defendant, were in irreconcilable conflict; second, that the verdict is in direct conflict with the instructions and so inconsistent as to make plain the fact that the jury either willfully disregarded the court's instructions or failed to comprehend the issues submitted to them and to consider the evidence on

those issues. We are unable to agree with the learned counsel for appellant that either of those assignments of error will avail. Instruction No. 5, the one asked and given at the request of plaintiff, proceeds upon the theory that the evidence in the case showed apparent authority on the part of Kehew to make contracts without first submitting them to the approval of his principal, or that defendant had held him out to plaintiff or others dealing with him as an agent having such general power. That is plaintiff's theory and the theory of this instruction. The theory of instruction No. 8, given at the instance of defendant, in effect, tells the jury that unless they find from the evidence that Kehew had the authority to modify the contract, they could not find for plaintiff, unless they found that defendant, with knowledge of the modification of the contract, had ratified it. That is defendant's theory. The learned counsel for appellant is correct in claiming conflict. He, however, contends with great vigor that, these two instructions being inconsistent, he is not estopped from claiming reversible error, even if he had invited error himself in asking a wrong declaration of law. Counsel cites several decisions which he claims to be in support of this proposition, among others that of *Bluedorn v. Missouri Pac. Ry. Co.*, 108 Mo. 439, 18 S. W. 1103, 32 Am. St. Rep. 615. Learned counsel, however, has overlooked the fact that the authority of the *Bluedorn* decision was thoroughly and completely destroyed by the decision of our Supreme Court in *Baker v. K. C., Ft. S. & M. R. Co.*, 122 Mo. 533, 26 S. W. 20; *Christian v. Connecticut Mut. Life Ins. Co.*, 143 Mo. 460, 45 S. W. 268; *Hall v. Mo. Pac. R. Co.*, 219 Mo. 553, 118 S. W. 56. In this latter case Judge Graves quotes (219 Mo., loc. cit. 592, 118 S. W. 67) the very emphatic language of Judge Sherwood in the *Christian* Case, in which, referring to the contention that self-invited error was ground for reversal, says that "this heresy was not long lived. It received its coup de grace in *Baker v. Railroad*, 122 Mo. 533 [26 S. W. 20]." Assuming these two instructions are conflicting, we are to determine which is correct, under the evidence in the case. It is entirely immaterial which of these two instructions was given first. The point is, which is correct? If that given at the instance of respondent is incorrect, the judgment must be reversed. If that given at the instance of appellant is erroneous, then, as it is self-invited error, appellant cannot derive any advantage from that error. We hold that instruction No. 5, given at the instance of plaintiff, should not have been given. On a careful reading of all the testimony in the case, both as abstracted by appellant and as shown by the supplemental statement of counsel for defendant, we are unable to discover any testimony that tends to show apparent authority in the agent Kehew to

make the supplemental contract of January 30th, or to show that defendant held Kehew out as an agent with general power to make contracts for the sale of motors or for the establishment of sales agencies. The contract of January 29th, a printed form which was to be filled up according to the agreement of the parties, with names and amounts and number of machines, bore on its face in plain and unmistakable terms a limitation upon the power of the agent Kehew. It did it by these words, "Subject to approval at the home office, St. Louis, Mo." It is true that no such clause is on the typewritten, supplemental, contract. But with the prior one before him, on a printed blank, plaintiff must be charged with knowledge of the limitation of the authority of Mr. Kehew. Mr. Kehew's employment, it appears, came originally from a Mr. Moores, who was the designer of defendant. He was the party who went to Boston to look after the repairs and overhauling of the machines, while they were being repaired or reconstructed, but there is not a particle of testimony to show that at that time there was any discussion of the authority of the agent, or that Moores had given Kehew general authority. There is no evidence that any one ever gave him any general authority, or that the president knew that the modified contract had ever been entered into until after November, 1907. The testimony of Mr. Moon is emphatic that he never saw or heard of it until after November, 1907. So that we are unable, after a careful reading of all the testimony, to find any on which to base an instruction covering the matter of apparent authority, as this instruction No. 5 does. There is no pretense of express authority. Instruction No. 8 is a correct statement of the law as applied to the facts in evidence.

Counsel for appellant contends that there is no evidence of a failure to ratify the supplemental contract on the part of defendant. It may be that no witness, in so many words, said that defendant had not ratified it, but no one, we submit, can read the testimony in the case and arrive at any other conclusion than that, taking it together, it shows an entire lack of ratification. Want of assent or want of ratification is proven as clearly as it is generally possible to prove a negative.

The second proposition, that the verdict is either in direct conflict with instructions or so inconsistent as to make plain the fact that the jury either willfully disregarded the court's instructions or failed to comprehend the issues submitted to them or to consider the evidence on those issues, is also untenable. The plain intent of the jury was to hold that under the facts in evidence in the case and the law as given to them by the court plaintiff was not entitled to recover anything and that defendant, while sustaining its second count, suffered no damage,

or that, by retaining the \$1,000, its damage was covered. In brief, the verdict left the parties just where they had placed themselves. The verdict is within the issues, and is warranted by the evidence in the case. While it is true that no instructions were asked or given as to nominal damages, the jury were correctly instructed as to what damages they might give, and how the rule of damages was to be applied.

On consideration of the whole case, we have concluded that the verdict is for the right party, and the judgment of the circuit court should be, and it is, affirmed.

NORTONI and CAULFIELD, JJ., concur.

DE VAN ROSE v. THOLBORN.

(Springfield Court of Appeals. Missouri. Feb. 6, 1911. Rehearing Denied March 7, 1911.)

1. LIBEL AND SLANDER (§ 41*)—"QUALIFIED PRIVILEGE"—PRIVILEGE.

A "qualified privilege" extends to all communications made bona fide on any matter in which the party communicating has an interest, or in reference to which he owes a duty to a person having a corresponding interest or duty, and to cases where the duty is not a legal one, but is of a moral or social character of imperfect obligation.

[Ed. Note.—For other cases, see Libel and Slander, Cent. Dig. §§ 127-129; Dec. Dig. § 41.*]

For other definitions, see Words and Phrases, vol. 7, p. 5877.]

2. LIBEL AND SLANDER (§ 51*)—QUALIFIED PRIVILEGE—MALICE.

In an action for slander because defendant stated to I. that P. "spent the night" with plaintiff, defendant testified that P. came to work for him as a stranger, and was desirous of finding a place to room, and that defendant introduced him to I. and recommended him so that I. let him a room in his house, and that defendant was thereafter informed that P. spent a night with plaintiff in her room, and that he thought it his duty to inform I. of such fact. Held, that the communication was not a privileged one if spoken with actual malice.

[Ed. Note.—For other cases, see Libel and Slander, Cent. Dig. §§ 149-150; Dec. Dig. § 51.*]

3. LIBEL AND SLANDER (§ 104*)—EVIDENCE.

Evidence that defendant at another time asked I. if plaintiff was rooming at his house, and stated that, if so, I. had better investigate her character, was admissible as tending to show actual malice.

[Ed. Note.—For other cases, see Libel and Slander, Cent. Dig. §§ 286-289; Dec. Dig. § 104.*]

4. LIBEL AND SLANDER (§ 110*)—EVIDENCE.

In slander for words imputing unchastity to a woman, defendant might not attack her reputation or character by showing specific acts of immorality.

[Ed. Note.—For other cases, see Libel and Slander, Cent. Dig. § 312; Dec. Dig. § 110.*]

5. NEW TRIAL (§ 47*)—MISCONDUCT OF JURY.

That one of the jurors, after being released for the night, walked home with a woman who had been subpoenaed as a witness for plaintiff and who was a friend of the plaintiff, and that

the juror and the witness had been seen in a whispered conversation before leaving the courthouse, was not ground for a new trial after verdict for plaintiff, where affidavits were filed by the juror and the witness in which they stated that the case was not mentioned in their conversation.

[Ed. Note.—For other cases, see New Trial, Cent. Dig. §§ 88-95; Dec. Dig. § 47.*]

Appeal from Circuit Court, Jasper County; David E. Blair, Judge.

Action by Patti De Van Rose against Walter Tholborn. From a judgment in favor of plaintiff, defendant appeals. Affirmed.

M. R. Lively, for appellant. Clay & Davis, for respondent.

COX, J. Action for slander. Plaintiff recovered a verdict for actual damages in the sum of \$800, and defendant has appealed.

The petition charged defendant with having made various slanderous statements relating to plaintiff's character, but only two were submitted to the jury, to wit: That defendant, in a conversation with one George Post, used the following language in relation to plaintiff, "You spent the night with Mrs. Rose"; and that defendant had, in a conversation with one Andy McInturff, used the following language in relation to plaintiff, "Post spent the night with Mrs. Rose, and Mrs. Smith said she would make an affidavit to it." Defendant filed an answer in which he had admitted making both of these statements, but justified on the ground that they were privileged communications. During the trial defendant was permitted to amend his answer by striking out that part in which he had admitted making the statement to Post. After having withdrawn this part of his answer, the plaintiff offered the withdrawn portion in evidence before the jury as an admission on the part of defendant.

Defendant, in his motion for new trial, assigned 24 errors committed by the trial court, all of which we cannot notice in detail, but will consider only those which we deem material as appears from the record in this case.

The petition alleged that defendant meant by the language used to charge her with having had illicit sexual intercourse with one George Post. When the case went to the jury, defendant was in the position of having admitted using the language the petition charged he had used in the presence of witness McInturff, and his only defense to it was that under the circumstances the communication was privileged.

Privileged communications are of two characters—absolute and qualified. A qualified privilege extends to all communications made bona fide upon any subject-matter in which the party communicating has an interest, or in reference to which he owes a duty to a person having a corresponding interest or

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

duty; and to cases where the duty is not a legal one, but where it is of a moral or social character of imperfect obligation. *Finley v. Steele*, 159 Mo. 299, 60 S. W. 108, 52 L. R. A. 852; *Holmes v. Royal Fraternal Union*, 222 Mo. 556, 568, 121 S. W. 100, 26 L. R. A. (N. S.) 1080. If the communication was privileged in this case at all, it was only a qualified privilege. Defendant, in order to bring himself within the rule applied to a qualified privileged communication, testified that he was postmaster at Webb City, and that Post came to Webb City a stranger to clerk in the post office, and was desirous of finding a place to room, and, in order to accommodate him, defendant had taken him to witness McInturff's and introduced him to McInturff and recommended him as being a proper person to whom McInturff might let a room, and that Post was a gentleman and would be a proper person for McInturff to permit to associate with his family; that, while Post was occupying a room at McInturff's home, defendant had been informed by Mrs. Smith, who kept a rooming house in the city, and in whose house the plaintiff had roomed, that Post had spent the night with the plaintiff in her room in the rooming house of Mrs. Smith, and that he thought it was his duty to inform McInturff how Post was conducting himself by reason of the fact that he had been instrumental in Post securing a room at the home of McInturff, and in discharge of that duty he had made the statement to McInturff which the petition charged that he did make.

Defendant contends that under this testimony it was the duty of the court to instruct the jury that, if they should believe from the evidence that defendant made the statements charged under such circumstances, it was a privileged communication, and the issues should be found for defendant. The court did not give the instruction as asked, but did give it as asked except that it added to it the following, "Unless you find that defendant spoke such words with actual malice," and defendant now contends that the addition of these words constituted error. We do not think so. If the words spoken were spoken under the circumstances detailed in the instruction, and as above indicated, they were privileged, provided they were spoken in good faith and under a sense of duty which defendant felt that he owed to McInturff to give him information in relation to the conduct of Post; but it was not an absolute privileged communication, and was only a privileged communication if spoken in good faith and from a sense of duty, and if it was spoken with actual malice it was not a privileged communication. Even though circumstances may exist which would justify a person in making a statement to another which would rob it of its slanderous character which it would otherwise possess, yet if the party making these statements does not make it from a sense of duty

and in good faith, but makes it from a malicious motive and from a feeling of personal ill will, or with a desire to injure the person about whom the language is used, then the rule that the communication was privileged cannot apply, and defendant must be held liable for his language. *Finley v. Steele*, 159 Mo. 299, 60 S. W. 108, 52 L. R. A. 852; *Minter v. Bradstreet Co.*, 174 Mo. 444, 73 S. W. 608; *Holmes v. Royal Fraternal Union*, 222 Mo. 556, 121 S. W. 100, 26 L. R. A. (N. S.) 1080; *Yager v. Bruce*, 116 Mo. App. 473, 93 S. W. 307.

The evidence discloses that Post went East upon a vacation, and that while he was gone the plaintiff moved into the room formerly occupied by Post at the home of McInturff, and while McInturff was testifying as a witness he was permitted to testify that defendant at one time in a conversation with him used the following language in relation to plaintiff: "Is that Rose woman rooming at your house? If she is, you had better investigate her character." It is contended by defendant that the admission of this testimony was error for the reason that plaintiff did not charge in her petition that defendant had used this language in relation to her. It is true the petition does not charge the use of this language, but that does not render it inadmissible. It was admissible as tending to show express or actual malice on the part of defendant toward the plaintiff.

Defendant offered to show by witnesses that the plaintiff had been seen sitting on the lap of Post in her room. Upon objection of plaintiff this testimony was excluded, and defendant now insists that error was committed in that respect. It was not permissible for defendant to attack the reputation or character of plaintiff by undertaking to show specific acts of immorality, and the court rightly excluded the offered testimony. *Yager v. Bruce*, 116 Mo. App. 473, 93 S. W. 307; *Shaefer v. Railroad*, 98 Mo. App. 445, 454, 73 S. W. 154; *State v. Gesell*, 124 Mo. 531, 27 S. W. 1101; *Wright v. Kansas City*, 187 Mo. 678, 693, 86 S. W. 452.

Defendant's counsel contends in his brief that the court erred in submitting to the jury the charge in the petition that defendant had said of the plaintiff, "Post spent the night with Mrs. Rose," on the ground that there was no evidence that defendant used this language. Why this contention should be made we are at a loss to understand, for defendant expressly admitted in the answer that he did make that statement, and, besides, McInturff testified that defendant did use that language concerning the plaintiff.

Defendant objected to all the instructions given on behalf of plaintiff and excepted to the refusal of all asked by defendant which were not given. The instructions are too numerous and too voluminous to discuss in detail; but in a general way they properly defined to the jury what is a "privileged

communication" as applied to this case, and told the jury that, if defendant used the language charged against him in good faith and under a sense of duty which he felt that he owed to the party to whom he was making the statement, then the statement was privileged, and the issues should be found for defendant, but if he did not make the statement under a sense of duty, but made it with actual malice, then the communication was not privileged, and, if the jury should believe that the language used was calculated to and did convey to the minds of his hearers the meaning that defendant was charging plaintiff with having had illicit sexual intercourse with one Post, then the issues should be found for plaintiff. As applied to the testimony in this case, this was a correct declaration of the law, the evidence warranted it, the jury has found for plaintiff, and their verdict is binding upon us.

Defendant also contends that the verdict should have been set aside by reason of the conduct of one member of the jury. It appears from the affidavits filed in support of a motion for new trial that the case was closed and was ready to submit to the jury at about 10 o'clock p. m.; that one of the jurors, after being released for the night, walked home with a lady who had been subpoenaed as a witness for plaintiff and who was a friend of the plaintiff; that the juror and the witness had been seen in a whispered conversation before leaving the courthouse. Affidavits were also filed, sworn to by the juror and the lady whom he had accompanied home, in which they both stated that the case was in no way mentioned during their conversation. The court, having overruled the motion for new trial, must have been satisfied from these affidavits that nothing improper occurred, and that the juror was in no way influenced by his association with this woman. We see no reason for interfering with the judgment of the court on that question.

The judgment will be affirmed. All concur.

NORVELL v. COOPER.

(St. Louis Court of Appeals. Missouri. Feb. 21, 1911. Rehearing Denied March 7, 1911.)

1. WITNESSES (§ 140*) — COMPETENCY — DISQUALIFICATION — PECUNIARY INTEREST — TRANSACTIONS WITH DECEDENT.

Rev. St. 1909, § 6354, provides that interest shall not disqualify a witness, except that, in actions where one of the original parties to the contract or cause of action is dead, the other party shall not testify in his own favor or in favor of any party claiming under him, and no party whose right of action or defense is derived to him from one who is, or if living would be, subject to such disqualification, shall testify in his own favor. *Held*, that a child and

heir of intestate was not disqualified by his pecuniary interest from testifying for defendant in an action against an administrator upon a promissory note executed by intestate.

[Ed. Note.—For other cases, see Witnesses Cent. Dig. § 605; Dec. Dig. § 140.*]

2. WITNESSES (§ 140*) — TRANSACTIONS WITH DECEDENT — DISQUALIFICATION — HUSBAND.

At common law a husband was incompetent to testify in actions to which his wife was a party, or, though not a party, in the result of which she had a direct pecuniary interest, and he remains incompetent to testify in such cases except in so far as the statute has removed his disqualification, and in an action against an administrator on a note executed by intestate the husband of a child and heir of intestate was incompetent to testify for defendant.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. § 608; Dec. Dig. § 140.*]

3. WITNESSES (§ 181*) — TRANSACTIONS AFFECTING DECEDENT — DISQUALIFICATION — WAIVER.

As a rule, the right to object to a witness as incompetent is waived if the objection is not taken at the earliest opportunity, so that plaintiff, by permitting a witness for defendant, whose incompetency he knew long before trial, to give considerable testimony, answering 17 questions, and by objecting to his evidence upon another ground before objecting because of his incompetency, waived such incompetency, on the ground that witness was the husband of a person pecuniarily interested in the action, which sought recovery on a note claimed to have been executed by a decedent.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 727, 728; Dec. Dig. § 181.*]

4. WITNESSES (§ 181*) — TRANSACTIONS AFFECTING DECEDENT — COMPETENCY — WAIVER.

Where, in such case, a witness was permitted to testify at a former trial without objection, an objection to his competency to testify at a second trial was waived.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 727, 728; Dec. Dig. § 181.*]

5. APPEAL AND ERROR (§ 762*) — ASSIGNMENTS OF ERROR — REPLY BRIEF.

An assignment of error in giving instructions will not be considered on appeal, where first made in appellant's reply brief, as it should have been made in her original brief, or in a supplemental brief filed by leave.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3007; Dec. Dig. § 762.*]

Appeal from Circuit Court, Pike County; D. H. Eby, Judge.

Action by Maggie Norvell against Alexander Cooper, Jr., administrator of the estate of Alexander Cooper, Sr. From a judgment for plaintiff, defendant appeals. Affirmed.

Ball & Sparrow and Pearson & Pearson, for appellant. Frank Duvall and J. D. Hostetter, for respondent.

CAULFIELD, J. This suit originated in the probate court of Pike county as a demand against the estate of Alexander Cooper, Sr., deceased, founded upon a negotiable promissory note for \$1,500 alleged to have been made by Cooper during his lifetime to his daughter, the plaintiff. An appeal was allowed and taken from the decision of the probate court to the circuit court. At the

trial in the circuit court two men engaged in the banking business, familiar with the handwriting of the decedent, gave testimony tending to prove the execution of the note by him. Thereupon the note was admitted in evidence. To meet this proof the sons and daughters of the decedent, Alexander Cooper, Sr., were permitted to testify in favor of the defendant, and this notwithstanding plaintiff's objection that they were disqualified as witnesses by reason of their pecuniary interest as children and heirs of the decedent; he having died intestate, and they being entitled to share in his estate. The court also permitted the husband of one of said daughters to testify in favor of the defendant administrator, against plaintiff's objection that he was incompetent because of being such husband "and therefore interested in the estate." To the rulings of the trial court in these respects the plaintiff duly saved exceptions and has duly assigned such rulings as errors. We will first dispose of the question as to the competency of the children, and next that as to the competency of the husband of one of them.

1. We may at the outset dismiss the idea that the children of the decedent, Alexander Cooper, Sr., are disqualified as at common law merely because they have a pecuniary interest directly involved in the matter in issue and on trial. That common-law rule has been abolished absolutely and unconditionally by section 6354, Rev. St. 1909. *Weiermueller v. Scullin*, 203 Mo. 466, 471, 101 S. W. 1088. This general statement must be accepted, however, subject to the qualification as to husband or wife testifying for or against each other, hereinafter mentioned. There is a proviso to section 6354, however, to which plaintiff's counsel cites us, and we will look to it to ascertain if thereby these children of the decedent, Alexander Cooper, Sr., are rendered or declared incompetent. The pertinent portion of that proviso reads as follows: "*Provided*, that in actions where one of the original parties to the contract or cause of action in issue and on trial is dead, or is shown to the court to be insane, the *other* party to such contract or cause of action shall not be admitted to testify either in his own favor or in favor of any party to the action, claiming under *him*, and no party to such suit or proceeding whose right of action or defense is derived to him from *one who is, or if living would be, subject to the foregoing disqualification*, shall be admitted to testify in his own favor, except as in this section is provided," etc. (The italics are our own.) It will be observed that the only ones by this proviso disqualified to testify are: First, the other party to such contract or cause of action; and, second, any party whose right of action or defense is derived to him from such other party.

In this case the only one of the original parties to the contract or cause of action in issue, who is dead, is defendant's intestate,

Alexander Cooper, Sr. The other party is the plaintiff. She is the only one "who is, or if living would be, subject to the foregoing disqualification." If there was any party to the suit whose right of action or defense was derived from her, the proviso would render such party incompetent to testify in his own favor; but there is no such party. The children of Alexander Cooper, Sr., derive from him, and not from plaintiff, or from any one else who is, or if living would be "subject to the foregoing disqualification." Plaintiff being alive, Alexander Cooper, Sr., if living, would not be disqualified, so the language of the statute would not disqualify his derivatives. It is suggested, however, that the plaintiff being by the proviso disqualified from testifying on account of the death of Alexander Cooper, Sr., the children of the decedent should also be held to be under the like disability; they being peculiarly interested in the event. To this the answer may be given that the statute has not so limited the competency of these children as witnesses, although it has restricted the evidence of the plaintiff. Our courts have gone far in construing this proviso, seeking to discover and declare its true spirit, rather than its letter; but we have been referred to no case where they have boldly amended it by adding a new class of disqualified persons in order to avoid possible or fancied inequalities between parties, as we would have to do here in order to sustain plaintiff's contention. Courts do not sit for that purpose. It is their duty to construe the law, leaving its wisdom and sufficiency to the Legislature. Our conclusion is that the trial court was correct in holding the children of Alexander Cooper, Sr., to be competent witnesses in this case. This conclusion we find is sustained by the ruling of our Supreme Court in *McKee v. Downing*, 224 Mo. 115, 137, 138, 124 S. W. 7; and is in harmony with that of the Kansas City Court of Appeals in *Smith v. Brinkley*, 132 S. W. 301.

2. But the rule is different as to Frank Worsham, the husband of one of the children of decedent. At the common law a husband was incompetent as a witness in actions where his wife was a party, or when, though not a party to the record, she had a direct interest in the result of the litigation. *Greenleaf, Evidence* (16th Ed.) § 341. And the husband remains incompetent to testify except in so far as our statutes have removed the disqualification. *Oexner v. Loehr*, 117 Mo. App. 698, 709, 93 S. W. 333. It is sufficient for our purposes to say that the disqualification of the husband is not removed by the statutes in the circumstances of this case. This witness gave substantial testimony affecting the merits of this case, and the court erred in admitting him to testify unless the objection to his competency was waived by being made too late. The general rule is that the right to object to any witness as incompetent is waived unless the

objection is taken at the first opportunity. *Ehrhardt v. Stevenson*, 128 Mo. App. 476, 481, 106 S. W. 1118; *Imboden v. Trust Co.*, 111 Mo. App. 220, 232, 86 S. W. 263; *Rapalje's Law of Witnesses*, § 173.

The direct examination of this witness proceeded to the point of objection as follows: "Frank Worsham, being sworn, testified as follows: Direct examination by Mr. Duvall: Q. Your name is Frank Worsham? A. Yes, sir. Q. You are the husband of Mrs. Worsham here in this case? A. Yes, sir. Q. You are a farmer? A. Yes, sir. Q. And you have been all your life? A. Yes, sir. Q. And have lived down there in Calumet township all your life? A. Yes, sir. Q. Were you present the day of the settlement had between Clay Smith, Mrs. Norvell, the plaintiff, at the time Smith bought the Fielder tract of land from Mrs. Norvell? A. Yes, sir. Q. Where was that? A. At my house. Q. Where was Uncle Alex living at that time? A. Living in our house. Q. And had been for years? A. No, sir; just a year at that time. Q. And continued to live with you from that time on until he went to Mrs. Norvell's here, about eight or nine months before he died? A. Yes. Q. Do you know what Smith paid for that tract of land? A. Yes, sir; \$2,400. Q. It was 40 acres at \$60 an acre? A. Yes, sir. Q. Now tell the jury what took place and how the settlement was made and what became of the money that Smith paid for the land? Mr. Ball: Hold on, let's see if this plaintiff was present and participated. Q. Mrs. Norvell was present? A. Yes, sir; right there. Clay Smith paid the money to Mr. Cooper, \$2,000, and gave a note for \$400 and figured up what Mrs. Norvell, Mrs. Tillett at that time, owed him. Q. Owed who? A. Owed Mr. Cooper. He held a mortgage or deed of trust. Q. What was the amount of money he loaned on the Fielder tract? A. \$1,100. Q. Go ahead and state the conversation that took place there in this settlement when Mrs. Norvell was there, and between her and her father. Mr. Ball: We object for the further reason this witness is a son-in-law of Alexander Cooper, he is the husband of a daughter of Mr. Cooper, and therefore interested in the estate and is an incompetent witness. (Objection overruled. To which ruling of the court the plaintiff then and there excepted and saved her exceptions.)"

It may be seen that the interest of the witness was disclosed at the commencement of his examination, and there is no claim that the plaintiff, at the time, labored under any mistake in relation to the interest of the witness, which might have authorized the court, in the exercise of its discretion, to relax the operation of the rule to prevent injustice. Indeed, it appears from the later testimony of this witness that he had testified at a former trial, in which event, if no

objection was made, the right to object in the later trial to his competency was clearly waived, and, being once waived, could not be recalled (*Imboden v. Trust Co.*, 111 Mo. App. 220, 86 S. W. 263); and, if objection was made, then the plaintiff and her counsel were very evidently apprised of this witness' incompetency long before he was sworn at this trial. Yet we find that plaintiff's counsel permitted the witness to make considerable progress in testifying and even interposed an interruption upon another ground before interposing any objection on the ground of incompetency. To sustain the objection under these circumstances would be to ignore the rule and allow parties to speculate upon the testimony, allowing the witness to continue while the testimony is not harmful and abruptly closing his mouth when the disclosures become painful or threaten to become so. It is well for counsel to understand that they must make the objection at the first opportunity or else be treated as waiving it. The action of the trial court in overruling this objection of plaintiff is sustained, and the assignment of error overruled.

3. In her reply brief for the first time the plaintiff, who is the appellant here, attempts to assign as error the action of the trial court in giving certain instructions. This assignment of error comes too late. It should have been made in appellant's original brief or in a supplemental brief filed by leave, so that respondent's counsel might have had an opportunity to answer it.

The judgment is affirmed.

REYNOLDS, P. J., and NORTONI, J., concur.

MARTIN v. JONES.

(St. Louis Court of Appeals. Missouri. Feb. 21, 1911.)

1. COURTS (§ 91*)—RULE OF DECISION.

The Court of Appeals must follow the decisions of the Supreme Court.

[Ed. Note.—For other cases, see *Courts*, Cent. Dig. §§ 325, 326; Dec. Dig. § 91.*]

2. EXECUTORS AND ADMINISTRATORS (§ 173*)—WIDOW'S ALLOWANCE—NATURE—STATUTE.

Bounties allowed the widow out of the estate of her husband by Rev. St. 1909, §§ 114, 115, 116, 117, are not a part of the widow's dower, as they belong to her absolutely, and not merely for life.

[Ed. Note.—For other cases, see *Executors and Administrators*, Cent. Dig. § 651; Dec. Dig. § 173.*]

3. EXECUTORS AND ADMINISTRATORS (§ 189*)—WIDOW'S ALLOWANCE—RELINQUISHMENT.

Where a widow, whose husband died testate, but without a child or other descendant, after renouncing the will elected, in accordance with Rev. St. 1909, § 353, to take in lieu of dower, under the direct provisions of Rev. St. 1909, § 351, one-half of the real and personal estate belonging to her husband absolutely, sub-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

ject to the payment of his debts, she is entitled under the direct provisions of Rev. St. 1909, §§ 116, 117, to choose personal property of her husband's estate, not exceeding \$400, to be hers absolutely, and not subject to the husband's debts.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. § 701; Dec. Dig. § 189.*]

Appeal from Circuit Court, Shelby County; Nat M. Shelton, Judge.

Proceeding by Elvira Martin against Arthur E. Jones, as executor of the last will and testament of William Parker Martin, deceased, to compel the setting aside of certain property as a widow's allowance. On appeal from the probate court to the circuit court, a judgment was had permitting the allowance, from which defendant appeals. Affirmed.

Harry J. Libby, for appellant. V. L. Drain, for respondent.

NORTONI, J. This is a proceeding for the widow's \$400 allowance out of the personal estate of her deceased husband. The finding and judgment were for plaintiff, and defendant prosecutes the appeal.

The controversy originated in the probate court of Shelby county, but thereafter found its way into the circuit court by appeal. Plaintiff is the widow of William Parker Martin, deceased, who departed this life testate without a child or other descendants in Shelby county about 1909, and defendant is the executor of the estate of her deceased husband under appointment in the will. It appears deceased left an estate of about \$26,000 which he disposed of by will, but there is nothing therein suggesting that plaintiff should not be entitled to the widow's absolute allowance under the statute, even though she accepted its terms. Plaintiff renounced the will immediately after its probate by filing her declaration in writing duly executed and in proper form in the proper offices in accordance with the statute. As her husband died without a child or other descendant living, plaintiff, after renouncing the will, elected, in accordance with section 353, Rev. St. 1909, to take in lieu of her dower, discharged of debts, one-half of the real and personal estate belonging to her husband at the time of his death absolutely subject to the payment of the husband's debts under the provisions of section 351, Rev. St. 1909. Her election so made is manifested by a declaration in writing acknowledged and duly filed, etc.. In all respects in conformity to section 355, Rev. St. 1909. The election so made and manifested in writing was consummated about eight months after letters testamentary were granted to defendant executor under the will. Immediately thereafter plaintiff asserted her right under the statute (sections 116, 117, Rev. St. 1909) to choose personal property of

her deceased husband's estate as hers absolutely, not to exceed \$400, and she made her claim thereto before such property had been distributed or sold. But defendant executor refused to accede to the demand on him for the reason it was premature. Defendant executor asserted that, by renouncing the will and electing to take one-half of her deceased husband's estate subject to the payment of debts, plaintiff's right to her absolute allowance became conditioned upon the fact that all debts were paid, and therefore postponed her to the status of an ordinary distributee of the estate. It appears that, though the estate inventoried about \$26,000, only \$20,000 of the amount was solvent, and demands to the amount of \$6,000 had been allowed against it in the probate court at the time plaintiff elected to take one-half of the real and personal property subject to debts. Furthermore, in addition to the demands thus allowed, a suit had been filed in the circuit court of Shelby county against the decedent's estate asserting a demand to the extent of \$17,500. In view of these facts, the question as to whether or not plaintiff had a present right to the \$400 allowance as absolute property or whether she was postponed in the circumstances of the case to the status of an ordinary distributee after the payment of debts became material, and affords the subject of an earnest controversy. It should be said that the court is profoundly grateful to counsel on either side for the diligent and painstaking manner in which they have briefed and argued the case, for both the main question and the sidelights thereon have been greatly elucidated by competent and discriminating lawyers with a degree of accuracy and precision that is commendable. As a result of these efforts, we have read many authorities and ascertain that, though there is conflict in the cases, the rule of decision seems entirely clear on the statutes.

The precise question presented for decision here was considered by our Supreme Court in Griffith v. Canning, 54 Mo. 282, in which the position assumed by defendant executor was sustained, and that case does not appear to have been expressly overruled. All of the material features of the present controversy are identical with those involved in that case, and, whatever may be our view of the law on the subject, it would be the duty of the court to determine this controversy in accord with the decision of the Supreme Court there given were it not for the fact that subsequent decisions of that tribunal have totally repudiated and overturned its doctrine. In that case the widow of a childless husband, after having renounced the will, as here, elected under the statutes, so far as material identical with those now in force, to take one-half of the husband's

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

real and personal property subject to debts in lieu of the dower right which otherwise obtained in her favor as to lands and thereafter asserted her claim as well to the \$400 allowance out of the personal property as here. On these facts, the Supreme Court denied the right of the widow as then present to the \$400 allowance, and said by her election she became as to the personalty only an ordinary distributee. The court declared the effect of the election to take one-half of the husband's real and personal property totally changed the attitude of the widow toward her husband's estate, and said that, if no election had been made, her present right to the absolute allowance of \$400 would be clear, as such right to \$400 was parcel of her dower. But by the election the widow voluntarily released all dower rights and assumed the position as to the personal property of an ordinary distributee after the payment of debts. It is obvious the court predicated its judgment in that case upon the proposition that the \$400 absolute allowance to the widow under the statutes was parcel of her dower, and that, as such, it was both required to be and was released perforce of the statute now section 353, Rev. St. 1909, providing for an election between dower and one-half of the entire estate. In that case the court omitted to notice that, by the express terms of the statute authorizing the widow's election in such circumstances, she is required only to elect between dower provided for in section 345, which pertains to one-third part of the lands whereof her husband died seised, discharged of debts, or the provisions of section 351, which affords her the right to one-half of the deceased husband's real and personal property subject to debts, and requires no election whatever with respect to bounties allowed the widow as her absolute property under sections 114, 115, 116, 117, Rev. St. 1909. In all material respects the statutes then in force and cited in *Griffith v. Canning* are the same as those above cited which now prevail. Though section 117, Rev. St. 1909, which was the same then as now, does provide the widow's allowance not to exceed \$400 shall be deducted from her dower in the personal estate, if any, the provision is without influence in the circumstances of a widow of a childless husband without other descendants, for as such no dower in the personal estate of the husband exists. Our present statute (section 349, Rev. St. 1909), which was as to the widow identical when *Griffith v. Canning* was decided, as appears by reference to section 4, c. 47, *Wagner's St. 1872*, confers dower on the widow in the personal estate only on condition that the husband die leaving a child or children or other descendants, in which event she is endowed equal to the portion of a child. This being true, it is clear that the widow of a deceased husband who left neither a child nor other descendant is possessed of no dower right in the personal estate

to forego by an election or otherwise. The fundamental error in *Griffith v. Canning*, is obvious, for, besides assuming that an election between the dower right in real estate and the one-half of both real and personal property included an election to release dower in personalty as well, the court assumed, furthermore, that the widow of one who left neither child nor other descendants was entitled to dower in the deceased husband's personal estate, and, being so entitled, released it, and this proposition is untrue. Moreover, such bounties allowed under the statute (sections 114, 115, 116, 117, Rev. St. 1909) to the widow are no part of her dower proper, though they do in some respects resemble it, for she has an absolute property in them, and not a life estate. *Bryant v. McCune*, 49 Mo. 546; *Glenn v. Gunn*, 88 Mo. App. 423; *Ellis v. Ellis*, 119 Mo. App. 63, 96 S. W. 260. In this view essentially the Supreme Court receded from the fundamental proposition involved in *Griffith v. Canning*, as appears by the more recent case of *State ex rel. Steers v. Taylor*, 72 Mo. 656, though no reasoning is given, for in that case it is declared the widow of a childless husband is entitled to take such statutory allowances, and this, too, whether she elects to take her dower or the one-half of her deceased husband's estate under the statute heretofore referred to. It is to be noted of this case that the opinion was prepared by the same judge who wrote *Griffith v. Canning*; this, too, when that case alone was cited in the briefs in support of the contrary doctrine. The principles of the two adjudications reflect a fundamental variance which may not be reconciled, and it would have relieved us of much labor had the first decision been expressly overruled as it should have been, instead of by process sub silentio. Besides this authority, which entirely repels the idea that the widow by electing to take one-half of the estate postponed her claim to the statutory allowance to that of a distributee after the debts are paid, the more recent case of *Waters v. Herboth*, 178 Mo. 186, 77 S. W. 305, declares the purpose of sections 115, 116, 117, Rev. St. 1909, is to give the articles mentioned and the rights thereto to the widow immediately, and that her right attaches at once upon the death of her husband. The court declares in that case that the articles and rights contemplated by those sections are to form no part of the estate either for the creditors or the distributees, and, furthermore, that the rights of the widow immediately dis sever such articles from the corpus of the estate. It is said, too, those sections of the statute and the rights of the widow thereunder are not to be considered in any manner in connection with section 351, which confers upon her the right to one-half of the deceased husband's real and personal property subject to the payment of debts, provided he dies without children or other descendants. From these more recent

decisions of the Supreme Court, it is obvious that the doctrine of *Griffith v. Canning*, supra, no longer obtains as the rule of decision in that tribunal, and, after putting that adjudication out of the way, it is entirely clear that the widow did not forego her right to the \$400 allowance by the mere act of electing under the statutes to take one-half of her husband's estate in lieu of her dower in real estate as mentioned by the pointed reference to the several sections of the statute pertaining to dower in lands in sections 353 and 355, which confer the right and point out the method of declaring the election. The judgment should be affirmed. It is so ordered.

REYNOLDS, P. J., and CAULFIELD, J., concur.

FRENCH v. BURLINGAME.

(St. Louis Court of Appeals. Missouri. Feb. 21, 1911.)

1. HUSBAND AND WIFE (§ 19*)—PRIVILEGES OF COVERTURE—WIFE'S IMPLIED AGENCY.

A wife has an implied agency to pledge her husband's credit for necessities for herself or his minor children.

[Ed. Note.—For other cases, see Husband and Wife, Cent. Dig. § 133; Dec. Dig. § 19.*]

2. PARENT AND CHILD (§ 3*)—SUPPORT OF CHILD—NECESSARIES.

A father is liable for reasonable necessities of life furnished to his minor children, whether they are procured by such children or his prior divorced wife.

[Ed. Note.—For other cases, see Parent and Child, Cent. Dig. §§ 36-46, 50; Dec. Dig. § 3.*]

3. PHYSICIANS AND SURGEONS (§ 21*)—ACTIONS FOR COMPENSATION.

The subsequent death of one upon whom a surgeon performed a proper operation does not affect the surgeon's right to compensation.

[Ed. Note.—For other cases, see Physicians and Surgeons, Cent. Dig. § 50; Dec. Dig. § 21.*]

4. PARENT AND CHILD (§ 3*)—NECESSARIES—FATHER'S LIABILITY.

A husband who allowed his wife and their family physician to take his minor child to a city for treatment by a surgeon, and the two physicians found that the only hope of saving the child's life was an immediate operation, which was then properly performed, he is liable for the surgeon's fee, though the child died and the operation was without his knowledge and against his wishes, but of which latter fact the surgeon was uninformed.

[Ed. Note.—For other cases, see Parent and Child, Cent. Dig. §§ 36-46; Dec. Dig. § 3.*]

Appeal from Circuit Court, St. Charles County; J. D. Barnett, Judge.

Action by Pinckney French against John Burlingame. From a judgment for plaintiff, defendant appeals. Affirmed.

Peers & Peers, for appellant. Wm. Waye, Jr., and Wilfey, McIntyre & Nardin, for respondent.

NORTONI, J. This is a suit in quantum meruit for the reasonable value of profes-

sional services of a surgeon in performing an operation on defendant's infant child. Plaintiff recovered, and defendant prosecutes the appeal.

There is but one question for decision, and that relates alone to the sufficiency of the evidence in support of defendant's liability for the charge of \$100 made against him by plaintiff for his services. It appears defendant resides together with his wife and family in Montgomery county, Mo. Plaintiff is a practicing physician and surgeon in the city of St. Louis. Defendant's little daughter, nine years of age, had been suffering some time with a liver trouble, and had been treated at home therefor by local physicians without success. She was finally brought to St. Louis by her mother and the family physician for treatment by Dr. French. Upon making an examination, plaintiff, Dr. French, and defendant's family physician, diagnosed the malady to be an abscess on the liver, and advised that an operation should be performed at once in order to permit the pus to escape, and thus save the patient's life. This fact was communicated to defendant's wife, who consented and agreed that the operation should be performed. In accord with her consent, the operation was performed at the hospital on the following day, and it is said as much as two quarts of pus were removed. The little girl succumbed a day or two thereafter, but it is conceded the operation was performed with skill and the death occurred from weakness resulting from the disease. Defendant is the father and resists payment of the \$100 charge made by Dr. French solely on the grounds that the operation was performed without his knowledge or consent. It is conceded in the case that the operation was necessary in order to save the life of the child, but was, of course, a dangerous one in the then weakened and emaciated condition of the patient. It is in evidence on the part of defendant that he had objected to an operation before his wife left home with the child, and said that one should not be performed, but this fact was not communicated to Dr. French. It appears that he was informed only that the father objected to the child's being removed to St. Louis, but nothing was said to him about an objection to an operation if one were found to be necessary.

Defendant relies upon the case of *Detwiler v. Bowers*, 9 Pa. Super. Ct. 473, where it is said a surgical operation of doubtful advantage is not a necessary for which a non-assenting father is liable upon an order given to the surgeon by the wife. But the facts in that case are somewhat dissimilar from this one, for there the malady from which the child suffered and for which the operation was performed at the instance of the mother without the knowledge and against the consent of the father was a cancerous tumor,

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

and the parents had been advised the disease would immediately reveal itself again, though an operation were had. Indeed, this prediction proved to be true in that case, for, though several operations were had, each time the cancerous growth recurred. On those facts the court deemed the operation so known to be of doubtful advantage as one not falling within the category of necessities furnished the child for which the parent should answer. Here the facts are entirely dissimilar, for naught in the case suggests that the malady—an abscess on the liver—might return if once removed, and it is conceded such was the only remaining chance for the recovery of the child. The fact that defendant objected to the child being removed from home and brought to St. Louis for treatment by Dr. French is wholly unimportant in view of the further fact that notwithstanding he permitted the removal to be made. Both the mother of the child and the family physician say they did not inform Dr. French defendant objected to an operation, but only that he preferred the child to remain at home. Defendant having acquiesced in the act of the mother in bringing the little one to plaintiff in St. Louis for treatment, the case must be viewed as though the wife was his agent for the purpose. No one can doubt the implied agency of the wife to pledge her husband's credit for necessities for herself or his minor children according to the circumstances of the case. *Sauter v. Scrutshfield*, 28 Mo. App. 150; 15 Am. & Eng. Ency. Law (2d Ed.) 876. It is the law, too, that the father is liable for such reasonable necessities of life as are compatible with his circumstances furnished to his minor child by third persons in case he neglects to supply them, and they are procured by the child or his prior divorced wife for it. *Rankin v. Rankin*, 83 Mo. App. 335; *Huke v. Huke*, 44 Mo. App. 309, 313. The proposition that a father may, of course, be held liable for necessities furnished to his infant child with his authority, though the obligation be contracted through his agent, is certainly sound beyond question. 21 Am. & Eng. Ency. Law (2d Ed.) 1052, 1053. The case concedes that the only chance for saving the life of the child was the operation, which plaintiff performed in a careful and skillful manner. The fact the patient subsequently died without fault of the surgeon is wholly immaterial to the obligation of defendant to pay the reasonable value of his services. *Logan v. Field*, 192 Mo. 54, 90 S. W. 127. In these circumstances, we can imagine nothing more highly necessary to the welfare of the child or more within the obligation of the parent than the services rendered, for it was the one and only hope of the little one's continued life to bless and cheer the parents. It is obvious, too, this service was rendered at the instance and re-

quest of defendant's wife, who possessed prima facie authority to bind him for such necessities as were furnished to herself or his minor children. Infection was present and about to progress. The mother, unattended except by the family physician, but with the father's consent, was in a great city with their child dangerously ill, seeking some measure of relief. So situated, was the mother to await communication with her husband at a distant part of the state while the spell of almost immediate dissolution hovered over the little one before asserting her authority to commit him to respond as for necessities in compensation of services which offered the one chance for its life? We answer no. We further say the services rendered were in the circumstances of the case necessities for which the law implies an obligation on the part of the father to pay when so performed at the instance and request of the mother. Every precept of natural justice suggests the liability of defendant, and, if there is no precedent for sustaining the judgment, one should be established forthwith.

The judgment should be affirmed. It is so ordered.

REYNOLDS, P. J., and CAULFIELD, J., concur.

TUCKER v. MINE LA MOTTE LEAD & SMELTING CO.

(St. Louis Court of Appeals. Missouri. Feb. 21, 1911.)

1. MASTER AND SERVANT (§ 291*)—INJURY TO MINER—INSTRUCTIONS.

An instruction that a miner, injured while pushing a car with his back toward it, should not have pushed in that way, was properly refused, where it appeared that that was the usual way of moving the car.

[Ed. Note.—For other cases, see Master and Servant, Dec. Dig. § 291.*]

2. MASTER AND SERVANT (§ 276*)—INJURY TO MINER—EVIDENCE—SUFFICIENCY.

Evidence held to sustain recovery for injury to a miner, received while pushing a car, on the theory that it was caused by negligent maintenance of a protruding plank between the rails.

[Ed. Note.—For other cases, see Master and Servant, Dec. Dig. § 276.*]

3. MASTER AND SERVANT (§ 226*)—RISKS NOT ASSUMED.

An employé does not assume risks arising from the employer's negligence, such as maintenance of a protruding plank between the rails of a track along which a miner is required to push a car, unless injury results from the particular manner in which the employé uses the defective appliance, when there was another and safe way.

[Ed. Note.—For other cases, see Master & Servant, Cent. Dig. §§ 659-667; Dec. Dig. § 226.*]

Appeal from Circuit Court, Madison County; Chas. A. Killian, Judge.

Action by Charles H. Tucker against the Mine La Motte Lead & Smelting Company.

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r indexes

Judgment for plaintiff, and defendant appeals. Affirmed.

Crews & Cantwell, for appellant. Robt. A. Anthony, for respondent.

REYNOLDS, P. J. Plaintiff sues for damages alleged to have been sustained by him while moving a car on which was loaded what is called a "can" along a drift of the mine of defendant. The actionable negligence of the defendant charged and relied on is that a plank was so placed between the rails of the track along which the car was being pushed by plaintiff that the wheels striking against it caused the car to tilt, and so cause the "can," which was being carried on it, to fall off and catch plaintiff, fracturing the bones of one of his legs, and bruising him on his body and limbs. The plank was placed by the foreman under whose immediate direction plaintiff was working. He had been employed in the drift, which was underground and dark, only two days; the accident occurring on the second day. He admits he knew the plank was there, and so placed as to jar the car when the latter was pushed along the track and over it; but he testified that his foreman told him it was all right, and that he relied on this assurance. When the accident occurred, he was pushing the car with his shoulder; his back to the car and he facing to the rear. In effect, he testified that there was nothing on the track to jar the car, unless it was this plank. Neither he nor any other witness testifies to having seen the car strike the plank, or that in fact it did strike it. When others went to the assistance of plaintiff, who had been operating the car alone, he was lying under the can, and the end of the car from him, the front of the car as plaintiff pushed it, was some 12 or 18 inches off of and away from the plank. The car had not reached the plank by some 12 or 18 inches. The incline of the track was toward the plank, and if the wheels of the car hit the plank the car must have rebounded "up hill."

The defendant demurred to the evidence, and, that being overruled, the court, at the instance of plaintiff, gave several instructions, not now objected to. At the instance of defendant several instructions presenting the theory of the defense were given; two being refused. One of these was on the theory that plaintiff should not have pushed the car with his back toward it. There was evidence that this was the usual way of moving this car, so that this instruction was correctly refused. Indeed, the learned coun-

sel for appellant makes no assignment of error on its refusal. The other instruction, asked by defendant and refused, is as follows: "(13) The court instructs the jury that even though you should find and believe that a board was placed across defendant's car track in such manner as to obstruct the wheels, or flanges on the wheels, of defendant's car, and that said board caused the hind wheels of said car to leave the track, and thereby caused a can of ore to fall upon and injure plaintiff, yet if you further find and believe that the plaintiff was as familiar as defendant with the size of said board, and the fact that it obstructed the passage of said car. If it did so obstruct the same, then you will find that plaintiff assumed the risk of pushing said car and can over said board and cannot recover."

There was a verdict for plaintiff, awarding him \$500 damages, and judgment followed, from which defendant, filing motion for new trial and in arrest, and saving exceptions to the action of the court in overruling them, has duly perfected its appeal to this court.

Four errors are assigned: First, in the refusal of the instruction in the nature of a demurrer to the evidence, offered at close of plaintiff's evidence; second, the refusal of a like instruction at the close of all the evidence; third, in the refusal of the above-quoted instruction; fourth, in overruling the motion for a new trial. The first and second assignments are untenable. There was evidence on which the jury might find for plaintiff under proper direction. It is true it is very slight, but sufficient to warrant the jury in finding as it did.

The instruction as to assumed risk, quoted above, was properly refused. It is the rule in this state that the servant does not assume the risks of the master's negligence (*Curtis v. McNair*, 173 Mo. 270, 73 S. W. 167), unless it be in a case where the injury occurs from the particular mode or manner in which the servant uses the defective appliance, when another safe way to use it appears (*Harris v. Kansas City Southern R. Co.*, 146 Mo. App. 524, 124 S. W. 576). The matter of the servant's knowledge of the condition under the facts of the case seems to be one for consideration on the question of contributory negligence, and the instruction was properly refused. *Blundell v. William A. Miller Elevator Mfg. Co.*, 189 Mo. 552, 88 S. W. 103.

The judgment of the circuit court is affirmed.

NORTONI and CAULFIELD, JJ., concur.

CAPE GIRARDEAU BELL TELEPHONE CO. v. HAMIL'S ESTATE.

(Springfield Court of Appeals. Missouri. Feb. 6, 1911. Rehearing Denied March 7, 1911.)

1. APPEAL AND ERROR (§ 1010*)—FINDINGS—CONCLUSIVENESS.

A finding supported by substantial evidence is conclusive upon the Court of Appeals.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3979-3982; Dec. Dig. § 1010.*]

2. ASSIGNMENTS (§ 31*)—VOLUNTARY PAYMENT.

Where plaintiff paid the funeral expenses of an employé killed in its service, stating at the time that if the employé's family offered to pay the bill the creditor should accept it, the payment was voluntary and not a purchase of the account, and the procurement of an assignment thereof by plaintiff two years thereafter did not make such payment a purchase of the account.

[Ed. Note.—For other cases, see Assignments, Dec. Dig. § 31.*]

3. SUBROGATION (§ 26*)—VOLUNTARY PAYMENTS.

One voluntarily paying a debt he is not legally bound to pay, without any agreement that it shall be assigned to him, cannot afterwards procure an assignment from the creditor and enforce payment from the debtor.

[Ed. Note.—For other cases, see Subrogation, Cent. Dig. § 67; Dec. Dig. § 26.*]

4. MONEY PAID (§ 1*)—VOLUNTARY PAYMENT.

One voluntarily paying another's debt, without any understanding for repayment, cannot recover such money from the person for whom he paid it.

[Ed. Note.—For other cases, see Money Paid, Cent. Dig. §§ 13-16; Dec. Dig. § 1.*]

Appeal from Cape Girardeau Court of Common Pleas; Robert G. Ranney, Judge.

Action by the Cape Girardeau Bell Telephone Company against the estate of T. J. Hamil, deceased. From a judgment for plaintiff, defendant appeals. Reversed.

L. L. Bowman and Frank Kelly, for appellant. Oliver & Oliver, for respondent.

COX, J. Thomas J. Hamil was an employé of plaintiff, and was killed by coming in contact with a live wire in July, 1907. The plaintiff soon thereafter paid the funeral expenses of the deceased. J. A. Hamil was appointed administrator of the estate of deceased and later brought suit against plaintiff and recovered judgment for \$1,875, damages on account of the death of Thomas J. Hamil. Plaintiff paid this judgment, then about November 1, 1909, secured an assignment to it of the accounts for the funeral expenses paid by it over two years prior thereto, and presented these accounts to the court of common pleas of Cape Girardeau, which exercised probate jurisdiction for allowance against the estate of Thomas J. Hamil. The account was allowed, and the administrator has appealed.

The only question to determine here is whether the finding of the court is supported

by substantial testimony. If it is so supported, the court's finding is binding upon us.

Plaintiff contends that it purchased the accounts, while defendant insists that plaintiff voluntarily paid the account and did not purchase it. It is conceded that plaintiff paid to the creditor the amount of the claim and that no assignment was taken or asked for at the time. The only thing said at the time by the party making the payment to the creditor was that if the family should offer to pay the bill for him to accept it. Did this show a purchase of the account or a payment of it? To our mind it negatives the idea of a purchase, and, on the contrary, shows a voluntary payment with a suggestion that, if the friends of the deceased wished to reimburse plaintiff for the payment, it would be accepted. This was not a purchase of the account at that time, and procuring an assignment of the account two years thereafter and after plaintiff had been compelled to pay a judgment against it for damages did not, and could not, convert the payment into a purchase.

A party who has an interest in property to protect, and, to do so, pays an incumbrance thereon may be subrogated to the rights of the holder of the debt, and the law will treat him as a purchaser of the debt in order to protect him, even though no assignment of the debt was taken at the time; but when a party who has no interest to protect pays the debt of another without any request from the debtor and when he is under no legal obligation to pay it, and pays it with no understanding at the time that an assignment is contemplated, he cannot afterward, when it suits his convenience to change front, go then and secure a formal assignment of the debt and enforce collection from the debtor. *Bunn v. Lindsay*, 95 Mo. 250, 7 S. W. 473, 6 Am. St. Rep. 48; *Crane v. Noel & Cohn*, 103 Mo. App. 122, 78 S. W. 826.

The payment of the debt in this case was voluntary when made, and plaintiff must be bound by it. The result is that plaintiff has no cause of action. Cases to which we are cited by respondent (*Vansandt v. Hobbs*, 84 Mo. App. 628; *Swope v. Leffingwell*, 72 Mo. 348; *Campbell v. Allen*, 38 Mo. App. 27; *Campbell v. Roeder*, 44 Mo. App. 324) are not in conflict with our holding in this case.

Judgment reversed. All concur.

BROWN v. T. J. MOSS TIE CO.

(St. Louis Court of Appeals. Missouri. Feb. 21, 1911.)

1. PLEADING (§ 311*)—EXHIBIT ANNEXED TO PLEADING.

An exhibit merely attached to the petition is not thereby made a part thereof.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. § 945; Dec. Dig. § 311.*]

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

2. SALES (§ 52*)—CONTRACTS—EVIDENCE.

Evidence held not to show a contract for the sale and purchase of ties, subject to inspection by a railroad company.

[Ed. Note.—For other cases, see Sales, Dec. Dig. § 52.*]

3. SALES (§ 181*)—CONTRACTS—PERFORMANCE—EVIDENCE.

In an action for breach of a contract to pay for ties subject to inspection by a railroad company, evidence held to show an inspection by and a rejection of the ties by the inspector of the company, as not up to the standard, defeating a recovery.

[Ed. Note.—For other cases, see Sales, Dec. Dig. § 181.*]

4. ASSIGNMENTS (§ 137*)—SUFFICIENCY—EVIDENCE.

Testimony by a party to a contract for the sale and purchase of ties, that he had sold out to a third person and the testimony of the third person that when he bought out the party he paid him a specified sum for the ties and the timber left on the ground, did not prove an assignment of the contract so as to entitle the third person to sue for damages for breach of contract.

[Ed. Note.—For other cases, see Assignments, Dec. Dig. § 137.*]

Appeal from Circuit Court, Dunklin County; Jas. L. Fort, Judge.

Action by Virgil Brown against the T. J. Moss Tie Company. From a judgment for plaintiff, defendant appeals. Reversed.

W. S. C. Walker, for appellant. John F. McKay, for respondent.

REYNOLDS, P. J. Plaintiff in this action seeks to recover damages against defendant for its failure to take up, receive, and pay for a lot of ties which plaintiff claims defendant had contracted for, the contract claimed to have been by a written proposal from one Myers, the assignor of plaintiff, and which proposal, it is claimed, was accepted in writing by Bray. The allegation in the petition as to the interest of plaintiff is as follows: "Plaintiff further states that he has purchased all the right, title, and interest of James A. Bray in and to the ties as aforesaid, and in and to any right accruing for damages." The exhibit is attached to the petition as Exhibit A. The answer, after a general denial, denies that the exhibit filed with the petition contains any contract between plaintiff and defendant; denies that the writer of the letter had any authority on the date of the letter to bind defendant in any contract, without express approval of defendant; denies that defendant ever approved the contract, and denies that any ties mentioned in the letter attached to the petition were offered for acceptance. The case was heard before the court and a jury. Defendant demurred to the evidence. That was overruled and exceptions saved. Plaintiff asked no instructions. Defendant asked several, all of which but one, not necessary to notice, were refused. There was a verdict for plaintiff,

from which, after unsuccessfully moving for a new trial, defendant has duly appealed.

Attaching an exhibit to a pleading does not make it part of the petition, and it is doubtful whether we can consider it at all, as it is not very clear that it was read in evidence. Waiving that and giving plaintiff the benefit of the doubt, we will treat it as having been given in evidence. This proposal, which the testimony of defendant tends to show was a mere general circular sent out to all timber and tie men, is addressed to Bray, and in substance the writer, Myers, writes that he had expected to see Bray, but did not do so, "but, in reference to buying ties, will say that we are in the market for all the soft and hardwood ties that are offered." The letter then quotes prices that defendant would pay, and specifies the sizes required, as well as quality of the ties—that is, as to what timber they were to be made from and their condition as to "crooks, knots," or other defects which would render them unacceptable—and specifies how they are to be piled. The letter concludes: "Will inspect and pay for ties in full once each month. All ties are contracted for subject to Frisco inspection and paid for at inspection. Will be glad to do business with you or help you to do business." By "Frisco" is meant the St. Louis & San Francisco Railroad Company. As to the oral evidence, it is sufficient to say of it that it falls short of even tending to prove that, conceding that an agent of defendant, having authority, made the offer contained in the letter, it does not tend to show an acceptance of the offer on the part of plaintiff's assignor which was known to or communicated to defendant. Bray, it is true, testified that he accepted the order, but it appeared that this was through Brown. All that Brown testified to on this is that he answered the letter of Myers and signed Bray's name to it. The letter was neither produced, accounted for, nor its contents testified to—merely that Brown, writing for Bray, had answered the letter of Myers. How he answered it does not appear. There is no evidence in the case tending to show any subsequent acts on the part of defendant, or any one representing it, that can be construed into a recognition of the fact of plaintiff's assignor having any contract whatever with defendant concerning ties. Furthermore, the letter relied on as a contract explicitly provides that "all ties are contracted for subject to Frisco inspection and paid for at inspection." Plaintiff and Bray and their witnesses do not pretend to say that the ties had not been inspected, the failure to do which is averred as one of the grounds for recovery in this case by plaintiff. All they say on the matter is that, if there was an inspection by the "Frisco" agents, they "did not know of it." To the contrary of

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

this negative testimony is the positive testimony of Myers and of the "Frisco" inspectors, and of the inspectors, or those whose business it was to take up ties for appellant, that these identical ties were inspected by the "Frisco," and rejected as not up to standard. Over and above this there is no proof whatever of any assignment of this contract pleaded and relied on by Bray to Brown. All that is said on this subject was by Bray under cross-examination, when he testifies: "I sold out to Brown (plaintiff) as early as January, 1908." All that Brown testifies to on the matter is this: "When I bought out Bray I gave him something like \$90 for the ties and the timber that was left on the ground." This is no proof whatever of such an assignment of the pretended contract as entitles plaintiff as assignee of Bray, to maintain this action for damages on that contract. It might be that Brown owned the ties. That would not make him privy to the contract for their purchase by defendant, if such contract existed. Much less would the purchase of the ties constitute him an assignee of a chose in action, so as to entitle him to claim damages against defendant for failure to comply with that contract. That is all that is in this case. Whether such a case as this, resting on an alleged assignment of a right to recover damages, can be maintained at all, we are not considering or deciding, as it is not necessary to do so here. There is no pretense that plaintiff himself had any contract whatever with defendant. Nor are we considering or determining the question as to whether this letter, claimed to be a proposal, on which the alleged contract is based, was definite enough, in itself, to constitute a contract or a definite proposition for a contract. On this phase of it we express no opinion. It is proper to say that no counsel appeared before us, and no briefs were filed, in behalf of respondent. We therefore prefer not to pass on any points not absolutely material to the determination of this particular case.

For a failure of evidence on the part of plaintiff in this case, the demurrer which defendant interposed at the close of all the testimony in the case should have been sustained.

The judgment of the circuit court is reversed.

NORTONI and CAULFIELD, JJ., concur.

ST. VICTOR v. EDWARDS et al.

(St. Louis Court of Appeals. Missouri. Feb. 21, 1911. Rehearing Denied March 7, 1911.)

1. TRIAL (§ 260*)—INSTRUCTIONS—REFUSAL OF INSTRUCTION COVERED BY CHARGE GIVEN.

Where the instructions given at the instance of the defeated party submitted the issues to the jury in the most favorable light pos-

sible for him, he could not complain of the refusal of other instructions.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 651; Dec. Dig. § 260.*]

2. APPEAL AND ERROR (§ 1050*)—HARMLESS ERROR—ERRONEOUS ADMISSION OF EVIDENCE.

Where, in replevin of a note brought by the payee against the makers, all the facts were shown by competent testimony, the error in permitting the payee to answer the question as to his purpose in surrendering the note to the makers was not prejudicial.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4153-4160; Dec. Dig. § 1050.*]

3. TRIAL (§ 140*)—CREDIBILITY OF WITNESSES—QUESTION FOR JURY.

The credibility of the witnesses is for the jury.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 334; Dec. Dig. § 140.*]

4. APPEAL AND ERROR (§ 1002*)—VERDICT—CONCLUSIVENESS.

A verdict on conflicting evidence will not be disturbed on appeal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3935; Dec. Dig. § 1002.*]

5. REPLEVIN (§ 72*)—EVIDENCE—SUFFICIENCY.

Evidence in replevin of a note brought by the payee against the maker held to justify a finding that the payee was entitled to possession of the note as against the objection that it had been delivered to the maker on the theory that it had been paid by the acceptance of a testamentary gift.

[Ed. Note.—For other cases, see Replevin, Dec. Dig. § 72.*]

Appeal from Circuit Court, Pike County; David H. Eby, Judge.

Action by Sallie St. Victor against John R. Edwards and another. From a judgment for plaintiff, defendants appeal. Affirmed.

Pearson & Pearson, for appellants. J. D. Hostetter, for respondent.

REYNOLDS, P. J. This is an action in replevin for the recovery of a note for the sum of \$500, alleged to be the property of plaintiff and to the possession of which she is entitled, the note being described as executed by defendants, payable to the order of plaintiff, it being averred that nothing had been paid on the note except the first year's interest, that the value of the note is \$550, and that defendants, who are husband and wife, wrongfully detain the note from plaintiff. Judgment is asked for the recovery of possession of the note and damages for the detention thereof.

The answer admits the execution of the note and payment of \$25 on it, but avers that defendants made payment of \$4.16 additional. As a further defense, it is averred that after the execution of the note one Sarah C. Lyons, now deceased, was about to and did execute her will; that she owned jointly with plaintiff a certain bond for the sum of \$1,000; that she told defendant Margaret A. Edwards that it was her desire and intention to pay off and discharge the note

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes
134 S.W.—70

of defendants to plaintiff herein, and that she was going to do so by her will, giving to plaintiff her (Mrs. Lyons') half interest in the \$1,000 bond; that Mrs. Edwards communicated the intention and desire of Mrs. Lyons to plaintiff, and that plaintiff consented thereto; that shortly thereafter Mrs. Lyons made and executed her will duly admitted to probate, and that by the will she bequeathed to plaintiff her half interest in the bond, with the further bequest of \$1,000; that plaintiff accepted the gift and bequest, and afterwards, in pursuance of the arrangements, agreements, and settlements, delivered and surrendered the note to defendants. As a further defense, setting up the intention of Mrs. Lyons to execute her will and that she jointly with plaintiff owned a \$1,000 bond, and that she told defendant Mrs. Edwards that it was her desire and intention to pay off and discharge the \$500 note sued on "by willing and giving" to plaintiff her (Mrs. Lyons' half interest in the \$1,000 bond, the answer avers that Mrs. Edwards communicated the intention on the part of Mrs. Lyons to plaintiff; that Mrs. Lyons made her will, and in it gave and bequeathed to plaintiff the half interest in the bond which Mrs. Lyons and plaintiff owned, together with the further bequest to plaintiff of the sum of \$1,000; that plaintiff accepted the gift and bequest so made in full payment and satisfaction of the note, and that in June, 1907, after the death of Mrs. Lyons and after her will had been duly filed and probated, plaintiff and defendants, "recognizing and accepting the act of said Sarah C. Lyons, in willing, giving, and bequeathing her one-half interest in said bond to the plaintiff as being in payment of the same, and a settlement and satisfaction of said note and the plaintiff delivered up said note to the defendants." Defendants accordingly pleaded full payment and satisfaction of the note, and that it was delivered to them by plaintiff because of the fact that it was paid in full and so considered by her.

The reply, after a general denial of the allegations, except as specially admitted, admits the making of the will by Mrs. Lyons; that plaintiff and Mrs. Lyons were the joint owners of the \$1,000 bond; that Mrs. Lyons bequeathed to her (plaintiff) her (Mrs. Lyons') one-half interest in the bond; that the will had been duly probated, and that it made a further bequest to her (plaintiff) of \$1,000, admits that, after the death of Mrs. Lyons and the probate of the will, plaintiff delivered the possession of the note to defendants, but that they had procured it from her by falsely representing to her that the bequest of one-half interest in the \$1,000 bond made by the will of Mrs. Lyons was made and intended by her as payment of the note, whereas, in point of fact, the bequest was unconditional, and was not in satisfaction or payment of the note and

not so intended by Mrs. Lyons. Plaintiff further avers in this reply that at the time she delivered the note to defendants she was in bad health, and expecting to leave home to have a dangerous surgical operation performed on her, and was at that time "in such a disturbed and distressed condition of mind, in addition to her physical ailments, that she was mentally irresponsible, and yielded by reason of her weak and enfeebled mental and physical condition to the importunities of the defendants and their false and fraudulent statements and representations, and delivered possession of the note to them without any consideration whatever, and without the same being paid off and discharged, and while the same was a valid and subsisting obligation against defendants." Plaintiff, again averring that at the time she delivered possession of the note to defendants she was about to leave her home to have a dangerous surgical operation performed on her, and from which plaintiff felt that she might never recover, avers that she was beset with the importunities of defendants to turn over possession of the note to them, so that, in the event she should die under the operation, they would have possession of the note, that under these circumstances she delivered possession of the note to defendants with the intention of requiring defendants, in case she survived the operation, to return the note to her, and she avers that she never at any time delivered possession of the note to the defendants or either of them with the purpose and intention on her part to part with the title to the note; that neither was it the intention of defendants that they, in receiving possession of the note, should acquire any title or ownership thereto; that they merely received the possession of the note because of the fact that they had persistently, but falsely, urged on plaintiff the claim that Mrs. Lyons provided in her will that the bequest of one-half interest in the bond should be and was in payment of the note, and she avers that they took the note, not with the idea of acquiring title or ownership thereto as against plaintiff, but merely to hold the same until it should be ascertained whether plaintiff would survive the operation, and it was then the intention and purpose of all the parties that, if plaintiff did so, the note should be returned and possession thereof given up to her; that, shortly after her return after having undergone the surgical operation, she requested defendants to return the note and deliver up possession thereof to her, and that she had frequently made that demand of them up to the time of the institution of the suit, wherefore she prays judgment as in her petition.

The trial was before the court and a jury. It is sufficient to say that plaintiff and Mrs. Edwards testified and introduced evidence along the lines of their respective

pleadings. The testimony of these ladies was flatly contradictory to each other on practically every material fact. The testimony of the other witnesses was on mere collateral matters. The will of Mrs. Lyons made no reference to the \$500 note in suit. At the conclusion of the testimony, the court gave eight instructions at the request of defendants, refusing seven which defendants prayed. No instructions were asked or given at the instance of plaintiff, the jury returning a verdict in favor of plaintiff, and finding that she was entitled to the possession of the note, and that defendants were detaining it unlawfully, assessed the value of it at \$535. Judgment followed accordingly as provided by statute in the action of replevin. Defendants in due time filed their motions for new trial and in arrest, both of which were overruled, defendants saving exception and afterwards perfecting appeal to this court.

The assignments of error made by the learned counsel for appellant are five. The first and fifth are practically assignments of error to the action of the court in refusing to sustain demurrers to the evidence. The second is to the refusal of the court to give proper and legal instructions asked by defendants. The third is to the allowance of illegal and improper testimony. The fourth is bottomed on the allegation that the jury disregarded instructions of the court given in behalf of defendants. The sixth is to the action of the court in overruling the motions for a new trial and in arrest.

Taking these up in their order, while, as before noted, the testimony of Miss St. Victor and that of Mrs. Edwards was flatly contradictory of each other on practically every material matter, that of plaintiff, if true, fully sustained the matter pleaded by her, except as to fraud, and as to that the court told the jury in the first instruction given that there was no evidence that the note had been secured by defendants by means of fraudulent statements. Plaintiff testified very distinctly that she had never surrendered or delivered up the note to defendants as paid. There was no error in overruling the demurrers.

We have carefully examined and considered the refused instructions, and are greatly aided by having before us the reasons moving the trial judge in overruling most of them. It is not necessary to incumber the record with setting out these instructions. It is sufficient to say that the action of the learned judge in refusing them was correct. They were either incorrect or covered by those given. Examining the instructions given at the instance of defendants, it is very clear that they placed the case before the jury in the most favorable light possible for the defendants. We have noticed the first. The second told the jury that, if plaintiff parted with the possession of the note by

voluntarily delivering it to defendants or either of them, the law presumed there was some consideration therefor; there being no evidence in the case that the note was surrendered by plaintiff to defendants as a gift. The third told the jury that, if they found from the testimony that at any time prior to the institution of the suit plaintiff had parted with the possession of the note in controversy by voluntarily delivering the same to defendants or either of them, intending at the time to part with the title thereof, their verdict should be for defendants. The fourth told the jury that if they found that in July, 1907, after the death of Mrs. Lyons, plaintiff and defendants or either of them had a conference, the subject-matter of which was the note in controversy, and if they found from the testimony that at that conference plaintiff delivered the note to defendants or either of them, with the intention then and there of parting with the title thereto, their verdict should be for defendant. The fifth told the jury that, if they found that plaintiff had voluntarily delivered possession of the note to defendants after its maturity, the law presumes that plaintiff intended to part with the title thereto, and, unless they further found from the evidence that there was other intention on the part of plaintiff in delivering possession of the note to defendants than that of parting with the title thereto, and that such intention, if any, was communicated to defendants at the time, and unless such intention had been shown by the evidence in the case, their verdict should be for defendants. The sixth told the jury that if they believed from the evidence that Mrs. Lyons entered into an agreement with plaintiff by which she would bequeath to plaintiff one-half of the \$1,000 bond mentioned, if plaintiff would deliver to defendants the note sued for in the cause, and if the jury found that the bequest was under such agreement and that the note was delivered by plaintiff to defendants under it, their verdict should be for defendants. The seventh told the jury that, under the evidence in the case, it appeared that plaintiff had received the one-half interest of Mrs. Lyons in the joint \$1,000 bond referred to. The eighth told the jury that if the plaintiff and defendants or either of the latter had a conference at which it was agreed between them that, if plaintiff would deliver up the note in controversy to defendants, they would return the note in question to plaintiff or pay her the amount thereof, if the will of Mrs. Lyons should be set aside, and plaintiff did not receive the one-half interest of Mrs. Lyons in the \$1,000 bond referred to, and if they further found that in pursuance of that settlement, and as the sole reason therefor, plaintiff delivered up the note in question to defendants, their verdict should be for defendants, provided they further found that the will of Mrs. Lyons was not set aside, and

that plaintiff received the one-half interest of Mrs. Lyons in the \$1,000 bond referred to in the will. Without passing on the correctness of these instructions, it can be most certainly said of them that they presented defendants' side of the case in the strongest and most favorable attitude that they could possibly ask.

The only evidence as to the admission of which error is assigned is that given by plaintiff in answer to a question as to her purpose in giving up the note. While that question should not have been asked in that form, the facts attendant upon the whole matter were so fully brought out by competent testimony that we do not think that the action of the court in overruling the objection to it was reversible error.

There was evidence before the jury which warranted them, in the light of the instructions given, to find as they did. The credibility of the witnesses giving it was for the jury. The court very distinctly stated the issues, and it cannot be said that the jury disregarded the instructions given on behalf of defendants.

It follows that the action of the learned trial court in overruling the motions for a new trial and in arrest was not error.

The judgment of the circuit court is affirmed.

NORTONI and CAULFIELD, JJ., concur.

BROWN v. EMERSON.

(St. Louis Court of Appeals. Missouri. Feb. 21, 1911. Rehearing Denied March 7, 1911.)

1. APPEAL AND ERROR (§ 1001*)—REVIEW—VERDICTS—CONCLUSIVENESS—SUBSTANTIAL EVIDENCE.

Where there is substantial evidence in support of the verdict, it will be affirmed unless there is error of law.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3922; Dec. Dig. § 1001.*]

2. SALES (§ 364*)—ACTION FOR PRICE OR VALUE—INSTRUCTIONS—CONFORMITY TO ISSUES.

In an action to recover the price of a jack, the refusal to instruct that if the plaintiff sold and delivered the jack to defendant for an agreed sum, and the defendant was to pay the freight to his place of business and deduct it from the price, the plaintiff is entitled to a verdict for the price less the freight with interest from demand, if demand is made, is error, since the instruction, besides hypothesizing plaintiff's theory of the case, requires the finding of all the facts essential to his right of recovery.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 1065-1076; Dec. Dig. § 364.*]

3. TRIAL (§ 250*)—INSTRUCTIONS—APPLICABILITY TO ISSUES AND EVIDENCE.

Where the only issue in an action was whether the defendant purchased a jack of the plaintiff, and there is evidence that it was of some value, an instruction that plaintiff was entitled to a verdict modified so as to include the conditions that the animal was without any value at the time of the alleged sale, and that the plaintiff made no misrepresentation as to

its qualities, is erroneous as being inapplicable to the issues and evidence.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 584-586; Dec. Dig. § 250.*]

4. PLEADING (§ 93*)—ANSWER—INCONSISTENT DEFENSES—DENIAL OF CONTRACTS—MISREPRESENTATIONS.

A party cannot traverse the allegations of a pleading and at the same time avoid the action on some other ground, and hence the defendant, in an action for the price of a jack alleged to have been purchased by him, cannot deny the purchase and at the same time admit that he purchased the animal and attempt an avoidance on the ground of a breach of warranty or a misrepresentation respecting the animal, since the defenses are inconsistent.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. § 189; Dec. Dig. § 93.*]

5. APPEAL AND ERROR (§ 215*)—RIGHT OF REVIEW—OBJECTIONS.

Where inconsistent instructions submitted for the defendant are excepted to at the time, the mere exception is sufficient to authorize their review, though the words "objected to" do not appear with reference to the instructions.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1309-1314; Dec. Dig. § 215.* Trial, Cent. Dig. §§ 683-685.]

Appeal from Circuit Court, Pike County; David H. Eby, Judge.

Action by M. D. Brown against Luke M. Emerson. Judgment for plaintiff, and defendant appeals. Reversed and remanded.

Joe H. Cupp and Tapley & Fitzgerald, for appellant. R. L. Motley, John W. Matson, and T. B. McGinnis, for respondent.

NORTONI, J. This is a suit for the purchase price of a jack. The finding and judgment were for defendant, and plaintiff prosecutes the appeal.

Defendant is a breeder and trader in jacks on his farm in Pike county. Plaintiff owned a jack in the state of Arkansas which he desired to dispose of and sought out defendant for the purpose. Plaintiff's evidence tends to prove that he described the jack to defendant as of about 14 hands high, high-headed, quick, and a good performer, but aged, and on this description alone defendant agreed to pay him \$250 for the animal f. o. b. Bowling Green, Mo. According to plaintiff, it was agreed defendant should pay the freight on the jack, deduct the same from the purchase price, and pay the balance to him. Plaintiff caused the jack to be shipped from Arkansas to defendant, whereupon defendant paid the freight, \$33.30, and took the jack to his farm, but refused to pay therefor because, as asserted, he had not purchased the animal at all. There is no controversy about the fact of plaintiff's having shipped the jack to defendant, and that defendant paid the freight and took it to his farm, but defendant insists that instead of purchasing the jack from plaintiff he only agreed to take it to resell on commission, unless he concluded to buy it after inspection.

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

Defendant concedes plaintiff spoke of the jack as an aged animal in their conversation which was relied upon by plaintiff as the contract of purchase, but insists that he at no time agreed to buy it unless he chose to do so after inspection. Defendant's testimony tends to prove that he agreed to take the jack upon its being shipped to him, pay the freight thereon, and endeavor to sell it thereafter for a commission, which commission was to be any amount he might receive over and above the \$250, the amount plaintiff hoped to realize less the freight thereon. Defendant says, too, that he agreed with plaintiff, if upon inspecting the jack on its arrival he concluded it was worth the money, to purchase it, but did not agree to do so until after inspecting the animal and determining its qualities and value for himself. Defendant's testimony is that the animal did not suit him, and therefore he retained it to sell on commission. After the jack had been in defendant's possession for a few months, it died; but the evidence is quite conclusive that the death did not occur from any fault on his part, as it received proper care and attention. There is testimony, too, from defendant that the jack in material respects differed from the representations made by plaintiff as to his character and qualities.

We believe the evidence as to what the agreement was greatly preponderates in favor of plaintiff's theory of the case; but this question is not open to review here, as the matter of the credibility of the witnesses and the weight and value to be given to their testimony is exclusively for the jury. There can be no doubt that there is substantial evidence in the record in support of the theory advanced by defendant, and in such circumstances it is our duty to affirm the judgment unless there appears some error of law in the case open to review on appeal. *Baum v. Fryrear*, 85 Mo. 151; *Smith v. Royse*, 165 Mo. 654, 65 S. W. 994.

Plaintiff requested the court to instruct for him as follows: "The court instructs the jury that if they believe from the evidence in the cause that the plaintiff sold and delivered to the defendant the jack mentioned in the evidence for the sum of \$250, and it was agreed between the plaintiff and the defendant that the plaintiff was to pay the freight on the jack from Big Bay, Ark., to Bowling Green, Mo., and that said freight was to be deducted from the \$250, then your verdict will be for the plaintiff for the sum of \$250, less the freight on said jack from Big Bay, Ark., to Bowling Green, Mo., and for 6 per cent. interest on the amount you find for the plaintiff from the date of demand, if you believe that demand was made by plaintiff." This instruction the court refused, and plaintiff preserved his exception to that ruling. We believe the argument the court erred in refusing this instruction to be sound, for,

besides hypothesizing plaintiff's theory of the case, it requires a finding of all the facts essential to his right of recovery. The court modified this request and gave an instruction at its own instance which incorporated that above copied and authorized a verdict for plaintiff unless the jury found the jack was wholly without value at the time of its alleged sale to defendant, and further that plaintiff had made no misrepresentations with respect to its character, qualities, etc. In so far as the modification submitted to the jury the question of the jack being wholly without value as precedent to the right of recovery, it should have been omitted entirely, for there is no evidence in the case to support it. Indeed, the proof is conclusive that the jack was an animal of considerable value at the time of the alleged sale and at the time of his delivery to defendant at Bowling Green, though he may not have been worth \$250. The modification by the court requiring the jury to find plaintiff had not misrepresented the character and qualities of the jack to defendant as precedent to his right of recovery is wholly beside the case in view of the fact that defendant denies that he purchased the animal and insists that he agreed to no more than to purchase him if on inspection he suited, or, if not, to take him for sale on commission. The court should have given the instruction above copied without the modifications referred to for the only issue was whether defendant did or did not purchase the jack.

It may be said the cause originated before a justice of the peace, and there was no formal answer interposed; but the instructions on the part of defendant submit inconsistent defenses, in that they present the matter to the jury and authorize a finding for defendant on both the theory that defendant did not purchase the jack at all, and further on the theory that he did purchase the jack and is relieved from liability therefor because of a breach of warranty with respect to its character, qualities, etc. No one can doubt that several defenses may be put forward to the same cause of action, but they are required to be consistent. One is not permitted to both traverse the allegation in toto and at the same time confess and avoid the action on some other ground, for such positions are so highly inconsistent as to lead to confusion and turmoil at the trial. A party is not permitted to avail himself of the denial of a purchase in toto and at the same time admit that he purchased the property and attempt an avoidance of responsibility therefor on the grounds of a breach of warranty or a misrepresentation with respect to the article sold. *State, to Use, etc., v. Matson*, 38 Mo. 489; *Coble v. McDaniel*, 33 Mo. 363; *Adams, etc., v. Trigg*, 37 Mo. 141. But defendant argues, though the instructions given for him submitted such inconsistent defenses, the error therein is not available to plaintiff here

for the reason the bill of exceptions discloses no objection whatever made thereto, and a mere exception is insufficient to authorize their review. The ruling of the Supreme Court in *Sheets v. Insurance Co.*, 226 Mo. 613, 126 S. W. 413, was in point and conclusive to this effect, and we followed it in a few cases under the constitutional mandate which requires the Courts of Appeals to be controlled by the last previous decision of the Supreme Court on any question of law or equity. But that rule no longer obtains, as the *Sheets* Case in so far as it determined this matter is now expressly overruled by the same court in *Harding v. Mo. Pac. R. Co.* (decided February 9, 1911, but not yet officially reported) 134 S. W. 641. The instructions given for defendant appear to have been excepted to at the time, and they are therefore open to review, though the words "objected to" as well do not appear as to them.

For the reason stated, the judgment should be reversed, and the cause remanded. It is so ordered.

REYNOLDS, P. J., and CAULFIELD, J., concur.

FORDER v. HANDLAN.

(St. Louis Court of Appeals. Missouri. Feb. 21, 1911. Rehearing Denied March 7, 1911.)

1. LANDLORD AND TENANT (§ 290*)—UNLAWFUL DETAINER—WHEN REMEDY LIES.

Unlawful detainer lies under Rev. St. 1909, § 7657, which makes one guilty of unlawful detainer who willfully holds possession of premises after the time for which it was let to him, only when premises are let to defendant or some one under whom he claims.

[Ed. Note.—For other cases, see *Landlord and Tenant*, Cent. Dig. § 1208; Dec. Dig. § 290.*]

2. FORCIBLE ENTRY AND DETAINER (§ 15*)—UNLAWFUL DETAINER—WHEN REMEDY LIES.

Unlawful detainer, being a possessory action, lies only against one in actual possession.

[Ed. Note.—For other cases, see *Forcible Entry and Detainer*, Cent. Dig. § 75; Dec. Dig. § 15.*]

3. LANDLORD AND TENANT (§ 291*)—UNLAWFUL DETAINER—POSSESSION—EVIDENCE—SUFFICIENCY.

Evidence held to sustain a finding that defendant in unlawful detainer was in actual possession as lessee.

[Ed. Note.—For other cases, see *Landlord and Tenant*, Dec. Dig. § 291.*]

4. APPEAL AND ERROR (§ 1010*)—REVIEW—FINDINGS—CONCLUSIVENESS.

Findings supported by evidence will not be disturbed on appeal.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 3979-3982; Dec. Dig. § 1010.*]

Appeal from St. Louis Circuit Court; Moses N. Sale, Judge.

Unlawful detainer by Anna C. Forder

against A. H. Handlan, Jr. Judgment for plaintiff, and defendant appeals. Affirmed.

John S. Leahy, for appellant. Earl M. Pirkey, for respondent.

NORTONI, J. This appeal is wholly without merit. The case is an action for unlawful detainer. Plaintiff recovered, and defendant prosecutes the appeal. The question for consideration relates alone to the sufficiency of the evidence to support the finding and judgment to the effect defendant was in actual possession of the property as tenant of plaintiff at the time of the institution of the suit. The controversy involves the possession of a portion of a brick building situate at Fourth and Gratiot streets in the city of St. Louis to which it is conceded plaintiff owns the title.

It appears the Meyrose Lantern Company had occupied the property for about 50 years, and that both the business of that concern and the building were owned by Mr. Ferdinand Meyrose. A few years ago Mr. Meyrose sold the Meyrose Lantern Company to A. H. Handlan, the father of defendant, A. H. Handlan, Jr. After having sold the business to A. H. Handlan, Mr. Ferdinand Meyrose, the then owner of the building in which the business was situate, leased the building to defendant, A. H. Handlan, Jr., for a term of two years to expire September 6, 1907, and the evidence tends to prove that the lantern business under the name of the Meyrose Lantern Company continued therein under this lease as before. Soon after selling his business to A. H. Handlan and after executing the lease of the building to A. H. Handlan, Jr., Mr. Meyrose sold the building to plaintiff, subject, of course, to the lease. In July, 1907, prior to the expiration of the lease on September 6th of that year, defendant, A. H. Handlan, Jr., called upon plaintiff's agent and negotiated with him about a lease for an additional two months to expire November 6, 1907. It is in evidence that defendant sought to continue in possession of the property until he could complete a new building into which he intended to move. Besides this conversation, several letters in evidence were interchanged between defendant and plaintiff's agent in which plaintiff expressed himself substantially as desiring to continue "my lease" on the property for the two months referred to, and the parties finally agreed to the effect Mr. Handlan should continue in possession at the rental of \$37.50 per month, as stipulated before, until November 6, 1907.

The testimony for defendant tends to prove that, though he renewed the lease for the time mentioned and both spoke and wrote of it as "my lease, etc.," he was in fact acting for his father, A. H. Handlan, who, he says, owned the business. The action proceeds under the first provision of section 7657, Rev.

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

St. 1909, which declares any person who shall willfully and without force hold over any lands, tenements, or other possessions after the termination of the time for which they were demised or let to him to be guilty of an unlawful detainer. There can be no doubt of the proposition that the action of unlawful detainer lies under this provision of our statute only when the premises are demised or let to defendant or some person under whom he claims. Besides the express words of the statute, see *H. & St. Jo. R. Co. v. Hill*, 60 Mo. 281. It is true, too, that, as the action of unlawful detainer is possessory in its character, it lies only against the party in actual possession of the premises and may not be maintained against one who is not in such possession at the time suit is instituted. *Orrick v. St. Louis Public Schools*, 32 Mo. 815; *Jennings v. Robinson*, 82 Mo. App. 544.

Defendant argues the present suit may not be maintained: First, for the reason that it does not appear the premises were demised or let to defendant, A. H. Handlan, Jr., or to some person under whom he claims; and, second, that it does not appear he was in the actual possession of the premises at the time the suit was instituted. It is conceded that possession of the property was not given at the end of the two months stipulated for under the new letting made between this defendant and plaintiff's agent, which expired on November 6, 1907, nor until after this suit was instituted. After plaintiff learned that Handlan intended moving into his new building, she leased her property, the building here involved, from November 6, 1907, to another tenant, and it was agreed by all concerned that defendant could occupy the same until that date at the same rental as under the prior lease with Ferdinand Meyrose. In the early part of November, plaintiff became aware of defendant's intention to remain in possession longer, notwithstanding the agreement, and therefore on the 5th day of that month notified him in writing to vacate the premises on November 6th and made a formal demand for possession. Afterward, on December 13th, this suit was instituted before a justice of the peace while defendant continued in possession, and he vacated the premises on the 19th of that month.

The argument put forward is that, as it appears A. H. Handlan purchased the business of the Meyrose Lantern Company in 1905, then it is obvious that he was in possession of the property, and not his son, A. H. Handlan, Jr., the present defendant. A. H. Handlan is connected with the Handlan-Buck Manufacturing Company, which owns and maintains an important business on Third street in the city of St. Louis, and defendant, A. H. Handlan, Jr., is secretary of that company as well. Be all of this as it may, there is an abundance of proof to sustain the finding and judgment that defend-

ant, A. H. Handlan, Jr., was the lessee of the premises and in actual possession thereof as such. Though A. H. Handlan may have purchased the business of the Meyrose Lantern Company in the first instance, he may have done so for the benefit of his son for all the record discloses to the contrary. At any rate, it is entirely clear defendant, A. H. Handlan, Jr., leased the premises in the first instance in September, 1905, from Mr. Ferdinand Meyrose, for besides the lease being executed to A. H. Handlan as the lessee, which it is true is the name of defendant's father as well, Mr. Meyrose on the witness stand testified positively that he executed the lease with and to this defendant, A. H. Handlan, Jr., and pointed him out in the courtroom as the lessee. It appears from the testimony of others that this defendant was frequently around the building involved in this suit looking after the business of the Meyrose Lantern Company, and that he claimed to own that business. He spoke of the foreman there as his foreman and exercised acts of ownership about the premises by giving consent to other tenants to use an elevator which was otherwise denied them. It is true he spent a portion of his time at the office of the Handlan-Buck Manufacturing Company, but nevertheless the evidence tends to prove that he was the controlling spirit pertaining to the business which was conducted under the name of Meyrose Lantern Company in plaintiff's building, and in conversations with plaintiff's agent he is said to have spoken of it as his business and requested a renewal of his lease. Numerous letters in evidence conceded to have been written by this defendant to plaintiff's agent refer to the building "I now occupy, etc.," and treat with the matter as though he was in possession of the property. One of these letters from defendant to plaintiff's agent is as follows: "Dear Sir: In reference to the conversation I had with you to-day, regarding the occupancy of the building I now occupy, beg to say that I will remain there until November 6th, and if you can see your way clear will occupy the building for a longer period. Trusting you will advise me promptly, I remain, Yours truly, A. H. Handlan, Jr." All of this constitutes not only substantial evidence, but an abundance thereof, to the effect that A. H. Handlan, Jr., leased the premises for himself, and that he was in actual possession thereof at the time of the institution of this suit on his own account. This court will not attempt to weigh the probative force and effect of such evidence if it be of a substantial character, as that is exclusively within the province of the trial court who tried the case by consent of parties without the aid of a jury. In such circumstances, the only matter open for review here is the question as to whether or not there is substantial evidence to support the judgment. Of this there

'is an abundance. *Baum v. Fryrear*, 85 Mo. 151; *Smith v. Royse*, 165 Mo. 654, 65 S. W. 994.

The judgment should be affirmed. It is so ordered.

REYNOLDS, P. J., and CAULFIELD, J., concur.

DOHERTY v. DOHERTY.

(St. Louis Court of Appeals. Missouri. Feb. 21, 1911. Rehearing Denied March 7, 1911.)

1. EVIDENCE (§ 174*)—BEST AND SECONDARY EVIDENCE—BILLS FROM BOOKS OF ACCOUNT.

Bills purporting to be an itemized statement of goods purchased, which were copied from books of account that are within the jurisdiction and can be produced, are not admissible to prove the purchase, for the books are the best evidence.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 562; Dec. Dig. § 174.*]

2. EVIDENCE (§ 376*)—DOCUMENTARY EVIDENCE—BOOKS OF ACCOUNT.

Books of account showing purchase of goods are competent evidence to prove the purchase, either when attested by the oath of the party who has knowledge of the facts they evince, or without such attestation, as a part of *res gestæ*.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 1628-1646; Dec. Dig. § 376.*]

3. EVIDENCE (§ 318*)—DOCUMENTARY EVIDENCE—PRIVATE MEMORANDUM—RECEIPTS.

Against a stranger a receipt is not competent evidence of the payment therein acknowledged, being a mere hearsay declaration of the party who signed it.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 1193-1200; Dec. Dig. § 318.*]

4. APPEAL AND ERROR (§ 1170*)—REVIEW—HARMLESS ERROR—INSTRUCTIONS.

In view of Rev. St. 1909, § 1850, providing that no judgment shall be reversed for an immaterial error, and a similar provision in Rev. St. 1909, § 2082, it was harmless error, in an action between a former husband and wife to recover certain property, to strike out of an instruction, which correctly declared the law as to the rights of the husband in his wife's property, a clause that there was no evidence that the wife consented to her husband having any interest in her property, where it was obvious to the jury that there was no such issue or evidence.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4540-4544; Dec. Dig. § 1170.*]

5. TRIAL (§ 267*)—INSTRUCTIONS—REQUESTS—MODIFICATION.

In replevin between parties who were formerly husband and wife, where the issue was whether certain property had been bought by the wife with her money or whether the husband had purchased it, a requested instruction as to the rights of a husband in his wife's property was unnecessary; and hence it was not erroneous to modify such an instruction.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 668-672; Dec. Dig. § 267.*]

Appeal from St. Louis Circuit Court; George H. Williams, Judge.

Action by Celia E. Doherty against Charles

Doherty. From a judgment for defendant, plaintiff appeals. Affirmed.

S. C. Rogers, for appellant. Frank H. Braden and John A. Talty, for respondent.

NORTONI, J. This is a suit in replevin. The finding and judgment were for defendant, and plaintiff prosecutes the appeal.

It appears the parties were formerly husband and wife, but the marriage relation was dissolved by a decree of divorce recently, before the institution of this suit in replevin. The subject-matter of the controversy is the household furniture and a horse, which the parties jointly used during the last four years of their married life. At the time the suit was instituted, the household furniture and horse were in possession of defendant, who was the prior husband, at the residence where they both formerly lived. Plaintiff, the former wife, asserts a claim to the property as owner, and as though she is entitled to the exclusive possession thereof. On the other hand, defendant insists the property belongs to him, because it was purchased with his money during their married life. The evidence tends to prove that defendant is a prosperous plumber, who has made considerable money through plying his trade, and plaintiff was employed by him as a stenographer about 1888 and 1889. In 1889, the parties were married, and both seem to have attended diligently to the matter of making money. While defendant prosecuted his trade, in which he employed a number of men, plaintiff kept several boarders in their home and attended to the household duties of the wife. Plaintiff's evidence tends to prove that she made money of her own by keeping boarders and accumulated some, too, from bad accounts which her husband gave to her for collecting. She says, too, on numerous occasions her husband, defendant, presented her with money, which she saved and accumulated through investments, etc. The parties formerly resided in Kansas City, but afterwards removed to St. Louis, where they commenced housekeeping. By the testimony of plaintiff, it appears she purchased the household furniture involved from Georgia-Stimson Company, a well-known furniture house in St. Louis, and the horse from another person, and paid therefor with her own separate means, which she had accumulated as above stated. For defendant the evidence is that whatever means plaintiff had were furnished to her by him along at different times, not as gifts, but merely for the purpose of investment, and that all the furniture involved was purchased with his money. He says, too, that, though plaintiff purchased the furniture from Georgia-Stimson Company and the horse from another party, and made payment for the

horse and for the major portion of the furniture, he made one payment of \$500 on the furniture by his check, and this statement seems not to be seriously controverted. On the proof in the record, it may be said there is an abundance of evidence tending to establish plaintiff's right of recovery, as though she purchased the property sued for with her own means and therefore owned it; and there is an abundance of evidence, as well, in support of defendant's claim that, though plaintiff purchased the furniture, she did it for him and with his means, and therefore he is the owner thereof. It is to be inferred from the proof that, while defendant was engaged in his business, plaintiff made such purchases as were needed by both parties and conducted matters of that character as if she were the head of the house, with his consent. The jury found the issue for defendant, as though he owned the property and had furnished the means to purchase it.

Plaintiff argues for a reversal of the judgment that the court erred in declining to permit her to introduce in evidence several bills of furniture made out in her name in 1904, and rendered to her by the Georgia-Stimson Company soon after the furniture was purchased. These bills purport to be copies from the books of the Georgia-Stimson Company, from whom the furniture was purchased in St. Louis, and are statements of the account of such purchases, item by item, after the transactions took place. Plaintiff urges the court should have received them in evidence as tending to prove her title to the household goods involved, but we believe there was no error in excluding them on the ground that the books were the best evidence. Such bills purporting to be copies from the books are, of course, secondary evidence of the facts therein recited, and the books themselves were within the jurisdiction of the court. This being true, they were properly excluded for the reason the books were the best evidence and should have been produced, if it were desired to show from them that plaintiff purchased the property. Such books are competent, either when attested by the oath of the party who has knowledge of the facts they evince or as of the *res gestæ*, under an exception to the rule against hearsay without such proof, if the entries therein are shown to have been made contemporaneously with the purchases in the usual course of business; but copies are not, when the books are convenient, as here. To render such statements copied therefrom competent in the circumstances stated, the loss or destruction of the books, or their otherwise being unavailable after diligent effort, should be shown. *Anchor Milling Co. v. Walsh*, 108 Mo. 277, 18 S. W. 904, 32 Am. St. Rep. 600. Such papers purporting to be statements copied from the books are self-serving and may be concocted, while the books themselves are authentic.

And it is because of this the law requires the best evidence accessible. It is clear that such bills are incompetent in the circumstances of the case, where the books and, probably, the salesman himself, or the person who made the original entries, is available. *Wright v. C. B. & Q. R. Co.*, 118 Mo. App. 392, 94 S. W. 555; 1 Greenleaf on Evidence (16th Ed.) §§ 563a and 563e. One of these bills was marked "paid," and was signed by the Georgia-Stimson Company, and this fact, of course, characterizes it as a receipt for the amounts set opposite the several items of furniture therein indicated. This, too, was rejected by the court, over plaintiff's exception, when offered in proof, and the same action was had with reference to a receipt signed by the party from whom the horse involved was purchased. The receipt as to the horse is of the ordinary character, properly dated, etc., and recites that plaintiff paid the owner thereof the amount therein mentioned for the horse.

It is urged the court should have permitted these receipts to be read in evidence at any rate, for they in themselves are indicative of title in her to the property. The proposition is no doubt true, if the controversy were between plaintiff and the Georgia-Stimson Company, from whom the furniture was purchased, or the gentleman from whom the horse was acquired. In such circumstances the receipt is *prima facie* evidence of payment of the amount therein mentioned, but not conclusive. 23 Am. & Eng. Ency. Law (2d Ed.) 980, 981. Nevertheless, both of these receipts were properly excluded here, when sought to be introduced against the present defendant, who was a stranger thereto, because they impinged the rule against hearsay. To receive such receipts in evidence against a stranger thereto, such as this defendant, operates the substitution of such *ex parte* statements made by the person executing the receipts, for the testimony under the sanction of an oath and all of the advantages of cross-examination of the parties executing the receipts. 23 Am. & Eng. Ency. Law (2d Ed.) 981; *Ford v. Smith*, 5 Cal. 314; *Lloyd v. Lynch*, 28 Pa. St. 419, 70 Am. Dec. 137; *Ellison v. Albright*, 41 Neb. 93, 59 N. W. 703, 29 L. R. A. 737.

Because of the testimony that plaintiff purchased the property with means which she had acquired through the earnings of her separate labor and through different gifts of her husband, the court instructed as follows: "The court instructs the jury that, if you believe and find from the evidence that all or part of the property in controversy was purchased by plaintiff with money which was given to her by her husband, then the same, together with all income, increase, and profits thereof, together with all other money or property which was received from other sources and which she earned by her own work, became and continued her separate

property; and you are further instructed that the fact that the husband used or cared for any or all of said property does not prove that the wife transferred same to her husband, but the same remained her separate property, unless the jury find she gave any interest in said property to her husband in writing. If you find the facts to be as above, then the law is that plaintiff was the owner of the property and entitled to the possession of the same." This instruction predicates on section 8309, Rev. St. 1909, which is parcel of the married woman's act, and provides, substantially, that personal property of the wife shall not be deemed to have been reduced to possession of the husband by his use and care thereof, but the same shall remain her separate property, unless, by assent in writing, full authority shall be given by the wife to the husband to the contrary, etc. Counsel for plaintiff requested this instruction substantially as given, but the court modified it by striking out of the request the following words, which were included therein after the word "writing," "and you are further instructed that there is no evidence in this case that such consent was given." We believe it would have been proper for the court to have given this instruction as requested. See *State ex rel. Smith v. Jones*, 83 Mo. App. 151. But we perceive no prejudicial error in modifying it by striking out the words quoted, for the jury knew as well as the court that there was no evidence in the case that plaintiff had given a written assent to defendant, by which her claims to the property, if any, were surrendered. There was no suggestion of such a matter throughout the evidence, nor was the theory presented that defendant acquired any rights to the property because he used or cared for the same, etc. Indeed, the issue sharply drawn throughout was as to whether plaintiff owned the property by virtue of having purchased it with her separate means, or whether the means with which she purchased it were those of defendant, and she acted for him in so doing. It is the command of the statute that the court shall, in every state

of the action, disregard any error or proceeding which shall not affect the substantial rights of the adverse party, and that no judgment shall be reversed or affected by reason of such error or defect. Section 1850, Rev. St. 1909. Furthermore, by another statute (section 2082, Rev. St. 1909), it is provided that no judgment shall be reversed, unless the court shall believe error was committed on the trial against the appellant, materially affecting the merits of the action. It is entirely clear the judgment should not be reversed for the mere failure of the court to direct the jury in this instruction that there was no evidence of the written assent of the wife in the case, for this was known as well to the jury as to the court. The instruction as given is clear enough, and correctly informs the jury of the substantive law and the rule of evidence on the subject. Besides, we believe the case would have been well enough instructed had this one been entirely omitted, for no such claim as the statute contemplates was asserted by defendant.

There is an argument advanced with respect to the failure of the court to reprimand counsel for defendant in making a statement of an offer of proof in the presence of the jury. This we have considered and regard without merit, for it appears nothing more was done than is usual on the trial, when the court excludes evidence and the attorney makes an offer to the end of incorporating the proposed evidence in the record for review on appeal.

The opinion should not be unnecessarily extended. Suffice to say we have examined the instructions given for defendant and find no error therein. The only issue in the case, a plain and simple one, was put to the jury under instructions eminently fair to both sides. On the proof the jury was amply justified in finding the fact as it did.

The judgment should be affirmed. It is so ordered.

REYNOLDS, P. J., and CAULFIELD, J., concur.

**BOWLING GREEN GASLIGHT CO. v.
DEAN'S EX'X.**

(Court of Appeals of Kentucky. March 9,
1911.)

**1. ELECTRICITY (§ 19*)—INJURY TO LINEMAN
—CAUSE—JURY QUESTION.**

Whether injury to a telegraph lineman caused by coming in contact with an electric light wire was caused by his own or the light company's negligence *held* under the evidence a jury question.

[Ed. Note.—For other cases, see *Electricity*, Cent. Dig. § 19.*]

**2. ELECTRICITY (§ 14*)—INSULATION—DUTY OF
LIGHT COMPANY.**

An electric light company must use the highest practicable care and skill to have its wires so insulated as to make them free from danger at a place where a lineman of another company is required to work.

[Ed. Note.—For other cases, see *Electricity*, Cent. Dig. § 7; Dec. Dig. § 14.*]

**3. ELECTRICITY (§ 18*) — INSULATION OF
WIRES—RIGHTS OF LINEMAN.**

A telegraph lineman may assume that an electric light company had performed its duty in insulating a wire at the place where he was required to work.

[Ed. Note.—For other cases, see *Electricity*, Cent. Dig. § 10; Dec. Dig. § 18.*]

**4. ELECTRICITY (§ 19*)—DUTY TO INSULATE
WIRES—INSTRUCTIONS.**

An instruction that an electric light company was bound to use the highest care and skill to so insulate its wires as to make them safe for those who might be brought in contact with them, and that if the company failed to so insulate the wire with which plaintiff's decedent came in contact, etc., plaintiff could recover, was not erroneous as absolutely requiring the company to keep its wires free from danger.

[Ed. Note.—For other cases, see *Electricity*, Dec. Dig. § 19.*]

**5. ELECTION OF REMEDIES (§ 3*)—NEGLIGENT
DEATH—REMEDIES.**

The administratrix of one who died through negligent injury could elect to sue either for his pain and suffering, or for destruction of his earning power.

[Ed. Note.—For other cases, see *Election of Remedies*, Dec. Dig. § 3.*]

6. DEATH (§ 99*)—DAMAGES—EXCESSIVENESS.

Six thousand seven hundred and fifty dollars was not excessive recovery for six days' excruciating pain suffered by a lineman before his death.

[Ed. Note.—For other cases, see *Death*, Dec. Dig. § 99.*]

**7. DAMAGES (§ 208*)—PAIN—DISCRETION OF
JURY.**

The amount to be awarded for physical pain rests within the sound discretion of the jury under proper instructions.

[Ed. Note.—For other cases, see *Damages*, Cent. Dig. § 533; Dec. Dig. § 208.*]

**8. EVIDENCE (§ 359*)—PHOTOGRAPHS—ADMIS-
SIBILITY.**

A photograph of a telegraph pole and wires with a man on the pole in the position decedent was in when he received the injuries sued for was properly admitted in evidence; its accuracy being established.

[Ed. Note.—For other cases, see *Evidence*, Cent. Dig. §§ 1509-1512; Dec. Dig. § 359.*]

**9. ELECTRICITY (§ 18*)—UNINSULATED WIRES
—ASSUMPTION OF RISK.**

A lineman did not assume the risk of being injured by an uninsulated wire, near which he was required to work, unless the danger was so obvious that one of his experience and intelligence would not have acted as he did.

[Ed. Note.—For other cases, see *Electricity*, Cent. Dig. § 10; Dec. Dig. § 18.*]

**10. ELECTRICITY (§ 18*)—UNINSULATED WIRES
—DUTY OF LINEMAN.**

A lineman of an electric company owes no duty to inspect or examine wires of another company, near which he is required to work.

[Ed. Note.—For other cases, see *Electricity*, Cent. Dig. § 10; Dec. Dig. § 18.*]

**11. ELECTRICITY (§ 19*)—INJURY TO LINEMAN
—CONTRIBUTORY NEGLIGENCE—EVIDENCE—
SUFFICIENCY.**

Evidence *held* to show that a lineman injured by coming in contact with an uninsulated wire was not guilty of contributory negligence.

[Ed. Note.—For other cases, see *Electricity*, Dec. Dig. § 19.*]

Appeal from Circuit Court, Warren County.

Action by John W. Dean's executrix against the Bowling Green Gaslight Company. Judgment for plaintiff, and defendant appeals. Affirmed.

Sims & Rodes and T. W. & R. C. P. Thomas, for appellant. B. F. Procter, Guy H. Herdman, Grider & Harlin, and Greene & Van Winkle, for appellee.

CARROLL, J. John W. Dean was a lineman for the Western Union Telegraph Company. He had been so employed for a number of years, and was an experienced, competent man. The Bowling Green Gaslight Company used in the city of Bowling Green the poles of the telegraph company for the purpose of running its wires. In April, 1909, Dean in the performance of his duties for the telegraph company, and while on one of its poles in the city of Bowling Green, came in contact with one of appellant's wires that was heavily charged with electricity, and as a result he fell from the pole which he was climbing a distance of some 25 feet, receiving injuries from which he died six days thereafter. In this action to recover damages for his pain and suffering between the date of his injury and death, his personal representative charged in her petition that the wire with which he came in contact was defective and dangerous and was placed so near the pole as to render the place dangerous and unsafe for Dean in the discharge of his duties. The answer was a traverse and plea of contributory negligence. Upon a trial before a jury, she recovered damages in the sum of \$8,750.

There is no dispute between the parties as to the cause of Dean's injury or death. It is conceded that in the discharge of his duties he had ascended the telegraph company's pole and was several feet from the ground when he received the shock from the wire of the appellant company that caused

him to fall. Nor is any issue made concerning the fact that Dean was a skillful, experienced, and careful lineman, who knew that the wires of the appellant company upon which it conveyed its electric current were strung on the pole of the telegraph company when and where he was injured and carried a dangerous or deadly voltage.

Two employes of the telegraph company were present assisting Dean at the time he received the injuries, and they testify that a tap wire of the appellant company that run from its main wire into a transformer was connected with the main wire at a point near the telegraph pole, and that Dean's hand was on the main wire at this point. This tap wire was wrapped around the main wire, and insulated at the junction, with the exception of a small part of the extreme end, which was not insulated. They further said there was a copper wire of the appellant company fastened to the side of the telegraph pole that run from the ground up the pole to a point above where Dean was when he received the shock. It is further shown that, if Dean's hand came in contact with the exposed end of this tap wire while some other part of his body was against the wire that run up the pole from the ground, a circuit would be created that would produce the shock he received. And also that, if the end of this tap wire had been properly insulated, no serious harm would have come to Dean if he had touched it or the main wire while some other part of his body was against the wire on the pole. Based on this evidence, it is the theory of appellee that Dean, in ignorance of the fact that the extreme end of the tap wire was not insulated, took hold of or placed his hand on the main wire at the point where the tap wire was connected with it, and at this moment his leg came in contact with the wire on the pole, and thus a circuit was formed. In short, the contention is that the company was negligent in failing to have the end of this tap wire insulated, as it should have been if the degree of care imposed upon electric companies had been observed. On the other hand, there is evidence for the appellant that there was no wire running up the pole a sufficient distance to permit Dean's leg or foot to touch it from the point at which he was located when struck by the current; that there was no exposed or uninsulated wire at the point where his hand came in contact with the main wire—its theory of the accident being that Dean carelessly and negligently put his hand on the main wire that he knew, or in the exercise of ordinary care should have known, was carrying a heavy and dangerous current of electricity; and, although this main wire, as well as the tap wire, was properly insulated, a circuit through Dean's body was formed by the fact that his leg or foot came in contact with a lead cable or some other grounded metal on the telegraph pole while his

hand was on the wire. This view of the case is supported by the evidence of experts, who say that, however well a wire carrying a heavy current of electricity may be insulated, it is dangerous to touch it when some other part of the body is in contact with a metal substance that goes to the ground. And so it is contended by appellant that Dean, who knew the danger of coming in contact with electric wires, came to his death by his own negligence.

From this summary of the evidence it will be noticed that there were two questions of negligence presented; one tending to show that Dean was negligent in putting his hand on the main wire, and the other conducing to show that the company was guilty of negligence in failing to have the end of the tap wire insulated. We cannot say under the evidence that Dean was guilty of such negligence as would defeat a recovery merely because he placed his hand upon the main wire, as it is shown that if it and the tap wire had been properly insulated no harm would have come to him from taking hold of them or either of them. There was sharp dispute in the evidence upon these vital issues; but it was for the jury to say under proper instructions whether or not Dean's death was caused by his negligence or that of the company, and they found against the company. If the end of the tap wire was not insulated, as it should have been, there can be no doubt that the company was guilty of negligence. It was its duty to exercise the highest practicable degree of care and skill to have its wires at this place so insulated as to make them free from danger. Dean had the right to assume that the company had performed this duty, unless he knew, or in the exercise of ordinary care in the discharge of his duties could have known, it had not. There is no evidence that he knew of the defective condition of this wire, nor can it be said that in the exercise of ordinary care he could have discovered that the extreme end of this tap wire was exposed. The exposed portion was very small, but yet sufficient to kill if touched by a person who was grounded.

With the evidence in the condition stated, the court properly instructed the jury that: "It was the duty of the defendant, the Bowling Green Gaslight Company, to use the highest degree of care and skill known, which may be used under the same or similar circumstances, to so insulate or protect its wires as to make them free from danger to those who may be brought in contact with them; and if they believe from the evidence that the said company failed to so insulate or protect the wire with which the plaintiff's decedent came in contact, and that his injuries were caused as the direct result of such failure, then the law is for the plaintiff, and the jury should find for the plaintiff such a sum in damages as will be a fair and reasonable compensation for the mental and

physical suffering of said decedent, if any, caused by said injury, not to exceed \$25,000, unless they further believe from the evidence that in receiving his injury plaintiff was himself negligent, and that but for his own contributory negligence, if any, he would not have been injured." Counsel in criticism of this instruction say that the court in effect told the jury that it was the duty of the company to so insulate or protect its wires as to make them free from danger, and thus imposed upon the company a higher degree of care than the law required or authorized, and such a degree of care as made it absolutely an insurer of the safety of persons coming in contact with its wires. But we do not think the instruction open to the objection urged against it. When read and considered as a whole, it merely told the jury that it was the duty of the company to use the highest degree of care and skill which might be used under the same or similar circumstances to so insulate or protect its wires as to make them free from danger. In other words, the instruction did not put upon the company the duty of making its wires free from danger, but only the duty of using the highest degree of care and skill practicable under similar conditions to make them free from danger. This is the standard measure of duty imposed by this court upon companies using heavily charged electric wires. *Mangan's Adm'r v. Louisville Electric Light Co.*, 122 Ky. 476, 91 S. W. 703, 6 L. R. A. (N. S.) 459; *McLaughlin v. Louisville Electric Light Co.*, 100 Ky. 173, 37 S. W. 851, 18 Ky. Law Rep. 693, 34 L. R. A. 812; *Paducah Ry. Co. v. Bell*, 85 S. W. 216, 27 Ky. Law Rep. 423. Nor is this degree of care an unreasonable requirement. When a company is using in the conduct of its business an agency so subtle and deadly as electricity, in places where persons have the right to go and be, the highest degree of skill and care attainable should be exercised to protect them from danger. Applicable to this case, it was said in *Overall v. Louisville Electric Light Co.*, 47 S. W. 442, 20 Ky. Law Rep. 759, that: "Appellant at the time he was struck was in a place where his business required him to be, and where he had a right to be; and it was the duty of the electric light company to know that linemen of the telephone company would have to come into close proximity to its wires in attending to their duties. It was its duty to use every precaution which was accessible to insulate its wires at that point and at all points where people have the right to go for business or pleasure, and to use the utmost degree of care to keep them so; and for personal injuries resulting from its failure in that regard it is liable in damages."

It may be true, as testified by some of the expert witnesses in this case, that all heavily charged electric wires are dangerous, and that no practicable method has yet been devised that will prevent injury to persons who come in contact with such wires. But this

very fact makes it more important and necessary that companies operating these wires should exercise the highest known care and skill to make them as free from danger as is practicable. And, as it is shown by the evidence that when these wires are properly insulated, and the insulation is properly maintained, persons may come in contact with them and yet not be harmed, it is really not essential to inquire in this case whether insulation that will insure perfect safety is possible or practicable.

Instruction No. 2 is also criticised. Considered alone, it may be objectionable; but, when read in connection with the instruction we have quoted, and which laid down the standard of care the company was required to exercise, we do not think it was prejudicial.

The instruction upon the subject of contributory negligence given at the instance of the appellee, although not accurately phrased, contains in substance the usual instruction given upon this subject. And, in addition to this, there was submitted to the jury in a series of well-written instructions given by the court at the instance of counsel for appellant every phase of contributory negligence that could excuse the company for its negligence.

It is next insisted that the amount of damages assessed by the jury was excessive. The administratrix had the right to elect to bring her suit to recover damages for the pain and suffering of the decedent from the time of his injury until his death, or to recover such damages as would compensate his estate for the destruction of his power to earn money occasioned by his death. She elected to bring her action for the pain and suffering of the deceased. He lived six days after his injuries, and during these six days, although unconscious a portion of the time, suffered the most excruciating pain. What in reason the jury should have awarded as compensation for this period of torture cannot be measured in dollars and cents. It is hopelessly incapable of reasonable ascertainment. No rule has ever been or ever will be discovered by which the human mind can estimate in money the suffering of a human being. In view of this inevitable condition, the courts have been obliged to leave to the sound discretion of a properly instructed jury the sum that will be allowed, and have adopted the practice of not interfering with their finding, unless it is so excessive as to leave the impression that it was the result of prejudice or passion. Considered from this standpoint, we cannot say the award was excessive. *Newport News & Mississippi Valley Co. v. Dentzel*, 91 Ky. 42, 14 S. W. 953, 12 Ky. Law Rep. 626.

The argument is made that, although the appellee could not join a cause of action for pain and suffering with a cause of action growing out of the death of her decedent, yet the jury in awarding the damages were

influenced to give the large amount they did as part compensation at least for the destruction of Dean's life. It was of course impossible to keep from the jury the fact that Dean died as a result of the injuries he received, and it is entirely within the bounds of probability that the jury to some extent were influenced in fixing the damages by the loss his widow, the executrix, sustained on account of his death. But, if this were so, it was unavoidable. The jury were told that they could not allow any damages for the death of Dean, and it does not appear in any tangible way that they did so.

It is further assigned as error that counsel for appellee was guilty of misconduct in argument in misrepresenting the testimony and in alluding to the death of Dean. We have read the argument objected to and do not consider it reversible error. The court in the two instances referred to promptly and properly admonished the jury that they should not be misled by the argument of counsel, but were to be governed in their decision of the case by the evidence and the law submitted to them in the instructions.

Exceptions were also saved to the ruling of the court in refusing to permit Fitch and other witnesses to answer certain questions. We have examined the questions excluded, and the avowals of what the witnesses would say, and do not find that the exclusion of this evidence was at all prejudicial. No evidence was rejected that served to illustrate or support any material issue in the case, or, if it did, the point had been fully covered by other evidence.

Some time after the injury, a photograph of the telegraph pole and wires, with a man on the pole in the position Dean was at the moment he received the shock, was taken, and this photograph over the objection of appellant was introduced as evidence for the appellee. It is insisted that the admission of this photograph was error, especially because it showed a man on the pole intended to represent Dean, although it is not claimed that the photograph does not correctly represent the scene of the injury or the position Dean was in. There can be no doubt that witnesses who were present when Dean was injured, and who saw where he was and the position he was in, could have described to the jury his attitude, the situation of the wires, and such surrounding objects as would throw relevant light on the matter being investigated. This being so, we are unable to perceive why a correct photograph of these objects and things would not be admissible as evidence. In the trial of cases like this, it is important that the jury shall have as clear an understanding of the situation as can be furnished, and relevant information may be conveyed to them by pictures or models that they can see and examine or by the words of witnesses who describe the conditions as they existed. When a witness describes a scene or a place, there is made in

the mind of the juror a picture intended to represent what the witness said. But, if a juror can see this picture as in a photograph, he has a better and more intelligent understanding of what is represented by it than he could well get from a verbal description. The photograph only displayed objects, things, and positions that the witnesses who were present described, or might have described, as best they could. It represented conditions as they actually were, and not the theory of one party or the other. It is a matter of common and approved practice to introduce on the trial of cases maps, models, and diagrams for the purpose of aiding the jury in getting a good understanding of the thing or place in controversy. Objects on these maps, models, and diagrams are pointed out and described to the jury by the witnesses, and frequently witnesses are allowed to take positions in the presence of the jury for the purpose of illustrating where the actors stood and their positions when the matter under investigation occurred, and we can think of no sound reason why a photograph that furnished an accurate reproduction of objects and places and things that are germane to the matter being investigated are not as competent as the other aids that we have mentioned. Of course, the accuracy of a photograph as a correct reproduction of what it purported to show should be established to the satisfaction of the court before being admitted as evidence; but, when its accuracy is shown, we have no doubt of its admissibility. *Wigmore on Evidence*, §§ 790-797; *L. & N. R. Co. v. Brown*, 127 Ky. 732, 106 S. W. 795, 32 Ky. Law Rep. 552, 13 L. R. A. (N. S.) 1135; *Higgs v. Minn. & St. P. R. Co.*, 16 N. D. 446, 114 N. W. 722, 15 L. R. A. (N. S.) 1162; *Dederichs v. Salt Lake City R. Co.*, 14 Utah, 137, 46 Pac. 656, 35 L. R. A. 802, and note; *Elliott on Evidence*, vol. 2, §§ 1224-1228.

The final contention of counsel is that as Dean knew the danger of coming in contact with electric wires and was thoroughly familiar with the situation of the wires on this pole, he assumed the risk of injury, and voluntarily placed himself in a position of peril, or carelessly brought upon himself the injury that resulted in his death—in either of which events there should be no recovery for the accident that happened to him. We have heretofore stated that Dean was a competent and experienced man, thoroughly familiar with the danger of coming in contact with electric wires, and that he knew the location and character of wires that were on this pole. But, granting this, it is a mistake to say that he assumed the risk of injury by these wires unless it were shown (and it was not) that the danger was so apparent or obvious that a person of his experience and intelligence would not have acted as he did. He owed no duty of inspection or examination. He was only obliged to exercise ordinary care to prevent injury. He

had the right to assume that the wires were properly insulated, unless he knew, or by the exercise of ordinary care in the discharge of his duties could have ascertained, that they were not; and, as we have heretofore stated, he was not guilty of negligence in this respect that would defeat a recovery. On the other hand, the appellant company owed to him the duty of keeping its wires properly insulated, and this the jury found it did not do. Dean of course knew the place where he was working was alive with danger; but there is no evidence that he knew it was more dangerous than it should have been. He did not know that the appellant would expose him to needless peril, or have any information that it had not performed its full duty in making the place as safe as it could have done. He did not voluntarily or otherwise assume any risk except such as resulted from the hazards of a place after it had been made as safe as it could be made.

A careful investigation of the record satisfies us that no substantial error was committed, and the judgment is affirmed.

ANGLEA'S ADM'X v. EAST TENNESSEE TELEPHONE CO.†

FRANKLIN ELECTRIC & ICE CO. v.
ANGLEA'S ADM'X.

(Court of Appeals of Kentucky. March 2, 1911.)

1. MASTER AND SERVANT (§§ 101, 102*)—INJURIES TO SERVANT—SAFE PLACE TO WORK.

A telephone company owed a lineman the duty to use reasonable care to furnish him a reasonably safe place and appliances in and with which to labor.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. §§ 135, 171, 172, 178-184, 192; Dec. Dig. §§ 101, 102.*]

2. MASTER AND SERVANT (§ 224*)—INJURIES TO SERVANT—ASSUMPTION OF RISK.

Where it was the business of a servant employed by a telephone company to erect poles, string wires, and keep them in condition, and he knew the bad condition of the wires of an electric light company which were carried upon the poles, and had no special or positive directions by any superior employé to do work on the pole where he was killed by receiving an electric shock from a wire of the electric light company, there could be no recovery for his death from the telephone company.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. § 654; Dec. Dig. § 224.*]

3. ELECTRICITY (§ 18*)—INJURIES—LIABILITY.

Where the wires of an electric light company were carried on the poles of a telephone company and were in an uninsulated and dangerous condition, whereby an employé of the telephone company was killed by receiving an electric shock while at work on a pole, the electric company was liable; a contention that the appliances were so unsafe that deceased must have known it, and that it was his duty to cease his labor for the telephone company, being without merit.

[Ed. Note.—For other cases, see *Electricity*, Dec. Dig. § 18.*]

Appeals from Circuit Court, Simpson County.

Action by the administrator of M. D. Anglea against the East Tennessee Telephone Company and another. From a judgment in favor of plaintiff against defendant the Franklin Electric and Ice Company, it appeals. Affirmed.

Laurence B. Finn, for administratrix. Sims & Rodes, for East Tennessee Telephone Company. Roark & Finn, for Franklin Electric & Ice Company.

NUNN, J. On and prior to August, 1900, M. D. Anglea was employed by the East Tennessee Telephone Company as a lineman, or "troubleman." Some time prior to that date, the Franklin Electric and Ice Company established an electric light plant in the city of Franklin, the place where Anglea was engaged, and by some arrangement, which is not shown, the electric light company attached its wires to the poles of the telephone company. For some time the electric light plant was operated only at night, but about three months before Anglea was killed the company started and continued the operation during the daytime. Anglea was killed about 3 o'clock one afternoon while on the pole of the telephone company in the performance of his duty as lineman for that company, by coming in contact with an electric light wire, and his administratrix brought suit against both companies, alleging that Anglea lost his life by reason of the joint and concurrent negligence of the two companies. She alleged that the electric light company failed to have and keep its wires properly insulated and to properly and safely string them at the points where Anglea was compelled to labor, and that the telephone company failed to furnish Anglea a reasonably safe place in which to perform his labor. On the trial of the case, after the administratrix introduced her testimony, the lower court gave the jury a peremptory instruction to find in behalf of the telephone company, to which she objected and from which ruling she appeals. The court overruled the motion made by the electric light company for a peremptory instruction, completed the testimony as to it, instructed the jury, and it found in behalf of the administratrix, the sum of \$5,000, from which the electric light company appeals.

These two companies owed Anglea very different duties. The telephone company, his employer, was required by law to use reasonable care to furnish him a reasonably safe place and appliances in and with which to labor. Anglea had been a lineman for that company at that place for about seven years. It was his business to erect the poles, string the wires, and keep them in condition

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

† Rehearing denied April 13, 1911.

for use by the telephone company's subscribers. He knew the condition of the wires of the company and the bad condition of the wires of the electric light company as well as or better than any one connected with his employer, and he had no special or positive directions by any superior employé of the telephone company to do work on the pole where he was killed, and it was on account of these facts, we infer, that the lower court gave the jury a peremptory instruction to find for the telephone company. This is a close question; but, giving some weight to the judgment of the lower court, we are inclined to let the judgment in favor of the telephone company stand.

The situation of the electric light company is different from that of the telephone company. Anglea was a member of the public in so far as it was concerned, and it knew that he would be frequently compelled to go up this pole while in the discharge of his duties to the telephone company. Therefore it was necessary for it to properly and safely insulate and string its wires. The testimony as to Anglea's injury and death was, in substance, that this pole was about 45 feet high; that near the top there was a box belonging to the telephone company; that just below the box was a messenger wire supporting a telephone cable from which a spur ran into the box and connected with the wires going into the residences in that neighborhood; that there were small iron steps about 3 feet apart on the east and west side of this pole to be used by the employés of the telephone company in ascending and descending the pole. It further appears from the testimony that there was a small, copper wire attached to the pole, running from the ground to the box mentioned, which was for the purpose of conducting the lightning from the telephone wires to the ground, and that the pole also had attached to it a guy wire about 10½ feet above the ground and about 5 feet below the telephone cable; that the electric light wires at this point ran east and west, and one was fastened to the north side of the pole with a bracket which held it about 2 or 2½ inches therefrom, and the other was attached to the south side of the pole, but was held about 12 inches therefrom. The testimony shows that one of the telephones in the vicinity was out of working order, and that Anglea went up the pole, as it was his duty to do, for the purpose of ascertaining the cause of the trouble and remedying it if he could. He ascended the pole, using the iron steps, with his back to the north, until he reached the telephone cable, where he stopped for a little while with one foot on an iron step and the other resting on the messenger wire, with one arm around the pole, his head south thereof, and was, apparently, looking up towards the box through some limbs to see whether or not

the limbs were interfering with the wires and causing the trouble, and it was from this point that he fell suddenly, which rendered him speechless and caused his death a few hours afterwards. The electric light wire burnt him rather to the back of the shoulder and near the base of the neck, about 1½ inches in depth. There was also a burn about 2 inches back of his left ear and about an inch long extending from the lower edge of his hair. There was also a small burnt place on the bottom of his foot that was resting on the messenger wire, which, as the witnesses stated, showed that the current of electricity passed through his body to the wire. All the evidence shows that the electric light wire at the place where Anglea was killed had lost nearly all of its insulation; that the pole was chestnut wood and full of crevices; that it was very easily saturated with water; at least, that it would absorb water more readily than most poles; that there had been a very heavy rain the night before Anglea was killed; and that the pole was damp. The evidence also shows that the copper wire before mentioned showed signs of having been burnt with electricity at the point where it crossed the guy wire. The expert witnesses who testified stated that the electric light wire was so badly insulated at that point that electricity escaped from it and passed into the pole and copper wire in sufficient quantities to give a person a shock when they come in contact with either of them while standing upon or holding to a conductor of electricity connected with the ground. Anglea was a little over six feet high, and the electric light wire was only five feet above him, so he must have stooped a little to get his head out south of the pole to look up through the limbs, and the reasonable inference from the testimony is that when he was so situated he received a shock from the pole or copper wire which caused him to inadvertently throw himself up and thus come in contact with the uninsulated electric light wire which killed him. The wire was carrying a current of about 2,200 volts. A bunch of Anglea's hair was found hanging to one of the electric light wires after he fell.

The electric light company did not defend upon the idea that it had used due care in stringing and insulating its wires; but, on the contrary, its main defense was that its wires were in such a bad condition that Anglea must have known it, and, as he took the risk of coming in contact with them, his administratrix should not be allowed to recover. The testimony shows that he knew that it was dangerous to touch one of the electric wires while standing upon a conductor of electricity connected with the ground, and the electric light company claims for that reason his administratrix should not be permitted to recover.

In the case of *Overall v. Louisville Electric Light Co.*, 47 S. W. 442, 20 Ky. Law Rep. 759, a case very similar to the one at bar, this court said: "Appellant at the time he was struck was in a place where his business required him to be, and where he had a right to be, and it was the duty of the electric light company to know that linemen of the telephone company would have to come in close proximity to its wires in attending to their duties, and it was its duty to use every protection which was possible to insulate its wires at that point and at all points where people have a right to go for business or pleasure, and to use the utmost care to keep them so; and for personal injuries resulting from its failure in that regard it is liable in damages." If the electric light company's contention were sustained, it would have the effect to remove all employees of the telephone company from the discharge of their duties. It is true, the evidence shows that Anglea knew that to come in contact with the wire when standing upon a conductor of electricity which was grounded would produce injury or death; but there is no evidence that he intentionally came in contact with the wire. As stated, the inference from the testimony is that he was looking up through the limbs trying to see if they were causing the trouble with the phone which had been reported out of repair, and that while thus situated he received a shock in the manner before stated which caused him to unconsciously straighten up and come in contact with the electric light wire. There was no testimony of contributory negligence on his part, and, as it cannot be presumed that a person who is dead at the time of the trial was guilty of contributory negligence, it must be proved. *Lexington & Carter County Mining Co. v. Stephens' Adm'r*, 104 Ky. 502, 47 S. W. 321, 20 Ky. Law Rep. 696, and *C. & N. O. & T. P. Ry. Co. v. Yocum*, 137 Ky. 117, 123 S. W. 247, 1200.

The testimony of all the witnesses shows that the electric light wires were improperly hung and insulated, and there is no pretense on the part of the company that it made any effort to insulate them; therefore, the instructions criticised by it which required the company to exercise a high degree of care in that regard were not hurtful to it, and it is unnecessary to consider the instructions any further.

As before stated, the main defense is that the place and appliances were so unsafe that Anglea must have known it, and it was his duty to cease his labor for the telephone company, and as he did not he cannot recover. We cannot agree with appellant, *Franklin Electric Ice Company*, in this.

The judgment is therefore affirmed in both cases.

SECOND NAT. BANK OF ASHLAND v. ROUSE et al.

(Court of Appeals of Kentucky. March 2, 1911.)

1. CONTRACTS (§ 10*)—MUTUALITY.

A contract, to be binding, must be mutual. [Ed. Note.—For other cases, see *Contracts*, Cent. Dig. §§ 21-40; Dec. Dig. § 10.*]

2. FRAUDS, STATUTE OF (§ 103*)—SALE OF STANDING TIMBER—MEMORANDUM—SUFFICIENCY.

A note, reciting that it is given for specified standing timber on a designated tract, with the privilege to remove it, and signed by the purchaser of the timber, and the indorsement of the note by the vendor, do not evidence a contract of sale of standing timber, within the statute of frauds (Ky. St. § 470 [Russell's St. § 1775]), contemplating a memorandum evincing the contract signed by the seller and delivered to the purchaser.

[Ed. Note.—For other cases, see *Frauds*, Statute of, Cent. Dig. §§ 192-208; Dec. Dig. § 103.*]

3. FRAUDS, STATUTE OF (§ 72*)—SALE OF STANDING TIMBER—VALIDITY.

Growing trees are, as a general rule, treated as realty; and, where standing timber is not sold for immediate severance from the soil, title thereto can only be passed by some writing signed by the seller and delivered to the purchaser.

[Ed. Note.—For other cases, see *Frauds*, Statute of, Cent. Dig. §§ 116-118; Dec. Dig. § 72.*]

Appeal from Circuit Court, Johnson County.

Action by the Second National Bank of Ashland against Peter W. Rouse and others. From a judgment granting insufficient relief, plaintiff appeals. Affirmed.

C. B. Wheeler and J. Morgan Chinn, for appellant. Vaughan, Howes & Howes, for appellees.

LASSING, J. On January 20, 1902, S. G. Preston sold to J. B. Preston all of the timber measuring 18 inches and up from the ground on a tract of land containing 486 acres, more or less, on the waters of George's creek, in Johnson county, for \$400. No cash was paid, but the purchaser gave his promissory note, by which he agreed to pay the purchase price one year after date. The following recitation is found in the note: That this \$400 was "for all the timber on 486 acres of land on George's creek, from 18 inches at the ground up, and the privilege to remove it." This recitation in the note is made important, because it is claimed that it is a writing evidencing a sale of the standing timber. After the execution of this note, the land upon which this timber stood was sold to satisfy a mortgage debt, and in the deeds conveying it no reservation was made of the timber. The note passed into the hands of the Second National Bank of Ashland. It was not paid on January 20, 1903, the date of its maturity, and on December 20, 1905, the bank brought suit against the maker of the note and Peter W. Rouse and George W. Daniels, the purchasers of the land, and

sought to recover a judgment thereon, and to have the timber on the land subjected to the satisfaction of this judgment, claiming that by virtue of the sale by S. G. Preston to J. B. Preston the latter acquired a superior title to the timber. Rouse and Daniels set out at length their purchase and ownership, denied that plaintiff had any lien by virtue of the sale relied upon, and in addition pleaded and relied upon the statute of frauds. Upon these issues the case was prepared and tried out. Judgment was rendered in favor of the bank against J. B. Preston, the maker of the note; but the court was of opinion, and so held, that it had no lien upon the timber. From this part of the judgment, the bank prosecutes this appeal.

It is insisted for the appellant that the recitation in the note as to what it is for is such a contract, evidencing the sale of this timber, as takes it beyond the operation of the statute of frauds. On the other hand, it is insisted for appellees that, as neither S. G. Preston nor his wife, V. H. Preston, signed, executed, or delivered any writing or contract evidencing the sale of the timber to J. B. Preston, the sale is absolutely void. The only writing is the note, and it is upon the recitation upon the face of this note, coupled with the indorsement of S. G. Preston, that the appellant bank relies to prevent the transaction from falling within the inhibition of the statute. So much of the statute (Ky. St. § 470 [Russell's St. § 1775]), as is pertinent is as follows: "No action shall be brought to charge any person * * * upon any contract for the sale of real estate, or any lease thereof, for longer than one year, nor upon any agreement which is not to be performed within one year from the making thereof, unless the promise, contract, agreement, representation, assurance or ratification or some memorandum or note thereof be in writing and signed by the party to be charged therewith, or by his authorized agent."

This note was signed by J. B. Preston, the buyer, not the seller, of the timber. It is a promise to pay \$400, with 6 per cent. interest, one year from the date thereof. It was not intended to evidence the contract of sale, was not to be held by the purchaser as a protection to him, or to guarantee to him any rights, and when indorsed by S. G. Preston it was not his intention, in indorsing it, to give it vitality as a contract representing the sale of this timber. His purpose was to invest the bank with the title to the note. This his indorsement did, and beyond this it had no effect whatever. The purchaser of the timber, J. B. Preston, had nothing whatever to show that he had bought it. S. G. Preston had signed nothing to show that he had sold it. A contract, to be binding, must be mutual. One party cannot be bound while

the other has the option to accept or reject its terms. The minds must have met, and the contract, to be binding upon one, must be such that the other is likewise bound. The execution of the note bound J. B. Preston to pay the \$400, with interest, at the date of its maturity. This was the extent to which he was bound. If it took the indorsement of S. G. Preston to complete the contract, then it was never completed, but remained open until he indorsed the note to the bank, and might never have been closed unless he had elected to indorse it. The note cannot be accepted as an evidence of the contract of sale within the meaning of the statute, which contemplates that some memorandum, at least, evidencing the contract must be signed by the seller and delivered by him to the buyer or to some one representing him, as was expressly decided in *Murray v. Pate*, 6 Dana, 335. The note, even when indorsed by S. G. Preston, fails to meet the requirements of the statute, and the contract for the sale of this timber must be treated as a verbal contract.

As a general rule, growing trees are treated as realty to the extent that the title to them will not pass without some writing evidencing same. 20 Cyc. 212. In this state it is well settled that, where the trees are not sold for immediate severance and removal from the soil, title to them can only be passed by some writing signed by the parties to be bound and delivered to the purchaser. *Wiggins v. Jackson*, 73 S. W. 779, 24 Ky. Law Rep. 2189. It is apparent from the foregoing that there was no binding, enforceable contract between S. G. and J. B. Preston, and hence the trial court properly held that the bank, by the purchase of the note, acquired no lien whatever upon the timber on the land in question.

It becomes unnecessary to consider the other questions raised upon this appeal.

Judgment affirmed.

ILLINOIS CENT. R. CO. v. MOSS' ADMR. (Court of Appeals of Kentucky. March 9, 1911.)

1. RAILROADS (§ 350*)—CROSSING ACCIDENT— NEGLIGENCE—QUESTION FOR JURY.

In an action for death in a railroad crossing collision, evidence held to require submission to the jury of defendant's negligence in approaching the crossing without signals.

[Ed. Note.—For other cases, see *Railroads*, Cent. Dig. §§ 1152-1192; Dec. Dig. § 350.*]

2. RAILROADS (§ 351*)—CROSSING ACCIDENT— CARE REQUIRED—INSTRUCTIONS.

An instruction that deceased when attempting to cross a railroad track was bound to use that care which an ordinarily prudent person would use under similar circumstances, and that, if the jury believed that the crossing was unusually dangerous and deceased knew it, he was bound to exercise increased care to avoid injury commensurate with the increased dan-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

ger, was objectionable for failure to require of deceased increased care for his own safety unless he knew the crossing to be unusually dangerous, without placing on him the burden of ordinary care to discover the fact.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 1193-1215; Dec. Dig. § 351.*]

3. APPEAL AND ERROR (§ 1064*)—INSTRUCTIONS—PREJUDICE.

Where deceased lived in the community where he was killed while traversing an exceedingly dangerous railroad crossing, and must have been familiar with its surroundings and dangers, and must have known it was his duty to use a high degree of care to avoid injury there, defendant was not prejudiced by an instruction only requiring him to use increased care to avoid injury to himself commensurate with the increased danger if he knew that the crossing was unusually dangerous.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4219-4224; Dec. Dig. § 1064.*]

4. RAILROADS (§ 330*)—CROSSING—SIGNALS.

Where a railroad crossing was so located that a person approaching it could not see a train until he was almost, if not quite, on the crossing, he was entitled to rely on signals being given of the approach of a train to the crossing, and hence, in case of his death by being struck by a train owing to the lack of such signals, the railroad company was answerable in damages.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 1071-1074; Dec. Dig. § 330.*]

5. RAILROADS (§ 349*)—CROSSING ACCIDENT—DEATH—PUNITIVE DAMAGES.

Failure of the operatives of a railroad train to give warning signals on approaching a dangerous crossing is ordinary, and not gross, negligence; and hence punitive damages may not be recovered for the death of a traveler occasioned thereby.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. § 1151; Dec. Dig. § 349.*]

6. APPEAL AND ERROR (§ 1170*)—PREJUDICE—INSTRUCTIONS—PUNITIVE DAMAGES.

Where, in an action for the negligent killing of deceased, a man 76 years of age, at a railroad crossing, due to defendant's negligence in failing to give warning signals, the jury only awarded \$2,500, which was not more than bare compensation, an erroneous instruction authorizing punitive damages would be regarded as without prejudice under Civ. Code Prac. § 134, providing that the Court of Appeals in every stage of an action must disregard any error or defect not affecting the substantial rights of the adverse party.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4540-4545; Dec. Dig. § 1170.*]

Nunn, J., dissenting.

Appeal from Circuit Court, McCracken County.

Action by Bennett V. Moss' Administrator against the Illinois Central Railroad Company. Judgment for plaintiff, and defendant appeals. Affirmed.

C. L. Sivley, Trabue, Doolan & Cox, and Wheeler & Hughes, for appellant. Herrick & Crice and Hal S. Corbett, for appellee.

LASSING, J. On June 30, 1909, Bennett V. Moss, a man about 76 years of age, while attempting to cross the tracks of appellant

company at Fortson crossing, in McCracken county, was struck by a train and killed. His administrator sued to recover for his death. The appellant company denied liability and pleaded contributory negligence. Upon these issues the case was submitted to a jury, which returned a verdict in favor of plaintiff for \$2,500. The company appeals.

The public road and the railroad approaching the crossing run in practically the same direction, the road crossing the railroad at an angle of about 35 degrees. In approaching the crossing in the direction in which deceased was going, his back would be toward the train for some distance before reaching the crossing, and almost so when passing over the crossing. The railroad enters a cut west of this crossing a few hundred feet before reaching it, and the highway also enters a cut west of the crossing for quite a distance before reaching it. Where they cross each other, the cuts come together, and at that point they are from five to seven feet deep. At the time the accident occurred, there were several box cars standing upon a side track at that point, and these, together with orchard trees which were growing upon a strip of ground between the railroad and the public road approaching this crossing, tended to obscure the view, so that it would be difficult for one approaching this crossing as deceased was to see the train going in the same direction until he had almost entered upon the track. The testimony shows that a man in a buggy approaching the crossing could not see a train until within the right of way—his horse would be practically upon the track before he could get a view of the road. In other words, after he had come out upon the crossing, he could see, and not until then. Those in charge of the train, and one other witness who saw the accident, testify that deceased drove upon the track at a time when the train was so short a distance away that no amount of care upon the part of those in charge of it, after they saw him upon the track, could have prevented the injury. The mule which was drawing the buggy crossed over the track. The buggy was struck and deceased thrown therefrom and killed. The negligence relied upon to support a recovery is that there were no signals of the train's approach to this crossing given. The company introduced a number of witnesses, who testify positively that the proper signals were given, while appellee introduced as many or more witnesses, who say that no signals whatever were given. It is conceded that the crossing in question is, because of its location, a peculiarly dangerous one. The locality is thickly peopled and the road much traveled. On this evidence the trial court refused to give a peremptory instruction, but submitted the case to the jury. And in this was undoubtedly correct.

Appellant's chief complaint is that the

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

court erred in defining the duties which deceased owed himself for his own protection in approaching the crossing; that, as this crossing is shown to be a dangerous one, deceased should have been required to exercise a degree of care for his own safety commensurate with that which the court told the jury the appellant company was required to use in approaching this crossing. Technically considered, the instruction is subject to this criticism. It is not as full and explicit as it might have been. Still we are of opinion that in the form in which it was given it was not misunderstood or misconstrued by the jury; for in it the jury is told that it was the duty of deceased in attempting to cross the track to use that degree of care that an ordinarily prudent and careful person would use in undertaking to cross over the track under like or similar circumstances, and that if the jury further believed that the crossing was unusually dangerous, and deceased knew it, then it was his duty to exercise such increased care to avoid injury to himself as was commensurate with the increased danger, etc. This instruction did not require of him to exercise increased care for his own safety in going over this crossing unless he knew it to be unusually dangerous. It did not put upon him the burden of exercising ordinary care to discover this fact. But if deceased lived in that community, as he doubtless did, he must have been familiar with the crossing and its characteristics and dangers, and it was unnecessary for him to exercise ordinary or any care to know these facts. He already knew them; and it is altogether improbable that the jury would have drawn the nice distinction which counsel for appellant now makes. All of the evidence shows that it was an extremely dangerous crossing, on a much traveled road, in a populous community, and that the train was running on a downgrade at a rate of speed variously estimated at from 20 to 30 miles an hour. The weight of the evidence is to the effect that no signals were being given of its approach to this crossing. The only safe means that deceased had to advise himself of the train's approach was withheld from him. He could not see the train because of the obstructions. It was downgrade, and made little noise, comparatively speaking. If this testimony was true, the jury was warranted in finding the company guilty of negligence, unless they further believed from the evidence that, notwithstanding this negligence on the part of the company, deceased was himself negligent, and but for his negligence the accident would not have happened. The testimony shows that at the time he came upon the track the train was so close upon him that it was impossible for him to save himself by getting out of the way, or for those in charge of the train to avoid striking him. After they discovered his peril, no degree of care on their part could have prevented the accident. The negligence, if any, that resulted in his death,

was in the failure of those in charge of the train to give the proper signals or warning of its approach to the crossing. Deceased had a right to expect these signals, and, if those in charge of the train failed to meet the requirements of the law and discharge their duty to the traveling public in this particular, the company is answerable in damages for such injuries as resulted. We are of opinion that the instruction complained of under the facts in evidence fairly and substantially presented the issue to the jury, and that appellant was in no wise prejudiced by instruction number three in the form in which it was given.

The instruction on punitive damages was not authorized by the evidence. The sum and substance of all the evidence is that the train which struck deceased was approaching this crossing under the usual rate of speed at which freight trains travel, and, according to the evidence of appellee, failed to give the usual signals of its approach. This is not gross, but ordinary, negligence. If the failure to give signals is an evidence of gross negligence, then a punitive damage instruction would be authorized in every case where an accident occurred at a public or private crossing where signals were to be given. This court has not heretofore held that negligence of this character is such as would warrant or justify the court in giving an instruction permitting the jury to award punitive damages. But, as the judgment is for only \$2,500, we are constrained to believe that the jury disregarded the punitive damage instruction, or at least that it was not prejudicial, for we would be unwilling to say that for an injury due to negligence that resulted in death to one no older than deceased \$2,500 would be more than bare compensation. It is true the deceased was about 76 years of age, but we cannot presume that, because of his age, his services to his family and estate were not valuable. If the verdict in this case were large, we would grant a reversal and direct a new trial because the court gave this instruction; but, when the amount awarded seems to us to be no more than bare compensation, we do not feel justified in disregarding section 134 of the Civil Code of Practice, which provides that: "The court must, in every stage of an action, disregard any error or defect in the proceedings, which does not affect the substantial rights of the adverse party; and no judgment shall be reversed or affected by reason of such error or defect."

Upon the whole case we are of opinion that appellant had a fair trial and that substantial justice has been done.

The judgment is therefore affirmed.

NUNN, J. (dissenting). I concur in the affirmation of this case, but dissent from the criticism of instruction number three; it was proper as was also the instruction authorizing punitive damages. Section 6 of the Ken-

tucky Statutes says whenever the death of a person shall result from an injury inflicted by negligence or by wrongful act, then in every such case, damages may be recovered for such death; and when the act is willful or the negligence gross, punitive damages may be recovered. It is said in the opinion: "All of the evidence shows that it was an extremely dangerous crossing, on a much traveled road, in a populous community, and that the train was running on a downgrade at a rate of speed variously estimated at from twenty to thirty miles an hour. The weight of the evidence is to the effect that no signals were being given of its approach to this crossing. The only safe means that deceased had to advise himself of the train's approach was withheld from him. He could not see the train because of the obstructions. It was downgrade, and made little noise, comparatively speaking. If this testimony was true, the jury was warranted in finding the company guilty of negligence." If this be true, it was certainly a case of gross negligence; it was an act of reckless disregard for human life. If a punitive damage instruction is not authorized by the facts above copied from the opinion, it is hard to conceive of facts which would justify such an instruction.

YORK et al. v. HOGG.

(Court of Appeals of Kentucky. March 10, 1911.)

DEEDS (§ 38*)—VALIDITY—CERTAINTY.

Descriptions in deed held sufficiently clear, in connection with parol evidence identifying the corners called for, etc.

[Ed. Note.—For other cases, see Deeds, Dec. Dig. § 38.*]

Appeal from Circuit Court, Perry County.

Action by E. E. Hogg against John W. York and others. From a judgment for plaintiff, defendants appealed. Reversed and remanded, with directions to enter judgment for defendants.

P. T. Wheeler, for appellants. E. E. Hogg and Hazelrigg & Hazelrigg, for appellee.

O'REAR, J. This is an action of trespass, and to enjoin trespass. It was brought in equity under the latter feature of the case. The case turns on the true location of the dividing line between the lands of appellant and the boundary owned by appellee. Both claim under a common grantor, who conveyed the two parcels (formerly constituting one body of land) by two separate deeds executed on the same day. The grantor was conveying the entire boundary in severalty to two of his children, dividing the tract between them. The land lays on Otter creek, a tributary of the Middle fork of Kentucky river. Forming the watershed of Otter creek are

two ridges, practically parallel with Otter creek; the ridges coming together at the head of the tributaries of that stream. Near the junction of two of its tributaries, one called "Cow creek," the other "Linden creek," is a cliff formation in a spur of the mountain ridge, in which is a cavern known as the Dark Rock House. Appellee claims under the deed from Jeremiah Smith to Preston Smith, which thus describes the land conveyed: "Beginning at the crooked rock in a small hollow above the fish trap; thence up the river to Otter creek; thence up said river to upper corner tree on the bank of said river; thence with said Smith's lines around the ridge opposite the Dark Rock House; thence crossing the said Otter creek; thence by the Dark Rock House square up to the top of the ridge; thence with the ridge down opposite the crooked rock; thence to the beginning." The other deed, under which appellants claim, thus describes the land conveyed by it: "Beginning at the Dark Rock House; thence up the left-hand side of the ridge to said Smith's lines, the outside line up to the left hand fork; thence up the Fork ridge to the top of the Fork ridge, and around to the head of the right-hand fork, in all the lands that said Smith holds in that boundary of land down around the ridge opposite to the Dark Rock House; thence to the beginning."

We construe the calls to read as if the reader were in person going around the boundaries from the beginning, so as to learn what was the intention of the grantor in using the descriptive language that he used; so that when, in going along the first-named ridge, a point is reached where the Dark Rock House is at an angle of 90 degrees, that is the point designated as being opposite the Dark Rock House. The line next called for is a straight line (nothing to the contrary appearing), so as to cross Otter creek, pass by the Dark Rock House, and on up the side of the next parallel ridge to its top; the grantor meaning by "square up the ridge to the top" to run the line in a direct straight course until the top of the ridge was reached. Then the line is turned back toward the beginning point on the river, following the top of the ridge.

Appellee contends, and the circuit court held, that the running of the line in controversy was to follow the first-named ridge until a spur ridge was reached which ran toward the Dark Rock House, being the shed between Linden branch and main Otter creek; thence cornering on the Dark Rock House; thence running on a deflected course to the spur coming in at that point from the opposite ridge; then following that spur in its meanders until the main ridge turning toward the river was reached. The line thus made would be irregular, crooked, and disappoint three or more of the objects or

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

courses called for in the deeds. It would not leave the first ridge at the point "opposite the Dark Rock House"; it would not correspond with the call in the second deed, "thence up the left-hand side of the ridge to Smith's lines"; nor would it leave the opposite ridge on a straight line from a point "opposite the Dark Rock House."

Evidence was heard as to how the respective grantees construed the description of the dividing line. It is not definite, nor very satisfactory in details. It sheds little or no light on the true location, which we have made from descriptions contained in appellee's evidence and confirmed by reference to a plat of the land furnished by him on the hearing. While the descriptions are awkwardly expressed, they are clear enough in their meaning not to require the aid of parol evidence to explain, further than to identify the points called for as corners, and a description of that body of land, with its water courses and its watersheds.

The judgment should have been for the defendants. Reversed and remanded, with instructions to enter a judgment in conformity herewith.

O'CONNOR v. WEISSINGER, Judge, et al.
(Court of Appeals of Kentucky. Feb. 24, 1911.)

1. HIGHWAYS (§ 105*)—HIGHWAY DISTRICTS—OFFICERS—AUTHORITY OF OFFICERS—FISCAL COURT.

Ky. St. § 4748b (Russell's St. §§ 5492-5507), provides that all turnpikes and gravel roads are public roads, to be maintained and kept in repair by the fiscal court, which is directed and permitted to keep them up, either under the general road law or by the adoption of other plans. Section 1845 (section 2979) authorizes members of the fiscal court to serve upon committees in directing road work, with compensation therefor. The fiscal court of a county adopted a plan dividing the county into road districts and appointing a member of the court as director of road work in each of such districts; the work being awarded by contract between the court and the contractors. *Held*, that this action of the fiscal court was within the powers conferred by the statutes.

[Ed. Note.—For other cases, see Highways, Cent. Dig. §§ 323-330; Dec. Dig. § 105.*]

2. HIGHWAYS (§ 94*)—HIGHWAY DISTRICTS AND OFFICERS—QUALIFICATIONS OF OFFICERS—MEMBERS OF FISCAL COURT.

Under Ky. St. § 1845 (Russell's St. § 2979), members of the fiscal court, excepting the county judge, can act as a committee in supervising work upon turnpikes and roads within the county at a compensation of \$3 per day.

[Ed. Note.—For other cases, see Highways, Cent. Dig. § 308; Dec. Dig. § 94.*]

3. HIGHWAYS (§ 105*)—HIGHWAY DISTRICTS AND OFFICERS—COMMISSIONERS.

Ky. St. § 1889 (Russell's St. § 3025), which declares that the fiscal court shall appoint three commissioners in each district who shall let out the work therein to the lowest bidder, when construed in connection with the remainder of the act of which it is a part, relates only to the disposition of surplus funds in certain counties

which could not be expended under the direction of the fiscal court, and does not require that the work of maintaining roads should be intrusted to commissioners.

[Ed. Note.—For other cases, see Highways, Cent. Dig. §§ 323-330; Dec. Dig. § 105.*]

Appeal from Circuit Court, Jefferson County, Chancery Branch, Second Division.

Action by Edward D. O'Connor against Muir Weissinger, Judge, and others. Judgment for defendants, and plaintiff appeals. Affirmed.

O'Connor & O'Connor and Jos. E. Conkling, for appellant. A. Scott Bullitt, John H. Sullivan, and Robert L. Page, for appellees.

SETTLE, J. This action in equity was instituted by appellant, a taxpayer of Jefferson county, against the county judge, fiscal court of Jefferson county, and magistrates composing same, to enjoin that court from awarding contracts for work done upon the turnpikes and roads of the county, and its members from acting as a committee or committees in directing and controlling such work.

Appellees by answer justified the action complained of, and asserted that in so maintaining the turnpikes and roads of the county, the court acted in accordance with certain plans adopted under authority conferred by section 4748b, Ky. St. (Russell's St. §§ 5492-5507). Appellant filed a demurrer to the answer, which the circuit court overruled. He refused to plead further, and judgment was entered dismissing the action. From the judgment manifesting these rulings, this appeal is prosecuted.

Section 4748b (section 5497), under which the fiscal court claims the power to maintain the turnpikes and roads of the county by the rules referred to in the answer, provides: "All turnpike and gravel roads thus acquired or constructed, shall become public roads and shall be maintained and kept in repair by and through the provisions of the fiscal court. Said court may provide for keeping them up as is directed and permitted under the general road law, or it may adopt other rules for the maintenance, repair and management of the same. * * * This section clearly confers the power exercised by the fiscal court of Jefferson county in the management and maintenance of the roads thereof.

In the case of Fleming County Fiscal Court v. Howe, County Judge, 121 Ky. 478, 89 S. W. 225, 28 Ky. Law Rep. 458, we held that the fiscal court of Fleming county, under the power conferred by the section, supra, could maintain the turnpikes and other roads of the county under rules adopted for that purpose, as provided by the statute in respect to turnpikes, and also according to the statutes regarding the maintenance of

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

other public roads; but that the fiscal court could appoint only one supervisor to take control of the turnpikes and roads of the county, as section 4313, Ky. St. (Russell's St. § 5446), gave that court the right, if it so elected, to appoint but one supervisor of roads for the county.

It is true that in *Pulaski County v. Sears*, 117 Ky. 249, 78 S. W. 123, 25 Ky. Law Rep. 1331, we decided that an order of the fiscal court investing the county judge with the general supervision of the roads of the county, and making the magistrate in each magisterial district director of the work therein, was void; and in *Boyd County v. Arthur*, 118 Ky. 932, 82 S. W. 613, 26 Ky. Law Rep. 906, and *Vaughn v. Hulett*, 119 Ky. 380, 84 S. W. 309, 27 Ky. Law Rep. 35, we also held that the statutes with reference to the control of the roads of a county by the fiscal court forbid the members of that court from acting as supervisors of county roads, as such action would make them interested in contracts for work that might be done upon the roads under their supervision. But since these cases were decided, the Legislature so amended section 1845, Ky. St. (Russell's St. § 2979), upon which they were rested, as to authorize members of the fiscal court to serve upon committees in directing road work, and provided compensation for such committee work as might thus be performed by them. In *Thomas v. O'Brien*, 138 Ky. 770, 129 S. W. 103, in construing that section of the statute as amended, we held that members of the fiscal court, excepting the county judge, can act as a committee, or committees, in directing and supervising work upon the turnpikes and roads of the counties, for which they might be compensated at the rate of \$3 a day.

It appears from the averments of the petition that the fiscal court of Jefferson county, by the plans adopted in pursuance of the power conferred by section 4748b, supra, divided the county of Jefferson into road districts and appointed a member of the fiscal court as director and inspector of roadwork in each of these districts; the work being awarded by contracts between the fiscal court and the contractors. In thus providing for the maintenance of the turnpikes and roads of the county, the fiscal court obviously acted within the powers conferred by sections 4748b and 1845, Ky. St.

It is, however, contended by appellant that the work of maintaining the roads in the districts of the county should have been intrusted by the fiscal court to three commissioners, as provided by section 1889, Ky. St. (Russell's St. § 3025), which declares that: "The fiscal court shall appoint three commissioners in each magisterial district, who shall let out the work in their districts to the lowest and best bidder, with the privilege of refusing all bids." This contention

of appellant cannot be sustained, as it ignores the meaning and object of the section, supra, which, when considered in connection with the remainder of the act of which it is a part, relates to the disposition of surplus funds in certain counties which could not be expended under the direction of the fiscal courts.

It follows from what we have said that the circuit court committed no error in overruling the demurrer to the answer, or in dismissing the action.

The judgment is affirmed.

O'CONNOR v. WEISSINGER, Judge, et al.
(Court of Appeals of Kentucky. Feb. 24, 1911.)

1. MANDAMUS (§ 107*)—SUBJECTS—OFFICERS—FISCAL COURTS.

Under Civ. Code Prac. § 477, mandamus lies to compel the fiscal court to allow a claim for plaintiff's salary as a road supervisor, under the direction of the court.

[Ed. Note.—For other cases, see *Mandamus*, Cent. Dig. §§ 225, 232, 234; Dec. Dig. § 107.*]

2. MANDAMUS (§ 176*)—PUBLIC OFFICERS AND BOARDS—MINISTERIAL ACTS—FISCAL COURT.

Under Civ. Code Prac. §§ 474-477, the court, in granting a writ to the fiscal court on petition of a road supervisor to compel allowance of his salary, will only compel action by the fiscal court, without controlling its judicial discretion.

[Ed. Note.—For other cases, see *Mandamus*, Cent. Dig. §§ 392-394; Dec. Dig. § 176.*]

3. APPEAL AND ERROR (§ 184*)—OBJECTIONS BELOW—FORM OF ACTION.

Where plaintiff seeks injunction in a matter in which the proper remedy is mandamus, and defendant does not demur or move to transfer the cause to the law docket, the appellate court will treat the case as an application for mandamus.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 1179-1183; Dec. Dig. § 184.*]

4. MANDAMUS (§ 76*)—PUBLIC OFFICERS—DISCRETIONARY ACTION—STATUTES—"MAY."

Ky. St. § 4313 (Russell's St. § 5446), providing that the fiscal court of any county wherein the roads are worked by taxation "may," at its first regular term after the act takes effect, and every two years thereafter, appoint a supervisor of roads, does not make the appointment of the supervisor mandatory, but leaves the matter to the discretion of the fiscal court, which discretion cannot be controlled by mandamus.

[Ed. Note.—For other cases, see *Mandamus*, Cent. Dig. §§ 158-160; Dec. Dig. § 76.*]

For other definitions, see *Words and Phrases*, vol. 5, pp. 4418-4447; vol. 8, p. 7719.]

5. HIGHWAYS (§ 93*)—HIGHWAY DISTRICTS AND OFFICERS—COUNTY JUDGE—AUTHORITY.

Where a fiscal court has abolished the office of supervisor of roads, as authorized by Ky. St. § 4313 (Russell's St. § 5446), and adopted rules for the maintenance of the roads of the county under Ky. St. § 4748b (Russell's St. §§ 5492-5507), there is no vacancy in the office of supervisor; and hence an appointment thereto made by a county judge purporting to act under section 4313 is invalid.

[Ed. Note.—For other cases, see *Highways*, Cent. Dig. §§ 304-307; Dec. Dig. § 93.*]

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep't Indexes

6. HIGHWAYS (§ 93*)—HIGHWAY DISTRICTS AND OFFICERS—APPOINTMENT OF OFFICERS—SUPERVISORS OF ROADS.

Under Ky. St. § 4313 (Russell's St. § 5446), relating to the appointment of road supervisors, the authority of the county judge can be exercised only when the fiscal court is not holding a regular term, the appointee only to fill the vacancy until the next regular term of the fiscal court.

[Ed. Note.—For other cases, see Highways, Cent. Dig. §§ 304-307; Dec. Dig. § 93.*]

Appeal from Circuit Court, Jefferson County, Chancery Branch, Second Division.

Action in equity by Edward D. O'Connor against Muir Weissinger, Judge, and others. Judgment for defendants, and the plaintiff appeals. Affirmed.

O'Connor & O'Connor and Jos. E. Conkling, for appellant. A. Scott Bullitt, John H. Sullivan, and Robert L. Page, for appellees.

SETTLE, J. Appellant by this action in equity brought in the court below against the county judge, fiscal court of Jefferson county, and magistrates composing the same, sought to obtain a mandatory injunction to compel the Jefferson county fiscal court to allow and pay him at the rate of \$2,000 per year, salary for several months' services alleged to have been performed by him as supervisor of roads for Jefferson county. In addition to the relief by injunction, appellant asked judgment against the fiscal court for the amount of salary alleged to be due him.

It was averred in the petition that appellant was appointed to the office of road supervisor by the judge of the Jefferson county court April 27, 1910, to fill a vacancy then existing, and that he at once qualified and began to perform the duties appertaining to the office, but that the fiscal court refused to recognize his right to act as such supervisor or to pay him for his services.

The appellees, except the county judge, filed a joint answer to the petition, in which they denied appellant's right to the injunction asked or to any part of the salary claimed by him, and alleged that his appointment to the office of supervisor of roads by the county judge was illegal and void; that there was at that time no such office in Jefferson county, or vacancy therein, and that the county judge was without power to make such appointment. It was also averred in the answer that in March, 1906, the fiscal court, at a regular term then held, for the first time appointed a supervisor of roads for Jefferson county as allowed by section 4313, Ky. St. (section 5446, Russell's St.), for a term of two years as therein prescribed, who after a few months of service resigned, and that the fiscal court thereupon filled the vacancy thereby created by appointing another person for the remainder of the two years term, which ended March

31, 1908. It was further averred in the answer that the fiscal court, by resolution adopted March 17, 1908, and an order then entered of record, abolished the office of supervisor of roads for Jefferson county, to take effect at the expiration of the term of the then incumbent, March 31, 1910, since which date the fiscal court has never appointed, and the county has not had, a supervisor of roads; and that at the time of abolishing that office the court by a further resolution and order, as allowed by section 4748b, Ky. St., adopted certain rules for maintaining the turnpikes and other public roads of Jefferson county, and they have since been maintained in the manner provided by such rules.

A demurrer interposed by appellant to the answer was overruled, whereupon he accepted and refused to plead further, and the court then entered judgment dismissing the action; hence this appeal. Under the practice obtaining in this state, mandamus is the proper remedy to compel action on the part of a fiscal court in the matter of such a claim as is here presented by appellant, application for the writ being made, by petition ordinary, to the circuit court; but, if authorized upon the facts presented by the petition and proof thereof, the court in granting the writ will merely compel action by the court of inferior jurisdiction, without controlling its judicial discretion. Civ. Code Prac. §§ 474, 475, 476, 477. But as appellees did not demur to the petition because of its invoking equitable relief by injunction, or move to transfer it to the law docket, we deem it proper to waive any informality in the proceeding and will consider the case as if it were an application for a mandamus.

The record affords us no cause for disagreeing with the conclusion reached by the circuit court. The facts alleged in the answer, and confessed by appellant's demurrer, show that appellant was never legally appointed supervisor of roads for Jefferson county. The appointment of a supervisor of roads is provided for by section 4313, Ky. St., which reads as follows: "The fiscal court of any county wherein the roads are worked by taxation may, at the first regular term after the taking effect of this act, and every two years thereafter, appoint a supervisor of roads in and for its county and who shall hold his office for the term of two years, and until his successor is appointed and qualified, unless sooner removed by the fiscal court. A vacancy in the office of supervisor shall be filled by the fiscal court at a regular term, and it shall be the duty of the county judge, in the event of such vacancy, immediately to fill the same until the next regular term of the fiscal court." It will be observed that the section declares that the fiscal court of any county wherein

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the roads are worked by taxation "may," at its first regular term after the act takes effect and every two years thereafter, appoint a supervisor of roads. The use of the word "shall" instead of the word "may," would have made the appointment of the supervisor by the fiscal court mandatory; but the use of the word "may" unmistakably shows that the Legislature intended to leave the matter to the discretion of the fiscal court; it may therefore appoint, or refuse to appoint, a supervisor, and the discretion thus given it cannot be controlled or interfered with by any other court.

If the fiscal court, in the exercise of the discretion with which it is clothed by the statute, may appoint or refuse to appoint a supervisor of roads for the county, it logically follows that it may, after appointing the supervisor, discontinue or abolish the office. The fiscal court of Jefferson county did establish the office of supervisor of roads in and for that county and continue it two years, and during that time appointed two supervisors of roads, the second appointment being necessary because of the resignation of the first appointee; but the two together only served the one term of two years for which the first supervisor was appointed. At the expiration of the two years the fiscal court, by formal and necessary action, discontinued or abolished the office, as it had the right to do. It is not for us to say whether in discontinuing the office of supervisor of roads the fiscal court of Jefferson county acted wisely or unwisely; the matter being one of discretion, for the exercise of which the members of that court are alone responsible to their constituents. If called on to conjecture why the office was discontinued by the court, it would be but fair to indulge the presumption, either that the two years trial of maintaining the roads of the county under the control of a supervisor had proven unsatisfactory, or that some better plan of maintaining them had been discovered. It is not material therefore that the office of supervisor of roads was abolished, because the fiscal court had, as alleged in its answer, adopted rules as provided by section 4748b, Ky. St. (sections 5492-5507, Russell's St.), for keeping up the roads of the county. We are not concerned with and need not discuss the reasons that influenced the court to discontinue the office; it is sufficient that it was discontinued. It is patent that, at the time the county judge attempted to appoint appellant supervisor of roads for Jefferson county, there was no vacancy to be filled, because the office had been abolished by the fiscal court two years before. Moreover, had there been a vacancy at that time, the county judge would have been without power to fill it, as the fiscal court was then in session and a regular term being held. A fiscal court can only appoint

a supervisor of roads at or during a regular term, even to fill a vacancy; and the authority to appoint conferred by section 4313, supra, upon the county judge, can be exercised by him only when a vacancy exists and the fiscal court is not holding a regular term, the appointee to fill the vacancy till the next regular term of the fiscal court.

Finding no error in the judgment of the circuit court, the same is affirmed.

CHILDERS v. BELCHER.

(Court of Appeals of Kentucky. March 7, 1911.)

1. EJECTMENT (§ 93*)—PLEADING IN EVIDENCE—SUFFICIENCY.

In ejectment, evidence held to sustain a judgment for the plaintiff.

[Ed. Note.—For other cases, see Ejectment, Dec. Dig. § 93.*]

2. EJECTMENT (§ 123*)—TRIAL—COSTS.

Where the defendant in ejectment denied that the plaintiff has any interest in the land claiming title to the whole, and the plaintiff recovers one-third of the land in controversy, taxing whole of costs against the defendant is proper.

[Ed. Note.—For other cases, see Ejectment, Dec. Dig. § 123.*]

Appeal from Circuit Court, Pike County.

Action by J. W. Belcher against A. W. Childers. Judgment for plaintiff and defendant appeals, and plaintiff prosecuted a cross-appeal. Affirmed.

A. F. Childers and J. E. Childers, for appellant. J. S. Cline and J. M. Bowling, for appellee.

GLAY, C. About 25 years ago, Isaac Cantrill and Jackson Moore were owners of adjoining land in Pike county, Ky. Several years later Jackson Moore died, leaving a widow and six children. In a short time his widow also died. Three of the children of Jackson Moore sold their interests in the farm, which their father owned, to appellant Childers, and executed to him a deed therefor. Appellee Belcher bought out the interests of two of these children. The sixth child, Farris Moore, retained his interest. A few years before the institution of this action, commissioners were appointed to divide the Jackson Moore farm among those entitled thereto. Appellant Childers and Isaac Cantrill were present when the division was made. Childers agreed that a line should be run through the lands, and that the children should be given the choice of halves. The infant children, by their guardian, elected to take the land lying on the left-hand side. It appears that the land in controversy in this action was not included in the division. This was probably due to the fact that appellant and Isaac Cantrill claimed that it did not belong to Jackson Moore.

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

Appellee, J. W. Belcher, brought this action to recover the land in controversy, evidently proceeding on the idea that by his purchase from one of the Moore heirs he acquired title to the entire tract. During the progress of the action he bought out the interest of another of the heirs. He charged in his amended petition that the land in controversy belonged to Jackson Moore at the time of his death and descended to his children. He also pleaded that the land was on the Moore side of the conditional line which had been established between him and Isaac Cantrill, and had been recognized by the parties for more than 15 years. The trial court was of opinion that the conditional line was established as claimed by appellee and held that appellee was entitled to recover of appellant two-sixths of the land. He further held that the infant, Farris Moore, was the owner of a one-sixth undivided interest in said land, while appellant was the owner of an undivided one-half interest therein. From this judgment Childers has appealed, and Belcher has prosecuted a cross-appeal.

Appellant did not set up his interest in the land in controversy by virtue of his purchase from the three Moore heirs, but claimed title to the whole of the land through conveyances from Isaac Cantrill to his son-in-law, Thomas Collins, and from Collins and wife to himself. Isaac Cantrill gave three depositions. In one deposition he testified that he owned land adjoining that in controversy. He and Jackson Moore met about 20 or 21 years before he testified to make a division line. They went up the Big branch near where the Falls spring then was; thence up the hill on the left-hand side to the top of the hill between the Big branch and the Panther branch. They then went to a small chestnut on the top of the hill between said branches. By agreement they ran a line due north towards the creek known as the Big branch to a beech on the bank of the creek standing near the tail of the Falls Spring. This beech was marked. When he sold his mineral, he sold to that line. He claimed and exercised ownership up to that line. The division line was not continued on account of Jack Moore being tired. Each of them recognized the other's ownership up to that line, Cantrill claiming nothing above, and Moore nothing below, it. In his other two depositions Cantrill claimed that, after they had marked the conditional line for a certain distance, Moore became tired and wanted to quit, and they then agreed to have no more of it. They never finished the conditional line. The way the line was marked Moore got a portion of Cantrill's land, while Cantrill secured none of Moore's. It is earnestly insisted by appellant that this evidence of Cantrill's is not sufficient to show that the conditional line in question was actually established. While it is true that Cantrill

varied his testimony, perhaps, because it was to his interest to claim that no conditional line was established, it appears from the testimony of other witnesses that he and Moore for upward of 15 years actually recognized the line fixed by the judgment of the trial court as the conditional line between them. Upon a careful consideration of all the evidence, we see no reason to disturb the judgment in this respect. If, then, the land in controversy was on Jackson Moore's side of the conditional line, it follows that, upon his death, the land descended to his heirs. That being true, appellant acquired no title by virtue of his purchase through Collins and Cantrill.

There is no merit in the contention of appellee that he is entitled to all of the land in controversy, because appellant elected to take the land on the right-hand side of the division line fixed by the commissioners. As the land in controversy was not included in the division, the title thereto necessarily remained in the heirs of Jackson Moore, and and the vendees of the heirs who had disposed of their interest.

Nor do we see any reason for reversing the judgment because the court adjudged all costs against appellant. He denied that appellee had any interest at all in the land, and he claimed title, not by virtue of his purchase from the Moore heirs, but by virtue of his purchase through Collins and Cantrill. Appellee recovered of appellant to the extent of two-sixths of the land in controversy. Under these circumstances, we conclude that he was entitled to a judgment for costs.

Upon the whole case, we think the trial court did substantial justice.

The judgment is affirmed, both on the original and cross appeal.

ROBINSON v. ROBINSON.

(Court of Appeals of Kentucky. March 7, 1911.)

1. HOMESTEAD (§ 59*)—PERSONS ENTITLED—HOUSEKEEPERS.

A bona fide housekeeper who acquires an interest in land by descent is entitled within a reasonable time after the death of his ancestor to have his share set apart as a homestead when it is divisible, or to obtain a sale when it is not divisible, and reinvest the money in a homestead.

[Ed. Note.—For other cases, see *Homestead*, Cent. Dig. § 87; Dec. Dig. § 59.*]

2. HOMESTEAD (§ 193*)—PERSONS ENTITLED—DELAY IN CLAIM.

An administrator sued to submit land to payment of a note. The defense was homestead. Defendant's father had been entitled to the land as tenant by the curtesy. At the time of the father's death, defendant was in the penitentiary. The action was brought about one year after the father's death, and defendant filed his answer, claiming homestead about six

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months after suit brought. *Held*, there was not such an unreasonable delay as would defeat his right of homestead.

[Ed. Note.—For other cases, see *Homestead*, Cent. Dig. § 364; Dec. Dig. § 193.*]

Appeal from Circuit Court, Boone County.

Action by Alonzo Robinson, etc., against Earl Robinson. From a judgment for defendant, plaintiff appeals. Affirmed.

J. G. Tomlin, Jno. L. Vest, and D. E. Castleman, for appellant. O. M. Rogers, for appellee.

HOBSON, C. J. Elizabeth Glackin died in Boone county, the owner in fee of a tract of 56 acres of land. Afterwards her husband, John H. Glackin, died in the year 1907. She left two children surviving her, and this suit was brought for the sale of the land and the division of the proceeds between them after the father's death. A. P. Glackin, one of the children, had executed a note to his father for \$690. The administrator of his father's estate sought to subject to the debt A. P. Glackin's interest in the land, which was worth less than \$1,000. A. P. Glackin set up that he was a housekeeper with a family, consisting of his wife and four children, and claimed the land as a homestead. The court adjudged him the homestead, and the plaintiff appeals.

The facts are these: A. P. Glackin had not moved upon the land. His family was living upon a piece of land owned by his wife. He was in the penitentiary, and had been there for some years. The land was indivisible, and had to be sold for the division of the proceeds between the parties entitled thereto. He did not set up his claim to a homestead until he filed his answer in this suit, brought about one year after his father's death. He filed his answer six months after the suit was instituted. We have held in a long line of opinions that a bona fide housekeeper with a family who acquires an interest in land by descent is entitled within a reasonable time after the death of his ancestor to have his share set apart to him to occupy it as a homestead, when it is divisible, or to obtain a sale if it is indivisible, and reinvest the proceeds in a homestead. *Jewell v. Clark*, 78 Ky. 398; *Spratt v. Allen*, 106 Ky. 274, 50 S. W. 270, 20 Ky. Law Rep. 1822; *Roark v. Bach*, 116 Ky. 460, 76 S. W. 340, 25 Ky. Law Rep. 699, and cases cited. The father was entitled to the land as tenant by the curtesy, and A. P. Glackin was not entitled to the possession of it until his father's death. When his father died, he was in the penitentiary, and, when the suit was brought for the sale of the land, he set up his right to the homestead. In view of his unfortunate condition, and the situation of his family, we do not see that there has been any such unreasonable delay as should deny him his right to a homestead.

Roberts v. Adams, 96 S. W. 554, 29 Ky. Law Rep. 848.

Judgment affirmed.

J. I. CASE THRESHING MACH. CO. v. MATTINGLY.

(Court of Appeals of Kentucky. March 7, 1911.)

1. TRIAL (§ 337*)—VERDICT—DISREGARD OF INSTRUCTIONS.

In an action to recover the purchase price of a threshing machine, where the jury are instructed to find for the plaintiff unless the contract of sale was obtained by fraud, or, if there was a breach of warranty, a verdict that defendant should return the machine and that plaintiff should return defendant's notes, retaining the amount of the first note to cover use of machine, disregarded instructions and should have been set aside.

[Ed. Note.—For other cases, see *Trial*, Cent. Dig. § 790; Dec. Dig. § 337.*]

2. SALES (§ 38*)—VALIDITY OF CONTRACT—MISREPRESENTATION AND FRAUD BY SELLER.

Where a written contract for the sale of a threshing machine containing a warranty is entered into and signed by the buyer without reading or having read to him the entire contract because he was in a hurry, and a duplicate is left with a third person for the buyer, as agreed, but is never called for, and the buyer in his testimony as to the contract does not allege that he was misled, there is no fraud in the obtaining of the contract, and it is binding on the buyer.

[Ed. Note.—For other cases, see *Sales*, Cent. Dig. §§ 65-85; Dec. Dig. § 38.*]

3. TRIAL (§ 178*)—TAKING CASE FROM JURY—PEREMPTORY INSTRUCTIONS—INFERENCES FROM EVIDENCE.

On the question of the propriety of a peremptory instruction for defendant, the plaintiff's evidence in so far as it conflicts with that of the defendant must be taken as true.

[Ed. Note.—For other cases, see *Trial*, Cent. Dig. §§ 401-403; Dec. Dig. § 178.*]

4. CONTRACTS (§ 93*)—VALIDITY—MISTAKE—SIGNING WITHOUT READING.

One who signs a written contract, refusing to read it, cannot say that he did not know its contents and is bound by its terms.

[Ed. Note.—For other cases, see *Contracts*, Cent. Dig. §§ 415-419; Dec. Dig. § 93.*]

5. CONTRACTS (§ 94*)—VALIDITY—SIGNING WITHOUT READING—FRAUD.

Where a person is misled into signing a written contract without negligence in so doing, it is a fraud which invalidates the contract.

[Ed. Note.—For other cases, see *Contracts*, Cent. Dig. §§ 420-430; Dec. Dig. § 94.*]

6. SALES (§ 423*)—CONTRACTS—COUNTERCLAIM FOR BREACH OF WARRANTY—RIGHT OF ACTION.

A buyer of a threshing machine under a written contract of warranty providing that, if it does not fulfill the warranty, notice specifying the defects shall be given directly to the seller and a reasonable time allowed to remedy defects, when sued for the balance of the purchase price, cannot counterclaim for the amount paid on the ground that it was paid upon a promise by the seller's agent to make the machine comply with the warranty, when his letters to the seller make no allusion to such a promise or to any failure to perform it, and where the machine was kept and used, and the

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Kay No. Series & Rep'r Indexes

seller had no opportunity to remedy the defects.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 1214-1223; Dec. Dig. § 428.*]

Appeal from Circuit Court, Woodford County.

Action by the J. I. Case Threshing Machine Company against G. W. Mattingly. Judgment for a rescission of the contract sued upon, and plaintiff appeals. Reversed and remanded.

Will D. Jesse and D. T. Edwards, for appellant. Field McLeod, for appellee.

HOBSON, C. J. On June 15, 1907, G. W. Mattingly purchased of the J. I. Case Threshing Machine Company a thresher for the sum of \$917, executing his three notes due September 1, 1907, 1908, and 1909; the first two of the notes being for \$306, and the last one one being for \$305. He also executed a mortgage on the property to secure the payment of the notes. The note falling due September 1, 1907, was paid. He failed to pay the other two notes when due, and this action was brought by the company against him to recover on them and to enforce the mortgage. He filed an answer, in which he alleged that, as an inducement to him to make the purchase, the plaintiff warranted that the thresher was the best made, suitable and fit for use in threshing grain, that it would work well and do good work, was well made and of good material and durable; that he relied on this warranty in making the purchase, and but for it would not have bought the machinery; that in fact the thresher was not the best made, nor well made at all, and was not fit or suitable for use in threshing grain or for any other purpose; that it would not work well, or do good work, was not made of good material or durable, and was entirely valueless; that he paid the first note upon the repeated and positive assurance of the plaintiff that the machine would be made by it to comply with its warranty, but this it had failed to do; and that the machine had never fulfilled in any respect the warranty and was entirely worthless. He made his answer a counterclaim, and asked judgment against the plaintiff for \$306, the amount he had paid, with interest from July 1, 1907. The defendant by reply pleaded that the machinery was sold to the defendant under a written contract, which contained the following warranty: "It is warranted to be made of good material, and durable with good care, to do as good work under same conditions as any made in the United States of equal size and rated capacity, if properly operated by competent persons with sufficient steam or horse power, and the printed rules and directions of the manufacturer intelligently followed. If by so doing after trial of ten days by the purchaser, said machinery shall fail to ful-

fill the warranty, written notice shall at once be given to J. I. Case Threshing Machine Company at Racine, Wisconsin, and also the agent through whom received, stating in what parts and wherein it fails to fulfill the warranty, and reasonable time shall be given to said company to send a competent person to remedy the difficulty, the purchaser rendering necessary and friendly assistance, said company reserving the right to replace any defective part or parts, and if then the machinery cannot be made to fill the warranty, the part that fails is to be returned by the purchaser, free of charge to the place where received, and the company notified thereof and at the company's option another substituted therefor that shall fill the warranty, or the notes and money for such part immediately returned, and the contract rescinded to that extent, and no further claim made on the company. No representation made by any person as an inducement to give and execute this order shall bind the company. The purchaser hereby waives notice of the acceptance of this order by the company." It alleged that the writing was the only contract made with the defendant, and denied that there was any other warranty than that stated in the writing. It also pleaded that the defendant had given no notice as required by the warranty of any defect in the machinery. It denied that the plaintiff paid the note due September 1, 1907, upon any assurance that the machine would be made by it to comply with any warranty or that the machine was defective in any way, and alleged that, if it had failed to do good work, it was by reason of the improper way in which it was managed. By his rejoinder the defendant pleaded that the written contract set out in the reply had been obtained from him by fraud. The allegations of the rejoinder were denied, and on motion of the defendant the case was transferred to the common-law docket for a jury trial. The jury to whom the case was submitted were instructed by the court in substance to find for the plaintiff unless the written contract was obtained by fraud, and to find for the defendant the damages he sustained by reason of the breach of the warranty if the written contract was obtained by fraud and the machinery was warranted as set out in the petition and did not fill the warranty. They returned the following verdict: "We, the jury, make the following verdict: Let G. W. Mattingly return to the J. I. Case Threshing Machine Company the separator and its appurtenances, and let the J. I. Case Company return to G. W. Mattingly his two notes, which said Machine Company holds, and divide the court costs equally between said parties. Let the J. I. Case Company retain the money which it has received from the said Mattingly to offset the use which the said Matting-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

ly has gotten out of the machine." The court entered judgment pursuant to the verdict, and the plaintiff appeals.

The verdict of the jury was not warranted by the instructions of the court. The jury were required by the instructions, if they found for the defendant on his counterclaim, to fix the damages he sustained, and to set off the amount so found against the notes sued on by the plaintiff. The defendant had kept and used the thresher for two seasons without at any time offering to return it. The plaintiff could not be required to rescind the contract, and the defendant was obliged to look to his warranty. The jury were without authority to disregard the instructions of the court. What they did was practically to make an arbitration of the case in disregard of the court's instruction. The court should have set aside the verdict and granted a new trial.

It remains to determine whether there was any evidence warranting the submission of the case to the jury on the question of the written contract being obtained by fraud. The thresher had been delivered under a written contract executed in duplicate signed by the parties. The defendant's own statement to show that a fraud was practiced upon him, put in narrative form, is as follows: "He (Carter, the agent of the company) came to my house, showed me cuts of the separator when set up, told me the terms he was selling the machinery on, and asked me to come in and see the machinery set up. I went in and watched it run for about a half an hour. I then told him I would take it, and he took a contract and filled it in and handed me the contract and asked me to sign my name to it. He asked me to wait for a copy. I told him I was in a hurry. I had brought the milk in to the creamery, and wanted to get it out there. I told him to leave it with Mr. Farra. He said the machinery was of steel, and was one of the best made, if not the best made; would do the work thoroughly and as good as any machine made. I did not read the paper when I signed it. A part of it was read to me. Mr. Carter did the reading of the first part, giving the terms of the sale and the part regarding the machinery. It was sold under a good guaranty. He read the first part describing the machinery, and the time of the payment for it. He read nothing after the words, 'note for \$305.00 due September 1, 1909.' He said, 'Sign that.' and I was in a hurry to go to the creamery and signed it. I have not seen the paper since I signed it until just before the trial. I never had a copy."

This is the substance of all he says on the subject. On the other hand, the witnesses for the plaintiff testify that Carter was reading the paper to him and had read the guaranty as contained in it, when he said it was all in favor of the company, and he need not read any more; that his copy was left

with Farra, who put it in the safe for him, and, he never having called for it, it was produced at the trial. So far as the plaintiff's evidence conflicts with the defendant's, his evidence must be taken as true on the question of a peremptory instruction. It will be observed that he does not say that Carter misled him in any way or that he was assured in any way as to what the terms of the writing were. He who signs a written contract without reading it takes the risk. He cannot say he was imposed upon when he refused to read it, or hear it read. It was natural that Carter should say that his machine was a good one, and would do good work. When agents cease to puff their wares, they will cease to be employed. Mattingly was bound to know when the writing was drawn and signed that it was made for the purpose of evidencing the contract. In *Upton v. Tribilcock*, 91 U. S. 45, 23 L. Ed. 203, the rule on the subject is stated by the United States Supreme Court as follows: "It will not do for a man to enter into a contract, and, when called upon to respond to its obligations, to say that he did not read it when he signed it, or did not know what it contained. If this were permitted, contracts would not be worth the paper on which they are written. But such is not the law. A contractor must stand by the words of his contract; and, if he will not read what he signs, he alone is responsible for his omission." See, also, 9 Cyc. 388, and cases cited. A different rule prevails where the party is misled as to the nature of the writing, and is not himself negligent. *Western Mfg. Co. v. Cotton*, 126 Ky. 749, 104 S. W. 578, 31 Ky. Law Rep. 1130, 12 L. R. A. (N. S.) 427.

In 1 *Greenleaf on Evidence*, § 275, it is said: "When parties have deliberately put their engagements into writing, in such terms as import a legal obligation, without any uncertainty as to the object or extent of such engagement, it is conclusively presumed that the whole engagement of the parties, and the extent and manner of their undertaking, was reduced to writing; and all oral testimony of a previous colloquium between the parties or of conversation or declarations at the time when it was completed, or afterwards, as it would tend in many instances to substitute a new and different contract for the one which was really agreed upon, to the prejudice, possibly, of one of the parties, is rejected." To same effect, see *O'Neal v. Rumley*, 53 S. W. 521, 21 Ky. Law Rep. 936; *Worland v. Secrest*, 106 Ky. 711, 51 S. W. 445, 21 Ky. Law Rep. 363; *Crane v. Williamson*, 111 Ky. 271, 63 S. W. 610, 975, 23 Ky. Law Rep. 680; *Beattyville Bank v. Roberts*, 117 Ky. 680, 78 S. W. 901, 25 Ky. Law Rep. 1796.

The defendant's own testimony does not show that a fraud was practiced upon him; it only shows that he entered into and signed the contract without reading it, refusing to allow it to be read to him, and leaving his copy of the contract in the hands of another

for safe-keeping. His own testimony also shows that he knew the writing contained "a good guaranty." He did not comply with the written warranty, and, there being a written warranty, no other warranty is implied. The court should therefore have instructed the jury peremptorily that the written contract was binding on the defendant.

The defendant testified that when the first note came due on September 1, 1907, he refused to pay it for the reason that the machine was defective and would not do the work; that Carter, the agent through whom he purchased, urged him to pay and promised him that, if he would pay it, the machine would be put in good order, and made to work right, and to comply with the warranty as to durability and suitability for threshing grain, and in reliance upon this promise he paid the first note. Carter testified that he saw Mattingly about September 28, 1907, and that Mattingly agreed that he would pay the note if they would come down and fix the machine the next year; that on June 26, 1908, he got a letter from Mattingly, telling him he would like to have the machine fixed; and that he took a man there then and did put the machine in order. On June 25, 1908, and after this work was done, Mattingly wrote the company the following letter: "Versailles, Ky., 6/25/1908. J. I. Case Threshing Machine Co., Racine, Wisconsin.—Gentlemen: Your Mr. J. C. McKinstry has rendered us the desired assistance in operating the machinery recently purchased from you, and we are well pleased and satisfied with it. Very truly, G. W. Mattingly." He did not pay the note due September 1, 1908, and on September 29th, which was after the close of the threshing season of that year, he wrote the company this letter: "Versailles, Ky., Sept. 29, 1908. J. I. Case T. M. Co., Racine, Wis.—Gentlemen: Your Mr. C. T. Bishop and W. H. Fitzhugh have to-day agreed to send an expert to overhaul my separator bought of you last year, and I hereby agree to pay my note which was due September 1st, 1908, in favor of your firm by November 1st, 1908, provided the work on separator is done by that time. They further agreed that you would send a man to start my separator the threshing season of 1909, provided I give you notice when I will be ready to start. G. W. Mattingly." The company had their man to go to Mattingly's and fix the machine, and after the work was done, on October 28th, he wrote them this letter: "Versailles, Ky., Oct. 28, 1908. J. I. Case T. M. Co., Louisville, Ky.—Gentlemen: Your Mr. W. T. Antill has been here and fixed extension on straw rack and grain pan and conveyor sieve and stopped leak under cylinder. G. W. Mattingly."

These are the letters he wrote the company as far as the record shows. He at no time complained in any letter that he wrote

them that the work that had been promised to be done on the machine had not been done. He did not give the company an opportunity to remedy any defects which he thought existed. It was incumbent on him, if there was such an agreement as he alleges, to call the company's attention to the defects which he complained of, and give it an opportunity to remedy them. He did not pay the note due November 1st, and this suit was brought the following February. In view of his own letters, he cannot maintain his defense on the ground that the company agreed to make the machine good when he paid the first note but failed to do so.

In *J. I. Case T. M. Co. v. Lyons*, 72 S. W. 356, 24 Ky. Law Rep. 1862; *Wisdom v. Nichols & Shepherd Co.*, 97 S. W. 18, 29 Ky. Law Rep. 1128; *J. I. Case T. M. Co. v. Patterson*, 137 Ky. 180, 125 S. W. 287; and *J. I. Case T. M. Co. v. Combs*, 125 S. W. 289—we held under contracts like that made here, and on facts not practically different, that the company could not be required to take back the property, and that the purchaser, having failed to comply with the written warranty, was liable on the notes he had executed. We do not see that this case can be distinguished from those cited. Mattingly's letters to the company nowhere allude to such an agreement as he alleges was made in September, 1907. On the contrary, his letter written the following June before the threshing season of that year began, and his letter written in September, after it closed and when he had used the thresher throughout the entire season, are utterly inconsistent with the existence of such a contract. On the admitted facts he could not maintain his counterclaim, and the jury should have been instructed peremptorily to find for the plaintiff.

Judgment reversed, and cause remanded for further proceedings consistent herewith.

GREENE v. BURNS.

(Court of Appeals of Kentucky. March 10, 1911.)

NEGLIGENCE (§ 24*)—DANGEROUS APPLIANCES —CAUSE OF ACTION—REQUISITES.

Where plaintiff's thumb was caught and injured, in an extension table she was examining in defendant's store as a prospective purchaser, by the clerk closing the table, she could not recover damages without proof that the clerk knew her thumb was between the leaves of the table, or by the exercise of ordinary care could have known it.

[Ed. Note.—For other cases, see *Negligence*, Cent. Dig. § 24; Dec. Dig. § 24.*]

Appeal from Circuit Court, Jefferson County, Common Pleas Branch, Second Division.

Action by Annie Burns against James Greene. Judgment for plaintiff, and defendant appeals. Reversed and remanded.

Jacob Solinger, for appellant. Edwards, Ogden & Peak, for appellee.

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

CLAY, C. Appellee, Annie Burns, brought this action against appellant, James Greene, to recover damages for personal injuries alleged to have been received through the negligence of one of appellant's servants. The jury awarded her \$400. From the judgment based thereon, this appeal is prosecuted.

Appellant insists that the court erred in failing to award him a peremptory instruction. Appellee testified that she went into Greene's store in company with a clerk by the name of McMeekin. He took her up on the elevator to the third floor, where he showed her some extension tables. She told him that Mr. Greene had said he had an extension table which sold at \$20 that he would let her have for \$14. McMeekin said he would show her those tables. He walked over and exhibited a common table and opened it. She informed him that she did not like that one, inquired as to the price of another table, and was informed that it was \$20. She then describes the accident in the following language: "He opened up the table to show me a spring or lock or something in there. It seemed like a spring or something under the table. I had my hand on the table, and looked under it. I had my hand on the table with my thumb down in the open part. He says: 'I advise you to take this table. It is a good oak table, and will match your sideboard.' I took a look at it, laid my hand on the table, and looked down under it, and the next thing I knew he closed the table. I hallooed, 'Oh! Oh!' and looked right at Mr. McMeekin, and Mr. McMeekin looked at me and looked excited. His face was real red, and he had his hands on the table. I showed him my thumb, and I said, 'That has ruined my hand.' Then he went back to the other table—it seemed like he was in such a hurry to tell me about the other table—and commenced talking about the other table," etc. She further testified that the table on which her thumb was injured was a round, pedestal table, and was not open at the time McMeekin first showed it to her. While appellee testified that McMeekin closed the table, she failed to say that she saw him close it. Appellee's daughter, Annie Burns, a child nine years of age, testified that she accompanied her mother to appellant's place of business on the occasion in question. When her mother was looking under the table, McMeekin touched the table and hurt her mother's hand. On cross-examination she stated that she was standing between McMeekin and her mother, and McMeekin was at her back.

Assuming that the evidence shows that appellee's thumb was injured by the table being closed, and that McMeekin closed the table, is that sufficient to justify the submission of the case to the jury? There is nothing in the evidence to warrant the assumption that the table automatically closed

itself; therefore it cannot be said that the table itself was dangerous. It may be conceded that McMeekin, in displaying the table and in opening and closing it, was bound to exercise ordinary care not to injure appellee. Appellee did not testify that McMeekin knew that her thumb was between the leaves of the table, or to any facts from which it could be reasonably inferred either that he knew, or by the exercise of ordinary care could have known, that such was the case. To sustain the charge of negligence, it was absolutely necessary to show that one of these states of fact existed. Mere proof of the fact that the table was closed and appellee's hand was hurt is not sufficient. As appellee's evidence, considered in the most favorable light to her, did not go any further than this, we conclude that the court erred in refusing the peremptory instruction requested by appellant.

Judgment reversed, and cause remanded for a new trial consistent with this opinion.

HIGGINS v. COMMONWEALTH.

(Court of Appeals of Kentucky. March 9, 1911.)

1. CRIMINAL LAW (§ 781*)—EVIDENCE—CORPUS DELICTI—INSTRUCTIONS.

Where the commonwealth showed beyond doubt that deceased came to his death from a blow on the head which fractured his skull, but the evidence to connect the prisoner with the offense was wholly circumstantial, aside from certain alleged extrajudicial confessions, and the theory of the defense was that deceased was struck by a passing railroad train, the court should have charged the language of Cr. Code Prac. § 240, that a confession of accused, unless made in open court, will not warrant a conviction unless accompanied with other proof that the offense has been committed.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1864-1871, 1898; Dec. Dig. § 781.*]

2. CRIMINAL LAW (§ 404*)—EVIDENCE—INSTRUMENT BY WHICH WOUND WAS INFLECTED.

In a prosecution for homicide, it was error to permit the commonwealth to introduce in evidence a piece of iron pipe on which human hair of the color of deceased's was sticking, which the witness stated had been given to him by another man some days after the homicide, in the absence of proof showing when and where it was found and in whose possession it had been since it was found, in order to justify some reasonable inference that it was connected with the homicide.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 891; Dec. Dig. § 404.*]

3. CRIMINAL LAW (§ 424*)—EVIDENCE—DECLARATIONS OF ACCOMPLICE.

Statements made by an accomplice when arrested, not in the presence of defendant and after the offense had been committed, were inadmissible against her.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1002-1010; Dec. Dig. § 424.*]

4. WITNESSES (§ 388*)—CONTRADICTION—INCONSISTENT STATEMENTS—FOUNDATION.

Inconsistent statements alleged to have been made by a witness are inadmissible to im-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

peach him as provided by Civ. Code Prac. §§ 597, 598, unless during the examination of the witness a foundation is laid therefor by calling his attention to such alleged statements, and, after designating the time and place as accurately as possible and the names of those present, asking the witness if he did not make the statements attributed to him.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 1233-1242; Dec. Dig. § 388.*]

5. WITNESSES (§ 406*)—CONTRADICTION—MATERIALITY.

Evidence that a commonwealth's witness had told defendant's attorney that another witness for the commonwealth had made a certain statement was immaterial and inadmissible to contradict her.

[Ed. Note.—For other cases, see Witnesses, Dec. Dig. § 406.*]

6. WITNESSES (§ 379*)—IMPEACHMENT—FORMER STATEMENTS.

Where a commonwealth's witness gave damaging testimony, a statement alleged to have been made by her before the trial that she knew nothing about the case was admissible to contradict her.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 1209, 1220-1222, 1247-1256; Dec. Dig. § 379.*]

7. CRIMINAL LAW (§ 673*)—INSTRUCTIONS—LIMITING SCOPE OF EVIDENCE.

Where witnesses are contradicted by alleged inconsistent statements, it is the court's duty to caution the jury that the contradictory evidence is only to be considered by them on the credibility of the witnesses thus attacked.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1875; Dec. Dig. § 673.*]

8. HOMICIDE (§ 142*)—INDICTMENT—VARIANCE—PRINCIPAL AND ACCESSORY.

An indictment charged that defendants F. and H. on a specified date did unlawfully, etc., strike and wound C. with a club, from which C. died within a year and a day thereafter; that F. did the striking; and that his codefendant, H., was present and did unlawfully, etc., aid, abet, encourage, and assist F. in the commission of the offense. *Held*, that under such indictment the jury, if they found that defendant H. did the striking which caused C.'s death, instead of merely aiding and abetting defendant F., could still convict H.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. § 252; Dec. Dig. § 142.*]

9. HOMICIDE (§ 307*)—MURDER—INCLUDED OFFENSES—INSTRUCTIONS.

The rule that, where the evidence of a homicide is wholly circumstantial, and there are signs of a struggle or other circumstances supporting such conclusion, the court should charge the whole law including murder, voluntary manslaughter, involuntary manslaughter, and self-defense, does not apply where there is no evidence to show voluntary or involuntary manslaughter or self-defense, or where from all the proof defendant is either guilty of murder or innocent.

[Ed. Note.—For other cases, see Homicide, Dec. Dig. § 307.*]

Appeal from Circuit Court, Greenup County. Sarah Hill Higgins was convicted of murder, and she appeals. Reversed and remanded.

Theo. K. Funk and A. S. Cooper, for appellant. James Breathitt, Atty. Gen., and Tom B. McGregor, Asst. Atty. Gen., for the Commonwealth.

HOBSON, C. J. Fred Ferguson and Sarah Hill Higgins were indicted for the murder of William Culbertson. She was tried first. The jury found her guilty and fixed her punishment at eight years in the state penitentiary. The court entered judgment on the verdict, and she appeals.

The facts as shown by the proof for the commonwealth on the trial are these: William Culbertson was the night agent of the Chesapeake & Ohio Railway at South Portsmouth, Ky., which is just across the Ohio river from Portsmouth, Ohio. Sarah H. Higgins and Ferguson lived in Portsmouth, Ohio, although she was a native of Kentucky, and had lived, until shortly before the death of Culbertson, in South Portsmouth, Ky. She had a son named Ike. Ike and Ferguson were arrested by the railway authorities some weeks before Culbertson's death for stealing coal. After this, Ike had a difficulty with William Culbertson, whom he charged with having had him arrested. Culbertson slapped him, and he then went off and got a gun. His mother, who was present when he came back with the gun, told her son to shoot him, and then, when he did not shoot him, said, "Give me the gun, and I will shoot him," using a vile word. About two weeks before Culbertson's death, she said she would bet a dollar that inside of two weeks Culbertson would not make anybody else quit getting coal. On the Saturday before his death, she said in the presence of several people that she would kill the man who had had her son arrested, if she had to slip up behind him and knock him in the head. Some of the witnesses say that she used Culbertson's name in this connection. On the next day she said that they had Ike in jail for stealing coal, and that if she had her gun she would blow the man's brains out who had him arrested. She was then in Portsmouth, Ohio, and went toward the river. According to other testimony for the commonwealth, she was not about her home any more that evening. That night Culbertson was the only person at the depot. He sold tickets for a passenger train which passed at 12:24, and about that time talked over the telephone to the dispatcher, who was at another building, several hundred yards away. At 1:24 a freight train passed from the east, the first train which passed after the passenger. A brakeman on this train sitting in the engine saw the body of a man lying on the platform near the depot with his feet toward the track, and his head out from it. The brakeman looked at the man after he passed him on the engine to see if he was free of the cars, and when he reached the next station reported the fact to the conductor of a train he met there going west, thinking perhaps the man was drunk. The conductor of the west-bound train saw the man as he passed in the same position as the

brakeman on the other train. He reported the matter to the station agent as he passed, but did not stop. The station agent then called up the depot by phone, but got no answer. This was about 2:30. Early in the morning a person went to the depot and found Culbertson lying on the platform in the position described. He was alive but unconscious. His skull was crushed on the right side of his head. The top of the right ear was clipped. The left eye was black. He had bled profusely from the nose and mouth. There was a slight bruise or cut on the left hand, and a slight bruise on each elbow. He died without regaining consciousness. Between 2 and 4 o'clock Monday morning, Mrs. Higgins met a woman in an alley near where she lived; seemed to be frightened, and said to her: "I told you this ticket agent should never interfere with William Ike. I told you last night he should never see the sun set again. We fixed him. We got him out of the way. I got that Ferguson boy to help. When the early train went by we came down, and I called this ticket agent to the door, and asked him to change some money for me, and he started to change the money, and the Ferguson boy hit him with a club. We then took him by the feet and shoulders and laid him on the railway track to make people think the train killed him." It was shown by other witnesses in Portsmouth that she made similar statements to them. To the officers who arrested her after Ferguson was arrested, she said that there were only three people on earth that knew anything about the case, that they had the right man in jail that did the killing.

It is insisted that this proof was not sufficient to warrant the conviction of the defendant for the reason that the corpus delicti was not shown. In 3 Greenleaf on Evidence, § 30, it is said: "The proof of the charge in criminal causes involves the proof of two distinct propositions: First, that the act itself was done; and, secondly, that it was done by the person charged, and by none other. In other words, proof of the corpus delicti, and of the identity of the prisoner. It is seldom that either of these can be proved by direct testimony; and therefore the fact may lawfully be established by circumstantial evidence, provided it be satisfactory." Again, in section 131, speaking of the corpus delicti, the learned author says: "And this involves two principal facts, namely, that the person is dead, and that he died in consequence of the injury alleged to have been received." In section 134 he further says: "The death and the identity of the body being established, it is necessary, in the next place, to prove that the deceased came to his death by the unlawful act of another person. The possibility of reasonably accounting for the fact by suicide, by accident, or by any natural cause, must be excluded by the circumstances proved; and it is only

when no other hypothesis will explain all the conditions of the case, and account for all the facts, that it can safely and justly be concluded that it has been caused by intentional injury."

The commonwealth showed here beyond doubt, that Culbertson was dead, and that he came to his death from a blow on the head which fractured his skull. The identity of the prisoner with the crime was shown wholly by circumstantial evidence and her own declaration. It is earnestly insisted that the proof does not show that anybody killed Culbertson; that it is reasonable from all the circumstances that he was sleeping on the platform and raised up as the train passed him and was struck by the cars, thus receiving the injury on his head. But this was a question for the jury. Section 240 of the Criminal Code of Practice provides: "A confession of a defendant, unless made in open court, will not warrant a conviction, unless accompanied with other proof that such an offense was committed."

In *Patterson v. Commonwealth*, 86 Ky. 320, 5 S. W. 390, 9 Ky. Law Rep. 485, the court pointing out the difference between section 240, relating to confessions out of court, and section 241, relating to the testimony of an accomplice, said: "But there is a material difference between the two sections, for, while one relates to the legal effect to be given to a confession when proved as a fact, the other not only prescribes the legal effect which may be given to the testimony of an accomplice when credited, but also determines the condition upon which the jury may give any credence to it. The converse of the proposition stated in section 240 is that if the confession is accompanied with proof such offense was committed—that is, with proof of the corpus delicti—it will warrant a conviction." See, also, to same effect, *Wigginton v. Com.*, 92 Ky. 289, 17 S. W. 634, 13 Ky. Law Rep. 641; *Dugan v. Com.*, 102 Ky. 252, 43 S. W. 418, 19 Ky. Law Rep. 1273; *Gilbert v. Com.*, 111 Ky. 798, 64 S. W. 846, 23 Ky. Law Rep. 1094.

It is also held in the cases cited that, if it is doubtful if the crime has been committed, the jury should be instructed in the language of this section. The defense here was rested in a large measure on the ground that the circumstances shown were consistent with the fact that the deceased was struck by the train; and, while there was evidence sufficient to go to the jury that the offense had been committed, the court should have instructed the jury as provided in section 240.

The commonwealth was allowed to introduce on the trial a piece of iron pipe which the witness stated another man had brought to him at the depot some days after the homicide, and to show that the wound might have been inflicted by such an instrument, and that human hair was sticking to the pipe in color like Culbertson's. The evidence did not show where this piece of pipe came from,

when or by whom it was found, and there was nothing in the evidence to connect it in any way with the homicide. It should not have been admitted in evidence without proof showing when and where it was found, and in whose possession it had been since it was found. It should also appear from the evidence that it was found at a time and place furnishing reasonable ground to connect it in some way with the homicide. The proof need not positively show the connection; but there must be proof rendering the inference reasonable or probable from its nearness in time and place or other circumstances.

The commonwealth was allowed to prove statements which were made by Ferguson when he was arrested for the crime, and also statements which he made on the same night that Culbertson was struck, but after he was seen lying on the platform. Any statement that Ferguson made not in her presence after the homicide was committed is incompetent against Sarah Hill Higgins. The declarations of an accomplice after the commission of the crime cannot be shown against his codefendant. All of this evidence should have been excluded. In 3 Greenleaf on Evidence, § 94, the rule and the reason for it are thus stated: "It is the same principle of identity with each other that governs in regard to the acts and admissions of agents, when offered in evidence against their principals, and of partners, as against the partnership, which has already been considered. And here, also, as in those cases, the evidence of what was said and done by the other conspirators must be limited to their acts and declarations made and done while the conspiracy was pending, and in furtherance of the design; what was said or done by them before or afterwards not being within the principle of admissibility."

Complaint is made that the defendant was not allowed to contradict certain of the witnesses for the commonwealth, by showing that they had made out of court statements inconsistent with their testimony. Section 597 of the Civil Code of Practice provides that a witness may be impeached by evidence showing that he has made statements different from his testimony. Section 598 is as follows: "Before other evidence can be offered of the witness having made at another time a different statement, he must be inquired of concerning it, with the circumstances of time, place and persons present, as correctly as the examining party can present them; and, if it be in writing, it must be shown to the witness, with opportunity to explain it."

Counsel in their interrogation of the witnesses did not conform to the statute in fixing the circumstances of time, place, and persons present. The time and place should be fixed as accurately as the examiner can reasonably do, and he should name as many of the persons present as he reasonably can, and where only certain persons were present

this should be indicated in the question. If the proper foundation is not laid in the examination of the witness, the impeaching witness cannot be examined. Evidence of statements out of court can only be admitted when the statement is inconsistent with the testimony of the witness as given on the trial. To illustrate, one of the witnesses for the commonwealth was asked if she had not told the defendant's attorney that another witness for the commonwealth had made a certain statement. This was entirely immaterial, as it in no wise conflicted with her testimony on the trial. On the other hand, a statement by one of the commonwealth's witnesses to the effect that she knew nothing about the case, when on the trial she had given damaging evidence, was competent to impeach her testimony. But such questions should be confined by counsel to material matters, and nearly all the questions embraced immaterial matters. The question that was asked Martha Dowdy as to the conversation she had with Sarah Sheets near the residence of John B. Hill did not fix the time or persons present. The subject-matter of this question was proper, if the time, place, and persons present had been given. Statements made by the witnesses for the commonwealth out of court to the effect that they had gotten money or were getting money for their testimony in the case may be shown by the defendant; but the witnesses must first be asked as to these statements, and the time, place, and persons present must be indicated, so that the witness may not be at a disadvantage, but may understand what conversation is referred to. The defendant offered to show that Martha McGraw made to William George the following statement: "I don't know anything about it myself, but, though, I reckon I can do like all the rest, tell around I do, and get a fee for it to go up there." Martha McGraw was an important witness for the commonwealth. This statement is inconsistent with her testimony on the trial, and it may be shown that she made the statement, if she is first asked about it, and the time, place, and persons present are fixed. What we have said does not cover all the matters complained of, but is illustrative of all. The court will not allow a witness to be contradicted as to statements made out of court unless material, and he will caution the jury that the contradictory evidence is only to be considered by them on the credibility of the witness thus attacked.

On another trial the court will omit all of instruction 1 except so much as defines the words "willful," "willfully," "feloniously," and "with malice aforethought." The remainder of the instruction is unnecessary, and may mislead the jury by giving prominence to the matters therein referred to. So much of instruction 2 as told the jury that they might find the defendant guilty if she struck and wounded William Culbertson was

proper. The offense is set out in the indictment in these words: "The said defendants, Fred Ferguson and Sarah Hill Higgins, on the 25th day of July, 1909, in the county and circuit aforesaid, before the finding of this indictment, did unlawfully, feloniously, willfully, maliciously, and with malice aforethought strike and wound Wm. Culbertson with a club or other heavy deadly weapon to the grand jury unknown, from which striking and wounding the said Culbertson died within a year and a day thereafter. The said Ferguson did the striking and wounding as aforesaid, and his said codefendant, Sarah Hill Higgins, was present and did unlawfully, willfully, feloniously, maliciously, and of her malice aforethought aid, abet, encourage, and assist her said codefendant, Fred Ferguson, in the commission of said crime."

The latter part of the charge is necessarily an explanation of the general words contained in the former part. The indictment as a whole charges that Ferguson did the striking, and that Mrs. Higgins was present aiding and abetting him. But under such a charge she may be convicted if she did the striking which caused Culbertson's death. The precise question was before the court in *Benge v. Com.*, 92 Ky. 1, 17 S. W. 146, 13 Ky. Law Rep. 308. In that case it was charged that Hampton did the deed, and that Benge was present aiding and abetting him. Holding under this indictment that Benge might be convicted of actually doing the cutting, the court said: "The one charged as principal may be found guilty of aiding and abetting; and the one charged as aider and abettor may be found guilty as principal. This is for the reason that each is the agent and instrument of the other, and his act is the act of the other, and the act of each constitutes but one crime, and each is guilty of the act actually committed by the other; such act is, in law, the act of each. Hence, each is principal as to each act, although he did not actually perpetrate each act; but the act that the other perpetrated was his act, and he is principal as to it." That case was followed and approved in *Reed v. Com.*, 125 Ky. 126, 100 S. W. 856, 30 Ky. Law Rep. 1212, where a number of other authorities are collected.

So much of instruction 2 as told the jury that if the defendant struck and murdered William Culbertson in sudden heat and passion or in sudden affray, and thus killed him, they should find her guilty of voluntary manslaughter, should have been omitted. There was no more reason for giving an instruction on voluntary manslaughter in the case than for giving one on involuntary manslaughter or self-defense. The defendant's proof showed that she was at home at Portsmouth, Ohio, and knew nothing about the injury to Culbertson. She denied making the threats against him or the confessions shown

by the commonwealth. There was nothing to show a struggle or combat. If the commonwealth's evidence was true, Culbertson was murdered in pursuance of a deliberate plan formed by the defendant. She was either guilty of murder or was innocent. This court has held that where the evidence is wholly circumstantial, and there are signs of a struggle or other circumstances supporting such a conclusion, the court should give to the jury the whole law of the case including the law of murder, voluntary manslaughter, involuntary manslaughter, and self-defense; but this rule does not apply where there is nothing in the evidence to show voluntary manslaughter, involuntary manslaughter, or self-defense, and where from all the proof, if the offense was committed, it was murder. *Bast v. Com.*, 124 Ky. 747, 99 S. W. 978, 30 Ky. Law Rep. 967; *Marshall v. Com.*, 141 Ky. 222, 132 S. W. 139.

Judgment reversed, and cause remanded for a new trial and for further proceedings consistent herewith.

BUCKLEY et al. v. HOGAN et al.

(Court of Appeals of Kentucky. March 10, 1911.)

1. WILLS (§ 448*)—CONSTRUCTION—PRESUMPTION AGAINST INTESTACY.

The presumption against intestacy is only a rule of construction invoked to aid in interpreting a will, and if, with the presumption in mind, the words used are clearly referable to other subjects than the property omitted, the presumption has no further place in the construction of the instrument.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 964; Dec. Dig. § 448.*]

2. WILLS (§ 587*)—CONSTRUCTION—OMITTED PROPERTY.

Testatrix bequeathed her property to B. and his wife in trust to pay the net income to testatrix's father for life, and, after his death, a particular house to be given to H., another house to E. and his sister, and a third house to be sold and the expenses and certain pecuniary bequests paid therefrom, ending with a provision "\$400 for head stones and if there is any left" the trustees are to use their own judgment about it. Held that, since it appeared from the whole will that testatrix did not intend that the trustees should take a beneficial interest in the property, they did not acquire by such closing clause any title to other real estate belonging to testatrix not otherwise disposed of by the will.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 1279, 1281-1291; Dec. Dig. § 587.*]

Appeal from Circuit Court, Franklin County.

Action between John T. Buckley, trustee, and others and John Hogan and others, to construe the will of Katie Welch Buckley, deceased. From a judgment in favor of the latter, the former appeal. Affirmed.

Hazelrigg & Hazelrigg and McQuown & Beckham, for appellants. B. G. Williams and Brown & Nuckols, for appellees.

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

O'REAR, J. This appeal involves the construction of the following will:

"Frankfort, Ky., Nov. 2, 1907.

"I leave all of my property to John T. Buckley and his wife Bridget T. Buckley, to hold in trust and without bond, to collect rents, to pay all taxes, insurance, repairs and improvements and to receive ten per cent of rents for their troubles, the income after all expenses are paid to be given to my father, James Fitzsimmons, for his life time, after his death, house on Ann street No. 129 given to Mrs. Margaret Buckley Haly and her children, house 131 Ann St., given to Edmond Buckley and his sister, Clara Buckley Chew, home on Main St. to be sold. All expenses paid out of this sale, also \$200.00 hundred dollars given to Mrs. May Savage Brown, also my clothing and jewelry to her and her children. \$100.00 (one hundred) given to Rev. N. H. Baker for his school for Orphans, Victorhill, New York.

"(\$50.00) fifty dollars kept for graves for some years to come, \$100.00 given to different priests for masses, \$50.00 to Mrs. Caty Callahan to use for Albert Callahan her grandson.

"(\$100.00) one hundred dollars to Mrs. Mattie W. Driscoll.

"\$400.00 for head stones, and if there is any left use their own judgment about it, also \$100.00 to Church of Good Shepherd of Frankfort.

Katie Welch Buckley.

"Witness: J. A. Brislan."

In addition to the property specifically described in the will, the testatrix owned at the time the will was written a vacant lot in the city of Frankfort. Thereafter she built a house on it at cost of about \$4,000, but the building was not completed at the time of her death. The testatrix was a widow and left no issue. Her only known relative in blood was her father, then about 80 years old. Much of her property she obtained through her husband, Michael Buckley, brother of appellant John T. Buckley, named in the will as one of the trustees thereby created. Some of the persons to whom she devised real estate were children of John T. Buckley. James Fitzsimmons survived his daughter, the testatrix. He devised the lot not mentioned in her will to appellees. It is contended by appellants John T. Buckley and Bridget Buckley that they took the lot under the will. Appellees' position is that the lot was undevised, and passed by descent to James Fitzsimmons as heir at law of Katie Welch Buckley.

If the lot passed under the will, it is because it was included in the last item, and in this expression: "\$400.00 for head stones, and if there is any left use their own judgment about it." It is argued that the reading of that clause should be "if there is any property left," etc. This argument is based on the law's presumption that a testator in-

tended to dispose of his whole estate. It concedes that the words unaided, and in connection alone with the context of the will, did not embrace the lot. It is also argued that as ample and careful provisions were made for the testatrix's father by her giving him a life estate in all her property, including this lot, she could not have intended either to enlarge that estate by an ambiguity of expression or by failing to dispose of the remainder. The presumption against intestacy is only a rule of construction invoked to aid in interpreting the words of the will. If, with the presumption in mind, the words used by the testator in his will are clearly referable to other subjects than that of the property omitted, the presumption has no further place in the construction. It has served its office. Viewing the entire document in question here, one is forced to the conclusion that the testatrix did not intend to make appellants John T. Buckley and his wife the beneficiaries of her will at all further than their fees for attending to her business in executing it. They are named as trustees, are in fact its executors, whose sole benefit under the will is expressed in plain terms. The money devised is that to be derived from the sale of the Main street house. After bestowing parts of it on persons and charities having a place in her benevolence, she finally directs what is probably deemed as the balance to be invested in gravestones, but, if perchance the sum set apart for that purpose was more than enough, "if there is any left," the trustees were to use their own judgment about it; that is, as to applying it to same or kindred purposes to those before named by her, being in the nature of an executory devise. Whether or not specific enough to be sustainable it is not necessary to here consider. She was, though, in that paragraph disposing of the proceeds of the Main street property only. The expression, "if there is any left use their own judgment about it," refers alone to that property, and is manifest, we think, from the context of the will. The first paragraph it is said for appellants devises to them all the testatrix's property. But the devise is in trust during the life of her father for two objects—one, to apply the net income to his maintenance; the other, after his death to apply the proceeds of one parcel to certain charitable uses, and pay Mrs. Brown \$200. The title of the trustees, unless as to the Main street house, is terminated by the will upon the death of the life tenant. Property devised for his life, and not thereafter disposed of, is undevised estate, and passes under the statute of descent and distribution. Consequently her father as her only heir at law took the title to the lot in question, and it passed under his will to appellees.

Such was the judgment of the circuit court, which is affirmed.

TRUSSLE v. CINCINNATI, N. O. & T. P. RY. CO.

(Court of Appeals of Kentucky. March 10, 1911.)

MASTER AND SERVANT (§ 216*)—ASSUMED RISKS—FELLOW SERVANT—RAILROAD EMPLOYEE—COMMON EMPLOYMENT.

Plaintiff was tearing away the wooden forms from concrete work under a bridge, and two other members of the same gang working under the same foreman were making an excavation for other concrete work about 20 feet above on a cliff. Plaintiff knew that they had been working above for several days, and throwing rock and dirt down the cliff within a few feet of him. *Held*, that plaintiff and the employees on the cliff were fellow servants, so that he assumed the risk of injury from rocks negligently thrown from the cliff.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 567-573; Dec. Dig. § 216.*]

Appeal from Circuit Court, Jessamine County.

Action by Silas Trussle against the Cincinnati, New Orleans & Texas Pacific Railway Company. From a judgment for defendant on a directed verdict, plaintiff appeals. Affirmed.

Everett B. Hoover, Robert Harding, and E. V. Puryear, for appellant. John Galvin and N. L. Bronaugh, for appellee.

CLAY, C. Appellant, Silas Trussle, brought this action against appellee, Cincinnati, New Orleans & Texas Pacific Railway Company, to recover damages for personal injuries alleged to have been due to the negligence of said company. At the conclusion of the evidence for appellant, the court awarded the railway company a peremptory instruction. To review the propriety of this ruling, Trussle has appealed.

Appellant charged in his petition that "the defendant's servants, who were engaged in work at a point and place about 40 feet or more above the place where the plaintiff was directed to go and required to work, and who were out of the sight of this plaintiff, by their gross negligence in shoveling and handling and working at said place aforesaid, caused, suffered, and permitted dirt, rock, and stone to fall, roll, and be thrown down upon the plaintiff from said place aforesaid, a portion of which rock, stone, and dirt struck and severely injured this plaintiff's hand," etc. Appellant was a laborer in appellee's employ. He belonged to a force of laborers known as "Williams' gang." On the morning of September 18, 1909, appellant and Milton Rawlings were put to work tearing loose the forms from some concrete work under High Bridge over the Kentucky river. Herbert Winkle and Dan Reynolds, two other members of the same gang of workmen, and who were that day working under the same foreman, were engaged about 40 feet higher up on the cliff in making an excavation in which other con-

crete work was to be laid in a form. Neither Herbert Winkle nor Dan Reynolds was superior in authority to appellant. When appellant went to work that morning, he knew that Winkle and Reynolds had been working where they were employed for several days. He knew that they were throwing rock and dirt from the place where they were at work, and that it was rolling down the cliff and within a few feet of him. Between 10 and 11 o'clock in the morning a rock, which was thrown from a shovel handled by Herbert Winkle, who was working on the cliff about 40 feet above appellant, rolled down the cliff and struck appellant on the hand, causing the injury complained of. Appellee defended on the ground that appellant and the party causing the injury were fellow servants.

Here appellant and the servant causing his injury were members of the same gang of laborers and were engaged in a common employment. Appellant was tearing away the wooden form around the concrete structure that had recently been made, while Winkle was engaged in making an excavation in the side of the cliff in which to build another structure. Not only that, they were engaged in the same grade of the common employment, as neither one could receive from or give orders to the other. The fact that they were 40 feet apart does not alter the rule. The facts of this case bring it within the rule laid down in *Martin v. Mason-Hoge Co.*, 91 S. W. 1146, 28 Ky. Law Rep. 1333, and *Ft. Hill Stone Co. v. Orm's Adm'r*, 84 Ky. 183. Being engaged in the same department of a common employment, and being of equal rank in that employment, appellant and Winkle were fellow servants. That being true, appellant assumed the risk of the injury, and the railroad company is not liable. It follows that the trial court properly instructed the jury to find for appellee.

Judgment affirmed.

JOHNSON et al. v. WILSON et al.

(Court of Appeals of Kentucky. March 10, 1911.)

COURTS (§ 223*)—APPELLATE JURISDICTION—AMOUNT IN CONTROVERSY.

Plaintiffs sued defendant sheriff and an execution creditor for the conversion of certain logs levied on. The execution creditor filed a cross-action against his codefendants. Judgment was rendered for plaintiffs for \$125, and in favor of the creditor in his cross-action against his codefendants for \$100. *Held*, that such judgments were several, and, neither being of sufficient amount to sustain an appeal to the Court of Appeals, under Ky. St. § 950 (Russell's St. § 2784), appeals therefrom would be dismissed.

[Ed. Note.—For other cases, see Courts, Cent. Dig. § 606; Dec. Dig. § 223.*]

Appeal from Circuit Court, Edmonson County.

Action by John T. Wilson and another against C. S. Johnson and another. From a judgment for plaintiffs for \$125, and from a judgment in favor of defendant Vanmeter against his codefendants for \$100, they appeal. Dismissed.

M. M. Logan and Ora E. Hazelp, for appellants. Jno. A. Logan and Grider & Harlin, for appellees.

O'REAR, J. Appellees Wilson and Bradley, claiming to be the owners of certain saw logs which were levied on and sold by appellant Johnson as sheriff under an execution in favor of Kimlinth & Bro. against T. S. Vanmeter, brought this suit against the sheriff and the execution plaintiff to recover damages for the wrongful conversion of the logs. The judgment rendered by the court, sitting without a jury, was for the plaintiff for \$125. Vanmeter, joined as a defendant, also prosecuted a cross-action against his codefendants, and was awarded judgment for \$100. From these judgments, this appeal is prosecuted by the sheriff and by Kimlinth & Bro.

We find ourselves unable to entertain appellants' complaint. The judgment is several against the defendants in favor of the plaintiffs and the cross-plaintiff. Neither judgment is for as much as \$200. Therefore the amount in controversy is not enough to give this court jurisdiction of the appeal. Section 950, Ky. St. (section 2784, Russell's St.); *Oswald v. Morris*, 92 Ky. 48, 17 S. W. 167, 13 Ky. Law Rep. 355; *Covington v. Jordan*, 125 Ky. 73, 100 S. W. 326, 30 Ky. Law Rep. 1135; *Fehler v. Gosnell*, 99 Ky. 380, 35 S. W. 1125, 18 Ky. Law Rep. 238.

The appeal must be dismissed.

LOUISVILLE BANKING CO. et al. v. COMMONWEALTH.

(Court of Appeals of Kentucky. March 10, 1911.)

1. ESCHEAT (§ 3*)—PROPERTY SUBJECT TO ESCHEAT.

Const. § 192, prohibiting a corporation from holding real estate for more than five years except such as may be necessary for carrying on its legitimate business under penalty of escheat, does not embrace a corporation which is not carrying on business, but which is in process of liquidation.

[Ed. Note.—For other cases, see Escheat, Cent. Dig. § 4; Dec. Dig. § 3.*]

2. PLEADING (§ 33*)—ALLEGATIONS OF TIME—MATERIALITY.

The common-law rule that allegations of time in a pleading are immaterial unless a matter of description is recognized under the Code.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. § 63; Dec. Dig. § 33.*]

3. ESCHEAT (§ 3*)—PROPERTY SUBJECT TO ESCHEAT.

Where a banking corporation held for more than five years while continuing in business

real estate not necessary for its legitimate business, the state could escheat it under Const. § 192, providing that a corporation shall not hold any real estate for more than five years under penalty of escheat, except such as may be necessary for its legitimate business.

[Ed. Note.—For other cases, see Escheat, Cent. Dig. § 4; Dec. Dig. § 3.*]

4. CONSTITUTIONAL LAW (§ 32*)—SELF-EXECUTING PROVISIONS—ESCHEAT.

Const. § 192, prohibiting any corporation from holding real estate for more than five years under penalty of escheat, except such as may be necessary for its legitimate business, is self-executing, and the state does not lose its right to escheat by failing to sue to enforce it.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. § 33; Dec. Dig. § 32.*]

5. LIMITATION OF ACTIONS (§ 19*)—RECOVERY OF REAL ESTATE—ESCHEAT.

Where a banking corporation held for more than five years while it continued in business real estate not necessary for its business and its charter then expired, so that it existed only to wind up its business under Ky. St. § 561 (Russell's St. § 2147), an action to escheat property being an action only for recovery of real estate was barred in 15 years under Ky. St. § 2505 (Russell's St. § 212), after the expiration of the charter.

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. §§ 73-85; Dec. Dig. § 19.*]

6. ESCHEAT (§ 6*)—RIGHT OF STATE.

A right of action to escheat property given by Const. § 192, is in the state, and it may, as it has done by Ky. St. § 2971 (Russell's St. § 850), authorize the Louisville school board to enforce its right of action to escheat property located within the city of Louisville.

[Ed. Note.—For other cases, see Escheat, Dec. Dig. § 6.*]

7. CONSTITUTIONAL LAW (§ 93*)—VESTED RIGHTS.

Where a banking corporation created under a statute passed since 1850, so that its charter was subject to legislative control, acquired real estate not necessary for its business subsequent to Const. § 192, prohibiting any corporation from holding for more than five years under penalty of escheat real estate not necessary for its legitimate business, no question of vested rights was involved.

[Ed. Note.—For other cases, see Constitutional Law, Dec. Dig. § 93.*]

8. CONSTITUTIONAL LAW (§ 126*)—IMPAIRING OBLIGATION OF CONTRACTS.

Const. § 192, prohibiting any corporation from holding under penalty of escheat for more than five years real estate not necessary for its legitimate business, does not impair the obligation of a contract when applied to a corporation subject to legislative control, and to property acquired by the corporation after the adoption of the Constitution.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. §§ 325, 366-369; Dec. Dig. § 126.*]

9. ESCHEAT (§ 6*)—ACTIONS—PARTIES.

In an action against a corporation in process of liquidation to escheat real estate under Const. § 192, a stockholder setting up no defense that the corporation has not set up may not intervene and defend in his own behalf.

[Ed. Note.—For other cases, see Escheat, Dec. Dig. § 6.*]

Appeal from Circuit Court, Jefferson County, Chancery Branch, Second Division.

Action by the Commonwealth, by the Louis-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

ville School Board, against the Louisville Banking Company, in which Charles T. Dearing sought to intervene. From a judgment for plaintiff and from a judgment denying the intervention, defendant and Charles T. Dearing appeal. Affirmed.

Tyler Barnett, for appellants. James C. Poston, Lawrence S. Poston, and Wallace A. McKay, for the Commonwealth.

HOBSON, C. J. The Louisville school board filed this action in its name and in the name of the commonwealth of Kentucky against the Louisville Banking Company to escheat two lots owned by the bank on Eleventh street under section 192 of the Constitution. Charles T. Dearing, a stockholder, appeared, and sought to defend the action for the stockholders. The circuit court adjudged the plaintiff the relief sought, and the defendants appeal.

Section 192 of the Constitution is as follows: "No corporation shall engage in business other than that expressly authorized by its charter, or the law under which it may have been or hereafter may be organized, nor shall it hold any real estate, except such as may be proper and necessary for carrying on its legitimate business, for a longer period than five years, under penalty of escheat." By section 2971, Ky. St. (section 850, Russell's St.), it is provided that property in the city of Louisville which escheats to the commonwealth may be recovered by the Louisville school board for the use and benefit of the schools of the city of Louisville. The property in contest was not proper or necessary for carrying on the legitimate business of the bank. It was taken by the bank for a debt on June 26, 1892, when it was conveyed to it by Vernon D. Price and wife, and had been held by the bank from that time until the filing of the action on October 31, 1908. It was alleged in the petition that the bank for more than five years next prior to the commencement of the action had been continuously in possession of the property, and was then in possession as the owner in fee simple, and that the property was not, and never had been, necessary or proper for carrying on its legitimate business. The bank pleaded that its charter expired on December, 31, 1898, and that since January 1, 1899, it had been in existence only for the purpose of winding up its business pursuant to section 561, Ky. St. (section 2147, Russell's St.), which, among other things, provides that "when any corporation expires by the terms of the articles of incorporation, or by the voluntary act of its stockholders, it may thereafter continue to act for the purpose of closing up its business but for no other purpose, and it shall be the duty of the officers to settle up its affairs and business as speedily as possible." The bank showed that it had been making efforts to sell the property but had not been able to make a sale, that

it was in good faith closing up its business as directed by the statute, and that it had not otherwise done business since December 31, 1898.

The first question arising in the case is whether the property is liable to escheat because it has been held in this way by the bank for more than five years since its charter expired. The language of section 192 of the Constitution refers to corporations which are carrying on business. It forbids the corporation from holding any real estate except such as may be proper and necessary for carrying on its legitimate business for a longer period than five years. A corporation which is not carrying on business is not embraced in the language of the section naturally construed. The legitimate business of a corporation within the meaning of the Constitution is the business authorized by its charter, and, when it has ceased to do business under the charter, it is no longer carrying on its legitimate business within the meaning of the Constitution, and property may not be escheated because it is held by the corporation more than five years while it is in process of liquidation. After it goes into liquidation, it holds the property simply as trustee for the stockholders. The stockholders are the real beneficiaries. They may at any time apply to a court of equity to have the trust carried out, and the property sold if the officers of the corporation unduly delay the settlement. All property owned by the corporation is proper and necessary to be held by it for carrying on the business of winding up the corporation and distributing the assets among the stockholders. We therefore conclude that the property cannot be escheated, because it was held by the defunct corporation for more than five years next before the suit was brought.

It remains to inquire whether the property may be escheated now because it was held by the corporation from June 26, 1892, to December 31, 1898, a period of more than five years, when it was not necessary or proper for the carrying on of its legitimate business. The allegations of time in a pleading are not material unless a matter of description. Newman on Pleading, § 218a. This was the rule at common law, and it has always been recognized under the Code. The right to escheat property is conferred by the Constitution, and under the facts shown the state had the right to escheat this property on December 31, 1898; for the bank had then held it more than 6½ years, when it was not necessary or proper for the carrying on of its business. Has the state lost the right it then had? Among other things section 2515, Ky. St. (section 224, Russell's St.), provides: "An action upon a liability created by statute when no other time is fixed by the statute creating the liability * * * shall be commenced within five years next after the cause of action accrued." Sections 2522,

2523, Ky. St. (sections 231, 240, Russell's St.), provide: "An action for relief not provided for in this or some other chapter, can only be commenced within ten years next after the cause of action accrued." Ky. St. § 2522. "The limitations prescribed in this chapter shall apply to actions brought by or in the name of the commonwealth, in the same manner as to actions by private persons, except where a different time is prescribed by some other chapter in this revision." Section 2523, Ky. St. Section 192 of the Constitution is self-executing. When property is held by a corporation in violation of that section for five years, the state's right of action accrues; and the fact that the state does not then sue does not operate to defeat or suspend the constitutional provision. The state may at any time sue and escheat the property if it has been held for five years next before the bringing of the action in violation of the Constitution; for, if the corporation is a going concern, the continued holding of the property by the corporation in violation of the Constitution would make it still subject to escheat. It is a recurrent right, arising from a continuing wrong. It is not a liability created by the statute in favor of the state, but a right created by the Constitution, and is not within the five-year statute of limitation. The cause of action to escheat the property here in contest, however, accrued finally on December 31, 1898, when the corporation expired and ceased to do business. An action to escheat real property under the Constitution is not one for relief not provided for, which can only be commenced within 10 years next after the cause of action accrued. It is an action to recover real estate, and is barred after 15 years under section 2505, Ky. St. (section 212, Russell's St.), when the charter of the corporation has expired. This action was brought within 10 years after December 31, 1898, when the charter of the bank expired.

The right of action is in the state. By section 2971, Ky. St., the state has simply designated the Louisville school board as the person to enforce its right of action. Construing section 2971, in *Louisville School Board v. Chicago, etc., R. R. Co.*, 124 Ky. 510, 90 S. W. 599, this court said: "The state has by this statute designated who should sue on its behalf to recover, and to what public purposes should be dedicated, escheats in cities of the first class." A suit brought by the Louisville school board pursuant to the statute to escheat property is more a suit on a liability created by statute than a suit by the Attorney General or an escheator, if the state had authorized the escheat to be enforced in this way. The liability here is created by the Constitution. The state might have brought this action December 31, 1898, to escheat the property, and this right which it had on that day it

may now enforce. The action was not therefore barred by limitation, and the defendant cannot complain that it was not brought sooner. The bank was created under a statute passed since 1856, and therefore its charter was subject to legislative control. The present Constitution was adopted in 1891. The bank took the deed to the property in contest in June, 1892, or nearly a year after the Constitution was adopted. No vested right is therefore involved in this case, nor does the constitutional provision impair the obligation of a contract.

The court did not err in refusing to allow Dearing, one of the stockholders of the bank, to intervene in the action, and defend in his own behalf. He set up no defense that the corporation had not set up. He was not a necessary party to the action, and he did not show there was any necessity for him to defend as that the corporation was refusing to defend, or incapable of defending.

The judgment on each appeal is affirmed.

MILLER, J., not sitting.

CINCINNATI, N. O. & T. P. RY. CO. v. RUE

(Court of Appeals of Kentucky. March 10, 1911.)

1. TRIAL (§ 143*)—EVIDENCE—QUESTION FOR JURY.

It is the province of the jury to decide questions of evidence, especially where the evidence is conflicting.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 342, 343; Dec. Dig. § 143.*]

2. TRIAL (§ 178*)—DIRECTION OF VERDICT—WHEN AUTHORIZED.

To authorize a directed verdict for defendant, it must appear that admitting plaintiff's testimony to be true, and every inference fairly deducible therefrom, he has failed to support his cause of action.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 401-403; Dec. Dig. § 178.*]

3. MASTER AND SERVANT (§ 302*)—ACTS OF SERVANT—LIABILITY OF MASTER.

A master is not responsible for the wrongful act of his servant, unless the act is done in the execution of the authority, express or implied, given by the master.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 1217-1221, 1225, 1229; Dec. Dig. § 302.*]

4. RAILROADS (§ 281*)—ACTS OF SERVANTS—SCOPE OF EMPLOYMENT.

A crew of a freight train has implied authority to eject trespassers on the train by using reasonable force, but where the crew resorts to unnecessary force and thereby inflict injury on him, the company is liable.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 906, 907; Dec. Dig. § 281.*]

5. RAILROADS (§ 281*)—ACTS OF SERVANTS—SCOPE OF EMPLOYMENT.

Where members of a freight train crew followed a trespasser as he fled from the train, and inflicted on him personal injury after he ceased to be a trespasser, the acts of the crew

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r indexes

were not in the performance of any duty which they owed their employer, and it was not liable.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 906, 907; Dec. Dig. § 281.*]

Appeal from Circuit Court, Jessamine County.

Action by Jesse Rue, by his next friend, Joseph Rue, against the Cincinnati, New Orleans & Texas Pacific Railway Company. From a judgment for plaintiff, defendant appeals. Reversed.

N. L. Bronaugh and John Galvin, for appellant. Everett B. Hoover, for appellee.

SETTLE, J. The appellee, Jesse Rue, an infant 18 years of age, by his next friend, Joseph Rue, brought this action in the court below against the appellant, Cincinnati, New Orleans & Texas Pacific Railway Company, to recover damages in the sum of \$1,800 for an alleged assault and battery committed upon the infant appellee by its servants in charge of a freight train. It was, in substance, alleged in the petition that while the infant appellee was "upon and about" the freight train the crew in charge thereof, consisting of James Keith, conductor, Thomas Heady and Pink Blair, brakemen, in order to prevent him from riding on the train, "did wrongfully, unnecessarily, negligently, unlawfully, and maliciously shoot at, assault, beat, bruise, and kick the said Jesse Rue, and curse, threaten to kill, injure, and mistreat him, thereby causing him great bodily and mental pain and suffering." The answer did not deny that the crew of the freight train was composed of the persons named, but traversed all other averments of the petition. The trial resulted in a verdict in favor of appellee for \$500 damages, and judgment was duly entered in conformity thereto. Appellant was refused a new trial, and has appealed.

Numerous grounds were filed in support of the motion for a new trial; but those most strongly urged were (1) that the court did not properly instruct the jury; (2) that the verdict was contrary to and unsupported by the evidence; (3) that the jury should have been peremptorily instructed to find for the appellant. In order to determine whether any of the foregoing grounds merit a ruling from us favorable to appellant, consideration of the evidence appearing in the record will be necessary.

According to the evidence of appellee, furnished mainly by his own testimony, he and two companions, James Coovert and Boone Phelps, both adults, rode upon one of appellant's passenger trains on Sunday March 27, 1910, from High Bridge to Lexington, and spent the afternoon and evening in that city. There being no night passenger train upon which they could return to High Bridge, at 2 o'clock on the morning of March 28th, they boarded at Lexington, without the permis-

sion of appellant or any of its servants, a freight train going south to High Bridge that they might return to their homes at that place. After getting upon the train, they so secreted themselves that their presence thereon did not become known to the train crew. When near Nicholasville and in eight miles of High Bridge, the freight train in going up a heavy grade became uncoupled, and was stopped. When it stopped, appellee got off the train on the left side thereof. His two companions got off on the right, and remained in hiding during the scenes that followed. Appellee, however, according to his testimony, was less fortunate, for, as he walked off down the railroad and beside the track, he was seen by Pink Blair, one of the train crew, who started toward him with the remark, "Here he is, Tom," at the same time firing a shot from a pistol held in his hand. Appellee ran some distance followed by Blair, who again fired the pistol, and said: "Stop, you God damn son of a bitch, or I'll kill you." Appellee continued to run, followed by Blair, until he got over a fence and off appellant's right of way, but, being in fear of the pistol, he, at Blair's command, permitted the latter to approach him. Blair accused him of uncoupling the train, which appellee denied. Blair, with others of the train crew, who had in the meantime come up, then took appellee back to the train, on the way threatening to deliver him to a peace officer. Upon arriving at the train Blair, and others of the crew, as further testified by appellee, assaulted, kicked, and knocked appellee down, after which the train departed for its destination, leaving appellee standing near the track. His two companions came out of their place of concealment after the train left, and walked with him to High Bridge. They testified that they did not see the train crew assault or strike appellee, as the train separated them from appellee and his assailants, and so obstructed the view from their place of concealment as to prevent them from witnessing what occurred; but they heard the pistol shots and some of the crew's abuse of appellee, and saw bruises and blood upon his face after they got with him following the departure of the train.

The evidence introduced in behalf of appellant conduced to show that appellee and his two companions had freely partaken of intoxicants while in Lexington, and conclusively proved that their presence on the train was not known to the train crew until the train became uncoupled and was stopped. Indeed, it was admitted by appellee and his companions that their presence on the train was unknown to the crew, and that they rode and were concealed upon a flat car containing an oil tank, which was separated by several box cars from the caboose. Appellant's evidence further conduced to prove that the uncoupling of the train was not ac-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

cidental, but accomplished by the intentional act of some person on the train, for none of the coupling apparatus of either of the cars at the place of uncoupling was broken or out of repair, and the lever by which the coupling pin of the drawhead of one of the cars was raised and lowered was found in a position which demonstrated that the uncoupling was effected by a person familiar with the only method by which it could be done.

Appellee and his companions on cross-examination denied that they had uncoupled the train, and there was no satisfactory evidence that they did so, but the fact that the train had been uncoupled and that appellant's train crew believed it to have been done by appellee gave occasion for the anger the latter testified they manifested toward him following his capture by Blair. The testimony of the members of the train crew was in most respects contradictory of that of appellee. Blair testified that upon his going, after the train stopped, to where it became uncoupled to ascertain the cause of the uncoupling, he discovered appellee, who was then leaving the opening in the train where it had been uncoupled; that he called to appellee and he began to run as if to escape, and, when he failed to stop at Blair's command to him to do so, Blair, calling other members of the train crew to his assistance, pursued him and fired his pistol into the air to frighten and stop him, whereupon appellee stopped and went to Blair and was taken by him back near the train; that Blair then asked him what he was doing on the train and accused him of uncoupling it, and appellee replied that he was not on the "damn train," and had not uncoupled it, and that Blair was a liar; that Blair retorted by calling him another; that appellee then said Blair was a damn liar, and put his hand in his pocket as if to draw a weapon, and Blair then struck appellee, but did not knock him down; that appellee then started to run, but got his feet entangled in some vines and fell, and then admitted he had been riding on the train, but denied that he had uncoupled it, saying, however, that he had two partners with him on the train, and they might have uncoupled it.

Blair's version of what occurred was fully corroborated by his fellow brakeman, Headly, and in large measure by the conductor, Keith, though the latter did not claim to have seen all that took place. It does not appear, however, from the testimony of any of them that there was a denial of appellee's statement that he was bruised and his face made to bleed. If their account of what took place was the true one, it would seem reasonably apparent that the assault and battery committed upon appellee was the act of Blair alone, and that it was done in his necessary self-defense. On the other hand, if appellee's version of the matter was the true one, it would seem equally apparent that he was

the victim of a malicious and unlawful assault and battery.

It is the province of a jury to pass upon and decide questions of evidence, and especially is this so, if the evidence is contradictory or conflicting; but it sometimes becomes the duty of the trial court, even where there is evidence both for and against the party seeking a recovery, to enter a nonsuit or direct the finding of the jury. This duty the law imposes on the court when the evidence as a whole fails to show a right of recovery in the party seeking it, or, to express our meaning in language employed by this court: "To authorize an instruction as in case of a nonsuit, it should appear that, admitting his testimony to be true, and every inference that is fairly deducible from it, the plaintiff has still failed to support his claim." *Shay v. R. & L. T. P. Co.*, 1 Bush, 108; *Morris' Adm'r v. L. & N. R. Co.*, 61 S. W. 41, 22 Ky. Law Rep. 1593. As the appellant, after the introduction of appellee's evidence, and again at the close of all the evidence, asked the trial court to peremptorily instruct the jury to find for it and the request was in each instance refused, its counsel contended on the motion for a new trial and now insists that this ruling of the court was error. This contention rests upon the ground that appellant's train crew, even if they or some of them, unlawfully and maliciously inflicted upon appellee the injuries complained of, were not at the time acting as the servants of appellant, or within the scope of their employment. It is a well-recognized rule that the master is not responsible for the wrongful act of his servant, unless that act be done in execution of the authority, express or implied, given by the master. Beyond the scope of his employment the servant is as much a stranger to his master as any third person, and the act of the servant, not done in the execution of the service for which he was engaged, cannot be regarded as the act of the master. In the well-considered case of *Sullivan v. Louisville & Nashville R. R. Co.*, 115 Ky. 447, 74 S. W. 171, 24 Ky. Law Rep. 2344, 103 Am. St. Rep. 330, the doctrine under consideration was stated as follows: "The reason the master is liable for the act of his servant at all is because the servant is acting in that matter in the master's stead and for him. Obviously, if the servant is not acting for the master, he cannot be said to be his representative in that act. So, if the servant is charged by his master with the authority to act in his stead in a given matter, the servant's action or his failure to act, as the case may be, is imputed to the master as if it were his own. This general doctrine must be too well known to require now the citation of authority to support it. But where the servant steps aside from his employment and assuming to act, and does act solely on his own account in a matter which the master has no more

connection with than if he were the most complete stranger, it would not be logical or fair to make the master vicariously suffer for it, for in doing that act the servant, so called, was absolutely his own master. *Cousins v. Hannibal*, etc., R. R. Co., 66 Mo. 572. Or, as it was expressed by Mitchell, J., in *Morlier v. St. Paul*, etc., R. R. Co., 31 Minn. 351, 17 N. W. 952, 47 Am. Rep. 793, quoted with approval in *Davis v. Houghtellin*, 33 Neb. 582, 50 N. W. 765, 14 L. R. A. 737. In determining whether a particular act is done in the course of the servant's employment, it is proper to inquire whether the servant was at the time engaged in serving his master. If the act be done while the servant is at liberty from the service and pursuing his own end exclusively, the master is not responsible. If the servant was at the time the injury was inflicted acting for himself and as his own master *pro tempore* the master is not liable. If the servant stepped aside from his master's business, for however short a time, to do an act not connected with his business, the relation of master and servant is for the time suspended." There was nothing in the evidence that tended to prove that appellant's train crew had any authority, express or implied, to do any of the acts resulting in appellee's injuries, or that such acts were within the scope of any service required by their employment. It goes without saying, although not shown by the evidence, that the train crew had authority to eject passengers from the train and to prevent them from riding thereon, for such authority arose by implication from their being in charge of the train under employment by appellant, the owner. A freight train does not, as a rule, carry passengers, and any person who rides upon such a train without the consent of those in control of it becomes a trespasser, and may, for that reason, be summarily ejected therefrom, without unreasonable force, by those in authority. But, if the servants in charge of the train in removing the trespasser should use unnecessary or unreasonable force and thereby inflict injury upon him, the master would in such case be liable for the injury, because, the servant being possessed of the authority to remove the trespasser in a proper manner, his wrongful exercise of such authority resulting in the injury would bring the act within the scope of his employment. The same would be true if the injury were wrongfully inflicted by the servant in preventing a trespasser from getting on the train.

Quite a number of cases may be found in which this court, applying the doctrine last announced, held the master liable for injuries wrongfully or negligently inflicted by the servant in ejecting persons from trains. Among these is the case of *Smith, by, etc., v. Louisville & Nashville R. R. Co.*, 95 Ky. 11, 23 S. W. 652, 15 Ky. Law Rep. 390, 22 L. R. A. 72, in which the plaintiff, an infant, was so injured. In the opinion it

is said: "The company is liable if the servant in the exercise of his authority, within the general scope of his employment and in the line of his duty, uses unnecessary force, or uses it under circumstances or at a time when the consequences ordinarily would be seriously injurious to the person ejected." *I. C. R. R. Co. v. West*, 60 S. W. 290, 22 Ky. Law Rep. 1387. Again, in *Thurman v. L. & N. R. R. Co.*, 34 S. W. 893, 17 Ky. Law Rep. 1343, we held that, although a boy riding on the truss rods under a freight car was a trespasser, the railroad company was liable for injuries received by him while thus riding, if they resulted from his being pushed off by one of the trainmen at a time when it endangered his life, or rendered it probable that he would be injured; and as it was evident from the proof in the case that, if violence was offered at all, it was at such a time, the only question to be submitted to the jury was whether the trainmen did push the boy off. *Williams' Adm'r v. Southern Ry. Co.*, 115 Ky. 320, 73 S. W. 779, 24 Ky. Law Rep. 2214.

It will, however, be found that in all these cases the persons injured were upon or being ejected from the train, but in the case at bar appellee's injuries were not so received. He had been a trespasser upon the train before receiving his injuries, but at the time the assault and battery were committed upon him by appellant's servants, if they were committed, he was not upon the train, or attempting to get thereon, and, when they inflicted upon him the punishment complained of, the train crew were not engaged in appellant's service or in the apparent scope of their employment. As said in the case of *Winnegar's Adm'r v. Central Passenger Ry. Co.*, 85 Ky. 532, 4 S. W. 239, 9 Ky. Law Rep. 156: "The general doctrine with reference to master and servant, employer and employé, is that, when the employé committing the injury is not at the time executing the employer's business or not acting within the scope of his employment, the employer is not responsible. If one driving the cars for the corporation should leave the car and beat or abuse one on the sidewalk, the company would not be responsible. Such an assault could not be said to have been authorized by the company, or part of the driver's employment, nor can it be said that it was done in the course of the employment." *Farber v. Missouri Pacific Ry.*, 116 Mo. 81, 22 S. W. 631, 20 L. R. A. 354. In the case of *L. & N. R. R. Co. v. Routt*, 76 S. W. 513, the plaintiff while standing near a railroad track was struck by a lump of coal thrown by the fireman on one of the defendant's locomotives, and injured. In declaring the defendant not liable the court said: "The evidence shows conclusively that, if the injury was done by a servant of appellant, such servant was not at that time acting within the scope of his employment. On the contrary, it shows that the servant purpose-

ly and maliciously threw the coal at appellee with the design to injure him, and not from any purpose of protecting the master's property, or otherwise furthering the master's interests. It is difficult to imagine a case where the facts more clearly show that the servant was acting on his own behalf and in no sense for his master." In *Gilliam v. South. & N. A. R. Co.*, 70 Ala. 268, the facts presented by the record were strikingly similar to those of the instant case. In that case the conductor of a railway train stopped his train, and, pistol in hand, pursued a boy into his father's house, seized the boy, and carried him off on the train. Upon these facts it was held that the railway company was not liable unless it authorized or ratified the conductor's acts. *N. O. J. & G. N. R. Co. v. Harrison*, 48 Miss. 112, 12 Am. Rep. 356; *Davis v. Houghtellin*, 33 Neb. 582, 50 N. W. 765, 14 L. R. A. 737.

In *Mechem on Agency*, § 741, we find this statement with respect to the doctrine under consideration: "The doctrine of the earlier cases was that the master was not liable for the willful, wrongful act of his servant, but the better and more modern rule clearly is that the mere nature of the act is not the only criterion, but that the most important test is whether the act was done in the course of the employment." In *I. C. R. R. Co. v. Ross*, 31 Ill. App. 170, it was held that a railroad company was not liable for an assault committed by its flagman stationed at a highway crossing, where he went outside of the limits of a highway and indulged in an altercation upon the company's right of way from which the assault resulted. *Holler v. Ross*, 68 N. J. Law, 324, 53 Atl. 472, 59 L. R. A. 943, 96 Am. St. Rep. 546; *Corcoran v. C. & M. R. Co.*, 56 Fed. 1014, 6 C. C. A. 231; *Bess v. C. & O. Ry. Co.*, 35 W. Va. 492, 14 S. E. 234, 29 Am. St. Rep. 820; *Dougherty v. Chicago, M. & St. P. Ry. Co.*, 137 Iowa, 257, 114 N. W. 902, 14 L. R. A. (N. S.) 590, 126 Am. St. Rep. 282.

Counsel for appellee relies with apparent confidence upon the case of *Robards v. P. Bannon Sewer Pipe Co.*, 130 Ky. 380, 113 S. W. 420, 18 L. R. A. (N. S.) 923, 132 Am. St. Rep. 394, but we are unable to see that the conclusion reached by the court in that case militates in any sense against that reached by us in the case at bar. In that case the only question for decision was whether the petition, to which a demurrer had been filed, stated a cause of action. It was therefore alleged that a watchman employed by the defendant as a night guard at its brick manufacturing establishment wrongfully and negligently shot and wounded the plaintiff as he approached the property, mistaking him for a burglar or other wrongdoer. It was held on appeal that the petition stated a cause of action, and, if its averments were established by proof, the master would be

liable for the injury inflicted; that such liability was based upon the fact that the watchman, according to the averments of the petition, was by the terms of his employment, not only vested with full discretion as to the means to be used in protecting the employer's property, but was expressly authorized to use firearms in doing so. Therefore in shooting and wounding the plaintiff the watchman acted in the exercise of a discretion with which he was clothed and within the scope of his employment, for which reason the master was liable for his act, which was an abuse of discretion, whether committed willfully, negligently, or by mistake.

In the case at bar the injuries inflicted upon the appellee resulted from the unauthorized and willful acts of the brakeman, Blair, and perhaps other members of the train crew who followed appellee to where he had fled away from the train, and were inflicted under circumstances which showed that he was not even a trespasser at the time. The acts therefore of the trainmen were not committed for the protection of appellant's property, or in the performance of any duty which they owed it. In other words, such acts were in no view of the case within the scope of the trainmen's employment. Therefore, in the light of the facts furnished by the record and the authorities referred to, we are constrained to hold that their acts and conduct imposed no liability upon appellant, and, this being so, it was clearly entitled to the peremptory instruction asked on the trial. Whether the evidence appearing in the record in this case would authorize a recovery against the trainmen, it would not be proper for us to say here.

The above conclusion makes it unnecessary for us to pass on the instructions complained of further than to say they should not have been given, as appellant was entitled to a peremptory instruction directing the jury to find for it. If appellee had sued the members of the train crew, he would have been entitled to have the case go to the jury upon his evidence, but the evidence did not warrant the submission of this case to the jury except for the purpose of directing the return of a verdict for appellant.

For the reasons indicated, the judgment is reversed for a new trial and proceedings consistent with the opinion.

MOUSER v. NUNN et al.
(Court of Appeals of Kentucky. March 9, 1911.)

1. GUARDIAN AND WARD (§ 21*)—MARRIAGE OF WARD—SETTLEMENT—RIGHTS OF HUSBAND.

Under Gen. St. 1873, c. 48, art. 1, § 12, in force in 1875, providing for an accounting between a guardian and ward, on the marriage

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

of a female ward before attaining her majority, she was entitled to demand a settlement of her guardian, and on such settlement her husband was entitled to demand and receive the money due her.

[Ed. Note.—For other cases, see *Guardian and Ward*, Cent. Dig. § 73; Dec. Dig. § 21.*]

2. LIMITATION OF ACTIONS (§ 72*)—INFANCY—MARRIAGE.

Where the husband, on marrying a female ward before she had arrived at majority in 1875, was entitled immediately to demand a settlement and receive the balance of the money due to his wife, the wife's coverture was no bar to limitations against the right of both to an accounting and settlement.

[Ed. Note.—For other cases, see *Limitation of Actions*, Cent. Dig. §§ 390-398; Dec. Dig. § 72.*]

3. LIMITATION OF ACTIONS (§ 95*)—IGNORANCE OF CAUSE OF ACTION.

Under Ky. St. § 2519 (Russell's St. § 229), providing that no suit for relief for fraud or mistake shall be prosecuted after 10 years from the time the fraud was perpetrated, or the mistake made, it was no answer to a plea of limitations, in a suit by a ward for an accounting against the heirs of her deceased guardian more than 10 years after the right to such accounting accrued, that she did not know, and could not by reasonable diligence have discovered, sooner than she did, that her guardian was indebted to her.

[Ed. Note.—For other cases, see *Limitation of Actions*, Cent. Dig. §§ 473, 474; Dec. Dig. § 95.*]

4. GUARDIAN AND WARD (§ 164*)—PRIVATE SETTLEMENT.

Where the husband of a female ward entitled to receive the balance due from her guardian after marriage executed to the guardian a receipt for all moneys ever due from the guardian to the husband, or his wife, on claims which the guardian had in his hands, as guardian, such receipt unimpeached constituted sufficient proof of a plea of payment in a suit by the wife against the guardian's heirs for an accounting.

[Ed. Note.—For other cases, see *Guardian and Ward*, Dec. Dig. § 164.*]

Appeal from Circuit Court, Metcalfe County.

Action by Nancy T. Mouser against Edward Nunn and others. Judgment for defendants, and plaintiff appeals. Affirmed.

J. W. Compton, for appellant. Baird & Richardson and J. W. Kinnaird, for appellees.

LASSING, J. P. J. Nunn was appointed guardian of Nancy T. Landon in February, 1869. He made four settlements as such, the last on March 30, 1875. His ward, while under 14 years of age, married one D. A. Mouser in 1873. P. J. Nunn died in 1906, and in September, 1907, Nancy T. Mouser brought suit against his heirs at law to recover of them the sum of \$376.75 (this being the amount shown to be due her by the settlement of March 30, 1875), with interest to date. The answer contained, besides a traverse, a plea of payment and also a plea of the statute of limitation. On these issues proof was taken and the case submitted for

judgment. The chancellor was of opinion that the plaintiff was not entitled to the relief sought, and dismissed her petition. She appeals.

According to the pleadings, no money came to the guardian's hands after June 18, 1875, and limitation must be computed from that date. So that more than 32 years have elapsed before suit was brought. To avoid the operation of the statute, it is pleaded that appellant was a married woman in 1875, and had been such at all times thereafter up to the date of the filing of her suit. Under the statute then in force (Gen. St. 1873, § 12, art. 1, c. 48), upon her marriage she was entitled to demand a settlement on the part of her guardian, and upon such settlement her husband was entitled to demand and receive the money due her. *Beazley v. Harris*, 1 Bush, 533; *Brown v. Adkinson*, 58 S. W. 524, 22 Ky. Law Rep. 649; *Hargis v. Sewell's Adm'r*, 87 Ky. 63, 7 S. W. 557, 9 Ky. Law Rep. 920. Her husband had a right of action against the guardian, and the limitation ran against him from the date of that settlement.

This identical question was decided in *Hargis v. Sewell's Adm'r*, in which, in disposing of a question in many respects similar to that under consideration, this court said: "The husband, in right of the wife, or in his own right, could have settled, receipted for, and collected this money at any time after the settlement. He was entitled to this fund by reason of the marriage, and the statute began to run as soon as this settlement took place." In that case, at the time the settlement took place, the beneficiary was married, and yet the court held that, inasmuch as her husband was entitled to this money, she could not avoid the effect of the plea of the statute of limitations by reason of her coverture.

In the case under consideration the parties lived in the same neighborhood. Appellant seeks to account for her failure to sue by pleading that she did not know, and could not, by the exercise of reasonable diligence, have discovered sooner than she did, that her guardian was indebted to her. This plea is of no avail, for the statute which permits a recovery on the ground of fraud or mistake expressly provides that no suit for relief for fraud or mistake shall be prosecuted after the lapse of 10 years from the time the fraud was perpetrated or the mistake made. Ky. St. § 2519 (Russell's St. § 229).

We are of opinion, however, that appellees are not driven to shelter under the plea of the statute of limitation, and in this way to seek to relieve themselves of liability, for in support of their plea of payment they filed a number of receipts, signed by appellant and her husband; and one, dated August 23, 1875, signed by her husband alone, which is in words and figures as follows: "I hereby acknowledge receipt of all moneys that have

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

ever been due from J. P. Nunn to me or my wife upon claims which he had in his hands as guardian of Nancy T. Landon who is my wife. August 23, 1875." The signature to this receipt is attested by John U. Young, who, at the date of the trial, was still living. No effort was made either to impeach the genuineness of the signature of appellant's husband, or to show that the receipt was other than what it purported to be. It is immaterial that appellant was not advised that her husband had receipted to her guardian for all moneys due her. This he had a perfect right to do without her knowledge or consent, and the guardian had a legal right to pay over to her husband any money that was due her. Having done so, the guardian is exonerated from further liability to his ward.

We are of the opinion that the plea of the statute was well taken, and the proof in the case abundantly supports the defense of payment. The chancellor correctly held that the claim was barren of equities, and his judgment dismissing the suit is affirmed.

BROWN v. CARPENTER.

(Court of Appeals of Kentucky. March 9, 1911.)

BROKERS (§ 38*)—BREACH OF DUTY—EVIDENCE—SUFFICIENCY.

Evidence held to show that a broker sold land for \$200 less than he was offered, falsely representing that it was the best obtainable price, rendering him liable for the difference.

[Ed. Note.—For other cases, see Brokers, Dec. Dig. § 38.*]

Appeal from Circuit Court, Jefferson County, Common Pleas Branch, First Division.

Action by Anna Lee Carpenter against James L. Brown. Judgment for plaintiff, and defendant appeals. Affirmed.

Harrison & Harrison, for appellant.

CARROLL, J. The appellee owned a one-third undivided interest in a house and lot in Louisville, worth between \$1,200 and \$1,300. Her brother and her sister owned the remaining interests. She employed appellant, Brown, a real estate agent, to sell or dispose of her interest, which Brown did for \$200. Thereafter she brought suit against Brown, setting up in substance that he falsely and fraudulently represented to her that \$200 was all her interest was worth and all he could get for it, and the largest and only offer that he had received, when in truth he had been offered as much as \$400, but had concealed this offer from her; that relying upon his statements she accepted the \$200, and conveyed her interest for this sum to a Mrs. Davis, whom she did not know. Brown answered, denying all the material averments of the petition, except that he admitted informing appellee that \$200 was the

only offer he had for her interest. Upon a trial before a jury, a verdict was returned in favor of appellee for \$200.

Appellant did not testify, nor was any witness introduced in his behalf. The testimony for appellee showed that at the time of the sale of her interest the relations between herself and her sister, with whom she had previously lived in the house owned by them, were not friendly, and for this reason she removed her residence and desired to sell; that she put the sale of her interest in the hands of appellant, who told her that \$200 was the best offer he could get, and the only one he had received, and was all the property was worth, and advised her to accept the offer, which she did. Other witnesses were introduced, who testified that her interest was worth \$400. Her sister testified that she had offered Brown as much as \$300 for the interest, and her sister's husband said that he had offered Brown \$400 in cash for the interest, but that Brown told him that appellee wanted \$450. Another witness testified that appellant told appellee that her sister and brother refused to join with her in selling the property as a whole, or to buy her one-third interest in it, and that it would be useless for her to see her sister or other members of her family about buying the property. Upon this evidence the court instructed the jury to award the appellee such a sum as they believed from the evidence would fairly and reasonably compensate her for the loss, if any, sustained, not exceeding \$200, by reason of the representations of the appellant. The instruction was in fact a peremptory instruction to find for the appellee in some amount not exceeding \$200.

Counsel for appellant insists that the jury should have been instructed to return a verdict in favor of his client, upon the ground that there was no evidence that the persons who offered more for the property than \$200 were financially able to buy it or pay for it, or that the offers they made were in good faith or in writing. In view of the fact that Monogue, the brother-in-law of appellee, testified that he offered Brown \$400 in cash for the interest, and other witnesses testified that it was worth that amount, it does not seem important what property the persons who made the offers owned. Nor is there any contradiction of the fact that the offer of \$400 in cash was made in good faith. It was the duty of Brown, as the agent of appellee, to deal fairly and honestly with her, and to get for the property that she had placed in his hands for sale the best obtainable price. But the evidence shows that, in place of doing this, he sold the property for \$200 less than he had been offered for it. His failure to testify, and the fact that appellee was unable to ascertain the where-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

abouts of the purchaser, do not help the case for the appellant. We think the court correctly instructed the jury, and that the assessment of damages was fully warranted by the evidence.

Wherefore the judgment of the lower court is affirmed.

MULLINS et al. v. BELCHER.

(Court of Appeals of Kentucky. March 9, 1911.)

SCHOOLS AND SCHOOL DISTRICTS (§ 13*)—PUBLIC SCHOOLS—PUPILS—"COLORED CHILDREN."

"Colored children," within Const. § 187, providing for separate schools for white and colored children, include all children wholly or in part of negro blood, or having any appreciable admixture thereof; and a child having one-sixteenth negro blood may not attend a school for white children.

[Ed. Note.—For other cases, see Schools and School Districts, Cent. Dig. § 15; Dec. Dig. § 13.*]

For other definitions, see Words and Phrases, vol. 2, p. 1273.]

Appeal from Circuit Court, Pike County.

Action by Troy Mullins and another by Miles Ratliff, guardian and next friend, against Edmond Belcher. From a judgment for defendant, plaintiffs appeal. Affirmed.

J. E. Childers and A. F. Childers, for appellants. Roscoe Vanover, for appellee.

CLAY, C. Troy Mullins and Loucreta Mullins are infants between the years of 6 and 20. They reside in common school district No. 28, in Pike county, Ky. Appellee, Edmond Belcher, is the trustee of that school district. He notified appellants that they could not attend said school. Appellants, suing by their guardian and next friend, Miles Ratliff, brought this action against appellee, Edmond Belcher, to enjoin him from interfering or in any wise preventing their attending said school. Appellee defended on the ground that the appellants were colored children, and therefore not entitled to attend the school in question, which was maintained and conducted exclusively for the education of white children. The affirmative allegations of the answer were denied by reply. Proof was then taken, and the case submitted. The trial judge made a separate finding of the law and the facts. He found that appellants had one-sixteenth negro blood, and concluded as a matter of law that they were "colored children," and therefore not entitled to attend the school in question, and entered judgment accordingly. From that judgment this appeal is prosecuted.

Section 187 of the Kentucky Constitution is as follows: "In distributing the school fund no distinction shall be made on account of race or color, and separate schools for white and colored children shall be maintain-

ed." The question before us is: Who are "colored children" within the meaning of the above section?

While it may be doubted if appellants' proportion of negro blood is as small as one-sixteenth, it is not contended that it is less. We shall therefore consider the case from this standpoint; that is, that their proportion of negro blood is one-sixteenth. For appellants it is insisted that, in order to constitute a person a "colored person," he must not only have an appreciable admixture of negro blood, but must also show the racial characteristics of the negro. In this connection it is insisted that appellants are as fair as members of the white race, and there is nothing in their personal appearance to indicate the presence of negro blood. In our opinion, however, the question does not depend upon personal appearance. The color of the person may be one means of indicating the class to which he belongs; but the question in its final analysis depends upon whether or not the person has, or has not, an appreciable admixture of negro blood.

In the case of *Enos Van Camp v. Board of Education of the Incorporated Village of Logan* (decided in 1859) 9 Ohio St. 406, the Supreme Court of Ohio, in discussing the question arising under a statute of that state providing for separate schools for white and colored children, used the following language: "Our standard philologist, Webster, defines 'colored people' to be 'black people—Africans or their descendants, mixed or unmixed.' Such is also the common understanding of the term. A person who has any perceptible admixture of African blood is generally called a colored person. In affixing the epithet 'colored,' we do not ordinarily stop to estimate the precise shade, whether light or dark, though, where precision is desired, they are sometimes called 'light colored,' or 'dark colored,' as the case may be. If we look at the evils the law was intended to remedy, we shall arrive at the same result. One of the evils undoubtedly was the repugnance felt by many of the white youths and their parents to mingling, socially and on equal terms, with those who had any perceptible admixture of African blood. This feeling or prejudice, if it be one, had been fostered by long years of hostile legislation and social exclusion. The General Assembly, legislating for the people as they were, rather than as, perhaps, they ought to have been, while providing for the education and consequent ultimate elevation of a long-degraded class, yielded for the time to a deep-seated prejudice, which could not be eradicated suddenly, if at all. Such an arrangement, in the present state of public feeling, is far better for both parties—for the colored youth as well as those entirely white. If those a shade more white than black were to be forced upon the white youth

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

against their consent, the whole policy of the law would be defeated. The prejudice and antagonism of the whites would be aroused, bickerings and contentions become the order of the day, and the moral and mental improvement of both classes retarded. It would seem, then, from this examination of the law of 1853, and the circumstances under which it was passed, that the words 'white' and 'colored,' as used in that act, were both used in the ordinary and common acceptation, and that any other construction would do violence to the legislative intent, and perpetuate the very evils that act was intended to remedy."

In the recent case of *State v. Treadaway et al.*, 126 La. 300, 52 South. 500, the Supreme Court of Louisiana, speaking through Mr. Justice Provosty, said: "There is a word in the English language which does express the meaning of a person of mixed negro and other blood, which has been coined for the very purpose of expressing that meaning, and because the word 'negro' was known not to express it, and the need of a word to express it made itself imperatively felt. That word is the word 'colored.' The word 'colored,' when used to designate the race of a person, is unmistakable, at least in the United States. It means a person of negro blood, pure or mixed; and the term applies, no matter what may be the proportions of the admixture, so long as the negro blood is traceable."

And in the still more recent case of *Isabel I. Wall, by, etc., v. James F. Oyster et al.*, 38 Wash. Law Rep. 794, the Court of Appeals of the District of Columbia held that, under the act of Congress providing for the maintenance of separate free schools for white and colored children in the District of Columbia, a child possessing from one-eighth to one-sixteenth negro blood was a "colored child." After citing the cases above referred to, that court said: "The most reliable sources of information in this regard are the dictionaries, which are universally accepted as the best exponents of the popular meaning of the words of the language. It is sufficient to say, without quoting from them, that these show that the word 'colored,' as applied to persons or races, is commonly understood to mean persons wholly or in part of negro blood, or having any appreciable admixture thereof. See Webster's International, the Standard, and the Century Dictionary."

As the makers of the Constitution did not undertake to define the words "colored children," as employed in section 187, we conclude that these words were used in their ordinary and general sense, and that they include all children wholly or in part of negro blood, or having any appreciable admixture thereof. It follows that the injunction prayed for was properly refused.

Judgment affirmed.

SUTHERLAND v. SUTHERLAND'S EX'RS.
(Court of Appeals of Kentucky. March 9, 1911.)

1. EXECUTORS AND ADMINISTRATORS (§ 206*)—SERVICES RENDERED DECEDENT—RIGHT TO COMPENSATION.

One morally bound to furnish board, nursing, etc., to another cannot recover therefor, unless the services were rendered under an express agreement for compensation, or unless they were given and received under expectation of compensation.

[Ed. Note.—For other cases, see *Executors and Administrators*, Cent. Dig. § 733; Dec. Dig. § 206.*]

2. EXECUTORS AND ADMINISTRATORS (§ 221*)—SERVICES RENDERED DECEDENT—RIGHT TO COMPENSATION.

Evidence held insufficient to show that board, nursing, etc., were furnished by a daughter-in-law under expectation of compensation.

[Ed. Note.—For other cases, see *Executors and Administrators*, Dec. Dig. § 221.*]

Appeal from Circuit Court, Mercer County.

Action by the Bank of Harrodsburg against John Sutherland's executors. From a judgment dismissing her claim against the estate, Josephine Sutherland appeals. Affirmed.

E. M. Hardin and J. T. Wilson, for appellant. E. H. Gaither, for appellees.

LASSING, J. Dr. John Sutherland died a resident of Harrodsburg, Ky., in June, 1909. At the date of his death he was indebted to the Bank of Harrodsburg for about \$300, and shortly after his death the bank brought a suit for the settlement of his estate. The case was referred to the master commissioner to hear proof of claims. Among others filed was one by Josephine Sutherland, wife of his son Ed Sutherland, for \$840 for board, nursing, and attention given to the decedent during the last 14 months of his life. The master took proof upon the claims and allowed this one. Exceptions were filed to the master's report, and the court was of opinion, on the trial of these exceptions, and so held, that the claimant was not entitled to compensation for the services for which she sought to charge the estate. Being dissatisfied with this finding and judgment, she appeals.

This court has frequently held that, where one owes another a moral obligation that would influence him to render personal services of the character here charged for, the party rendering such services cannot recover therefor unless he shows one of two things: Either that they were rendered under an express contract, by the terms of which he was to be paid therefor; or else that at the time the services were rendered the party rendering same expected compensation and the party receiving them intended to pay therefor.

In *Green's Ex'r v. Green*, 119 Ky. 103, 82 S. W. 1011, it was held that compensation

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

for services rendered an uncle by a nephew, in the way of caring for his farm and nursing and caring for him in his last illness, could not be recovered in the absence of proof showing that both parties intended and expected that the services should be paid for. To the same effect is *Galloway's Adm'r v. Galloway*, 70 S. W. 48, 24 Ky. Law Rep. 857. In the latter case there was an attempt made to recover for services of this character rendered an uncle by a niece.

In the case at bar the claimant is a daughter-in-law. Her father-in-law, an old man, moved from the country into the city, and bought a house near her mother's, and they moved into it. There they lived together during the last few months of his life. The evidence shows that to several of their neighbors and acquaintances he stated that his daughter-in-law was very kind and good to him and he intended she should be rewarded for it. To others he stated that he had bought a home for them to live in; and to still others he gave expressions of his kindly feelings towards his daughter-in-law and his appreciation of the way and manner in which she served and waited upon him. In his will he evidently attempted to make provision to compensate for this service, for he gave to her husband \$200 more than he did to his other children, and in addition provided that they should occupy the home where he was living with them free of rent for 12 months after his death. No satisfactory reason is shown why he should have favored appellant's husband over his other children except as a reward for the service which he and his wife, the appellant, rendered him during the latter months of his life. The evidence introduced cannot be said to amount to a promise on his part to pay, or to show that he expected to pay, for this service, or that appellant, when rendering it, expected to charge therefor. It simply amounts to an expression of appreciation on his part of the way in which he was cared for in his son's family. He manifested this appreciation by purchasing a home for himself, where he lived with his son and the appellant until he died, and by providing in his will for this son more liberally than for any of his other children. The record shows that deceased had lived with this son and his wife some six or seven years before the occasion when he moved in with them for which it is sought to recover on the claim sued here. During that time no charge was made for board or for care and attention given her father-in-law, and it is quite evident, when all the evidence is considered, that when he came to town to live with his son he was not expecting to pay board, for such attention as he received there in his son's family. He came to live with him because they had theretofore lived together and got along well, and he was fond of his daughter-in-law. She

was kind and good to him. During his stay in the city there is no evidence to the effect that the suggestion was ever made that he pay for this service. His son was a man of moderate means, was a renter up to the time his father purchased the house into which they moved, and, if compensation had at that time been expected by appellant or her husband, some claim therefor should have been presented during the life of her father-in-law.

On the whole case, we are of opinion that the chancellor reached the right conclusion, and his judgment is affirmed.

BULLITT v. LOUISVILLE RY. CO.

(Court of Appeals of Kentucky. March 9, 1911.)

1. CARRIERS (§ 303*)—DUTY TO ALIGHTING PASSENGERS.

A street railway company's only duty to an alighting passenger who has signaled the car to stop is to stop until he has safely alighted; personal assistance not being required.

[Ed. Note.—For other cases, see *Carriers*, Cent. Dig. §§ 1216, 1218, 1224-1243; Dec. Dig. § 303.*]

2. CARRIERS (§ 315*)—INJURY TO ALIGHTING PASSENGER—PLEADING AND EVIDENCE.

In an action for injury to an alighting street car passenger, it was not error to exclude evidence that when the accident occurred plaintiff told the conductor that he had better learn how to let ladies off the car; the only issue being whether he shoved her.

[Ed. Note.—For other cases, see *Carriers*, Dec. Dig. § 315.*]

Appeal from Circuit Court, Jefferson County, Common Pleas Branch, Second Division.

Action by Henrietta Bullitt against the Louisville Railway Company. Judgment for defendant, and plaintiff appeals. Affirmed.

O'Doherty & Yonts and A. E. Richards, for appellant. Fairleigh, Straus & Fairleigh, Alfred Selligman, and Howard B. Lee, for appellee.

LASSING, J. In attempting to alight from one of appellee's cars in the city of Louisville, appellant fell or was thrown to the ground and severely injured. She instituted a suit against the appellee to recover damages for her injuries on the ground that they resulted from the gross carelessness and negligence of the conductor in shoving her from the car. The company denied liability, and upon the issues thus formed the case was submitted to a jury, which returned a verdict in favor of the company. Conceiving that the trial court erred in the admission of evidence and in instructing the jury, she prays an appeal and asks that the judgment be reversed.

Two witnesses testified as to the negligence, the plaintiff and the conductor. She testified that, when the car came to a stop, she arose from her seat and proceeded to leave the car. As she stepped from the car

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes 134 S.W.—73

to the platform and from the platform to the first step, the conductor did not touch or offer to assist her. But, as she was in the act of leaving the car, he took hold of her left arm and turned or shoved her so that she fell to the street and was considerably bruised and injured thereby. The conductor testified that, when the car came to a stop, appellant got off unassisted by him, and that as she stepped to the ground she fell; that he did not touch her in any way after she had passed out of the car. Other witnesses testified to seeing her after she fell, but as to what caused her to fall she and the conductor were the only witnesses.

The court gave to the jury but two instructions, one defining the measure of damages, and the following: "If you believe from the evidence in this case that the conductor on the car in regard to which you have heard the testimony took hold of the plaintiff, Henrietta Bullitt, and caused her to fall from the car, the law of the case is for the plaintiff, and you should so find. But, unless you believe from the evidence in this case that the conductor took hold of her and caused her to fall from the car, the law of the case is for the defendant, and you should so find." This was the issue as made by the pleadings and the evidence. In plain and simple language the court thus submitted to the jury the single issue in the case. If the jury had accepted appellant's statement as true, it could not have escaped returning a verdict in her favor. Evidently they did not believe that the conductor took hold of her and caused her to fall; hence the verdict in favor of the company.

When appellant signaled the car to stop in order that she might alight, the only duty that the company owed to her was to stop the car and have it remain stationary until she had safely stepped therefrom. In *Illinois Central R. R. Co. v. Cruse*, 123 Ky. 463, 96 S. W. 821, 8 L. R. A. (N. S.) 299, 29 Ky. Law Rep. 914, it was held that a carrier does not owe to a passenger the duty to render him personal service or attention in alighting from the car.

The error in the admission of evidence complained of was the refusal of the court to permit the conductor to answer the following question propounded to him on cross-examination: "Didn't she say to you then and there that you had better learn how to let ladies off the car?" The avowal is as follows: "Plaintiff avows that the witness, if permitted to answer the question, would state, and it is true, that she said to him right there that he had better learn how to take care of ladies getting off of the car, and complained of the way in which he had shoved her off." It is insisted that, as this statement was made to the conductor by the appellant before she had arisen or been helped from the street, her answer thereto must be

treated as a part of the *res gestæ*, and would have, in this respect, strengthened her testimony to the effect that he had shoved or thrown her from the car.

There might be some force in this contention if the answer in the avowal were responsive to the question. The conductor was not asked if she did not say to him that he had shoved her off the car. That answer would not have been responsive to the question. It is possible that this question was preliminary, and, had the court permitted it to be answered, the further question, bringing out and developing the answer in the avowal, might have been asked. But, inasmuch as no question was asked to which the avowal could have been responsive, appellant is in no position to complain because the court refused to permit the question to be answered. In fact, if it had been answered in the form in which it was asked, it would have thrown no light upon the issue involved, for whether or not the conductor knew how to let ladies off of the car could not have aided the jury in determining whether or not he threw or shoved this one off.

We find no error in the record prejudicial to appellant's substantial rights. She was permitted to fairly present her case to the jury, under instructions which could not have been misunderstood; and the failure of the jury to accept her theory of how the injury occurred furnishes no ground for reversal.

Judgment affirmed.

EVANS v. STRATTON.

(Court of Appeals of Kentucky. March 8, 1911.)

1. FRAUDS, STATUTE OF (§ 115*)—SALE OF LANDS—MEMORANDUM—SIGNING—PARTY TO BE CHARGED.

The party to be charged in a contract for the sale of land, within the statute of frauds, is the vendor; and hence such a contract signed by the vendor is enforceable against the vendee, though not signed by him.

[Ed. Note.—For other cases, see *Frauds, Statute of*, Cent. Dig. §§ 242-250; Dec. Dig. § 115.*]

2. VENDOR AND PURCHASER (§ 214*)—CONTRACT OF SALE—ASSIGNMENT.

Where a written offer to sell certain land was accepted in writing by the vendee, such offer and acceptance constituted a title bond enforceable by either party, so that on the vendee's executing thereon an assignment to defendant, he became bound to perform the contract.

[Ed. Note.—For other cases, see *Vendor and Purchaser*, Cent. Dig. §§ 442-448; Dec. Dig. § 214.*]

3. VENDOR AND PURCHASER (§ 214*)—CONTRACT FOR THE SALE OF LAND—ASSIGNMENT—ACCEPTANCE.

Acceptance of an assignment of a written contract for the sale of land by the assignee may be by parol.

[Ed. Note.—For other cases, see *Vendor and Purchaser*, Cent. Dig. §§ 442-448; Dec. Dig. § 214.*]

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

4. VENDOR AND PURCHASER (§ 219*)—CONTRACT OF SALE—ASSIGNMENT—ACCEPTANCE—EVIDENCE.

Evidence held sufficient to warrant a finding of a parol acceptance of an assignment of a contract for the sale of land.

[Ed. Note.—For other cases, see Vendor and Purchaser, Dec. Dig. § 219.*]

Appeal from Circuit Court, Jefferson County, Chancery Branch, First Division.

Action by Jennie D. Stratton against T. C. Evans. Judgment for plaintiff, and defendant appeals. Affirmed.

Jos. E. Conkling, for appellant. L. A. Hickman, for appellee.

SETTLE, J. This is an appeal from a judgment entered in the court below upon a verdict awarding appellee \$400 damages against appellant for the alleged breach by him of a contract with respect to the sale of a house and lot in the city of Louisville. It was alleged in the petition that one Anna C. Pryor, on the 8th day of October, 1909, executed and left in the hands of B. H. Wilson & Co., real estate agents of Louisville, a writing authorizing them to sell, upon the terms therein specified, a house and lot on South Eleventh street in that city, owned by her, and that appellee on the same day accepted in writing the proposition of sale at the price and upon the terms expressed in the instrument. In order that their meaning may be understood, we here copy the writing in question and appellee's acceptance of the offer of sale it contains:

"Louisville, Ky., Oct. 8th, 1909.

"B. H. Wilson & Co., Agents: I the undersigned authorize you to sell my house known as 930-932 and 934, South Eleventh street, with lot 50x150-20x105 for the sum of \$1,500 (fifteen hundred dollars) cash * * * balance of which I will take second mortgage lien notes amounting to thirteen hundred (\$1,300) dollars payable one and two years in equal payments, on or before. Should the title prove defective present owner is to be responsible to the amount of charges of either title company of Louisville, Kentucky. Present owner is to pay B. H. Wilson & Co., agents, the regular commission as agreed upon by the Louisville Kentucky Real Estate Association, January 2, 1907, if the proposition is accepted. Above property is to be deeded with a deed of general warranty and to be free from any and all incumbrances except all taxes for the year 1910.

Anna C. Pryor.

"I accept the above proposition, this 8th day of October, 1909.

"Jennie D. Stratton."

It was, in substance, also alleged in the petition that shortly after appellee's purchase of the house and lot she agreed, in consideration of \$400 to be paid her in cash by appellant, and his undertaking to pay Anna C. Pryor the \$2,800, she had agreed to

accept from appellee for the house and lot, to assign appellant all her rights acquired under the written contract with Anna C. Pryor; that appellant thereupon employed the Kentucky Title Company to examine the title to the house and lot described in the written contract, which duty it performed, and thereafter appellee at the request of an officer of the Kentucky Title Company, appellant's agent, assigned the written contract made with Anna C. Pryor to appellant. The assignment was written on the contract and is in words and figures as follows: "I hereby surrender all my right, title and interest in this contract for a valuable consideration to T. C. Evans. Oct. 20th, 1909.

"Jennie D. Stratton."

The petition contained the further averments that, notwithstanding the assignment by appellee of her rights and interest under the contract with Anna C. Pryor to appellant and his acceptance thereof, he failed and refused to pay her the \$400 he agreed to pay therefor, or to perform the contract with respect to the rights of Anna C. Pryor; that appellee was damaged \$400 by appellant's failure to comply with his contract with her, and for this amount she prayed judgment. The appellant's answer merely traversed the averments of the petition.

Appellant asked a new trial in the court below on various grounds, but only three of them do we deem it necessary to consider. These are, first, that, as he did not in writing accept the assignment from appellee of her contract with Anna C. Pryor, there should have been no recovery; second, that the jury were not properly instructed; third, that there was no evidence to support the verdict, and therefore a peremptory instruction should have been given by the court directing the jury to find for him.

The first of these contentions is manifestly unsound, for as a matter of law a written contract for the sale of real estate is enforceable against both parties to it, if signed by the vendor. The vendor holding the title is the party to be charged by such contract, within the meaning of the statute of frauds, and an action against the vendee for the purchase money may be maintained, although he did not sign the written contract. *Lewis v. Grimes*, 7 J. J. Marsh. 336; *Moore v. Chenault*, 29 S. W. 140, 16 Ky. Law Rep. 531; *Ellis v. Deadman's Heirs*, 4 Bibb, 466; *Tyler v. Onzts*, 93 Ky. 331, 20 S. W. 256, 14 Ky. Law Rep. 321.

When appellee accepted in writing the written proposition of sale made by Anna C. Pryor, the owner of the lot, it consummated the sale of the property to her and constituted the writing a title bond, which entitled each of the parties to a specific performance of the contract according to its terms. The law permits the assignment of a title bond by the vendee, and does not re-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

quire a written acceptance of the assignment by the assignee. Both the vendor and assignor are bound to perform the contract, and each is liable to the assignee for a breach thereof. A verbal acceptance on the part of appellant of the assignment made him by appellee of the contract for the sale of the lot into which she had entered with Anna C. Pryor met all the requirements of the law.

That there was an acceptance by appellant of the assignment and contract of sale there was ample testimony to establish. Not only was the acceptance proved by the testimony of B. H. Wilson, the agent of both parties, but it was further shown by the acts and conduct of the appellant himself; for he put the matter into the hands of the Kentucky Title Company for an examination of title and preparation of the deed, if the title was found to be correct, and by direction of an officer of that company appellee was required to formally make and write upon the contract the assignment thereof to appellant. Moreover, when it was discovered by the officials of the Kentucky Title Company that the house on the Prior lot extended over two or three inches upon an adjacent lot, appellant demanded that appellee purchase enough of the adjacent lot from its owner to cure this defect; and in compliance with his demand she did make the purchase of the additional ground and received from the owner thereof a deed of conveyance therefor to appellant, and also caused a deed to be prepared from Anna C. Pryor to appellant, conveying him the lot described in the contract of sale assigned to appellant, and this deed was duly acknowledged by Anna C. Pryor and tendered to appellant before the institution of this action. Obviously, the acts and conduct of appellant referred to constituted a full and complete acceptance of the assignment made him by appellee of her contract with Anna C. Pryor, and made him the beneficiary thereof. This disposes of appellant's third contention that the verdict of the jury was without support from the evidence.

The fact that appellant, by his acceptance of the assignment of the contract from appellee, was made to pay \$400 more for the property than it would have cost him if purchased directly from Anna C. Pryor gave him no right to repudiate his contract with appellee after accepting the assignment. Nor does the fact that his acceptance of the assignment was made after the expiration of the time fixed in a written offer to purchase the property directly from Anna C. Pryor, which he had made through B. H. Wilson, affect the validity of the assignment. It is not alleged in the answer, nor shown by the proof, that there was any fraud or collusion between Wilson and appellee, whereby the latter had, pending appellant's offer to pur-

chase the property, secured it by the contract with Anna C. Pryor at \$400 less than appellant had offered to pay for it. So we need not decide what effect such fraud and collusion, if established, would have had upon the assignment.

We also fail to see any merit in appellant's contention that the jury were improperly instructed by the trial court. The two instructions given sharply and correctly submitted to the jury the single question whether appellant accepted the assignment of the contract with appellee. This was all that was necessary to submit to the jury. If they found from the evidence that the assignment had been accepted by appellant, they necessarily had to find for appellee \$400 as instructed by the court, for that was the amount appellant agreed to pay her for the property over and above what she had contracted to pay her vendor for it. The measure of damages was therefore fixed by the law, as well as by the terms of the assignment.

For the reasons indicated, the judgment is affirmed.

FIRST NAT. BANK OF LOUISVILLE v. CHOWNING ELECTRIC CO. et al.

(Court of Appeals of Kentucky. March 8, 1911.)

1. MORTGAGES (§ 186*)—PRIORITY—NOTICE—EVIDENCE.

In an action to foreclose a mechanic's lien, evidence held to show that a mortgagee, before the execution of the mortgage, had knowledge that a materialman would claim a lien on the mortgaged property so as to make the lien superior to the mortgage under Ky. St. § 2463 (Russell's St. § 2383), providing that liens of laborers and materialmen shall not take precedence of a mortgage or other lien for value without notice unless the persons claiming such prior lien shall have filed a specified statement with the clerk of the county court.

[Ed. Note.—For other cases, see Mortgages, Dec. Dig. § 186.*]

2. CORPORATIONS (§ 428*)—NOTICE TO OFFICERS—CONFLICT OF INTEREST.

Where the same persons were directors of an electric company engaged in erecting a building, and a bank which held a mortgage on the property, a notice to such persons as directors of the electric company was notice to the bank of intention to claim the lien.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 1748-1761; Dec. Dig. § 428.*]

3. CORPORATIONS (§ 428*)—NOTICE TO OFFICERS—CONFLICT OF INTEREST.

Where a mechanic's lien notice was given to the directors of an electric company which was the owner of the building, the notice was sufficient as against a bank, which, after the service of such notice, took an assignment of another claimant's lien, though the same persons were directors in both the electric company and the bank, since the conflict of interest arising after the notice was given did not impair the notice.

[Ed. Note.—For other cases, see Corporations, Dec. Dig. § 428.*]

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

Appeal from Circuit Court, Jefferson County, Common Pleas Branch, Second Division.

Action by the Chowning Electric Company against the First National Bank of Louisville and others. From a judgment determining priorities as between the defendants, the defendant named appeals. Affirmed.

Helm & Helm and Furlong, Woodbury & Furlong, for appellant. Geo. Weissinger Smith, for appellee Ridgway Dynamo & Engine Co. Gibson, Marshall & Gibson and William W. Crawford, for appellee F. A. Clegg & Co.

CLAY, C. The Jefferson County Electric Company was organized in the year 1906 for the purpose of furnishing electric light to the White City, a place of amusement in Louisville, Ky., and to others. To this end it purchased about $3\frac{1}{2}$ acres of land in Jefferson county and erected a brick building thereon. On December 11, 1906, J. R. Chowning entered into a written contract with the company to equip its plant for the sum of \$31,065.70. Subsequently Chowning organized the Chowning Electric Company, and transferred and assigned to it his assets and contract rights. At the time of the institution of this action there was a balance due the Chowning Electric Company of \$15,498.15. Alleging that it had a lien on the property of the Jefferson County Electric Company, it brought this action to enforce the same. To this action appellees F. A. Clegg & Co. and the Ridgway Dynamo & Engine Company were made parties. Each of these parties came in and asserted a lien; the former for \$4,556.40, and the latter for \$2,688.03. Prior to the institution of the action, the Jefferson County Electric Company had executed to the United States Trust Company, as trustee, a mortgage to secure bonds amounting to \$30,000. This mortgage was executed in pursuance of a resolution adopted by the directors of the Jefferson County Electric Company May 25, 1907. The mortgage was put to record on June 15, 1907. On July 24, 1907, the bonds were delivered to appellant, the First National Bank, as collateral security to secure a loan of \$14,000. Of this sum \$10,502.61 had theretofore been loaned by the bank to the Jefferson County Electric Company, leaving only \$3,497.39 as a contemporaneous loan. The Westinghouse Electric & Manufacturing Company furnished certain machinery of the value of \$5,612.56. The amount of its claim was guaranteed by the directors of the Jefferson County Electric Company. On September 28, 1907, the claim of the Westinghouse Electric & Manufacturing Company was paid by the directors of the Jefferson County Electric Company in conformity with their guaranty, and its claim against the Chowning Electric Company was assigned to Charles J. Doherty, trustee. On November 29, 1907, the Chowning Electric Company assigned its lien to

the extent of the claim paid to Charles J. Doherty, trustee. In this action the Westinghouse Electric & Manufacturing Company has appeared and asserted a lien under the Chowning Electric Company for the benefit of Charles J. Doherty, trustee. The First National Bank is also a party, asserting that its lien is superior to that of any of the lien claimants. During the progress of the action the assets of the plant of the Jefferson County Electric Company were sold, and brought about \$8,000. In the distribution of the assets the chancellor held that appellees F. A. Clegg & Co. and the Dynamo & Engine Company had a lien superior to that of the First National Bank. From that portion of the judgment this appeal is prosecuted.

Section 2463, Ky. St. (Russell's St. § 2383), is as follows: "A person who performs labor or furnishes materials in the erection, altering or repairing a house, building or other structure, or for any fixture or machinery therein, or for the excavation of cellars, cisterns, vaults, wells, or for the improvement, in any manner, of real estate by contract with, or by the written consent of, the owner, contractor, subcontractor, architect or authorized agent, shall have a lien thereon, and upon the land upon which said improvements shall have been made or on any interest such owner has in the same, to secure the amount thereof with costs; and said lien on the land or improvements shall be superior to any mortgage or incumbrance created subsequent to the beginning of the labor or the furnishing of the materials; and said lien, if asserted as hereinafter provided, shall relate back and take effect from the time of the commencement of the labor or the furnishing of the materials: Provided, that such lien shall not take precedence of a mortgage or other contract, lien or bona fide conveyance for value without notice, duly recorded or lodged for record according to law, unless the person claiming such prior lien shall, before the recording of such mortgage or other contract lien or conveyance, have filed in the clerk's office of the county court of the county wherein he shall have performed labor or furnished material, or shall expect to perform labor or furnish materials, as aforesaid, a statement showing that he has performed or furnished, or that he expects to perform or furnish, such labor or materials, and the amount in full thereof, and his lien shall not, as against the holder of said mortgage or other contract lien or conveyance, exceed the amount of the lien claimed, or expected to be claimed, as set forth in such statement. The statement aforesaid shall, in other respects, be in the form of the tenor prescribed by section 2468. The liens provided for herein shall in no case be for a greater amount in the aggregate than the contract price of the original contractor; and should the aggregate amount of liens exceed the price agreed upon between the original contractor and the own-

er, then there shall be a pro rata distribution of the original contract price among said lienholders."

It was the contention of appellees in the court below, and the chancellor held, that the bank took the bonds as collateral security for its debt with knowledge of the lien claimants' rights, and that the bank's mortgage lien was therefore postponed until the satisfaction of appellees' claims. To determine the propriety of the court's action it will be necessary, briefly, to review the facts.

C. C. McClarty was president of the First National Bank and also a director in the Jefferson County Electric Company. C. C. Bickel was vice president of the First National Bank and president and director of the Jefferson County Electric Company. Charles J. Doherty was a director in both concerns. James Clark, Jr., was a director in the bank, and bid on some of the work of construction in connection with the Chowning Electric Company. Hugh L. Rose was a clerk at the bank and secretary of the electric company. All the money which the electric company had to its credit was deposited in the First National Bank. Nearly all the meetings of the directors of the electric company were held in the office of the bank. The original contract made with Chowning was signed by Bickel. It was read to and approved by the board of directors. At this meeting Bickel, McClarty, and Doherty were present. They all knew, therefore, that the Chowning Electric Company was the original contractor. It also appears from the testimony that they knew that appellees Ridgway Dynamo & Engine Company and F. A. Clegg & Co. were subcontractors; indeed, Bickel testified that he knew that those engaged in the construction of the plant had not been paid, and that they were entitled to have and hold mechanic's liens against the property. When the bank's claim was first asserted, it appears that it was based upon the note executed November 24, 1907. While the pleadings were in that condition, Chowning testified that prior to that time he had talked with McClarty, Bickel, and Doherty in regard to his claim and that of the subcontractors. He then stated to them how much was due, and Doherty said he was sorry the matter could not be fixed up, but that it was Chowning's duty to protect his creditors by filing a lien. Subsequently it developed that the note executed November 24, 1907, was simply the renewal of a note which was first executed on July 24, 1907. In a second deposition, Chowning testified that during the month of June, prior to July 24, 1907, he went to see McClarty and told him he would have to file a lien to protect his creditors, and that Clegg & Co. and the Ridgway Dynamo & Engine Company were creditors. McClarty advised him to go and have a talk with Bickel. He then went to Bickel and had practically the same conversation he had just had with McClarty. In that conversation

Bickel was told the amount that was due Clegg & Co.; also the amount of all the bills, and that they would have to protect themselves by filing a lien. This testimony of Chowning is corroborated by that of F. A. Clegg, who testified that McClarty, Bickel, and Doherty knew that the money was due the lien claimants and that they intended to protect themselves by filing a lien. This information was imparted to Bickel and McClarty some time in June. Chowning was with them when they went to the bank. McClarty knew the amount that was due Clegg & Co. Chowning told him the amount that was due the Chowning Electric Company. The testimony of McClarty, Bickel, and Doherty is to the effect that, while they knew the work was going on, they believed the contractors would all be paid, and they had no knowledge of the amount due each one, or that they expected to or would claim a lien. McClarty admits, however, having had a conversation with Clegg and Chowning, but was of the opinion that the conversation took place later in the summer after July 24, 1907.

We deem it unnecessary to give the evidence more at length; suffice it to say that we see no reason to disturb the finding of the chancellor on the question of fact. We think, upon the whole case, it was perfectly plain that McClarty, Bickel, and Doherty had knowledge of the amounts that were due appellees and the fact that appellees would claim a lien, and that this knowledge was imparted to them prior to July 24th.

Furthermore, we conclude that the notice was sufficient. It was given to the president and vice president of the bank, and it was not a mere knowledge on their part that the work was being performed, but they knew that the lien claimants had not been paid in full, that there was a balance due them, what the balance was, and that they would assert a lien to secure the same. *Scheas v. Boston & Paris, etc.*, 125 Ky. 535, 101 S. W. 942, 31 Ky. Law Rep. 157; *Connecticut Mutual Life Insurance Co. v. Scott*, 81 Ky. 540.

But it is insisted that, inasmuch as McClarty, Bickel, and Doherty were directors both of the Jefferson County Electric Company and of the bank, notice to them was not notice to the bank because of the conflict of interests developed by the facts of this case. The solution of this question depends upon the condition of affairs at the time it is alleged notice was given. At that time the Chowning Electric Company and the other lien claimants had performed a considerable portion of their respective contracts. The Jefferson County Electric Company had at that time overdrawn its account in appellant bank. Each of these claims was a valid one against the electric company. To the extent of its assets it had to pay the lien claimants and the bank at all hazards. So far as the electric company was concerned, it was immaterial whether the bank or the

lien claimants were paid first. There was, then, absolutely no conflict of interests between the bank and the electric company. Nor is there now any contest in this action between the bank and the Jefferson County Electric Company. It is perfectly plain, therefore, that, so far as the relationship which they sustain to the two corporations is concerned, there is nothing to show that it was the duty of McClarty, Bickel, and Doherty to withhold from the bank information which they obtained as directors of the electric company. On the contrary, it was their duty to impart such information to the bank, for in so doing they were not in any wise acting against the interests of the electric company.

But it is insisted that the conflict of interest grows, not out of the relations which the electric company and the bank sustain, but out of the relations which McClarty, Bickel, and Doherty sustain to the bank because of their guaranteeing the claim of the Westinghouse Electric & Manufacturing Company and taking an assignment thereof from the Chowning Electric Company, and that in this action Doherty, as trustee, is now asserting a lien claim as against the bank. At the time, however, when the notice was given, there was nothing to show that the directors of the electric company would ever be called upon to pay the claim of the Westinghouse Electric & Manufacturing Company, or that they would ever undertake to enforce it by lien. They did not pay this claim until September 28, 1907, and did not take an assignment of that company's alleged lien until November 29, 1907. At the time the notice was given, then, there was no such conflict of interest between themselves personally and the bank as would prevent their receiving notice on behalf of the bank. The fact that a conflict of interest subsequently developed did not take away the notice they had already received before such conflict arose. Furthermore, the loyalty of McClarty, Bickel, and Doherty to the bank in all the transactions involved in this action is perfectly manifest. In every stage of the proceedings they have shown their allegiance to the bank, and it is not because of any willingness on their part to testify against the bank's interest that the fact of notice was proved.

Judgment affirmed.

CUMBERLAND TELEPHONE & TELEGRAPH CO. v. LOGSDON.

(Court of Appeals of Kentucky. March 8, 1911.)

1. COURTS (§ 223*)—APPELLATE JURISDICTION—SHAM PLEADING.

A sham counterclaim, filed to obtain jurisdiction for an appeal to the Court of Appeals, will not be considered in determining the amount in controversy on appeal, though the

trial court did not strike it out of the record, as authorized by Civ. Code Prac. § 113, subsec. 8, but dismissed it at the trial.

[Ed. Note.—For other cases, see Courts, Cent. Dig. § 606; Dec. Dig. § 223.*]

2. COURTS (§ 223*)—APPELLATE JURISDICTION—SHAM PLEADING.

Under Ky. St. § 950 (Russell's St. § 2784), prohibiting appeals to the Court of Appeals where the amount in controversy is less than \$200, an appeal does not lie from a judgment for plaintiff for \$35, though defendant filed a sham counterclaim for \$500.

[Ed. Note.—For other cases, see Courts, Cent. Dig. § 606; Dec. Dig. § 223.*]

Appeal from Circuit Court, McLean County.

Action by J. T. Logsdon against the Cumberland Telephone & Telegraph Company From a judgment for plaintiff, defendant appeals. Dismissed.

J. W. Boston, for appellant. Milton Clark, for appellee.

MILLER, J. The appellee, Logsdon, a farmer of McLean county, sued the appellant telephone company for \$500 damages for breach of contract in delaying for about four months to furnish telephone service to appellee. Appellant counterclaimed as follows: "Defendant states that if the court should adjudge that it has committed a breach of contract with the plaintiff, or with Rhoades, all of which it denies, then and in that event it is entitled to all the rents and profits for the services plaintiff claims defendant should have rendered, which reasonably would be worth as much to the defendant as to the plaintiff for the time plaintiff claims to have been deprived of the use of telephone service, and likewise defendant was deprived of the like value for being prevented from rendering the services for said time, all of which it says would reasonably be worth the sum of \$500."

The court sustained a demurrer to this counterclaim, whereupon appellant amended it to read as follows: "Defendant further says that it was put to much trouble and annoyance by the plaintiff, J. T. Logsdon, and before it could get to the construction of a line of telephone that it might give him connection with its exchange aforesaid he threatened and did sue it, seeking to compel it to place him in connection with its exchange, before it could do so in its regular course of work, as it owed duties to the public as well as to the plaintiff, and in so doing defendant had to abandon other work, and was placed at much unusual and unnecessary expense to give plaintiff said connection, and was thereby damaged in the sum of \$500, and it pleads same as a counterclaim against the plaintiff, J. T. Logsdon, and against any claim of the said Logsdon, and it asks judgment over against the plaintiff for the sum of \$500."

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

The amended counterclaim was controverted of record; and, the jury having found a verdict for the plaintiff for \$35, the counterclaim was dismissed. From that judgment, and a judgment for plaintiff for \$35, the company appeals.

As the statute forbids an appeal to this court from a judgment for less than \$200, that portion of the judgment which granted appellee a judgment for \$35 cannot be reviewed, unless the counterclaim for \$500 be added to appellee's recovery in considering the question of the amount in controversy. Clearly, the counterclaim did not state a cause of action; and it is evident that it was a sham plea, filed for the purpose of obtaining jurisdiction for an appeal to this court. And, although the circuit judge did not strike it from the record, as he might have done under subsection 8 of section 113 of the Civil Code of Practice, he properly dismissed it upon the trial. Being a sham plea, and without merit, it will not be considered in determining the amount in controversy. This leaves the appellee's judgment for \$35 as the amount in controversy, and it being less than \$200, this court is without jurisdiction to review it. Ky. St. § 950 (Russell's St. § 2784); C. & O. Ry. Co. v. Roe, 54 S. W. 1, 21 Ky. Law Rep. 1145; Montgomery v. Montgomery, 78 S. W. 465, 25 Ky. Law Rep. 1632.

The appeal is dismissed, with damages.

PAINE v. LEVY.

(Court of Appeals of Kentucky. March 8, 1911.)

1. BILLS AND NOTES (§ 527*)—PAYMENT—EVIDENCE.

Evidence in an action on a note held not to show payment as claimed.

[Ed. Note.—For other cases, see Bills and Notes, Dec. Dig. § 527.*]

2. BILLS AND NOTES (§ 490*)—ACTIONS—BURDEN OF PROOF—PAYMENT.

The burden is on defendant in an action on a note to show that the debt represented thereby has been paid.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. §§ 1695-1697; Dec. Dig. § 490.*]

3. USURY (§ 113*)—BURDEN OF PROOF.

The burden is upon one claiming that a debt represented by a note was usurious to show what part of the debt, if any, was usurious.

[Ed. Note.—For other cases, see Usury, Cent. Dig. §§ 308-323; Dec. Dig. § 113.*]

4. APPEAL AND ERROR (§ 1009*)—REVIEW—FINDINGS — CONCLUSIVENESS — EQUITY CASES.

Where the proof is conflicting and the question is doubtful, the chancellor's judgment will not be disturbed.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3970-3978; Dec. Dig. § 1009.*]

5. LIMITATION OF ACTIONS (§ 49*)—ACCRUAL—USURY.

Limitations do not begin to run in an action to recover usurious interest until the usury has been paid, and the renewal of a usurious

note is not payment of the usury so as to start limitations against it.

[Ed. Note.—For other cases, see Limitation of Actions, Dec. Dig. § 49; * Usury, Cent. Dig. § 268.]

6. USURY (§ 100*)—APPLICATION OF PAYMENTS.

Usurious payments will be applied at the borrower's election first upon the legal interest due and then upon the principal, so that usury will not be regarded as having been paid until the legal interest and principal have been satisfied.

[Ed. Note.—For other cases, see Usury, Cent. Dig. §§ 219-234; Dec. Dig. § 100.*]

7. USURY (§ 100*)—EFFECT—APPLICATION OF PAYMENTS.

One receiving usurious interest cannot be deprived of the principal and legal interest paid him.

[Ed. Note.—For other cases, see Usury, Cent. Dig. §§ 219-234; Dec. Dig. § 100.*]

Appeal from Circuit Court, Jefferson County, Chancery Branch, Second Division.

Action by J. Levy against F. G. Paine. From a judgment for plaintiff, defendant appeals. Affirmed.

Samuel Avritt, for appellant. Stanley R. Wolf, for appellee.

SETTLE, J. Appellee sued appellant in the court below upon a note of \$603, executed March 13, 1907, payable one day after date and bearing 6 per cent. interest from date. The note was secured by a mortgage of the same date upon personal property. Judgment was asked by appellee for the amount of the note and interest and also for the enforcement of the mortgage lien and sale of the mortgaged property for its payment. Appellant's answer, as amended, admitted the execution of the note and mortgage, but alleged that the note contained usury in a large amount; that it had been fully paid; and that, if appellant were allowed credit for the usury and other sums he paid appellee thereon, the note had been overpaid by \$217. The answer was made a counterclaim and judgment prayed therein against appellee for that amount. Appellee by reply controverted the affirmative matter of the answer and counterclaim, and pleaded the statute of limitations as to the usury sought to be recovered by appellant. Appellant filed a rejoinder traversing the plea of the statute of limitations and other affirmative matter of the reply, which completed the issues. The circuit court allowed appellant credit for \$196 of usury found to be included in the note, and gave appellee judgment against him for \$407 with interest from March 13, 1907; also for the enforcement of the mortgage lien and a sale of the mortgaged property, or enough thereof to pay the debt and costs of the action. From that judgment this appeal is prosecuted.

It appears from appellant's answer and counterclaim, and also from his deposition

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

found in the record, that he began borrowing money from appellee as far back as 1902. The first amount he borrowed was \$100, which he claims to have paid back within the year; the other amounts borrowed from time to time down to 1907 were as small as \$50 and never greater than \$100. On all sums borrowed he claims to have paid interest from time to time in advance, at the rate of 6 per cent. per month. If correct in this statement, it is manifest that the interest paid was largely in excess of the legal rate; but appellant was unable to remember, and exhibited no statement which showed the amount of interest thus paid, or when paid, except that he produced a receipt for the payment of the first \$100 he borrowed of appellee, and another for \$8, interest he claimed to have paid on the first loan. The receipt shows that it was executed for interest paid, but does not indicate upon what loan it was paid, at what rate, or the period covered by it. According to his testimony, he borrowed of appellee from 1902 down to 1907, including the \$100 he got when the note sued on was executed, \$650, and during the same time, without being able to fix dates or amounts, he paid appellee on these loans totaling \$650, various sums aggregating \$385; yet, after making all these alleged overpayments, he on March 13, 1907, borrowed another \$100 of appellee, and then gave him his note for \$603 and the chattel mortgage to secure its payment, with the understanding, as he admits, that \$503 of the \$603 note was what appellee claimed he owed him as the balance due upon the principal and interest of the former loans.

It is not alleged in the answer and counterclaim that appellant is lacking in mental capacity, that he was overreached in this transaction, or that he executed the note and mortgage under duress; and it is beyond belief that in order to borrow another \$100 of appellee, who was, as he now claims, then owing him more than that sum for overpayments on the former loans, appellant should have executed to appellee the note and mortgage for \$603.

Appellant testified that he left with his son a statement showing the various sums he had borrowed of appellee and when borrowed, and also the several payments he had made him as well as the date of each; but he did not procure or file the statement with his deposition, although the son lives in or near Louisville and could have been reached in a few minutes' time.

It will thus be seen that the testimony furnished by appellant's deposition as to the usury and other payments made by him to appellee is too vague and inconsistent with reason to satisfactorily support the defense of payment interposed by his answer and counterclaim. His deposition constituted his entire proof in the case, and the burden was upon him to show that the debt for which

the note sued on was executed had been paid.

It also devolved upon him to show what amount of usury, if any, is contained in the note. While his deposition fails to show in any definite sense the amount of such usury, it does sufficiently establish the fact that the payments of usury were made by him on the loans obtained of appellee, and it is evident that some of the usury that accrued and was computed on the loans was carried into the note sued on; but it is impossible from the record before us to determine the precise amount. It can only be approximately arrived at.

We find from appellee's deposition, which constituted his only proof, that he loaned appellant various sums aggregating \$650, including the \$100 he let him have, March 13, 1907, when the note and mortgage were executed; and that appellant at different times made him payments amounting altogether to \$314. These loans and payments appear to have been taken from appellee's books, which were not introduced in evidence, but were willingly submitted to the inspection of appellant's counsel before he cross-examined appellee; and it is patent that appellant was ignorant of and unable to state the entire amount of money he borrowed of appellee until after the latter's books had been examined by his attorney. After getting the necessary information from appellee's books, appellant seemed to no longer disagree with him as to the amounts borrowed, but still disagreed with him as to the rate of interest charged and payments made and was unsupported in his statements as to these matters, while appellee's testimony in regard thereto contradicted that of appellant and was corroborated by the entries appearing in his (appellee's) books. We are of opinion therefore that the circuit court did not err in reaching the conclusion that \$314 constituted the aggregate of all payments made by appellant to appellee upon the amounts borrowed of him. But, assuming this to be true, it is still apparent that appellant's indebtedness to appellee at the time he executed the note and mortgage was not, exclusive of usurious interest, as much as \$603, the amount contained in the note. There was therefore some amount of usurious interest included in the note, and this fact appellee, in giving his deposition, did not deny. The amount of usury included in the note was fixed by the circuit court at \$196. In other words, that court was of opinion that appellant's true indebtedness to appellee at the time of the execution of the note and mortgage, including the \$100 then borrowed, was \$407 instead of \$603; hence the latter was given judgment for \$407 with interest from March 13, 1907, it being admitted by appellant that nothing was paid by him after the execution of the note.

The data furnished by the record is not sufficiently definite to enable us to demonstrate by the necessary calculation the pre-

cise amount of usury contained in the note; but we assume that the circuit court arrived at the amount for which judgment was given by computing, according to the legal mathematical rule, interest at 6 per cent. upon the sum or sums borrowed by appellant, from the dates, respectively, of such borrowing, and allowing him credit for all payments as of the dates they were made, respectively. The record does not, however, disclose the particular method adopted for the calculation; but we will not, in the absence of a showing to the contrary, conjecture that the calculation was incorrectly made. While in this court judgment in a case in equity will be given according to the weight of the evidence and the truth as it shall appear from the whole record, yet, where the proof is conflicting and on the whole case there is doubt, the chancellor's judgment will not be disturbed. *Quigley v. Beam's Adm'r*, 137 Ky. 325, 125 S. W. 727; *Flowers v. Moorman & Hill*, 88 S. W. 545, 27 Ky. Law Rep. 728; *Campbell v. Trospen*, 108 Ky. 602, 57 S. W. 245, 22 Ky. Law Rep. 277; *Bank of Campbellsburg v. Minor*, 99 S. W. 227, 30 Ky. Law Rep. 496; *Akers v. Akers*, 101 S. W. 353, 31 Ky. Law Rep. 36.

Appellee's plea of the statute of limitations was properly disregarded by the circuit court. If, as appellant testified, the \$100 he borrowed of appellee in 1902 was, together with the usurious interest it bore, repaid that year and its payment closed the transaction, it would seem that as to such usury as he paid on that \$100, the statute would bar a recovery. We gather from the evidence as a whole that from the time of the first borrowing in 1902, which was the \$100 referred to, down to the execution of the note and mortgage, March 13, 1907, appellant was continually in debt to appellee for money borrowed of him, paying him, or being charged by him, usurious interest at some rate thereon, and that the principal and legal interest of none of the sums borrowed by appellant of appellee was ever fully paid before he would procure of the latter another loan which, when made, would be merged with what appellant was owing on former loans into a new obligation, thereby making each obligation, as created, contain some part of the usurious interest with which he had been charged and a part of which he had paid from the beginning, and in this way a considerable part of such usury was carried into the note of March 13, 1907.

The statute of limitations does not begin to run in an action to recover usurious interest until the usury has been paid: *Fitzpatrick v. Apperson's Ex'x*, 79 Ky. 272; *Roberts v. Thomas*, 4 Ky. Law Rep. 227; *Anderson v. Trimble*, 37 S. W. 71, 18 Ky. Law Rep. 507; *Burnside v. Mealer*, 80 S. W. 783, 26 Ky. Law Rep. 79. Notwithstanding the statute requiring suits to recover usury to be

brought within a year from the time it was paid, while any part of an obligation upon which usury has been paid remains undischarged, the obligor may have it purged of the usury, although paid more than a year before suit. And this would be so, though the obligation may have been repeatedly renewed or one or more of such renewals made to include, with the original debt, another or others owing by the obligor to the holder. In brief, the renewal of a note tainted with usury is not a payment of the usury, and the statute of limitations as to the usury does not begin to run at completion of the novation. So long as the usury can be traced it may be extracted. *Rudd v. Planters' Bank*, 78 Ky. 513; *Nall v. Farmers' Bank*, 5 Ky. Law Rep. 122.

The reason for this rule is that payments, though made by a borrower as usury, will, at his election, be applied first upon the legal interest then due, and then upon the principal, so that, if he elects, no usury can be regarded as having been paid until the satisfaction of the principal and legal interest. *Neal v. Rouse*, 93 Ky. 151, 19 S. W. 171, 14 Ky. Law Rep. 128; *Bank of Russellville v. Coke*, 45 S. W. 867, 20 Ky. Law Rep. 291; *Crenshaw v. Crenshaw*, 69 S. W. 962, 24 Ky. Law Rep. 600; *Crenshaw v. Duff's Ex'r*, 113 Ky. 912, 69 S. W. 962, 24 Ky. Law Rep. 718; *Day's Adm'r v. Davis*, 47 S. W. 769, 20 Ky. Law Rep. 869.

Although the law permits the recovery of usury paid, or that the claim sued on be purged of usury, it does not forfeit the money of the usurer. He cannot be deprived of his principal and legal interest, and these the judgment gives him.

There being no error apparent in the judgment of the circuit court, it is affirmed.

GILLIAM v. GUFFY.

(Court of Appeals of Kentucky. March 8, 1911.)

1. GUARDIAN AND WARD (§ 157*)—ACCOUNTING—BURDEN OF PROOF.

The burden was upon a statutory ward, suing her guardian for an accounting for money received, to overcome the prima facie case made by a receipt given by her for such money.

[Ed. Note.—For other cases, see *Guardian and Ward*, Cent. Dig. §§ 511-513; Dec. Dig. § 157.*]

2. APPEAL AND ERROR (§ 1009*)—FINDINGS OF CHANCELLOR—CONCLUSIVENESS.

The chancellor's findings will not be disturbed, where the fact found is doubtful, and the evidence to establish it is as strong as the evidence against it.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 3970-3978; Dec. Dig. § 1009.*]

3. GUARDIAN AND WARD (§ 157*)—ACCOUNTING—PROCEEDINGS—SUFFICIENCY OF EVIDENCE.

In proceedings against a statutory guardian for an accounting, evidence held to sustain a

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

finding that the ward received a certain sum, which she claimed had not been accounted for.
[Ed. Note.—For other cases, see *Guardian and Ward*, Dec. Dig. § 157.*]

Appeal from Circuit Court, Butler County.

Action by Eunice I. Gilliam against A. Guffy. From a judgment for defendant, plaintiff appeals. Affirmed.

N. T. Howard and Gardner & Wood, for appellant.

MILLER, J. The appellee is the father of the appellant, and was her statutory guardian. The appellant became of age on October 17, 1907, and in January, 1908, the appellee made his final settlement as her guardian in the Butler county court. It showed that he owed the appellant something over \$2,100. The settlement was approved at the February term, 1908, of the Butler county court, and, among other credits, it showed that appellee was given credit for the following payments of money to the appellant:

Voucher No. 6 (Nov. 2, 1907), for... \$ 500 00
Voucher No. 7 (Nov. 15, 1907), " ... 500 00
Voucher No. 9 (Dec. 20, 1907), " ... 1,194 20

On September 29, 1908, appellant conveyed her farm of about 100 acres to her father, for a consideration of \$400, which sum, it is alleged, is much less than its value. On May 7, 1910, about 2½ years after the settlement, appellant brought this suit against her guardian, alleging that she had signed and delivered voucher No. 7, for \$500, to her father, on November 2, 1907, upon his agreement to deposit that sum of money to her credit in the Morgantown Deposit Bank, soon after the signing and delivery of the receipt, but that he had wholly failed to do so, although he had taken credit for the \$500 in his settlement. The petition further alleges that when appellant delivered voucher No. 9, for \$1,194.20, to her father on December 20, 1907, he paid her only \$994.20 by check, but that on November 21, 1908, and before this suit was filed, he had deposited the remaining \$200 called for by voucher No. 9 to her credit in the John M. Carson Banking Co.'s Bank, and that she had since received it. She brought this action in May, 1910, 2½ years after the settlement, in which she seeks to recover the \$500, represented by voucher No. 7, of November 15, 1907, the unpaid interest on the \$200 balance from December 20, 1907, to November 21, 1908, the day it was paid, \$316.87, rent for the farm, \$10, the value of the timber cut therefrom, and a rescission of the conveyance for the farm. All matters in controversy, however, with the exception of the \$500 called for by voucher No. 7, have been settled between the parties, and are no longer in dispute.

The payment of this \$500 raises a clear-cut issue of fact, and the evidence upon that issue is sharply conflicting and wholly irre-

concilable. The appellee swears, positively, that he paid this \$500 in greenback currency to the appellant on November 15, 1907, in the front room of his residence, and took the voucher, No. 7, as evidence of the payment. The appellant, on the other hand, admits that she signed the voucher in the room indicated, but denies, with equal positiveness, that her father ever paid her the money. She states that vouchers 6 and 7 were both written and signed on November 2, 1907, and that voucher No. 6 was given for the \$500 which her father deposited to her credit in the Morgantown Bank on the preceding day, November 1st; while voucher No. 7, although signed on November 2d, was postdated to November 15th, "for lack of money on hand for settlement at that time." The appellee says, however, that voucher No. 6, of date November 2d, was written on November 15th, and given for the \$500 which he had deposited in the bank to appellant's credit on November 1st. No other witness testifies as to the payment of this money, and it is not claimed by either party that any other person was present when Voucher No. 7 was signed, or when the money is claimed to have been paid.

No explanation is given for the long delay—from January, 1908, to May, 1910—in bringing this suit. The appellant's receipt made a prima facie case for appellee. The burden of proof was upon the appellant to make out her case, by overcoming her receipt, and that she has failed to do so. The facts of this case bring it within the well-established rule that the finding of the chancellor on an issue of fact will not be disturbed by this court, if the truth of the matter is in doubt, and the evidence in favor of his finding is as strong as the evidence against it. *Roberts v. Williams*, 90 S. W. 565, 28 Ky. Law Rep. 1084; *Wilson v. Hall*, 101 S. W. 889, 31 Ky. Law Rep. 119; *Sebree v. Thompson*, 104 S. W. 781, 31 Ky. Law Rep. 1148. Under all the circumstances, we are not inclined to disturb this finding of fact of the chancellor.

Judgment affirmed.

CAPERTON'S EX'X v. TODD et al.

(Court of Appeals of Kentucky. March 7, 1911.)

WILLS (§ 684*)—CONSTRUCTION—INCOME.

A testamentary gift to a legatee of the income on \$5,000, payable annually for life, is a gift of the income of \$5,000 set apart for the legatee, after deducting the tax, fees, and costs of administration of the fund.

[Ed. Note.—For other cases, see *Wills*, Cent. Dig. § 1621; Dec. Dig. § 684.*]

Extension of opinion.

For former opinion, see 132 S. W. 1038.

NUNN, J. The parties to this action appear to be in doubt as to the meaning of

the opinion. Appellant claims that under it appellees are entitled to the income from \$5,000 each after deducting the tax, fees, and costs of administration of this fund. Appellees claim that the income should be paid to them without any deductions therefrom.

The opinion was drafted with the view of carrying out the intention expressed by the appellant. The testator did not intend to give them an annuity of \$300, or he would have said so explicitly; besides, if he meant that, why did he say the income from \$5,000? Hence appellant's contention is right.

**GREEN RIVER CHEMICAL CO. et al. v.
BOARD OF TRUSTEES OF TOWN
OF ROCKPORT.**

(Court of Appeals of Kentucky. March 7, 1911.)

1 DEEDS (§ 155*)—CONDITIONS—"MANUFACTURING BUSINESS."

A deed to a company organized to manufacture chemicals, providing for sale of the land on cessation of use for "manufacturing business," did not require any particular kind of manufacturing business to be continued.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. §§ 488-495; Dec. Dig. § 155.*]

For other definitions, see Words and Phrases, vol. 5, pp. 4344-4346; vol. 8, p. 7716.]

2. EVIDENCE (§ 448*)—TESTIMONY AFFECTING DEED—ADMISSIBILITY.

Intention of parties to a deed can be shown by extraneous evidence only when the deed is ambiguous.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 2068; Dec. Dig. § 448.*]

3. EVIDENCE (§ 456*)—TESTIMONY AFFECTING DEED—ADMISSIBILITY.

Parol evidence is inadmissible to show the meaning of "manufacturing business" in a condition in a deed requiring continuation of such business.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 2105; Dec. Dig. § 456.*]

4. MUNICIPAL CORPORATIONS (§ 225*)—ULTRA VIRES ACTS—RIGHT TO COMPLAIN.

A town cannot recover land conveyed in aid of a manufacturing enterprise, because the conveyance was ultra vires, where no taxpayer complains, and the grantee has expended much money in improvements.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 626-643; Dec. Dig. § 225.*]

Appeal from Circuit Court, Ohio County.

Action by the Board of Trustees of the Town of Rockport, Ohio county, Kentucky, against the Green River Chemical Company and others. Judgment for plaintiff, and defendants appeal. Reversed and remanded, with directions.

Barnes & Anderson, for appellants. J. E. Fogle and Wilson & Crowe, for appellee.

NUNN, J. On December 9, 1902, appellee purchased a small piece of land adjoining the town of Rockport, but which has since been included within the corporate limits of the town, and on the same day conveyed it by

deed to appellant in consideration of \$1, "and the further consideration that, in the event the second party, their successors or assigns, shall cease to do a manufacturing business on the lot hereinafter described, then, the said lot shall, at once, become for sale and that the first party shall have first call on purchase of said lot, and in the event the first party shall purchase said lot then the first party shall have a credit of \$500 in the purchase price of said lot," etc. Appellant obtained this lot for the purpose of erecting a plant to manufacture wood alcohol, charcoal, acetate of lime, and other by-products. It erected thereon a large chemical plant, retort room, charcoal room, drying kiln, and all machinery, appliances, and equipments necessary for that purpose, and operated it until 1907, when it sold the plant to a person by the name of Bohannon, who has since ceased to operate it for such purpose. In 1903 appellant procured a sawmill manufacturing plant to be established on a part of the lot, in the name of Burgess & Co., who operated it for some time under that name, and then sold it to one Moffitt and others, who operated it for some time, and then a corporation was formed, which took it over, and has been ever since, and is now, operating it in the name of the "Rockport Sawmill Company." These parties have spent considerable money in erecting this sawmill plant, and are now working 35 or 40 persons every day, and pay out \$500 or \$600 every week. The railroad company at that point has run a spur down by the mill and on to a coal mine situated on the river a short distance below the mill.

Appellees instituted this action for a recovery of the land, upon the idea that appellant had ceased manufacturing wood alcohol and its by-products. It asks that, in the event they cannot recover the lot, it be sold and its lien for \$500 be enforced under that part of the deed copied herein. The contract, as expressed in the deed from appellee to appellant, authorized appellant to dispose of the property, but required that a manufacturing plant be conducted on the lot, and if that business ceased then the lot should be sold and the city should have a lien for \$500. The uncontradicted proof shows that a manufacturing business has been conducted on the lot ever since soon after the date of the deed to the present, and it appears that this mill is a valuable adjunct to the town. The deed did not require a continuation of the manufacture of wood alcohol, but only required a manufacturing business, without specifying any particular kind. Appellee introduced considerable proof showing what the intention of the makers of the deed was. Such proof is only admissible when the language of the deed is ambiguous, which is not true in this case. The words used, "manufacturing business,"

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

are plain, and need no explanation by witnesses. Consequently such testimony was not competent.

It is agreed that the city, as a corporate body, had no right to make this conveyance, and that it had no right to purchase any real estate, except for park and cemetery purposes. Conceding this to be correct, it did, however, make the conveyance to appellant. Mrs. Campfield, from whom the city purchased the lot, is not complaining, nor is any taxpayer of the city; and it is certainly not right for the city, after having induced persons, by means of the conveyance, to spend from \$20,000 to \$40,000 in establishing a manufacturing plant, to recover the lot and all the improvements thereon. At the time the action was instituted, and at the time of trial, it appears there was a manufacturing establishment in operation on the lot, and this action was prematurely brought.

For these reasons, the judgment is reversed, and the case remanded, with directions to dismiss appellee's petition.

LEOPOLD v. NEWPORT COAL CO.

(Court of Appeals of Kentucky. March 7, 1911.)

MASTER AND SERVANT (§ 304*)—INJURY TO THIRD PERSONS—NEGLIGENCE OF SERVANT—FAILURE TO WARN.

Where plaintiff had assisted defendant's driver to unload his wagon in a narrow passage, in order that he himself might drive through, and knew that the driver was backing the team, as was necessary in order to get out, the driver was not negligent in failing to warn plaintiff to keep out of the way.

[Ed. Note.—For other cases, see Master and Servant, Dec. Dig. § 304.*]

Appeal from Circuit Court, Campbell County.

Action by J. F. Leopold against the Newport Coal Company. From a judgment for defendant, plaintiff appeals. Affirmed.

J. Edward Boltz and V. O. Williams, for appellant. Frank V. Benton, for appellee.

CARROLL, J. The appellant, in this action to recover damages for personal injuries against the appellee, charged in his petition that a servant of appellee, while delivering coal to the Bonning Hotel, dumped a load in a driveway of the hotel, and that in attempting to back his horses and wagon out of the driveway he backed and drove his horses in such a careless and negligent manner that the wagon was backed upon and struck appellant with great force, pressing him against the wall of the hotel, thereby bruising and permanently injuring him. The answer was a traverse, and plea of contributory negligence. Upon a trial before a jury, a verdict was returned in favor of appellee, and judgment entered accordingly. A re-

versal is asked for alleged error of the court in misinstructing the jury.

Briefly the facts are these: The appellant is a farmer, and on the day he was injured had driven into Newport, stopping with his horse and wagon at the Bonning Hotel. This hotel has a driveway or wagon shed, paved with brick, which opens on the street. About noon an employé of the appellee coal company arrived with a two-horse wagon load of coal, and drove in this passway to the place where the coal was to be unloaded. Appellant could not get his wagon out until the coal was unloaded, as the coal wagon blocked the passway; and, being in a hurry, he assisted in unloading the coal. After the coal was unloaded, it was necessary to back the coal wagon, to which the two horses were hitched, out of the passway to the street. While the driver was backing the wagon, appellant attempted to pass between the wagon and the wall, from the rear of the wagon to the front of the horses, when the wheels of the wagon swerved, with the result that one of the wheels struck the appellant and pressed him against the wall, causing the injuries of which he complains.

The court instructed the jury, in substance, that if they believed from the evidence that the appellee's employé in charge of the horses and wagon was negligent in handling, driving, or backing the horses or wagon, they should find for the appellant; and, on the other hand, if they believed he exercised ordinary care in handling and backing the horses, or that the swerving of the wheels was an accident that the driver by the exercise of ordinary care could not have anticipated or guarded against, they should find for the appellee. They were further properly instructed as to the measure of damages, and also told that if the appellant, in attempting to come from the rear to the front of the wagon while it was in motion, failed to exercise that degree of care for his own safety which ordinarily prudent persons ordinarily exercised under the same or similar circumstances, and that the failure on his part to exercise this degree of care contributed to his injuries, and but for such lack of care on his part he would not have been injured, they should find for the appellant.

An examination of the evidence satisfies us that the injuries received by the appellant were caused by his own negligence, or by an accident that the driver, who was exercising ordinary care, could not have anticipated would happen. Appellant knew that the wagon was being backed out, and with knowledge of this fact he attempted to go between it and the wall. It is probable that, as to a person who did not know the wagon was going to be backed out, it would have been negligence on the part of the driver to

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

have failed to give some warning that he was going to back, or to have looked around for the purpose of seeing if any person was in the way of the wagon. But it cannot fairly be said that he owed to appellant the duty of looking behind him, or the duty of giving warning, as appellant knew as well as the driver did what the driver was going to do and what he was doing. The instructions fairly submitted the law of the case, and we do not see how the jury could well have found a different verdict.

Wherefore the judgment is affirmed.

SIMPSON et al. v. SMITH et al.

Court of Appeals of Kentucky. March 7, 1911.)

HUSBAND AND WIFE (§ 193*)—DISABILITIES OF COVERTURE—CONVEYANCES—CAPACITY TO CONVEY.

A married woman's separate deed was not a valid conveyance, where her husband neither joined nor conveyed as required by Ky. St. §§ 506, 2128 (Russell's St. §§ 2076, 4631).

[Ed. Note.—For other cases, see Husband and Wife, Cent. Dig. §§ 716-718; Dec. Dig. § 193.*]

Appeal from Circuit Court, Garrard County.

Action by Luther Smith and another against William Simpson and others. From a judgment for plaintiffs, defendants appeal. Affirmed.

William Herndon, for appellants. R. H. Tomlinson, for appellees.

NUNN, J. This action was instituted for the recovery of about one-half acre of land in Garrard county. A judgment of recovery was obtained, and this appeal is prosecuted therefrom.

The facts of the case are: On October 23, 1906, Celia Smith, wife of appellee Luther Smith, made and executed a deed conveying this piece of land to William Dyehouse at the price of \$10. The husband never joined in the conveyance. Afterwards, in April, 1908, Dyehouse desired to sell this land, but could not, as the husband had not joined in the deed with his wife. Dyehouse and the husband entered into an agreement in which Luther Smith, the husband, was to repurchase the property from Dyehouse at the price of \$90 and Dyehouse and wife were to convey it to him. Luther Smith went to town on the day agreed upon, but Dyehouse would not make him a general warranty deed, unless he first signed the deed his (Smith's) wife had executed. This he agreed to, and did do, and the clerk interlined the certificate on the record, by inserting the words "and Luther Smith." Dyehouse then asked him \$100 for the property, and Smith contended with him that he had agreed to make him a conveyance for \$90. They exchanged words over the matter for a short

time, and Smith left the room, and returned shortly with the other \$10, and said that he would give the \$100. Milo Simpson, a brother of appellant William Simpson, was present, and he remarked to Smith: "It is too late; it is already conveyed to William Simpson." Luther Smith averred in his petition that this was a scheme on the part of the two Simpsons and Dyehouse to get his signature to the deed that his wife executed, and that they never had any intention that the lot should be conveyed to him. He introduced considerable proof to establish these allegations, and appellants introduced as much to the contrary.

However this matter be, Celia Smith never parted with her title to the land, as her attempted conveyance was void. It is provided in section 2128, Ky. St. (Russell's St. § 4631), that a married woman cannot sell and convey her real estate unless her husband join with her. Section 506 (section 2076) provides that a conveyance of a married woman may be by joint deed of the husband and wife, or by separate instrument; but in the latter case the husband must convey first. There is no pretense in the case at bar that the husband joined with the wife, or that he conveyed to Dyehouse before she made her attempted conveyance.

Therefore the lower court did not err in adjudging the property to her, and the ruling of the lower court is affirmed.

SLAVEN et al. v. DORITY.

(Court of Appeals of Kentucky. March 3, 1911.)

1. ADVERSE POSSESSION (§ 14*)—INTENTION—ACTUAL POSSESSION.

Mere intention, unaccompanied by an actual taking of possession which is hostile and can be seen by the world, will not carry possession beyond the lines indicated by actual possession.

[Ed. Note.—For other cases, see Adverse Possession, Cent. Dig. §§ 77-81; Dec. Dig. § 14.*]

2. ADVERSE POSSESSION (§ 97*)—CONSTRUCTIVE POSSESSION—COLOR OF TITLE.

Though, where one claims under color of title and is in actual possession of a part of the land within his boundary, the law, by construction, carries his possession to the full extent of his boundary, where he claims title by adverse possession only, he acquires no title to any land except that which is in his actual possession, as there can be no constructive possession without color of title.

[Ed. Note.—For other cases, see Adverse Possession, Cent. Dig. §§ 537-541; Dec. Dig. § 97.*]

3. ADVERSE POSSESSION (§ 114*)—EXTENT OF POSSESSION—EVIDENCE.

In ejectment for 181½ acres of land, where plaintiff had cleared and fenced only about 20 acres at one end of the tract, and rested his claim on adverse possession for 15 years of the entire tract, evidence held insufficient to show a possession extending to the entire tract.

[Ed. Note.—For other cases, see Adverse Possession, Cent. Dig. § 685; Dec. Dig. § 114.*]

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

Appeal from Circuit Court, Whitley County.

Action by E. K. Dority against Emanuel Slaven and others. From a judgment for plaintiff, defendants appeal. Reversed.

E. L. Stephens, William Low, Geo. P. Johnson, and I. N. Steely, for appellants. H. H. Tye and R. L. Pope, for appellee.

MILLER, J. This is a suit in ejectment brought by E. K. Dority against his father, H. C. Dority, and the other children of H. C. Dority, to recover a small tract of land on Laurel branch and the waters of Bear creek, in Whitley county. The jury found for the plaintiff, and the defendants have appealed.

H. C. Dority, the father, owned and lived upon what is known as the "Abbott Survey," or patent of 250 acres. In 1854 Walt and Hudson patented 9,600 acres of land, which included the Abbott survey within its boundary, but expressly excepted it as being a senior patent. All the land west of the Abbott survey, including the land in controversy, was embraced within the Walt and Hudson patent of 1854. In 1882 H. C. Dority and his two sons, the appellee E. K. Dority and Emanuel Dority, surveyed as vacant land 200 acres on the west side of, and adjoining, the Abbott survey, upon which H. C. Dority then lived. This survey was made upon the idea that the 200 acres of vacant land was not embraced within the Walt and Hudson patent, or within any patent. In 1884 the appellee E. K. Dority settled upon the northern end of this 200-acre tract, built a house thereon, and cleared and cultivated some 10 acres of the land. In 1891, the Walt and Hudson 9,600-acre tract having come into the possession of Van Winkle and Chamberlain, and it being apparent that the title of the Doritys to the 200 acres they had surveyed in 1882 was inferior to the Walt and Hudson patent of 1854, E. K. Dority and Van Winkle made the following agreement: "July 29, 1891. In 1882 together with my father, H. C. Dougherty and my brother Manuel Dougherty we laid an entry on 200 acres of land on waters of Bear creek, Whitley Co., Ky. & for said entry a Ky. Patent was issued in our names. It now appears to me that said patent is located within and is inferior in law & age to the Walt & Hudson 9600 acre patent. owned by Chamberlain and Van Winkle, and whereas I have probably built my barn within this 200 acre patent and desire to improve some land to farm on which is within said 200, I agree to pay thirty dollars for 100 acres \$30.00 for the farm (surface right) whenever a deed for said 100 acres is offered by them to me. My is not to act against sd. Van Winkle & Chamberlain. In case I have not all the money at time the deed is offered it is understood that I am to pay part down, the balance in stated sums at stated times. Elissa Dority. John S. Van Winkle." The

Chamberlain interest in the Walt and Hudson patent was subsequently acquired by Roberta S. Bryant, of Danville, Ky., and on December 11, 1900, she agreed with E. K. Dority to carry out the contract of July 29, 1891, whereupon E. K. Dority executed and delivered to her his note, which reads as follows: "\$30.00. Pine Knot, Ky., Dec. 11, 1900. One day after date I promise to pay to the order of Roberta S. Bryant of Danville, Ky., thirty dollars & no/100 dollars at Bryant Bros. office, Pine Knot, Ky. being first payment on land this day deeded said Dougherty by said Bryant, and for the payment of which a lien is retained in said deed. Value received with interest at 6 per cent. per annum. No. ——. Due ——. E. K. Dority." A deed was made by Mrs. Bryant to E. K. Dority in compliance with the contract of July 29, 1891, but it was never put to record, and has not been introduced in this case. The appellants repeatedly called upon E. K. Dority to file said deed for the purpose of showing its terms, and as possibly shedding some light upon his title, but appellee has not filed it. In 1899 Mrs. Bryant sold to H. C. Dority, the father, 145 acres which embraces a part of the land in question in this suit. This 145-acre tract and the adjoining 36½ acres constitute the southern portion of the tract claimed by appellee. H. C. Dority subsequently gave a part of the 145-acre tract to his daughter, Mrs. Slaven, and put her in possession thereof. Mrs. Bryant also sold the 36½ acres to Emanuel Dority. H. C. Dority assisted his daughter, Mrs. Slaven, in building a house upon the part he had given her, and she and her husband had been living upon it about 10 years, when this suit was brought in October, 1906. It appears, therefore, that the entire 200 acres was subsequently conveyed by Mrs. Bryant to the Doritys, but that E. K. Dority has never recorded the deed for his portion of the tract. The 145 acres conveyed by Mrs. Bryant to H. C. Dority and the 36½ acres immediately south of it conveyed by Mrs. Bryant to Emanuel Dority embrace the land in controversy in this action.

The appellee rests his title solely upon an alleged adverse possession of the land for more than 15 years before the action was brought. He did not show any record title to any portion of this land. There was, however, some parol testimony tending to show that he was claiming under what is known as the Beatty and Ingram survey or patent. There is no record evidence, however, that there was ever such a survey made or patent granted. In 1881 the sheriff sold 100 acres, called the Beatty and Ingram tract, to Douglas for \$3.61, the delinquent state tax for 1879; and in 1892 the sheriff of the county made a deed for the land to "the heirs" of Douglas, the purchaser, without specifying who the heirs were. Douglas was the father-in-law of E. K. Dority, and E. K. Dority claims that Douglas gave the Beatty and Ingram 106-

acre tract to his daughter, who is the wife of E. K. Dority. He made her no deed to it, however, and this suit is brought in the name of E. K. Dority under his possessory title. So it cannot be claimed that there is any record evidence showing title in E. K. Dority to the so-called Beatty and Ingram tract. Whatever title he has is by possession only. Subsequently, in about 1904, E. K. Dority had a survey made of what he calls the Beatty and Ingram tract, and it has been copied into the amended petition in this case as showing the boundary he claims. It is evident, however, that this survey is not made from any record, but that the calls are arbitrary, and were made by the surveyor as directed by E. K. Dority. The surveyor had no deeds, plats, surveys, or other record evidence to go by, and E. K. Dority does not show that the calls he used were obtained from any record source, although he made diligent search with that end in view.

It is also contended that E. K. Dority acquiesced in the claims of his sister, Mrs. Slaven, and his brother, to the property now sued for, until after his father had divided his land among his children in a way that displeased E. K. Dority, and that he then, for the first time, laid a claim to the property now held by Mrs. Slaven and his brother Emanuel Dority. There is some evidence to sustain this contention; and, when it is taken in connection with the further fact that Mrs. Slaven lived upon the land which was given her by her father for more than 10 years before E. K. Dority brought this suit, we are entirely satisfied that his alleged possession of this part of the land occupied by his brother and sister was no possession at all. Furthermore, it does not appear that E. K. Dority ever had any well-defined boundary or well-marked line to any of this land, except to about 20 acres, which he cleared and fenced, near the northern end of the 200-acre tract, and which in no way interferes with the land on the southern end of the tract, which is now the subject of this action. E. K. Dority never cleared or fenced more than 20 acres of that land. According to his own testimony, the possession of the other part of the tract consisted in his cutting from it such timber as he might need for use or for sale. During at least 10 years of this period, however, Mrs. Slaven and the other Doritys were doing the same thing with the southern end of the tract which they claimed.

The first question that is presented for decision is: Was there sufficient evidence of adverse possession in E. K. Dority for the statutory period of 15 years to warrant the court in submitting his claim to the jury? The appellants trace their title to the land in controversy back to the commonwealth; while the appellee rests his claim entirely upon possession. While it is true the appellee testified that he owned and claimed this ground which was within a well-defined

boundary, it is apparent that he merely draws a conclusion in so testifying without explaining what he means by a well-defined boundary. Mere intention, unaccompanied by an actual taking of possession which is hostile and can be seen by the world, will not carry possession beyond the lines indicated by actual visible possession—in this case the land cleared and inclosed. *Taylor v. Coombs*, 50 S. W. 64, 20 Ky. Law Rep. 1828. Where one claims under color of title and is in actual possession of a part of the land within his boundary, the law, by construction, carries his possession to the full extent of his boundary; but, where he claims title by adverse possession only, he acquires no title to any land except that which is in his actual possession. There can be no constructive possession without color of title. *Shackleford v. Smith*, 5 Dana, 232. The "squatters" sovereignty is confined to his dominion. *Le Moyne v. Roundtree*, 135 Ky. 40, 45, 121 S. W. 960, from Whitley county. is very similar, in its controlling facts, to the case at bar. In that case Roundtree made no claim to the land in controversy, except by prescription, while Le Moyne established a complete and perfect paper title. In discussing the nature of Roundtree's possession, which was peculiarly like E. K. Dority's in this case, the court said: "Except as to a small part (some 10 or 12 acres) of the land sued for which appellee testified to having fenced in and held and used, he showed no possession which would ripen into a title by the expiration of the statutory period. In 1890 he says that his father-in-law, Tom Meadors, put him in possession of a house on the Creekmore survey which the latter owned, and told him he could have it and the surrounding land, consisting of certain fields. He understood his father-in-law to make him a present of the land. The Creekmore survey was coterminous to the land in question; the public road, however, running between the two tracts. The possession which Meadors gave to his son-in-law is thus described by appellee himself: After having stated that his father-in-law gave him the land in controversy which he did now own, and a part of his own land, he was asked this question: 'What did Tom Meadors say about this land in question? A. He just waved his hand up that way, and said I could have all that land. Q. Did he give you this land? A. Yes, sir; that is what I understood him. Q. What did you do, if anything, toward taking possession of the land or improving it? A. In the spring of 1890 I fenced up 10 to 12 acres of it, and cleared ½ or ¾ of an acre.' The witness does afterwards say that he claimed all of the land to a well-defined boundary, but showed on cross-examination that he knew nothing of the lines, and more especially showed that he did not know whether the lines of the tract were marked or not. * * * The property was rough, uninclosed

mountain land; and, while appellee shows that he occasionally cut timber and tan bark, and committed other occasional acts of trespass, he had no sort of actual occupancy except of the 10 or 12 acres he says he inclosed."

The facts of possession, as shown in this case, are no stronger than those just quoted from the opinion in *Le Moyne v. Roundtree*. After reviewing the cases upon the question, the court laid down the following rule to be applied to all cases of this character: "We have never held that a mere trespasser could obtain a possessory title unless he claimed to a well-marked or well-defined boundary. His possession must be such as gives the world, and especially those in interest, notice of the extent of his claim; and then, if the owner stands by and allows the trespasser to occupy and claim his property for the full term of 15 years, he loses it, and the trespasser, under the statute, obtains title to the extent of his possession. The appellee had no such possession as is necessary to the acquisition of title by prescription, and what he did upon appellant's land, according to his own testimony, did not give notice of his adverse holding, except to the few acres he inclosed. A wrongdoer cannot acquire title to another's land by occupancy without giving notice for 15 years of what he is doing and claiming." Under the facts as above stated, the court held that Roundtree's possession was not adverse beyond the few acres which he had actually cleared and cultivated. The same result must follow here. We think this rule of law is both applicable and controlling to the facts of this case.

E. K. Dority is not claiming under any title of record. He obtained a deed from Mrs. Bryant to the 100 acres which he now occupies, and the parol evidence in connection with his contract with Van Winkle and the note subsequently given thereunder to Mrs. Bryant shows that he obtained only the surface right to the 100 acres of land which he now occupies, and which does not overlap the land in controversy. But he does not even rely upon that title; he rests simply upon his possession. We are of opinion that he did not make out such a case of possession that warranted the court in submitting his claim to the jury. His actual adverse possession, as above defined, was limited to the 20 acres which he had fenced and cultivated on the northern end of the tract, and which in no way touched, or interfered with, the 145-acre tract, or the 36½-acre tract to the south of him, and which is now in controversy here. When his father bought the 145 acres from Mrs. Bryant in 1899, E. K. Dority not only followed the surveyors and helped run the lines, but he afterwards knew all about his father giving a part of that

tract to Mrs. Slaven, and his building a house for her and her family thereon. And when E. K. Dority bought his 100 acres in 1900 from Mrs. Bryant, who held the legal title, it is perfectly clear that he intended to confine his claim to the boundary therein set forth. His failure to produce that deed strongly corroborates the claim of appellants that the deed is in strict conformity with the Van Winkle contract and the Bryant note, and that they correctly show the extent of his claim and the character of his title.

We are of opinion that the circuit judge should have sustained appellants' motion for a peremptory instruction to find for them, and that the judgment in favor of appellee should be reversed. It is so ordered, with instructions to take further proceedings consistent with this opinion.

CHESAPEAKE & O. RY. CO. v. STEIN.

(Court of Appeals of Kentucky. March 2, 1911.)

1. EMINENT DOMAIN (§ 141*)—RAILROAD'S USE OF STREET—ABUTTER'S MEASURE OF DAMAGE.

An abutter's measure of damage for permanent railroad improvements placed in a street—such as elevated tracks, switches, signal blocks, etc.—is the resulting depreciation in the market value of the property, and, for the company's temporary failure to plank and pave the street as required by ordinance, the depreciation in the rental value if his property is rented, or the damage to its use and occupation if occupied by him.

[Ed. Note.—For other cases, see *Eminent Domain*, Cent. Dig. §§ 372-376; Dec. Dig. § 141.*]

2. TRIAL (§ 208*)—RECEPTION OF EVIDENCE—INSTRUCTIONS TO DISREGARD.

The trial judge, on discovering his error in ruling as to the measure of an abutter's damage for use of a street of defendant railroad company, properly instructed the jury to disregard the evidence on the question of damages and permitted re-examination of the witnesses on the correct theory.

[Ed. Note.—For other cases, see *Trial*, Cent. Dig. § 504; Dec. Dig. § 208.*]

3. TRIAL (§ 18*)—RECEPTION OF EVIDENCE.

The conduct of a trial within reasonable limits, especially in receiving evidence, lies within the sound discretion of the trial judge.

[Ed. Note.—For other cases, see *Trial*, Cent. Dig. § 37; Dec. Dig. § 18.*]

4. APPEAL AND ERROR (§ 1050*)—REVIEW—HARMLESS ERROR—EVIDENCE.

Any error in fixing a date as a basis for ascertaining the depreciation in value of property caused by railroad improvements in an abutting street was harmless, where it does not appear that there was any difference in market value between that date and when the improvements were commenced.

[Ed. Note.—For other cases, see *Appeal and Error*, Dec. Dig. § 1050.*]

5. EMINENT DOMAIN (§ 141*)—USE OF STREETS BY RAILROADS—MEASURE OF ABUTTER'S DAMAGE.

An abutter's damage through railroad improvements in a street is the difference be-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes 134 S.W.—74

tween the value of his property immediately before the improvements were announced and after they were made.

[Ed. Note.—For other cases, see Eminent Domain, Cent. Dig. §§ 372-376; Dec. Dig. § 141.*]

6. EMINENT DOMAIN (§ 206*)—USE OF STREETS BY RAILROAD—RIGHTS OF ABUTTERS.

An abutter's damage resulting from a railroad company's failure to comply with an ordinance requiring planking and paving of a street is of a continuing nature, giving him successive causes of action against the company.

[Ed. Note.—For other cases, see Eminent Domain, Dec. Dig. § 266.*]

7. APPEAL AND ERROR (§ 171*)—REVIEW—THEORY ADOPTED BELOW.

Where the nature of damage sued for is doubtful on the pleadings, as to being permanent or temporary, the parties' treatment of the matter on the trial will not be disturbed on appeal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1053-1069, 1161-1165; Dec. Dig. § 171.*]

8. EMINENT DOMAIN (§ 106*) — STREETS — RIGHTS OF ABUTTERS.

An abutter has a right of action for interference with his ingress and egress caused by a railroad company's noncompliance with an ordinance or maintenance of a nuisance in using a street.

[Ed. Note.—For other cases, see Eminent Domain, Cent. Dig. §§ 282-289; Dec. Dig. § 106.*]

9. EMINENT DOMAIN (§ 300*)—STREETS—USE BY RAILROADS—OBSTRUCTION OF ABUTTER'S INGRESS—EVIDENCE—WEIGHT.

Evidence held to show that an abutter's ingress and egress were obstructed by defendant railway company's failure to plank and pave a street as required by an ordinance.

[Ed. Note.—For other cases, see Eminent Domain, Dec. Dig. § 300.*]

10. APPEAL AND ERROR (§ 1070*)—HARMLESS ERROR—COMPUTATION OF DAMAGE.

Error in permitting recovery for continuing damage up to the date of trial, instead of the date when the amended petition was filed, was harmless, since any future recovery will run from the later date.

[Ed. Note.—For other cases, see Appeal and Error, Dec. Dig. § 1070.*]

11. APPEAL AND ERROR (§ 1057*) — PRODUCTION OF BOOKS—HARMLESS ERROR.

It was not error to refuse to require production of books when all necessary information was deduced on examination of witnesses.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4194-4199; Dec. Dig. § 1057.*]

Appeal from Circuit Court, Lewis County.

Action by A. J. Stein against the Chesapeake & Ohio Railway Company. From a judgment for plaintiff, defendant appeals. Affirmed.

Worthington, Cochran & Browning, for appellant. Dinkle & Prichard, W. C. Halbert, and Samuel J. Pugh, for appellee.

CARROLL, J. This is the second appeal of this case. The opinion on the former appeal may be found in 132 Ky. 322, 116 S. W. 733. The facts are so fully stated in that opinion that it seems unnecessary to repeat them here. Upon a return of the case, a retrial was had, and a verdict returned in favor

of the appellee for \$2,135. From the judgment upon the verdict this appeal is prosecuted.

Appellee's cause of action for damages on account of the depreciation in the value of his property was based upon the fact that the appellant had raised its railroad tracks in the street in front of his property, and placed a number of switches and signal blocks in the street, and failed to plank and pave it as provided for in an ordinance set out in the former opinion. There was conflict in the testimony concerning the elevation of the grade of the tracks; but it is virtually admitted that the additional obstructions, such as switches and signal blocks, were from time to time placed in the street, and that there had not been a compliance with the ordinance requiring the street to be planked and paved. The elevation of the tracks and the construction of the switches and signal blocks were permanent improvements or structures; but the failure to plank and pave the street was a temporary omission of duty. In other words, the tracks, switches, and signal blocks were placed in the condition complained of by the appellee with the intention upon the part of the railway company that they should remain in that condition; while the planking and paving of the street could be done at any time. The rule established in this state as to the measure of damages that an adjacent or abutting property owner is entitled to in cases like this differs when the improvement or structure is permanent and when it is temporary. It was thus stated in *Fidelity Trust Company v. Shelbyville Water & Light Company*, 110 S. W. 239, 33 Ky. Law Rep. 202: "Where the improvement that produces the injury or nuisance complained of is permanent, the measure of damage is the depreciation in the market value of the property. In this class of cases limitation begins to run from the completion of the improvement or structure, whatever it may be, that causes the injury, and the action is barred in five years from that time, and all damages for past, present, or future injury must be recovered in one action. If, however, the improvement is temporary in its character, and such a one as that it may be readily remedied, removed, or abated, the measure of damage is the depreciation in the rental value of the property, if it be rented out, or, if it is occupied by the owner, the damage to its use and occupation; and in this class of cases successive actions may be brought for damages caused by a continuance of the injury or nuisance." According to this rule the measure of damage the appellee was entitled to recover on account of the elevation of the tracks, the construction of the switches, and the erection of the signal blocks was the depreciation in the market value of his property caused by these structures or improvements; while the measure of his damage for the failure of the appel-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

lant to do the planking and paving required by the ordinance was the depreciation in the rental value of his property, if it was rented out, or the damage to its use and occupation, if it was occupied by him.

But it appears that upon the trial the judge ruled that the three classes of wrongdoing by the appellant company were permanent injuries to the property of the appellee, and accordingly the witnesses were asked to state the damage done to the market value of the property by the doing and the failure to do these things; the court not making any distinction between the elevation of the grade, the construction of the switches, the erection of the signal blocks, and the failure to plank and pave the street. But, at the conclusion of the evidence, when the attention of the court was called to the Shelbyville Water & Light Company Case, and others laying down a similar doctrine, he correctly concluded that the measure of damages he had previously ruled plaintiff was entitled to and that the witnesses had been inquired about was erroneous; and thereupon counsel for appellee, who had been misled by the ruling of the judge, moved the court at the conclusion of the testimony, and before the case was submitted to the jury, to allow him to introduce evidence as to the damage to the use and rental value of the property for the period covered by the pleadings and to prove the acts of the defendant complained of in failing to plank and pave the street.

To this motion the appellant objected; but the court overruled the objection, and after instructing the jury not to consider the testimony of the witnesses or any of them who testified to the damage or quantity of damage sustained by the appellee from the elevation of the tracks, and the construction of the switches and signal blocks, or the failure of the defendant to plank or pave the street, permitted the appellee, over the objection of the appellant, to reintroduce and re-examine the witnesses who had previously testified upon these points. And upon this re-examination these witnesses were asked to state the decreased rental value of the property owned by the appellee that was rented out and the injury to the use and occupation of that occupied by him caused by the fact that the street was not planked or paved; as well as to state the depreciation in the market value of his property by reason of the elevation of the tracks and the construction of the switches and signal blocks. In short, on the re-examination of the witnesses they were asked such questions as were competent to illustrate the damage appellee had sustained by the acts and omissions of the appellant. We are unable to see how this course of conduct prejudiced the rights of the appellant. The court had fallen into an error in permitting witnesses to be examined along a certain line and, when his attention was called to the mistake, he promptly corrected it, and

instructed the jury, not only at the time, but in the instructions given to them when the evidence was all in, not to regard at all the testimony that had been excluded. The testimony excluded, and the testimony the witnesses afterwards gave, only differed in the particular that the excluded evidence was confined entirely to the depreciation in the market value of the property, while in the re-examination the witnesses were asked to state the depreciation in the market value of the property by the improvements made and the depreciation in the rental value and use by the failure to make others.

It frequently happens in the trial of cases that questions are asked, and a line of examination pursued, with the approval of the court, and afterwards during the trial the evidence is excluded, and other questions and other lines of examination are permitted in place of that excluded; but, unless it affirmatively appears that the substantial rights of the complaining party have been prejudiced by the rulings, we would not interfere upon this ground with the finding of the jury. The conduct of the trial within reasonable limits, especially in the admission and exclusion of evidence, is and should be left to the sound discretion of the trial judge, and, unless it satisfactorily appears that this discretion has been abused, this court will not interfere with the rulings of the trial court.

It is next objected that the court, in the instruction fixing the measure of damage that appellee was entitled to on account of the depreciation in the market value of his property, erred in naming May, 1899, as the date when it became generally known that the permanent improvements complained of would be made, and thereby authorized the jury to find that the injury to appellee was the difference in the value of the property at that time and after the improvements were made. It is said it should have been left to the jury to fix the date. But there is little merit in this contention. The court was doubtless induced to fix May, 1899, as that was five years before the suit was filed, and as far back as a recovery could be had, and because the evidence showed that the improvements were begun shortly after May, 1899. But, aside from this, the fact that the court fixed this date did not in the least prejudice the rights of the appellant, as it does not appear that there was any difference in the market value of appellee's property between May, 1899, and the time when the improvements were commenced. It was the fact that the improvements were put in the street that depreciated the value of his property, and it was the difference between the value of his property before these improvements were made, or, to be more accurate, immediately before it was known they would be made, and after they were made, that constituted the measure of his damage.

It is further said that so much of instruction No. 3 as relates to the measure of appellee's damages on account of the failure to plank and pave Third street was erroneous. The form of the instruction is unobjectionable. But it is said that, as appellee only sought to recover for the permanent injury done to his property, there should have been no recovery for damages of a temporary nature such as the failure to plank and pave the street. In the former opinion the court said that abutting owners had a cause of action against the company for its failure to observe the requirements of the ordinance under which it occupied Third street. The ordinance provided that "all that portion of Third street lying between alley No. 1 and alley No. 4 shall by said company be filled and graded to conform, to the grade of said street and planked or paved the entire width of the street." It is obvious that the failure to plank and pave the street was only a temporary violation of the ordinance—however long it may have continued. The failure to comply with this requirement in the ordinance was merely an omission to do a thing that could easily have been done at any time. If appellee sustained damage by the failure to make this improvement, the damages were of such a character as that the company could at any time relieve itself from the burden by making the improvement. The damage in this respect is of a continuing nature, and appellee may have successive causes of action against the company on account of it. It is an injury, not to the market value of his property, but to the rental value of it or the use and occupation of it, as the case may be. Nor do we agree with counsel that the damage for this particular injury was not sought in the petition. The pleading is full enough to and does embrace every character of injury that the appellee sustained by acts of omission and commission on the part of the company. It often happens in cases like this that it is difficult to determine with reasonable certainty whether the acts complained of are permanent or temporary in their nature, and when there is doubt upon this question we have adopted the rule of leaving it to the parties to the litigation to determine by the character of suit they bring and the proceedings thereunder whether or not the thing complained of shall be treated as permanent or temporary. In other words, where the nature of the improvement is in doubt, and the parties treat it as permanent, we will not interfere with their conclusion; and so, if they treat it as temporary. *City of Madisonville v. Hardman*, 92 S. W. 930, 29 Ky. Law Rep. 253; *Board of Park Com. v. Donahue*, 140 Ky. 502, 131 S. W. 285; *Louisville & Nashville R. R. Co. v. Whitsell*, 125 Ky. 433, 101 S. W. 334, 31 Ky. Law Rep. 76.

The next error assigned is that the court erred in admitting evidence and allowing a

recovery for damages that resulted to appellee's residence and tannery property from the failure to plank and pave the street. The property occupied by appellee as a residence, and also his tannery property, is located immediately west of alley No. 1, and not between alley No. 1 and alley No. 4; and, as the ordinance only provides for the planking and paving of Third street between alleys Nos. 1 and 4, it is said that the company was under no obligation to pave Third street in front of appellee's residence or tannery property, and hence there could be no recovery on account of the depreciation in the rental value or use of property not situated between these alleys. The witnesses for appellee were asked: "To what extent, if any, has the value and use and occupation of that part of Mr. Stein's property occupied and used by him been diminished by the failure of the defendant to plank or pave Third street between alleys Nos. 1 and 4, and keep the same in repair since 1899?" In the instructions the jury were authorized to assess damages in favor of appellee for injury to his property by the failure to plank and pave the street between alleys Nos. 1 and 4, although the property thus injured may not have abutted on the street between these alleys. It appears, however, from the evidence that appellee's means of ingress and egress to and from the property immediately west of alley No. 1 is at the point where this alley intersects the street, and therefore the failure to pave and plank the street as specified in the ordinance was a direct injury to his property immediately west of the alley. We do not understand the former opinion to limit the appellee's right of recovery to the damage to his property that abutted on the street between these alleys, or to hold that appellee's right of recovery was confined exclusively to the violation of the ordinance. If by the failure to observe this ordinance or by the creation of a nuisance the ingress and egress of abutting property owners to and from their premises to Third street was interfered with or obstructed, a right of action accrued. In the former opinion the court said: "The lot owners owned an easement in the street fronting their property different from and in addition to the rights of the general public. It was that of reasonable ingress and egress to and from their lots from that street, not only upon foot, but by vehicles. It was also to have the street maintained as a street for the use of their properties. The city was without power to cede the street to a railroad company for its exclusive use even if it had attempted to do so. * * * Independent of the condition imposed in the ordinance containing the grant, the railroad company must so use its right as not to unreasonably interfere with the property rights of the owners of the abutting lots." We therefore conclude that as the evidence showed that appellee's

ingress and egress to and from Third street to his residence and tannery was obstructed and interfered with by the failure to plank and pave the street, although his property did not immediately abut on the street between these alleys, he was yet entitled to recover the damage, whatever it might be.

It is next insisted that the recovery on account of the failure to pave and plank the street should have been limited to the damages sustained by appellee prior to January, 1907, when the last-amended petition asserting these damages was filed. But the court in instructing the jury authorized them to award damages for the temporary injury without directing them up to what time they might estimate these damages. We do not think that the failure of the court to limit the recovery on account of this class of damages to January, 1907, was prejudicial to appellant. Under the instructions and the evidence, the jury had the right to, and doubtless did, consider all the damage that appellee had sustained up to the time of the trial, and, while technically it would have been more appropriate for appellee to have filed an amended pleading asking damages to the date of the trial, his failure to do so was not hurtful. If the court had confined the damages the jury might award to those

that accrued prior to January, 1907, then the appellee would have another cause of action for the damages accruing between January, 1907, and the date of the trial. But, as it is, if he brings another suit to recover damages on account of the failure to plank or pave this street, it can only be for the recovery of such damages as have accrued since this trial was had. Viewed in this light, which we think the proper one, it is manifest that no error prejudicial to the substantial rights of appellant was committed by the failure of the court to limit appellee's right of recovery to the damage accruing prior to January, 1907.

It is also suggested that the court erred in refusing to require appellee to produce his books and papers showing the amount and cost of the improvements placed upon his property and the amount of rents received from the property. But all the information necessary to an intelligent understanding of these features of the case was brought out on the examination of appellee and other witnesses; and we do not think that the court committed error in refusing this request.

After a careful consideration of the entire record, we conclude that appellant had a fair trial, and the judgment is affirmed.

COFFEE v. CHICAGO, R. I. & G. RY. CO.
(Supreme Court of Texas. Feb. 22, 1911.)
RAILROADS (§ 351*)—CROSSING ACCIDENTS—
CONTRIBUTORY NEGLIGENCE—INSTRUCTION
TO JURY.

In an action for injuries at a railroad crossing, where the only issue submitted was the failure of defendant to sound the statutory warning, and the court instructed that such failure entitled plaintiff to recover, if he was without fault which contributed to his injury, and, at defendant's request, also instructed that if plaintiff did not look and listen, and a person of ordinary care would have done so, and if he had looked and listened he would have seen the approaching train, the defendant would not be liable, the charge as a whole presented both phases of the issue and was consistent.

[Ed. Note.—For other cases, see *Railroads*, Cent. Dig. §§ 1193-1215; Dec. Dig. § 351.*]

Error to Court of Civil Appeals of Second Supreme Judicial District.

Action by J. C. Coffee against the Chicago, Rock Island & Gulf Railway Company. From the judgment of the Court of Civil Appeals (126 S. W. 638), reversing a judgment of the district court for plaintiff, plaintiff brings error. Reversed, and judgment of district court affirmed.

R. E. Carswell, Stephens & Miller, and Robt. Carswell, for plaintiff in error. N. H. Lassiter, T. J. McMurray, and Robt. Harrison, for defendant in error.

BROWN, C. J. From the opinion of the Court of Civil Appeals (126 S. W. 638) we extract this statement:

"While J. C. Coffee was driving a team of mules attached to a wagon, he was struck and injured, his mules killed, and his wagon destroyed by one of the trains of the Chicago, Rock Island & Gulf Railway Company at a point where the public road on which he was traveling crossed the track of the railway company. He sued the company for damages resulting to him from the accident, and from a judgment in his favor for \$5,000 the defendant has appealed.

"The alleged failure of the railway company to sound the statutory warnings of the approach of the train to the crossing was the only issue of negligence submitted by the court in the charge given the jury as a basis for plaintiff's recovery. Several assignments of error are addressed to the following instruction, given by the court in his charge to the jury: 'If you find and believe from a preponderance of the evidence that the plaintiff was crossing the track of the defendant's railway at a public crossing with his mule team and wagon, and if you believe that, when the plaintiff was on the defendant's track upon said public crossing, the team of the plaintiff which he was driving to his wagon was struck by one of the defendant's engines on its said track and killed, and the wagon destroyed, and that plaintiff was, by reason of his team being

so struck, thrown from his wagon, and was thereby hurt and injured as charged in his petition, without fault or negligence on the part of the plaintiff that caused or proximately contributed to the plaintiff's injuries, and if you believe that the agents and employes of the defendant operating said engine and train failed to blow the whistle at a distance of at least 80 rods from said crossing, and to ring the bell at said distance from said crossing, and to keep the said bell ringing until said crossing was reached, and if you believe that by reason of the failure to so blow the whistle and ring the bell plaintiff drove upon the track, and his team was struck and killed, and his wagon destroyed, and the plaintiff hurt, the plaintiff would be entitled to recover."

The charge copied above did not submit to the jury the question whether the fact of the plaintiff's being upon the track contributed to his injury, but required the jury to find that the plaintiff was "without fault which contributed to his injury" before they could find a verdict in his favor. He might have been at fault in not looking and listening, or in other respects, whereby he would have been defeated. In *Parks v. San Antonio*, 100 Tex. 225, 94 S. W. 332, 98 S. W. 1100, this court, speaking through Mr. Justice Williams, stated very clearly the proper test for such charges: "To illustrate, there being nothing in the charge given affirmatively authorizing the jury to return a verdict for plaintiff, although he may have been negligent, if his negligence did not contribute to his damage, a further instruction that the uncontroverted evidence showed that, if he had done the act charged against him, it did so contribute, and that, therefore, if they should find that he did the act, and that it was negligent, they should sustain the defense, would have been substantially consistent with all the other instructions, and would have made the charge as full as the defendant claims it should have been. This proves that that which is complained of was a mere omission; for, if it were a wrong statement of the law, a correct statement of it would introduce a conflict. In the other class of cases, since the charges required the jury to find whether or not the negligence of the plaintiff contributed to his injuries, and to decide in favor of the plaintiff if such was not found to be the fact, a further instruction, such as we have supposed, as to the effect of the uncontroverted evidence, would have been in conflict with the directions already given. This seems to us to be the fair way in which to determine the question whether or not the charge has merely omitted a proper instruction, or has given a positive misdirection, and the dependent question whether or not it was the duty of the party to request further instructions."

That test is presented by the following

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

charge, which was requested by the defendant and given by the court: "The defendant requests the court to charge the jury that if they find from the evidence in this case that the plaintiff was struck by one of defendant's engines and injured, but you also find that before he drove upon the track he did not look or listen to see the approach of any train that might be approaching, and that he was guilty of negligence in not looking and listening for the approach of the train, and that a person of ordinary care would have looked or listened before going upon said track, and that he was thereby injured, and that if he had looked or listened before he drove upon the track he would have discovered the approach of the train in time to have escaped injury, you will find for defendant railway company." Reading in connection the charges given, both phases of the issue are presented, and the charge, as a whole, is consistent.

The writer is unable to better state the distinction between this case and *Texas & Pacific Railway Co. v. McCoy*, 90 Tex. 264, 38 S. W. 36, and others of that class, than is done in *Parks v. San Antonio*, cited above, in this language: "In each of the three first-named cases the charge, in effect, directed the jury to make inquiry as to the existence of the fact which the evidence conclusively established, and told them that if they found that it did not exist the plaintiff would not be defeated by his own negligence; in other words, the jury were told that, although the plaintiff may have done the thing charged against him as negligent, and although it may have been negligent, he could still recover, if it did not proximately contribute to his injury, when the patent fact was that it did contribute. This is what the court held to constitute affirmative error, because it, in effect, informed the jury that the fact was in issue, when it was not, and authorized them to find for the plaintiff in opposition to the uncontroverted evidence."

We take jurisdiction in this case because of conflict with *Railway Company v. Campbell*, 45 Tex. Civ. App. 231, 100 S. W. 170. The Court of Civil Appeals erred in holding that the trial court erred in giving the charge first above set out and in reversing the judgment of the district court.

It is therefore ordered that the judgment of the Court of Civil Appeals be reversed, and that the judgment of the district court be affirmed.

ANDERSON v. ST. LOUIS SOUTHWESTERN RY. CO. OF TEXAS.

(Supreme Court of Texas. March 1, 1911.)

1. MASTER AND SERVANT (§ 236*)—INJURIES TO SERVANT—ACTION—JURY QUESTION.

Testimony by a fence gang foreman in an action for injuries sustained in running a hand

car through an open switch that he does not believe there was a target on the switch, but that he did not look for or think of one in approaching it, was not sufficient to raise an issue as to the absence of the target, where there was uncontradicted testimony that there was a target on the switch.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. § 1021; Dec. Dig. § 286.*]

2. MASTER AND SERVANT (§ 235*)—INJURIES TO SERVANT—CONTRIBUTORY NEGLIGENCE—RAILROAD EMPLOYÉ.

Where plaintiff, a fence gang foreman, after going out of defendant's yards on a hand car, returned on the same track after a train had passed leaving a switch open, and ran into the open switch and was injured, he was negligent in failing to look out for the open switch in order to protect the men under him and the company's property as he was bound to do, and could not recover.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. § 710; Dec. Dig. § 235.*]

3. MASTER AND SERVANT (§ 231*)—INJURIES—CONTRIBUTORY NEGLIGENCE.

An employé may assume that his employer has properly performed his duties, and is not guilty of contributory negligence, unless he knows or ought to have known by the exercise of ordinary care that he is endangered from the employer's failure to perform his duties.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. §§ 675-677; Dec. Dig. § 231.*]

4. MASTER AND SERVANT (§ 227*)—INJURIES—CONTRIBUTORY NEGLIGENCE.

An employer is not responsible for injuries received by an employé which he would not have sustained but for his own negligence.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. § 668; Dec. Dig. § 227.*]

5. MASTER AND SERVANT (§ 235*)—INJURIES—CONTRIBUTORY NEGLIGENCE—RAILROAD EMPLOYÉ.

While a fence gang foreman in charge of a hand car need only use ordinary care commensurate with the dangers of operating the hand car in yards, the nature of the situation requires him to keep a lookout for open switches so far as he can do so consistent with his other duties while directing the operation of the car, in analogy to the duty of an engineer to keep such a lookout as is consistent with the performance of his other duties.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. § 710; Dec. Dig. § 235.*]

Error to Court of Civil Appeals, Sixth Supreme Judicial District.

Action by T. J. Anderson against the St. Louis Southwestern Railway Company of Texas. From a judgment of the Court of Civil Appeals (124 S. W. 1002) reversing a judgment for plaintiff and rendering judgment for defendant, plaintiff brings error. Affirmed.

B. Q. Evans, J. P. Copeland, and L. E. Keeney, for plaintiff in error. Glass, Estes King & Buford, E. B. Perkins, and D. Upthegrove, for defendant in error.

WILLIAMS, J. A judgment of the district court in favor of plaintiff in error against the defendant in error for damages for personal injuries sustained by him in its service was reversed by the Court of Civil

Appeals (124 S. W. 1002) and final judgment was rendered in favor of defendant, for two reasons: (1) That there was no evidence of negligence on the part of the defendant; and (2) that the evidence conclusively showed negligence of plaintiff which contributed to his injuries. Of course, one of these propositions must be true to sustain the rendition of final judgment.

The plaintiff was foreman of a fencing gang in the service of the defendant, and, with the men under his control, traveled over the road on a hand car as occasion required. Being in North Ft. Worth, he was directed by the roadmaster to go to Hodge, a point some miles out, to aid in repairing a part of the road which had been washed out. In going out on his hand car he passed over the main track of the defendant in its yards in North Ft. Worth, and by the switch at which later he was hurt. After he went north, other employes passed through this switch with an engine from the main track onto a siding leading to the packery, where they were to take charge of a train load of meat to be transported over the road to its destination. Expecting soon to return to the main track, they left the switch open, and this condition continued for several hours on account of their being unexpectedly detained. In the interval plaintiff, with his men returned south on the hand car, and ran into the open switch, and this caused the injuries to plaintiff on which this action is based. The main track referred to was that in the yards, and not the main line over which the freight and passenger traffic was carried on, and it was the contention of the defendant that the leaving of the switch open at that place was entirely proper and in accordance with its rules and customs known to its employes. We shall assume, however, that under all the evidence this was a question for the jury to decide, and shall confine ourselves to the other contention that plaintiff, by his own negligence, was partly responsible for the occurrence in which he was hurt.

While, as stated, he was foreman of a gang whose employment was to put up fences and was called on this occasion to do other work, he had had some years previous experience in other branches of railroad service, was familiar with the running of hand cars over tracks and switches, and knew of the location of the switch in question. The car and the men were under his control and protection, and the duty of keeping a lookout for obstacles to the safe running of the car was his. His position was by a brake with which the car could be stopped, and which it was his duty to apply when occasion arose. On this occasion, he stood there, looking ahead for street crossings, for people who might be in danger, and for obstructions. At the switch was the usual target standing seven or eight feet above, and four or five feet to the right of,

the track, plainly indicating the condition of the switch. It was visible for at least 100 yards to the north. The plaintiff says that he does not believe there was a target on this switch, but admits that he did not look for or think about one, and this, in our opinion, is wholly insufficient to raise an issue with other uncontradicted testimony to the fact of its presence. The condition of the rails themselves could have been seen for at least 40 feet, and the car, which was being moved slowly and carefully, could have been stopped by plaintiff in 30 feet at most. About 100 yards north of the switch was the crossing of another railroad where there was an interlocker at which the car had to be stopped, and over which it had to be lifted by the men. Neither from this point nor from any other did the plaintiff look to see the condition of the switch target or of the rails. These facts are stated from plaintiff's own testimony. He says that his view along the right of way was obstructed by one of the men on the car standing in front of him, but admits that he could have seen the target, if there, and the condition of the rails at the distances mentioned, if his attention had not been diverted from them in the manner to be stated. Besides, considering his duty of keeping a lookout resulting from the nature of the position which he held, it could hardly be admitted as an excuse, if he permitted his view to be thus obstructed so as to prevent the proper discharge of that duty. He stated that the rules and practice were to keep the switches properly set and locked for the main line, unless a man were stationed at any which might be open to give warning, and that, seeing no man, he relied on this, and did not look at the target or rails, having passed that morning over a number of switches without harm. His chief explanation, however, is that his attention was distracted by a train which stood at the North Ft. Worth depot with its rear towards him. He first noticed it when at the interlocker, about 400 yards from it. The distance between the interlocker and the switch was, as we have seen, about 100 yards. Between the switch and the train were three bridges, 160, 60, and 30 yards long, respectively, and plaintiff did not know but that the train might move back towards him to take a siding in order to let some other train pass, and that he might, unless careful, be caught on one of the bridges where he could not get his car out of the way. Hence he caused the car to be moved slowly and carefully, watching the train, and being unable at that distance to see whether it was in motion or not. But he admits that it would only have required a "flash of the eye" towards the switch to have seen its condition; indeed, it is perfectly evident that both rails and target were easily within the range of his vision as he looked at the train, and that his failure to see them was wholly the result of

inattention due to the causes stated. The conclusion cannot be avoided in any reasonable way that such inattention was in itself a failure to perform the duty which, in the place of his employer, he had undertaken to perform, by keeping a proper lookout for the safety of the men and the property under his protection, and that such failure constituted negligence.

This is not the ordinary case of an employé hurt through the neglect of the employer to discharge some of his duties with reference to the safety of the employé while doing his work, and to the performance of which it is no duty of the latter to see. Such an employé may assume without investigation that the employer has properly performed his duties, and is not chargeable with contributory negligence for merely pursuing his work on that assumption until he has learned, or it is so patent and obvious that he ought to have seen that a danger to him, which in common prudence he ought not to incur, has arisen from a dereliction of duty on the part of the employer. Here the master, if controlling in person the operation of the hand car as plaintiff was, would have been under the affirmative duty of keeping lookout for his employés relying on him for protection. That duty plaintiff assumed, and for any injury to the other employés resulting from his inattention to it the employer would be as fully responsible as if that inattention were his own. Can it be true that he is also responsible to the delinquent for an injury which but for his dereliction would have been prevented? We cannot admit such a proposition. It is true that the duty to keep the lookout is not the absolute duty to see and avoid the danger at all events and under all circumstances. It merely exacts ordinary care commensurate with the dangers and risks attending such operations; the lookout exacted for such things as open switches being such only as is consistent with the discharge of all the duties arising out of the situation. But the duty is an affirmative one to discover as far as the exercise of the requisite care will allow the dangers for the avoidance of which it is assumed. It is like that incumbent on locomotive engineers; due allowance being made for the greater dangers and difficulties which surround them. The engineer has to operate and control his engine, and this requires much of his care and attention, but at the same time he is required to keep as vigilant an outlook along the track as is consistent with the proper discharge of all his duties. His attention must at times be turned from objects in front of him, and his failure from such causes to see things which would otherwise be apparent to his observation is in no sense a failure of his duty. This is fully recognized in many authorities. *H. & T. C. R. Co. v. Sympkins*, 54 Tex. 615, 38 Am. Rep. 632; 5 Thompson on Neg. §§ 5461, 5473; *Labatt, Master & Servant*, §§

350, 351; *L. & N. Ry. Co. v. Hurt*, 101 Ala. 34, 13 South. 130; *Hall v. Chicago, etc., Ry. Co.*, 46 Minn. 439, 49 N. W. 239; *N. & W. R. R. Co. v. Williams*, 89 Va. 165, 15 S. E. 522; *I. C. Ry. Co. v. Guess*, 74 Miss. 170, 21 South. 50. But it will be seen that this is true, either because of some emergency which demands swift action, or because of the performance of some part of the duty which is inconsistent with the exercise at the same time of the vigilance along the track. If the watch can be kept consistently with the doing of everything else that duty demands, the mere inattention which prevents it can be properly considered nothing but negligence—negligence of a kind into which almost any one may occasionally lapse, for the most prudent persons are negligent at times—but negligence still, the consequences of which the person guilty of it has no right to visit on others.

We have assumed that a jury might find that the duties of other employés of the defendant required them to keep switches like that in question closed, and the contentions of counsel for plaintiff involve one that the plaintiff had the right to act on the assumption that this duty had been properly performed, and that this switch was closed. But what was the purpose for which the switch target and the lookout were required if it was not to enable those performing such duties as that which the plaintiff undertook to avoid the consequences of a neglect on the part of others? The same argument would apply to any other condition of the track, and would render nugatory those precautions and expedients by which disastrous consequences of the neglect of some are to be averted by the vigilance of others. Commonest experience has demonstrated that in matters involving so much it is often unsafe to rely on the perfect performance of duty on the part of one employé, and necessary to interpose successively the vigilance of several in order to insure the safety of the traveling public, or of other employés, and one who has undertaken such a duty, and, by an omission to perform it, brought injury upon himself, is not in a position to demand redress because others, too, have neglected their part in the scheme devised to avert danger. This contention is conclusively answered by the fact that the duty to keep a vigilant lookout required that plaintiff should not neglect to see as far as was practicable whether or not those whose business it was to keep the switch closed had done so. This he admits he could have seen, and did not see. There was no emergency and no inconsistent duty which prevented him from seeing. He had all the time he needed to see the switch and at the same time avoid the train. He was never for a moment after coming in seeing distance of the switch under any necessity which forbade or impeded his looking at it.

If one of the other men had been hurt and

this were a case in which the trial court had directed the jury that, even if there was no negligence in leaving the switch open, still the defendant would be responsible for the admitted neglect of its foreman under whose protection it had put the other employees to look out for the switch target, could the propriety of the instruction be seriously questioned? We think not; and certainly it will not do to hold the defendant liable to its employé for the same negligent omission that, when imputed to it, makes it liable to others.

The judgment of the Court of Civil Appeals is correct.

Affirmed.

BALDWIN v. HASKELL NAT. BANK.
(Supreme Court of Texas. Feb. 22, 1911.)

On motion for rehearing. Motion granted, and judgment rendered.

For former opinion, see 133 S. W. 864.

RAMSEY, J. In its motion for a rehearing, seasonably filed in this court, the defendant in error expressly remits "all amounts due it except the said principal sum of \$2,050, with 6 per cent. interest thereon from the 28th day of January, 1908, the date on which same was to have been paid, and does here now expressly waive its right to a submission of the issue of the question as to plaintiff in error having authorized the change in the note," and asks that its motion for rehearing be granted, and our judgment be reformed, so as to decree to it a recovery for the sum admitted to be due, with interest from the date, January 28, 1908, when under the testimony and contention of plaintiff in error such debt, we think interest, was to become due and payable. On such waiver and remittitur it logically follows that the motion should be granted and judgment so rendered.

It is therefore ordered that the motion for rehearing be and the same is hereby granted, and judgment is here rendered in favor of the Haskell National Bank against J. L. Baldwin for the sum of \$2,050, with 6 per cent. interest per annum from January 28, 1908. The costs of appeal to the Court of Civil Appeals and of this writ of error to this court are adjudged against the defendant in error, and all other costs are adjudged against plaintiff in error.

HART v. STATE.

(Court of Criminal Appeals of Texas. Feb. 8, 1911. On Motion for Rehearing, March 8, 1911.)

1. JUDGES (§ 19*)—DISQUALIFICATION—PLEAS—EVIDENCE.

A verified plea in limine alleging that a judge of a different district is threatening to

try the case, though the regular judge is not disqualified, and though the judge from the other district has not been appointed by the Governor to hold court, and though the lawyers practicing at the bar have not elected him to hold court, and though accused has not agreed to try the case before him, does not prove itself; but there must be evidence to sustain it, especially where the record contradicts the plea.

[Ed. Note.—For other cases, see Judges, Dec. Dig. § 19.*]

2. JUDGES (§ 29*)—QUALIFICATIONS—JUDGES OF OTHER DISTRICTS.

Under Rev. St. 1895, art. 1108, providing that any judge of the district court may hold court for any other district judge, the regular presiding judge of a district may vacate the bench, and the judge of another district may hold court for him.

[Ed. Note.—For other cases, see Judges, Cent. Dig. §§ 140-152; Dec. Dig. § 29.*]

3. CRIMINAL LAW (§ 595*)—CONTINUANCE—GROUNDS—SUFFICIENCY.

Where the evidence showed accused's guilt, the refusal to grant a continuance on the ground of the absence of his wife, who would testify to an alibi, was not erroneous.

[Ed. Note.—For other cases, see Criminal Law, Dec. Dig. § 595.*]

4. CRIMINAL LAW (§ 508*)—EVIDENCE—ADMISSIBILITY.

The testimony of a codefendant, testifying against defendant on trial, is properly received, and it is not error to refuse to strike it out.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1099-1123; Dec. Dig. § 508.*]

5. CRIMINAL LAW (§ 1090*)—RULINGS ON TESTIMONY—BILL OF EXCEPTIONS.

Where there is no bill of exceptions reserved to testimony complained of in the motion for new trial, the admissibility of the testimony is not reviewable on appeal.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 2816; Dec. Dig. § 1090.*]

On Motion for Rehearing.

6. CRIMINAL LAW (§ 595*)—CONTINUANCE—GROUNDS.

Where, on a trial for burglary, the evidence clearly connected accused with the offense, and showed his guilt and his effort to secure witnesses to testify in his favor, a continuance, on the ground of the absence of a witness who would testify to codefendant's threat to implicate accused in a penitentiary offense, was properly refused, because the testimony of the absent witness was immaterial.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1323-1327; Dec. Dig. § 595.*]

Appeal from District Court, Archer County; Jo. A. P. Dickson, Judge.

Mont Hart was convicted of burglary, and he appeals. Affirmed.

W. E. Forgy and Taylor, Jones & Humphrey, for appellant. C. E. Lane, Asst. Atty. Gen., for the State.

HARPER, J. The appellant was sentenced to a term of two years in the penitentiary from Archer county, charged with burglary.

The appellant complains in four assignments of error of the action of the trial court, the first of which is that the court erred in overruling defendant's plea in limine—the plea alleging that Hon. A. H. Car-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

rigan is the judge of the district in which Archer county is situate, and that he is not disqualified from trying the cause; that Hon. Jo. A. P. Dickson is judge of a different district, and he is threatening to try the cause on invitation of the regular presiding judge. The plea alleges that Hon. Jo. A. P. Dickson was not appointed by the Governor to hold court in Archer county, that he was not elected by the lawyers practicing at the bar to hold court in said county, and that appellant had not agreed to try said cause before said judge. The plea was sworn to by appellant, but no proof was introduced as to the truth of the allegations contained in the plea. A plea of this kind does not prove itself, but takes evidence to sustain it, and especially would this be true when the record contradicts the plea; the order reciting: "Monday, April 18, 1910. This day the honorable district court of Archer county was opened pursuant to adjournment, and Hon. A. H. Carrigan, district judge of the 30th judicial district, having by mutual arrangement and for reasons deemed expedient to them, exchanged districts for the time being with Hon. Jo. A. P. Dickson, district judge of the 50th district, the said Hon. Jo. A. P. Dickson was present and presiding." But even if Hon. Jo. A. P. Dickson had been holding merely upon the invitation of the regular presiding judge, who on account of sickness, for business or any other reasons, preferred to vacate the bench, if the adjoining judge was willing to hold court for him, our statutes authorized him to do so. Article 1108 of the Revised Statutes of 1895 reads: "Any judge of the district court may hold court for or with any other district judge." There was no error in overruling the plea.

The appellant's next contention is that the court erred in overruling his application for continuance. Waiving the question of diligence, we do not think the testimony desired from the witnesses Joe Nash and E. B. Weeks was material. All that it is claimed it is expected to prove by the witness Nash is that, prior to the burglary, Geo. Parrish, a witness for the state, had said he had it in for the defendant, and that he intended to implicate him in some trouble that would send him to the penitentiary. If the defendant, in connection with Geo. Parrish, did get implicated in a burglary, even if it was at the instance of Parrish, he would still be amenable to the law. By the witness E. B. Weeks it is stated that defendant expected to prove that he had caught the witness Parrish, in connection with another, near the store in which he was clerking, about 10 o'clock at night, and he asked them if they had not been going in the store and getting goods, and they answered no, but that appellant, Mont Hart, was stealing goods, and they were laying for him, and would turn him in if they caught him. Ad-

mit that all this is true, and that the witness Parrish was very bitter in his feelings, and anxious to do defendant all the harm he could, and send him to the penitentiary, if possible, in what way could it be evidence in this case? Eliminate the testimony of the witness Parrish, and what does the record show? Appellant went to a livery stable late in the night, and hired a buggy and horse. He and the witness Parrish were seen driving away from the stable in the buggy by the witness Oscar Johnson late at night, after it had rained some. The store was broken into that night. A buggy had been driven to the store, making a plain track after it had rained. Flour and bacon were stolen from the store. Early the next morning the sheriff and a number of citizens trailed the buggy tracks, and they led, first, to the house of Parrish, where a portion of the stolen goods were found. It then led to the rear of appellant's house, and in his house more of the stolen goods were found. In the record there is no explanation of his possession of these goods. The buggy was then trailed from appellant's residence to the livery stable. Upon inquiry it was learned that appellant had hired the buggy between 11 and 12 at night, and appellant had returned the buggy about daylight next morning, the night of the burglary, and had paid for the use of the buggy. In the buggy used that night was found grease signs and salt, and on the buggy springs a "right smart grease." The horse hired by defendant had a defect in one shoe. This was detected in the tracks of the horse drawing the buggy. In the absence of any explanation of appellant's possession of the stolen property, this is direct and positive testimony of defendant's guilt, outside of the testimony of the witness Parrish, and it would be immaterial what Parrish's state of feelings were toward appellant, or what statements he had made prior to the burglary.

The other witness named in the application was the wife of defendant, by whom he stated he expected to prove that he was at home from 11 o'clock that night until 4 next morning. The witness was in the town where the case was tried during the trial. It is true that in the application it is stated she was sick, and had been under the care of a physician for two or three days. No certificate or affidavit of any physician is attached to the application. No subpoena was ever issued for this witness, and no diligence shown. By the witnesses Oscar Johnson, Henry Hodges, and others appellant is shown not to have been at home, if their testimony is true, and in addition thereto it is shown by the witness Dickson and others, after his arrest, that appellant had come to them and asked them if they could not say that on Thursday night before the burglary they had seen the things found in his house in their place of business. They answered they

could not. In the light of all the testimony, there was no error in overruling the application for a continuance.

There was no error in refusing to strike out the testimony of the witness Parrish.

While there is complaint in the motion for a new trial to the admissibility of the testimony of the witnesses M. Lea, Ed. Goodwin, Charlie Martin, C. D. Williams, and N. N. Ewing, there are no bills of exception in the record reserved to this testimony, and in this condition we cannot pass on the question.

The judgment is affirmed.

On Motion for Rehearing.

In this case the judgment of the district court was affirmed at a former day of this term. Appellant has filed a motion for a rehearing, in which he complains that the court, in holding that the lower court did not err in overruling his application for a continuance, did not set out all that he stated he expected to prove by the witness Joe Nash, and that the court must not have considered the remainder.

Defendant stated he expected to prove by the witness Nash "that his codefendant, Geo. Parrish told him the said Joe Nash, in Archer City, Texas, some time during the month of March, 1910, in the pool hall, in Archer City, Texas, that he had it in for the defendant, Mont Hart, and that he intended to implicate him in some trouble that would send him to the penitentiary, and that when the said Parrish made this statement to the witness Joe Nash that the witness asked the said Parrish how he intended to get this defendant into trouble, and that the said Parrish told him that he could tell that this defendant was guilty of breaking into storehouses and stealing goods, and that he could get a party to help him leave some goods at the house of this defendant, and that when they were found the proof would be sufficient to convict this defendant, and that the people here in the town of Archer City would be ready and believe that the defendant had broken into some store and had stolen the goods that were found in his possession; that he can and will prove by the witness Joe Nash that he was on very intimate terms with the defendant Geo. Parrish at the time the said Parrish made this statement to him, and that the said Parrish at said time asked this said witness not to tell what he had said to him, nor to give away his scheme to catch this defendant."

Had there been any effort made on the trial of this cause to show that defendant had been imposed on, and that the stolen goods had been placed in his house without his knowledge, this testimony might have become material. But in the record there is no explanation of the defendant's possession of the stolen goods. On the other hand, the

record shows that defendant approached Midford Dickson and others, after his arrest, and tried to prevail on them to testify that the goods found at his house belonged to him and were in his possession prior to the night of the burglary. The testimony sought from this absent witness, in the condition the record is brought to us, could not have been material, and, taken in connection with the evidence on the trial of the cause, it is apparent the testimony would not be true. *Weathersby v. State*, 29 Tex. App. 278, 15 S. W. 823; *Carrer v. State*, 36 Tex. Cr. R. 552, 38 S. W. 183; *Koller v. State*, 36 Tex. Cr. R. 496, 38 S. W. 44.

Admit that the witness would testify that Parrish had made such statement to him: The record shows that the store was burglarized at night, that night defendant hired a buggy from a livery stable, defendant was seen to drive the buggy out of the stable, the buggy tracks were traced to the store burglarized, and from the store to defendant's residence, where a portion of the stolen goods were found. He carries the buggy back to the stable just before daylight. There are signs on the buggy showing the stolen goods had been hauled in it. Defendant tries to get witnesses to testify that he was in possession of the goods (found at his house) before the night of the burglary, and, failing in this, no explanation of his possession is found in the record. Upon a trial, there must be something shown whereby the testimony of an absent witness would be material. In this record there is nothing rendering this testimony material.

The motion for rehearing is overruled.

HARTFIELD v. STATE.

(Court of Criminal Appeals of Texas. Oct. 26, 1910. On Motion for Rehearing, March 8, 1911.)

1. CRIMINAL LAW (§ 1090*)—APPEAL AND ERROR—NECESSITY OF EXCEPTIONS—RULINGS AS TO CONTINUANCE.

Ruling on application for continuance cannot be reviewed, when not presented by a bill of exceptions.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 2812; Dec. Dig. § 1090.*]

2. HOMICIDE (§ 99*)—ASSAULT WITH INTENT TO KILL—DEFENSE OF PROPERTY.

Under Pen. Code 1895, art. 680, the law gives an owner no right to retake his stolen property by such means as would result in the loss of life or serious bodily injury.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. § 129; Dec. Dig. § 99.*]

3. HOMICIDE (§ 340*)—APPEAL AND ERROR—HARMLESS ERROR—INSTRUCTIONS.

At a trial for assault with intent to murder, where no one except the defendant and the person injured, who was a witness, were present at the assault, an instruction on the presumption arising from the use of a deadly weapon, which referred to the injured party as

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

"the deceased," while erroneous, is harmless, in view of the evidence.

[Ed. Note.—For other cases, see Homicide, Dec. Dig. § 340.*]

4. HOMICIDE (§ 90*)—ASSAULT WITH INTENT TO KILL—NATURE OF WEAPON—"DEADLY WEAPON."

A pistol, used as a firearm, is a "deadly weapon."

[Ed. Note.—For other cases, see Homicide, Cent. Dig. § 119; Dec. Dig. § 90.*]

For other definitions, see Words and Phrases, vol. 2, pp. 1853-1856; vol. 8, p. 7627.]

Appeal from District Court, Morris County; P. A. Turner, Judge.

Luke Hartfield was convicted of assault with intent to commit murder, and he appeals. Affirmed.

Jas. E. Stewart, for appellant. John A. Mobley, Asst. Atty. Gen., for the State.

RAMSEY, J. On the 9th of March of this year appellant was convicted in the district court of Morris county on a charge of assault with intent to murder, and his punishment assessed at confinement in the penitentiary for a period of two years.

There are no bills of exception in the record, and in this condition of same there are matters urged as grounds for reversal which we cannot review. Among other things, an application for continuance was made in the court below; but the action of the court touching this matter is not preserved by any bill. All the matters which can in any possible event form the basis of reversal are contained in the motion for new trial, and to intelligently pass on these matters some brief statement of the case will be necessary.

It was shown by the testimony of Charlie Heath, the assaulted party, and several other witnesses, that on the day in question he and appellant had been playing cards; that in the morning on the day in question the fortunes of the play had gone against Heath, but in the afternoon he had succeeded in winning all the money that appellant had; that, being so relieved of his available funds, appellant wanted Heath to give him a "dollar sight," which request was refused by Heath, who stated he would give him a "four-blits sight"; that they were betting a dollar a game; that thereupon he (Heath) got up and walked away, when appellant ran after him and said he was going to have a dollar; that thereupon he pulled out his pocketbook and said, "I will give you a dollar," when appellant said, "I don't want a dollar; I want two dollars;" that about this time he drew a pistol from his pocket, and presented it to witness in a hostile attitude; that he (Heath) then sat down on the ground in front of appellant and commenced talking to him, and said, "I will give you a two-dollar sight if you want to play," and appellant said, "No, fling it all from you; if you don't, I will kill you this very

evening," to which he replied he would not throw it all from him, and as he started to get up appellant shot him in the head; that when shot he grabbed appellant and threw him, but he struck him twice with the pistol before he could throw him; that he called others near by to come to his assistance; that he was getting weak from the loss of blood; and that he then got up and went off. This is substantially corroborated by the testimony of several other witnesses.

Appellant in his own behalf gave quite a different account of the transaction, and testified, in substance, that on the day in question he was at work sawing wood, when Heath came to him alone and tried to get a game with him, which appellant refused, saying he did not gamble; that he finally walked up to his jumper and took his money out of it, some \$25; that his jumper was hanging up on a bush not far from his work; that he then walked up to Heath and asked him for his money, who replied that he would not give it to him, at the same time pulling out a knife; that he said to him he was not going to give him anything unless he would gamble with him; that he again walked up to Heath and begged him to give him his money, which he would not do, but pulled out his knife; that he walked up to him, and tried to get his jumper and money, which Heath would not let him have; that after he would not give him his jumper and money. Heath pulled his knife, and came at him, and cut his clothing; that he then jumped back and got out of his way, and jumped back to where he got his pistol and shot at Heath; that he did not know whether he hit him or not; that he shot at him, because he was cutting him, and had his money, and would not give it to him; that during all this time no one was present.

1. Counsel for appellant claim that there was error in the ruling of the court, in that the court should have submitted the law with reference to the defense of his property. Article 680 of our Penal Code of 1895 is as follows: "When, under article 677, a homicide is committed in the protection of property, it must be done under the following circumstances: (1) The possession must be of corporeal property, and not of a mere right, and the possession must be actual and not merely constructive. (2) The possession must be legal, though the right of the property may not be in the possessor. (3) If possession be once lost, it is not lawful to regain it by such means as result in homicide. (4) Every other effort in his power must have been made by the possessor to repel the aggression before he will be justified in killing." It will thus be seen that it is provided that, if the possession of property be once lost, it is not lawful to regain it by such means as will result in homicide. It must also seem evident that this was not a case of robbery by

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

putting in fear, but a case of theft; and under the article of the statute above quoted it is manifest that the law gives appellant no right to repossess his property by means of such attack upon Heath as would result in the loss of his life or serious bodily injury.

2. It is urged that the charge of the court in respect to the presumption arising from the use of a deadly weapon is erroneous and hurtful. The particular objection to this charge is well and clearly put by appellant, and it is urged that the error and hurtfulness of the paragraph complained of lies in the fact that there was nothing in the record to show that the injured party was deceased, and the jury might have believed from said charge that, before the law presumed the injured party intended to murder or inflict serious bodily injury upon the defendant by being armed at the time of the difficulty, said injured party must have been killed, and that said charge was therefore misleading and calculated to prejudice the rights of appellant before the jury. That there is an error in the charge of the court on this question can admit of no doubt. Where the word "deceased" is used, the trial court evidently should have written the name of Heath; but, in view of the entire charge, which is as follows: "Upon the law of self-defense you are further instructed that if, from the acts of the said Charlie Heath (if any), or from his words, coupled with his acts (if any), there was created in the mind of the defendant a reasonable apprehension that he (the defendant) was in danger of losing his life or of suffering serious bodily harm at the hands of the said Charlie Heath, then the defendant had the right to defend himself from such danger or apparent danger as it reasonably appeared to him at the time, viewed from his standpoint. And a party so unlawfully attacked is not bound to retreat in order to avoid the necessity of killing his assailant. If you believe that the defendant committed the assault as a means of defense, believing at the time he did so (if he did do so) that he was in danger of losing his life or of serious bodily injury at the hands of the said Charlie Heath, then you will acquit the defendant, on the grounds of self-defense, and if the deceased was armed at the time he was killed, and was making such attack on defendant, and if the weapon used by him and the manner of its use were such as were reasonably calculated to produce death or serious bodily harm, then the law presumes the deceased intended to murder or aimed to inflict serious bodily injury upon the defendant"—we think it impossible, certainly most unlikely, that the use of this language should have injured appellant. Under his testimony there was no one present but Heath. Under no testimony was there any claim that any one else than Heath assaulted him, and the intelligence of any jury must have understood that the use of the word "deceased" was inadvertent, and the true import of the

charge of the court could not have been misunderstood.

3. It is also urged that there was error in the court's definition of what is meant by a deadly weapon. A pistol used as a firearm is a deadly weapon, and it was unnecessary for the court to define it at all; but, if this were not so, it is not believed that the definition given by the court is substantially erroneous.

A careful inspection of the record has convinced us there was no error in the trial of the case injurious to appellant, or which should work a reversal of the judgment of conviction, which is therefore affirmed.

On Motion for Rehearing.

HARPER, J. At a former day of this court the judgment of the trial court was affirmed. Appellant filed a motion for rehearing, alleging that this court was in error in holding that it was unnecessary, under the facts of this case, to charge that one has a right to kill to protect his property. The injured party had made no assault on defendant, and, if any attempt at robbery was committed, it was by appellant. The state's testimony is that prosecuting witness won the money in a game, and defendant shot him because he would not give back the money. Defendant testified that there was no game, but that the prosecuting witness took the money out of his clothes, and when he discovered the theft he demanded the return of the money; that, when he made the demand, prosecuting witness struck at him with a knife. This, if true, made a case of self-defense. The court fairly presented this theory, and the jury found against appellant's theory.

The motion for rehearing is overruled.

Ex parte TYLER.

(Court of Criminal Appeals of Texas. Feb. 8, 1911.)

Appeal from District Court, Galveston County; Clay S. Briggs, Judge.

Habeas corpus by Austin Tyler for his discharge on bail. From a judgment fixing bail, he appeals. Affirmed.

Thomas C. Turnley, for appellant. C. E. Lane, Asst. Atty. Gen., for the State.

PRENDERGAST, J. On appeal from the order of the district court fixing bail at \$5,000.

The appellant was arrested on a complaint charging him with rape. He had an examining trial before the justice court, and after a full hearing was allowed bail, and his bond fixed at \$5,000. Upon his failing to give this he was remanded to the custody of the sheriff. After this he sued out a writ of habeas corpus before the district judge in Galveston county. The district judge heard the evi-

dence, and in effect approved the judgment of the justice of the peace by allowing the defendant bail and fixing his bond at \$5,000. Upon his failure to execute this bond he was remanded to the custody of the sheriff, and was confined by the sheriff in the county jail. There is no evidence in the record showing the financial condition of the appellant. In his application for the writ of habeas corpus before the district judge he states, however, that he is unable to give the amount of the bond fixed by the justice of the peace, \$5,000, and that fixing the amount at such a large sum is in effect a denial of bail; that the appellant ought to be discharged, or required to give only a nominal bond of \$500.

It would be improper for us to discuss the evidence before the lower court. We have carefully gone over it, and are of opinion that the district judge has committed no error. Hence we affirm his action in admitting the appellant to bail, fixing the amount thereof at \$5,000.

CITIZENS' STATE BANK OF TOYAH v. O'NEAL et al.

(Court of Civil Appeals of Texas. Feb. 11, 1911.)

APPEAL AND ERROR (§ 750*)—ASSIGNMENTS OF ERROR—REQUISITES.

Under Rev. St. 1895, art. 1018, requiring appellant to file all assignments of error distinctly specifying the grounds on which he relies, and Courts of Civil Appeals Rules 24, 26 (67 S. W. xv), providing that assignments of error must distinctly specify the grounds, assignments of error that the court erred in failing to find a verdict for appellant on the evidence, and that the court erred in dismissing the case because against the preponderance of the evidence, and that the court erred in refusing to find a judgment for plaintiff against defendants failing to appear and answer, and because defendant appearing failed to answer, except by plea in abatement, which he failed to urge until after plaintiff had made its prima facie case, etc., are insufficient to question the sufficiency of the evidence, and the refusal of judgment by default.

[Ed. Note.—For other case, see Appeal and Error, Cent. Dig. §§ 3074-3083; Dec. Dig. § 750.*]

Appeal from District Court, Reeves County; S. J. Isaacks, Judge.

Action by the Citizens' State Bank of Toyah against J. F. O'Neal and others. From a judgment for defendants, plaintiff appeals. Affirmed.

McKenzie & Brady and J. W. Parker, for appellant. Hefner & Hudson and Pender S. Carter, for appellees.

CONNER, C. J. This suit was instituted by the appellant bank against J. F. O'Neal, D. F. White, G. E. Wilson, and T. W. Owen as the makers, and against appellee Victor Dziedzloch as indorser, of two promissory

notes, one for the sum of \$1,000 and the other for the sum of \$900, both dated October 12, 1908, and due in 6 and 12 months, respectively, from date. Certain credits were admitted, and judgment was sought for the remainder with a foreclosure of the vendor's lien upon certain lands for which the notes had been given. Defendants were duly cited, but Victor Dziedzloch alone answered, which was by a verified special plea to the effect that the plaintiff was not entitled to recover upon the notes forming the basis of its suit in that he, said defendant, "is now, and at all times since the execution and delivery of the said notes has been, the legal and equitable owner of the same"; that the indorsements of the notes to the plaintiff had been under a contract of sale which the plaintiff later refused to complete. The trial was before the court without a jury, and judgment given for the defendants, from which this appeal has been prosecuted.

We are led to infer from argument in appellant's brief that it is intended to question the sufficiency of the evidence on the issue of appellant's ownership of the notes sued upon, and the action of the court in refusing a judgment by default against those defendants who were cited, but who wholly failed to answer. The assignments of error under which the first question is discussed are the first, fifth, seventh, tenth, twelfth, and thirteenth, which are as follows:

"First. The court erred in its failure and refusal to find a verdict for the plaintiff, because the overwhelming preponderance and weight of the evidence was with the plaintiff, and under the law was entitled to a verdict and judgment in its favor."

"Fifth. The court erred in failure to find a verdict for the plaintiff for the full amount sued for, because the overwhelming weight and preponderance of the evidence was in plaintiff's favor."

"Seventh. The court erred in sustaining defendant's plea in abatement and dismissing this cause, because the overwhelming preponderance and weight of the evidence was against said plea in abatement and in favor of the plaintiff."

"Tenth. The court erred in rendering a verdict and judgment in favor of defendants and for dismissing their cause."

"Twelfth. The court erred in rendering judgment in favor of the defendants dismissing this cause, because the verdict and judgment as rendered in this cause is against the overwhelming preponderance and weight of the evidence."

"Thirteenth. The court erred in rendering verdict for defendants and dismissing this cause because the notes upon their face both showed to be long past due and owing

at the time of filing this suit, and, there being no evidence showing the contrary, the court should have found for the plaintiff."

The assignments of error which we infer were intended to present the second question are the second, third, fourth, sixth, eighth, and ninth, which are as follows:

"Second. The court erred in its refusal to find a judgment for the plaintiff, the defendants J. F. O'Neal, G. E. Wilson, T. W. Owen, and D. F. White having failed to appear and answer, and the defendant Victor Dziedzloch failed to answer except by plea in abatement which the said Victor Dziedzloch failed to urge until after the plaintiff had made its prima facie case, and was entitled to judgment, all of the parties having made default, though having been legally cited to appear and answer in terms of law.

"Third. The court erred in overruling plaintiff's motion that judgment be given to plaintiff; said motion having been urged by plaintiff after the plaintiff had introduced its evidence and made out its prima facie case, as will more fully appear by reference to plaintiff's bill of exception No. 1 herein, reference to which is hereby made for a more complete description of said proceedings.

"Fourth. The court erred in its failure to give verdict and render judgment in favor of plaintiff after all the evidence in said cause was heard, and all parties having rested, the plaintiff moved the court to find in its favor, the defendant and each of them having failed to appear and answer, though having been cited to appear and answer in terms of the law. All of which said proceedings will more fully appear in plaintiff's bill of exception No. 2, reference to which is hereby made for the full proceedings."

"Sixth. The court erred in its failure to find a verdict for the plaintiff because each of the defendants failed to answer to the merits of the cause, but wholly made default, except as to defendant Victor Dziedzloch, who filed a dilatory plea only, because the great weight of the evidence was in favor of the plaintiff as to said plea so filed by said defendant Victor Dziedzloch, and the other defendants having failed to appear and answer though duly cited to do so in terms of the law."

"Eighth. The court erred in rendering a verdict and judgment in favor of the defendants because the defendants J. F. O'Neal, G. E. Wilson, T. W. Owen, and D. F. White failed to appear and answer though duly cited in terms of the law, and judgment as against said defendants and each of them should have been in favor of the plaintiff for its debt and foreclosure.

"Ninth. The court erred in its failure to find for the plaintiff for its debt and for

foreclosure of its vendor's lien as retained in the said notes sued upon, the defendants having failed to appear and answer herein, but wholly made default."

The statement following the first assignment, which by reference thereto is made to constitute the statement of many others, consists of some nine lines of the brief and the following further references: "See, also, the order of the defendant to Messrs. McKenzie & Brady, Statement of Facts, page 6. See, also, the letter of defendant to Messrs. McKenzie & Brady, Statement of Facts, page 6. See the testimony of Finley Holmes, Statement of Facts, pages 23 to 27. See, also, the testimony of V. Van Gelson, Statement of Facts, pages 17 to 23. See the testimony of Aubrey Shrock, Statement of Facts, page 28. See, also, the testimony of J. F. McKenzie, pages 28 to 29. See the entire Statement of Facts, 2 to 30."

We think the mere exhibit of the brief above made is a sufficient answer to the entire appeal. It is manifest that, regardless of the insufficiency of the statements, the assignments do not constitute such distinct specifications of the grounds of error relied upon as is required alike by Rev. St. 1895, art. 1018, and rules 24 and 26 (67 S. W. xv) prescribed for the government of this court. This might be illustrated from quotations from many decisions; but the subject has been so fully and often treated that we content ourselves with a citation of a few of the cases. See *Garrison v. Ochiltree Co.*, 50 Tex. Civ. App. 397, 111 S. W. 445; *Guerguin v. McGown*, 53 S. W. 585; *Bayne v. Denny*, 21 Tex. Civ. App. 435, 52 S. W. 983; *Wright v. Wren* (Sup.) 16 S. W. 996.

We conclude that all assignments of error must be disregarded, and, no error being apparent of record, that the judgment should be affirmed.

THOS. GOGGAN & BROS. v. SYNNOTT et al.

(Court of Civil Appeals of Texas. Jan. 7, 1911. Rehearing Denied Feb. 11, 1911.)

1. APPEAL AND ERROR (§ 655*)—STATEMENT OF FACTS—STRIKING.

Where appellee's motion to strike the statement of facts on one ground was overruled, he could not afterwards move to strike the statement on a somewhat different ground.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 2823-2825; Dec. Dig. § 655.*]

2. APPEAL AND ERROR (§ 499*)—BILL OF EXCEPTIONS—ADMISSION OF EVIDENCE.

Assignments of error as to the admission of evidence cannot be considered, where the bill of exceptions does not show the objections to its admission overruled.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. § 2297; Dec. Dig. § 499.*]

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

3. CHATTEL MORTGAGES (§ 153*)—REGISTRATION—SUBSEQUENT PURCHASERS.

Sayles' Ann. Civ. St. 1897, art. 4651, provides that if a chattel mortgage permits one in whose possession the mortgaged property is to remove from the county in which the mortgage is recorded, and shall not within four months after such removal cause the mortgage to be recorded in the county to which the property is removed, the mortgage shall be void as to bona fide purchasers so long as it is not recorded in such county. *Held*, that registration was necessary only where the mortgagee consented to the removal or at least had knowledge thereof.

[Ed. Note.—For other cases, see Chattel Mortgages, Cent. Dig. § 255; Dec. Dig. § 153.*]

4. EVIDENCE (§ 594*)—WEIGHT OF TESTIMONY.

The testimony of a party is not necessarily binding upon the jury, though it is not expressly contradicted.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 2431; Dec. Dig. § 594.*]

5. CHATTEL MORTGAGES (§ 284*)—BONA FIDE PURCHASERS—JURY QUESTION.

In foreclosure by a chattel mortgagee, where another claimed title under a purchase from the mortgagor, whether claimant was a purchaser for value without notice *held* a jury question.

[Ed. Note.—For other cases, see Chattel Mortgages, Dec. Dig. § 284.*]

Appeal from Dallam County Court; C. S. Harrington, Judge.

Action by Thos. Goggan & Bros. against J. E. Synnott and others in which Clara Synnott filed a claim to mortgaged chattels. From a judgment for claimant, plaintiff appeals. Reversed and remanded for new trial.

J. S. Bailey and Meador, Davis & Dedmon, for appellant. Tatum & Tatum and H. A. Turner, for appellees.

SPEER, J. On January 8, 1907, Thomas Goggan & Bros. sold and delivered to J. E. Synnott a certain Krell piano for the sum of \$375 of which \$25 was paid in cash and the balance was to be paid in monthly installments of \$10 each; such installments being represented by the notes of Synnott payable to the order of Thomas Goggan & Bros. at Galveston, Tex. Thomas Goggan & Bros. retained a chattel mortgage lien upon the piano and immediately caused it to be recorded in the office of the county clerk of Cherokee county, the county in which Synnott resided at the time. Synnott made default in the payment of these notes, and Thomas Goggan & Bros. filed suit in Galveston county and obtained judgment for the amount of the unpaid purchase money, together with a foreclosure of its chattel mortgage lien, and on April 20, 1909, caused to be issued an order of sale directed to the sheriff of Dallam county, to which county Synnott had in the meantime removed with the property, and on May 24, 1909, the sheriff of Dallam county seized the piano as the property of J. E. Synnott. Mrs. Clara Synnott, wife of J. E. Synnott, made a claim-

ant's oath and bond as required by law, claiming title to the piano by virtue of a sale to her by her husband. Upon the trial of the cause the court instructed the jury to find for the claimant, and from a judgment based upon a verdict thus directed Thomas Goggan & Bros. has appealed.

Before considering appellant's assignments of error, it is necessary to dispose of appellee's motion to strike out the statement of facts. We overrule this motion because on a former day we had before us appellee's motion to strike out the statement of facts and appellant's motion to require appellee to produce the original statement of facts and praying this court in the alternative to consider the statement contained in the transcript. We sustained appellant in these matters, and no hearing was ever asked. True, the precise point in the present motion was not urged in the former, but a party will not be allowed to make as many separate and independent attacks as he has grounds. There would never be an end to litigation if such were the rule.

We overrule the first assignment of error complaining of the admission of certain testimony because the bill of exceptions does not show the objections overruled by the court.

The next assignment, however, complaining of the peremptory instruction virtually places before us the entire case. It is not denied that appellant duly retained a chattel mortgage on the piano at the time of the sale to J. E. Synnott, nor that such chattel mortgage was duly recorded in Cherokee county so as to preserve appellant's rights as against all subsequent purchasers. The only question is whether or not appellant has lost its lien by reason of the removal of the piano by Synnott to Dallam county and appellant's failure to record its chattel mortgage in that county; it being undisputed that the chattel mortgage was never recorded in Dallam county, and appellee's testimony showing that the piano had been removed to that county more than four months before the sale to Mrs. Synnott. Article 4651, Sayles' Ann. Civ. St. 1897, so far as pertinent to the questions before us, is as follows: "Every deed, mortgage or other writing respecting the title of personal property hereafter executed, which by law, ought to be recorded, shall be recorded in the clerk's office of the county court of that county in which the property shall remain; and if afterwards the person claiming title under such deed, mortgage or other writing shall permit any other person in whose possession such other property may be to remove with the same or any part thereof out of the county in which the same shall be recorded, and shall not, within four months after such removal, cause the same to be recorded in the county to which such property shall be removed, such deed, mortgage, or

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes 134 S.W.—75

other writing, for so long as it shall not be recorded in such last-mentioned county, and for so much of the property aforesaid as shall have been removed, shall be void as to all creditors and purchasers thereof for valuable consideration without notice."

There is evidence tending to show that appellant had notice of Synnott's intention to remove with the property to Dallam county, and that it did not object, but this is disputed by appellant's testimony. The vice president and general manager of appellant testified that when it learned of the removal of the piano, which he said was after the piano was removed, the company objected. So that it remains to be determined whether or not the statute quoted making void chattel mortgage liens in favor of bona fide purchasers applies to a state of facts like this. In *Spikes v. Brown*, 49 S. W. 725, it was held that this article does not apply where mortgaged chattels are removed from the county without the mortgagee's consent and he seeks to recover them as soon as he learns of their removal. The same thing was held by this court in *Vickers v. Carnohan*, 4 Tex. Civ. App. 305, 23 S. W. 338. The contention is made by appellee, however, and we suppose it was upon this contention the court instructed a verdict as he did, that in order to keep alive its lien the duty was devolved upon appellant to file its chattel mortgage in Dallam county within four months after it had knowledge that the property had been removed to that county. But we cannot agree that this duty rests upon a mortgagee. It will be observed from an examination of the statute quoted that the statute where it is applicable at all requires the recording of the chattel mortgage in the county to which the property has been removed "within four months after such removal." Under appellee's contention it would be within the power of a mortgagor, by removing the mortgaged property without the mortgagee's consent or knowledge, and by keeping him in ignorance of such removal for four months or longer, to effectually deprive him of the benefits of his mortgage altogether, for under the terms of the statute, as before stated, to be effective at all the registration must be within four months from the removal of the property. This proves to a practical certainty that the Legislature in requiring the mortgagee to register his chattel mortgage within four months of a removal of such property which he has permitted meant the requirement to apply only to those instances where the mortgagee consented to the removal, or at least had knowledge of it beforehand. It is unnecessary for us to determine in the present case whether the statute would apply where the mortgagee had notice of the intended removal, but did not consent thereto, since the evidence, as already stated, was sufficient to raise the issue that appellant consented to the removal by

not objecting when notified by J. E. Synnott that he intended to move to Dallam county with the property.

There is another reason why we would not be willing to affirm the trial court's peremptory instruction in favor of appellee. The evidence cannot be said to be undisputed that Mrs. Clara Synnott was a purchaser of the property for a valuable consideration without notice. Appellees were husband and wife living together, and, though the husband testified that the wife paid value for the piano and had no notice, yet the testimony of an interested party is not necessarily binding on the jury, even though such testimony is not expressly contradicted by other witnesses. Besides, the circumstance of the relation of the parties is such as the jury may have disbelieved this testimony altogether and the court should not have taken the issue from the jury.

For the error in giving the peremptory instruction to find for the plaintiff, the judgment is reversed, and the cause remanded for another trial.

FRITTER v. PENDLETON et al.

(Court of Civil Appeals of Texas. Feb. 8, 1911. Rehearing Denied March 8, 1911.)

1. PLEADING (§ 205*)—DEMURRER—GENERAL AND SPECIAL DEMURRER.

A demurrer stating that "specially demurring defendant says that such petition is insufficient in law because it does not set out the facts constituting the cause of action with sufficient certainty" is a general demurrer; and labeling it a special demurrer does not change its character.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. § 491; Dec. Dig. § 205.*]

2. VENUE (§ 32*)—WAIVER OF OBJECTIONS—PRIVILEGE.

Where an action was filed March 31, 1908, and a plea of privilege followed exceptions and a general denial in an answer filed on January 26, 1910, the plea of privilege was waived by defendant.

[Ed. Note.—For other cases, see Venue, Cent. Dig. §§ 47-50; Dec. Dig. § 32.*]

3. PLEADING (§ 290*)—FRAUD ON JURISDICTION—VERIFIED PLEADINGS.

A plea of fraud on the jurisdiction not verified is a nullity.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. § 861; Dec. Dig. § 290.*]

4. BROKERS (§ 82*)—COMMISSION—ISSUES AND PROOF.

Where the basis of an action was a promise to pay commissions for the sale of land, it was immaterial whether the land belonged to defendant or his wife, or whether it was a separate tract or an undivided interest in a tract, and hence evidence showing such facts did not establish a variance.

[Ed. Note.—For other cases, see Brokers, Cent. Dig. § 103; Dec. Dig. § 82.*]

5. TRIAL (§ 55*)—ABSENCE OF DEFENDANT—EXPLANATION.

Where defendant was not called upon to account for his absence at the trial, the fact that he was paralyzed in his limb was properly

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

excluded, as it could have no other purpose than to excite sympathy.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 130; Dec. Dig. § 55.*]

6. BROKERS (§ 55*) — COMMISSIONS—PROCURING PURCHASER.

In an action for commissions, where the evidence showed that brokers procured a purchaser who was willing, able, and ready to buy the land, and who did buy the land, they were entitled to commissions, although the deal was closed by the agent for the purchaser.

[Ed. Note.—For other cases, see Brokers, Cent. Dig. §§ 82-84; Dec. Dig. § 55.*]

Appeal from Bexar County Court; P. H. Shook, Judge.

Action by R. Pendleton against F. S. Fritter, B. F. Nicholson, and D. K. Furnish. From a judgment for plaintiff and judgment for defendants Nicholson and Furnish, over against Fritter, defendant Fritter appeals. Affirmed.

W. L. Clamp and Guinn & McNeill, for appellant. John D. Hartman and Mason Williams, for appellees.

FLY, J. This is a suit instituted by R. Pendleton against F. S. Fritter, B. F. Nicholson, and D. K. Furnish to recover the sum of \$413.88 alleged to be due on a claim by appellant to Nicholson & Furnish for commissions for the sale of land, and which was assigned by them to Pendleton. Appellant filed general and special demurrers and a general denial. The cause was tried by jury, and resulted in a verdict and judgment in favor of Pendleton against the other parties, and judgment in favor of Nicholson & Furnish over against appellant.

The first assignment of error claims that the court erred in overruling what is denominated a special demurrer, but which is a general demurrer. The demurrer is: "And, specially demurring, he says that said petition is insufficient in law, because it does not set out the facts constituting the cause of action with sufficient certainty." The exception is undoubtedly a general demurrer, and labeling it a special demurrer does not change its character. *Railway v. Granger*, 85 Tex. 574, 22 S. W. 959. The petition is good as against a general demurrer.

The second and fourth assignments are based on certain special exceptions which were overruled by the court. The exceptions were properly overruled. The court did not err in striking out the plea of privilege and allegations of fraud in the transfer of the claim against appellant. This suit was filed on March 31, 1908, and the plea of privilege followed exceptions and a general denial in an answer filed on January 26, 1910. The plea of privilege was waived by appellant. The plea setting up fraud on the jurisdiction followed a plea to the merits and was not verified by affidavit, and was a nullity. *Wilson v. Adams*, 15 Tex. 323;

Taylor v. Hall, 20 Tex. 211; *Graham v. McCarty*, 69 Tex. 323, 7 S. W. 842.

There was no error in admitting in evidence the transfer of the claim by Nicholson & Furnish to Pendleton. There was no variance between the allegation and proof. The basis of the action was a promise to pay commissions for the sale of certain land, and it did not matter whether it belonged to Fritter or his wife, or whether it was a separate tract or an undivided interest in a tract.

The fact of appellant being paralyzed in his limbs had no connection with any issue in the case, and evidence bearing on that subject was properly excluded. He was not called upon to account for his absence from the trial, and the evidence could have been desired for no other purpose than to excite sympathy or arouse prejudice or passion.

The charge objected to in the eighth assignment of error conformed to the pleadings, and does not permit a finding except according to the terms of contract. It was not alleged in the petition that the land belonged to appellant, and, if appellant agreed to pay commissions for the sale of the land, it did not matter who owned it, and he was bound on his contract. The evidence showed that a purchaser for the land was procured by Nicholson & Furnish who was willing, able, and ready to buy, and who did buy, the land. Stafford did not procure the purchaser. He was the agent of the purchaser who closed the deal brought about by Nicholson & Furnish.

None of the assignments of error can be sustained, and the judgment is affirmed.

WATKINS v. PARKER.

(Supreme Court of Arkansas. Feb. 6, 1911.)

1. EXECUTORS AND ADMINISTRATORS (§ 434*)—ACTIONS BY ADMINISTRATORS—SET-OFF.

Under Kirby's Dig. § 6102, providing that, in suits by administrators, debts due from the intestate to defendants at the death of the intestate may be set off, a defendant may not set off a note given by the intestate to a third person and purchased by defendant after intestate's death.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. §§ 1698-1715; Dec. Dig. § 434.*]

2. EXECUTORS AND ADMINISTRATORS (§ 224*)—CLAIMS—EXHIBITION.

The holder of a note executed by decedent to a third person, and purchased by the holder after decedent's death, must probate the note as a claim against decedent's estate, though the note was not due at the date of decedent's death.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. §§ 768-788; Dec. Dig. § 224.*]

3. EXECUTORS AND ADMINISTRATORS (§ 225*)—CLAIMS—EXHIBITION.

All demands subsisting at the time of the death of decedent, whether matured or not, capable of being asserted in a court of justice.

must be exhibited within the statutory period or they are barred.

[Ed. Note.—For other cases, see *Executors and Administrators*, Cent. Dig. §§ 789-805; Dec. Dig. § 223.*]

4. EXECUTORS AND ADMINISTRATORS (§ 434*)—CLAIMS—SET-OFF.

A claim against a decedent barred by the statute of nonclaim cannot be set off to an action by the administrator for a debt due his intestate.

[Ed. Note.—For other cases, see *Executors and Administrators*, Cent. Dig. §§ 1698-1715; Dec. Dig. § 434.*]

5. COSTS (§ 282*)—JUDGMENT FOR COSTS—LIABILITY.

A party obtaining a judgment for costs may not collect the costs until he has paid them, since the officers and witnesses in whose favor the costs are taxed may collect them by fee bills against the losing party.

[Ed. Note.—For other cases, see *Costs*, Dec. Dig. § 282.*]

Appeal from Ashley Chancery Court; Zachariah T. Wood, Chancellor.

Suit by Thomas E. Watkins, administrator of W. L. Howell, deceased, against Dr. J. L. Parker. From a decree dismissing the complaint and rendering costs for defendant, plaintiff appeals. Reversed.

On the 16th day of July, 1904, W. L. Howell executed to Dr. J. L. Parker a deed to 320 acres of land in Ashley county, Ark. The consideration for the deed was that Dr. Parker should take care of Howell for the remainder of his natural life, and pay \$150 annually. Parker executed to Howell his note of the same date as the deed, and due on or before the 1st day of January, 1905. On the 2d day of August, 1904, Wash L. Howell died and Thos. E. Watkins was duly appointed as administrator of his estate. The administrator and heirs instituted suit in the chancery court against Dr. Parker to set aside the deed as having been procured by fraud. Parker denied that it was procured by fraud. On the proof made, the decision of the chancellor was in favor of Dr. Parker. The decision of the chancellor was affirmed, but because the affirmance was based entirely on the facts the case is not reported. Subsequently, the administrator commenced this suit in the circuit court against Dr. Parker to recover judgment for the amount of the promissory note and the accrued interest. Dr. Parker answered, admitting the execution of the note sued on, but set up the facts of the prior suit above recited, and asked that the costs of that suit which had been adjudged in his favor be set off against the amount of the note sued on. He further answered that after the death of Wash L. Howell, he purchased a note for \$100 which Howell in his lifetime had executed to the Bank of Hamburg. He purchased the note on the 3d day of June, 1905, and never probated same against the estate of said Howell, although the estate has been in course of administration since the 20th day of Oc-

tober, 1904. He pleaded this note as set-off to the note sued on. The plaintiff filed a reply, pleading the general statute of limitations and the statute of nonclaims, and denied the right of set-off by the defendant. The case was transferred to the chancery court on motion of the defendant, and without objection on the part of the plaintiff. The chancellor allowed the set-off, and dismissed the complaint of the plaintiff, and rendered judgment for costs only for the defendant, no judgment over against the plaintiff having been asked. The plaintiff has duly prosecuted an appeal to this court.

Geo. W. Norman and J. C. Brown, for appellant. Thomas Compere and Robt. E. Craig, for appellee.

HART, J. (after stating the facts as above). The decision of the chancellor was wrong. We will first take up the right of the defendant to set off the note given by Howell to the Bank of Hamburg and purchased by defendant after Howell's death. "In suits by administrators, debts existing against their intestates, and owing to the defendant at the time of the death of the intestate, may be set off by the defendant in the same action as if the action had been brought by and in the name of the deceased." Kirby's Dig. § 6102. It is plain from the language of this section that the defendant did not have under it the right to hold the note, and use it as a set-off to a suit which might be brought against him by Howell's administrator. This is so because he was not the owner or holder of the note at the date of Howell's death. It follows that if the defendant could not hold the note and use it under section 6102, supra, as a set-off to an anticipated suit against him by Howell's administrator, it was his duty to probate it as a claim against Howell's estate. It is true the note was not due at the date of Howell's death, but it has been the settled law of this state since the decisions of *Walker v. Byers*, 14 Ark. 253, and *Bennett v. Dawson*, 18 Ark. 334, that all demands "subsisting at the time of the death of the testator or intestate, whether matured or not, capable of being asserted in a court of justice, whether of law or equity," must be exhibited within the statutory period or else be barred.

The note in question was not exhibited within the time prescribed by the statute, and is barred by the statute of nonclaim. A claim barred by the statute of nonclaim cannot be set off to an action by the administrator for a debt due his decedent. *Bell v. Andrews*, 34 Ala. 538; *Patrick v. Petty*, 83 Ala. 420, 3 South. 779; *Jones v. Jones*, 21 N. H. 219; *Ewing v. Griswold*, 43 Vt. 400. To the same effect, see *Walker v. Byers*, 19 Ark. 323.

It is also insisted by counsel for defendant

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

that he should be allowed to set off to the action of the administrator the costs adjudged him in the case of *Watkins v. Parker* referred to in our statement of facts, but he does not show that he paid any of these costs. He only shows that certain costs were taxed in that case. He should have alleged and proved that he paid the costs. It is true that costs by statute are an incident to the judgment, but a party to a suit has no right to collect costs unless he has paid them. The reason for this is that officers and witnesses in whose favor costs are taxed have the right to collect them themselves by fee bills, so if the losing party should pay the costs to his adversary without any showing that he had paid them to officers or witnesses entitled to them, he might become liable to pay them a second time.

The decree will be reversed and the cause remanded, with directions to enter a decree in accordance with the opinion.

PULASKI GAS LIGHT CO. v. McCLINTOCK.†

(Supreme Court of Arkansas. Jan. 30, 1911.
Rehearing Denied Feb. 27, 1911.)

1. APPEAL AND ERROR (§ 889*)—THEORY OF CAUSE—AMENDMENT TO CONFORM TO PROOF.

Where evidence not within the issues joined was admitted at the trial without objection, and the trial court treated the issues as thus joined on the proof, the complaint would be treated on appeal as amended to conform to the proof.

[Ed. Note.—For other cases, see Appeal and Error. Cent. Dig. §§ 3621, 3622; Dec. Dig. § 889.*]

2. GAS (§ 17*)—INJURIES FROM ESCAPE—CARE REQUIRED.

A corporation engaged in the manufacture and distribution of gas is bound to use a degree of care commensurate with the danger, to guard against injury to persons and property by the escape thereof, and if it fails to exercise such care, and injury results, it is liable, if the person injured is free from fault contributing to the injury.

[Ed. Note.—For other cases, see Gas, Cent. Dig. § 14; Dec. Dig. § 17.*]

3. NEGLIGENCE (§ 56*)—PROXIMATE CAUSE—PRIMARY CAUSE.

The primary cause of an injury may be the proximate cause of a disaster, though it may operate through successive instruments.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. §§ 69, 70; Dec. Dig. § 56.*]

4. NEGLIGENCE (§ 59*)—PROXIMATE CAUSE—NATURAL CONSEQUENCES.

In general, in order to warrant a finding of negligence, or that an act not amounting to wanton wrong is the proximate cause of an injury, it must appear that the injury was the natural and probable consequence of the negligence or wrongful act, and that it ought to have been foreseen, in the light of the attending circumstances, but it is not necessary that the particular injury should have been foreseen, since, if the act or omission is of itself negligent and likely to result in injury to others, then the person guilty is liable for the natural con-

sequences, whether he might have foreseen it or not.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. § 72; Dec. Dig. § 59.*]

5. GAS (§ 18*)—INJURY FROM ESCAPE—PROXIMATE CAUSE.

Gas was installed in decedent's house prior to 1903, and connected with a gooseneck attached to a meter. The premises were occupied by a tenant from 1903 to 1907, during which no gas was used in the house. In 1905 the grade of the street and defendant's mains were lowered and a new service pipe was put in without request or notice to decedent, and the old service pipe was disconnected and left in the ground. The new service pipe was connected with the same riser that had been previously connected with the old service, and was left practically in the same position, with nothing to indicate that it was not still connected with the old pipe. The old service pipe stuck out of the ground two or three inches over the curb line, and the sidewalk, on being cut down to grade, left it exposed across the walk, forming an obstruction. Decedent returned from another state and occupied the house in the fall of 1907, without knowledge that a new service pipe had been put in, or that the riser was not still connected with the old pipe. He endeavored to take up the old pipe to remove the obstruction across the sidewalk, and in doing so unscrewed the riser, when he was overcome with gas and died before he could escape from under the house porch. *Held*, that the gas company's negligence in cutting off the old service pipe from the main and leaving it exposed and still apparently connected with the riser, and installing a service with another pipe and connecting it with the old riser, without the knowledge or consent of deceased or anything to put him on inquiry, was the proximate cause of decedent's death.

[Ed. Note.—For other cases, see Gas, Dec. Dig. § 18.*]

6. GAS (§ 20*)—INJURY FROM ESCAPE—QUESTION FOR JURY—CONTRIBUTORY NEGLIGENCE.

Deceased was not guilty of contributory negligence as a matter of law in unscrewing the riser, in the belief that it was still connected with the dead pipe.

[Ed. Note.—For other cases, see Gas, Dec. Dig. § 20.*]

7. GAS (§ 19*)—APPLIANCES—NEGLIGENT CONSTRUCTION.

Where decedent was killed by inhalation of gas while endeavoring to take up certain old gas pipes which he erroneously believed had been disconnected from the main, by reason of defendant's alleged negligence in putting in new service pipes without taking out the old one, defendant was not entitled to a verdict, if decedent disconnected a riser and inhaled the gas, unless he did so voluntarily.

[Ed. Note.—For other cases, see Gas, Dec. Dig. § 19.*]

8. GAS (§ 19*)—ASPHYXIATION—CONTRIBUTORY NEGLIGENCE—INSTANTANEOUS DEATH.

Where decedent went underneath the porch of his house to disconnect a riser connected, as he erroneously believed, with a dead gas pipe, and on disconnecting the riser was asphyxiated by gas flowing from the pipe, and the court found as a matter of law that death was instantaneous and without suffering, there could be no further claim that deceased was negligent in remaining under the house and attempting to connect the gas.

[Ed. Note.—For other cases, see Gas, Dec. Dig. § 19.*]

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

† For dissenting opinion, see 134 S. W. 1199.

9. DEATH (§ 99*)—DAMAGES—EXCESSIVENESS.

Deceased, a strong healthy man, with a life expectancy of 22 years, was killed by defendant's alleged negligence in maintaining certain gas connections with decedent's house. He earned \$90 a month, which he contributed to the support of his family, except what he spent for clothing, and was of good habits. He was a kind and affectionate father, and took great interest in the training of his two minor children. Held, that a verdict awarding \$10,000 to his widow, as administratrix, was not excessive.

[Ed. Note.—For other cases, see Death, Cent. Dig. §§ 125-130; Dec. Dig. § 99.*]

Appeal from Circuit Court, Pulaski County; Guy Fulk, Judge.

Action by Mary J. McClintock, as administratrix of the estate of James McClintock, deceased, against Pulaski Gas Light Company. Judgment for plaintiff, and defendant appeals. Affirmed.

E. W. Kimball, J. W. & M. House, and J. W. House, Jr., for appellant. Mehaffy & Williams and Downie, Rouse & Streepey, for appellee.

KIRBY, J. This was an action by appellee for damages for the wrongful death of James McClintock, alleged to have been caused by the negligence of appellant.

The complaint states: "That plaintiff's intestate, James McClintock, for several years prior to and until the 17th day of March, 1909, resided in a house and lot on West Seventeenth street, which had been his property and his residence continuously. That on the 17th day of March, 1909, plaintiff's intestate was engaged in some work on his premises under his residence, and was suffocated and died because of the escape of illuminating gas from the mains of the defendant, negligently permitting said gas to escape, and plaintiff's intestate's death was due to such negligent act of the defendant. * * * That said plaintiff and her children are damaged by the negligent act of the defendant in the sum of fifteen thousand (\$15,000.00) dollars. That plaintiff's intestate suffered great physical pain and mental anguish from his injuries until his death and that his estate was damaged thereby in the sum of five thousand (\$5,000.00) dollars." To this complaint the appellant filed an answer, denying each and every allegation in the complaint, and afterward the appellee filed an amendment to her complaint, which is as follows: "Comes the plaintiff by leave of the court and files this amendment to her original complaint herein, and states that the defendant negligently failed to install a stop box on a level with the sidewalk and just immediately next and inside the curb line when it laid its service pipes on plaintiff's premises, as it was required to do by ordinance No. 1020 of the city of Little Rock, Campbell & Stevenson's Digest of Ordinances of City of Little Rock, Ark., on account of which negligence

in failing to install a stop box plaintiff's intestate was killed." Appellant denied every material allegation of the complaint, that James McClintock's death was due to any negligent act on its part, and alleged "that, if he was suffocated by gas, it was because of his own carelessness and negligence in handling the pipes and fixtures of the defendant company, and such carelessness and negligence upon his part directly and proximately contributed to his death, and for which this defendant company is in no way responsible."

The testimony tended to show that James McClintock was asphyxiated and killed by gas escaping from the one-inch service pipe from appellant's mains, which he disconnected under the front porch of his residence by unscrewing the "riser" on the morning of March 17, 1908, between 7 and 8 o'clock. He had been engaged in removing an old service gas pipe from his premises, which was cut off at the curb line and left in the ground by the gas company when they lowered their mains, upon the grade of the street being cut down in 1905, and when they put in a new service pipe from the main, deeper in the ground than the old and at right angles to the main and within about a foot of and parallel to the old pipe, and connected it with the same riser under the porch that had connected the old service pipe with the meter and the house. The end of this old pipe stuck out of the ground two or three inches over the curb line, and the sidewalk was being cut down to grade and left it exposed across the sidewalk and an obstruction, and McClintock then unscrewed and broke and pulled up this old pipe, as the ground showed, to near the edge of the porch, under which the riser stood. The porch was about 20 inches high, and he dug a hole with a file about a foot in circumference around the riser, about eight inches deep, and to within about two inches of where it screwed into the elbow on the end of the service pipe. He took a pipe wrench and turned it, and it unscrewed at the elbow at the bottom of the hole, although there were three other places on it between the wrench and the elbow where it could have been unscrewed. He was found dead, under the porch about to his hips, lying on his belly, stretched out with both hands in front of him in line, as if he tried to shove and could not, as a witness says, with his face pretty near right over the pipe from which the gas was spouting out. The pipe wrench was lying on his left and the disconnected riser or "goose-neck," as some witnesses call it, to his right and the file was in the hole. The gas was first installed in the house in 1899, while deceased lived there with his sister. The one-inch service pipe was laid from the main in the street in front at right angles with it, under the ground extending under the front

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

porch about three feet, where it connected with the riser or upright piece of pipe, upon the top of which was a lead pipe gooseneck for connecting the meter and a meter cock to turn on and shut off the gas when the service was discontinued. The gas service in the house had long been discontinued and the meter removed, but when or by whose direction the testimony does not show, and the gas was shut off by the meter cock on the riser near the top of it, leaving the gas in the main free access to the service pipe and the riser, to where the meter cock stopped it. The premises were occupied by a tenant from 1903 to 1907, in the fall, when McClintock and his family moved in, and no gas had been used in the house since 1903. In 1905 the grade of the street was lowered, and appellant's mains, and a new service pipe was put into the McClintock house without any request from or notice to him, and the old one disconnected and left in the ground, as already stated. Deceased had been married about six years, and lived in Little Rock in 1905, and went to Louisiana in 1906, and with his wife first moved into this house in the fall of 1907. There was no testimony tending to show that he had any knowledge of the fact that a new service pipe had been put in or that the riser, which was the same size as the old pipe and smaller than the new, was connected with a live service pipe other than the riser itself, as it stood there.

The ordinances of the city did not require the gas to be installed on the premises with a stop box and service cock at the curb, to cut off the gas when the service was discontinued, and it was shown that the meter cock on the riser cut it off as effectually and safely, so far as the escape of gas was concerned, as the stop box would have done. No gas escaped; nor could any have escaped but for the action of deceased in unscrewing the riser, which he could not have done without the aid of a pipe wrench. There was conflicting testimony as to whether death could be produced by asphyxiation from gas escaping in the open air, some of the witnesses saying it was unheard of; and also as to whether death caused by asphyxiation by suddenly inhaling a large volume of illuminating gas, would be so speedy as to be without pain and suffering. The court gave seven instructions as requested by appellee, and six of the 23 requested by appellant, amending two of them by inserting the word "voluntarily."

Appellant asked the court to instruct a verdict for defendant company, which he refused to do, and of his own motion did instruct the jury to return a verdict for defendant upon the second count of the complaint, which asked damages for physical pain and mental anguish suffered by deceased.

Objection was made to some remarks of Hon. J. E. Williams, of counsel for appellant, in his closing argument to the jury, part of

which were withdrawn, and the jury instructed to disregard them, and to the following, which were made over appellant's objection: "Answering the argument of the counsel for the defendant, that the deceased was guilty of contributory negligence in remaining under the porch and trying to stop the flow of gas after he was aware of the escaping gas: This question cannot be considered as showing or tending to show any contributory negligence upon the part of the deceased, because the court has instructed you as a matter of law that there could be no recovery for pain and suffering, and has directed a verdict for the defendant, on that ground that the deceased's death was instantaneous and without any conscious suffering, and, if he died instantaneously, was killed immediately by the escaping gas, he could not be guilty of contributory negligence in remaining there and fighting the gas which was killing him"—counsel insisting that this phase of the question of contributory negligence had practically been concluded by the court's holding as a matter of law, under the evidence, the deceased's death was instantaneous.

The jury returned a verdict for \$10,000 damages for the widow and next of kin, and appellant appealed.

The complaint alleged that appellant was negligent in permitting the gas to escape, and in failing to install a stop box at the curb line and cut it off there, as required by the ordinances of the city of Little Rock. Appellant strongly insists here that, since no other negligence is alleged, and the proof is unquestioned that the gas could not have escaped and caused injury but for the action of the deceased in disconnecting the riser and releasing it, and also that no ordinance required the installation of a stop box, the court erred in refusing to give the peremptory instruction as requested. But evidence was introduced without objection, directed to the issue of negligence on the part of appellant in putting in gas service with a new pipe entirely underground, without request from or notice to deceased, and confining the gas with the old riser and meter cock that had been connected with the old pipe at about the same place under the porch, instead of cutting it off with a stop box at the curb, and leaving the old disconnected service pipe in the ground with one end exposed at the curb line, showing it was dead and not connected with the main, and the other still apparently connected with the riser as it had been, and the court below so treated the issue as thus joined on the proof, and the complaint will be treated here as amended to conform to the proof. *Roach v. Richardson*, 84 Ark. 41, 104 S. W. 538.

It is next contended that appellant's conduct, if negligent, was not the proximate cause of the injury, and, third, that the injury was produced by deceased's contributory negligence in disconnecting the riser.

True it is that the gas could not have escaped and killed him, if he had not unscrewed the riser. The degree of care required of persons engaged in the manufacture and distribution of gas to guard against injury to persons and property was defined in *Pine Bluff Water & Light Co. v. Schneider*, 62 Ark. 109, 34 S. W. 547, 33 L. R. A. 366, where this court said: "The company must use a degree of care commensurate to the danger which it is its duty to avoid. If it fails to exercise this degree of care, and injury results from such negligence, the company is liable, if the person injured is free from fault contributing to the injury"—citing authorities. See, also, *Koelsch v. Philadelphia Co.*, 152 Pa. 355, 25 Atl. 522, 18 L. R. A. 759, 34 Am. St. Rep. 653.

Appellant installed gas in McClintock's house in the usual way, by placing a one-inch service pipe underground from its main in the street in front, and at right angles with the main, to about three feet under the front porch, where it connected with the riser, near the top of which was the meter cock and the meter, which connected with the pipes in the house. Deceased was living there with his sister at the time. The gas service was discontinued, the meter removed, and the gas shut off at the meter cock, but when or by whose direction it does not appear. There was no gas service in the house during the time it was occupied by Prof. Rust, a tenant, from 1903 to 1907, in the fall, when McClintock and his wife moved back from Louisiana and first moved in, nor thereafter. The grade of the street was cut down, and the gas company lowered its mains in 1905, and, without request from or notice to McClintock, installed a new service pipe, connected with the main and placed deeper in the ground than the old, and near and parallel to it, connecting it with the riser that had been connected with the old pipe at about the same place under the porch, leaving the old disconnected service pipe in the ground with one end exposed at the curb line, showing that it was dead and not connected with the main, and the other apparently still connected with the riser as it had been.

Here was a deceptive and misleading condition created by appellant entirely different from that existing when deceased moved from the premises, and in cutting his sidewalk to grade the old disconnected service pipe was exposed, and it became necessary or desirable to remove it. This he set about doing the morning of his death, and unscrewed, broke off, and pulled up this pipe to near where it went under the porch, on a line to the riser with which it had been connected when he moved away. He then crawled under the porch, which was about 18 inches high and inclosed on three sides, and unscrewed the riser, that the remainder of the old pipe might the more easily be removed. He knew that there was no gas in the old

pipe, that none had been used in the house since 1903, that the riser had been connected with this pipe when he went away, and, even if he be held to know that the street had been graded down and the gas mains necessarily lowered—which we by no means decide—he knew that he had not since ordered nor consented to the service being again extended to his house, or had any notice that it was done. There was nothing whatever to indicate that this riser was connected with a live service pipe, as it stood there where it had seven years before been connected, and still appeared to be, with the old service pipe now dead. He dug about and unscrewed it, and a stream of gas from an inch pipe shot up in his face, overcame, asphyxiated, and paralyzed him; that he fell with his face over the hole he had dug, from which the gas was escaping, and died. What was the proximate cause of the injury?

This is not a question of science or knowledge, and is a question ordinarily for the jury, to be determined as a fact from the particular situation, in view of the facts and circumstances surrounding it. The primary cause may be the proximate cause of a disaster, though it may operate through successive instruments. *Milwaukee, etc., Ry. Co. v. Kellogg*, 94 U. S. 476, 24 L. Ed. 256; *Waters-Pierce Oil Co. v. Deselms*, 212 U. S. 177, 29 Sup. Ct. 270, 53 L. Ed. 453. "But it is generally held that, in order to warrant a finding that negligence, or an act not amounting to wanton wrong, is the proximate cause of an injury, it must appear that the injury was the natural and probable consequence of the negligence or wrongful act, and that it ought to have been foreseen, in the light of the attending circumstances." *Milwaukee, etc., Ry. Co. v. Kellogg*, supra.

Our court said, in *Gage v. Harvey*, 66 Ark. 68, 48 S. W. 898, 43 L. R. A. 143, 74 Am. St. Rep. 70: "In determining whether an act of a defendant is the proximate cause of an injury, the rule is that the injury must be the natural and probable consequence of the act; such a consequence, under the surrounding circumstances of the case, as might and ought to have been foreseen by the defendant as likely to flow from his act." And in *Railway Co. v. Bragg*, 69 Ark. 402, 64 S. W. 226, 86 Am. St. Rep. 206: "It is a fundamental rule of law that, to recover damages on account of the unintentional negligence of another, it must appear that the injury was the natural and probable consequences thereof, and that it ought to have been foreseen, in the light of the attending circumstances."

It is not necessary that the particular injury should have been foreseen. In *Foster v. Railway Co.*, 127 Iowa, 84, 102 N. W. 422, 4 Am. & Eng. Ann. Cas. 150, the court said: "Doubtless the particular situation might not have been foreseen, but this was not essential to making out a charge of negligence. Accidents, as they occur, are seldom foreshadowed; otherwise many would be avoid-

ed. If the act or omission is of itself negligent and likely to result in injury to others, then the person guilty thereof is liable for the natural consequences which occurred, whether he might have foreseen it or not. In other words, if the act or omission is one which the party ought, in the exercise of ordinary care, to have anticipated was likely to result in injury to others, then he is liable for any injury proximately resulting therefrom, although he might not have foreseen the particular injury which did happen."

In *B. & O. Ry. Co. v. Slaughter*, 167 Ind. 330, 79 N. E. 186, 7 L. R. A. (N. S.) 597, 119 Am. St. Rep. 503, the court said: "To entitle one to a trial of the question of another's negligence which resulted in injury, it is not necessary that the effect of the act or omission complained of in all cases, or even ordinarily, be to produce the consequences which followed; but it is sufficient if it is reasonably to be apprehended that such an injury might thereby occur to another while exercising his legal right in an ordinarily careful manner."

Here the negligence of appellant consisted in cutting off from the main the old service pipe and leaving it there exposed, still apparently connected with the riser, thus showing the gas was shut off from the premises, and installing the service again with another pipe deeper in the ground, and, instead of cutting it off at the curb, confining the gas with the old riser and meter cock, which still appeared to be connected with the old dead service pipe he was removing, long after the use of gas in the house had been discontinued, and without the knowledge or consent of deceased or anything to put him on notice that gas was on the premises. "There was no intermediate cause disconnected from the primary fault, and self-operating, which produced the injury, and such negligence was the proximate cause of it." *Milwaukee, etc., Ry. Co. v. Kellogg*, supra; *The G. R. Booth*, 171 U. S. 450, 19 Sup. Ct. 9, 43 L. Ed. 239; *Waters-Pierce Oil Co. v. Deselms*, supra. Deceased had the right to remove this apparently disconnected and dead gas pipe from his premises, and if he exercised as much care in doing so as an ordinarily prudent man would have done under the circumstances, he was not guilty of contributory negligence which would bar his recovery. This was a question that was fairly submitted to the jury and within their province, and upon which they have decided in appellee's favor; and there is ample evidence to sustain their verdict. The issues in the whole case were fairly submitted on proper instructions.

There was no error committed in inserting the word "voluntarily" in appellant's two requested instructions before giving them, as otherwise they would have told the jury to

find for the defendant, if deceased disconnected the riser and inhaled the gas, without regard to his ability to keep from inhaling it after the disconnection was made.

Some of the remarks of Hon. J. E. Williams, of counsel for appellee, in his closing argument, to which objection was made, were withdrawn and the jury admonished to disregard them, and we cannot see that any prejudice could have resulted. As to other remarks which were not withdrawn, in which he argued to the jury that, since the court had instructed a verdict for defendant on the second count of the complaint, in which damages for pain and suffering were asked, because death had been instantaneous and without suffering, there could no longer be any question of the contributory negligence of deceased in remaining under the house and attempting to connect the gas, according to appellant's theory of the injury, such remarks were not improper, nor more than the correct inference to be drawn from such instruction.

Was the verdict excessive? The evidence shows that deceased was a strong healthy man, with a life expectancy of 22 years; that he was industrious and earned about \$90 per month, all of which he contributed to the support of his family, except what he spent for clothing; that his habits were good; that he was a kind and affectionate father, and took great interest in the training of his two little children. Under these facts the verdict of \$10,000 was not excessive. *St. L., I. M. & S. R. Co. v. Freeman*, 89 Ark. 326, 116 S. W. 678; *St. L., I. M. & S. R. Co. v. Haist*, 71 Ark. 258, 72 S. W. 893, 100 Am. St. Rep. 65; *Railway Co. v. Sweet*, 60 Ark. 550, 31 S. W. 571; *St. L., I. M. & S. R. Co. v. Robert Hitt*, 76 Ark. 227, 88 S. W. 908, 990.

Finding no reversible error in this cause, the judgment is affirmed.

KAUFMAN BROS. v. REDWINE.

(Supreme Court of Arkansas. Feb. 13, 1911.)
EXECUTORS AND ADMINISTRATORS (§ 231*)—
PRESENTATION OF CLAIM—NECESSITY.

Under Act May 28, 1907 (Laws 1907, pp. 1170, 1171), classifying the demands against estates of deceased persons, and section 4 thereof, providing that claims shall be properly authenticated and exhibited to the executor or administrator, and section 5, providing that all demands not so exhibited within one year from the granting of letters shall be barred, a claim not filed within such time in probate court, duly authenticated, is barred, though the will directed that all testator's just debts should be paid.

[Ed. Note.—For other cases, see *Executors and Administrators*, Cent. Dig. §§ 804, 828, 829; Dec. Dig. § 231.*]

Appeal from Circuit Court, Randolph County; Jno. W. Meeks, Judge.

Action by Kaufman Bros. against Thomas J. Redwine, executor of M. C. Haven, de-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes.

ceased. From a judgment for defendant reversing a judgment of the Probate Court, plaintiffs appeal. Affirmed.

M. C. Haven died September 24, 1907. At the time of his death he owed appellant \$279.33 on account, contracted August 24, 1907. He died testate, his will providing that all of his just debts should be paid, and the estate was solvent. T. J. Redwine, the executor, duly qualified as such. On October 10, 1907, appellant mailed its account duly verified to appellee at his proper address. Appellee did not receive the letter. Appellee had an original invoice of the goods sold by appellant to M. C. Haven as early as October 7, 1907. Appellee testified that he examined the books of appellant and did not find any record of the payment of the account. Appellant again by mail sent a duplicate of its account, duly verified, to the proper address of appellee February 27, 1909. This duplicate claim was indorsed as follows: "Examined and rejected this April 12, 1909. Tom J. Redwine, executor." Appellant, on same day (April 12, 1909), presented its claim to the probate court for allowance. The executor resisted the claim. The probate court allowed the claim, and the executor appealed to the circuit court. The circuit court reversed the ruling of the probate court and ordered that the claim be rejected. Appellant duly prosecuted this appeal.

W. A. Anderson, for appellants. Witt & Schoonover, for appellee.

WOOD, J. (after stating the facts as above). The act of May 28, 1907 (Laws 1907, pp. 1170, 1171), classifies the demands against the estates of deceased persons. After specifying claims for the first, second, and third classes, it provides: "Fourth. All demands without regard to quality, which shall be exhibited to the executor or administrator properly authenticated, within six months after the first granting of letters on the estate. Fifth. All such demands as may be exhibited as aforesaid after six months and within one year after the first letters granted on the estate, and all demands not exhibited to the executor or administrator, as required by this act, before the end of one year from the granting of letters shall be forever barred." The act repeals all laws and parts of laws in conflict with it. The statute changes the former law (section 110, Kirby's Dig.) with reference to the time when claims shall be presented, but proper authentication is still required as formerly. "The statute requires that all claims against estates of deceased persons, capable of being asserted either in a court of law or equity, shall be authenticated by affidavits of the claimants to the effect that the claims are just and have not been paid in whole or in part as the case may be." McIlroy Bank-

ing Co. v. Dickson, 66 Ark. 327, 50 S. W. 868, and cases cited; Nichols v. Shearon, 49 Ark. 75, 4 S. W. 167. Knowledge on the part of the executor that the claim was in existence cannot do away with the necessity for its authentication, nor for its presentation. Borum v. Bell, 132 Ala. 85, 31 South. 454. Section 115, Kirby's Dig., says: "Before any executor or administrator shall pay or allow any such debt, the same shall be sworn to as aforesaid." The statute in force at the time the debt was contracted does not control here, for that had been repealed by the present law before the death of the testator. The law in force at that time was the governing statute. The direction in the will for the executor to pay all just debts does not mean that he should pay them without probate. There is nothing in the will to indicate that the testator intended that his estate should be administered in any other than the regular way under the statute which requires "all demands against the estates of deceased persons," "all such demands as may be exhibited," etc. The statute provides the very means for ascertaining whether the claims against the estate are just debts. The statute requires the executor, after letters testamentary have been issued, to give notice of that fact by posting at the courthouse door, or if the court orders it, through the newspapers, etc., and "requiring all persons having claims against the estate to exhibit same," etc. Section 70, Kirby's Dig.

The evidence shows that the notice was given.

The appellants, having failed to comply with the requirements of the statute, are barred from having their claim allowed, and the judgment of the circuit court to that effect is affirmed.

ST. LOUIS, I. M. & S. RY. CO. v. BROWN. (Supreme Court of Arkansas. Jan. 30, 1911.)

1. CARRIERS (§ 382*)—WRONGFUL EJECTION OF PASSENGERS—DAMAGES—MENTAL ANGUISH.

A passenger wrongfully and forcibly ejected from a train, directly causing physical suffering, mental anguish, and humiliation, may recover for the physical suffering and for the mental anguish and humiliation.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 1483-1491; Dec. Dig. § 382.*]

2. CARRIERS (§ 382*)—WRONGFUL EJECTION OF PASSENGERS—DAMAGES—MENTAL ANGUISH.

The jury in estimating the damages for wrongfully ejecting a passenger may consider the fact that she was wrongfully expelled with her baggage at a lonely place on the railroad, where she could not procure shelter, and that she became physically exhausted in attempting to carry her baggage to the depot and in seeking shelter for the night, together with physical and mental suffering endured in consequence thereof.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 1483-1491; Dec. Dig. § 382.*]

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

Appeal from Circuit Court, Conway County; Hugh Basham, Judge.

Action by Mamie Brown against the St. Louis, Iron Mountain & Southern Railway Company for damages for wrongful expulsion from a train. From a judgment for plaintiff, defendant appeals. Affirmed.

Lovick P. Miles and Thos. B. Pryor, for appellant. Moose & Reid, for appellee.

MCCULLOCH, C. J. Plaintiff embarked at Plummerville, Ark., as a passenger on one of appellant's trains en route to Bragg, Okl., and had a ticket which entitled her to ride on the train between those stations. According to the allegations of the complaint, and testimony which she adduced at the trial, the train auditor wrongfully and forcibly ejected her from the train in the night before she reached her destination and about half a mile from Bluffs, Okl., another station. She testified that the auditor pitched her baggage off, and then, over her protest, seized her under the arms and set her off the train, that she screamed and asked where the depot was, and he replied, as the train moved on, that the depot was about 200 yards back. She was alone and her baggage was heavy. She attempted to carry it until she became exhausted and set it down by the track, and, after search, she found a house, and finally flagged a freight train and was carried to her destination, reaching there about 11 o'clock in the night. In her search for a house at which to stay, and in getting back to the railroad after failing to get a place to stay, she had to walk across fields, through brush and briars. She testified that she was humiliated and frightened at being put off in a strange place in the night, that she was physically exhausted by the exertion in carrying the heavy baggage, and that her condition became such that she did not sleep for several nights, and was unable to get out of her room for about two weeks.

It is insisted by counsel for defendant that the court erred in giving instructions which permitted plaintiff to recover damages for "humiliation and fright, anxiety and mental distress, which she suffered, if any, by reason of being ejected from said train and left alone," and that the damages assessed were excessive on account of the jury being allowed to consider those elements. Counsel base their contention on the case of St. L. I. M. & S. Ry. Co. v. Taylor, 84 Ark. 42, 104 S. W. 551. The doctrine of that case is stated in the following language, and does not reach to this case at all: "We prefer to adhere to the rule as a sound one that mental suffering alone, unaccompanied by physical injury or any other element of recoverable damages, cannot be made the subject of an independent action for damages, even where the act or violation of duty com-

plained of was willfully committed, and that such suffering does not of itself constitute a cause of action, but is merely an aggravation of damages when it naturally ensues from the act complained of." Here there is an independent cause of action for the wrongful and forcible ejection. L. R. & F. S. Ry. v. Dean, 43 Ark. 529, 51 Am. Rep. 584; H. S. R. R. v. Deloney, 65 Ark. 177, 45 S. W. 351, 67 Am. St. Rep. 913; L. R. Ry. & Elec. Co. v. Goerner, 80 Ark. 158, 95 S. W. 1007, 7 L. R. A. (N. S.) 97; St. L. S. W. Ry. Co. v. Furlow, 81 Ark. 496, 99 S. W. 689; St. L. I. M. & S. Ry. Co. v. Baty, 88 Ark. 282, 114 S. W. 218. In St. L. S. W. Ry. Co. v. Furlow, supra, we said: "The amount of damages for an injury involving humiliation and distress of mind resulting from a wrongful expulsion from a train, accompanied by harsh treatment, is indeterminate, and must be left, to some extent, to the sound discretion of the jury; and unless the assessment is palpably excessive, or so flagrantly unjust as to indicate passion, prejudice, or a failure to appreciate the law and facts presented, this court will not disturb it."

The evidence in the present case warranted a finding that the train auditor ejected plaintiff from the train with full knowledge of the fact that it was not her station, that it was not any station at all, and that there was an element of willfulness and intentional wrong in his conduct. There is also evidence of physical suffering resulting directly from the wrongful expulsion of plaintiff with her baggage at a lonely place on the railroad where she could not procure shelter. She became physically exhausted in attempting to carry her baggage back to the place where the auditor told her she would find the depot, and in seeking to find a house where she could procure shelter and protection for the night. The jury had a right to consider these circumstances, and the mental as well as the physical suffering plaintiff endured, in estimating the amount of her damages.

Counsel for defendant do not argue the question of excessiveness of the damages except in connection with their contention that the court erred in submitting to the jury the element of mental pain and suffering.

The case was submitted to the jury under proper instructions, and the evidence was sufficient to warrant a finding that the plaintiff was wrongfully ejected from the train without any fault on her part.

The judgment is therefore affirmed.

ARKANSAS CYPRESS SHINGLE CO. v.
METO VALLEY RY. CO. et al.

(Supreme Court of Arkansas. Feb. 13, 1911.)
1. CHATTEL MORTGAGES (§ 33*)—EQUITABLE
MORTGAGE.

Where a purchase-money note provided that, though possession be parted with, a lien

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

is retained by agreement, equity will give effect to it as an equitable mortgage or lien, even though the words were not sufficient to create a legal mortgage.

[Ed. Note.—For other cases, see *Chattel Mortgages*, Cent. Dig. § 17; Dec. Dig. § 33.*]

2. RECEIVERS (§ 77*)—TITLE TO PROPERTY—LIENS.

An equitable lien for the price of personality may be enforced, even though the property be in the hands of a receiver, as the receiver takes the title burdened with the equities to which it was subject when in the hands of the debtor.

[Ed. Note.—For other cases, see *Receivers*, Cent. Dig. §§ 138-144; Dec. Dig. § 77.*]

Appeal from Lonoke Chancery Court; Eugene Lankford, Chancellor.

Action by the Arkansas Cypress Shingle Company against the Meto Valley Railway Company and J. A. Watkins, as receiver. From a judgment for defendants, plaintiff appeals. Reversed and remanded with directions.

J. A. Watkins was appointed receiver by the Lonoke chancery court to take charge of the assets of the Meto Valley Railway Company, an insolvent corporation, for the purpose of distributing these assets among the creditors of such corporation under the provisions of sections 949 to 952, inclusive, of Kirby's Digest. Among the assets placed in the hands of the receiver was an engine and tender which the appellant had sold the railway company before the company was placed in the hands of the receiver. The appellant took notes for the payment of the purchase money, one of which was due and unpaid at the time of the institution of this suit. The note is as follows: "\$600.00 Little Rock, Ark., July 19, 1909. Four months after date we or either of us promise to pay to the order of the Arkansas Cypress Shingle Company, six hundred dollars, for value received, negotiable and payable, without defalcation or discount at German National Bank, with interest thereon from date at the rate of six per cent. per annum until paid. This is one of a series of notes, all given by the same payor to the same payee, of even date herewith, maturing at different dates, and all being for the purchase money of the following described locomotive: One Brooks locomotive and tender No. 2 complete, used at A. J. Niemeyer Lumber Company plant in this city, upon which a lien is hereby and herein retained, by agreement, for the purchase money thereof; and it is agreed, as a part of the original contract, that, if either of the preceding notes, maturing prior to this one, shall remain unpaid after the maturity thereof, such default shall cause the full maturity of this note, and the same shall become due and payable immediately upon such default, and the holder of this note shall have the right to demand and to sell and to enforce the payment hereof after default, just the same as if the same were

fully matured upon its face, and permission is given to take the said locomotive to Lonoke county, Arkansas. [Signed] Meto Valley Ry. Co. Ed Murray, Engr." This suit was brought against the railway company and the receiver based on the above instrument to recover the amount named therein, and to have a lien declared on the engine and tender therein described, and to have same sold to satisfy same. The railway company did not answer. The receiver answered that he held the engine and tender "free from all liens or claims of the plaintiff." The court dismissed the complaint, holding that the appellant could take "nothing by reason of its alleged lien." This appeal has been duly prosecuted.

Morris M. Cohn, for appellant.

WOOD, J. (after stating the facts as above). In *Martin v. Schichtl*, 60 Ark. 595, 598, 31 S. W. 458, 459, we said: "Equity requires no particular words to be used in creating a lien. It looks through the form to the substance of an agreement, and if from the instrument evidencing the agreement the intent appear to give, or to charge or to pledge, property, real or personal, as a security for an obligation, and the property is so described that the principal things intended to be given or charged can be sufficiently identified, the lien follows." This language was recently quoted by the Chief Justice speaking for the court in *Ward v. Stark*, 91 Ark. 268, 273, 121 S. W. 382. See other cases cited in appellant's brief, and especially *Wood v. Holly Mfg. Co.*, 100 Ala. 326, 13 South. 948, 46 Am. St. Rep. 56, where in a similar case the court said: "That a lien created by contract, and not sufficient as a legal mortgage, will generally be regarded as in the nature of an equitable mortgage. The form of the contract is immaterial. Though a lien may not be expressed in terms, equity will imply a security from the nature of the transaction, and give it effect as such in furtherance of the agreement of the parties if there appears an intention to create a security." *Cox v. Smith*, 93 Ark. 371, 125 S. W. 437. The instrument under consideration in express terms creates a lien upon the property in controversy in favor of the appellant. The lien thus created is in the nature of a mortgage. It is an equitable mortgage from the railway company to appellee on the engine and tender, which the appellee can enforce in equity notwithstanding the property has passed into the hands of a receiver. The receiver took the title to the property burdened with all the equities to which it was subject in the hands of the debtor. 23 A. & E. Ency. (2d Ed.) 1091-1093; *Auten v. City Electric St. Ry. Co.* (C. C.) 104 Fed. 395; 34 Ency. 348e, note.

The lien which is here sought to be enforced is created by contract. The statutory

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

remedy whereby the vendor of personal property in an action against the vendee for the purchase money may impound the property while in the possession of the vendee to prevent him from selling same is an entirely different proceeding from that resorted to herein. Sections 4966, 4967, Kirby's Dig. Cases arising under that statute have no application here. The judgment dismissing the complaint was erroneous.

It is therefore reversed, and the cause is remanded for further proceedings not inconsistent with this opinion.

HART, J., concurs in the judgment.

RAMSEY v. WEEDMAN et al.

(Supreme Court of Arkansas. Feb. 20, 1911.)

1. APPEAL AND ERROR (§ 1009*)—REVIEW—FINDINGS—CONCLUSIVENESS.

A finding of a chancellor not against the weight of evidence will not be disturbed.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3970-3978; Dec. Dig. § 1009.*]

2. PARTNERSHIP (§ 121*)—ACTIONS—NOTES—EVIDENCE.

In an action between partners, evidence held to support a chancellor's finding that a note and mortgage signed by all members of a partnership was for the individual debt of one partner.

[Ed. Note.—For other cases, see Partnership, Cent. Dig. § 184½; Dec. Dig. § 121.*]

Appeal from Monroe Chancery Court; Jno. M. Elliott, Chancellor.

Action by M. D. and N. B. Weedman against J. W. Ramsey to foreclose a mortgage and recover judgment on a note, and that defendant filed a cross-bill seeking affirmative relief. From a judgment for plaintiffs, defendant appeals. Affirmed.

H. A. Parker, for appellant. Thomas & Lee, for appellees.

HART, J. On the 19th day of January, 1906, M. D. and N. B. Weedman instituted this action in the chancery court against J. W. Ramsey to foreclose a mortgage on a sawmill outfit and to recover judgment on the note, which the mortgage was given to secure.

The undisputed facts are substantially as follows: E. S. Weedman is the father of N. B. and M. D. Weedman, the plaintiffs, and all of them lived at Clarendon in the year 1900. E. S. Weedman was acquainted with the defendant, J. W. Ramsey, who at the time resided in Perry county, Ind., and entered into correspondence with him relative to forming a partnership at Clarendon, for the purpose of operating a stave plant. The correspondence culminated in a partnership between N. B. and M. D. Weedman and J. W. Ramsey. The contract was in

writing, dated at Clarendon, Ark., January 1, 1901, and was to continue for one year. By its terms Ramsey was to furnish the sawmill with boiler, engine, belting, shafting, pulleys, all complete with saws. N. B. and M. D. Weedman were to take charge of the mill and furnish all necessary funds to operate same in manufacturing gum staves and lumber; also to furnish one barrel stave saw. The contract also, contained the following provision: "It is agreed and understood that each, N. B. Weedman and M. D. Weedman and J. W. Ramsey, are to share equal in all expenses in setting this machinery up and operating same, and in all repairs in keeping up the plant. N. B. Weedman and M. D. Weedman are to furnish J. W. Ramsey monthly statements of all expenditures and all income from said business from time to time." The firm name was Weedman Bros. & Co., and it was agreed that N. B. and M. D. Weedman should have the right to receive all moneys and pay all liabilities that might accrue in the business. On January 8, 1902, Ramsey moved from the state of Indiana to Clarendon, Ark., and has lived there ever since. The business was conducted until the 10th of November, 1902, at which time a new contract of partnership between the parties was entered into. Under this contract, Ramsey was to receive one half of the profits, and N. B. and M. D. Weedman were to receive the other half. On the same day the verbal contract of partnership was entered into, the note and mortgage sued on was executed in favor of W. H. Johnson & Co. The note was for \$534.25, due one year after date, and was signed by Weedman Bros. & Co. and by J. W. Ramsey. The mortgage was signed by the individual members of the partnership. The mortgage recites that it was given to secure \$532.38, balance of purchase price on the sawmill, which W. H. Johnson on that day assumed and paid, and for future advances to the partnership of \$7.50 per thousand on gum staves which Weedman Bros. & Co. get out at said mill. On the 8th day of June, 1903, after the verbal contract of partnership had been terminated, the note sued on and the mortgage to secure same was transferred in writing by W. H. Johnson & Co. to M. D. and N. B. Weedman.

It is the contention of the plaintiffs that the partnership under the written contract was fully settled and the profits divided, and the property used in the partnership business divided before the verbal contract of partnership was entered into. They claim that the note sued on was the individual debt of Ramsey, and the mortgage was given to secure it because only on that condition would W. H. Johnson & Co. agree to give them further advances, which it was necessary for them to have, in order to enable them to

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

continue running the stove plant; that they paid the amount of the note sued on out of their own funds, and had same transferred to them. On the other hand, Ramsey contends that there never was any settlement of the partnership under the written contract; that plaintiffs never made an account to him of the profits thereof; and that a large sum is now due him as his share of the profits arising therefrom, which he seeks to recover by his cross-bill filed herein. He also denied that the note sued on was given for his individual debt. Upon the proof introduced, the chancellor found for the plaintiffs, and the defendant has appealed.

The testimony for the plaintiffs tended to show that the partnership under the written contract was settled and the profits and property divided before the verbal contract of partnership was entered into. The three Weedmans, father and sons, all testified. From their testimony it appears that E. S. Weedman, the father, managed the business. He received a salary of \$50 per month from the date of the formation of the partnership under the written contract until the verbal contract of partnership was entered into, and from that time on he received \$40 per month. They show that they sent monthly statements of the business to Ramsey until he moved to Clarendon, and that after that the books were open to him for inspection. The books were kept by E. S. and M. D. Weedman. They say the profits of the partnership before the verbal contract was entered into amounted to about \$1,300, and that of this amount Ramsey received \$670; that they paid Ramsey \$150 of this in cash, and the balance to the Hellman Machine Works for an amount owed that company by Ramsey, and Ramsey does not deny that. He directed them to pay this amount to the Hellman Machine Works as a part purchase price of machinery owed said company by him, nor does he deny that he received the \$150 cash. They also testify in positive terms that the contract of partnership was settled up, a division of the profits was had, and a division of the machinery used by the partnership was made before the verbal contract of November 10, 1902, was made, and that this was done after a full disclosure of the conduct of the business had been made.

The defendant denies all this, but the finding of the chancellor is against him. The defendant makes many charges of fraud against the plaintiffs, but he has not supported them by proof. It is true that he shows by one witness that E. S. Weedman purchased groceries from him and paid for them by checks of the partnership; but during this time E. S. Weedman was receiving a salary from the firm, and he denies that he purchased the goods with the partnership funds. Plaintiffs testify that the books kept

by them showed a complete account of the partnership affairs until the verbal contract was made in November, 1902; that defendant after a full and fair disclosure of their contents settled with them and divided both the profits and the property used in the partnership; that monthly statements of the conduct of the business was sent to Ramsey until he moved to Clarendon; and that thereafter, until the verbal contract of partnership was entered into, Ramsey had access to the books, and could keep himself informed as to the partnership business. Complaint is now made that these books have been destroyed. Plaintiffs, after the whole partnership had been terminated, left Clarendon. They say they destroyed the books because they were no longer of any use; the written contract of partnership having been fully settled and adjusted.

The decree of the chancellor was for the plaintiffs. It necessarily follows that he found that the partners had settled and adjusted the partnership affairs under the terms of the written partnership, and divided the profits accruing therefrom. His finding in that behalf is not against the weight of the evidence, and, under the settled rule of this court, will not be disturbed.

We now come to the question of whether the note sued on was given for the debt of Ramsey. The three Weedmans say that it was; that it was a balance owed by Ramsey on his mill machinery. They say they consented to mortgage their property to secure his debt because Johnson & Co. would not agree to make the firm of Weedman Bros. & Co. any further advances unless they did so. It will be noted that after the partnership existing under the written agreement had been settled, and its affairs adjusted, the property of each partner was set apart to him. That is to say, the part belonging to the plaintiffs was set apart to them, and that belonging to the defendant was set apart to him. They, however, continued to use this property in the partnership business under the agreement of November 10, 1902, and this was the property mortgaged to Johnson & Co. After the partnership of that date was formed, Johnson & Co. kept the accounts and made the settlements with the firm after the manufactured product was disposed of. M. D. Weedman, however, kept the time of the employees of the mill. The profits of that partnership amounted to about \$200, which plaintiffs expended in paying debts of the partnership. Their testimony is contradicted by the defendant alone.

The finding of the chancellor on the issues raised by the complaint of the plaintiffs and cross-complaint of the defendant was in favor of the plaintiffs, and we are of the opinion that his finding should be sustained.

The decree will therefore be affirmed.

BUFORD v. LEWIS.

(Supreme Court of Arkansas. Jan. 31, 1910.)

Appeal from Polk Chancery Court; Jas. D. Shaver, Chancellor. See, also, 124 S. W. 244.

PER CURIAM. Appeal dismissed, without prejudice, on appellant's motion.**MILLER et al. v. STATE.**

(Supreme Court of Arkansas. Jan. 31, 1910.)

Appeal from Circuit Court, Pulaski County, Second Division; F. Guy Fulk, Judge. See, also, 81 Ark. 359, 99 S. W. 533.

PER CURIAM. Settled, and appeal dismissed.**ST. LOUIS, I. M. & S. RY. CO. v. BELL.**

(Supreme Court of Arkansas. Jan. 24, 1910.)

Appeal from Circuit Court, Jackson County; Charles Coffin, Judge.

PER CURIAM. Affirmed, for noncompliance with rule 9.**ST. LOUIS, I. M. & S. RY. CO. v. MURPHY.**

(Supreme Court of Arkansas. Jan. 24, 1910.)

Appeal from Circuit Court, Faulkner County; Eugene Lankford, Judge.

PER CURIAM. Judgment in accordance with agreement of parties.**THOMPSON COTTON CO. et al. v. GULLICK et al.**

(Supreme Court of Arkansas. Dec. 20, 1909.)

Appeal from Miller Chancery Court; James D. Shaver, Chancellor.

PER CURIAM. Settled, and appeal dismissed.**WESTERN UNION TELEGRAPH CO. v. TUCKER.**

(Supreme Court of Arkansas. Dec. 20, 1909.)

Appeal from Circuit Court, Ouachita County; George W. Hays, Judge.

PER CURIAM. Judgment rendered in accordance with stipulations filed.**PULASKI GASLIGHT CO. v. McCLINTOCK.**

(Supreme Court of Arkansas. March 6, 1911.)

Dissenting Opinion.

For majority opinion, see 134 S. W. 1189.

McCULLOCH, C. J. The state of the proof was such that the court should have submitted to the jury the question whether McClintock was guilty of contributory negli-

gence in remaining under the house after he discovered the presence of gas in the pipe from which he was removing the gooseneck. There was evidence which would have warranted the jury in finding that enough gas escaped while he was unscrewing the pipe to apprise him of the presence of gas before it escaped in sufficient quantity to asphyxiate him and in time to have made his escape. The court gave instructions submitting the question of contributory negligence, but they were in effect withdrawn by the court's approval of the remarks of counsel. The overruling of defendant's objection was in effect an approval of the remarks, and was the same as if the court had in express terms withdrawn its former instructions and refused to submit the question of contributory negligence. It is true that the court had directed the jury not to consider the element of pain and suffering, but this was not on the ground that the death was instantaneous after the gas began to escape. It would have been error for the court to have told the jury that death was instantaneous as soon as the gas began to escape, for that was a disputed question of fact. The court was correct, however, in withdrawing from the jury the element of pain and suffering, for the undisputed proof showed that death by asphyxiation was painless. This court now holds that the plaintiff was entitled to recover on the theory that the defendant negligently created a deceptive condition which misled McClintock, by leaving the old pipe exposed and gas in the new pipe. If the court is correct on that question, the error in withdrawing the question of contributory negligence is distinctly emphasized; for, if McClintock was in fact deceived into attempting to unscrew the joint of the pipe which he supposed was an old unused one, the moment that he detected the escape of gas it should have warned him that he was mistaken in supposing that the pipe contained no gas. As already stated, I think there is abundant proof to have warranted the jury in finding that there was sufficient escape of gas to give him warning in time to make his escape before he entirely removed the pipe so as to allow it to escape in sufficient volume to kill him.

Mr. Justice WOOD concurs in what I have thus far said.

In addition to this, I am of the opinion that leaving the old pipe exposed was not the proximate cause of the injury, and that the plaintiff entirely failed to make out a case for the recovery of damages. But, even if the case could be rested upon that theory, it seems clear to me that that issue was not embraced in the pleadings, and was not submitted to the trial jury. The whole record shows that the trial proceeded upon the theory of negligence in failing to install a stop box at the curb. This runs through all the instructions given by the court. It is true that one or two of the instructions mention the fact of the old pipe being exposed;

but that is mentioned only as one of the conditions existing at the time, and not as an act of negligence for the jury to consider. It is evident to my mind that the jury based its verdict upon the failure of defendant to install a stop box, and it is now conceded that according to the undisputed proof that was not an act of negligence; for the meter cock at the end of the pipe prevented the escape of gas as effectually as a stop box at the curb, and the gas escaped solely on account of McClintock unscrewing the joint.

END OF CASES IN VOL. 134

INDEX-DIGEST

ABATEMENT.

Of nuisance, see Intoxicating Liquors, §§ 261-279; Nuisance, §§ 23-36.

ABATEMENT AND REVIVAL.

Election of remedy, see Election of Remedies.

II. ANOTHER ACTION PENDING.

Splitting cause of action, see Action, § 53.

V. DEATH OF PARTY AND REVIVAL OF ACTION.

(A) Abatement or Survival of Action.

§ 54. Under Rev. St. 1895, art. 3353a, *held*, that the widow and children of a decedent could recover all damages for malicious prosecution which he could have recovered if living.—Missouri, K. & T. Ry. Co. of Texas v. Groseclose (Tex. Civ. App.) 736.

ABDUCTION.

See Kidnapping; Seduction.

ABSENCE.

Of veniremen as ground for quashing venire, see Jury, § 116.

Of witness or evidence, ground for continuance, see Continuance, §§ 23-26; Criminal Law, §§ 594, 595.

ABSTRACT INSTRUCTIONS.

See Trial, § 248.

ABUTTING OWNERS.

Compensation for taking of or injury to lands or easements for public use, see Eminent Domain, §§ 106-141.

Rights in streets and highways in general, see Municipal Corporations, § 671.

Rights to damages for injuries from public improvements, see Municipal Corporations, §§ 396-404.

ACCEPTANCE.

Of goods sold, see Sales, § 181.

Of offer or proposal to contract, see Contracts, § 24.

Of performance of contract, see Contracts, §§ 284-305.

Of performance of contract for public improvements, see Municipal Corporations, § 365.

Of services as implying contract to pay for same, see Work and Labor, § 4.

ACCESSION.

Annexation of personal to real property, see Fixtures.

§ 2. An owner may follow and retake property in the hands of a willful trespasser.—Sligo Furnace Co. v. Hobart-Lee Tie Co. (Mo. App.) 585.

ACCESSORIES.

Acts and declarations of conspirators and co-defendants as evidence, see Criminal Law, § 424.

Criminal responsibility, see Homicide, § 30.
Testimony of accomplices, see Criminal Law, § 508.

ACCIDENT.

Cause of death, see Death, §§ 33-104.

ACCOMPLICES.

Testimony, see Criminal Law, § 508.

ACCORD AND SATISFACTION.

See Compromise and Settlement; Novation; Payment; Release.

ACCOUNT.

Evidence preliminary to introduction of books of account in evidence, see Evidence, § 376.
Settlement of balance of mutual accounts, see Compromise and Settlement.

Accounting by particular classes of persons.

See Executors and Administrators, §§ 460-515.

Guardian, see Guardian and Ward, §§ 157-164.

Partners, see Partnership, § 325.

Trustees, see Trusts, §§ 315-329.

ACCRUAL.

Of right of action or defense as affecting limitation, see Limitation of Actions, § 48.

ACCUSATION.

Of crime, indictment or information, see Indictment and Information.

ACKNOWLEDGMENT.

Operation and effect of admissions as evidence, see Evidence, §§ 205-265.

ACQUIESCENCE.

In location of boundary lines, see Boundaries, § 48.

ACTION.

Abatement, see Abatement and Revival.

Accrual, as affecting limitations, see Limitation of Actions, § 49.

Bar by former adjudication, see Judgment, § 619.

Damages recoverable, see Damages.

Election of remedy, see Election of Remedies.

Ignorance of cause of action as affecting limitation, see Limitation of Actions, § 95.

Judicial admissions, see Evidence, § 208.

Judicial notice of judicial proceedings and records, see Evidence, § 43.

Jurisdiction of courts, see Courts.

Laches, see Equity, §§ 67-71.

Limitation by statutes, see Limitation of Actions.

Malicious actions, see Malicious Prosecution.

Officious intermeddling in suits between others, see Champerty and Maintenance.

Retrospective laws relating to remedies, validity, see Constitutional Law, § 191.
 Right to trial by jury, see Jury, § 31.
 Survival, see Abatement and Revival, § 54.

Actions between parties in particular relations.
 See Attorney and Client, § 158; Master and Servant, §§ 39, 264-296; Partnership, §§ 121, 325.

Cotenants, see Partition, §§ 77, 78.

Creditors and sureties, see Principal and Surety, § 133.

Mortgagor and mortgagee, see Chattel Mortgages, § 284; Mortgages, §§ 556-587.

Principal and broker, see Brokers, §§ 38, 79-88.

Actions by or against particular classes of persons.

See Brokers, § 38; Carriers, §§ 132-134, 184, 185, 227-230, 315-321, 344-347, 382; Corporations, § 521; Executors and Administrators, §§ 434, 473; Husband and Wife, § 207; Insane Persons, § 89; Landlord and Tenant, §§ 288-291; Master and Servant, §§ 264-296, 329; Municipal Corporations, §§ 404, 818-822, 1031; Physicians and Surgeons, § 24; Principal and Agent, §§ 184-194; Railroads, §§ 282, 297, 344-351, 400, 401, 446, 447, 485; Receivers, § 174; Street Railroads, §§ 112-118.

Assignees, see Assignments, § 137.

Attorneys, see Attorney and Client, § 158.

Creditors of estate of decedent, see Executors and Administrators, § 283.

Electric light or power companies, see Electricity, § 19.

Insurance companies, see Insurance, § 825.

Joint tenants, see Joint Tenancy, § 14.

Married women, see Husband and Wife, § 207.

Mortgagors or mortgagees, see Chattel Mortgages, § 284; Mortgages, §§ 556-587.

National banks, see Banks and Banking, § 280.

Stockholders, see Corporations, § 121.

Sureties, see Principal and Surety, § 133.

Sureties on bail bonds or undertakings, see Bail, § 89.

Sureties on bonds of executors or administrators, see Executors and Administrators, § 537.

Sureties on bonds or undertakings on appeal or writ of error, see Justices of the Peace, § 191.

Telegraph or telephone companies, see Telegraphs and Telephones, §§ 66, 67.

Trustees, see Trusts, § 268.

Trustees in bankruptcy, see Bankruptcy, § 303.

Actions relating to particular species of property or estates.

See Trade-Marks and Trade-Names, § 93; Waters and Water Courses, §§ 178, 179.

Decedents' estates, see Executors and Administrators, § 473.

Demised premises, see Landlord and Tenant, §§ 288-291.

Mortgaged property, see Chattel Mortgages, § 284; Mortgages, §§ 556-587.

Trust estates, see Trusts, § 268.

Particular causes or grounds of action.

See Bills and Notes, §§ 471-534; Death, §§ 33-104; Forcible Entry and Detainer, §§ 4-15; Fraud, §§ 50-60; Fraudulent Conveyances, § 249; Insurance, §§ 612-672, 825; Libel and Slander, §§ 89-125; Malicious Prosecution, §§ 49-72; Money Paid; Nuisance, §§ 23-36; Torts, §§ 26, 27; Trespass, §§ 40-52.

Appropriation of property for public use, see Eminent Domain, §§ 206-300.

Bail bonds, see Bail, § 89.

Bonds and undertakings on appeal or writ of error, see Justices of the Peace, § 191.

Bonds of executors or administrators, see Executors and Administrators, § 537.

Breach of contract, see Contracts, §§ 350-353.

Breach of contract of sale, see Sales, §§ 382, 405; Vendor and Purchaser, § 331.

Breach of contract of suretyship, see Principal and Surety, § 133.

Breach of covenant, see Covenants, § 130.

Breach of warranty of goods sold, see Sales, §§ 428-441.

Cloud on title, see Quieting Title.

Compensation of attorneys, see Attorney and Client, § 158.

Compensation of brokers, see Brokers, §§ 79-88.

Compensation of physicians or surgeons, see Physicians and Surgeons, § 24.

Deceit, see Fraud, §§ 50-60.

Delay in transportation or delivery of live stock, see Carriers, §§ 227-230.

Ejection of passenger or intruder from train, see Carriers, § 382.

Infringement of trade-mark or trade-name, see Trade-Marks and Trade-Names, § 93.

Injuries at railroad crossings, see Railroads, §§ 344-351.

Injuries by servants, see Master and Servant, § 329.

Injuries from accidents to trains, see Railroads, § 207.

Injuries from defects or obstructions in streets, see Municipal Corporations, §§ 818-822.

Injuries from escape or explosion of gas, see Gas, § 20.

Injuries from fires caused by operation of railroad, see Railroads, § 485.

Injuries from flowage, see Waters and Water Courses, §§ 178, 179.

Injuries from public improvements, see Municipal Corporations, § 404.

Injuries to animals on or near railroad tracks, see Railroads, §§ 446, 447.

Injuries to licensees or trespassers on railroad property in general, see Railroads, § 282.

Injuries to passengers, see Carriers, §§ 315-321, 344-347.

Injuries to persons on or near railroad tracks, see Railroads, §§ 400, 401.

Injuries to persons on or near street railroad tracks, see Street Railroads, §§ 112-118.

Injuries to servants, see Master and Servant, §§ 264-296.

Liquor nuisance, see Intoxicating Liquors, §§ 260-279.

Loss of or injury to goods in course of transportation, see Carriers, §§ 132-134, 184, 185.

Loss of or injury to live stock in course of transportation, see Carriers, §§ 227-230.

Negligence in general, see Negligence, §§ 111-136.

Negligence in operation of railroad, see Railroads, §§ 282, 297, 344-351, 400, 401, 446, 447, 485.

Negligence in operation of street railroad, see Street Railroads, §§ 112-118.

Negligence in production or use of electricity, see Electricity, § 19.

Negligence of master, see Master and Servant, §§ 264-296.

Negligence or default in transmission or delivery of telegraph or telephone message, see Telegraphs and Telephones, §§ 66, 67.

Negligence or misconduct of broker, see Brokers, § 38.

Negligence or misconduct of servant, see Master and Servant, § 329.

Negligent or wrongful use of street, see Municipal Corporations, § 706.

Nonpayment of taxes in general, see Taxation, § 593.

Price of timber, see Logs and Logging, § 3.

Purchase money on sale of goods, see Sales, § 364.

Recovery of possession of leased premises by landlord, see Landlord and Tenant, §§ 288-291.

Recovery of price paid for corporate stock, see Corporations, § 121.

Recovery of price paid for land, see Vendor and Purchaser, §§ 338-341.

Services, and materials furnished incident thereto, see Work and Labor.

Unlawful detainer of demised premises, see Landlord and Tenant, §§ 288-291.
 Usurious contract, see Usury, §§ 100-113.
 Wrongful attachment, see Attachment, §§ 368-377.
 Wrongful conversion of personal property, see Trover and Conversion, §§ 32-68.
 Wrongful discharge of servant, see Master and Servant, § 39.
 Wrongful sequestration, see Sequestration, § 21.

Particular forms of action.

See Ejectment; Forcible Entry and Detainer, §§ 4-15; Quieting Title; Replevin; Trespass, §§ 40-52; Trespass to Try Title; Trover and Conversion.

Particular forms of special relief.

See Divorce; Injunction; Mandamus; Partition, §§ 77, 78; Quieting Title; Quo Warranto; Specific Performance.
 Abatement of liquor nuisance, see Intoxicating Liquors, §§ 289-279.
 Abatement of or injunction against nuisance, see Nuisance, §§ 23-36.
 Accounting by executor or administrator, see Executors and Administrators, §§ 473, 504-515.
 Accounting by guardian, see Guardian and Ward, §§ 157-164.
 Accounting by trustee, see Trusts, §§ 315-320.
 Alimony, see Divorce, §§ 249-271.
 Application for liquor license, see Intoxicating Liquors, § 64.
 Cancellation of instrument, see Cancellation of Instruments.
 Confirmation or trial of tax title, see Taxation, §§ 790-816.
 Dissolution and accounting of partnership, see Partnership, § 325.
 Enforcement of assessments for public improvements, see Municipal Corporations, § 567.
 Enforcement of dissolution of partnership, see Partnership, § 325.
 Enforcement of forfeiture for breach of condition in deed, see Deeds, § 168.
 Enforcement of payment of claim against estate of decedent, see Executors and Administrators, § 283.
 Enforcement of taxes, see Taxation, §§ 545-593, 643.
 Establishment and determination of heirship, see Descent and Distribution, § 71.
 Establishment and enforcement of rights or liens against estate of bankrupt, see Bankruptcy, § 214.
 Establishment of boundaries, see Boundaries, §§ 37-48.
 Foreclosure of mortgage, see Chattel Mortgages, § 284; Mortgages, §§ 556-587.
 Judgment against real property for taxes, see Taxation, § 643.
 Protection of attorney's lien, see Attorney and Client, § 190.
 Quieting title, see Quieting Title.
 Removal of cloud, see Quieting Title.
 Revocation of liquor license, see Intoxicating Liquors, § 108.
 Sale of land to enforce assessment for public improvements, see Municipal Corporations, § 567.
 Setting aside transfers in fraud of creditors or subsequent purchasers in general, see Fraudulent Conveyances, § 249.
 Specific performance of contract between church factions, see Religious Societies, § 25.
Particular proceedings in actions.
 See Appearance; Continuance; Costs; Depositions; Dismissal and Nonsuit; Evidence; Execution; Judgment; Jury; Limitation of Actions; Lis Pendens; Parties; Pleading; Trial; Venue.
 Assessment of damages, see Damages, §§ 208-216.
 Default, see Judgment, §§ 137-139.

Sales under judgment, order, or decree of court, see Execution, §§ 258-269; Judicial Sales.
 Transfer of causes from one state court to another, see Courts, § 485.
 Verdict, see Trial, §§ 329-337.

Particular remedies in or incident to actions.

See Attachment; Garnishment; Injunction; Receivers; Sequestration; Set-Off and Counterclaim.

Proceedings in exercise of special or limited jurisdiction.

Courts of limited jurisdiction in general, see Courts, § 163.
 Criminal prosecutions, see Criminal Law.
 Suits in equity, see Equity.
 Suits in justices' courts, see Justices of the Peace, § 91.

Review of proceedings.

See Appeal and Error; Certiorari; Exceptions, Bill of; Justices of the Peace, §§ 174-191; New Trial.
 Bill of review, see Equity, § 447.

I. GROUNDS AND CONDITIONS PRECEDENT.

Power of commissioner taking deposition to determine good faith in bringing action, see Depositions, § 52.

II. NATURE AND FORM.

Review of decisions, see Appeal and Error, § 184.

Particular actions or proceedings.

Contest of election, see Elections, § 269.
 For compensation of attorney, see Attorney and Client, § 158.
 For compensation of brokers, see Brokers, § 79.
 For price paid for land, see Vendor and Purchaser, § 338.
 For wrongful attachment, see Attachment, § 368.
 To confirm or try tax title, see Taxation, § 790.
 To recover possession of demised premises, see Landlord and Tenant, § 288.

III. JOINDER, SPLITTING, CONSOLIDATION, AND SEVERANCE.

Joinder of counts in indictment or information, see Indictment and Information, § 132.

§ 38. Action to cancel deeds to certain land, and to recover the same, *held* not to show an improper joinder of causes.—Morse v. Tackaberry (Tex. Civ. App.) 273.

§ 45. A petition *held* not demurrable for misjoinder of causes of action.—Remmers v. Shubert (Mo. App.) 1042.

§ 53. A person injured by a joint tort-feasor may prosecute his action against all or only one of the wrongdoers, but he cannot split the same.—Laughlin v. Excelsior Powder Mfg. Co. (Mo. App.) 116.

§ 53. Right to recover personal judgment for a debt secured by a lien on real estate and the right to have a foreclosure of the lien *held* severable.—Jordan v. Massey (Tex. Civ. App.) 804.

IV. COMMENCEMENT, PROSECUTION, AND TERMINATION.

Arrest of judgment, see Judgment, § 269.

§ 65. Evidence of matters arising after commencement of action for rent *held* immaterial.—Keahey v. Bryant (Tex. Civ. App.) 409.

ACTS.

See Statutes.

ADEPTION.

Of legacy or devise, see Wills, § 767.

ADEQUATE REMEDY AT LAW.

Effect on jurisdiction in equity, see Chattel Mortgages, § 255; Injunction, § 17.

ADJOINING LANDOWNERS.

See Boundaries.

Easements, see Easements.

ADJOURNMENT.

Of civil causes in general, see Continuance.
Of criminal causes in general, see Criminal Law, §§ 586-614.

ADJUDICATION.

Decisions of courts in general, see Courts, § 91; Judgment.
Operation and effect of former adjudication, see Judgment, §§ 619, 713-743.

ADJUSTMENT.

Of controversy by parties, see Compromise and Settlement.
Of loss under insurance policy, see Insurance, § 576.

ADMEASUREMENT OF DOWER.

See Dower, § 59.

ADMINISTRATION.

Of estate of decedent, see Executors and Administrators.
Of public finances, see Counties, §§ 152-191; Municipal Corporations, § 886.
Of trust property, see Trusts, §§ 219-268.

ADMISSION.

To practice medicine or surgery, see Physicians and Surgeons, § 6.

ADMISSIONS.

As evidence, see Evidence, §§ 205-265.
In pleadings, see Pleading, §§ 36, 214.
To prevent continuance, see Continuance, § 33.

ADOPTION.

Of common law, see Common Law, § 11.
Of statutes, see Statutes, § 5.

ADULTERY.

See Bigamy.

Evidence in civil actions, see Divorce, § 129.

ADVANCEMENTS.

By factor, see Factors, § 45.

ADVANCES.

Interest on advances, see Interest, § 57.

ADVERSE CLAIM.

Determination of claims to real property, see Quietting Title.
To property levied on or garnished, see Garnishment, § 201.

ADVERSE POSSESSION.

See Limitation of Actions.

By cotenants, see Tenancy in Common, § 15.
Grants of lands held adversely, see Champerty and Maintenance, § 7.

I. NATURE AND REQUISITES.

(B) Actual Possession.

§ 14. Mere intention, unaccompanied by actual possession, will not carry possession beyond the line indicated by actual possession.—*Slaven v. Dority* (Ky.) 1166.

(C) Visible and Notorious Possession.

§ 31. The extent of the encroachment on land held to determine its sufficiency as notice of an adverse claim to land not actually occupied.—*Wm. M. Rice Institute v. Goolsbee* (Tex. Civ. App.) 397.

(E) Duration and Continuity of Possession.

§ 43. If a successive privity exists between them, the last occupant of land may avail himself of the occupancy of his predecessors.—*Wilson v. Rogers* (Ark.) 318.

§ 43. In order to create the privity requisite to enable a subsequent occupant to take his possession to that of a prior occupant, it is not necessary that there should be a conveyance in writing.—*Wilson v. Rogers* (Ark.) 318.

§ 43. Possession of a purchase-money mortgage held not adverse to the mortgagor, so as to make a new starting point for the statute of limitations in favor of a later owner.—*Wilson v. Rogers* (Ark.) 318.

§ 43. The possession of a prior occupant of land may be passed by operation of law as that of an execution debtor to the purchaser of the land on execution sale.—*Wilson v. Rogers* (Ark.) 318.

§ 44. If there was a break in the possession and occupancy of a part of a tract claimed by adverse possession, such possession was not sufficient to confer title to the whole tract.—*Wm. M. Rice Institute v. Goolsbee* (Tex. Civ. App.) 397.

§ 44. Facts held to show unbroken possession by occupant of land so as to confer title by adverse possession.—*Bayle v. Norris* (Tex. Civ. App.) 767.

§ 57. Where land is claimed adversely by reason of the possession of different tenants, the intention with which each tenant entered and the continuity of the tenancies must be proved.—*Upchurch v. Sutton Bros.* (Ky.) 477.

§ 57. Evidence held that there was a break in possession and occupancy of the land, defeating title by limitations.—*Wm. M. Rice Institute v. Goolsbee* (Tex. Civ. App.) 397.

(F) Hostile Character of Possession.

§ 60. The heirs and representatives of one estopped to claim land by adverse possession are also estopped.—*Upchurch v. Sutton Bros.* (Ky.) 477.

§ 60. Under the circumstances stated, held, that one entering land under a void patent was estopped to claim by adverse possession.—*Upchurch v. Sutton Bros.* (Ky.) 477.

§ 62. Possession by a purchaser and his grantee held not adverse to the heirs of the vendor, retaining a vendor's lien for the price, until they repudiate the title under the vendor.—*Lumpkin v. Story* (Tex. Civ. App.) 298.

II. OPERATION AND EFFECT.

(A) Extent of Possession.

§ 97. Where one claims title by adverse possession without color of title, he acquires no ti-

tle except to land in his actual possession.—*Slaven v. Dority* (Ky.) 1166.

(B) Title or Right Acquired.

§ 106. Under the statute which makes title by adverse possession "full title precluding all claims" the holder has as full ownership as can be held under any other character of title.—*Clark v. Asbury* (Tex. Civ. App.) 286.

III. PLEADING, EVIDENCE, TRIAL, AND REVIEW.

§ 114. The possession essential to divest one who holds title by grant from the commonwealth stated.—*Upchurch v. Sutton Bros.* (Ky.) 477.

§ 114. In ejectment for 181½ acres, evidence held insufficient to show adverse possession except as to 20 acres.—*Slaven v. Dority* (Ky.) 1166.

§ 115. Possession of a part of a 160-acre tract held sufficient to raise the issue of notice to the owner of adverse claim to the whole thereof.—*Wm. M. Rice Institute v. Goolsbee* (Tex. Civ. App.) 397.

ADVERTISEMENT.

Unauthorized publication of picture as libel, see Libel and Slander, § 16.

AFFIDAVITS.

See Depositions.

Particular proceedings or purposes.

New trial, see Criminal Law, §§ 956-958.

Of merits and good faith on appeal or writ of error, see Appeal and Error, § 367.

Verification of petition in suit to foreclose lien for taxes, see Taxation, § 643.

Verification of pleading, see Pleading, § 290.

Verification of plea or answer in action on bill or note, see Bills and Notes, § 485.

AFFIRMANCE.

Of judgment or order in civil actions in general, see Appeal and Error, § 1133.

AFTER-ACQUIRED PROPERTY.

Construction and operation of mortgages, see Chattel Mortgages, § 124.

Description in will, see Wills, § 578.

AGE.

Best and secondary evidence, see Criminal Law, § 398.

AGENCY.

In general, see Principal and Agent.

AGREEMENT.

See Contracts.

AGRICULTURE.

Instructions assuming fact in action for permitting Johnson grass to mature on right of way of railroad, see Trial, § 191.

§ 8. An action against a railroad company for permitting Johnson grass to mature on its right of way in violation of the statute may be defeated by the company proving that plaintiff had permitted the grass to mature on his land during the time complained of.—*Missouri, K. & T. Ry. Co. of Texas v. Tolbert* (Tex. Civ. App.) 280.

§ 8. One suing a railroad company for penalties and damages under the statute making it

unlawful for a railroad company to permit Johnson grass to mature on its right of way need not allege or prove negligence.—*Missouri, K. & T. Ry. Co. of Texas v. Tolbert* (Tex. Civ. App.) 280.

§ 8. That plaintiff permitted Johnson grass to grow on his land held not to defeat recovery from defendant railroad company for negligence in constructing its road, whereby Johnson grass seed was washed on plaintiff's land.—*Missouri, K. & T. Ry. Co. of Texas v. Tolbert* (Tex. Civ. App.) 280.

§ 8. The measure of damages for the act of a railroad company on permitting Johnson grass to spread on the land of another determined.—*Missouri, K. & T. Ry. Co. of Texas v. Tolbert* (Tex. Civ. App.) 280.

§ 8. Under the statute, a railroad company held liable for the penalty each time Johnson grass is permitted to mature on its right of way.—*Missouri, K. & T. Ry. Co. of Texas v. Tolbert* (Tex. Civ. App.) 280.

AIDER BY VERDICT.

In civil actions, see Pleading, § 433.

ALCOHOLIC LIQUORS.

Regulation of manufacture, use and sale, see Intoxicating Liquors.

ALIENATION.

Of married woman's separate property, see Husband and Wife, § 193.

ALIENS.

Escheat, see Escheat.

ALIMONY.

See Divorce, §§ 249-271.

ALLOCUTION.

Necessity in misdemeanor cases, see Criminal Law, § 989.

ALLOWANCE.

Of alimony or counsel fees and expenses in divorce proceedings, see Divorce, §§ 249-271.

Of appeal or writ of error, see Appeal and Error, §§ 359-367.

Of bill of exceptions, see Criminal Law, § 1092.

Of claims against estate of decedent, see Executors and Administrators, § 238.

To surviving wife, husband, or children from estate of decedent, see Executors and Administrators, §§ 173-189.

ALMANAC.

Computation of time, see Time.

ALTERATION.

Of geographical or political divisions, see Counties, § 16; Municipal Corporations, § 29; Schools and School Districts, §§ 32-39.

ALTERATION OF INSTRUMENTS.

Payment of altered paper by bank, see Banks and Banking, § 148.

§ 27. Changes in instruments held presumed to have been made before delivery.—*James v. Holdam* (Ky.) 435.

§ 29. Evidence held insufficient to show a fraudulent substitution of decedent's wife's name for decedent as grantee in a deed.—*James v. Holdam* (Ky.) 435.

ALTERNATIVE ALLEGATIONS.

In pleading, see Pleading, § 20.

AMBIGUITIES.

Parol or extrinsic evidence to construe ambiguous instruments, see Evidence, §§ 448-456.

AMENDMENT.

Effect of appeal or other proceeding for review, see Appeal and Error, § 440.

In particular remedies or special jurisdictions.

In appellate court, see Appeal and Error, §§ 655, 889.

Of particular acts, instruments, or proceedings. Irregularities and errors at trial, see Trial, §§ 418-423.

Judgment, see Judgment, § 334.

Municipal charter, see Municipal Corporations, § 46.

Pleading, see Pleading, §§ 234-276.

Pleading in garnishment, see Garnishment, § 146.

Record on appeal or writ of error, see Appeal and Error, § 655; Criminal Law, § 1110.

AMICUS CURIAE.

§ 1. Where plaintiff's counsel appeared in contempt proceedings against defendant, and also in resistance of a writ of habeas corpus as amicus curiae, such appearance was a mere matter of grace concerning the court alone.—*Ex parte Brockman* (Mo.) 977.

AMOUNT IN CONTROVERSY.

Jurisdictional amount, see Courts, § 223; Justices of the Peace, § 43.

ANIMALS.

Carriage of live stock, see Carriers, §§ 203-230.

Frightening animals, see Railroads, §§ 305, 360.

Frightening animals on street, see Municipal Corporations, §§ 705-733.

Injuries to animals from operation of railroads, see Railroads, §§ 446, 447.

Running at large in violation of municipal regulations, see Municipal Corporations, §§ 631, 636.

Stabling and hiring of horses, see Livery Stable Keepers.

§ 65. Where a violation of an estray ordinance was made a misdemeanor, that the animal might have been impounded did not relieve the owner from liability nor authorize forfeiture of the animal without affording the owner a trial.—*Tutt v. City of Greenville* (Ky.) 890.

ANNEXATION.

Of chattels to real property, see Fixtures.

Of territory to municipal corporation, see Municipal Corporations, § 29.

ANNUITIES.

Nature of estates and interests created, see Wills, § 619.

§ 1. Annuity defined.—*Wiegand v. Woerner* (Mo. App.) 596.

§ 4. Annuities are not apportionable except where for the benefit of a widow without other means or for married women living apart from their husbands or infants.—*Wiegand v. Woerner* (Mo. App.) 596.

§ 4. An annuity given by a will held not apportionable.—*Wiegand v. Woerner* (Mo. App.) 596.

ANNULMENT.

Actions to annul written instruments, see Cancellation of Instruments.

ANSWER.

In general, see Pleading, §§ 83-127, 253.

Of garnishee, see Garnishment, § 146.

ANTI-TRUST LAW.

See Monopolies, §§ 12-30.

APPEAL AND ERROR.

See Certiorari; Exceptions, Bill of; New Trial. Appellate jurisdiction of particular state courts, see Courts, §§ 223-231.

Review in special proceedings.

See Habeas Corpus, § 113.

Review of criminal prosecutions.

See Criminal Law, §§ 1020-1170½; Homicide, §§ 325-340.

By habeas corpus, see Habeas Corpus.

Violations of municipal ordinances, see Municipal Corporations, § 642.

Review of proceedings of justices of the peace.

See Justices of the Peace, §§ 174-191.

I. NATURE AND FORM OF REMEDY.

§ 1. The right of appeal does not exist unless conferred by statute.—*Powdrill v. Powdrill* (Tex. Civ. App.) 272.

§ 14. Where it appeared that there was no separate abstract of record or bill of exceptions by the respondent, although he obtained leave to file same, his cross-appeal was not perfected, and must be dismissed.—*South Side Realty Co. v. St. Louis & S. F. R. Co.* (Mo. App.) 1034.

II. NATURE AND GROUNDS OF APPELLATE JURISDICTION.

Criminal prosecutions, see Criminal Law, § 1020.

§ 21. Parties to a case arising outside of the territorial limits of the Springfield Court of Appeals held not authorized by consent to confer jurisdiction on it.—*State ex rel. St. Louis Dressed Beef & Provision Co. v. Nixon* (Mo.) 538; *State ex rel. Raines v. Nolte* (Mo.) 542.

§ 21. The jurisdiction of an appellate court, limited by law to appeals arising within fixed limits, cannot be enlarged by consent of the parties.—*State ex rel. St. Louis Dressed Beef & Provision Co. v. Nixon* (Mo.) 538; *State ex rel. Raines v. Nolte* (Mo.) 542.

III. DECISIONS REVIEWABLE.

(D) Finality of Determination.

Jurisdiction of particular courts, see Courts, § 223.

(E) Nature, Scope, and Effect of Decision.

§ 100. Acts 1906, c. 34, § 2, does not authorize an appeal from an order modifying a temporary injunction and refusing to dissolve the same as modified.—*Powdrill v. Powdrill* (Tex. Civ. App.) 272.

V. PRESENTATION AND RESERVATION IN LOWER COURT OF GROUNDS OF REVIEW.

Criminal prosecutions, see Criminal Law, §§ 1035-1063.

(A) Issues and Questions in Lower Court.

§ 169. A judgment will not be reversed for a matter not presented to nor passed on by the trial court.—*Maysville Telephone Co. v. First Nat. Bank* (Ky.) 886.

§ 171. Where parties treat an action as a suit in equity in the circuit court, it will be so treated on appeal, though the case is tried by ordinary proceeding.—*Cornett v. Burchfield* (Ky.) 466.

§ 171. Where the nature of damages sued for is doubtful on the pleadings, as to being permanent or temporary, the parties' treatment of the matter on the trial will not be disturbed on appeal.—*Chesapeake & O. Ry. Co. v. Stein* (Ky.) 1169.

§ 171. Plaintiff in the appellate court is held to the theory on which he tried the case below.—*Gordon v. Metropolitan St. Ry. Co.* (Mo. App.) 26.

§ 172. Distress held not justifiable on a ground under *Sayles' Ann. Civ. St. 1897*, art. 3240, not urged below.—*Michalek v. Cernock* (Tex. Civ. App.) 270.

(B) Objections and Motions, and Rulings Thereon.

Criminal prosecution, see Criminal Law, §§ 1035, 1036.

§ 181. Error not presented at trial, cannot be raised on appeal.—*Dazey v. Elvin* (Mo. App.) 85.

§ 184. Where plaintiff seeks injunction where the proper remedy is mandamus, held, that the appellate court will consider the case as an application for mandamus.—*O'Connor v. Weisinger* (Ky.) 1127.

§ 187. An objection to the right of a portion of the heirs of a deceased to sue for his death under Kirby's Dig. § 6290, made for the first time on appeal, comes too late.—*St. Louis, I. M. & S. Ry. Co. v. Watson* (Ark.) 949.

§ 206. Action of court in sustaining an objection to a question to a witness held not to be reviewable on appeal, where no avowal was made.—*Lang v. Bach* (Ky.) 188.

§ 206. A party objecting to an offer of evidence must object to the offer; an exception to the admission of evidence not being sufficient.—*Nelson v. Alport* (Mo. App.) 71.

§ 213. Defendant, who did not move to transfer the case to the law docket, cannot complain on appeal that he was not permitted to try an issue to a jury.—*Upchurch v. Sutton Bros.* (Ky.) 477.

§ 215. Only an exception to the giving or refusing of instructions is necessary to preserve the ruling thereon for review; an objection not being necessary.—*Harding v. Missouri Pac. Ry. Co.* (Mo.) 641.

§ 215. Where plaintiff asked no instructions and did not object to the giving of one for defendant, he cannot complain of the charge on appeal.—*Gordon v. Metropolitan St. Ry. Co.* (Mo. App.) 26.

§ 215. An instruction will not be reviewed on appeal, where the party complaining did not object, but merely excepted to the giving of the instruction.—*Chamlee v. Planters' Hotel Co.* (Mo. App.) 123.

§ 215. Where inconsistent instructions submitted for the defendant are excepted to at the time, the mere exception is sufficient to authorize their review.—*Brown v. Emerson* (Mo. App.) 1108.

§ 231. Where the trial court gives an instruction correctly declaring the law, its faults of verbiage must under the settled rules of court be attacked by specific objections; a

general one being insufficient to warrant review.—*St. Louis, I. M. & S. Ry. Co. v. Stacks* (Ark.) 315.

§ 231. Ambiguity in an instruction given cannot be taken advantage of unless a specific objection thereto was made at the trial.—*Russellville Anthracite Coal Mining Co. v. Quita Coal Co.* (Ark.) 624.

§ 237. A party against whom a special verdict is rendered must, if he deems the evidence insufficient to sustain it, move to set aside the verdict, and, if on appeal he complains of the verdict, he must do so under an assignment of error addressed to the action of the court in refusing to set it aside.—*Smith v. Hessey* (Tex. Civ. App.) 256.

(C) Exceptions.

Criminal prosecutions, see Criminal Law, § 1055.

§ 274. Scope of review of exceptions to offer of evidence stated.—*Nelson v. Alport* (Mo. App.) 71.

§ 274. Certain exceptions held insufficient to allow a witness' testimony in a deposition to be questioned.—*Western Union Telegraph Co. v. Landry* (Tex. Civ. App.) 848.

(D) Motions for New Trial.

§ 281. Error not presented in the motion for new trial cannot be raised on appeal.—*Dazey v. Elvin* (Mo. App.) 85.

§ 281. A motion for a new trial is necessary to enable the Supreme Court to review matters proper to a bill of exceptions.—*Louisville & N. R. Co. v. Ray* (Tenn.) 858.

§ 283. That a suit for partition was tried by ordinary proceedings did not change it into an action at law so as to require a motion for a new trial and a separation of the law from the facts in order to justify a review of the merits on appeal.—*Cornett v. Burchfield* (Ky.) 466.

VII. REQUISITES AND PROCEEDINGS FOR TRANSFER OF CAUSE.

Criminal prosecutions, see Criminal Law, § 1076.

(A) Time of Taking Proceedings.

§ 345. Judgment entered with verdict, as authorized by Shannon's Code, § 5892, subsec. 3 (Acts 1805, c. 45, § 2), is, for purposes of appeal, only quasi final for 30 days after entry.—*Louisville & N. R. Co. v. Ray* (Tenn.) 858.

(B) Petition or Prayer, Allowance, and Certificate or Affidavit.

§ 359. Under Civ. Code Prac. § 755, a cross-appeal can be granted only by the Court of Appeals.—*F. Haag & Bro. v. Reichart* (Ky.) 191.

§ 367. An unsigned, unattested affidavit of appeal leaves the appellate court without jurisdiction.—*Rosenberger v. Pacific Express Co.* (Mo. App.) 1033.

(C) Payment of Fees or Costs, and Bonds or Other Securities.

Criminal prosecution, see Criminal Law, § 1076.

§ 376. For failure to make an appeal bond for the benefit of all adversely interested, the appeal will be dismissed.—*Keel & Son v. Gribble-Carter Grain Co.* (Tex. Civ. App.) 801.

VIII. EFFECT OF TRANSFER OF CAUSE OR PROCEEDINGS THEREFOR.

Criminal prosecutions, see Criminal Law, § 1083.

(A) Powers and Proceedings of Lower Court.

§ 440. Pending appeal and after the term at which it rendered the judgment, the trial court cannot uproot it by writ of error coram nobis, and so divest the appellate court of jurisdiction.—*Reed v. Bright* (Mo.) 653.

X. RECORD AND PROCEEDINGS NOT IN RECORD.

Review of criminal prosecutions, see Criminal Law, §§ 1090-1128.

(A) Matters to be Shown by Record.

Review of criminal prosecutions, see Criminal Law, §§ 1090-1128.

§ 499. Assignments of error as to the admission of evidence cannot be considered, where the bill of exceptions does not show the objections overruled.—*Thos. Goggan & Bros. v. Synnott* (Tex. Civ. App.) 1184.

(B) Scope and Contents of Record.

§ 518. Error in refusing to permit amended answer and counterclaim to be filed *held* not to be considered on appeal, where they were not made a part of the record, either by order of the court or by being embraced in the bill of exceptions.—*Lang v. Bach* (Ky.) 188.

(C) Necessity of Bill of Exceptions, Case, or Statement of Facts.

Making and filing of bill of exceptions, see Exceptions, Bill of.

Review of criminal prosecutions, see Criminal Law, §§ 1090-1094, 1097.

§ 549. A bill of exceptions to the failure of the judge to file conclusions, under Rev. St. 1895, art. 1333, and Acts Ex. Sess. 1907, c. 7, *held* not such that it should be ignored.—*Sutherland v. Kirkland* (Tex. Civ. App.) 851.

(G) Authentication and Certification.

Review of criminal prosecutions, see Criminal Law, § 1105.

(H) Transmission, Filing, Printing, and Service of Copies.

§ 627. The Court of Civil Appeals can acquire no jurisdiction of an appeal from an order granting or refusing or dissolving an injunction under Acts 1909, c. 34, § 2, where the record is not filed in the appellate court within 15 days after record of the order appealed from.—*Powdrill v. Powdrill* (Tex. Civ. App.) 272.

§ 633. The penalty for the failure of appellant to serve a copy of his printed abstract and brief in the time prescribed by Court of Appeals Rule 15 (67 S. W. vi) is a dismissal of the appeal.—*Tomlinson v. Timmons* (Mo. App.) 582.

(I) Defects, Objections, Amendment, and Correction.

Review of criminal prosecutions, see Criminal Law, § 1110.

§ 639. Where an appeal is in the short form authorized by the statute, and the certified copy of the judgment of the lower court was filed in time, the judgment omitted from the printed abstract will be read into the abstract from the transcript by the Supreme Court in the interests of justice.—*Ginnocchio v. Illinois Cent. R. Co.* (Mo. App.) 129.

§ 644. The failure of appellant to comply with Court of Appeals Rule 15 (67 S. W. vi) *held* not to justify a dismissal of the appeal in view of respondent's agreement.—*Tomlinson v. Timmons* (Mo. App.) 582.

§ 655. All of the grounds for striking a statement of facts should be urged in one motion.—

Thos. Goggan & Bros. v. Synnott (Tex. Civ. App.) 1184.

(J) Conclusiveness and Effect, Impugning and Contradicting.

Review of criminal prosecutions, see Criminal Law, § 1111.

§ 663. Recital in bill of exceptions that it contained all the evidence *held* not controlling.—*Nelson v. Alport* (Mo. App.) 71.

(K) Questions Presented for Review.

Review of criminal prosecutions, see Criminal Law, § 1119.

§ 691. Appellant must preserve in the record on appeal the evidence actually admitted by the trial court and excepted to by him.—*Nelson v. Alport* (Mo. App.) 71.

§ 692. To review of the exclusion of evidence, the record must show what the testimony was, or must show an offer to prove material facts.—*New Hampshire Fire Ins. Co. v. Blakeley* (Ark.) 926.

§ 692. Rulings excluding questions to a witness will not be reviewed where the bill of exceptions fails to show what answers would have been given.—*Couturie v. Crespi* (Tex. Civ. App.) 257.

§ 702. Where the whole charge does not appear in a record, the court will not consider assignments based on special requests refused or given.—*Louisville & N. R. Co. v. Smith* (Tenn.) 866.

(L) Matters Not Apparent of Record.

§ 714. The court on appeal from a judgment for plaintiff suing a street car company for injuries cannot refer to other cases in the same court with reference to defendant for information as to whether it operated the car at the time of the injury.—*Reisenleiter v. United Ry. Co. of St. Louis* (Mo. App.) 11.

XI. ASSIGNMENT OF ERRORS.

Review of criminal prosecutions, see Criminal Law, § 1129.

§ 742. Assignments of error not followed by such propositions and statements as will enable the Supreme Court to pass upon the assignments without referring to the transcript, may be ignored.—*Couturie v. Crespi* (Tex. Civ. App.) 257.

§ 742. In a personal injury action, an assignment of error *held* insufficient to present propositions concerning the employer's duty.—*Lantry-Sharpe Contracting Co. v. McCracken* (Tex. Civ. App.) 363.

§ 742. An assignment of error to the admission of evidence *held* insufficiently presented.—*Rankin v. Rankin* (Tex. Civ. App.) 392.

§ 742. An assignment of error to the admission of evidence will not be considered where statement of facts does not exclude circumstances under which evidence would be admissible.—*Rankin v. Rankin* (Tex. Civ. App.) 392.

§ 742. An assignment of error to an instruction *held* insufficient.—*Rankin v. Rankin* (Tex. Civ. App.) 392.

§ 742. An assignment of error will not be considered where it is not a proposition in itself, and none is submitted thereunder.—*Rankin v. Rankin* (Tex. Civ. App.) 392.

§ 742. Grounds of objection to testimony set out in a bill of exceptions cannot be treated as a statement of facts under an assignment of error to the admission of such testimony.—*Rankin v. Rankin* (Tex. Civ. App.) 392.

§ 742. Reference to the evidence in support of assignments to the refusal of requests to

charge *held* insufficient to justify review thereof.—*Caruthers v. Hadley* (Tex. Civ. App.) 757.

§ 742. Where a statement under an assignment that the court erred in refusing an instruction did not set out evidence on the question, the assignment will not be reviewed.—*Caruthers v. Hadley* (Tex. Civ. App.) 757.

§ 742. Assignment of errors *held* insufficient to be considered on appeal.—*Texas Co. v. Garrett* (Tex. Civ. App.) 812.

§ 750. An assignment of error to the action of the court in rendering judgment on a special verdict merely raises the question whether the court entered in conformity with the verdict.—*Smith v. Hessey* (Tex. Civ. App.) 256.

§ 750. Under Rev. St. 1895, art. 1018, and Courts of Civil Appeals Rules 24, 26 (67 S. W. xv), assignments of error *held* insufficient.—*Citizens' State Bank of Toyah v. O'Neal* (Tex. Civ. App.) 1183.

§ 753. An appeal will be dismissed for lack of statement or assignment of errors.—*C. & A. J. Matthews v. Phoenix Ins. Co. of Hartford* (Mo. App.) 587.

XII. BRIEFS.

§ 762. An assignment of error cannot be first made in appellant's reply brief.—*Norvell v. Cooper* (Mo. App.) 1095.

XIII. DISMISSAL, WITHDRAWAL, OR ABANDONMENT.

§ 790. Under Kirby's Dig. §§ 1227, 1228, an appeal against a receiver of a street railroad company in an action for personal injuries will be dismissed, where the receiver has been finally discharged.—*O'Leary v. Brent* (Ark.) 617.

XV. HEARING AND REHEARING.

Computation of time for application for rehearing, see *Time*, § 9.

XVI. REVIEW.

Criminal prosecutions, see *Criminal Law*, §§ 1137-1170.

(A) Scope and Extent in General.

§ 837. On appeal from a judgment for plaintiff, the correctness of the instructions on plaintiff's behalf and the overruling of defendant's motion for a peremptory instruction are to be tested with reference to plaintiff's evidence.—*Louisville & N. R. Co. v. Sewell* (Ky.) 162.

§ 837. Refusal to permit deposition to be read in evidence *held* reviewable on appeal, where deposition is made a part of the bill of exceptions.—*Lang v. Bach* (Ky.) 188.

§ 837. In reviewing the sufficiency of a bill, resort may be had to the pleadings, but not to the evidence.—*Shelton v. Horrell* (Mo.) 988.

§ 856. In an action against a street railway company for injuries caused by a negligently constructed switch, a recovery upon the theory that the company showed no license to be in the streets and hence the switch was a nuisance *held*, under the petition, not to be considered on appeal to support plaintiff's judgment.—*Asmus v. United Rys. Co. of St. Louis* (Mo. App.) 92.

§ 867. Appeal from an order overruling a motion for a new trial, made after entry of judgment, is an appeal from the judgment, and not from the order.—*Louisville & N. R. Co. v. Ray* (Tenn.) 858.

(C) Parties Entitled to Allege Error.

Criminal prosecutions, see *Criminal Law*, § 1137.

§ 890. A defendant who has appealed from an adverse decree may not base any right on

an outstanding title in nonappealing codefendants, which the chancellor has decreed is not valid.—*Pulaski County v. Hill* (Ark.) 973.

§ 880. Where, in an action against a street railway company and a railroad company for injuries to a street car passenger in a collision between the car and a train, the jury found a verdict against both companies, the street railway company could not on appeal complain of errors in instructions too favorable to the railroad company.—*Augustus v. Chicago, R. I. & P. Ry. Co.* (Mo. App.) 22.

§ 882. One admitting by his answer that he was entitled to only half the profits, though alleging the other half was to go to the other defendant, *held* not entitled to complain of the decree awarding such half to plaintiff.—*Beebe v. Olentine* (Ark.) 936.

§ 882. Defendant was not entitled to object on appeal to an instruction embodying a similar proposition to that contained in an instruction requested by defendant.—*Louisville Ry. Co. v. Bryant* (Ky.) 182.

§ 882. A party cannot complain because, on his motion and over the objection of the other party, the cause was transferred from the equity to the ordinary docket to be tried by a jury.—*Barton v. Barton's Adm'r* (Ky.) 902.

§ 882. In an action against a city and a street railroad where an erroneous instruction, given at the request of the city, was prejudicial to the railroad, a judgment in favor of the plaintiff against the railroad will be reversed, even though plaintiff did not request the instruction.—*Asmus v. United Rys. Co. of St. Louis* (Mo. App.) 92.

§ 882. An allegation in the petition that a contract was executed by husband and wife, admitted in the answer, *held* conclusive on appeal, in spite of evidence that it was signed by the husband only.—*Independence Sash, Door & Lumber Co. v. Bradfield* (Mo. App.) 118.

§ 882. Appellant may not claim a reversal for inconsistent instructions, where he himself invited the error by asking a wrong declaration of law.—*Thompson v. Joseph W. Moon Buggy Co.* (Mo. App.) 1088.

§ 882. Plaintiffs in an action for damages for cutting timber *held* not entitled to object on appeal to the finding describing the controversy in view of the allegations of the petition.—*Bayle v. Norris* (Tex. Civ. App.) 767.

§ 883. Amount of a verdict having been stipulated, defendant could not claim on appeal that it was excessive.—*Louisville & N. R. Co. v. Sewell* (Ky.) 162.

(D) Amendments, Additional Proofs, and Trial of Cause Anew.

Trial de novo on appeal from justices' courts, see *Justices of the Peace*, § 174.

§ 889. Where evidence not within the issues was introduced at the trial without objection, and the trial court treated the issue as thus joined on the proof, the complaint would be treated as amended to conform to the proof on appeal.—*Pulaski Gas Light Co. v. McClintock* (Ark.) 1189.

§ 893. A suit in equity is tried anew on appeal, and the question on appeal is whether the chancellor on the legal evidence did equity.—*Walther v. Null* (Mo.) 993.

(E) Presumptions.

Review of criminal prosecutions, see *Criminal Law*, § 1144.

§ 907. In an action to foreclose a mortgage, certain writing, not evidenced in the abstract, *held* sufficient to satisfy the statute of frauds.—*Robinson v. Wynne* (Ark.) 319.

§ 916. Where plaintiff's statement of cause of action in a case originating in a justice's court is not incorporated in the record on appeal to the Court of Civil Appeals, that court will assume that the pleadings other than those appearing from the transcript were oral.—*Loomis v. Broadus & Leavell* (Tex. Civ. App.) 743.

§ 916. Where exceptions to plaintiff's petitions were not presented to nor acted on by the trial court, it would be presumed on appeal that they stated a cause of action.—*Prosser v. First Nat. Bank* (Tex. Civ. App.) 781.

§ 917. Where the facts developed on the trial in the county court on appeal from a justice's court disclosed a good cause of action, the court on further appeal must presume in favor of the county court's ruling on a demurrer to the pleadings.—*Loomis v. Broadus & Leavell* (Tex. Civ. App.) 743.

§ 927. On appeal held that the testimony must be given its strongest probative force to determine whether it was sufficient to sustain a verdict for plaintiff.—*Headrick v. H. D. Williams Cooperage Co.* (Ark.) 957.

§ 927. The court, on appeal from a dismissal on the opening statement, will presume that the action was correct, in the absence of a bill of exceptions disclosing the reason of the dismissal.—*Hart's Adm'r v. Louisville Ry. Co.* (Ky.) 140.

§ 927. The court, in considering a demurrer of defendant to plaintiff's evidence, must accept as proved the facts in evidence hostile to defendant's contention.—*Augustus v. Chicago, R. I. & P. Ry. Co.* (Mo. App.) 22.

§ 927. The appellate court, in disposing of the question arising on defendant's demurrer to the evidence, must give controlling effect to the evidence of plaintiff.—*Chambers v. Kupper-Benson Hotel Co.* (Mo. App.) 45.

§ 930. The court, in determining whether there is any evidence warranting the verdict, will consider the testimony in its most favorable aspect to the successful party.—*Chicago, R. I. & P. Ry. Co. v. Grubbs* (Ark.) 636.

§ 930. On verdict for plaintiffs, the court will accept as the facts what their evidence tends to prove.—*Moss v. Missouri, K. & T. Ry. Co.* (Mo. App.) 1070.

§ 931. Where a case is tried by the court, it will be presumed that improper evidence submitted over objection was not considered.—*Skinner v. D. Sullivan & Co.* (Tex. Civ. App.) 426.

(F) Discretion of Lower Court.

§ 959. The discretion of the court to allow or refuse amendments under Civ. Code Prac. § 134, will not be disturbed on appeal unless the discretion has been abused.—*Petry v. Petry* (Ky.) 922.

§ 966. Denial of a continuance for absence of a witness will not be disturbed on appeal unless the trial court's discretion has been abused, especially where the affidavit is permitted to be read as the witness' deposition.—*Louisville Ry. Co. v. Bryant* (Ky.) 182.

§ 972. The exercise of the discretion of the trial court as to the propriety of the arguments and conduct of counsel will not be reviewed, save when such discretion is abused.—*Brinkman v. Gottenstroeter* (Mo. App.) 584.

§ 977. Where a new trial is granted upon a ground within the knowledge of the trial court, his action will not be disturbed on appeal.—*Boulware v. Victor Automobile Mfg. Co.* (Mo. App.) 7.

§ 979. Discretion in granting a new trial will not be interfered with on appeal unless abused.—*Hawver v. Springfield Traction Co.* (Mo. App.) 70.

§ 981. The trial court held not to have abused its discretion in refusing a new trial for newly discovered evidence.—*Kidd v. McCracken* (Tex. Civ. App.) 839.

(G) Questions of Fact, Verdicts, and Findings.

Review of criminal prosecutions, see Criminal Law, § 1159.

§ 989. The court on appeal reviewing the sufficiency of the evidence to sustain the verdict will not determine the weight of the evidence; but will only determine whether there is any evidence to support the verdict.—*Creamer v. Louisville Ry. Co.* (Ky.) 193.

§ 994. Appellate courts cannot pass upon the credibility of evidence.—*Roberts v. Wabash R. Co.* (Mo. App.) 89.

§ 994. The Court of Appeals will only set aside a verdict on the evidence where it so preponderates against it that it is clearly wrong, or if the testimony sustaining it appears false.—*Houston & T. C. R. Co. v. Ellis* (Tex. Civ. App.) 246.

§ 995. Weight of evidence held to be a question for the trial court sitting as a jury.—*Gay Oil Co. v. Muskogee Oil Refining Co.* (Ark.) 639.

§ 995. Appellate courts cannot pass upon the weight of evidence.—*Roberts v. Wabash R. Co.* (Mo. App.) 89.

§ 999. Findings supported by evidence are conclusive on appeal.—*Jones Lumber Co. v. Howard* (Ky.) 133.

§ 999. Findings of fact by the jury are conclusive upon the appellate court.—*Crain v. Miles* (Mo. App.) 52.

§ 1001. In an action for injuries in a collision with a street car, evidence held sufficient to go to the jury on the issue whether plaintiff's injuries were caused by the negligence of the motorman of the car or by his own negligence, so that their finding exonerating defendant will not be disturbed on appeal.—*Creamer v. Louisville Ry. Co.* (Ky.) 193.

§ 1001. A verdict for plaintiff is binding on appeal where there was evidence to support his contention.—*Shook v. Retail Hardware Mut. Fire Ins. Co. of Minnesota* (Mo. App.) 539.

§ 1001. A verdict supported by substantial evidence will not be disturbed.—*Brown v. Emerson* (Mo. App.) 1108.

§ 1001. A special verdict supported by evidence will not be disturbed on appeal.—*Smith v. Hessey* (Tex. Civ. App.) 256.

§ 1001. A verdict sustained by evidence will not be disturbed.—*Lantry-Sharpe Contracting Co. v. McCracken* (Tex. Civ. App.) 363.

§ 1002. Verdict on conflicting evidence is conclusive on appeal.—*New Hampshire Fire Ins. Co. v. Blakely* (Ark.) 926.

§ 1002. A verdict will not be disturbed where there is any substantial evidence to support it.—*Lemoine v. Sullivan* (Ark.) 946.

§ 1002. A verdict on a disputed question of fact will not be disturbed.—*Long v. Douthitt* (Ky.) 453.

§ 1002. A verdict on conflicting evidence will not be disturbed on appeal.—*St. Victor v. Edwards* (Mo. App.) 1105.

§ 1002. A verdict on conflicting evidence will not be reversed.—*Houston & T. C. R. Co. v. Ellis* (Tex. Civ. App.) 246.

§ 1002. A special verdict rendered on conflicting evidence will not be disturbed on appeal.—*Smith v. Hessey* (Tex. Civ. App.) 256.

§ 1002. The court on appeal cannot say that a verdict based on the contentions of

the successful party, is not supported by the evidence.—*St. Louis Southwestern Ry. Co. v. Texas v. McCauley* (Tex. Civ. App.) 798.

§ 1004. A verdict will not be set aside as excessive, unless so excessive as to indicate passion or prejudice.—*Louisville Ry. Co. v. Bryant* (Ky.) 182.

§ 1008. Findings of fact by the trial court on an issue raised by the evidence are conclusive on appeal.—*Bayle v. Norris* (Tex. Civ. App.) 767.

§ 1009. A finding of a chancellor not against the preponderance of evidence will not be disturbed.—*Hayes v. Martin* (Ark.) 626.

§ 1009. The findings of the chancellor will not be set aside unless against the clear preponderance of evidence.—*Cunningham v. Toye* (Ark.) 962.

§ 1009. A finding of a chancellor not against the weight of evidence will not be disturbed.—*Ramsey v. Weedman* (Ark.) 1197.

§ 1009. The chancellor's judgment will not be disturbed on conflicting evidence.—*Paine v. Levy* (Ky.) 1160.

§ 1009. Findings of a chancellor will not be disturbed by the Supreme Court, when sustained by evidence.—*Gilliam v. Guffy* (Ky.) 1162.

§ 1009. The Court of Appeals will defer to a trial judge's findings on a bill in equity.—*Castle v. Terry* (Mo. App.) 73.

§ 1009. While the Court of Appeals will give full credit to findings of fact of the trial court in equity cases, it will not be bound thereby, especially where they appear to be erroneous.—*Heath v. Tucker* (Mo. App.) 572.

§ 1009. The court on appeal from an order refusing an injunction must accept as true the testimony of a party in whose favor the court found.—*Doyle v. Scott* (Tex. Civ. App.) 829.

§ 1010. A finding by the trial court *held* conclusive, if the evidence was sufficient to support it.—*Gay Oil Co. v. Muskogee Oil Refining Co.* (Ark.) 639.

§ 1010. The findings of a chancellor not contrary to the evidence will be sustained on appeal.—*Mitchell v. Fish* (Ark.) 940.

§ 1010. Findings of fact required by Rev. St. 1909, § 1972, will not be interfered with on appeal, where there is substantial evidence to support them.—*Walther v. Null* (Mo.) 993.

§ 1010. A finding supported by substantial evidence is conclusive upon the Court of Appeals.—*Cape Girardeau Bell Telephone Co. v. Hamil's Estate* (Mo. App.) 1103.

§ 1010. Findings supported by evidence will not be disturbed.—*Forder v. Handlan* (Mo. App.) 1110.

§ 1022. The court on appeal may determine for itself the correctness of the conclusion of the referee in involuntary reference and the trial court in proceedings for the settlement of an administrator's account.—*Goodman v. Griffith* (Mo. App.) 1051.

(H) Harmless Error.

Criminal prosecutions, see Criminal Law, §§ 1166½–1170½.

§ 1026. The Supreme Court will reverse only for prejudicial errors.—*New Hampshire Fire Ins. Co. v. Blakely* (Ark.) 926.

§ 1028. Where, under the undisputed evidence, the jury could have rendered a verdict only for defendant, any error committed at trial was harmless to plaintiff.—*Conroy v. Sharman* (Tex. Civ. App.) 244.

§ 1033. That the court erroneously submitted to the jury the meaning of a rule as to

signals to an engineer *held* not prejudicial to defendant.—*Louisville & N. R. Co. v. Sewell* (Ky.) 162.

§ 1033. A claimant against the estate of a decedent cannot complain because allowed to testify to conversations with a decedent under Civ. Code Prac. § 606, subsec. 2.—*Barton v. Barton's Adm'r* (Ky.) 902.

§ 1033. Where the correct measure of duty is given in an instruction, and a more favorable rule is also given, the party at whose instance such request is given cannot object to the inconsistency.—*Houston & T. C. R. Co. v. Ellis* (Tex. Civ. App.) 246.

§ 1033. A party on appeal from a judgment on a special verdict on the ground that the judgment does not conform to the verdict may not complain of an error in the judgment operating to the disadvantage of the adverse party, who does not complain.—*Smith v. Hessey* (Tex. Civ. App.) 256.

§ 1033. A charge *held* favorable to defendant, as submitting an issue not raised by the evidence, so that defendant could not claim a reversal for any error therein.—*Atchison, T. & S. F. Ry. Co. v. Classin* (Tex. Civ. App.) 358.

§ 1036. While the widow could have sued alone to recover for injury to her husband's reputation and feelings by a malicious criminal prosecution, it was not reversible error to allow the children to prosecute with her.—*Missouri, K. & T. Ry. Co. of Texas v. Groseclose* (Tex. Civ. App.) 736.

§ 1036. In an action by a collecting bank against its correspondent to recover the proceeds of a check collected and remitted, defendant *held* not prejudiced by an order dismissing the action as to the drawer and payee of the check.—*First Nat. Bank v. First Nat. Bank* (Tex. Civ. App.) 831.

§ 1040. Defendant was not prejudiced by the overruling of exceptions to allegations in the petition tendering an issue which the court did not submit to the jury.—*First Nat. Bank v. First Nat. Bank* (Tex. Civ. App.) 831.

§ 1041. Plaintiffs *held* not prejudiced by a ruling permitting defendant to amend so as to obviate an objection to certain evidence offered.—*Couturie v. Roensch* (Tex. Civ. App.) 413.

§ 1047. In a suit in equity, rulings on evidence *held* as a general rule of little or no controlling force on appeal.—*Walther v. Null* (Mo.) 993.

§ 1047. Refusal to strike out testimony *held* to be harmless.—*Musick v. United Rys. Co. of St. Louis* (Mo. App.) 31.

§ 1050. Objections to the admission of evidence of express authority of an agent to do a certain act are immaterial, where his apparent authority is *held* sufficient for the purpose.—*Modern Brotherhood of America v. Phelps* (Ky.) 892.

§ 1050. Any error in fixing a date as a basis for ascertaining depreciation in value of property *held* harmless.—*Chesapeake & O. Ry. Co. v. Stein* (Ky.) 1169.

§ 1050. Where a wife in an action against a railway company for the wrongful death of her husband testified that she had five minor children, it was not reversible error.—*Asmus v. United Rys. Co. of St. Louis* (Mo. App.) 92.

§ 1050. The error, if any, in permitting certain evidence, *held* not prejudicial.—*McKinstry v. Chicago, R. I. & P. Ry. Co.* (Mo. App.) 1061.

§ 1050. The admission of certain testimony *held* not prejudicial.—*St. Victor v. Edwards* (Mo. App.) 1105.

§ 1050. Any error in admitting evidence is not reversible where similar evidence of the

same fact was admitted without objection.—*Conroy v. Sharman* (Tex. Civ. App.) 244.

§ 1051. Error in admitting evidence was not prejudicial to appellant where he virtually admitted the facts testified to.—*Long v. Douthitt* (Ky.) 453.

§ 1051. The reading before the jury of a stipulation held not prejudicial error.—*Witty v. Springfield Traction Co.* (Mo. App.) 82.

§ 1051. The error if any in admitting testimony to prove a fact shown by other testimony received without objection is not ground for reversal.—*Farmers' Cotton Oil Co. v. Barnes* (Tex. Civ. App.) 369.

§ 1051. The admission of certain testimony held to be harmless error.—*Western Union Telegraph Co. v. Landry* (Tex. Civ. App.) 848.

§ 1052. Where, in an action against an electric company for death by electric shock, the verdict was not assailed as excessive, the error in admitting evidence of the capitalization of the company was not reversible.—*Jacksonville Ice & Electric Co. v. Moses* (Tex. Civ. App.) 379.

§ 1053. Any error in overruling objections to evidence as to a certain item of damage held not to have injured defendant.—*Missouri, K. & T. Ry. Co. of Texas v. Groseclose* (Tex. Civ. App.) 736.

§ 1053. The admission of certain testimony held to be harmless error in view of an instruction given.—*Western Union Telegraph Co. v. Landry* (Tex. Civ. App.) 848.

§ 1054. Plaintiff held not prejudiced by the admission of improper evidence where the trial was to the court without a jury.—*Couturie v. Roensch* (Tex. Civ. App.) 413.

§ 1056. The error, if any, in excluding testimony held harmless.—*St. Louis, S. F. & T. R. Co. v. Taylor* (Tex. Civ. App.) 819.

§ 1057. It was not error to refuse to require production of books when all necessary information was deduced on examination of witnesses.—*Chesapeake & O. Ry. Co. v. Stein* (Ky.) 1169.

§ 1057. The exclusion of evidence as to a fact otherwise established is not reversible error.—*Crain v. Miles* (Mo. App.) 52.

§ 1057. In a suit involving a right to apportion an annuity given by a will, the exclusion of certain evidence held not prejudicial.—*Wiegand v. Woerner* (Mo. App.) 596.

§ 1058. Error in excluding testimony held not harmless, notwithstanding the admission of other testimony of the witness.—*Houston & T. C. R. Co. v. Haberlin* (Tex. Civ. App.) 411.

§ 1062. Error in submitting the issue of waiver after loss, of which there was no evidence, held harmless.—*Shook v. Retail Hardware Mut. Fire Ins. Co. of Minnesota* (Mo. App.) 589.

§ 1064. Where a peremptory instruction should have been given, error in instructions held not prejudicial.—*Cox v. Illinois Cent. R. Co.* (Ky.) 911.

§ 1064. In an action for death at a railroad crossing, defendant held not prejudiced by an instruction which only required decedent to use a high degree of care in case he knew that the crossing at which he was killed was unusually dangerous.—*Illinois Cent. R. Co. v. Moss' Adm'r* (Ky.) 1122.

§ 1064. An erroneous instruction requiring a railroad company to sound the whistle and ring the bell at a crossing, held harmless, where the undisputed evidence showed that neither signal was given.—*Tate v. Wabash Ry. Co.* (Mo. App.) 14.

§ 1064. Evidence in authorizing recovery of the "reasonable," instead of the "market," val-

ue of live stock injured in transit held harmless.—*Galveston, H. & S. A. R. Co. v. Jones* (Tex.) 323.

§ 1066. In an action for injury to a child employed in violation of Act March 18, 1908 (Ky. St. § 331a, subsec. 11 [Russell's St. § 3247]), an instruction held not prejudicial error.—*Casperson v. Michaels* (Ky.) 200.

§ 1066. In an action for the death of an elevator passenger, the refusal to withdraw from the jury negligence under the humanitarian doctrine held not prejudicial to defendant.—*Chambers v. Kupper-Benson Hotel Co.* (Mo. App.) 45.

§ 1067. In an action by a broker for commissions, refusal of an instruction held prejudicial error.—*Edling-Adcock Real Estate Co. v. Thompson* (Mo. App.) 681.

§ 1068. Error in authorizing recovery for permanent personal injury was harmless where the award was only sufficient to cover pain suffered.—*Illinois Cent. R. Co. v. Hurt* (Ky.) 144.

§ 1068. An erroneous instruction held harmless.—*Illinois Cent. R. Co. v. Mayes* (Ky.) 436.

§ 1068. An instruction on the measure of damages held to be harmless error.—*Louisville & N. R. Co. v. Roe* (Ky.) 437.

§ 1070. Error in permitting recovery for continuing damage up to date of trial, instead of the date when the amended petition was filed, held harmless.—*Chesapeake & O. Ry. Co. v. Stein* (Ky.) 1169.

§ 1071. Failure of the trial court in a suit in equity to make findings of fact and conclusions of law held not prejudicial.—*Walther v. Null* (Mo.) 993.

§ 1073. An error of \$36.20 in the amount of a finding in favor of defendant, held not prejudicial to plaintiff.—*Couturie v. Roensch* (Tex. Civ. App.) 413.

§ 1074. A judgment of the circuit court held not subject to reversal for erroneously reciting that a demand was assigned by the probate court to the fifth class, instead of to the sixth class.—*Dooley v. Ryan's Estate* (Mo. App.) 30.

(J) Decisions of Intermediate Courts.

§ 1064. Assignments of error to rulings of Court of Civil Appeals not affecting the judgment appealed from will not be considered.—*Galveston, H. & S. A. R. Co. v. Jones* (Tex.) 323.

(K) Subsequent Appeals.

§ 1097. The rule that an opinion on a former trial is the law of the case is not changed by the introduction of evidence on retrial which is merely cumulative.—*W. B. Samuels & Co. v. T. M. Gilmore & Co.* (Ky.) 169.

§ 1097. A judgment of the Supreme Court held to have established the law of the case on a subsequent appeal.—*Western Union Telegraph Co. v. Landry* (Tex. Civ. App.) 848.

XVII. DETERMINATION AND DISPOSITION OF CAUSE.

(A) Decision in General.

§ 1122. Where there is no conflict in the evidence, the appellate court may supplement the findings of fact made at the trial.—*State v. Downman* (Tex. Civ. App.) 787.

(B) Affirmance.

§ 1133. A judgment held not subject to reversal because of the fact that a certain diagram was not contained in the bill of exceptions.—*Headrick v. H. D. Williams Cooperage Co.* (Ark.) 957.

(D) Reversal.

§ 1165. Assignments of error *held* open to consideration on appeal in view of the statement of facts filed, although the trial court had failed to file conclusions on request, under Rev. St. 1896, art. 1333, and Acts Ex. Sess. 1907, c. 7.—*Sutherland v. Kirkland* (Tex. Civ. App.) 851.

§ 1165. An appellant *held* entitled to a reversal because of failure of trial judge to file conclusions required by Rev. St. 1896, art. 1333, and Act Ex. Sess. 1907, c. 7.—*Sutherland v. Kirkland* (Tex. Civ. App.) 851.

§ 1170. Under Civ. Code Prac. § 134, *held* that it was not reversible error in an action for personal injuries for an instruction to leave the amount of damages for mental suffering blank where all the damages the plaintiff could recover were stated in another part, and the entire award was not disproportionate to the physical injury.—*Louisville & N. R. Co. v. Hardy* (Ky.) 899.

§ 1170. Error in authorizing a recovery of punitive damages in an action for death at a railroad crossing *held* not prejudicial under Civ. Code Proc. § 134, where the jury only allowed \$2,500.—*Illinois Cent. R. Co. v. Moss' Adm'r* (Ky.) 1122.

§ 1170. In view of Rev. St. 1909, §§ 1850, 2082, a modification of an instruction *held* to be harmless error.—*Doherty v. Doherty* (Mo. App.) 1112.

§ 1173. In view of Rev. St. 1909, § 5431, giving codefendants sued for a tort the right of contribution, *held* that, where a judgment for plaintiff is reversed as to one, such judgment will be reversed as to both that they may be permitted to defend throughout.—*Miller v. United Rys. Co. of St. Louis* (Mo. App.) 1045.

§ 1175. Where a judgment overruling a general demurrer to a petition is reversed, and it is not possible to so amend as to state a cause of action, the appellate court may render judgment for defendant.—*Galveston Tribune v. Guisti* (Tex. Civ. App.) 239.

§ 1177. Though an execution sale under which defendants in trespass to try title claim be adjudged void on review, the cause will be remanded, where an adjustment of equities may be proper.—*Bailey v. Block* (Tex.) 323.

§ 1178. Where plaintiff abandoned the humanitarian rule, *held*, that the case will be remanded where the evidence warranted submitting that issue.—*Gordon v. Metropolitan St. Ry. Co.* (Mo. App.) 26.

(F) Mandate and Proceedings in Lower Court.

§ 1195. Where the opinion on a former appeal found there was no evidence of fraud, and the evidence on retrial was no stronger, it was proper not to submit it to the jury.—*W. B. Samuels & Co. v. T. M. Gilmore & Co.* (Ky.) 169.

§ 1195. Where an opinion on a former appeal found that a contract of defendant corporation had been entered into by the secretary and treasurer, all question as to the president's mental capacity was out of the case.—*W. B. Samuels & Co. v. T. M. Gilmore & Co.* (Ky.) 169.

§ 1214. Where a judgment is reversed, the case is to be retried on testimony introduced on the new trial.—*Louisville & N. R. Co. v. Irby* (Ky.) 139.

XVIII. LIABILITIES ON BONDS AND UNDERTAKINGS.

On appeal from justices' courts, see Justices of the Peace, § 191.

APPEARANCE.

§ 18. A general appearance by defendant in Supreme Court *held* to waive question of jurisdiction.—*Wilkerson v. McGhee* (Mo. App.) 596.

§ 19. Where the court has jurisdiction of the subject-matter, want of jurisdiction of the person is cured by appearance.—*State ex rel. St. Louis Dressed Beef & Provision Co. v. Nixon* (Mo.) 538; *State ex rel. Raines v. Nolte* (Mo.) 542.

§ 19. Appearance and general denial *held* to waive the objection that a suit for the penalty prescribed in Rev. St. 1899, § 1017, was not instituted at the proper term.—*State ex rel. Lawrence County v. Grier Land & Mining Co.* (Mo. App.) 1087.

APPLIANCES.

Defective and dangerous appliances, liability of master for injuries to servant, see Master and Servant, §§ 101, 102-118, 234-236.

APPLICATION.

For liquor license, see Intoxicating Liquors, § 64.

Of instructions to case, see Criminal Law, § 814; Trial, §§ 248-253.

For particular remedies or forms of relief.

See Injunction, § 158.

Continuance, see Continuance, § 37.

Judgment on pleadings, see Pleading, § 343.

Making pleading more definite and certain, see Pleading, § 367.

New trial, see Criminal Law, §§ 951-958; New Trial, § 155.

APPOINTMENT.

Of amicus curiae, see Amicus Curiae, § 1.

Of executors or administrators, see Executors and Administrators, § 22.

Of highway officers, see Highways, § 93.

Of receivers for insolvent corporations, see Corporations, § 553.

Powers of appointment, see Powers.

APPORTIONMENT.

Of annuities, see Annuities, § 4.

APPRAISAL.

Adjustment of loss under insurance policy, see Insurance, § 576.

APPROPRIATION.

Of property to public use, see Eminent Domain.

APPROVAL.

By architects, arbitrators, or others of work done under contract, see Contracts, §§ 284-305.

Of findings of referee, master, commissioner, or auditor, as affecting power of appellate court to review questions of fact, see Appeal and Error, § 1022.

APPURTENANCES.

Easements in general, see Easements.

ARBITRATION AND AWARD.

Adjustment of loss under insurance policy, see Insurance, § 576.

ARCHITECTS.

Approval or certificate of architects, arbitrators, or others of performance of contract, see Contracts, §§ 284-306.

ARGUMENT OF COUNSEL.

In civil actions, see Trial, §§ 106-131.
In criminal prosecutions, see Criminal Law, §§ 719-728.

ARMS.

See Weapons.

ARMY AND NAVY.

See Militia; Pensions.

ARRAIGNMENT.

See Criminal Law, § 301.

ARRAY.

Challenge to array of jurors, see Jury, §§ 116-120.

ARREST.

See Bail; Prisons.
Illegal arrest, see False Imprisonment.

II. ON CRIMINAL CHARGES.

Powers of members of militia in active service to arrest without warrant, see Militia, § 15.

ARREST OF JUDGMENT.

In civil actions, see Judgment, § 269.

ASSAULT AND BATTERY.**I. CIVIL LIABILITY.**

Ejection of passenger or intruder from train, see Carriers, §§ 353-382.
Liability of railroad company for acts of employé, see Railroads, § 281; Carriers, §§ 283, 284.

(A) Acts Constituting Assault or Battery and Liability Therefor.

Liability of railroad company for acts of employé, see Railroads, § 281.

II. CRIMINAL RESPONSIBILITY.

Assault with intent to kill, see Homicide, §§ 90-99, 257.

ASSENT.

Of owner of property to improvements thereon as affecting right to lien, see Mechanics' Liens, §§ 57-61.
Of parties to contracts in general, see Contracts, §§ 93, 94.
Of parties to jurisdiction of court, see Appeal and Error, § 21.
To proceeding, as estoppel to allege error, see Appeal and Error, § 883.

ASSESSMENT.

Of damages in general, see Damages, §§ 208-216.
Of expenses of public improvements, see Levees, §§ 22, 23; Municipal Corporations, § 567.
Of taxes, see Taxation, §§ 357-446.
On members of mutual insurance companies, see Insurance, §§ 350-367, 751.

ASSIGNMENT OF DOWER.

See Dower, § 59.

ASSIGNMENT OF ERRORS.

See Appeal and Error, §§ 742-753; Criminal Law, § 1129.

ASSIGNMENTS.

For benefit of creditors, see Assignments for Benefit of Creditors.

Validity as to creditors or subsequent purchasers, see Fraudulent Conveyances.

Transfers of particular species of property, rights, or instruments.

Insurance policies, see Insurance, §§ 203-222, 593.

Leases, see Landlord and Tenant, § 80.

Shares of corporate stock, see Corporations, § 121.

I. REQUISITES AND VALIDITY.

(A) Property, Estates, and Rights Assignable.

§ 19. A personal contract held not assignable.—F. Haag & Bro. v. Reichert (Ky.) 191.

(B) Mode and Sufficiency of Assignment.

Parol acceptance of written assignment of land contract, see Vendor and Purchaser, § 214.

§ 31. Payment of another's funeral expenses held a voluntary payment and not the purchase of the creditor's account.—Cape Girardeau Bell Telephone Co. v. Hamill's Estate (Mo. App.) 1103.

(C) Validity.

§ 64. Evidence held insufficient to sustain a finding that plaintiff, at the time he transferred his equity in an assigned stock of goods to his assignee, was imposed upon.—Heath v. Tucker (Mo. App.) 572.

§ 68. Plaintiff, having been offered a rescission of a contract of sale of his equity to his assignee for the benefit of creditors, and having refused and elected to treat the contract as valid, could not thereafter obtain a rescission.—Heath v. Tucker (Mo. App.) 572.

II. OPERATION AND EFFECT.

Priority of assignment over garnishment, see Garnishment, § 201.

III. RIGHTS AND LIABILITIES OF PARTIES.

§ 94. An assignee of a personal contract held entitled to recover thereunder.—F. Haag & Bro. v. Reichert (Ky.) 191.

§ 109. Effect of assignment of personal contract stated.—F. Haag & Bro. v. Reichert (Ky.) 191.

IV. ACTIONS.

§ 137. Testimony held not to prove an assignment of a contract.—Brown v. T. J. Moss Tie Co. (Mo. App.) 1103.

ASSIGNMENTS FOR BENEFIT OF CREDITORS.

See Bankruptcy, §§ 214-303.

I. REQUISITES AND VALIDITY.

(A) Nature and Essentials of Trusts for Creditors.

§ 12. A transfer is within Ky. St. § 1910 (Russell's St. § 2104), when the transferee should know under the statute, as a reasonable man under the circumstances, that he was insolvent when the transfer was made, and that its effect would be to prefer one creditor to an-

other.—Union Trust & Savings Co. of Maysville v. Taylor (Ky.) 196.

§ 14. A mortgage executed by an insolvent to secure a debt secured by a prior valid mortgage is not within Ky. St. § 1910 (Russell's St. § 2104).—Union Trust & Savings Co. of Maysville v. Taylor (Ky.) 196.

ASSOCIATIONS.

Judicial notice of associations and members thereof, see Evidence, § 22.

Mutual benefit insurance associations, see Insurance, §§ 699-825.

ASSUMPSIT, ACTION OF.

Particular implied contracts as grounds of action, see Money Paid; Work and Labor.

ASSUMPTION.

As to facts by trial court in instructing jury, see Criminal Law, § 761; Trial, § 191.

Of debt by purchaser of mortgaged property, see Mortgages, § 280.

Of risk by employé, see Master and Servant, §§ 203-226, 273, 288, 295.

ATTACHMENT.

See Execution; Garnishment; Sequestration. Exemptions, see Homestead.

II. PROPERTY SUBJECT TO ATTACHMENT.

Exemptions, see Homestead.

III. PROCEEDINGS TO PROCURE.

(A) Jurisdiction and Venue.

§ 74. Under Rev. St. 1909, § 1751, subd. 4, §§ 1752, 2306, 2314, attachment against a nonresident *held* properly made in one county in aid of a suit in another.—Sedalia Nat. Bank v. Rudert (Mo. App.) 1056.

VI. PROCEEDINGS TO SUPPORT OR ENFORCE.

§ 209. Under an order of publication in attachment, the court *held* not to have acquired jurisdiction.—Missouri, K. & T. Ry. Co. v. Morris (Mo. App.) 1027.

XI. WRONGFUL ATTACHMENT.

§ 368. An action *held* in trespass and not for wrongful attachment, making existence of grounds for attachment immaterial.—Central Coffee & Spice Co. v. Welborn (Mo. App.) 2.

§ 376. An action being in trespass and not for wrongful attachment, *held* error to allow the jury to consider damages sustained in defending an attachment suit.—Central Coffee & Spice Co. v. Welborn (Mo. App.) 2.

§ 377. Punitive damages are recoverable for causing seizure of one's goods, knowing them to be his, under attachment against a third person.—Central Coffee & Spice Co. v. Welborn (Mo. App.) 2.

ATTORNEY AND CLIENT.

Argument and conduct of counsel at trial, see Criminal Law, §§ 719-728; Trial, §§ 106-131. Attorneys in fact, see Principal and Agent. Special counsel for state in criminal prosecution, see Criminal Law, § 639.

II. RETAINER AND AUTHORITY.

§ 70. An attorney appearing for a party will be presumed to have authority to do so.—Miller

v. Continental Assur. Co. of America (Mo.) 1003; Same v. International Fire Assur. Co. of America (Mo.) 1007.

§ 71. Individual defendants against whom judgment was rendered in proceedings for a receiver of a corporation cannot contest the authority of attorneys to represent the corporation on a motion to dismiss an appeal.—Miller v. Continental Assur. Co. of America (Mo.) 1003; Same v. International Fire Assur. Co. of America (Mo.) 1007.

§ 72. Where the authority of attorneys to represent a corporation to move to dismiss an appeal was denied, the Supreme Court could receive proof of such authority not within the record.—Miller v. Continental Assur. Co. of America (Mo.) 1003; Same v. International Fire Assur. Co. of America (Mo.) 1007.

IV. COMPENSATION AND LIEN OF ATTORNEY.

(A) Fees and Other Remuneration.

Effect of counterclaim, see Set-Off and Counterclaim, § 58.

Expenditures for counsel fees by executor or administrator, see Executors and Administrators, § 111.

In action on bill or note, see Bills and Notes, §§ 471, 534.

In action on separation agreement, see Husband and Wife, § 281.

§ 153. An attorney for a county school superintendent having permitted his client to contract for satisfaction of a judgment recovered for a wholly inadequate sum, and the satisfaction having been set aside and the judgment collected by the client's successor in office, the attorney was not entitled to recover for his services in obtaining the judgment.—Board of Education of Mercer County v. Rankin (Ky.) 157.

§ 158. An attorney employed by the attorney of record on his own behalf, to assist in the trial of a case, *held* not entitled to proceed in equity against the attorney of record to recover his compensation.—Smith v. Wright (Mo. App.) 683.

(B) Lien.

§ 177. Attorneys *held* entitled to liens under the statute.—Smith v. Wright (Mo. App.) 683.

§ 177. An attorney, employed by the attorney of record, not as agent of the client, *held* not entitled to a lien under the statute for his fees.—Smith v. Wright (Mo. App.) 683.

§ 180. Where attorneys under a contract for a contingent fee filed a suit against one of the defendants for injuries to their client, the filing of the suit dispensed with the necessity of giving such defendant notice of their lien conferred by Rev. St. 1909, § 965.—Laughlin v. Excelsior Powder Mfg. Co. (Mo. App.) 116.

§ 190. Where attorneys contracted to prosecute a cause of action for injuries on a contingent fee against joint tort-feasors, and the client thereafter settled with one who had not been sued, the pleading of such release as a defense to the suit brought did not render the tort-feasor sued liable to the attorneys for their attorneys' lien.—Laughlin v. Excelsior Powder Mfg. Co. (Mo. App.) 116.

§ 190. Where attorneys had a lien on their client's cause of action under Rev. St. 1909, § 965, any act of the defendant which destroyed the attorneys' lien after it attached made the defendant liable to the attorneys in an independent action.—Laughlin v. Excelsior Powder Mfg. Co. (Mo. App.) 116.

ATTORNEYS IN FACT.

See Principal and Agent.

ATTRACTIVE NUISANCES.

Machinery and other things attractive to children, see Negligence, § 23.

AUDITA QUERELA.

Bill of review in equity, see Equity, § 447.

Relief against execution in general, see Execution, § 163.

Relief against judgment by equitable proceedings, see Judgment, § 445.

AUTHENTICATION.

Of documents offered in evidence, see Evidence, §§ 364-376.

Of record for purpose of review, see Criminal Law, § 1105.

AUTHORITY.

Of agents, see Principal and Agent, §§ 62-70.

Of attorneys, see Attorney and Client, §§ 70-72.

Of bank in making collections, see Banks and Banking, § 161.

Of brokers, see Brokers, §§ 8-11.

Of executors or administrators, see Executors and Administrators, § 111.

Of fiscal court to maintain highway, see Highways, § 105.

Of judges, see Judges, §§ 29, 30.

Of justices of the peace, see Justices of the Peace, § 43.

Of officers and agents of corporations in general, see Corporations, §§ 306, 398-432.

Of trustees, see Trusts, §§ 219-268.

To allow appeal or writ of error, see Appeal and Error, § 359.

To make admission binding another, see Evidence, §§ 242-253.

AUTOMOBILES.

On streets, liabilities for injuries, see Municipal Corporations, § 706.

Power of city to prohibit operation by minors, see Municipal Corporations, § 703.

Powers of county board to purchase, see Counties, § 118.

AUTREFOIS ACQUIT AND CONVICT.

See Criminal Law, § 162.

AVOIDANCE.

Of contract, see Contracts, § 265.

BAIL.**II. IN CRIMINAL PROSECUTIONS.**

§ 58. Under Rev. St. 1899, § 2800 (Ann. St. 1906, p. 1619 [Rev. St. 1909, § 5019]), variance between information and recognizance held not to affect validity of the recognizance.—State v. Mudd (Mo.) 562.

§ 80. Under Rev. St. 1909, §§ 5130, 5132, bail held relieved from liability on recognizance on actual surrender of principal, notwithstanding failure to deliver copy of recognizance to sheriff.—State v. Mudd (Mo.) 562.

§ 89. In scire facias on recognizance in a criminal case, surety held precluded by answer from raising question of variance between information and recognizance.—State v. Mudd (Mo.) 562.

BAILMENT.

Particular species of bailments, and bailments incident to particular occupations.

See Factors; Livery Stable Keepers; Pledges. Carriage of goods, see Carriers, §§ 46-185.

Deposits in banks, see Banks and Banking, § 153.

BANKRUPTCY.

See Assignments for Benefit of Creditors.

Of employer affecting liability for compensation to employé, see Master and Servant, § 24.

III. ASSIGNMENT, ADMINISTRATION, AND DISTRIBUTION OF BANKRUPT'S ESTATE.

(C) Preferences and Transfers by Bankrupt, and Attachments and Other Liens.

§ 214. Where a factor purchased cotton for bankrupts with his own funds, and did not ship the cotton to the bankrupts under their instructions, because of their bankruptcy, he was entitled to sell it for the best price obtainable and charge them with the loss.—Couturie v. Roensch (Tex. Civ. App.) 413.

(E) Actions by or Against Trustee.

§ 303. In an action by a trustee in bankruptcy to recover a preferential payment, evidence held sufficient to support a finding that defendant had no knowledge of the insolvency of his debtor.—Couturie v. Crespi (Tex. Civ. App.) 257.

BANKS AND BANKING.**III. FUNCTIONS AND DEALINGS.**

(B) Representation of Bank by Officers and Agents.

§ 116. Where a corporation's president was also the cashier of a bank, and as such president permitted the corporation to become indebted to the bank in excess of its debt limit, his knowledge of such limit would not be imputed to the bank.—Randolph v. Ballard County Bank (Ky.) 165.

(C) Deposits.

As property of estate by entirety, see Husband and Wife, § 14.

Limitation of actions to recover for conversion of special deposits, see Limitation of Actions, § 100.

§ 148. A payment of a draft properly indorsed by an employé held valid as against the employer.—Texas Seating Co. v. Farmers' & Mechanics' Nat. Bank (Tex. Civ. App.) 807.

§ 148. In an action against a bank for paying drafts on forged indorsements, no recovery held authorized by the evidence.—Texas Seating Co. v. Farmers' & Mechanics' Nat. Bank (Tex. Civ. App.) 807.

§ 153. Where a bank had no knowledge concerning the agreement under which a special deposit was made, its act in thereafter transferring the amount to the depositor's general account, which was later overdrawn, held not a conversion of the special deposit.—Prosser v. First Nat. Bank (Tex. Civ. App.) 781.

(D) Collections.

§ 161. A collecting bank to which a check is sent for collection from another bank under the custom of banks may accept the drawee bank's check or draft, and is not negligent in failing to demand payment in money.—First Nat. Bank v. First Nat. Bank (Tex. Civ. App.) 831.

IV. NATIONAL BANKS.

§ 261. That the purchase by plaintiff national bank of the special tax bills sued on was ultra vires is not a defense, but can be raised only by direct proceedings by the government.—First Nat. Bank of Independence v. Shewalter (Mo. App.) 42.

§ 280. The allegation of the petition in an action by a national bank on a special tax

bill, that it purchased it for a valuable consideration properly implies that the purchase was one it had authority to make.—*First Nat. Bank of Independence v. Shewalter* (Mo. App.) 42.

BAR.

Of action by former adjudication, see Judgment, § 619.
Of action by laches or staleness of demand, see Equity, §§ 67-71.
Of action by limitation, see Limitation of Actions, § 170.
Of allowance to surviving wife, husband, or children from estate of decedent, see Executors and Administrators, § 189.

BARROOMS.

See Intoxicating Liquors.

BASE FEE.

Construction of wills, see Wills, § 602.

BAWDYHOUSE.

See Disorderly House.

BENEFICIAL ASSOCIATIONS.

Mutual benefit insurance association, see Insurance, §§ 690-825.

BENEFICIARIES.

Of insurance, see Insurance, § 787.
Of trust, see Trusts.

BENEFITS.

Mutual benefit insurance, see Insurance, § 787.

BENEFIT SOCIETIES.

See Insurance, §§ 690-825.

BEQUESTS.

See Wills.

BEST AND SECONDARY EVIDENCE.

See Criminal Law, § 398; Evidence, §§ 158-174.

BETTERMENTS.

Compensation for improvements in trespass to try title, see Trespass to Try Title, § 56.
Improvement of highways, see Highways, § 106.
Liens for improvements on real estate, see Mechanics' Liens.
Public improvements, see Highways; Levees; Municipal Corporations, §§ 347-547.

BETTING.

See Gaming.

BIAS.

Of medical expert, see Evidence, § 560.

BIGAMY.

§ 2. Under Rev. St. 1909, §§ 4720, 4721, the mere belief of a man charged with bigamy that his former wife had been divorced *held* not a defense.—*State v. Trainer* (Mo.) 528.

§ 8. On a trial for bigamy, a fact *held* admissible to aid the jury in fixing the punishment.—*State v. Trainer* (Mo.) 528.

BILL.

Introduction and passage of legislative bills, see Statutes, § 5.

BILL OF EXCEPTIONS.

See Criminal Law, §§ 1090-1094; Exceptions, Bill of.

BILL OF REVIEW.

See Equity, § 447.

BILL OF RIGHTS.

See Constitutional Law.

BILLS AND NOTES.

As memorandum of contract within statute of frauds, see Frauds, Statute of, § 103.

As property of estate by entirety, see Husband and Wife, § 14.

Competency as witness of party to note, see Witnesses, § 140.

Presentation as claim against estate of decedent, see Executors and Administrators, § 224.

Set-off against administrators, see Executors and Administrators, § 434.

I. REQUISITES AND VALIDITY.

(F) Validity.

§ 107. Under Ky. St. §§ 4215, 4216 (Russell's St. §§ 6159, 6158), *held*, that a note given for patent rights was not void in the hands of a purchaser for value, because the words "Peddler's Note" were not written across its face, as required by section 4223 (Russell's St. § 1800).—*National Bank of the Republic v. Current* (Ky.) 479.

II. CONSTRUCTION AND OPERATION.

§ 125. Where a blank for the rate of interest in a note was filled by drawing a line through the space left for the rate per cent. if such filling of the blank be regarded as a patent ambiguity, it would indicate that no interest was to be paid.—*Couturie v. Roensch* (Tex. Civ. App.) 413.

V. RIGHTS AND LIABILITIES ON INDORSEMENT OR TRANSFER.

(D) Bona Fide Purchasers.

§ 334. An indorsee of note procured by fraud who holds funds of payee *held* not entitled to recover of maker.—*Union Nat. Bank v. Menefee* (Tex. Civ. App.) 822.

§ 335. A purchaser of notes *held* to take them burdened with an obligation which must be fulfilled before he may collect them.—*Cunningham v. Toye* (Ark.) 962.

VII. PAYMENT AND DISCHARGE.

Payment of forged or altered paper by bank, see Banks and Banking, § 148.

Rights, duties, and liabilities of bank receiving bill or note for collection, see Banks and Banking, § 161.

VIII. ACTIONS.

Counterclaim, see Set-Off and Counterclaim, §§ 35, 58.

Set-off against administrators, see Executors and Administrators, § 434.

Sufficiency of evidence in action of replevin, see Replevin, § 72.

§ 471. In an action on certain notes plaintiff *held* not entitled to recover attorneys' fees.

where the petition failed to allege the date when the notes were placed in the hands of attorneys for collection.—*Ward v. Boydston* (Tex. Civ. App.) 786.

§ 485. Where the answer denying liability in an action on a note was not sworn to, the execution of the note was admitted.—*First Nat. Bank v. Asel* (Mo. App.) 110, 111.

§ 499. The burden is on defendant in an action on a note to show that the debt represented thereby has been paid.—*Paine v. Levy* (Ky.) 1160.

§ 517. Evidence in an action on a note held to sustain a finding for defendant on defense of non est factum.—*Dillender v. Lester* (Mo. App.) 1041.

§ 518. Evidence in an action on a note held to sustain a finding for defendant on defense of want of consideration.—*Dillender v. Lester* (Mo. App.) 1041.

§ 525. Evidence held to support a finding that a purchaser of notes was not an innocent purchaser.—*Cunningham v. Toye* (Ark.) 962.

§ 527. In an action on a note, where it was claimed that the note had been paid by the delivery of crop mortgaged to secure it, evidence held to warrant a finding that the note had not been paid or the crop delivered.—*Glass v. Cincinnati Tobacco Warehouse Co.* (Ky.) 897.

§ 527. Evidence in an action on a note held not to show payment.—*Paine v. Levy* (Ky.) 1160.

§ 534. In an action on vendor's lien notes, plaintiff held not entitled to recover attorneys' fees stipulated for on an offset for improvements which were falsely represented to be located on the land and included in the sale.—*Ward v. Boydston* (Tex. Civ. App.) 786.

BIRTH.

Of child, as affecting revocation of will, see Wills, § 191.

BLACKMAIL.

See Threats.

BOARDS.

Highway boards, see Highways, §§ 93, 94.

Levee boards, see Levees, § 5.

Of park commissioners, see Municipal Corporations, § 747.

BONA FIDE PURCHASERS.

From persons of unsound mind, see Insane Persons, § 61.

Of bills or notes, see Bills and Notes, §§ 334, 335.

Of mortgaged property, see Chattel Mortgages, § 153.

Of real property in general, see Vendor and Purchaser, § 230.

BONDS.

Contractor's bonds, see Municipal Corporations, § 347.

For payment of claims by insurance company, see Insurance, § 8.

Municipal bonds, see Municipal Corporations, § 907.

School district bonds, see Schools and School Districts, § 97.

Sureties on bonds, see Principal and Surety.

Bonds for performance of duties of trust or office.

See Executors and Administrators, § 537; Sheriffs and Constables, § 157.

School contractor's bond, see Schools and School Districts, § 81.

Bonds in judicial proceedings.

See Bail.

Appeal or writ of error in general, see Appeal and Error, § 376; Criminal Law, § 1078; Justices of the Peace, § 191.

II. CONSTRUCTION AND OPERATION.

§ 50. Obligors in a statutory bond are presumed to have known the terms of the statute, and to have bound themselves in reference thereto.—*Crawford v. Ozark Ins. Co.* (Ark.) 951.

§ 50. Statutory bonds executed in the form prescribed by the statute must be construed as though the statute were written in them as respects the rights of principal and surety.—*Crawford v. Ozark Ins. Co.* (Ark.) 951.

BOOKS.

Assessment books, see Taxation, § 446.

BOOKS OF ACCOUNT.

Evidence preliminary to introduction in evidence, see Evidence, § 376.

BOROUGHES.

See Municipal Corporations.

BOUNDARIES.

Of city, see Municipal Corporations, § 29.

Of school district, see Schools and School Districts, §§ 32-39.

Requirement of statute of frauds affecting agreement as to, see Frauds, Statute of, § 70.

I. DESCRIPTION.

§ 3. Discrepancy between calls of patent and surveyor's plat held not proof of mistake which would render the plat controlling.—*Hall v. Pratt* (Ky.) 900.

II. EVIDENCE, ASCERTAINMENT, AND ESTABLISHMENT.

Declaration, see Evidence, § 274.

§ 37. Evidence held not sufficient to establish prima facie that the land in controversy was not within the exclusions referred to in a patent.—*Cornett v. Burchfield* (Ky.) 466.

§ 41. In trespass to try title involving a disputed boundary line, a request to charge held properly covered by instructions given.—*Caruthers v. Hadley* (Tex. Civ. App.) 757.

§ 47. Owner of land inducing purchase from third person held estopped to deny title as against purchaser.—*Hall v. Pratt* (Ky.) 900.

§ 48. Under certain conflicting conveyances held, that there could be no apportionment of the land between grantees.—*Vance v. Gray* (Ky.) 181.

BOUNTIES.

See Pensions.

BRAKEMAN.

Conductor and brakemen as fellow servants, see Master and Servant, § 185.

BREACH.

Of conditions of deeds, see Deeds, § 160.

Of conditions of insurance policies, see Insurance, §§ 323-367, 745.

Of contract in general, see Contracts, §§ 280-305.

Of contract of sale, see Sales, §§ 166-181; Vendor and Purchaser, §§ 133-137.

Of contract of sale as ground for rescission, see Sales, § 119.
Of covenant, see Covenants, § 130.

BRIBERY.

In local option elections, see Intoxicating Liquors, § 37.

BRIDGES.

Obstruction of water courses, see Waters and Water Courses, § 171.

BRIEFS.

On appeal or writ of error, see Appeal and Error, § 762.

BROKERS.

See Factors.

Insurance brokers, see Insurance, §§ 77-90.

Listing of land with broker by county as creation of debt, see Counties, § 152.

II. EMPLOYMENT AND AUTHORITY.

§ 8. In an action for brokers' commissions, evidence *held* to sustain a finding that plaintiffs were employed to secure the property for defendants and that plaintiffs were entitled to commissions.—Davis v. Gross (Mo. App.) 83.

§ 11. A contract for the exclusive selling agency of certain oil *held* not broken by sales made by the principal.—Gay Oil Co. v. Muskogee Oil Refining Co. (Ark.) 639.

§ 11. The burden of proving damages from a breach of contract *held* to be upon the one claiming them.—Gay Oil Co. v. Muskogee Oil Refining Co. (Ark.) 639.

III. DUTIES AND LIABILITIES TO PRINCIPAL.

§ 38. Evidence *held* to show that a broker sold land for \$200 less than he was offered.—Brown v. Carpenter (Ky.) 1150.

IV. COMPENSATION AND LIEN.

§ 40. A broker effecting a sale of real estate may not recover commissions therefor unless he had authority to act as agent in the matter.—Loomis v. Broadus & Leavell (Tex. Civ. App.) 743.

§ 49. A broker suing on contract, and not on quantum meruit for his services, cannot recover without showing compliance with the contract or that he was prevented from executing it by his principal.—Clark v. Asbury (Tex. Civ. App.) 286.

§ 53. To entitle a real estate broker to his commission, he must be the procuring cause in finding a purchaser.—Crain v. Miles (Mo. App.) 52.

§ 53. In an action for brokers' commissions, plaintiff *held* not entitled to commissions.—Clegg v. Mayer (Tex. Civ. App.) 386.

§ 55. Where an agent sets on foot a sale of property which wholly fails, and after such failure another agent makes the sale, the first agent is not entitled to compensation.—Crain v. Miles (Mo. App.) 52.

§ 55. Where the owner authorizes more than one agent to sell, the commission belongs to the agent who procures a purchaser, though another agent closes the deal.—Crain v. Miles (Mo. App.) 52.

§ 55. Brokers procuring a purchaser were entitled to commissions, though the deal was closed by the agent for the purchaser.—Fritter v. Pendleton (Tex. Civ. App.) 1186.

§ 56. Where a broker fails to get his offer within the terms of his authority, and the purchaser buys the same on less terms, the broker is not entitled to commission.—Crain v. Miles (Mo. App.) 52.

§ 56. Giving exclusive agency does not of itself preclude the principal from making a sale.—Clark v. Asbury (Tex. Civ. App.) 286.

§ 56. A broker employed to procure a purchaser of real estate *held* entitled to commissions where he produces a purchaser who makes a contract with the owner, irrespective of matters affecting only the parties to that contract.—Loomis v. Broadus & Leavell (Tex. Civ. App.) 743.

§ 57. A broker employed to find a purchaser of land *held* not to have complied with the contract.—Clark v. Asbury (Tex. Civ. App.) 286.

§ 57. A broker to procure a purchaser *held* required to show that he found a purchaser ready, willing, and able to purchase on the terms specified in the contract of employment, unless the buyer produced by him agrees with the owner on different terms.—Loomis v. Broadus & Leavell (Tex. Civ. App.) 743.

§ 61. Broker *held* not entitled under the circumstances to recover of executors compensation for procuring a purchaser of property.—Roberts v. Holland (Tex. Civ. App.) 810.

§ 71. A contract by a county to list land with a broker for sale at \$4 an acre net to the county construed.—Sandifer v. Foard County (Tex. Civ. App.) 823.

§ 75. Rights of a broker to compensation *held* to become fixed at the time of sale.—F. Haag & Bro. v. Reichert (Ky.) 191.

V. ACTIONS FOR COMPENSATION.

Review as dependent on prejudicial nature of error, see Appeal and Error, § 1067.

§ 79. If a broker is entitled to recover any compensation on a sale made by his principal on terms differing from those set forth in his contract, he must sue upon a quantum meruit and not on the contract.—Clark v. Asbury (Tex. Civ. App.) 286.

§ 82. In an action for commissions for the sale of land, *held*, that there was no variance between the pleadings and proof.—Fritter v. Pendleton (Tex. Civ. App.) 1186.

§ 84. Under a certain contract for purchase of timber, *held*, that a broker could not recover commissions in the absence of evidence showing the amount of timber that the purchaser was compelled to take under the contract.—Saunders v. Montgomery (Tex. Civ. App.) 775.

§ 85. In an action for brokers' commissions for securing property at a partition sale, evidence that plaintiffs agreed not to have any other bidders at the sale than defendants *held* admissible.—Davis v. Gross (Mo. App.) 83.

§ 85. In an action for brokers' commissions, evidence that one of the plaintiffs at a public sale of the property stopped an adverse bidder *held* admissible.—Davis v. Gross (Mo. App.) 83.

§ 88. In an action to recover commissions for effecting the sale of land, *held*, that whether the plaintiff was the procuring cause of the sale was for the jury.—Gould v. St. John (Mo. App.) 578.

VI. RIGHTS, POWERS, AND LIABILITIES AS TO THIRD PERSONS.

§ 97. Payment by plaintiff to principal of interest on full amount of loan *held* not to entitle him to recover part of loan retained by broker pending removal of defects in title to land offered as security.—Peters v. Carroll (Mo. App.) 49.

§ 97. Plaintiff *held* not entitled to recover of loan broker part of loan retained pending removal of defects in title to land offered by plaintiff as security.—*Peters v. Carroll* (Mo. App.) 49.

BROTHEL.

See Disorderly House.

BUGGERY.

See Sodomy.

BUILDING CONTRACTS.

Liens for labor and materials, see Mechanics' Liens.

BUILDINGS.

Fixtures, see Fixtures.
Lien for construction or repair, see Mechanics' Liens.

BURDEN OF PROOF.

In civil actions, see Evidence, § 94.

BURGLARY.

Capacity of minor to commit burglary, see Infants, § 66.

II. PROSECUTION AND PUNISHMENT.

Instructions as to presumptions of innocence in prosecution of minor, see Infants, § 68.

§ 36. In a prosecution for burglary, certain evidence *held* admissible.—*Holland v. State* (Tex. Cr. App.) 693.

§ 41. Evidence in a prosecution for burglary *held* to sustain a finding that defendant entered the building for the purpose of committing theft.—*Ragsdale v. State* (Tex. Cr. App.) 234.

§ 41. Evidence *held* to support a conviction of burglary.—*Hayden v. State* (Tex. Cr. App.) 703.

§ 46. Charge given in a burglary prosecution *held* to require a finding of all of the elements of theft in order to convict, so that the court was not required to technically define theft in another charge or paragraph.—*Ragsdale v. State* (Tex. Cr. App.) 234.

§ 46. Where, in a prosecution for burglarizing a store, there was no explanation of accused's possession of the stolen goods, the court properly refused to charge the law as to possession of stolen property.—*Holland v. State* (Tex. Cr. App.) 693.

BUSINESS.

Regulation of conduct of business as regulation of commerce, see Commerce, §§ 58-61.

BYSTANDERS.

Misconduct ground for discharge of jury, see Jury, § 140.

CALENDARS.

Computation of time, see Time.

CALLS.

In deeds, see Boundaries, § 3.

CANCELLATION OF INSTRUMENTS.

See Quieting Title.

Of contracts of sale, see Sales, § 119.

Of tax deeds, see Taxation, §§ 790-816.

Setting aside transfer in fraud of creditors or subsequent purchasers, see Fraudulent Conveyances, § 249.

II. PROCEEDINGS AND RELIEF.

§ 37. A petition for rescission by a vendor *held* not insufficient.—*Campbell v. Kerrick* (Ky.) 186.

§ 45. A vendor's executor suing to cancel a deed for fraud need show no title other than that conveyed.—*Rankin v. Rankin* (Tex. Civ. App.) 392.

CANDIDATES.

For office, defamation, see Libel and Slander, § 48.

CAPITAL.

Corporate capital in general, see Corporations, §§ 104-121.

CARELESSNESS.

See Negligence.

CARNAL KNOWLEDGE.

See Rape; Seduction; Sodomy.

CARRIERS.

As employers, see Master and Servant.

Construction, regulation and operation of railroad in general, see Railroads.

Construction, regulation, and operation of street railroads in general, see Street Railroads.

Construction, regulation, and operation of telegraph and telephone lines, see Telegraphs and Telephones.

I. CONTROL AND REGULATION OF COMMON CARRIERS.

Regulation of, as regulation of commerce, see Commerce, §§ 33-40.

(B) Interstate and International Transportation.

Regulation by state as interference with interstate commerce, see Commerce, §§ 33-40.

II. CARRIAGE OF GOODS.

Regulation, as regulation of commerce, see Commerce, §§ 33-40.

(B) Bills of Lading, Shipping Receipts, and Special Contracts.

§ 46. Ordinarily a shipment contract is governed by the laws of the state where it is made.—*Lord & Bushnell Co. v. Texas & N. O. R. Co.* (Mo. App.) 111.

(C) Custody and Control of Goods.

§ 73. A shipper has the right to stop or divert a car at an intermediate point.—*Lord v. Bushnell Co. v. Texas & N. O. R. Co.* (Mo. App.) 111.

(D) Transportation and Delivery by Carrier.

§ 79. A carrier must conform to the shipper's routing directions, except as to perishable goods, where conformity would cause injury to the shipment.—*Lord & Bushnell Co. v. Texas & N. O. R. Co.* (Mo. App.) 111.

§ 86. The carrier must observe directions as to whom freight shall be delivered.—*Ginnocchio-Jones Fruit Co. v. Missouri, K. & T. Ry. Co.* (Mo. App.) 1028.

§ 87. A consignor of fruit to his order is bound to have some one at destination to re-

ceive it.—*Ginnocchio-Jones Fruit Co. v. Missouri, K. & T. Ry. Co.* (Mo. App.) 1028.

§ 89. A carrier *held* not liable for conversion on sale of perishable freight, under Comp. Laws 1909, § 456, on failure of consignee to accept same.—*Ginnocchio-Jones Fruit Co. v. Missouri, K. & T. Ry. Co.* (Mo. App.) 1028.

(F) Loss of or Injury to Goods.

§ 110. Where a carrier is misled as to the value of goods, and is not notified of their character by the shipper, *held*, that it is not liable for their exceptional value if lost.—*Galveston, H. & S. A. Ry. Co. v. Quilhot* (Tex. Civ. App.) 261.

§ 110. The shipment of silverware and expensive china in a box and barrel is not so unusual, nor is their value so extraordinary as to require the shipper as a matter of law to give notice to the carrier of their nature and value.—*Galveston, H. & S. A. Ry. Co. v. Quilhot* (Tex. Civ. App.) 261.

§ 113. When the risk of a common carrier of goods attaches stated.—*American Lead Pencil Co. v. Nashville, C. & St. L. Ry.* (Tenn.) 613.

§ 121. A common carrier is not liable for the loss of goods caused by the shipper's act.—*American Lead Pencil Co. v. Nashville, C. & St. L. Ry.* (Tenn.) 613.

§ 123. The act of a shipper's employé *held* the proximate cause of the destruction by fire of the car containing the shipper's goods.—*American Lead Pencil Co. v. Nashville, C. & St. L. Ry.* (Tenn.) 613.

§ 132. Where goods are damaged by fire occurring upon premises under control of a common carrier, the carrier is presumed to be negligent.—*Southern Pacific Co. v. Weatherford Cotton Mills* (Tex. Civ. App.) 778.

§ 132. In an action against a carrier for damage to goods by fire while in its control, evidence *held* insufficient to overcome the presumption of negligence.—*Southern Pacific Co. v. Weatherford Cotton Mills* (Tex. Civ. App.) 778.

§ 134. In an action for loss of silverware and china en route which were packed in a box and barrel, evidence *held* to sustain a finding that the railroad company's agent was not misled as to the character or value of the goods.—*Galveston, H. & S. A. Ry. Co. v. Quilhot* (Tex. Civ. App.) 261.

(H) Limitation of Liability.

§ 159. A stipulation in a shipping contract requiring notice of a claim for injuries *held* valid.—*McKinstry v. Chicago, R. I. & P. Ry. Co.* (Mo. App.) 1061.

(I) Connecting Carriers.

§ 173. An initial carrier's liability respecting freight may be extended beyond its line by special contract.—*Lord & Bushnell Co. v. Texas & N. O. R. Co.* (Mo. App.) 111.

§ 173. A shipper suing on a contract for through shipment can recover for a connecting carrier's failure to comply with a routing direction preventing a diversion of the shipment as a negligent breach of defendant's contract obligation.—*Lord & Bushnell Co. v. Texas & N. O. R. Co.* (Mo. App.) 111.

§ 173. An initial carrier's obligation to carry freight beyond its line can be shown by usage or conduct.—*Lord & Bushnell Co. v. Texas & N. O. R. Co.* (Mo. App.) 111.

§ 174. An initial carrier *held* to perform its duty by delivering freight to connecting carrier.—*Lord & Bushnell Co. v. Texas & N. O. R. Co.* (Mo. App.) 111.

§ 177. A domestic law making an initial carrier liable for negligence of connecting carriers

does not apply to a contract of shipment made in another state.—*Lord & Bushnell Co. v. Texas & N. O. R. Co.* (Mo. App.) 111.

§ 177. Under the interstate commerce act (Act Cong. Feb. 4, 1887, c. 104, § 20, 24 Stat. 386 [U. S. Comp. St. 1901, p. 3169], amended by Act Cong. June 29, 1906, c. 3591, § 7, 34 Stat. 595 [U. S. Comp. St. Supp. 1909, p. 1166]), an initial carrier of an interstate shipment *held* liable for any injury occurring on the line of the connecting carrier, though the connecting carrier is not liable for injury on the line of the initial carrier.—*Otrich v. St. Louis, I. M. & S. Ry. Co.* (Mo. App.) 665.

§ 177. Where carriers forming a continuous line contract to carry through for a single price, they are jointly and severally liable for injury to the freight on any part of the route.—*Otrich v. St. Louis, I. M. & S. Ry. Co.* (Mo. App.) 665.

§ 177. Carriers on connecting routes *held* partners.—*Otrich v. St. Louis, I. M. & S. Ry. Co.* (Mo. App.) 665.

§ 180. Effect of initial carrier's contract limiting its liability stated.—*Lord & Bushnell Co. v. Texas & N. O. R. Co.* (Mo. App.) 111.

§ 180. A contract *held* one for through shipment, rendering an initial carrier liable for negligence of a connecting carrier.—*Lord & Bushnell Co. v. Texas & N. O. R. Co.* (Mo. App.) 111.

§ 180. Act Cong. June 29, 1906, c. 3591, § 7, 34 Stat. 595 (U. S. Comp. St. Supp. 1909, p. 1166) amending Hepburn Commerce Act Feb. 4, 1887, c. 104, § 20, 24 Stat. 386 (U. S. Comp. St. 1901, p. 3169), so far as it makes an initial carrier in case of shipments from one state to another liable for the defaults of connecting carriers, has no application to a shipment from Texas to a foreign country.—*Houston E. & W. T. Ry. Co. v. Inman, Akers & Inman* (Tex. Civ. App.) 275.

§ 180. A state statute restricting the right of a common carrier to limit its liability has no application to a shipment from a point within the state to a foreign country.—*Houston E. & W. T. Ry. Co. v. Inman, Akers & Inman* (Tex. Civ. App.) 275.

§ 180. Where an initial carrier accepted cotton for transportation to Germany, it was entitled to limit its liability to loss or damage occurring on its own line.—*Houston E. & W. T. Ry. Co. v. Inman, Akers & Inman* (Tex. Civ. App.) 275.

§ 180. Under Act Cong. June 29, 1906, c. 3591, § 7, 34 Stat. 595 (U. S. Comp. St. Supp. 1909, p. 1166), a stipulation exempting a carrier from liability for loss or damage to goods by fire *held* without effect.—*Southern Pacific Co. v. Weatherford Cotton Mills* (Tex. Civ. App.) 778.

§ 184. Variance between allegation and proof on a shipment contract *held* immaterial.—*Lord & Bushnell Co. v. Texas & N. O. R. Co.* (Mo. App.) 111.

§ 185. A shipper of an interstate shipment, to maintain a joint liability against the initial and connecting carriers, has the burden of showing that the damage to the shipment was caused by the connecting carrier.—*Otrich v. St. Louis, I. M. & S. Ry. Co.* (Mo. App.) 665.

III. CARRIAGE OF LIVE STOCK.

Interstate commerce regulations, see Commerce, § 61.

Opinion evidence in action for injuries to live stock in transportation, see Evidence, § 544. Parol evidence to explain contract, see Evidence, § 450.

§ 203. A stipulation in a shipping contract executed in Iowa for transportation of stock

from Iowa to Missouri *held* governed by law of Iowa.—*McKinstry v. Chicago, R. I. & P. Ry. Co.* (Mo. App.) 1061.

§ 205. A carrier handling a shipment of live stock in the usual and ordinary course of business complies with the law.—*Otrich v. St. Louis, I. M. & S. Ry. Co.* (Mo. App.) 665.

§ 205. That live stock was partly loaded and the remainder placed in the carrier's pens shows delivery to it.—*Moss v. Missouri, K. & T. Ry. Co.* (Mo. App.) 1070.

§ 208. A shipper of live stock *held* required to procure the insertion of a stipulation requiring the carrier to grade and classify the stock.—*Baltimore & O. S. W. R. Co. v. Clift* (Ky.) 917.

§ 210. The right of a shipper of live stock to unload the stock during transportation and feed them for two weeks *held* required to be expressed in the contract of shipment, or it cannot be enforced.—*Banks v. Chicago, B. & Q. R. Co.* (Mo. App.) 1071.

§ 213. A carrier *held* not liable for delay unless occasioned by its negligence.—*Otrich v. St. Louis, I. M. & S. Ry. Co.* (Mo. App.) 665.

§ 213. Under Rev. St. 1895, art. 326, a carrier of live stock *held* not liable for damage resulting from delay in caring for stock.—*Galveston, H. & S. A. R. Co. v. Jones* (Tex.) 328.

§ 215. A carrier of live stock *held* an insurer of the safe delivery thereof.—*Baltimore & O. S. W. R. Co. v. Clift* (Ky.) 917.

§ 215. A shipper of live stock *held* not entitled to hold the carrier liable for defects in the car.—*Otrich v. St. Louis, I. M. & S. Ry. Co.* (Mo. App.) 665.

§ 218. A stipulation in an interstate shipping contract *held* invalid under the provision of the amendment to the interstate commerce act known as the "Hepburn Bill" (Act June 29, 1906, c. 3591, § 7, 34 Stat. 595 [U. S. Comp. St. Supp. 1909, p. 1166]).—*McKinstry v. Chicago, R. I. & P. Ry. Co.* (Mo. App.) 1061.

§ 218. A stipulation in a shipping contract requiring notice of a claim *held* inapplicable to the facts.—*McKinstry v. Chicago, R. I. & P. Ry. Co.* (Mo. App.) 1061.

§ 218. Under Code Iowa, § 2074, a stipulation in a shipping contract requiring notice of claim within a specified time *held* invalid.—*McKinstry v. Chicago, R. I. & P. Ry. Co.* (Mo. App.) 1061.

§ 218. A live stock shipping contract, limiting liability to a specific amount, *held* unreasonable, where the cattle damaged were worth two or three times the amount limited.—*Louisville & N. R. Co. v. Smith* (Tenn.) 866.

§ 218. Before a shipper can be bound by a limited liability contract, it must appear that it was known to him that the carrier was willing to ship the goods under the common-law liability and that a rate was fixed therefor.—*Louisville & N. R. Co. v. Smith* (Tenn.) 866.

§ 218. A shipper, in the absence of fraud or misrepresentation, is bound by live stock shipping contract, though he did not read it.—*Louisville & N. R. Co. v. Smith* (Tenn.) 866.

§ 218. A limited live stock shipping contract *held* not sufficient to notify a shipper that he had the option to ship at rates imposing a common-law liability on the carrier.—*Louisville & N. R. Co. v. Smith* (Tenn.) 866.

§ 219. A contract for the carriage of live stock *held*, in absence of evidence, not to make a connecting carrier liable for damages in handling the cattle in stockyards.—*Baltimore & O. S. W. R. Co. v. Clift* (Ky.) 917.

§ 219. The initial carrier *held* the agent of the connecting carrier in making the contract

of shipment.—*Baltimore & O. S. W. R. Co. v. Clift* (Ky.) 917.

§ 219. A connecting carrier *held* liable only for damages occurring on its own line.—*Baltimore & O. S. W. R. Co. v. Clift* (Ky.) 917.

§ 219. An initial carrier of live stock *held* not required to load it on the connecting carrier's cars.—*Galveston, H. & S. A. R. Co. v. Jones* (Tex.) 328.

§ 219. The initial carrier under an intrastate live stock shipment contract can limit its liability to damage occurring on its own line and in delivering the shipment to the connecting carrier.—*Galveston, H. & S. A. R. Co. v. Jones* (Tex.) 328.

§ 219. Essentials to bring a contract for shipment over connecting lines within Rev. St. 1895, art. 331a, stated.—*Galveston, H. & S. A. R. Co. v. Jones* (Tex.) 328.

§ 219. An initial carrier of live stock *held* not bound to permit its cars to go over the connecting line nor liable for damage resulting from unloading at the end of its line in the absence of negligence.—*Galveston, H. & S. A. R. Co. v. Jones* (Tex.) 328.

§ 227. A shipper of live stock *held* not relieved from the duty of stating in his petition a cause of action against the initial and connecting carriers jointly or from proving at the trial a joint responsibility.—*Otrich v. St. Louis, I. M. & S. Ry. Co.* (Mo. App.) 665.

§ 228. Where in an action against a connecting carrier of live stock for mixing and unclassifying the stock, evidence *held* not to show that the mixing was done by the connecting carrier's agent.—*Baltimore & O. S. W. R. Co. v. Clift* (Ky.) 917.

§ 228. In an action against a connecting carrier for mixing cattle in reloading, the burden of proving that the mixing was done before delivery to the connecting carrier *held* not to rest on it in view of the petition.—*Baltimore & O. S. W. R. Co. v. Clift* (Ky.) 917.

§ 228. The liability of a connecting carrier of live stock for damages for mixing the stock is not shown by its receipt of the stock in a mixed condition and its carriage of the same without grading and classifying them.—*Baltimore & O. S. W. R. Co. v. Clift* (Ky.) 917.

§ 228. Evidence *held* not to show that a connecting carrier of live stock was guilty of negligent delay in transporting the same.—*Otrich v. St. Louis, I. M. & S. Ry. Co.* (Mo. App.) 665.

§ 228. In an action against a carrier of horses for negligent transportation, evidence *held* to show negligence.—*McKinstry v. Chicago, R. I. & P. Ry. Co.* (Mo. App.) 1061.

§ 228. Evidence *held* to sustain recovery for negligent delay in carrying live stock.—*Moss v. Missouri, K. & T. Ry. Co.* (Mo. App.) 1070.

§ 228. Evidence *held* admissible, in an action for delay in carrying live stock.—*Moss v. Missouri, K. & T. Ry. Co.* (Mo. App.) 1070.

§ 228. In an action for injuries to horses in transit, evidence *held* insufficient to show that the shipper was notified that the carrier would ship under common-law liability at a rate fixed therefor.—*Louisville & N. R. Co. v. Smith* (Tenn.) 866.

§ 228. In an action for injuries to horses in transit, evidence *held* sufficient to show defendant's negligence.—*Louisville & N. R. Co. v. Smith* (Tenn.) 866.

§ 229. The measure of damages for live stock killed in transit is their "market," and not "reasonable," value.—*Galveston, H. & S. A. R. Co. v. Jones* (Tex.) 328.

§ 230. In an action for injuries to sheep caused by delay in transportation, evidence *held* sufficient to take to the jury the question of negligent delay.—*Louisville & N. R. Co. v. Cooper* (Ky.) 920.

IV. CARRIAGE OF PASSENGERS.

(A) Relation Between Carrier and Passenger.

§ 236. Ky. St. § 806 (Russell's St. § 5350), providing for punishment and ejection of disorderly passengers, *held* passed to protect the carrier, and applicable only to persons on trains, and not to have changed the common-law rule as to who must be received as a passenger.—*Chesapeake & O. Ry. Co. v. Selsor* (Ky.) 143.

§ 236. A carrier need not receive as a passenger one who is intoxicated or otherwise in an improper condition.—*Chesapeake & O. Ry. Co. v. Selsor* (Ky.) 143.

§ 236. A tender to a street railway company of the requisite fare and the ability of a passenger to find a place of safety on the car *held* to impose an obligation on the company to receive and transport the passenger.—*De Glopper v. Nashville Ry. & Light Co.* (Tenn.) 609.

§ 247. Where a passenger has reached his destination, and a reasonable time has elapsed for him to leave the station, his rights as a passenger cease.—*Louisville & N. R. Co. v. Bays' Adm'r* (Ky.) 450.

§ 247. The relation of carrier and passenger between a passenger and a carrier by elevator *held* to arise at a designated time.—*Chambers v. Kupper-Benson Hotel Co.* (Mo. App.) 45.

§ 247. The relation of carrier and passenger *held* to begin the moment one starts to enter an elevator used for the carriage of passengers and brings himself within range of its possible activities.—*Chambers v. Kupper-Benson Hotel Co.* (Mo. App.) 45.

(D) Personal Injuries.

Admissions as evidence in action for injuries, see Evidence, § 244.

Admissions in pleading in action for injuries, see Pleading, § 127.

Credibility of witnesses in action for injuries, see Evidence, § 588.

Dismissal as to one of several defendants in action for injuries, see Dismissal and Nonsuit, § 42.

Error in instructions cured by giving other instructions in action for injuries, see Trial, § 296.

Instructions ignoring evidence in action for injuries, see Trial, § 253.

§ 280. A street railway company owes to its passengers the duty of exercising the highest degree of care to protect them from injury during transportation.—*Augustus v. Chicago, R. I. & P. Ry. Co.* (Mo. App.) 22.

§ 280. A carrier of passengers by elevator must use the utmost care and skill in the choice and maintenance of the machinery and appliances and the selection of operatives.—*Chambers v. Kupper-Benson Hotel Co.* (Mo. App.) 45.

§ 283. A railway company *held* liable for assault by its operator, though incidentally he worked as operator for an independent telegraph company.—*Roberts v. Wabash R. Co.* (Mo. App.) 89.

§ 284. A flagman stationed at a railroad crossing used by a street railway company is the agent of the latter company, and it is liable for his negligence in signaling a motorman to cross.—*Augustus v. Chicago, R. I. & P. Ry. Co.* (Mo. App.) 22.

§ 286. Where approach to a depot is faulty in construction and repair, and a passenger is

injured thereby, he can recover.—*Farmer v. International & G. N. Ry. Co.* (Tex. Civ. App.) 356.

§ 300. A motorman operating a street car on a railroad crossing must know of the presence of trains there, and he cannot attempt to cross so long as a train is in striking distance.—*Augustus v. Chicago, R. I. & P. Ry. Co.* (Mo. App.) 22.

§ 300. A motorman operating a street car across a railroad crossing *held* required to hold his car in a place of safety until crossing is clear.—*Augustus v. Chicago, R. I. & P. Ry. Co.* (Mo. App.) 22.

§ 303. Scope of carrier's duty to alighting passenger, stated.—*Bullitt v. Louisville Ry. Co.* (Ky.) 1153.

§ 303. When a street car is stopped at a regular stopping place for the ingress and egress of passengers, the carrier should hold the car stationary while the passenger is making a reasonable effort to alight.—*Kinyoun v. Metropolitan St. Ry. Co.* (Mo. App.) 15.

§ 303. Though a street car is stopped at a place not intended for use as a passenger station, the carrier should not start the car while the passenger is alighting with the knowledge and consent of the conductor.—*Kinyoun v. Metropolitan St. Ry. Co.* (Mo. App.) 15.

§ 303. Where a street car on the signal of a passenger slows down, and the passenger prepares to alight, it is negligence to suddenly start it just before making the stop.—*Musick v. United Rys. Co. of St. Louis* (Mo. App.) 31.

§ 303. A conductor and motorman should not only hold the car stationary a reasonable length of time while a passenger is alighting, but should exercise a high degree of care to see that she has alighted in safety before putting the car in motion.—*Jerome v. United Rys. Co. of St. Louis* (Mo. App.) 107.

§ 303. A street railway company *held* a carrier of passengers, and required to exercise the highest degree of care to carry them in safety, including holding the car still while passengers are alighting.—*Zeiler v. Metropolitan St. Ry. Co.* (Mo. App.) 1067.

§ 315. Statement by a street car passenger to a conductor on being injured while alighting *held* inadmissible.—*Bullitt v. Louisville Ry. Co.* (Ky.) 1153.

§ 315. Evidence, in an action for injury to an alighting passenger, that the car was moving very slightly *held* not a variance from a petition charging a sudden start from a standstill.—*Kinyoun v. Metropolitan St. Ry. Co.* (Mo. App.) 15.

§ 315. In an action for injuries to a street car passenger in a collision between a car and a train at a railroad crossing, plaintiff, in view of the petition, *held* not required to prove specific negligence.—*Augustus v. Chicago, R. I. & P. Ry. Co.* (Mo. App.) 22.

§ 315. Proof *held* to correspond to the allegations of the petition.—*Musick v. United Rys. Co. of St. Louis* (Mo. App.) 31.

§ 316. In an action for injuries to a passenger while attempting to board a street car, a verdict for plaintiff *held* unauthorized because of the absence of evidence to show that defendant owned or operated the car.—*Reisenleiter v. United Rys. Co. of St. Louis* (Mo. App.) 11.

§ 316. A passenger *held* to show a prima facie case of negligence so as to throw on the carrier the burden of showing freedom from negligence.—*Augustus v. Chicago, R. I. & P. Ry. Co.* (Mo. App.) 22.

§ 316. Where the relation of carrier and passenger exists, ordinarily a presumption of negligence or *res ipsa loquitur* is prima facie proof

on showing a collision and injury.—*Miller v. United Rys. Co. of St. Louis* (Mo. App.) 1045.

§ 318. Evidence *held* to show that a strain in alighting from a train proximately caused a passenger's miscarriage.—*Illinois Cent. R. Co. v. Hurt* (Ky.) 144.

§ 318. Evidence *held* to sustain a finding that a passenger was injured in alighting from a moving train.—*Illinois Cent. R. Co. v. Hurt* (Ky.) 144.

§ 318. In an action for injuries to passenger while attempting to board a street car, slight evidence in support of the allegations as to the ownership or operation of the car *held* sufficient.—*Reisenleiter v. United Rys. Co. of St. Louis* (Mo. App.) 11.

§ 318. In an action for the death of an elevator passenger, evidence *held* to justify a finding that the operator, either voluntarily or through inattention to duty, moved the lever thereby causing the elevator to fall.—*Chambers v. Kupper-Benson Hotel Co.* (Mo. App.) 45.

§ 320. In an action for death of an intending passenger struck by an engine, evidence of negligence of the trainmen in striking deceased *held* insufficient to go to the jury.—*St. Louis, I. M. & S. Ry. Co. v. Watson* (Ark.) 949.

§ 320. In an action by a passenger against a street car company for negligently starting a street car as she was alighting, evidence of defendant's negligence *held* sufficient to go to the jury.—*Kinyoun v. Metropolitan St. Ry. Co.* (Mo. App.) 15.

§ 320. Whether a motorman operating a car across a railroad crossing was guilty of negligence *held* for the jury.—*Augustus v. Chicago, R. I. & P. Ry. Co.* (Mo. App.) 22.

§ 320. Whether a street car passenger was thrown from the car while alighting caused by the sudden starting of the car, *held*, under the evidence, for the jury.—*Zeiler v. Metropolitan St. Ry. Co.* (Mo. App.) 1067.

§ 321. Instruction in action for injuries to passenger *held* erroneous as authorizing recovery for injury without attaching condition that defendant was negligent.—*Louisville, H. & St. L. Ry. Co. v. Stillwell* (Ky.) 202.

§ 321. In an action by a passenger against a street car company for negligently starting a street car while she was in the act of alighting, *held* not error to modify certain instruction for the plaintiff.—*Kinyoun v. Metropolitan St. Ry. Co.* (Mo. App.) 15.

§ 321. A charge *held* erroneous as not confined to the negligence alleged and proved.—*Miller v. United Rys. Co. of St. Louis* (Mo. App.) 1045.

§ 321. An instruction in an action for injuries to a street car passenger while alighting *held* not objectionable as broadening the issues stated in the petition.—*Zeiler v. Metropolitan St. Ry. Co.* (Mo. App.) 1067.

§ 321. It is not error to instruct the jury as to the legal relation between a carrier and a passenger when such information is pertinent to the issues.—*Zeiler v. Metropolitan St. Ry. Co.* (Mo. App.) 1067.

§ 321. In an action for injuries to a passenger, a charge that, if those in charge of the car were guilty of negligence, there should be a finding for defendant, is misleading.—*Osborne v. Texas Traction Co.* (Tex. Civ. App.) 816.

(E) Contributory Negligence of Person Injured.

§ 327. A passenger has no right to enter a private telegraph office in a station without invitation.—*Roberts v. Wabash R. Co.* (Mo. App.) 89.

§ 344. In an action for death of an intending passenger, burden of proof *held* to be on plaintiff to show that trainmen should have discovered his perilous position.—*St. Louis, I. M. & S. Ry. Co. v. Watson* (Ark.) 949.

§ 347. Whether passenger was negligent in taking position on step while train was still in motion *held* a question for the jury.—*Louisville, H. & St. L. Ry. Co. v. Stillwell* (Ky.) 202.

§ 347. It is not negligence per se in one desiring to get on board a car to attempt to board the car while it is moving.—*Osborne v. Texas Traction Co.* (Tex. Civ. App.) 816.

§ 348. An instruction as to a carrier's liability for injury to a passenger *held* erroneous.—*Louisville, H. & St. L. Ry. Co. v. Stillwell* (Ky.) 202.

(F) Ejection of Passengers and Intruders.

§ 353. One who boards a train after the conductor has rightfully refused to carry him is a trespasser, and may be ejected, though he has a ticket.—*Chesapeake & O. Ry. Co. v. Selsor* (Ky.) 143.

§ 382. The jury in estimating damages for wrongfully ejecting a passenger *held* entitled to consider certain facts.—*St. Louis, I. M. & S. Ry. Co. v. Brown* (Ark.) 1194.

§ 382. A passenger wrongfully ejected from a train *held* entitled to recover for physical suffering and for mental anguish and humiliation.—*St. Louis, I. M. & S. Ry. Co. v. Brown* (Ark.) 1194.

CARS.

In general, see Carriers; Railroads.
Injuries to employes through defect in or negligent management of cars, see Master and Servant, § 191.

CASE ON APPEAL

In criminal prosecutions, see Criminal Law, § 1097.

CATTLE.

Injuries to, by operation of railroad, see Railroads, §§ 446, 447.

CAUSE.

Probable cause for prosecution, see Malicious Prosecution, §§ 20-24.

CAUSE AND EFFECT.

Expert testimony, see Evidence, § 544.
Opinion evidence in general, see Evidence, § 493.

CAUSE OF ACTION.

See Action; Injunction, § 17; Malicious Prosecution, §§ 20-24.

Joinder, see Action, § 45.
Jurisdiction, see Appearance, § 18.
Single and entire, see Action, § 38.

CAVEAT EMPTOR.

Application of doctrine to sales by independent executor, see Executors and Administrators, § 7.

CERTAINTY.

Of allegations of pleading, see Pleading, § 367.
Of contracts, see Contracts, § 9.
Of description of property conveyed, see Deeds, § 38.

CERTIFICATE.

By architects, arbitrators, or others approving performance of contract, see Contracts, § 287.

Of corporate stock, see Corporations, § 104.
Of record for purpose of review, see Criminal Law, § 1105.

CERTIFIED COPIES.

Of public or official acts and records as evidence, see Criminal Law, § 445.

CERTIORARI.

Review of proceedings to revoke liquor license, see Intoxicating Liquors, § 108.

I. NATURE AND GROUNDS.

§ 1. The office of a writ of certiorari is to give relief to an injured party where the court has proceeded without or in excess of its jurisdiction.—State ex rel. Smith v. Dykeman (Mo. App.) 120.

CESTUI QUE TRUST.

See Trusts.

CHAMPERTY AND MAINTENANCE.

§ 7. The possession of one who occupied land as a tenant by sufferance was not adverse, so that the sale of the land by the owner was not champertous.—Perry v. Veal (Ky.) 458.

CHANCERY.

See Equity.

CHARACTER.

Of accused or other persons, evidence in criminal prosecutions, see Criminal Law, § 380.
Of witness, see Witnesses, § 340.

CHARGE.

Criminal accusation, see Indictment and Information.
Instructions to jury, see Criminal Law, §§ 761-763, 764, 769-815, 824-830; Trial, §§ 191-296, 423.

CHARTER.

Corporate charters in general, see Municipal Corporations, § 46.
Laws impairing obligation of corporate charter, see Constitutional Law, § 126.

CHattel MORTGAGES.

See Pledges.
Removal of fixtures, by mortgagee of lessee, see Fixtures, § 33.
Transfers operating to hinder, delay, or defraud creditors in general, see Fraudulent Conveyances.

I. REQUISITES AND VALIDITY.

(A) Nature and Essentials of Transfers of Chattels as Security.

§ 17. Interest in chattel subject to mortgage.—Thornton v. Findley (Ark.) 627.

§ 33. An instrument held to create an equitable lien on the purchase of personalty.—Arkansas Cypress Shingle Co. v. Meto Valley Ry. Co. (Ark.) 1195.

III. CONSTRUCTION AND OPERATION.

(C) Property Mortgaged, and Estates and Interests of Parties Therein.

§ 124. Chattel mortgage covers after-acquired title.—Thornton v. Findley (Ark.) 627.

(D) Lien and Priority.

§ 140. Priority of purchase-money mortgage.—Thornton v. Findley (Ark.) 627.

§ 144. Record as affecting priority.—Thornton v. Findley (Ark.) 627.

§ 152. Where plaintiff took and recorded a chattel mortgage on property, if conditionally sold to the mortgagor, and the seller thereafter accepted a chattel mortgage on the property to secure the balance of the price, plaintiff's mortgage was a prior lien under Kirby's Dig. § 5396.—Thornton v. Findley (Ark.) 627.

§ 153. Sayles' Ann. Civ. St. 1897, art. 4651, held to require the registration of a chattel mortgage in the county to which the chattels were removed only where the mortgagee consented to the removal or had knowledge thereof.—Thos. Goggan & Bros. v. Synnott (Tex. Civ. App.) 1184.

V. RIGHTS AND REMEDIES OF CREDITORS.

§ 194. Necessity of record of chattel mortgage as against creditors.—Thornton v. Findley (Ark.) 627.

IX. FORECLOSURE.

§ 255. A chattel mortgagee may sue at law to recover the chattel or for its conversion, or in equity to foreclose.—Thornton v. Findley (Ark.) 627.

§ 284. In foreclosure, where another claimed title under a purchase from the mortgagor, whether claimant was a bona fide purchaser held a jury question.—Thos. Goggan & Bros. v. Synnott (Tex. Civ. App.) 1184.

CHATELS.

In general, see Property.
Annexation to real property, see Fixtures.
Pledge, see Pledges.
Sale, see Sales.

CHEAT.

See False Pretenses.

CHILDREN.

See Guardian and Ward; Infants; Parent and Child.

Care required of master as to infant servant, see Master and Servant, § 153.
Dangerous machinery as attractions to children, see Negligence, § 23.

Injuries to minors employed in violation of statute, see Master and Servant, § 95.

Injuries to, on or near street railroad tracks, see Street Railroads, § 95.

Kidnapping, see Kidnapping.

Proximate cause of injury to minor employés, see Master and Servant, § 95.

CHURCHES.

See Religious Societies.

CIRCUMSTANTIAL EVIDENCE.

Instructions, see Criminal Law, § 784.

CITIES.

See Municipal Corporations.

CITIZENS.

Privileges and immunities, see Constitutional Law, §§ 205-208.

CIVIL ACTION.

See Action.

CIVIL RIGHTS.

Constitutional guaranty of trial by jury, see Jury, § 31.
Deprivation of life, liberty, or property without due process of law, see Constitutional Law, § 278.
Privileges or immunities and class legislation, see Constitutional Law, §§ 205-208.
Protection of contract obligations, see Constitutional Law, § 126.
Protection of vested rights, see Constitutional Law, § 93.

CLAIM AND DELIVERY.

See Replevin.

CLAIMS.

Against estate of decedent, see Executors and Administrators, §§ 206-283.
Of mechanic's lien, see Mechanics' Liens, §§ 124-154.
To property garnished, see Garnishment, § 201.

CLASS LEGISLATION.

See Constitutional Law, § 208.

CLERKS.

Pensions to legal representatives of railway clerks killed while in service, see Pensions, § 2.

CLIENTS.

See Attorney and Client.

CLOUD ON TITLE.

See Quieting Title.

CODES.

Construction, see Statutes, § 231.
Joinder of causes of action under codes, see Action, § 45.

COERCION.

See Threats.

COLLATERAL ATTACK.

On execution sale, see Execution, § 258.
On judgment, see Judgment, §§ 495-504.

COLLATERAL SECURITY.

See Pledges.

COLLATERAL UNDERTAKINGS.

See Principal and Surety.

COLLECTION.

By bank, see Banks and Banking, § 161.
Of assessment for public improvements, see Municipal Corporations, § 567.
Of costs, see Costs, § 282.
Of taxes, see Taxation, §§ 545-593.

COLLECTORS.

Of taxes, see Taxation, §§ 545-549.

COLLEGES AND UNIVERSITIES.

Schools in general, see Schools and School Districts.

COLLISION.

Between railroad trains, see Railroads, § 288.
Between trains or cars, injuries to passengers, see Carriers, § 300.

COLOR OF TITLE.

See Adverse Possession.

COMBINATIONS.

See Conspiracy; Monopolies, §§ 12-30.

COMITY.

Between courts, see Courts, § 485.

COMMENCEMENT.

Of action, see Action, § 65.

COMMERCE.

Carriage of goods and passengers, see Carriers.
Combination in restraint of interstate commerce, see Monopolies, §§ 12-30.
Contracts in restraint of trade, see Contracts, § 117.

II. SUBJECTS OF REGULATION.

§ 33. A sale by a foreign corporation held an interstate transaction and not subject to the anti-trust laws of the state.—*State v. Racine Sattley Co.* (Tex. Civ. App.) 400.

§ 33. The purchase of goods in one state to be shipped into another is interstate commerce, and not within the provisions of the anti-trust laws of the state.—*State v. Racine Sattley Co.* (Tex. Civ. App.) 400.

§ 40. Parties to a contract in restraint of trade held to violate the anti-trust act of 1903 (Laws 1903, c. 94), as against the objection that the transaction was interstate commerce.—*State v. Racine Sattley Co.* (Tex. Civ. App.) 400.

III. MEANS AND METHODS OF REGULATION.

§ 58. Acts 1900, p. 986, requiring maintenance of depot, held not a regulation of commerce violative of Const. U. S. art. 1, § 8.—*St. Louis Southwestern Ry. Co. v. State* (Ark.) 970.

§ 61. The right of a state to refuse to enforce a special live stock shipping contract limiting the liability of a carrier, made in a foreign state, is not affected by the interstate commerce act (Act Feb. 4, 1887, c. 104, 24 Stat. 379 [U. S. Comp. St. 1901, p. 3154]).—*Louisville & N. R. Co. v. Smith* (Tenn.) 866.

COMMERCIAL PAPER.

See Bills and Notes.

COMMISSIONERS.

Board of park commissioners, see Municipal Corporations, § 747.
Highway commissioners, see Highways, §§ 93, 94.
Jury commissioners, subject and title of act creating board, see Statutes, § 124.
Railroad and warehouse commissioners, jurisdiction of election contest, see Elections, § 275.

COMMISSION MERCHANTS.

See Factors.

COMMISSIONS.

Of broker, see Brokers, §§ 40-75, 79-88.
Of county treasurer, see Counties, § 74.

COMMON CARRIERS.

See Carriers.

COMMON KNOWLEDGE.

Judicial notice of matters of common knowledge, see Evidence, §§ 18-43.

COMMON LANDS.

Joint estates in lands, see Tenancy in Common.

COMMON LAW.

§ 11. The common law, where not changed by statute, is in force in Missouri.—*Wiegand v. Woerner* (Mo. App.) 596.

COMMON PROPERTY.

See Joint Tenancy.

COMMON SCHOOLS.

See Schools and School Districts, §§ 13-97.

COMMUNITY PROPERTY.

See Husband and Wife, § 273.

COMPANIES.

See Corporations; Partnership.

COMPENSATION.

Compensatory damages, see Damages, §§ 20-38.
For improvements, see Trespass to Try Title, § 56.

For performance of contract, see Contracts, § 232.

For property taken for public use, see Eminent Domain, §§ 106-141.

Of particular classes of officers or other persons.

See Executors and Administrators, § 500; Physicians and Surgeons, §§ 21-24.

Attorneys, see Attorney and Client, §§ 153-190.

Brokers, see Brokers, §§ 40-75, 79-88.

County officers and agents, see Counties, § 74.

Road supervisors, see Highways, § 94.

Tax collectors, see Taxation, § 549.

Trustees, see Trusts, §§ 315-318.

COMPENSATORY DAMAGES.

See Damages.

COMPETENCY.

Of contradictory testimony, see Witnesses, § 406.

Of expert witnesses, see Evidence, § 544.

Of impeaching testimony, see Witnesses, § 392.

Of juror, see Jury, §§ 116-120.

Of witnesses, see Witnesses, §§ 53-181.

COMPETITION.

Combinations to lessen or stifle free competition in trade, see Monopolies, §§ 12-30.

Contracts preventing competition in trade, see Contracts, § 117.

Unfair competition, see Trade-Marks and Trade-Names, §§ 70-73.

COMPLAINT.

By servant to master as affecting assumption of risk, see Master and Servant, § 220.

In civil actions, see Pleading.

In criminal prosecutions, see Indictment and Information.

COMPOSITIONS WITH CREDITORS.

See Compromise and Settlement.

COMPROMISE AND SETTLEMENT.

See Payment; Release.

Admissibility of evidence of offer to compromise as an admission, see Evidence, § 213.

Protection of attorney against settlement of claim in litigation, see Attorney and Client, § 190.

§ 15. A valid settlement of a pending suit including an agreement to dismiss the same deprives the plaintiff of the right to thereafter file an amended petition.—*Petry v. Petry* (Ky.) 922.

§ 21. A court of equity in the absence of fraud or mistake does not aid a party to an action to violate a settlement of the controversy.—*Petry v. Petry* (Ky.) 922.

COMPUTATION.

Of interest, see Interest, § 57.

Of period of limitation of civil actions, see Limitation of Actions, §§ 49-107.

Of time, see Time.

CONCEALMENT.

Element of fraud, see Fraud, § 17.

CONCLUSION.

Of law on appeal or writ of error, see Appeal and Error, § 1122.

Of law on trial by court, see Trial, §§ 394-403.

Of witness, see Criminal Law, §§ 448-485; Evidence, §§ 471-498½.

CONCLUSIVENESS.

Of admissions, see Evidence, § 265.

Of allegations or admissions on party pleading, see Pleading, § 36.

Of architect's certificate as to performance of contract, see Contracts, § 287.

Of certificate to record on appeal or other proceeding for review, see Appeal and Error, § 683.

Of judgment, see Judgment, §§ 713-743.

Of judgment in election contest, see Elections, § 304.

Of record on appeal or writ of error, see Criminal Law, § 1111.

Of settlement of accounts of executor or administrator, see Executors and Administrators, § 513.

Of tax assessment, see Taxation, § 446.

Of verdicts and findings, see Appeal and Error, §§ 989-1022.

Of verdict on appeal or writ of error, see Criminal Law, § 1159.

CONCURRENT JURISDICTION.

Of courts in general, see Courts, § 485.

CONCURRENT NEGLIGENCE.

See Negligence, § 61.

Of master and fellow servant, see Master and Servant, § 201.

Of master and servant as affecting assumption of risk by servant, see Master and Servant, § 226.

CONCURRENT REMEDIES.

See Election of Remedies.

CONDEMNATION.

Taking property for public use, see Eminent Domain.

CONDITIONAL SALES.

See Sales, § 477.

CONDITIONS.

Conditional delivery of deed, see Escrows.

In contracts and conveyances.

See Contracts, § 221; Deeds, §§ 144-168; Wills, §§ 656, 657.

Insurance policies, see Insurance, §§ 323-367, 748.

Sale, see Sales, § 477.

Statement in memorandum required by statute of frauds, see Frauds, Statute of.

Precedent to actions or other proceedings.

By or against receivers, see Receivers, § 174.

On insurance policies, see Insurance, § 612.

To rescind contract, see Contracts, § 265.

CONDUCT.

Of counsel at trial, see Criminal Law, §§ 719-728.

Of election, see Elections, §§ 219, 220.

Of witness as ground of impeachment, see Witnesses, § 340.

CONDUCTORS.

As fellow servants of brakemen, see Master and Servant, § 185.

CONFEDERACY.

See Conspiracy.

CONFIDENTIAL RELATIONS.

See Brokers; Factors; Guardian and Ward; Partnership; Principal and Agent; Trusts.

CONFIRMATION.

Of tax title, see Taxation, §§ 790-816.

CONFLICTING CLAIMS.

Determination of conflicting claims to real property, see Quieting Title.

CONFLICT OF LAWS.

Judicial notice of laws of other states, see Evidence, § 35.

Presumptions as to laws of other states, see Evidence, § 80.

Contracts and conveyances.

Contracts in general, see Contracts, § 144.

Contract for shipment of live stock, see Carriers, § 203.

Contracts for carriage of goods, see Carriers, § 46.

Remedies, and jurisdiction and procedure.

Conflicting jurisdiction of courts, see Courts, § 485.

CONFUSION OF GOODS.

See Accession.

CONJUGAL RIGHTS.

See Husband and Wife.

CONNECTING CARRIERS.

See Carriers, §§ 173-185, 219.

CONSENT.

Jurisdiction conferred by consent, see Appeal and Error, § 21.

Of owner of property to improvements thereon as affecting right to lien, see Mechanics' Liens, §§ 57-61.

Of parties to contracts in general, see Contracts, §§ 93, 94.

To proceeding, as estoppel to allege error, see Appeal and Error, § 883.

Want of consent to sexual intercourse as element of rape, see Rape, § 12.

CONSEQUENTIAL DAMAGES.

See Damages, §§ 20-38.

CONSERVATORS.

See Guardian and Ward.

CONSIDERATION.

Of assumption of mortgage, see Mortgages, § 280.

Of contracts in general, see Contracts, § 47.

Of conveyance or other transfer, sufficiency as to creditors of grantor or subsequent purchasers, see Fraudulent Conveyances, § 80.

Parol or extrinsic evidence to show nature of consideration of contracts, see Evidence, § 419.

CONSIGNMENT.

See Factors.

CONSPIRACY.

Acts and declarations of conspirators as evidence against co-conspirators in general, see Criminal Law, § 424; Evidence, § 253.

Combinations to monopolize trade, see Monopolies, §§ 12-30.

I. CIVIL LIABILITY.

(A) Acts Constituting Conspiracy and Liability Thereof.

§ 1. "Conspiracy," defined.—State v. Racine Sattley Co. (Tex. Civ. App.) 400.

§ 14. The act of a co-conspirator done in furtherance of the common design is the act of all the conspirators, and all the conspirators are joint tort-feasors.—State v. Racine Sattley Co. (Tex. Civ. App.) 400.

CONSTABLES.

See Sheriffs and Constables.

CONSTITUTIONAL LAW.

Provisions relating to particular subjects.

See Escheat, §§ 3, 6; Municipal Corporations, § 46; Public Lands, § 173; Taxation, § 40.

Amendment of city charter, see Municipal Corporations, § 46.

Enactment and validity of statutes, see Statutes, § 5.

Enactment of laws at special sessions, see Statutes, § 5.

Subjects and titles of statutes, see Statutes, §§ 114-124.

II. CONSTRUCTION, OPERATION, AND ENFORCEMENT OF CONSTITUTIONAL PROVISIONS.

§ 32. Const. § 192, relating to escheats, held self-executing.—Louisville Banking Co. v. Commonwealth (Ky.) 1142

§ 32. Const. art. 9, § 16, relating to the number of votes requisite to the adoption of a city charter amendment, *held* self-enforcing, and not subject to change, either by charter amendment or act of the General Assembly.—State ex inf. Major v. Kansas City (Mo.) 1007.

§ 46. Where a statutory penalty included in a judgment is remitted, the question of the validity of the statute will not be considered on appeal.—Missouri, K. & T. Ry. Co. of Texas v. Haynes (Tex. Civ. App.) 271.

III. DISTRIBUTION OF GOVERNMENTAL POWERS AND FUNCTIONS.

(B) Judicial Powers and Functions.

Judicial power to determine public character of use of property taken under legislative sanction, see Eminent Domain, § 66.

§ 70. Legislature *held* sole judge whether requirement of Const. art. 5, § 26, as to notice of proposed bill, has been complied with.—St. Louis Southwestern Ry. Co. v. State (Ark.) 970.

§ 70. The Legislature is the exclusive judge of the question whether a general law will serve the purpose as well as a special act.—St. Louis Southwestern Ry. Co. v. State (Ark.) 970.

§ 70. Determination of Legislature whether public necessity required establishment of depot *held* to be disturbed only when clearly unreasonable.—St. Louis Southwestern Ry. Co. v. State (Ark.) 970.

§ 73. The exercise of the Governor's discretion in calling the militia into active service is not subject to control or restraint by the courts.—Franks v. Smith (Ky.) 484.

VI. VESTED RIGHTS.

§ 93. In an action to escheat property of a corporation as authorized by Const. § 192, no question of vested rights *held* to arise.—Louisville Banking Co. v. Commonwealth (Ky.) 1142.

VII. OBLIGATION OF CONTRACTS.

(B) Contracts of States and Municipalities.

§ 126. Const. § 192, *held* not to impair the obligation of a contract when applied to a corporation and property acquired by it after the adoption of the Constitution.—Louisville Banking Co. v. Commonwealth (Ky.) 1142.

VIII. RETROSPECTIVE AND EX POST FACTO LAWS.

§ 191. The act of 1907, relating to the remedy by injunction, *held* not invalid as an ex post facto law when applied to a county having previously adopted prohibition under the local option law.—Ex parte Roper (Tex. Cr. App.) 334.

§ 191. Laws which affect the remedy or procedure merely *held* not within the constitutional inhibition against retroactive laws.—Ex parte Roper (Tex. Cr. App.) 334.

IX. PRIVILEGES OR IMMUNITIES, AND CLASS LEGISLATION.

Special or local laws, see Statutes, §§ 75-77.

§ 205. Act March 14, 1910 (Laws 1910, c. 8) § 1, providing for a bipartisan hospital board, does not violate Bill of Rights, § 3, prohibiting special privileges.—Render v. City of Louisville (Ky.) 453.

§ 208. Rev. St. 1909, § 7227, *held* not class legislation in violation of Const. art. 4, § 53

(Ann. St. 1906, p. 197).—State v. Rawlings (Mo.) 530.

§ 208. Acts 31st Leg. c. 10, *held* not class legislation within the state and federal Constitutions.—St. Louis, S. F. & T. R. Co. v. Taylor (Tex. Civ. App.) 819.

§ 208. A statute *held* not class legislation inhibited by the state and federal Constitutions.—St. Louis, S. F. & T. R. Co. v. Taylor (Tex. Civ. App.) 819.

XI. DUE PROCESS OF LAW.

§ 278. That property included within the limits of a city, as extended, would be required to pay higher taxes was not taking the property of the owner without due process of law.—State ex inf. Major v. Kansas City (Mo.) 1007.

CONSTRUCTION.

Of language used in alleged libel or slander, see Libel and Slander, § 19.

Parol or extrinsic evidence to aid construction of written instruments, see Evidence, §§ 448-456.

Of contracts, instruments, or judicial acts and proceedings.

See Bills and Notes, § 125; Bonds, § 50; Release, § 29; Sales, § 81; Wills, §§ 448-684.

Conditions in will, see Wills, §§ 656, 657.

Constitutional provisions, see Constitutional Law, §§ 32-46.

Contracts, see Contracts, §§ 144-232.

Contracts of insurance, see Insurance, §§ 177, 726.

Covenant affecting right to remove fixtures, see Fixtures, § 27.

Deeds, see Boundaries, § 3; Deeds, §§ 120-168.

Instructions, see Trial, §§ 295, 296.

Judgment or order, see Judgment, § 525.

Leases, see Mines and Minerals, § 70.

Mortgages, see Chattel Mortgages, §§ 124-153.

Of statutes, see Statutes, §§ 205-241.

Pleadings, see Pleading, § 34.

Powers, see Powers, § 33.

Rules of master governing work of servant, see Master and Servant, § 145.

Subleases, see Landlord and Tenant, § 80.

Suretyship agreement, see Principal and Surety, §§ 50-68.

Testamentary trusts, see Wills, § 684.

Of buildings or other works.

See Highways, § 105; Railroads, § 113.

CONSTRUCTIVE ASSIGNMENTS.

For benefit of creditors, see Assignments for Benefit of Creditors, §§ 12, 14.

CONSTRUCTIVE NOTICE.

To purchaser of land of claims or liens against property, see Vendor and Purchaser, § 230.

CONSTRUCTIVE TRUSTS.

See Trusts, § 95.

CONTEMPORANEOUS AGREEMENTS.

Evidence of parol agreements affecting written instruments, see Evidence, §§ 441, 442.

CONTEMPT.

Disobedience to particular writs, mandates, orders, or judgments.

Injunction, see Injunction, § 230.

Injunction against liquor nuisance, see Intoxicating Liquors, § 279.

Refusing to give deposition, see Depositions, § 71.
Violation of liquor injunction, see Intoxicating Liquors, § 279.

II. POWER TO PUNISH, AND PROCEEDINGS THEREFOR.

Violation of injunction, see Injunction, § 230.

CONTEST.

Of election, see Elections, §§ 269-304.
Of local option election, see Intoxicating Liquors, § 37.

CONTINUANCE.

Of criminal prosecutions, see Criminal Law, §§ 586-614.

Review of decisions, see Appeal and Error, § 960; Criminal Law, §§ 1690, 1151.

§ 23. An application for a continuance for absence of witness, under Civ. Code Prac. § 315, must show the evidence of such witness to be material and believed to be true.—*Louisville Ry. Co. v. Bryant* (Ky.) 182.

§ 26. An application for a continuance for absence of witness, under Civ. Code Prac. § 315, must show diligence of the applicant in endeavoring to secure the attendance of the witness.—*Louisville Ry. Co. v. Bryant* (Ky.) 182.

§ 26. Facts held insufficient to show diligence of an applicant for a continuance to procure the attendance of an absent witness.—*Louisville Ry. Co. v. Bryant* (Ky.) 182.

§ 33. Denial of a continuance for absence of a witness held not prejudicial, where defendant's statement of what was expected to be proved by the witness was permitted to be read to the jury as the witness' deposition as authorized by Civ. Code Prac. § 315.—*Louisville Ry. Co. v. Bryant* (Ky.) 182.

§ 37. An application for a continuance for absence of witness, under Civ. Code Prac. § 315, must set out the evidence expected to be proven.—*Louisville Ry. Co. v. Bryant* (Ky.) 182.

CONTRACTORS.

Bonds, see Municipal Corporations, § 347.

CONTRACTS.

Agreements within statute of frauds, see Frauds, Statute of.

Alteration, see Alteration of Instruments.

Assignment, see Assignments.

Best and secondary evidence of contract, see Evidence, § 165.

Cancellation of written contracts, see Cancellation of Instruments.

Ground for mechanics' liens, see Mechanics' Liens, §§ 57-61.

Ground of estoppel, see Estoppel, § 78.

Impairing obligations, see Constitutional Law, § 126.

In restraint of trade, see Monopolies, §§ 12-30.

Liquidated damages or penalties, see Damages, § 81.

Novation, see Novation.

Operation and effect of champerty, see Champerty and Maintenance.

Operation and effect of customs or usages, see Customs and Usages.

Parol or extrinsic evidence affecting written contract, see Evidence, §§ 387-425, 448-456.

Separate or subsequent oral agreement affecting written contract, see Evidence, §§ 441, 442.

Specific performance, see Specific Performance.

Subrogation to rights or remedies of creditors, see Subrogation.

Contracts of particular classes of persons.

See Brokers, § 97; Carriers, §§ 46, 173, 180, 218; Corporations, § 450; Counties, § 113; Husband and Wife, §§ 19, 193; Municipal Corporations, §§ 347-365; Schools and School Districts, § 81.

Attorney, with client, see Attorney and Client, §§ 70-72.

Insurance companies, see Insurance.

Mutual benefit insurance association, see Insurance, §§ 724-726.

Officers and agents of banks, see Banks and Banking, § 116.

Officers and agents of corporations in general, see Corporations, §§ 398-432.

Contracts relating to particular subjects.

See Fixtures, § 27; Insurance.

Assumption of mortgage debt by purchaser of mortgaged property, see Mortgages, § 280.

Compensation of broker, see Brokers, §§ 40-75.

Dedication of property to public use, see Dedication, § 18.

Floating logs, see Logs and Logging, § 15.

Limitation of liability of carrier in respect to goods, see Carriers, § 180.

Limitation of liability of carrier in respect to live stock, see Carriers, § 218.

Married women's separate property, see Husband and Wife, § 193.

Public improvements, see Municipal Corporations, §§ 347-376.

Standing timber, see Logs and Logging, § 3.

Transportation of goods, see Carriers, § 46.

Particular classes of express contracts.

See Bills and Notes; Bonds; Covenants; Deeds; Partnership; Sales.

Agency, see Principal and Agent.

Insurance policies, see Insurance.

Leases, see Landlord and Tenant.

Sales of realty, see Vendor and Purchaser.

Sales of standing timber, see Logs and Logging, § 3.

Suretyship, see Principal and Surety.

Transfer of shares of corporate stock, see Corporations, § 121.

Particular classes of implied contracts.

See Interest; Money Paid; Work and Labor.

Particular modes of discharging contracts.

See Compromise and Settlement; Novation; Payment; Release.

I. REQUISITES AND VALIDITY.

(A) Nature and Essentials in General.

§ 1. The elements of a valid contract stated.—*American Lead Pencil Co. v. Nashville, C. & St. L. Ry.* (Tenn.) 613.

§ 9. Where there is a patent ambiguity in one clause of a contract which renders it void for uncertainty, the nullity of the clause will not affect the remainder of the contract if there is enough left to constitute a complete contract.—*State v. Racine Sattley Co.* (Tex. Civ. App.) 400.

§ 10. A contract, to be binding, must be mutual.—*Second Nat. Bank of Ashland v. Rouse* (Ky.) 1121.

(B) Parties, Proposals, and Acceptance.

§ 24. A binding contract of sale does not exist until both parties have agreed to the same proposition.—*D. S. Cage & Co. v. Black* (Ark.) 942.

(C) Formal Requisites.

Of deed, see Deeds, § 38.

§ 33. A patent ambiguity in a contract cannot be aided by parol evidence, and, where the written instrument does not evidence a contract without the aid of parol evidence, it cannot

be enforced.—*State v. Racine Sattley Co.* (Tex. Civ. App.) 400.

(D) **Consideration.**

For assumption of mortgage, see *Mortgages*, § 280.

Parol or extrinsic evidence to show nature of consideration, see *Evidence*, § 419.

Sufficiency as to creditors and subsequent purchasers, see *Fraudulent Conveyances*, § 80.

§ 47. Want of consideration is always a defense to the enforcement of a contract.—*First Nat. Bank v. Asel* (Mo. App.) 110, 111.

(E) **Validity of Assent.**

To bill or note, see *Bills and Notes*, § 107.

To contract of sale, see *Sales*, § 38.

To deed, see *Deeds*, §§ 70-76.

§ 93. One who signs a written contract, refusing to read it, cannot say that he did not know its contents and is bound by its terms.—*J. I. Case Threshing Mach. Co. v. Mattingly* (Ky.) 1131.

§ 94. Where a person is misled into signing a written contract without negligence in so doing, it is a fraud which invalidates the contract.—*J. I. Case Threshing Mach. Co. v. Mattingly* (Ky.) 1131.

(F) **Legality of Object and of Consideration.**

Champtious contracts, see *Champterty and Maintenance*.

Legality of partnership, see *Partnership*, § 26.

§ 117. When an agreement not to pursue a business, upon selling the business and good will, is valid, stated.—*Linneman & Moore v. Allison & Yates* (Ky.) 134.

§ 117. A covenant not to engage in the undertaking business within 50 miles of the city, upon selling the business and good will, held a reasonable restriction.—*Linneman & Moore v. Allison & Yates* (Ky.) 134.

§ 138. Though a contract was illegal, held, that an accounting as to profits and losses would be decreed.—*Mitchell v. Fish* (Ark.) 940.

II. CONSTRUCTION AND OPERATION.

Particular classes of contracts.

See *Bills and Notes*, § 125; *Bonds*, § 50; *Chatel Mortgages*, §§ 124-153; *Compromise and Settlement*, § 15; *Insurance*, §§ 177, 726; *Mortgages*, § 186; *Release*, § 29; *Sales*, § 81. *Deeds*, see *Boundaries*, § 3; *Deeds*, §§ 120-168. *Leases*, see *Mines and Minerals*, § 70. *Subleases*, see *Landlord and Tenant*, § 80. *Suretyship*, see *Principal and Surety*, §§ 59-66.

(A) **General Rules of Construction.**

Parol or extrinsic evidence affecting written contract, see *Evidence*, §§ 387-425, 448-456. Separate or subsequent oral agreement affecting written contract, see *Evidence*, §§ 441, 442.

§ 144. A contract must be construed by the law of the place where made.—*McKinstry v. Chicago, R. I. & P. Ry. Co.* (Mo. App.) 1061.

§ 164. Where a contract is contained in two distinct papers, they will be read together.—*Sackett v. Maggard* (Ky.) 888.

§ 169. Contracts must be construed with reference to the surrounding circumstances and the condition of the parties.—*Weeks-Betts Hardware Co. v. Roosevelt Lead & Zinc Co.* (Mo. App.) 35.

§ 176. An instruction containing a correct statement as to the meaning of a contract is

not erroneous.—*Loomis v. Broadus & Leavell* (Tex. Civ. App.) 743.

(C) **Subject-Matter.**

Liquidated damages and penalties, see *Damages*, § 81.

(E) **Conditions.**

In insurance policies, see *Insurance*, §§ 323-367, 748.

§ 221. A new corporation organized to take over the assets of a telephone company held not entitled to stocks and bonds representing the old company's indebtedness until \$21,000 had been furnished to pay the debts of the old company as agreed.—*Maysville Telephone Co. v. First Nat. Bank* (Ky.) 886.

(F) **Compensation.**

§ 232. Where a building contract provides that extra work should only be paid for upon the certificates and computation of the architect, such conditions are precedent to recovery therefor, unless the architect acts in bad faith or arbitrarily.—*Taub v. Woodruff* (Tex. Civ. App.) 750.

IV. RESCISSION AND ABANDONMENT.

Cancellation of written contracts in equity, see *Cancellation of Instruments*.

Discharge by novation, see *Novation*.

Rescission of contract of sale, see *Sales*, § 110.

§ 265. A rescission of a contract involves restoring the status quo of the parties.—*Ungerer & Co. v. Louis Maull Cheese & Fish Co.* (Mo. App.) 56.

V. PERFORMANCE OR BREACH.

Enforcement of specific performance, see *Specific Performance*.

Liquidated damages and penalties for breach, see *Damages*, § 81.

Particular classes of contracts.

Conditions in deeds, see *Deeds*, § 160.

Conditions in insurance policies, see *Insurance*, §§ 323-367, 748.

Employment of broker, see *Brokers*, §§ 11, 49-57.

Sales, see *Sales*, §§ 166-181; *Vendor and Purchaser*, §§ 133-137.

With municipal corporation, see *Municipal Corporations*, §§ 359-365.

§ 280. A personal contract held performable through a competent third person.—*F. Haag & Bro. v. Reichert* (Ky.) 191.

§ 284. Contractor's possession of warrants issued by an architect, since deceased, held not a condition precedent to his recovery of a balance on a building contract.—*Pleasant J. Potter College v. George A. Collett & Bro.* (Ky.) 173.

§ 287. Bad faith or arbitrary action by an architect in declaring forfeiture of building contract or in certifying cost of completion of building held to destroy the value of his certificates.—*Taub v. Woodruff* (Tex. Civ. App.) 750.

§ 287. Architect's certificates as to cost of completing building after breach of contract by contractor held admissible in evidence over objections stated.—*Taub v. Woodruff* (Tex. Civ. App.) 750.

§ 305. A party to an option contract held by his conduct estopped from declaring a forfeiture.—*Stafford v. Pinson* (Ky.) 909.

VI. ACTIONS FOR BREACH.

Damages, liquidated damages and penalties, see *Damages*, § 81.

Judgment against one or more coparties, see Judgment, § 238.

Parol or extrinsic evidence affecting written contract, see Evidence, §§ 387-425, 448-456.

Separate or subsequent oral agreement affecting written contract, see Evidence, §§ 441, 442.

Statutory limitations, see Limitation of Actions, § 49.

§ 350. Evidence *held* to support a finding denying damages for a breach of contract.—Gay Oil Co. v. Muskogee Oil Refining Co. (Ark.) 639.

§ 350. Evidence *held* to sustain a judgment for the plaintiff for the balance claimed under a building contract.—Pleasant J. Potter College v. George A. Collett & Bro. (Ky.) 173.

§ 353. In an action on a building contract, evidence *held* not to warrant submission of issue of the owner's waiver of all damages for delay in completion.—Taub v. Woodruff (Tex. Civ. App.) 750.

CONTRADICTION.

Of witness, see Witnesses, § 406.

CONTRIBUTORY NEGLIGENCE.

See Negligence, §§ 83-92, 122.

CONTROVERSY.

Amount in controversy as affecting jurisdiction of courts, see Justices of the Peace, § 43.

CONVERSION.

Of chattels into realty, see Fixtures.

Wrongful conversion of personal property, see Trover and Conversion.

CONVEYANCES.

Contracts to convey, see Vendor and Purchaser. Declarations by grantor as evidence against grantee or subsequent purchasers, see Evidence, § 230.

Delivery in escrow, see Escrows.

Description of boundaries, see Boundaries.

Fraudulent as to creditors or subsequent purchasers, see Fraudulent Conveyances.

Parol or extrinsic evidence to construe and apply language of instrument, see Evidence, §§ 448-456.

Parol or extrinsic evidence to contradict or vary, see Evidence, § 390.

Validity as to creditors or subsequent purchasers, see Fraudulent Conveyances.

Conveyances by or to particular classes of persons.

See Insane Persons, § 61.

Assignees for benefit of creditors, see Assignments for Benefit of Creditors, §§ 12-14.

Married women, see Husband and Wife, § 193.

Mortgagors, see Mortgages, § 280.

Conveyances of particular species of, or estates or interests in, property.

Lands held adversely, see Champerty and Maintenance, § 7.

Married women's separate property, see Husband and Wife, § 193.

Mortgaged property, see Mortgages, § 280.

Personal property, in general, see Chattel Mortgages; Sales.

Public lands, see Public Lands, §§ 151-175.

Real property in general, see Deeds; Mortgages; Vendor and Purchaser.

Standing timber, see Logs and Logging, § 3.

Particular classes of conveyances.

See Assignments; Assignments for Benefit of Creditors; Chattel Mortgages; Deeds.

In trust, see Trusts, §§ 20-43.

CONVICTS.

See Prisons.

Conviction affecting right to recover on insurance certificate, see Insurance, § 748.

Nature and extent of punishment, see Criminal Law, § 1208.

COPY.

Certified copy of document as evidence, see Criminal Law, § 445.

CORAM NOBIS.

Writ of error coram nobis, see Judgment, § 334.

CORPORATIONS.

Judicial notice of corporations and members thereof, see Evidence, § 22.

Laws impairing obligation of charter, see Constitutional Law, § 126.

Verification of mechanic's lien, see Mechanics' Liens, § 154.

Particular classes of corporations.

See Carriers; Municipal Corporations; Railroads; Religious Societies.

Banks, see Banks and Banking.

Insurance companies, see Insurance.

Mutual benefit insurance associations, see Insurance, §§ 699-825.

School districts, see Schools and School Districts, §§ 13-97.

Street railroad companies, see Street Railroads. Telegraph or telephone companies, see Telegraphs and Telephones.

II. CORPORATE EXISTENCE AND FRANCHISE.

Amendment or alteration of charter as impairing obligation of contract, see Constitutional Law, § 126.

§ 34. The appearance of a corporation by attorney precludes it from denying its existence.—Hammar v. St. Louis Motor Carriage Co. (Mo. App.) 1060.

IV. CAPITAL, STOCK, AND DIVIDENDS.

(C) Issue of Certificates.

§ 104. Where stockholders took part in the issuance of stock as fully paid and nonassessable which was in fact not fully paid, *held*, that one consenting stockholder could not take advantage of another because of lack of compliance with the law.—Bucklew v. Pyron (Mo. App.) 1064.

(D) Transfer of Shares.

§ 121. A purchaser of stock from a stockholder and director of a corporation *held* entitled to recover the difference between the real value of the stock purchased and its value as falsely represented by the seller.—Long v. Douhitt (Ky.) 453.

§ 121. In an action to recover sum paid for alleged worthless corporate stock, evidence *held* to show that plaintiff acted on his own judgment.—Bowen v. Walton (Ky.) 885.

§ 121. In an action to recover sum paid for alleged worthless corporate stock evidence *held* insufficient to show false representations inducing purchase.—Bowen v. Walton (Ky.) 885.

§ 121. In an action to recover sum paid for alleged worthless corporate stock, evidence *held* to show that the stock had a substantial value.—Bowen v. Walton (Ky.) 885.

V. MEMBERS AND STOCKHOLDERS.**(C) Suing or Defending on Behalf of Corporation.**

Right to defend proceedings for escheat, see Escheat, § 6.

VI. OFFICERS AND AGENTS.

Of insurance companies, see Insurance, §§ 77-90.

(B) Authority and Functions.

§ 306. Want of authority in the president of a corporation to bind the company by the execution of an undertaking to pay for goods sold to a third person will not render the president personally liable on an implied warranty of payment.—Standard Underground Cable Co. v. Southern Independent Telephone Co. (Tex. Civ. App.) 429.

(D) Liability for Corporate Debts and Acts.

§ 337. At common law the creation of indebtedness in excess of the charter limit would not render the directors of a corporation personally liable to creditors.—Randolph v. Ballard County Bank (Ky.) 165.

§ 337. Directors of a corporation, having permitted its manager to exceed its authorized indebtedness, held individually liable for the excess under Ky. St. § 550 (Russell's St. § 2134).—Randolph v. Ballard County Bank (Ky.) 165.

VII. CORPORATE POWERS AND LIABILITIES.

Of banks, see Banks and Banking, §§ 116-161.

(A) Extent and Exercise of Powers in General.

Construction of penal laws, see Statutes, § 241.

§ 388. An agreement or conditional sale of patent rights held to have transferred to a corporation such a beneficial right that it was estopped to assert that the transaction was ultra vires.—Osmer v. Le May-Wegmann Brokerage Co. (Mo. App.) 65.

§ 388. An acquiescing stockholder is estopped to object that a contract of the corporation is ultra vires.—Osmer v. Le May-Wegmann Brokerage Co. (Mo. App.) 65.

§ 388. A corporation which enjoyed the benefits of a contract held not entitled to repudiate it as ultra vires.—Osmer v. Le May-Wegmann Brokerage Co. (Mo. App.) 65.

(B) Representation of Corporation by Officers and Agents.

Bank officers and agents, see Banks and Banking, § 116.

Declarations by officers and agents as evidence against corporation, see Evidence, § 241.

Enforcement of escheat, see Escheat, § 6.

Liability for injuries to third persons caused by negligence of servant, see Master and Servant, § 304.

Property subject to escheat, see Escheat, § 3.

Verification of mechanic's lien, see Mechanics' Liens, § 154.

§ 398. Under Rev. St. 1895, arts. 656, 661, corporate powers can only be performed under the authority of the board of directors.—Standard Underground Cable Co. v. Southern Independent Telephone Co. (Tex. Civ. App.) 429.

§ 406. The president of a corporation has no power to contract for the corporation nor to control its property or funds, in the absence

of authority in the act of incorporation or from the board of directors.—Standard Underground Cable Co. v. Southern Independent Telephone Co. (Tex. Civ. App.) 429.

§ 410. Action of president of telephone company in purporting to undertake to pay plaintiff company for goods sold by it to another held not authorized by the by-laws of defendant company or by its board of directors, so that the company was not liable.—Standard Underground Cable Co. v. Southern Independent Telephone Co. (Tex. Civ. App.) 429.

§ 423. A failure to perform nondelegable duties of a corporation held a default of the corporation.—Jacksonville Ice & Electric Co. v. Moses (Tex. Civ. App.) 379.

§ 425. A corporation held not entitled to repudiate notes, signed by the president on behalf of the corporation, because not authorized by board of directors.—Osmer v. Le May-Wegmann Brokerage Co. (Mo. App.) 65.

§ 428. Notice of a mechanic's lien to the directors of one corporation held to charge another corporation having the same directors with notice of the lien.—First Nat. Bank v. Chowning Electric Co. (Ky.) 1136.

§ 428. Notice of a mechanic's lien given to the directors of one corporation held sufficient notice to another corporation having the same directors, where a conflict of interest, if any, arose after it was given.—First Nat. Bank v. Chowning Electric Co. (Ky.) 1136.

§ 432. In an action for the price of goods sold, evidence held to require a finding that the goods were sold to defendant corporation, and not to its general manager.—Russellville Anthracite Coal Mining Co. v. Quita Coal Co. (Ark.) 624.

(C) Property and Conveyances.

Constitutional provisions impairing obligation of contract, see Constitutional Law, § 126.

Limitation of action for escheat, see Limitation of Actions, § 19.

Of religious societies, see Religious Societies, §§ 23-25.

Vested rights to property, see Constitutional Law, § 93.

(D) Contracts and Indebtedness.

§ 450. Where a business or manufacturing corporation, created under a general law, exceeds the limit of indebtedness fixed in its articles, it is a violation of the law under which it was created.—Randolph v. Ballard County Bank (Ky.) 165.

(E) Torts.

Particular classes of corporations or associations.

See Carriers, §§ 110-134, 159, 173-185, 203-230, 280-321, 353-382; Railroads, §§ 113, 274-282, 288-297, 301-351, 358-401, 446, 447, 485; Street Railroads, §§ 81-118.

Gas companies, see Gas, §§ 17-20.

(F) Civil Actions.

Competency of member, stockholder, or officer of corporation to testify to transaction with person since deceased or incompetent, see Witnesses, § 142.

Declarations by officers and agents as evidence against corporation, see Evidence, § 244.

Liability for wrongful death, see Death, § 33.

Limitation of action for escheat, see Limitation of Actions, § 19.

Waiver of objections for failure to verify pleading, see Pleading, § 422.

By or against particular classes of corporations or associations.

See Carriers, §§ 132-134, 184, 185, 227-230, 315-321, 344-347, 382; Railroads, §§ 282, 297, 344-351, 400, 401, 446, 447, 485; Street Railroads, §§ 112-118.

Electric companies, see Electricity, § 19.

Gas companies, see Gas, § 20.

Insurance companies, see Insurance, §§ 612-672.

§ 521. In an action for the price of goods sold a corporation, an instruction *held* not objectionable.—Russellville Anthracite Coal Mining Co. v. Ouita Coal Co. (Ark.) 624.

VIII. INSOLVENCY AND RECEIVERS.

§ 553. Before a court of equity will open its doors to a single stockholder he must, not only on behalf of himself, but also on behalf of all other stockholders, show that there is no other road to redress, and this is not shown unless all the remedies within the corporation itself have been exhausted.—Blades v. Billings Mercantile Co. (Mo. App.) 579.

§ 553. A petition by a stockholder for a receiver for the corporation *held* not to state any grounds therefor.—Blades v. Billings Mercantile Co. (Mo. App.) 579.

§ 553. The appointment of a receiver to compel restitution from the directors sufficient to pay plaintiff's judgment *held* proper.—Hammar v. St. Louis Motor Carriage Co. (Mo. App.) 1060.

XI. DISSOLUTION AND FORFEITURE OF FRANCHISE.

Property subject to escheat, see Escheat, § 3.

§ 618. By analogy to Ky. St. §§ 3858, 3859 (Russell's St. §§ 3888, 3889), allowing two years for the settlement of estates of decedents, a corporation has two years to close up its affairs.—Ewald Iron Co. v. Commonwealth (Ky.) 481.

CORRECTION.

Of erroneous instructions by other instructions, see Trial, § 296.

Of irregularities and error at trial, see Trial, §§ 418-423.

Of judgment, see Judgment, § 334.

Of record on appeal or writ of error, see Appeal and Error, § 644; Criminal Law, § 1110.

CORROBORATION.

Of testimony of female in prosecution for seduction, see Seduction, § 46.

CORRUPTION.

In general, see Fraud.

CO-SERVANTS.

See Master and Servant, §§ 185-201.

COSTS.

Expenditures for costs by executor or administrator, see Executors and Administrators, § 111.

In action by trustee, see Trusts, § 268.

In ejectment, see Ejectment, § 123.

Payment or security on taking appeal or other proceeding for review, see Appeal and Error, § 376; Criminal Law, § 1076.

I. NATURE, GROUNDS, AND EXTENT OF RIGHT IN GENERAL.

§ 32. An apportionment of costs *held* proper.—Sutherland v. Kirkland (Tex. Civ. App.) 851.

IV. SECURITY FOR PAYMENT.

Security to perfect appeal or other proceeding for review, see Appeal and Error, § 376.

V. AMOUNT, RATE, AND ITEMS.

§ 184. Minor stepchildren of plaintiff, recovering judgment for injuries to his wife, the mother of the children, *held* entitled to witness fees taxed as costs against defendant.—Northern Texas Traction Co. v. Grimes (Tex. Civ. App.) 803.

VII. ON APPEAL OR ERROR, AND ON NEW TRIAL OR MOTION THEREFOR.

Security to perfect appeal or other proceeding, see Appeal and Error, § 376.

VIII. PAYMENT AND REMEDIES FOR COLLECTION.

Payment or security on taking appeal or other proceeding for review, see Appeal and Error, § 376; Criminal Law, § 1076.

§ 282. A party obtaining a judgment for costs *held* not entitled to collect them until he has paid them.—Watkins v. Parker (Ark.) 1187.

IX. IN CRIMINAL PROSECUTIONS.

Security to perfect appeal or other proceeding for review, see Criminal Law, § 1076.

CO-TENANCY.

See Joint Tenancy; Tenancy in Common.

COUNSEL.

See Amicus Curiae; Attorney and Client.

COUNTERCLAIM.

See Set-Off and Counterclaim.

COUNTIES.

See Municipal Corporations; Schools and School Districts, §§ 13-97.

County in which to sue, see Venue.

Highways, see Highways.

I. CREATION, ALTERATION, EXISTENCE, AND POLITICAL FUNCTIONS.

§ 16. Facts *held* to show a certain debt against Menefee county, and that its fiscal court should take steps to levy and collect the tax (Acts 1869, c. 1872, § 7; Act April 8, 1880 [Priv. Laws 1879-80, c. 871]; Ky. St. 1894, § 1852).—Montgomery County v. Taylor (Ky.) 894.

§ 16. The county fiscal court *held* to have authority to hear evidence as to what an agreement between such county and another was and to spread the same on its record.—Montgomery County v. Taylor (Ky.) 894.

II. GOVERNMENT AND OFFICERS.**(D) Officers and Agents.**

Liability for compensation of sheriff as tax collector, see Taxation, § 549.

Tax collectors, see Taxation, §§ 545-549.

§ 74. Right of a county treasurer to compensation under Const. art. 16, § 44, and Rev. St. 1895, art. 2467, stated.—Hill County v. Sauls (Tex. Civ. App.) 267.

§ 74. Under Rev. St. 1895, art. 2467, a county treasurer *held* entitled to commissions as money was received and disbursed.—Hill County v. Sauls (Tex. Civ. App.) 267.

§ 74. Under Rev. St. 1895, art. 2467, *held*, courts cannot interfere with an order fixing the county treasurer's commission at $1\frac{1}{2}$ mills on the dollar.—*Hill County v. Sauls* (Tex. Civ. App.) 287.

III. PROPERTY, CONTRACTS, AND LIABILITIES.

(B) Contracts.

§ 113. A fiscal court, under Ky. St. §§ 1840, 4318, 4318a (Russell's St. §§ 2975, 5462, 5463), had no power to purchase an automobile to be used by members of the court in inspecting county roads.—*Hollis v. Weissinger* (Ky.) 176.

§ 113. Under Ky. St. § 1840 (Russell's St. § 2975), the fiscal court had power to appropriate county money to provide fans operated by electricity for the office of the county court clerk.—*Hollis v. Weissinger* (Ky.) 176.

IV. FISCAL MANAGEMENT, PUBLIC DEBT, SECURITIES, AND TAXATION.

§ 152. A contract by a county listing land for sale *held* not to create debt within Const. art. 11, § 7, requiring provision for payment.—*Sandifer v. Board County* (Tex. Civ. App.) 823.

§ 191. Under Kirby's Dig. § 1500, *held*, that certain tax levy by the quorum court was valid.—*Fussell v. Mallory* (Ark.) 631.

COUNTS.

Separate counts in pleading, necessity and sufficiency of election, see Indictment and Information, § 132.

Separate counts in pleading, right to join, see Indictment and Information, § 132.

COUNTY ROADS.

See Highways.

COURSES AND DISTANCES.

See Boundaries.

COURTS.

See Judgment.

Amicus curiæ, see Amicus Curiae.

Constitutional exercise of judicial powers in general, see Constitutional Law, §§ 70-73.

Judges, see Judges.

Judicial notice of jurisdiction, organization, and procedure of courts, see Evidence, § 43.

Mandamus to inferior courts, see Mandamus, § 31.

Province of court and jury, see Criminal Law, §§ 741-763, 764; Trial, §§ 139-178, 191-194.

Right to trial by jury, see Jury, § 31.

Subjects and titles of acts relating to courts, see Statutes, § 124.

Trial by court without jury, see Trial, §§ 394-403.

Jurisdiction of particular actions or proceedings.

Election contest, see Elections, § 275.

Prosecution for violation of ordinance, see Municipal Corporations, § 636.

To determine validity of exercise of power of eminent domain, see Eminent Domain, § 66.

To enjoin liquor nuisance, see Intoxicating Liquors, § 269.

Special jurisdictions and particular classes of courts.

See Justices of the Peace, § 43.

Appellate jurisdiction, see Appeal and Error, § 21.

Equity jurisdiction, see Equity, §§ 3-32.

L. NATURE, EXTENT, AND EXERCISE OF JURISDICTION IN GENERAL.

Appearance, see Appearance, §§ 18, 19.

Presumptions as to superior or general jurisdiction upon collateral attack on judgment, see Judgment, § 495.

§ 17. The subject-matter presented to a court of appeals in a case arising outside of its territorial jurisdiction *held* not within its jurisdiction.—*State ex rel. St. Louis Dressed Beef & Provision Co. v. Nixon* (Mo.) 538; *State ex rel. Raines v. Nolte* (Mo.) 542.

II. ESTABLISHMENT, ORGANIZATION, AND PROCEDURE IN GENERAL.

(A) Creation and Constitution, and Court Officers.

Judges, see Judges.

(B) Terms, Vacations, Place and Time of Holding Court, Courthouses, and Accommodations.

Judicial notice of terms, see Evidence, § 41.

(D) Rules of Decision, Adjudications, Opinions, and Records.

Decision of appellate court as law of the case in lower court, see Appeal and Error, § 1195.

Former decision of appellate court as law of the case on subsequent appeal, see Appeal and Error, § 1097.

§ 91. The Court of Appeals must conform to the last decision of the Supreme Court on the subject.—*Chamlee v. Planters' Hotel Co.* (Mo. App.) 123.

§ 91. The Court of Appeals must follow the decisions of the Supreme Court.—*Martin v. Jones* (Mo. App.) 1097.

III. COURTS OF GENERAL ORIGINAL JURISDICTION.

Presumptions as to jurisdiction upon collateral attack on judgment, see Judgment, § 495.

IV. COURTS OF LIMITED OR INFERIOR JURISDICTION.

§ 163. An action *held* within the jurisdiction of the county court.—*Jordan v. Massey* (Tex. Civ. App.) 804.

VI. COURTS OF APPELLATE JURISDICTION.

Appellate jurisdiction in general, see Appeal and Error, § 21.

Decisions reviewable, see Appeal and Error, § 100.

(B) Courts of Particular States.

§ 223. Judgments in favor of different parties to an action *held* several and insufficient to sustain appeals to Court of Appeals, under Ky. St. § 950 (Russell's St. § 2784).—*Johnson v. Wilson* (Ky.) 1141.

§ 223. An appeal under Ky. St. § 950 (Russell's St. § 2784), *held* not to lie to the Court of Appeals from a judgment for \$35.—*Cumberland Telephone & Telegraph Co. v. Logsdon* (Ky.) 1159.

§ 223. A sham counterclaim, not stricken from the record, as authorized by Civ. Code Prac. § 113, subsec. 8, will not be considered in determining the amount in controversy.—*Cumberland Telephone & Telegraph Co. v. Logsdon* (Ky.) 1159.

§ 231. Under Const. Amend. 1884, § 6 (Ann. St. 1906, p. 244), the Supreme Court is to hear a certified case the same as when jurisdiction is obtained by ordinary appeal process.—*State v. Clinkenbeard* (Mo.) 537.

VII. UNITED STATES COURTS.(F) *State Laws as Rules of Decision.*

§ 363. *Sayles' Ann. Civ. St. 1897, art. 1483, authorizing suits against receivers without leave of court, has no application to receivers appointed by a federal court.—Morse v. Tackaberry (Tex. Civ. App.) 273.*

VIII. CONCURRENT AND CONFLICTING JURISDICTION, AND COMITY.(A) *Courts of Same State, and Transfer of Causes.*

Transfer of prosecution to juvenile docket, see Infants, § 68.

§ 485. *Under Const. art. 6 (Ann. St. 1906, p. 212) and Rev. St. 1906, § 3926, each Court of Appeals has jurisdiction only of appeals arising within its territorial limits, and section 3939 is void.—State ex rel. St. Louis Dressed Beef & Provision Co. v. Nixon (Mo.) 538; State ex rel. Raines v. Nolte (Mo.) 542.*

COVENANT, ACTION OF.

Covenants on which the action may be maintained, see Covenants.

COVENANTS.

Affecting right to remove fixtures, see Fixtures, § 27.

Conditions and provisos in contracts in general, see Contracts, § 221.

Conditions and restrictions in deeds, see Deeds, §§ 145-168.

II. CONSTRUCTION AND OPERATION.

Affecting right to remove fixtures, see Fixtures, § 27.

IV. ACTIONS FOR BREACH.

§ 130. *Under the facts a grantee held not entitled to recover on a covenant of warranty.—Sutherland v. Kirkland (Tex. Civ. App.) 851.*

COVERTURE.

See Husband and Wife.

CREDIBILITY.

Of witness, see Witnesses, §§ 330-406.

Of witnesses as affecting weight and sufficiency of evidence, see Evidence, § 588.

CREDITORS.

See Assignments for Benefit of Creditors; Attachment; Bankruptcy; Compromise and Settlement; Execution; Fraudulent Conveyances; Garnishment; Homestead; Novation; Payment; Release.

Interest on default or delay in payment of obligation, see Interest.

Of decedent, see Executors and Administrators, §§ 206-283.

Remedies against sureties, see Principal and Surety, § 133.

Rights and remedies as to mortgage by debtor, see Chattel Mortgages, § 194.

Subrogation to rights of creditor, see Subrogation.

CREDITORS' SUIT.

Remedies in cases of fraudulent transfers, see Fraudulent Conveyances, § 249.

CRIMES.

See Criminal Law.

CRIMINAL LAW.

Bail, see Bail, §§ 58-89.

Competency and challenge to jurors, see Jury, §§ 116-120.

Conviction affecting right to recover on insurance certificate, see Insurance, § 748.

Grand jury, see Grand Jury.

Habeas corpus to review proceedings, see Habeas Corpus.

Impaneling jury, see Jury, § 149.

Indictment, information, or complaint, see Indictment and Information.

Malicious prosecution, see Malicious Prosecution.

Prisons, see Prisons.

Qualifications of jurors, and exemptions, see Jury, §§ 39-53.

Offenses by particular classes of persons.

See Infants, §§ 66-68.

Particular offenses.

See Bigamy; Burglary; Disorderly House; False Pretenses; Gaming, §§ 74-88; Homicide; Kidnapping; Larceny; Rape, §§ 4-12; Seduction, §§ 32-50; Sodomy; Threats.

Abandonment of children by parent or neglect to support, see Parent and Child, § 17.

Assault with intent to kill, see Homicide, §§ 90-99.

Carrying weapons, see Weapons, § 17.

Offenses relating to weapons, see Weapons.

Practicing medicine or surgery without authority, see Physicians and Surgeons, § 6.

Violations of anti-trust laws, see Monopolies, § 30.

Violations of liquor laws, see Intoxicating Liquors, §§ 132-139, 204-223.

Violations of municipal regulations, see Municipal Corporations, §§ 631-642.

Violations of Sunday laws, see Sunday, § 29.

III. PARTIES TO OFFENSES.

To murder, see Homicide, § 30.

IV. JURISDICTION.

Transfer of prosecution to juvenile docket, see Infants, § 68.

§ 90. *Under Const. § 143, and Ky. St. § 3651 (Russell's St. § 1662), a police court has no jurisdiction of an offense not committed within the limits of the city where the court is located.—Tutt v. City of Greenville (Ky.) 890.*

§ 90. *It is not essential that a person shall have been personally present in a city when the offense was committed to be guilty of committing the offense within the city.—Tutt v. City of Greenville (Ky.) 890.*

VII. FORMER JEOPARDY.

§ 162. *The act of 1907 held not invalid as imposing an additional punishment for a violation of the local option law.—Ex parte Roper (Tex. Cr. App.) 334.*

IX. ARRAIGNMENT AND PLEAS, AND NOLLE PROSEQUI OR DISCONTINUANCE.

Plea of guilty as bar to action for malicious prosecution, see Malicious Prosecution, § 24.

§ 301. *Filing a demurrer to the information after waiver of formal arraignment and plea of not guilty did not withdraw the plea so as to require new arraignment.—State v. Cannon (Mo.) 513.*

X. EVIDENCE.

Competency of witnesses in general, see Witnesses, §§ 53-181.

Credibility, impeachment, contradiction, and corroboration of witnesses, see Witnesses, §§ 330-406.

Cross-examination of witnesses, see Witnesses, §§ 286, 287.

Examination of witnesses, see Witnesses, §§ 286, 287.

In particular criminal prosecutions.

See Bigamy, § 8; Burglary, §§ 36-41; Disorderly House, § 16; Gaming, § 98; Homicide, §§ 156-257; Larceny, §§ 58-60; Rape, §§ 36-52; Seduction, §§ 44-46.

For practicing medicine without license, see Physicians and Surgeons, § 6.

Violations of liquor laws, see Intoxicating Liquors, §§ 224-230.

(A) Judicial Notice, Presumptions, and Burden of Proof.

§ 304. The court will take judicial notice of the fact that the Legislature relies in a large measure on the titles of the several laws enacted by it.—State v. Rawlings (Mo.) 530.

§ 304. A state court held not authorized to take judicial notice of city ordinances.—Karchmer v. State (Tex. Cr. App.) 700.

(B) Facts in Issue and Relevant to Issues, and Res Gestæ.

§ 364. Certain evidence held properly excluded as hearsay and self-serving.—Cornwell v. State (Tex. Cr. App.) 221.

(C) Other Offenses, and Character of Accused.

§ 380. The character of defendant cannot be assailed by the state by proof of his specific acts of wrongdoing.—State v. McDonough (Mo.) 545.

(E) Best and Secondary and Demonstrative Evidence.

§ 398. Where the father of prosecutrix testified as to her age, an entry of the date of her birth made by him in an ordinary ledger is inadmissible as secondary evidence.—Haywood v. State (Tex. Cr. App.) 218.

§ 404. In a prosecution for homicide, the admission of a piece of iron pipe held error for failure to sufficiently connect it with the crime.—Higgins v. Commonwealth (Ky.) 1135.

§ 404. A bullet held sufficiently identified to make it admissible in evidence against one accused of murder.—Butler v. State (Tex. Cr. App.) 230.

(F) Admissions, Declarations, and Hearsay.

§ 415. In a prosecution for rape, evidence of prosecutrix's statements to others that she had had intercourse with other men mentioned held admissible as bearing on question of limitation.—Foreman v. State (Tex. Cr. App.) 229.

§ 417. Declarations by third persons held inadmissible against accused for want of a showing of conspiracy.—Clements v. State (Tex. Cr. App.) 728.

(G) Acts and Declarations of Conspirators and Codefendants.

§ 424. Statements made by an alleged accomplice not in defendant's presence held inadmissible.—Higgins v. Commonwealth (Ky.) 1135.

(H) Documentary Evidence and Exclusion of Parol Evidence Thereby.

§ 440. Under Rev. St. 1895, art. 2312, and Code Cr. Proc. art. 764, deed records of a county held inadmissible.—Gould v. State (Tex. Cr. App.) 695.

§ 445. Under Rev. St. 1895, arts. 2306, 2308, certified copies of papers in the office of the Secretary of State held properly received in evidence.—Gould v. State (Tex. Cr. App.) 695.

(I) Opinion Evidence.

§ 448. Certain evidence held not objectionable as a conclusion.—Duke v. State (Tex. Cr. App.) 705.

§ 450. Witness held not entitled to give an opinion as to how long it would take to overcome a house's reputation as disorderly.—Thompson v. State (Tex. Cr. App.) 850.

§ 452. Exclusion of certain testimony of a witness held proper.—Duke v. State (Tex. Cr. App.) 705.

§ 474. An objection to a question to a medical expert held properly sustained.—Duke v. State (Tex. Cr. App.) 705.

§ 485. A hypothetical question to a medical expert held proper.—Duke v. State (Tex. Cr. App.) 705.

§ 485. The practice of putting hypothetical questions to experts stated.—Duke v. State (Tex. Cr. App.) 705.

(J) Testimony of Accomplices and Codefendants.

Corroboration of testimony of female in prosecution for seduction, see Seduction, § 46.

§ 508. The testimony of a codefendant against defendant on trial is properly received, and it is not error to refuse to strike it out.—Hart v. State (Tex. Cr. App.) 1178.

(M) Weight and Sufficiency.

Capacity of minor to commit burglary, see Infants, § 66.

Credibility, impeachment, corroboration, and contradiction of witnesses, see Witnesses, §§ 330-406.

In particular criminal prosecutions.

See Burglary, § 41; Gaming, § 98; Homicide, §§ 232-257; Larceny, §§ 58-60; Rape, §§ 51, 52; Seduction, §§ 45, 46.

XI. TIME OF TRIAL AND CONTINUANCE.

§ 586. The granting or refusal of continuance to obtain testimony of absent witnesses held within the discretion of the trial court.—Alexander v. State (Ark.) 953.

§ 594. The refusal to grant a continuance for absent witnesses held not erroneous.—Thurman v. Commonwealth (Ky.) 174.

§ 594. Refusal to grant a first continuance for the absence of a witness held erroneous.—Sharp v. State (Tex. Cr. App.) 333.

§ 594. Overruling of application for continuance held not error.—Florence v. State (Tex. Cr. App.) 689.

§ 595. Refusal to grant a continuance on the ground of the absence of a witness held not erroneous.—Hart v. State (Tex. Cr. App.) 1178.

§ 614. Second application for continuance, containing neither of the requisites stated in Code Cr. Proc. art. 598, and where testimony of absent witness would be cumulative, held properly denied.—Bacon v. State (Tex. Cr. App.) 690.

XII. TRIAL.

Competency of and challenge to jurors, see Jury, §§ 116-120.

Impaneling jury, see Jury, § 149.

Qualifications of jurors, and exemptions, see Jury, §§ 39-53.

In particular criminal prosecutions.

See Burglary, § 46; Homicide, §§ 263-310; Larceny, § 77; Rape, § 59; Seduction, § 60.

For carrying weapons, see Weapons, § 17.

For practicing medicine without license, see Physicians and Surgeons, § 6.

Violations of liquor laws, see Intoxicating Liquors, § 238.

(A) Preliminary Proceedings.

§ 628. Failure to indorse name of witness on information, *held* not ground for reversal, where defendant knew before the trial that the witness was to appear.—*State v. Whitsett* (Mo.) 555.

(B) Course and Conduct of Trial in General.

Misconduct of bystander ground for discharge of jury, see Jury, § 149.

§ 639. The stating of the case to the jury by special counsel for the state, instead of by the regular prosecuting attorney, *held* not error.—*State v. Boyer* (Mo.) 542.

§ 642. In a trial for assault, it was within the judge's sound discretion to permit a complaining witness to serve as interpreter.—*Sellers v. State* (Tex. Cr. App.) 348.

§ 655. Remarks of the court on voir dire examination of jury as to qualifying on the question of having conscientious scruples against capital punishment *held* not tending to prejudice them against defendant.—*State v. Boyer* (Mo.) 542.

(C) Reception of Evidence.

Examination of witnesses, see Witnesses, §§ 286, 287.

§ 671. The better practice on a hearing as to the competency of a witness or of offered evidence *held* to be to exclude the jury.—*State v. McDonough* (Mo.) 545.

§ 673. Where evidence of contradictory statements is introduced to impeach witnesses, the court should instruct the jury that such evidence is limited to that purpose.—*Higgins v. Commonwealth* (Ky.) 1135.

(D) Objections to Evidence. Motions to Strike Out, and Exceptions.

§ 695. It is not error to permit proof of the reputation of witnesses at the time of the trial as against an objection going only to the weight of the evidence.—*Sharp v. State* (Tex. Cr. App.) 333.

(E) Arguments and Conduct of Counsel.

§ 719. Statement of the county court in his argument, without any evidence of the facts stated, *held* reversible error, in the absence of correction by the court.—*Harwell v. State* (Tex. Cr. App.) 701.

§ 719. It is improper to permit the state's attorney to argue that there was a conspiracy to kill decedent, where accused was not shown to have been involved in one.—*Clements v. State* (Tex. Cr. App.) 728.

§ 728. Alleged objectionable remarks of the prosecuting attorney cannot be complained of on appeal, where a defendant did not request any charge in respect to such remarks.—*Flurence v. State* (Tex. Cr. App.) 689.

(F) Province of Court and Jury in General.

In prosecution for homicide, see Homicide, § 268.

In prosecution for violations of liquor laws, see Intoxicating Liquors, § 238.

§ 741. The weight of testimony is for the jury, and not for the court.—*State v. Cannon* (Mo.) 513.

§ 741. The jury are the judges of the credibility of the witnesses and the weight of their testimony.—*Nash v. State* (Tex. Cr. App.) 709.

§ 761. Instructions *held* not to assume facts not in evidence.—*Haywood v. State* (Tex. Cr. App.) 218.

§ 761. An instruction *held* not erroneous, as assuming that accused made the assault charged.—*Sellers v. State* (Tex. Cr. App.) 348.

§ 761. Instruction on law of explanation of possession of recently stolen property *held* not on the weight of evidence, as assuming certain facts.—*Bacon v. State* (Tex. Cr. App.) 690.

§§ 763, 764. In a murder case, a charge limiting impeaching testimony *held* not on the weight of evidence.—*Day v. State* (Tex. Cr. App.) 215.

§§ 763, 764. In a murder case, a certain charge *held* not on the weight of testimony.—*Day v. State* (Tex. Cr. App.) 215.

(G) Necessity, Requisites, and Sufficiency of Instructions.***In particular criminal prosecutions.***

See Burglary, § 46; Homicide, §§ 286-310; Larceny, § 77; Rape, § 59; Seduction, § 50. For carrying weapons, see Weapons, § 17. Prosecution of minor, see Infants, § 68.

§ 769. Written instruction in a criminal case, as required by Rev. St. 1909, § 5231, must cover the whole question to which it relates.—*State v. Harris* (Mo.) 535.

§ 781. In a prosecution for homicide, the evidence connecting accused with the offense being wholly circumstantial, aside from certain alleged extrajudicial confessions, the court should have charged Cr. Code Prac. § 240, that an extrajudicial confession will not warrant a conviction unless accompanied with other proof of the corpus delicti.—*Higgins v. Commonwealth* (Ky.) 1135.

§ 782. An instruction on alibi *held* not erroneous.—*State v. Glasscock* (Mo.) 549.

§ 784. Where there was positive evidence of assault, it was unnecessary to instruct on circumstantial evidence.—*Sellers v. State* (Tex. Cr. App.) 348.

§ 785. An instruction as to credibility of defendant and his wife *held* not error.—*State v. McDonough* (Mo.) 545.

§ 785. A charge as to the effect of the testimony of impeaching witnesses is proper.—*Flurence v. State* (Tex. Cr. App.) 689.

§ 786. An instruction as to credibility of defendant *held* not error.—*State v. Boyer* (Mo.) 542.

§ 793. In a prosecution of two defendants for burglary, a charge *held* sufficient to enable the jury to properly formulate their verdict if they should acquit or convict either, neither, or both of the defendants.—*Ragsdale v. State* (Tex. Cr. App.) 234.

§ 793. Instructions in a trial for assault with intent to murder *held* not erroneous, as requiring a joint conviction or joint acquittal.—*Sellers v. State* (Tex. Cr. App.) 348.

§ 796. Under Code Cr. Proc. 1895, art. 1145, as amended by act approved March 17, 1909 (Laws 1909, c. 54), the court was not required to charge that the verdict should fix the place of confinement in a prosecution of an accused under 16 years of age, but properly instructed that the judgment would be for confinement in the state institution for juveniles if the conviction was for 5 years or less, and in the penitentiary if for more than 5 years.—*Ragsdale v. State* (Tex. Cr. App.) 234.

§ 800. An instruction *held* to sufficiently define "malice aforethought."—*Potter v. Commonwealth* (Ky.) 462.

§ 800. Under Rev. St. 1909, § 5231, *held*, that the words "good repute," as used in the evidence and instruction, need not be defined.—*State v. Walker* (Mo.) 516.

§ 804. In view of Code Cr. Proc. 1895, art. 753, *held*, that it was not reversible error to instruct the jury orally as to the form of the verdict they should bring in.—*Ragsdale v. State* (Tex. Cr. App.) 234.

§ 814. Evidence of the state to show a false statement by defendant *held* not to require an instruction on alibi.—*State v. Glasscock* (Mo.) 549.

§ 815. An instruction as to flight of accused *held* error for failure to cover defendant's explanation of his flight.—*State v. Harris* (Mo.) 535.

(H) Requests for Instructions.

§ 824. Under Rev. St. 1909, § 5231, when the evidence shows that accused may be guilty of an offense included in that charged, the court should instruct upon such minor offense.—*State v. Hoag* (Mo.) 509.

§ 824. Under Rev. St. 1909, § 5231, the failure of the trial court to instruct on collateral questions is not reversible error.—*State v. Harris* (Mo.) 535.

§ 829. It was not error to refuse a requested instruction already covered by instruction given.—*Alexander v. State* (Ark.) 953; *Same v. Walker* (Mo.) 516.

§ 830. On a requested charge as to reasonable doubt, *held*, that the court should have given a proper charge on the subject, where the evidence required it, though the requested charge might not have been properly worded.—*King v. State* (Tex. Cr. App.) 687.

(K) Verdict.

Misconduct of bystander ground for discharge of jury, see Jury, § 149.

§ 884. As regards the validity of the judgment, *held*, under Rev. St. 1909, § 5254, it is immaterial whether the verdict sufficiently declares the punishment.—*State v. McDonough* (Mo.) 545.

XIII. MOTIONS FOR NEW TRIAL AND IN ARREST.

§ 916. That accused had no attorney *held* no ground for a new trial.—*Hayden v. State* (Tex. Cr. App.) 703.

§ 925. Affidavit of juror *held* insufficient to authorize granting of new trial.—*Bacon v. State* (Tex. Cr. App.) 690.

§ 936. Failure to move for continuance *held* waiver of surprise at introduction of witness whose name was not indorsed on information.—*State v. Whitsett* (Mo.) 555.

§ 938. Matters to be shown by defendant to entitle him to a new trial on the ground of newly discovered evidence, stated.—*State v. Whitsett* (Mo.) 555.

§ 939. Newly discovered evidence *held* not ground for new trial where no diligence is shown to have procured it before trial.—*State v. Whitsett* (Mo.) 555.

§ 939. In view of nature of evidence and lack of diligence, *held* denial of new trial for newly discovered evidence was proper.—*Johnson v. State* (Tex. Cr. App.) 225.

§ 969. Accused *held* not entitled to a new trial for newly discovered testimony.—*Sellers v. State* (Tex. Cr. App.) 348.

§ 941. Newly discovered evidence to impeach evidence *held* not ground for new trial where cumulative.—*State v. Whitsett* (Mo.) 555.

§ 942. Newly discovered evidence of conviction of witness for state to impeach witness *held* not ground for new trial.—*State v. Whitsett* (Mo.) 555.

§ 951. A motion for new trial, filed three days after judgment, *held* too late, under Rev. St. 1909, § 5285 (Rev. St. 1899, § 2689 [Ann. St. 1906, p. 1587]).—*State v. Thomas* (Mo.) 571.

§ 956. Where facts in affidavits presented after motion for new trial were not included in the motion, they cannot be considered.—*State v. Walker* (Mo.) 516.

§ 957. Code Cr. Proc. art. 817, *held* not to authorize the filing or consideration of affidavit of juror impeaching verdict on ground stated.—*Bacon v. State* (Tex. Cr. App.) 690.

§ 958. A new trial cannot be granted on the ground of newly discovered evidence in the absence of the affidavit of the person relied upon to give such evidence.—*State v. Walker* (Mo.) 516.

XIV. JUDGMENT, SENTENCE, AND FINAL COMMITMENT.

§ 989. Under Rev. St. 1909, §§ 5263, 5264, the failure of the record to show an allocation in a misdemeanor case *held* to be without effect on the sentence.—*State v. Clinkenbeard* (Mo.) 537.

XV. APPEAL AND ERROR, AND CERTIORARI.

In prosecution for homicide, see Homicide, §§ 325-340.

In prosecutions for violations of municipal ordinances, see Municipal Corporations, § 642.

(A) Form of Remedy, Jurisdiction, and Right of Review.

Orders in habeas corpus proceedings, see Habeas Corpus, § 113.

§ 1020. In view of the punishment, under Rev. St. 1899, § 1927 (Ann. St. 1906, p. 1312), for obtaining by false pretenses the sum for so obtaining which defendant was convicted, *held*, the appeal was properly taken to the Court of Appeals.—*State v. Johnston* (Mo. App.) 38.

(B) Presentation and Reservation in Lower Court of Grounds of Review.

In prosecutions for homicide, see Homicide, § 340.

§ 1035. Objections to formation of jury *held* not properly raised on appeal.—*Sellers v. State* (Tex. Cr. App.) 348.

§ 1036. Accused cannot first object to alleged improper questions on appeal.—*State v. Hoag* (Mo.) 509.

§ 1036. The question of admissibility of evidence *held* not before the appellate court, where objection was not made to its admission.—*State v. Glasscock* (Mo.) 549.

§ 1036. Accused *held* not entitled to complain of cross-examination of his witnesses as to good reputation.—*Butler v. State* (Tex. Cr. App.) 230.

§ 1055. Objection to argument of counsel *held* not open for review, in absence of exception to court's failure to rule thereon.—*State v. Whitsett* (Mo.) 555.

§ 1063. Where it is shown by the record that defendant's motions for new trial and in arrest were filed after entry of judgment, only the record proper, without the purported bill of exceptions, is presented on appeal.—*State v. Clinkenbeard* (Mo.) 537.

(C) Proceedings for Transfer of Cause, and Effect Thereof.

Death of insured pending appeal as affecting right to recover on benefit certificate, see Insurance, § 748.

§ 1076. A recognition on appeal, which does not comply with Code Cr. Proc. 1895, art.

887. *held* not to confer jurisdiction.—Bird v. State (Tex. Cr. App.) 687.

§ 1076. A recognition on appeal from a judgment convicting defendant of violating the liquor law, failing to recite that he was convicted of a misdemeanor and the punishment assessed, *held* insufficient.—Switzer v. State (Tex. Cr. App.) 705.

§ 1083. Action of circuit court in granting a new trial after defendant had perfected his appeal *held* illegal.—State v. Sutton (Mo.) 663.

§ 1083. Judgment on new trial pending appeal from first conviction to Supreme Court, reversed.—State v. Sutton (Mo.) 664.

(D) Record and Proceedings Not in Record.

§ 1090. In absence of a bill of exceptions and statement of facts, a ruling denying a continuance cannot be reviewed.—Wells v. State (Tex. Cr. App.) 702.

§ 1090. Where there is no bill of exceptions reserved to testimony complained of in the motion for new trial, the admissibility of the testimony is not reviewable on appeal.—Hart v. State (Tex. Cr. App.) 1178.

§ 1090. Ruling on continuance cannot be reviewed, when not presented by a bill of exceptions.—Hartfield v. State (Tex. Cr. App.) 1180.

§ 1091. Pleas in abatement and motions to quash indictment *held* required to be preserved in the bill of exceptions, that rulings therein may be reviewed.—State v. Glasscock (Mo.) 549.

§ 1091. In a murder case a bill of exceptions *held* insufficient.—Day v. State (Tex. Cr. App.) 215.

§ 1091. A bill of exceptions *held* insufficient to raise an objection to admission in evidence of a bullet removed from decedent's body.—Butler v. State (Tex. Cr. App.) 230.

§ 1091. Rule as to the sufficiency of bill of exceptions stated.—Ridge v. State (Tex. Cr. App.) 732.

§ 1091. Bills of exceptions *held* to be looked into, though defective.—Ridge v. State (Tex. Cr. App.) 732.

§ 1092. A statement of facts and bill of exceptions, not verified by the county judge who heard the cause, is invalid.—Young v. State (Tex. Cr. App.) 736.

§ 1093. Bill of exceptions *held* insufficient to show error in excluding testimony in a trial for keeping a disorderly house.—Thompson v. State (Tex. Cr. App.) 350.

§ 1094. A conviction will be affirmed, where, because of the absence of a statement of facts and bills of exceptions in the record, the alleged errors cannot be reviewed.—Wells v. State (Tex. Cr. App.) 702.

§ 1094. Where the record on appeal contains no statement of facts or bill of exceptions, the judgment will be affirmed.—Burk v. State (Tex. Cr. App.) 705.

§ 1094. In view of the record, there being no bill of exceptions or statement of facts, *held*, there must be an affirmance.—Marue v. State (Tex. Cr. App.) 727.

§ 1097. Unless instructions are fundamentally erroneous, they cannot be reviewed, in absence of a statement of facts.—Wells v. State (Tex. Cr. App.) 702.

§ 1097. The sufficiency of evidence to sustain a conviction cannot be reviewed, in the absence of a statement of facts.—Wilson v. State (Tex. Cr. App.) 704.

§ 1105. The approval of the trial court of a bill of exceptions does not amount to a certifi-

cate that grounds of objection correctly state the facts.—Duke v. State (Tex. Cr. App.) 705.

§ 1110. A bill of exceptions cannot be aided by a statement in reply to a motion for new trial or by the statement of facts.—Thompson v. State (Tex. Cr. App.) 350.

§ 1110. Certiorari *held* not to lie to bring a statement of facts into the record.—Olivus v. State (Tex. Cr. App.) 694.

§ 1111. Appellant *held* bound by bill of exceptions as allowed, stating that application for continuance was second application.—Bacon v. State (Tex. Cr. App.) 690.

§ 1119. An objection that an interpreter did not fairly interpret the testimony is insufficient, where it does not appear whose testimony he interpreted.—Sellers v. State (Tex. Cr. App.) 348.

§ 1119. Improper arguments by the county attorney cannot be relied on on appeal where there was no bill of exceptions showing that such language was used by him, the bills of exceptions only showing requested instructions that the jury should ignore certain alleged remarks.—Holland v. State (Tex. Cr. App.) 693.

§ 1128. In a prosecution for unlawfully selling intoxicating liquors, a certified copy of order of the commissioners' court declaring the result of the election, filed by appellant in Court of Appeals will not be considered.—Nelson v. State (Tex. Cr. App.) 218.

(E) Assignment of Errors and Briefs.

§ 1129. Court on appeal *held* not required to search record for errors not specifically pointed out.—State v. Whitsett (Mo.) 555.

§ 1129. An assignment of error *held* too general to present the question for review.—Cornwell v. State (Tex. Cr. App.) 221.

(G) Review.

§ 1137. Defendant having asked for an instruction on alibi, *held* he could not complain of the giving of a proper one thereon, though the evidence did not call for one.—State v. Glasscock (Mo.) 549.

§ 1137. Doctrine of invited error in respect to the giving of instructions stated.—Cornwell v. State (Tex. Cr. App.) 221.

§ 1139. The Court of Criminal Appeals cannot consider ex parte affidavits filed with appellant's brief in which new issues are sought to be made.—Sellers v. State (Tex. Cr. App.) 348.

§ 1144. General verdict referring to the count on which defendant was tried *held* a finding against the defendant as to all elements of the offense.—State v. Sutton (Mo.) 663.

§ 1144. The court on appeal *held* authorized to find that a charge omitted from the transcript and lost had been given.—Sharp v. State (Tex. Cr. App.) 333.

§ 1144. In the absence of a statement of facts, the Court of Criminal Appeals will presume that the facts support the verdict.—James v. State (Tex. Cr. App.) 699.

§ 1144. Assumption as to instructions, where there is no statement of facts in the record, stated.—Cunningham v. State (Tex. Cr. App.) 728.

§ 1144. In the absence of a statement of facts, the Supreme Court will assume that the county court properly submitted the law to the jury.—Young v. State (Tex. Cr. App.) 736.

§ 1151. The discretion of the trial court in a ruling on an application for a continuance under Cr. Code Prac. §§ 188, 189, will not be disturbed unless abused.—Thurman v. Commonwealth (Ky.) 174.

§ 1151. In view of the record, *held* the refusal of a continuance for absent witnesses could not be disturbed as an abuse of discretion.—*Johnson v. State* (Tex. Cr. App.) 225.

§ 1152. In a trial for assault, it was within the judge's sound discretion to permit a complaining witness to serve as interpreter.—*Seller v. State* (Tex. Cr. App.) 348.

§ 1156. Refusal to set aside a conviction, on affidavits alleging a juror's expression of opinion as to the defendant's guilt before his acceptance as a juror, will not be disturbed.—*Gatcliff v. Commonwealth* (Ky.) 133.

§ 1159. Where there was some evidence sustaining a conviction, it will not be disturbed.—*Anderson v. Commonwealth* (Ky.) 477.

§ 1159. A verdict sustained by evidence will not be disturbed on appeal.—*State v. Cannon* (Mo.) 513.

§ 1159. Where the evidence was conflicting the Court of Criminal Appeals cannot set aside a conviction.—*Garrett v. State* (Tex. Cr. App.) 696.

§ 1166½. Compelling one who had exhausted his peremptory challenges to take an incompetent juror over his specific objection *held* reversible error.—*Darnell v. State* (Tenn.) 307.

§ 1166½. Any error in trying a criminal case before the district court as an ordinary criminal case instead of transferring it to the juvenile docket, on the ground that defendant was under 16 years of age, was not reversible where it was not shown that accused was injured thereby.—*Ragsdale v. State* (Tex. Cr. App.) 234.

§ 1166½. Overruling of challenges for cause to jurors *held* not reviewable on appeal.—*Duke v. State* (Tex. Cr. App.) 706.

§ 1167. Refusal to require election between counts for keeping gaming tables *held* harmless error.—*State v. Cannon* (Mo.) 513.

§ 1169. In rape, where there is no issue as to the age of the prosecutrix, the erroneous admission of secondary evidence of her age is not reversible error.—*Haywood v. State* (Tex. Cr. App.) 218.

§ 1169. Erroneous admission of prejudicial declarations by third persons *held* not cured by withdrawal from the jury.—*Clements v. State* (Tex. Cr. App.) 728.

§ 1170. Exclusion of testimony by one accused of keeping a disorderly house *held* not reversible error.—*Thompson v. State* (Tex. Cr. App.) 350.

§ 1170½. Any error in permitting cross-examination of accused's witnesses as to good reputation *held* harmless.—*Butler v. State* (Tex. Cr. App.) 230.

§ 1170½. Where an objection to a question by the state's attorney is sustained, and the form of the question is then corrected, the asking of the question is not reversible error.—*Florence v. State* (Tex. Cr. App.) 689.

XVI. SUCCESSIVE OFFENSES AND HABITUAL CRIMINALS.

§ 1202. Under Ky. St. § 1130 (Russell's St. § 3154), verdict *held* sufficient to authorize imposition of double penalty because of former conviction.—*Lucas v. Commonwealth* (Ky.) 456.

§ 1202. In view of Ky. St. § 1627 (Russell's St. § 86), evidence in prosecution for maliciously cutting and stabbing with intent to kill *held* sufficient to authorize double penalty because of former conviction.—*Lucas v. Commonwealth* (Ky.) 456.

XVII. PUNISHMENT AND PREVENTION OF CRIME.

Prisons, see Prisons.

§ 1208. Shannon's Code, § 7206, providing that the jury may assess the punishment of those convicted of felony at imprisonment in the county jail, has no application to cases governed by section 6471, providing that in cases of assaults and attempts to commit felony the jury may assess the punishment at imprisonment in the county jail and a fine.—*Mitchell v. State* (Tenn.) 306.

CROPS.

See Agriculture.

CROSS-APPEAL.

See Appeal and Error, §§ 14, 359.

CROSS-DEMANDS.

See Set-Off and Counterclaim.

CROSS-EXAMINATION.

Of expert witnesses, see Evidence, § 558.

Of witnesses in general, see Witnesses, §§ 286, 287, 330.

CROSSINGS.

Railroad crossings, accidents at, see Railroads, §§ 301-351.

CRUELTY.

Ground for divorce, see Divorce, § 27.

CUMULATIVE EVIDENCE.

Newly discovered cumulative evidence as ground for new trial, see Criminal Law, § 941.

CUMULATIVE REMEDIES.

See Election of Remedies.

CURATORS.

See Guardian and Ward.

CURTESY.

See Dower.

CUSTODY.

Of goods in course of transportation, see Carriers, § 73.

CUSTOMS AND USAGES.

Customary law, see Common Law.

§ 1. "Usage" and "custom" defined and distinguished.—*American Lead Pencil Co. v. Nashville, C. & St. L. Ry.* (Tenn.) 613.

§ 11. A usage cannot be resorted to, to make a contract.—*American Lead Pencil Co. v. Nashville, C. & St. L. Ry.* (Tenn.) 613.

§ 15. Custom or usage will be admitted to explain an uncertainty in a written contract.—*American Lead Pencil Co. v. Nashville, C. & St. L. Ry.* (Tenn.) 613.

§ 17. Custom or usage will not be admitted to vary or contradict a written contract.—*American Lead Pencil Co. v. Nashville, C. & St. L. Ry.* (Tenn.) 613.

§ 18. Proof of a usage *held* not supported by allegations of a complaint.—*American Lead Pencil Co. v. Nashville, C. & St. L. Ry.* (Tenn.) 613.

CUTTING TIMBER.

See Logs and Logging, § 3.

DAMAGES.

Compensation for property taken for public use, see Eminent Domain, §§ 106-141.
Distribution of damages as community property, see Husband and Wife, § 273.
Effect of remedy on right to relief by injunction, see Injunction, § 17.
Release of claim for damages, see Release.

Damages for particular injuries.

See Death, § 99; Fraud, §§ 59, 60.
Breach of covenant, see Covenants, § 130.
Ejection of passenger or intruder from train, see Carriers, § 382.
Injuries from flowage, see Waters and Water Courses, § 178.
Injuries from negligence or default in transmission or delivery of telegraph or telephone message, see Telegraphs and Telephones, § 67.
Injuries from negligent or wrongful use of street, see Municipal Corporations, § 706.
Injuries from public improvements, see Municipal Corporations, §§ 396-404.
Injuries to persons at railroad crossings, see Railroads, § 349.
Loss of or injury to live stock in course of transportation, see Carriers, § 229.
Taking or detention of personal property, see Trover and Conversion, § 46.
Trespass, see Trespass, § 52.
Wrongful attachment, see Attachment, §§ 376, 377.
Wrongful distress, see Landlord and Tenant, § 274.

Recovery in particular actions or proceedings.
See Trespass, § 52; Trover and Conversion, § 46.

III. GROUNDS AND SUBJECTS OF COMPENSATORY DAMAGES.

In actions for fraud, see Fraud, § 60.

(A) Direct or Remote, Contingent, or Prospective, Consequences or Losses.

§ 20. A wrongdoer is liable for all injuries directly resulting from the wrongful act, whether or not they could have been foreseen, if they are the natural consequences of the wrongful act.—*South Side Realty Co. v. St. Louis & S. F. R. Co.* (Mo. App.) 1034.

§ 38. The impairment of ability to perform labor resulting from personal injuries is a proper element of damages.—*McNeill v. City of Cape Girardeau* (Mo. App.) 582.

IV. LIQUIDATED DAMAGES AND PENALTIES.

§ 81. Certain facts held not to have affected a vendor's right to money deposited by the vendee as liquidated damages.—*Atwood v. Fagan* (Tex. Civ. App.) 765.

§ 81. Circumstances under which stipulation for liquidated damages will be regarded as for a penalty, stated.—*Atwood v. Fagan* (Tex. Civ. App.) 765.

§ 81. Provision in a contract for sale of real estate, held one for liquidated damages.—*Atwood v. Fagan* (Tex. Civ. App.) 765.

V. EXEMPLARY DAMAGES.*For particular injuries.*

Injuries at railroad crossing, see Railroads, § 349.
To servant, see Master and Servant, § 282.
Wrongful attachment, see Attachment, § 377.
Wrongful distress, see Landlord and Tenant, § 274.

§ 91. Exemplary damages are recoverable for the unauthorized and malicious use of one's picture.—*Munden v. Harris* (Mo. App.) 1076.

VI. MEASURE OF DAMAGES.

Compensation for appropriation under power of eminent domain, see Eminent Domain, § 141.

For particular injuries.

See Fraud, § 59; Trover and Conversion, § 46.
Injuries from flowage, see Waters and Water Courses, § 178.
Trespass, see Trespass, § 52.

(A) Injuries to the Person.

§ 95. The measure of damages for personal injuries stated.—*Creamer v. Louisville Ry. Co.* (Ky.) 183.

§ 95. Passenger held entitled to recover for injuries such sum as will compensate him for mental and physical suffering and reduction of power to earn money.—*Louisville, H. & St. L. Ry. Co. v. Stillwell* (Ky.) 202.

§ 95. Measure of damages in a personal injury action stated.—*St. Louis, S. F. & T. R. Co. v. Taylor* (Tex. Civ. App.) 819.

VII. INADEQUATE AND EXCESSIVE DAMAGES.*For particular injuries.*

See Death, § 99.

§ 130. An award of \$1,500 damages for personal injuries held not excessive.—*Witty v. Springfield Traction Co.* (Mo. App.) 82.

§ 131. Where plaintiff was confined to his bed about ten months and had pains all the time in his back and one leg, and was compelled to use crutches, a verdict for \$2,000 was not excessive.—*Louisville & N. R. Co. v. McMillen* (Ky.) 185.

§ 132. Where a dentist negligently spilled ammonia in plaintiff's eyes, a verdict of \$750 held not excessive.—*Lemoine v. Sullivan* (Ark.) 946.

§ 132. In an action for injuries to a child by being run over by a street car at a crossing, a verdict allowing plaintiff \$11,000 held not so excessive as to indicate passion or prejudice.—*Louisville Ry. Co. v. Bryant* (Ky.) 182.

§ 132. An award of \$1,999 damages for personal injuries held not excessive.—*Illinois Cent. R. Co. v. Mayes* (Ky.) 436.

§ 132. An award of \$2,600 damages for personal injuries held not to be excessive, but only compensatory.—*Louisville & N. R. Co. v. Roe* (Ky.) 437.

§ 132. Award of \$1,000 damages for injuries to child by being kicked by mule held not so excessive as to warrant Court of Appeals in disturbing it.—*American Engineering & Construction Co. v. Crawford* (Ky.) 448.

§ 132. A verdict in a personal injury action held not excessive.—*Chamlee v. Planters' Hotel Co.* (Mo. App.) 123.

§ 132. A verdict in a personal injury action held excessive.—*Zeiler v. Metropolitan St. Ry. Co.* (Mo. App.) 1067.

VIII. PLEADING, EVIDENCE, AND ASSESSMENT.**(A) Pleading.**

§ 143. The petition in an action for personal injuries must allege the particular consequences of the injuries in order to admit evidence thereof, if such consequences do not naturally and necessarily result from the injuries alleged.—*Dallas Oil & Refining Co. v. Carter* (Tex. Civ. App.) 418.

(B) Evidence.

§ 178. In an action for injuries to a servant, the exclusion of certain testimony *held* not erroneous.—St. Louis, S. F. & T. R. Co. v. Taylor (Tex. Civ. App.) 819.

§ 185. In action for injuries from being kicked by a mule, evidence as to whether subsequent sickness was caused by the injuries *held* to sustain verdict for \$1,000 damages.—American Engineering & Construction Co. v. Crawford (Ky.) 448.

(C) Proceedings for Assessment.

§ 208. The amount to be awarded for physical pain rests within the sound discretion of the jury under proper instructions.—Bowling Green Gaslight Co. v. Dean's Ex'x (Ky.) 1115.

§ 210. An instruction as to damages in an action for personal injuries *held* unobjectionable.—Freeman v. Courtney (Tex. Civ. App.) 260.

§ 216. An instruction as to damages for future pain and suffering *held* proper.—Louisville & N. R. Co. v. Roe (Ky.) 437.

§ 216. It is error to submit the loss of earning capacity as an element of damages where there is no evidence that the person injured was engaged in any business.—McNeill v. City of Cape Girardeau (Mo. App.) 582.

(D) Computation and Amount, Double and Treble Damages, and Remission.

Review of amount of recovery, see Appeal and Error, § 1004.

DANGEROUS WEAPONS.

Carrying weapons, see Weapons.

DAYS.

Exclusion in computation of time, see Time, § 9.

DEADLY WEAPONS.

Carrying weapons, see Weapons.

DEATH.

Of party to action as ground for abatement, see Abatement and Revival, § 54.

Of patient affecting right of surgeon to recover compensation, see Physicians and Surgeons, § 21.

Termination of tenancy at will, see Landlord and Tenant, § 120.

Testimony as to transactions with persons since deceased, see Witnesses, §§ 139-181.

II. ACTIONS FOR CAUSING DEATH.

Election of remedy, see Election of Remedies, § 3.

(A) Right of Action and Defenses.

Judicial notice of laws of other state, see Evidence, § 85.

§ 33. A private corporation *held* included within Rev. St. 1895, art. 3017, cl. 2, authorizing an action for death by wrongful act.—Jacksonville Ice & Electric Co. v. Moses (Tex. Civ. App.) 379.

(C) Parties and Process.

§ 42. In an action for death, there being no personal representative, all the heirs of deceased are properly joined as parties plaintiff under Kirby's Dig. § 6290.—St. Louis, I. M. & S. Ry. Co. v. Watson (Ark.) 949.

(D) Pleading and Evidence.

§ 65. In an action by a widow for the negligent death of her husband, his expectancy may be proved to show the pecuniary loss sustained.—Chambers v. Kupper-Benson Hotel Co. (Mo. App.) 45.

§ 66. In an action by a widow for the negligent death of her husband, his age and health may be proved to show the pecuniary loss sustained.—Chambers v. Kupper-Benson Hotel Co. (Mo. App.) 45.

§ 68. In an action by a widow for the negligent death of her husband, his habits may be proved to show the pecuniary loss sustained.—Chambers v. Kupper-Benson Hotel Co. (Mo. App.) 45.

§ 69. The existence of minor children *held* to constitute an element of damages in an action by a wife for the wrongful killing of her husband.—Brinkman v. Gottenstroeter (Mo. App.) 584.

§ 71. In an action by a widow for the negligent death of her husband, her age, expectancy, and health may be shown as bearing on the pecuniary loss sustained.—Chambers v. Kupper-Benson Hotel Co. (Mo. App.) 45.

(E) Damages, Forfeiture, or Fine.

§ 99. In an action for death, a verdict for \$10,000 *held* not excessive.—Pulaski Gas Light Co. v. McClintock (Ark.) 1189.

§ 99. \$0.750 *held* not an excessive recovery for six days' excruciating pain suffered by a lineman before his death.—Bowling Green Gaslight Co. v. Dean's Ex'x (Ky.) 1115.

(F) Trial, Judgment, and Review.

§ 103. Whether or not one sued for a wrongful death killed in self-defense *held* to be a jury question.—Brinkman v. Gottenstroeter (Mo. App.) 584.

§ 104. An instruction permitting consideration of decedent's health, energy, etc., *held* erroneous in the absence of supporting evidence.—Texas & P. Ry. Co. v. Gullett (Tex. Civ. App.) 262.

§ 104. An instruction permitting consideration of the value of decedent's services to his family, *held* erroneous.—Texas & P. Ry. Co. v. Gullett (Tex. Civ. App.) 262.

§ 104. An instruction that in determining damages caused by negligent death the jury could consider the support of the widow and minor children, *held* erroneous.—Texas & P. Ry. Co. v. Gullett (Tex. Civ. App.) 262.

DE BENE ESSE.

See Depositions.

DEBTOR AND CREDITOR.

See Assignments for Benefit of Creditors; Attachment; Bankruptcy; Compromise and Settlement; Execution; Fraudulent Conveyances; Garnishment; Homestead; Novation; Payment; Release.

Interest on default or delay in payment of obligation, see Interest.

Remedies against sureties, see Principal and Surety, § 133.

Subrogation to rights of creditors, see Subrogation.

DECEDENTS.

Estates, see Descent and Distribution; Executors and Administrators; Wills.

Testimony as to transactions with persons since deceased, see Witnesses, §§ 139-181.

DECEIT.

See Fraud.

DECEPTION.

See Fraud.

DECLARATION.In pleading, see Pleading.
Of trust, see Trusts, § 20.**DECLARATIONS.**

As evidence, see Criminal Law, §§ 415-417, 424; Evidence, §§ 269-274.

DECREE.

Judgments in general, see Judgment.

DEDICATION.**I. NATURE AND REQUISITES.**§ 18. An owner who divides land into lots held to have dedicated an alley for the benefit of the owners of the lots abutting on the alley.—*Reccius v. Weber* (Ky.) 145.§ 44. Evidence held to show that a road was located and dedicated to public use, justifying an injunction of its obstruction as a nuisance.—*State ex rel. Prosecuting Attorney of Saline County v. Busse* (Mo. App.) 680.**DEDUCTIONS.**For insurance premiums in action on policy, see Insurance, § 672.
Of indebtedness from valuation of property for taxation, see Taxation, § 357.**DEEDS.**

Admissibility of record in evidence, see Criminal Law, § 440.

Alteration, see Alteration of Instruments.

Covenants in deeds, see Covenants.

Declarations by grantor as evidence against grantee, or subsequent purchasers, see Evidence, § 230.

Delivery in escrow, see Escrows.

Description of boundaries, see Boundaries.

Parol evidence to explain conditions, see Evidence, § 456.

Parol or extrinsic evidence to construe and apply language of instrument, see Evidence, §§ 448-456.

Validity as to creditors or subsequent purchasers, see Fraudulent Conveyances.

Deeds by or to particular classes of persons.

See Insane Persons, § 61.

Assignees for benefit of creditors, see Assignments for Benefit of Creditors, §§ 12-14.

Married women, see Husband and Wife, § 193.

Mortgagors, see Mortgages, § 280.

Deeds of particular species of, or estates or interest in, property.

Lands held adversely, see Champerty and Maintenance, § 7.

Married women's separate property, see Husband and Wife, § 193.

Mortgaged property, see Mortgages, § 280.

Standing timber, see Logs and Logging, § 3.

Particular classes of deeds.

Of trust, see Assignments for Benefit of Creditors; Trusts, §§ 20-43.

Trust deeds, see Chattel Mortgages; Mortgages.

I. REQUISITES AND VALIDITY.**(A) Nature and Essentials of Conveyances in General.**§ 8. A bare possibility of an interest in land is not a proper subject of grant.—*Humphreys*

County Board of Education v. Baker (Tenn.) 863.

(B) Form and Contents of Instruments.§ 38. Description in deeds held sufficiently clear, with parol evidence identifying the corners called for.—*York v. Hogg* (Ky.) 1125.**(D) Delivery.**

In escrow, see Escrows.

(E) Validity.

Cancellation for invalidity in general, see Cancellation of Instruments, §§ 37-45.

§ 70. A deed to the grantor's son's daughter obtained by his fraud is invalid.—*Rankin v. Rankin* (Tex. Civ. App.) 392.§ 76. In an action against a guardian for an accounting, evidence that when plaintiff's father made a deed to her mother, who afterwards married the guardian, her father was mentally incapable of making a deed, is inadmissible, as the deed could not be collaterally attacked in such proceeding.—*Cooper v. Walker* (Ky.) 171.**III. CONSTRUCTION AND OPERATION.****(A) General Rules of Construction.**

Parol or extrinsic evidence to construe and apply language of instrument, see Evidence, §§ 448-456.

Parol or extrinsic evidence to contradict or vary, see Evidence, § 390.

(B) Property Conveyed.Description of boundaries, see Boundaries, § 3.
Parol evidence to vary description, see Evidence, § 390.**(C) Estates and Interests Created.**§ 120. A deed executed subsequently to a voluntary conveyance cannot defeat it, or convey a greater estate than remains to the grantor.—*Hayes v. Martin* (Ark.) 626.§ 121. A quitclaim deed gives no better title than the grantor had.—*Shelton v. Horrell* (Mo.) 988.§ 127. Words of limitation in conveyance held to create a fee tail which the statutes convert into a fee simple.—*Pelphrey v. Williams* (Ky.) 884.**(E) Conditions and Restrictions.**

Parol evidence to explain conditions, see Evidence, § 456.

§ 144. Apt and appropriate words must be used or the right of re-entry be reserved to create a condition in a deed.—*Harris v. Rather* (Tex. Civ. App.) 754.§ 145. A stipulation in a contract of sale not incorporated in the deed, held a covenant, and not a condition.—*Harris v. Rather* (Tex. Civ. App.) 754.§ 155. A deed restricting use of the land to "manufacturing business" held not to require any particular kind of manufacturing business.—*Green River Chemical Co. v. Board of Trustees of Town of Rockport* (Ky.) 1164.§ 156. Breach of conditions in law may be taken advantage of by the grantor, his heir, or assignee, by entry; but a breach of conditions in deed is available only to the grantor and his heirs.—*Humphreys County Board of Education v. Baker* (Tenn.) 863.§ 160. Facts held insufficient to show an abandonment of certain real property conveyed to school directors for school and church purposes, so as to authorize a reversion.—*Humphreys County Board of Education v. Baker* (Tenn.) 863.

§ 166. A provision in a deed for reversion in case the property should be abandoned for use as a schoolhouse and church *held* a condition in deed available only to the grantor and his heirs, which was waived by a conveyance of the fee to defendant, and, not being a grantable interest, was unenforceable by defendant.—Humphreys County Board of Education v. Baker (Tenn.) 863.

§ 168. The only mode of taking advantage of a breach of a condition in deed is by entry.—Humphreys County Board of Education v. Baker (Tenn.) 863.

IV. PLEADING AND EVIDENCE.

Parol or extrinsic evidence to construe and apply language of instrument, see Evidence, §§ 448-456.

Parol or extrinsic evidence to contradict or vary, see Evidence, § 390.

§ 207. Evidence *held* to show execution of a deed.—Hayes v. Martin (Ark.) 626.

§ 208. Evidence *held* to show delivery of deed.—Hayes v. Martin (Ark.) 626.

DEEDS OF TRUST.

See Trusts, §§ 20-43.

DEFAMATION.

See Libel and Slander.

DEFAULT.

In payment of insurance premium or assessment, see Insurance, §§ 350-367, 751.

In performance of contracts in general, see Contracts, §§ 280-305.

Judgment, see Judgment, §§ 137-139.

DEFEASANCE.

Defeasible fee, see Wills, § 602.

DEFECTS.

In parties, see Parties, § 84.

In performance of contracts in general, see Contracts, § 305.

In record on appeal or writ of error, see Appeal and Error, §§ 639-655.

DEFICIENCY.

On foreclosure of mortgage, see Mortgages, §§ 556-562.

DEFILEMENT.

Of female, see Rape; Seduction.

DEFRAUD.

See Fraud.

DEGREES.

Of crime, see Homicide, §§ 22, 250-254, 307-310.

DELAY.

Hindering and delaying creditors by fraudulent transfers, see Fraudulent Conveyances.

In delivery of goods sold, see Sales, § 176.

In procuring evidence as affecting right to continuance, see Continuance, § 26.

In transmission or delivery of telegraph or telephone messages, see Telegraphs and Telephones, §§ 66, 67.

In transmission or filing of record on appeal or error, see Appeal and Error, § 627.

In transportation or delivery of live stock, see Carriers, §§ 213, 227-230.

Laches, see Equity, §§ 67-71.

DELEGATION.

Of power to make public improvements, see Municipal Corporations, § 284.

DELIBERATION.

Element of murder, see Homicide, §§ 156-158, 232, 286.

DELIVERY.

Of deed, see Deeds, § 208; Escrows.

Of goods by carrier, see Carriers, §§ 79-89.

Of goods by initial to connecting carrier, see Carriers, § 174.

Of goods sold, see Sales, §§ 166-181, 201.

Of live stock by carrier, see Carriers, §§ 205, 213.

Of property pledged, see Pledges, § 11.

Of telegraph or telephone messages, see Telegraphs and Telephones, §§ 66, 67.

DEMISE.

See Landlord and Tenant.

DEMONSTRATIVE EVIDENCE.

See Criminal Law, § 404.

DEMURRER.

See Pleading, §§ 193-217.

Presumption on appeal or writ of error, see Appeal and Error, § 917.

To indictment or information, see Indictment and Information, § 147.

DENIALS.

In pleading, see Pleading, § 127.

DEPOSITARIES.

Deposits incident to particular occupations, see Banks and Banking.

Of deeds delivered as escrow, see Escrows.

DEPOSITIONS.

See Witnesses.

Habeas corpus for discharge of witness refusing to testify, see Habeas Corpus, § 51.

§ 21. Rev. St. 1909, §§ 6356, 6384, 6404, *held* to provide a practice in the nature of the equity bill of discovery, entitling a party to sift the conscience of his adversary.—*Ex parte Brockman* (Mo.) 977.

§ 52. A justice of the peace, notary, or special commissioner, charged with the duty of taking depositions, may not determine the good faith of the action before compelling a witness to testify, or proceeding against him for refusal to answer competent questions.—*Ex parte Brockman* (Mo.) 977.

§ 64. Where a witness had been once sworn in a proceeding to take his deposition, it was not necessary that he should be again sworn before being required to testify before the same officer in the same matter.—*Ex parte Brockman* (Mo.) 977.

§ 71. A witness having refused to testify in proceedings to take his deposition *de bene esse*, under Rev. St. 1909, §§ 6356, 6384, 6404, *held* properly compelled for contempt.—*Ex parte Brockman* (Mo.) 977.

§ 71. In proceedings against a defendant for contempt, and to obtain his discharge by habeas

corpus for refusal to testify before a commissioner, plaintiffs held to have a sufficient interest to authorize them to appear in support of the contempt proceedings.—*Ex parte Brockman* (Mo.) 977.

§ 90. The court held not to have erred in permitting defendant to introduce the answers to certain *ex parte* interrogatories propounded to defendant in a deposition.—*Couturie v. Roensch* (Tex. Civ. App.) 413.

DEPOSITS.

In bank, see Banks and Banking, §§ 148-153.
In bank as property of estate by entirety, see Husband and Wife, § 14.

DEPOTS.

Railroad stations, see Railroads, § 58.

DESCENT AND DISTRIBUTION.

See Dower; Escheat; Executors and Administrators; Wills.

Allowance to surviving wife, husband, or children from estate of decedent, see Executors and Administrators, §§ 173-189.

Devolution of property and interests undisposed of by will, see Wills, § 866.

III. RIGHTS AND LIABILITIES OF HEIRS AND DISTRIBUTES.

Partition among coheirs, see Partition.

(A) Nature and Establishment of Rights in General.

Adverse possession by or against heirs, see Adverse Possession, § 62.

Community and separate property of husband and wife, see Husband and Wife, § 273.

§ 71. Lapse of time and nonclaim by 3 of 11 heirs held to raise no presumption that their shares of land of ancestor were satisfied out of other parts not conveyed by the other heirs.—*Bayle v. Norris* (Tex. Civ. App.) 767.

DESCRIPTION.

Of offense in bail bond, see Bail, § 58.

Of property conveyed, see Boundaries, § 3; Deeds, § 88.

Of property devised or bequeathed, see Wills, §§ 578-588.

Of property in deed, parol evidence to vary, see Evidence, § 890.

Of property mortgaged, see Chattel Mortgages, § 124.

DETAINER.

See Forcible Entry and Detainer.

DETINUE.

Actions for damages only, for injuring, taking, converting, or detaining personalty, see Trespass; Trover and Conversion.

Actions for recovery of personalty founded on right of possession, see Replevin.

DEVICES.

See Wills.

DIES NON JURIDICUS.

See Sunday.

DILIGENCE.

Affecting right to bill of review, see Equity, § 447.

Affecting right to continuance, see Continuance, § 26.

Affecting right to equitable relief in general, see Equity, §§ 67-71.

Affecting right to new trial, see Criminal Law, § 939; New Trial, § 102.

DIMINUTION OF RECORD.

See Appeal and Error, §§ 639-655.

DIRECTING VERDICT.

See Trial, §§ 160-178.

DISABILITIES.

Affecting limitation of actions, see Limitation of Actions, §§ 72-76.

Construction of insurance certificate, see Insurance, § 787.

Of infants, see Infants.

Of insane person, see Insane Persons.

DISBURSEMENTS.

By executor or administrator, see Executors and Administrators, § 111.

Costs in general, see Costs.

DISCHARGE.

Of servant, see Master and Servant, §§ 30-39.

Of surface waters, see Waters and Water Courses, § 119.

From indebtedness, obligation, or liability.

See Bills and Notes, § 527; Compromise and Settlement; Novation; Release.

Sureties on bonds, and undertakings in judicial proceedings, see Bail, § 80.

DISCLOSURE.

By garnishee, see Garnishment, § 146.

DISCONTINUANCE.

Of action, see Dismissal and Nonsuit, §§ 7-42.

DISCOVERED PERIL.

Injury avoidable notwithstanding contributory negligence, see Negligence, § 83; Railroads, §§ 346, 348, 350, 390.

DISCOVERY.

See Depositions.

Of fraud as time of accrual of cause of action for relief, see Limitation of Actions, § 100.

DISCRETION.

Control by mandamus, see Mandamus, §§ 76, 176.

DISCRETION OF COURT.

Admission of opinion evidence, see Evidence, § 498½.

Amendment of pleadings, see Pleading, § 236.

Continuance, see Criminal Law, § 586.

Control of argument and conduct of counsel, see Trial, § 106.

Opening or vacating judgment, see Judgment, § 139.

Reopening case for further evidence, see Trial, § 68.

Review of discretion in civil actions, see Appeal and Error, §§ 959-981.

Review of discretion in criminal prosecutions, see Criminal Law, §§ 1151-1153.

Specific performance of contract, see Specific Performance, § 8.

DISCRIMINATION.

Constitutional requirement of equality and uniformity of taxation, see *Taxation*, § 40.
Special privileges or immunities and class legislation, see *Constitutional Law*, §§ 205-208.

DISEASE.

False charge of contracting venereal disease as cruelty grounds for divorce, see *Divorce*, § 27.

DISJUNCTIVE ALLEGATIONS.

In pleading, see *Pleading*, § 20.

DISMISSAL AND NONSUIT.

Of appeal or writ of error, see *Appeal and Error*, § 790.

I. VOLUNTARY.

§ 7. Under Rev. St. 1909, § 1980, a plaintiff *held* not entitled to nonsuit his case.—Board of Education of City of St. Louis v. United States Fidelity & Guaranty Co. (Mo. App.) 18.

§ 8. Under Sayles' Ann. Civ. St. 1897, art. 1301, plaintiff cannot take a nonsuit after being informed by the trial judge of what his decision will be.—Kidd v. McCracken (Tex. Civ. App.) 839.

§ 42. The allegations of the petition against a street railway company and a railroad company for injuries to a street car passenger in a collision between a car and a train *held* unaffected by the act of plaintiff in dismissing the action as against the railroad company.—Augustus v. Chicago, R. I. & P. Ry. Co. (Mo. App.) 22.

DISORDERLY CONDUCT.

Keeping disorderly house, see *Disorderly House*.

DISORDERLY HOUSE.

Opinion evidence, see *Criminal Law*, § 450.
Revocation of liquor license, see *Intoxicating Liquors*, §§ 106, 108.

§ 4. Essentials of disorderly house, stated.—State ex rel. Smith v. Dykeman (Mo. App.) 120.

§ 16. Evidence *held* admissible for one accused of keeping a disorderly house.—Thompson v. State (Tex. Cr. App.) 350.

DISPARAGEMENT.

Of title or interest by grantors, former owners, or privies as admission, see *Evidence*, § 230.

DISPATCH.

See *Telegraphs and Telephones*.

DISPOSSESSION.

See *Forcible Entry and Detainer*.

DISPUTE.

Amount in dispute as affecting jurisdiction of courts, see *Justices of the Peace*, § 43.

DISQUALIFICATION.

Of jurors, see *Jury*, §§ 39-53.

DISSEISIN.

See *Forcible Entry and Detainer*.

DISSOLUTION.

Of corporation or association, see *Corporations*, § 618.

Of partnership, see *Partnership*, § 825.

DISTRESS.

For rent, see *Landlord and Tenant*, § 274.

DISTRIBUTION.

Of estate of decedent, see *Descent and Distribution*.

Of governmental powers and functions, see *Constitutional Law*, §§ 70-73.

DISTRICT AND PROSECUTING ATTORNEYS.

Necessity and sufficiency of signature to indictment, see *Indictment and Information*, § 33.

DISTRICTS.

Levee districts, see *Levees*, § 5.

School districts, see *Schools and School Districts*, §§ 13-97.

DITCHES.

See *Waters and Water Courses*, §§ 171-179.

DIVORCE.

Separation agreements and separate maintenance, see *Husband and Wife*, § 281.

II. GROUNDS.

§ 27. Falsity of plaintiff's charges in an action for divorce *held* to constitute cruel treatment and indignity.—Wilson v. Wilson (Ark.) 963.

III. DEFENSES.

§ 43. That a wife became insane subsequent to her committing adultery *held* not to preclude the husband from obtaining a divorce.—Thomason v. Thomason (Ky.) 161.

IV. JURISDICTION, PROCEEDINGS, AND RELIEF.**(D) Evidence.**

§ 128. Finding for defendant in an action for divorce, alleging contraction of a venereal disease, *held* supported by a preponderance of the evidence.—Wilson v. Wilson (Ark.) 963.

§ 129. Finding for defendant in an action for divorce, alleging adultery, *held* supported by a preponderance of the evidence.—Wilson v. Wilson (Ark.) 963.

V. ALIMONY, ALLOWANCES, AND DISPOSITION OF PROPERTY.

§ 249. Under Civ. Code Prac. § 425, a husband, obtaining a divorce, *held* entitled to have land conveyed to his wife by reason of the marital relation restored to him.—Thomason v. Thomason (Ky.) 161.

§ 271. In an action to enforce a judgment for alimony, the court properly allowed plaintiff a certain sum out of the proceeds of insurance policies in which defendant had an interest.—Hooge v. Hooge (Ky.) 476.

DOCTORS.

See *Physicians and Surgeons*.

DOCUMENTS.

As evidence, see Criminal Law, §§ 440-445;
Evidence, §§ 359-378.
Best and secondary evidence, see Criminal Law,
§ 398; Evidence, §§ 158-174.
Production at trial, see Evidence, § 364.

DOMESTIC ANIMALS.

See Animals.

DOMICILE.

Of parties to action as determining venue, see
Venue, § 32.

DOWER.

Allowance to surviving wife from estate of hus-
band, see Executors and Administrators, §§
173-189.
Election in lieu of dower as affecting right to
widow's allowance, see Executors and Ad-
ministrators, § 189.
Rights of widow in respect of community prop-
erty, see Husband and Wife, § 273.

**III. RIGHTS AND REMEDIES OF
WIDOW.**

§ 59. A widow cannot be allotted both home-
stead and dower in her husband's estate, but
she may select which she wants.—Middleton v.
Fields (Ky.) 180.

DRAINS.

Private rights as to drainage of surface waters,
see Waters and Water Courses, § 119.

DRAMSHOPS.

See Intoxicating Liquors.

DRUNKARDS.

Duty of carrier to receive intoxicated person
as passenger, see Carriers, § 236.

DUE COURSE OF TRADE.

Transfer of negotiable instruments, see Bills
and Notes, §§ 334, 335.

DUE PROCESS OF LAW.

See Constitutional Law, § 278.

DUES.

Of members of mutual benefit insurance asso-
ciations, see Insurance, § 751.

DUPLICITY.

In indictment or information, see Indictment
and Information, § 125.

DURESS.

Criminal duress, see Threats.

EARNING CAPACITY.

Impairment of, as element of damages, see Dam-
ages, § 38.
Impairment of, evidence, see Damages, § 173.

EASEMENTS.

Public easements.

See Dedication; Highways.
Streets, see Municipal Corporations, §§ 671-
700.

**I. CREATION, EXISTENCE, AND TER-
MINATION.**

§ 18. Grantee of land *held* entitled to con-
tinue the use of passway over grantor's land
after the latter's death, notwithstanding terms
of written contract.—Conley v. Fairchild (Ky.)
142.

§ 18. Grantee of land *held* entitled to pass-
way as appurtenant thereto, whether he had
another outlet or not.—Conley v. Fairchild
(Ky.) 142.

ECCLESIASTICAL CORPORATIONS.

See Religious Societies.

EDUCATION.

See Schools and School Districts.

EJECTION.

Of passengers or intruders from passenger
trains, see Carriers, §§ 353-382.

EJECTMENT.

See Forcible Entry and Detainer, §§ 4-15; Tres-
pass to Try Title.

III. PLEADING AND EVIDENCE.

§ 93. Evidence *held* to sustain a judgment for
the plaintiff.—Childers v. Belcher (Ky.) 1129.

**IV. TRIAL, JUDGMENT, ENFORCE-
MENT OF JUDGMENT, AND
REVIEW.**

§ 123. Where a plaintiff recovered a part of
the land, taxing all the costs to defendant *held*
proper.—Childers v. Belcher (Ky.) 1129.

ELECTION.

Between counts in indictment or information,
see Indictment and Information, § 132.
Between homestead and dower, see Dower, §
59.

ELECTION OF REMEDIES.

§ 3. Alternative remedies of an administra-
trix for injuries resulting in decedent's death,
stated.—Bowling Green Gaslight Co. v. Dean's
Ex'r (Ky.) 1115.

§ 7. Persons advancing money to telephone
company to construct line *held* not to have
waived other remedies by suing for damages
for failure of the company to keep lines in
repair.—Eastern Kentucky Telephone & Tele-
graph Co. v. Hardwick (Ky.) 140.

ELECTIONS.

Defamation of candidate for office, see Libel
and Slander, § 48.
For adoption of local option law, see Intoxi-
cating Liquors, §§ 33-37.
For amendment of city charter, see Municipal
Corporations, § 46.

**II. ORDERING OR CALLING ELEC-
TION, AND NOTICE.**

Local option election, see Intoxicating Liquors,
§ 33.

VIII. CONDUCT OF ELECTION.

Local option election, see Intoxicating Liquors,
§ 34.

§ 219. A ballot of a voter who votes on the
table in the election booth without being sworn
is properly rejected.—Hill v. Mottley (Ky.) 469.

§ 220. A ballot of an elector marked by an election officer without compliance with Ky. St. § 1475 (Russell's St. § 4034), *held* properly rejected.—Hill v. Mottley (Ky.) 469.

IX. COUNT OF VOTES, RETURNS, AND CANVASS.

Amendment of city charter, see Municipal Corporations, § 46.

X. CONTESTS.

Local option election, see Intoxicating Liquors, § 37.

§ 269. The right to contest an election is not a natural right, but exists, if at all, in the Constitution or statutes.—Bradbury v. Wightman (Mo.) 511.

§ 275. Rev. St. 1899, § 7056 (Ann. St. 1906, p. 3424 [Rev. St. 1909, § 5951]), enacted pursuant to Const. 1875, art. 8, § 9 (Ann. St. 1906, p. 255), *held* not to confer on the Supreme Court jurisdiction of contests of election of Railroad and Warehouse Commissioner.—Bradbury v. Wightman (Mo.) 511.

§ 295. Evidence of fraud and bribery sufficient to set aside an election stated.—Hill v. Mottley (Ky.) 469.

§ 295. Fraud and bribery at an election *held* required to be proved by direct evidence or circumstances from which the inference of fraud or bribery naturally follows.—Hill v. Mottley (Ky.) 469.

§ 299. An examination of the ballots by the court in an election contest *held* proper to determine the number of ballots cast in violation of a statute.—Hill v. Mottley (Ky.) 469.

§ 304. An election contest is a proceeding in rem, and a judgment therein is binding and conclusive on all the world.—Bickers v. Lacy (Tex. Civ. App.) 763.

ELECTRICITY.

Electric railroads, see Street Railroads.
Instructions giving undue prominence to particular matters in action for injuries, see Trial, § 244.

Instructions on weight of evidence in action for injuries, see Trial, § 194.

Liability for injuries to third persons caused by negligence of servant, see Master and Servant, § 304.

Liability for wrongful death, see Death, § 33.

Power of fiscal court to make appropriations for county offices, see Counties, § 113.

Risks assumed by servant, see Master and Servant, § 224.

Telegraph and telephone lines, see Telegraphs and Telephones.

§ 9. An operator of an electric light plant has no natural right to encroach on the streets with its wires.—Jacksonville Ice & Electric Co. v. Moses (Tex. Civ. App.) 379.

§ 13. One acquiring the right to maintain electric wires across public highways must use proper care in the construction of its lines and in keeping the same in condition.—Jacksonville Ice & Electric Co. v. Moses (Tex. Civ. App.) 379.

§ 13. One maintaining electric light wires across a public road without having obtained authority for that purpose *held* to maintain a nuisance so as to be absolutely responsible for injuries received.—Jacksonville Ice & Electric Co. v. Moses (Tex. Civ. App.) 379.

§ 14. An electric light company *held* bound to use the highest practicable care and skill to insulate its wires at a place where a lineman of

another company was required to work.—Bowling Green Gaslight Co. v. Dean's Ex'r (Ky.) 1115.

§ 14. Care required in operating an electric light plant and maintaining over public highways wires carrying electricity sufficient to destroy life stated.—Jacksonville Ice & Electric Co. v. Moses (Tex. Civ. App.) 379.

§ 16. An electric company *held* liable for the death of employé of a telephone company by an electric shock.—Angela's Adm'r v. East Tennessee Telephone Co. (Ky.) 1119.

§ 16. An operator of an electric light plant *held* required to guard against ordinary and usual conditions.—Jacksonville Ice & Electric Co. v. Moses (Tex. Civ. App.) 379.

§ 18. A lineman could assume that an electric light company had performed its duty in insulating a wire at the place where he was required to work as an employé of another company.—Bowling Green Gaslight Co. v. Dean's Ex'r (Ky.) 1115.

§ 18. A lineman *held* not to have assumed the risk of being injured by an uninsulated wire.—Bowling Green Gaslight Co. v. Dean's Ex'r (Ky.) 1115.

§ 18. A lineman of an electric company owes no duty to inspect or examine wires of another company near which he is required to work.—Bowling Green Gaslight Co. v. Dean's Ex'r (Ky.) 1115.

§ 18. In an action for death by electric shock, evidence *held* not to show decedent's contributory negligence.—Jacksonville Ice & Electric Co. v. Moses (Tex. Civ. App.) 379.

§ 19. An instruction *held* not erroneous as absolutely requiring an electric light company to keep its wires free from danger.—Bowling Green Gaslight Co. v. Dean's Ex'r (Ky.) 1115.

§ 19. Evidence *held* to show that a lineman injured by contact with an uninsulated wire was not guilty of contributory negligence.—Bowling Green Gaslight Co. v. Dean's Ex'r (Ky.) 1115.

§ 19. Whether injury to a telegraph lineman caused by coming in contact with a light wire was caused by his own or the light company's negligence *held* under the evidence for the jury.—Bowling Green Gaslight Co. v. Dean's Ex'r (Ky.) 1115.

§ 19. In an action against an electric light company for death by electric shock, evidence of the condition of the insulation of the wires at or near the place of the accident as observed by a witness a few days after the accident *held* admissible.—Jacksonville Ice & Electric Co. v. Moses (Tex. Civ. App.) 379.

§ 19. In an action against an electric light company for death by electric shock received from a broken wire, a charge as to the duty of inspection *held* proper under the evidence.—Jacksonville Ice & Electric Co. v. Moses (Tex. Civ. App.) 379.

§ 19. In an action for death by electric shock, an instruction *held* to properly submit the issue whether defendant exercised reasonable care to guard against ordinary and usual conditions.—Jacksonville Ice & Electric Co. v. Moses (Tex. Civ. App.) 379.

ELEVATORS.

As fixtures, see Fixtures, §§ 7, 27, 33.

Injuries to passengers, see Carriers, § 247.

Liability of master for injuries to servant, admissibility of evidence, see Master and Servant, § 273; risks assumed by servant, see Master and Servant, § 217; variance between pleading and proof, see Master and Servant, § 264.

ELIGIBILITY.

Of jurors, see Jury, §§ 39-53.

EMBANKMENTS.

See Levees.

EMBEZZLEMENT.

See False Pretenses; Larceny.

Civil liability for conversion, see Trover and Conversion.

EMINENT DOMAIN.

Dedication of property to public use, see Dedication.

Public improvements by municipalities, see Municipal Corporations, §§ 347-547.

I. NATURE, EXTENT, AND DELEGATION OF POWER.

§ 20. Under Laws 1905, pp. 408, 409, §§ 1-5, short line road constructed principally in developing and operating coal mines held a public carrier, for which land could be acquired by the right of eminent domain.—Ozark Coal Co. v. Pennsylvania Anthracite R. Co. (Ark.) 634.

§ 61. The right of eminent domain cannot be delegated or exercised for the purpose of acquiring property for private use.—Ozark Coal Co. v. Pennsylvania Anthracite R. Co. (Ark.) 634.

§ 66. Whether a particular use for which private property is to be taken under legislative sanction is a public one is a judicial question.—Ozark Coal Co. v. Pennsylvania Anthracite R. Co. (Ark.) 634.

II. COMPENSATION.**(B) Taking or Injuring Property as Ground for Compensation.**

§ 106. An abutter has a right of action for interference with his ingress and egress caused by a railroad company's noncompliance with an ordinance or maintenance of a nuisance in using a street.—Chesapeake & O. Ry. Co. v. Stein (Ky.) 1169.

(C) Measure and Amount.

§ 141. An abutter's measure of damage on use of a street for railroad purposes, stated.—Chesapeake & O. Ry. Co. v. Stein (Ky.) 1169.

§ 141. An abutter's measure of damage caused by railroad improvements in a street, stated.—Chesapeake & O. Ry. Co. v. Stein (Ky.) 1169.

IV. REMEDIES OF OWNERS OF PROPERTY.

§ 266. An abutter held to have successive causes of action against a railway company for its failure to plank and pave a street.—Chesapeake & O. Ry. Co. v. Stein (Ky.) 1169.

§ 300. Evidence held to show that an abutter's ingress and egress were obstructed by defendant railway company's failure to plank and pave a street as required by ordinance.—Chesapeake & O. Ry. Co. v. Stein (Ky.) 1169.

EMPLOYÉS.

See Master and Servant.

EMPLOYMENT.

Of broker, see Brokers, §§ 8-11, 40.

ENACTMENT.

Of municipal ordinances or by-laws, see Municipal Corporations, § 108.

Of statutes, see Statutes, § 5.

ENCROACHMENT.

By judiciary on Legislature, see Constitutional Law, § 70.

ENDOWMENT.

See Dower.

ENTICEMENT.

See Kidnapping.

ENTIRETY, ESTATE BY.

See Husband and Wife, § 14.

ENTRY.

On land, by force, see Forcible Entry and Detainer.

Re-entry by landlord, see Landlord and Tenant, §§ 288-291.

ENTRY, WRIT OF.

Actions for damages for wrongful entry upon or injury to real property, see Trespass.

Actions for forcible entry and detainer, see Forcible Entry and Detainer, §§ 4-15.

Actions for recovery of possession of real property, and damages for detention thereof, see Ejectment; Trespass to Try Title.

EQUALITY.

Constitutional requirement as to equality and uniformity of taxation, see Taxation, § 40.

EQUIPMENT.

Of county buildings, see Counties, § 113.

EQUITABLE ESTATES.

See Mortgages; Trusts.

EQUITABLE ESTOPPEL

See Estoppel, §§ 56-117.

EQUITABLE LIENS.

Enforcement against property in hands of receiver, see Receivers, § 77.

EQUITABLE MORTGAGES.

See Chattel Mortgages, § 33; Mortgages, § 27.

EQUITY.

Equitable estates, see Mortgages; Trusts.
Equitable estoppel, see Estoppel, §§ 56-117.
Equitable lien, enforcement against receiver, see Receivers, § 77.

Equitable mortgages, see Mortgages, § 27.
Necessity of motion for new trial for purpose of review, see Appeal and Error, § 283.
Transfer of equity of redemption by mortgagor, see Mortgages, § 280.

Particular subjects of equitable jurisdiction and equitable remedies.

See Cancellation of Instruments; Fraudulent Conveyances, § 249; Injunction; Nuisance, §§ 23-36; Quieting Title; Receivers; Specific Performance; Subrogation; Trusts.

For compensation of attorney, see Attorney and Client, § 158.

Relief from judgment, see Judgment, § 445.

Review on appeal.

Scope and extent of review in equitable actions, see Appeal and Error, § 1009.

I. JURISDICTION, PRINCIPLES, AND MAXIMS.

(A) Nature, Grounds, Subjects, and Extent of Jurisdiction in General.

Grounds for injunction, see Injunction, § 17.

§ 3. Equity jurisdiction depends upon existence of equitable interests and inadequacy of legal remedies.—*Engel v. Powell* (Mo. App.) 74.§ 6. Equity relieves against mistake of one or both parties to a written agreement, which would defeat the real agreement.—*Engel v. Powell* (Mo. App.) 74.§ 32. Defendant in a suit by vendor for rescission held not entitled to urge insufficiency of petition.—*Campbell v. Kerrick* (Ky.) 186.

(B) Remedy at Law and Multiplicity of Suits.

Remedy at law as bar to injunction, see Injunction, § 17.

Review of decisions, see Appeal and Error, § 184.

II. LACHES AND STALE DEMANDS.

In suit to confirm or try tax title, see Taxation, § 805.

In suit to set aside transfer in fraud of creditors or subsequent purchasers, see Fraudulent Conveyances, § 249.

§ 67. "Laches" defined.—*Walther v. Null* (Mo.) 993.§ 71. Laches is measurable by conduct of the parties and equities, rather than by limitations.—*Shelton v. Horrell* (Mo.) 988.**III. PARTIES AND PROCESS.**

In suit to enforce specific performance, see Specific Performance, § 106.

IV. PLEADING.

In suit to cancel written instrument, see Cancellation of Instruments, §§ 37-45.

In suit to quiet title, see Quieting Title, § 34.

(A) Original Bill.

In suits to quiet title, see Quieting Title, § 34.

V. EVIDENCE.*In particular proceedings.*

For divorce, see Divorce, §§ 128, 129.

To cancel written instrument, see Cancellation of Instruments, § 45.

To enforce specific performance, see Specific Performance, § 119.

VIII. HEARING, SUBMISSION OF ISSUES TO JURY, AND REHEARING.§ 377. In equity, it is within the chancellor's discretion to direct jury trial of an issue of fact.—*Walton Brick Co. v. Anderson Foundry & Machine Works* (Ky.) 136.§ 381. A verdict on a legal issue is conclusive, unless set aside as against the evidence.—*Walton Brick Co. v. Anderson Foundry & Machine Works* (Ky.) 136.§ 381. A verdict on an equitable issue is advisory, and not conclusive.—*Walton Brick Co. v. Anderson Foundry & Machine Works* (Ky.) 136.**IX. MASTERS AND COMMISSIONERS, AND PROCEEDINGS BEFORE THEM.**

Review of questions of fact, see Appeal and Error, § 1022.

XI. BILL OF REVIEW.§ 447. Review for newly discovered evidence asked for seven years after discovery held properly refused.—*Jackson v. Becktold Printing & Book Mfg. Co.* (Ark.) 629.§ 447. One held not entitled to review of a decree for new evidence which with reasonable diligence could have been discovered before rendition of the decree.—*Jackson v. Becktold Printing & Book Mfg. Co.* (Ark.) 629.**ERROR, WRIT OF.**

See Appeal and Error.

ESCHEAT.

Constitutional provisions affecting vested rights to property, see Constitutional Law, § 93; impairing obligations of contract, see Constitutional Law, § 126.

Limitation of action for escheat, see Limitation of Actions, § 19.

Self-executing constitutional provisions, see Constitutional Law, § 32.

§ 3. Under Const. § 192, real estate of a banking corporation held subject to escheat.—*Louisville Banking Co. v. Commonwealth* (Ky.) 1142.§ 3. Under Const. § 192, property of a defunct corporation may not be escheated.—*Louisville Banking Co. v. Commonwealth* (Ky.) 1142.§ 6. In an action against a corporation to escheat its real estate, a stockholder held not entitled to intervene to defend in his own behalf.—*Louisville Banking Co. v. Commonwealth* (Ky.) 1142.§ 6. A right of action to escheat property given by Const. art. 192, held in the state, and it may adopt Ky. St. § 2971 (*Russell's St. § 850*).—*Louisville Banking Co. v. Commonwealth* (Ky.) 1142.**ESCROWS.**§ 10. Where a deed has been delivered in escrow subject to a condition which has been fulfilled, a court of chancery has jurisdiction to compel delivery to the person entitled to its possession.—*Tombler v. Sumpter* (Ark.) 967.**ESTABLISHMENT.**

Of boundaries, see Boundaries, §§ 37-48.

Of heirship or right to share in distribution of intestate's estate, see Descent and Distribution, § 71.

Of railroad stations, see Railroads, § 58.

Of right of exemption, see Homestead, § 193.

Of schools, see Schools and School Districts, § 13.

ESTATES.

Bankrupts' estates, see Bankruptcy.

Conveyances to husband and wife, see Husband and Wife, § 14.

Created by deed, see Deeds, §§ 120-127.

Created by will, see Wills, §§ 602-619.

Decedents' estates, see Descent and Distribution; Executors and Administrators; Wills.

Estate by entirety, see Husband and Wife, § 14.

Particular estates.

See Dower; Homestead; Remainders.

Estates for years, see Landlord and Tenant.

Joint tenancy, see Joint Tenancy.

Tenancy in common, see Tenancy in Common.

ESTATES TAIL.

Creation by deed, see Deeds, § 127.

ESTOPPEL.

See Election of Remedies.

I. BY RECORD.

By judgment, see Judgment, §§ 619, 713-743.

III. EQUITABLE ESTOPPEL.

As to boundaries, see Boundaries, § 47.

Of particular classes of persons, or persons in particular relations.

See Corporations, § 388.

To assert or deny particular facts, rights, claims, or liabilities.

Authority of officers and agents of corporations in general, see Corporations, § 425.

Contest of local option election, see Intoxicating Liquors, § 37.

Corporate existence, see Corporations, § 34.

Corporate powers, see Corporations, § 388.

Grounds for avoidance or forfeiture of insurance policy, see Insurance, §§ 375, 376.

To deny insurance agency, see Insurance, § 77.

Validity of assignment, see Assignments, § 68.

Validity of certificate of corporate stock, see Corporations, § 104.

Validity of insurance policy, see Insurance, §§ 375, 376.

To maintain or oppose particular remedies or defenses.

Appeal or other proceeding for review, see Appeal and Error, §§ 882, 883; Criminal Law, § 1137.

Objections to evidence, see Trial, § 105.

(A) Nature and Essentials in General.

§ 56. Plaintiff held not to have changed his position by reason of taking certain personal property, and was therefore not entitled to claim that defendant was estopped to deny that the firm, and not an individual partner, owned the property.—*Ricketson v. Best* (Tex. Civ. App.) 353.

(B) Grounds of Estoppel.

Estoppel as to boundaries, see Boundaries, § 47.

§ 78. A party to a written contract cannot execute his part and then claim rights in opposition to the contract in the absence of fraud, accident or mistake.—*City of Newport v. Schoolfield* (Ky.) 508.

(E) Pleading, Evidence, Trial, and Review.

§ 117. In support of an alleged plea of estoppel to deny that personal property sold by a firm to plaintiff in payment of a debt belonged to the firm, evidence should have been restricted to what preceded the alleged sale to plaintiff.—*Ricketson v. Best* (Tex. Civ. App.) 353.

EVIDENCE.

See Depositions; Witnesses.

Absence of evidence, ground for continuance, see Continuance, §§ 23-26; Criminal Law, §§ 594, 595.

Applicability of instructions to evidence, see Criminal Law, § 814; Trial, § 252.

Comments by counsel on evidence or failure to produce evidence or call witness, see Trial, § 121.

Comments of counsel on matters not sustained by evidence, see Criminal Law, § 719.

Exceptions to evidence, see Trial, § 105.

Instructions as to rules of evidence, see Criminal Law, §§ 781-786; Trial, §§ 203-208, 234-237.

Instructions ignoring, see Trial, § 253.

Instructions on evidence or witnesses as invasion of province of jury, see Trial, §§ 191-194.

Motion to strike out evidence, see Trial, § 89.

Newly discovered evidence ground for new trial, see Criminal Law, §§ 938-942; New Trial, §§ 102-108.

Objections to evidence, see Criminal Law, § 695. Questions of fact for jury, see Criminal Law, § 741; Trial, §§ 139-143.

Reception at new trial, see Appeal and Error, § 1214.

Reception at trial, see Criminal Law, §§ 671-673; Trial, §§ 55-105.

Verdict or findings contrary to evidence ground for new trial, see New Trial, § 72.

As to particular facts or issues.

See Adverse Possession, §§ 57, 114; Alteration of Instruments, §§ 27-29; Boundaries, § 37; Dedication, § 44; Deeds, §§ 207, 208; Usury, § 113.

Adultery, as ground for divorce, see Divorce, § 129.

Agency, see Brokers, § 8; Principal and Agent, § 22.

Assumption of risk by servant injured, see Master and Servant, § 273.

Authority of attorney, see Attorney and Client, §§ 70-72.

Authority of corporate officer or agent, see Corporations, § 432.

Bar of statute of limitations, see Limitation of Actions, § 197.

Capacity of minor to commit burglary, see Infants, § 66.

Consideration of bill or note, see Bills and Notes, § 518.

Contributory negligence, see Negligence, § 122.

Creation, existence, and validity of trust, see Trusts, §§ 43, 88.

Damages, see Damages, §§ 173-185.

Delivery and acceptance of goods sold, see Sales, § 181.

Delivery of deed, see Deeds, § 208.

Estoppel, see Estoppel, § 117.

Execution of deed, see Deeds, § 207.

Fraud, see Fraud, §§ 50-52.

Good faith of purchaser of bill or note and payment of value, see Bills and Notes, § 525.

Impairment of earning capacity, see Damages, § 173.

Incompetency of fellow servant, see Master and Servant, § 279.

Loss of or injury to goods in course of transportation, see Carriers, §§ 182-184, 185.

Married woman's separate property, see Husband and Wife, § 133.

Negligence of fellow servant, see Master and Servant, § 279.

Negligence of master causing injury to servant, see Master and Servant, §§ 270, 278.

Payment, see Payment, § 74.

Payment of bill or note, see Bills and Notes, §§ 499, 527.

Personal injuries and physical suffering, see Damages, § 185.

Validity of contract of sale, see Sales, § 52.

In actions by or against particular classes of persons.

See Brokers, §§ 38, 84, 85; Carriers, §§ 132-134, 185, 228, 316-318, 344; Master and Servant, §§ 265-279; Municipal Corporations, §§ 818-822; Partnership, § 121; Railroads, §§ 346-348; Street Railroads, § 112.

Assignees, see Assignments, § 137.

Stockholders, see Corporations, § 121.

Trustees in bankruptcy, see Bankruptcy, § 303.

In particular civil actions or proceedings.

See Habeas Corpus, § 85; Replevin, § 72; Torts, § 27; Trespass, § 46; Trespass to Try Title, § 41; Work and Labor, § 28.

Accounting by guardian, see Guardian and Ward, § 157.

By owner of property taken for public use, see Eminent Domain, § 300.

Election contests, see Elections, § 295.

For breach of contract, see Contracts, §§ 350-353.

For breach of contract of sale, see Sales, § 382.

For breach of warranty of goods sold, see Sales, § 441.

For causing death, see Death, §§ 65-71.
 For compensation of broker, see Brokers, §§ 84, 85.
 For delay in transportation or delivery of live stock, see Carriers, § 228.
 For divorce, see Divorce, §§ 128, 129.
 For fraud, see Fraud, §§ 50-52.
 For injuries at railroad crossings, see Railroads, §§ 346-348.
 For injuries caused by electricity, see Electricity, § 19.
 For injuries from defects or obstructions in streets, see Municipal Corporations, §§ 818-822.
 For injuries from delay in delivery of telegram, see Telegraphs and Telephones, § 66.
 For injuries from flowage, see Waters and Water Courses, § 179.
 For injuries from negligence, see Negligence, §§ 121, 122.
 For injuries from public improvements, see Municipal Corporations, § 404.
 For injuries to passengers, see Carriers, §§ 316-318, 344.
 For injuries to persons on or near street railroad tracks, see Street Railroads, § 112.
 For injuries to servants, see Master and Servant, §§ 265-279.
 For libel or slander, see Libel and Slander, §§ 104-112.
 For loss of or injuries to goods in course of transportation, see Carriers, §§ 132-134, 185.
 For loss of or injury to live stock in course of transportation, see Carriers, § 228.
 For malicious prosecution, see Malicious Prosecution, § 60.
 For price of timber, see Logs and Logging, § 3.
 For price paid for land, see Vendor and Purchaser, § 341.
 For unpaid taxes, see Taxation, § 593.
 For wrongful sequestration, see Sequestration, § 21.
 On assigned claims, see Assignments, § 137.
 On bills or notes, see Bills and Notes, §§ 499-527.
 On bond of administrator, see Executors and Administrators, § 537.
 On claim against estate of decedent, see Executors and Administrators, § 221.
 Relating to usury, see Usury, § 113.
 To abate or restrain nuisance, see Nuisance, § 33.
 To cancel written instrument, see Cancellation of Instruments, § 45.
 To determine and establish rights under mortgage, see Mortgages, § 186.
 To enforce specific performance, see Specific Performance, § 119.
 To enjoin use of trade-name, see Trade-Marks and Trade-Names, § 93.
 To establish and determine heirship, see Decedent and Distribution, § 71.
 To establish boundaries, see Boundaries, § 37.
 To recover possession of demised premises, see Landlord and Tenant, § 291.
 To recover price paid for corporate stock, see Corporations, § 121.

In criminal prosecutions.

See Bigamy, § 8; Burglary, §§ 36-41; Criminal Law, §§ 304-508; Disorderly House, § 16; Gaming, § 98; Homicide, §§ 156-257; Larceny, §§ 58-60; Rape, §§ 36-52; Seduction, §§ 44-46.
 Application for new trial, see Criminal Law, §§ 956-958.
 Capacity of minor to commit burglary, see Infants, § 66.
 For practicing medicine without license, see Physicians and Surgeons, § 6.
 For violations of liquor laws, see Intoxicating Liquors, §§ 224-230.

Review and procedure thereon in appellate courts.

Matters considered in determining questions, see Appeal and Error, § 837.

Review of rulings as dependent on prejudicial nature of error, see Appeal and Error, §§ 1047-1058.
 Review of rulings as dependent on presentation of evidence in record, see Appeal and Error, §§ 691, 692.
 Review of rulings as dependent on presentation of objection in lower court, see Appeal and Error, §§ 205, 206; Criminal Law, § 1036.
 Review of sufficiency of evidence, see Appeal and Error, §§ 989-1022; Criminal Law, § 1159.

I. JUDICIAL NOTICE.

In criminal prosecutions, see Criminal Law, § 304.

§ 18. The courts will not take judicial notice of the methods of ascertaining the present net value of a life insurance policy.—Leeker v. Prudential Ins. Co. of America (Mo. App.) 670.

§ 20. The court will take judicial notice that wholesale dealers ordinarily make sales to their customers in the state by sending travelling salesmen to their customers' places of business.—State v. Racine Sattley Co. (Tex. Civ. App.) 400.

§ 22. Courts cannot take judicial notice of the fact that on a designated date a street railway company was the owner of a line on a street in the city of St. Louis, or was operating a car on that line.—Reisenleiter v. United Rys. Co. of St. Louis (Mo. App.) 11.

§ 23. The Supreme Court will take judicial notice that a county has other sources of revenue than its general tax levy.—Fussell v. Mallory (Ark.) 631.

§ 23. Judicial notice cannot be taken that in 1895 more than half the public domain had been exhausted for the benefit of others than the public free school fund.—State v. Powell (Tex. Civ. App.) 746.

§ 35. The Missouri courts held not entitled to take judicial notice of the law of master and servant of Illinois.—Ginnocchio v. Illinois Cent. R. Co. (Mo. App.) 129.

§ 41. Statement of what the court will take judicial notice.—Lindsey v. Bloodworth (Ark.) 950.

§ 41. The Court of Criminal Appeals will take judicial notice that in a large part of Texas the district courts convene only twice a year, and that in many of the counties they remain in session for periods of time ranging from one to four or five weeks.—Ex parte Loper (Tex. Cr. App.) 345.

§ 43. The court cannot take judicial notice of the record in another case.—Taylor v. Shelton (Tex. Civ. App.) 302.

II. PRESUMPTIONS.

On appeal or writ of error, see Appeal and Error, §§ 907-931.
 To aid construction of statute, see Statutes, § 212.

As to particular facts or issues.

See Alteration of Instruments, § 27.
 Authority of attorney to appear, see Attorney and Client, § 70.
 Continuance of ownership of property, see Property, § 9.
 Jurisdiction of courts, see Judgment, § 495.
 Loss of or injury to goods in course of transportation, see Carriers, § 132.

In particular civil actions or proceedings.

Continuance of ownership of property, see Property, § 9.
 For injuries from negligence, see Negligence, §§ 121, 122.
 For injuries to passengers, see Carriers, § 316.

For injuries to persons on or near street railroad tracks, see *Street Railroads*, § 112.
 For loss of or injury to goods in course of transportation, see *Carriers*, § 132.
 Presumptions as to fraud, see *Fraud*, § 50.
 To establish and determine heirship, see *Descent and Distribution*, § 71.

§ 78. An attorney of a party *held* authorized to talk to the witnesses of the adverse party so long as he does not act corruptly.—*Hill v. Mottley* (Ky.) 460.

§ 80. The presumption is that the law of a foreign state is identical with the law of Missouri except as to statute.—*Ginnocchio v. Illinois Cent. R. Co.* (Mo. App.) 129.

III. BURDEN OF PROOF.

As to particular facts or issues.

Compensation of broker, see *Brokers*, § 84.
 Contributory negligence of passenger, see *Carriers*, § 344.
 Payment of bill or note, see *Bills and Notes*, § 499.
 Usury in note, see *Usury*, § 113.

In particular civil actions or proceedings.

See *Cancellation of Instruments*, § 45.
Accounting by guardian, see *Guardian and Ward*, § 157.
 For injuries at railroad crossings, see *Railroads*, § 346.
 For injuries from negligence, see *Negligence*, §§ 121, 122.
 For injuries to passengers, see *Carriers*, §§ 316, 344.
 For injuries to servants, see *Master and Servant*, § 265.
 For loss of or injury to goods shipped, see *Carriers*, § 185.
 For loss of or injury to live stock shipped, see *Carriers*, § 228.
 On bills or notes, see *Bills and Notes*, § 499.
 To enforce specific performance, see *Specific Performance*, § 119.

§ 94. A defective plea of non est factum, not objected to, merely shifts the burden of proof to the defendant.—*Standard Underground Cable Co. v. Southern Independent Telephone Co.* (Tex. Civ. App.) 429.

IV. RELEVANCY, MATERIALITY, AND COMPETENCY IN GENERAL.

(A) *Facts in Issue and Relevant to Issues.*
 In criminal prosecutions, see *Criminal Law*, § 364.

(B) *Res Gestæ.*

In criminal prosecutions, see *Criminal Law*, § 364.

§ 123. A statement by a night watchman of a livery stable made the next morning concerning an accident to a horse during the night was not a part of the *res gestæ*.—*Caldwell v. Nichol* (Ark.) 622.

§ 123. Certain evidence as to statements by a station agent that he had been robbed *held* admissible as *res gestæ*.—*Missouri, K. & T. Ry. Co. of Texas v. Groseclose* (Tex. Civ. App.) 736.

(C) *Similar Facts and Transactions.*

§ 139. Plaintiffs *held* properly denied the right to give evidence as to their customs in dealing with agents other than defendant.—*Couturie v. Roensch* (Tex. Civ. App.) 413.

(E) *Competency.*

Of contradictory testimony of witness, see *Witnesses*, § 406.
 Of impeaching evidence, see *Witnesses*, § 392.

Rebuttal of evidence of adverse party as to transactions with person since deceased or incompetent, see *Witnesses*, § 177.

V. BEST AND SECONDARY EVIDENCE.

In criminal prosecutions, see *Criminal Law*, § 398.

§ 158. Where, in replevin, plaintiff claimed title through a firm, parol evidence as to what property had been delivered by W. to one of the members of the firm, independent of the execution of a bill of sale, *held* admissible.—*Ricketson v. Best* (Tex. Civ. App.) 353.

§ 165. Oral evidence of the contents of a bill of sale is inadmissible in the absence of a proper predicate.—*Ricketson v. Best* (Tex. Civ. App.) 353.

§ 168. A witness, who was the addressee of a letter, *held* not entitled to testify as to its contents without some evidence excusing its nonproduction.—*Ricketson v. Best* (Tex. Civ. App.) 353.

§ 174. Bills copied from books of account *held* inadmissible to show the purchase of certain goods.—*Doherty v. Doherty* (Mo. App.) 1112.

VI. DEMONSTRATIVE EVIDENCE.

In criminal prosecutions, see *Criminal Law*, § 404.

VII. ADMISSIONS.

(A) *Nature, Form, and Incidents in General.*

§ 205. A telephone conversation in which defendant's cashier promised plaintiff bank to return its check for the proceeds of a collection from a bank that had failed after paying a check drawn on it by worthless drafts *held* admissible as an admission against interest.—*First Nat. Bank v. First Nat. Bank* (Tex. Civ. App.) 831.

§ 208. In an action for personal injury, *held* not improper to admit in evidence defendant's abandoned answer.—*Lantry-Sharpe Contracting Co. v. McCracken* (Tex. Civ. App.) 363.

§ 213. One suing for a deficit in the acreage of land could not show that defendants' grantor offered to settle if defendants would release him, but that defendants refused to do so unless reimbursed for legal expense.—*Engel v. Powell* (Mo. App.) 74.

§ 213. Declaration that evidence tending to show an offer to compromise is not offered for that purpose does not make the evidence competent.—*Engel v. Powell* (Mo. App.) 74.

(C) *By Grantors, Former Owners, or Privies.*

§ 230. Admissibility of declarations by a grantor stated.—*Rankin v. Rankin* (Tex. Civ. App.) 392.

(D) *By Agents or Other Representatives.*

§ 242. Evidence of a statement concerning an injury to a horse by a night watchman of a livery stable *held* not within the scope of his agency so as to bind the livery stable keeper as an admission of his agent.—*Caldwell v. Nichol* (Ark.) 622.

§ 243. An agent's declarations concerning a matter within the scope of his agency are admissible only when made at the time of the transaction.—*Roberts v. Wabash R. Co.* (Mo. App.) 89.

§ 244. On suit against a railway company for an assault by its operator, it was improper to permit plaintiff to show a subsequent declaration by the general passenger agent tending to

show the operator's quarrelsomeness.—*Roberts v. Wabash R. Co.* (Mo. App.) 89.

§ 248. Admissibility of one's declarations affecting property held by his wife, stated.—*Rankin v. Rankin* (Tex. Civ. App.) 392.

§ 253. In an action for damages from an alleged conspiracy, evidence of the declaration of the president of a corporation *held* not binding on the individual defendants unless they consented to it or aided in the matter.—*Louisville Gas Co. v. Kentucky Heating Co.* (Ky.) 206.

(E) Proof and Effect.

§ 258. The testimony of persons in charge of stockyards *held* inadmissible as against a carrier in the absence of evidence that they were its agents.—*Baltimore & O. S. W. R. Co. v. Clift* (Ky.) 917.

§ 265. In a pleading of a party introduced in evidence, admissions of the pleader and allegations adverse to his opponent are not of equal probative force.—*Chamlee v. Planters' Hotel Co.* (Mo. App.) 123.

VIII. DECLARATIONS.

By agent as to his authority, see Principal and Agent, § 22.

(A) Nature, Form, and Incidents in General.

§ 269. In an action for damages for conspiracy, statements made by the acting president of defendant gas company two years after the acts complained of *held* admissible to show motive.—*Louisville Gas Co. v. Kentucky Heating Co.* (Ky.) 206.

§ 271. Certain evidence *held* properly excluded as self-serving declarations.—*Kidd v. McCracken* (Tex. Civ. App.) 839.

§ 273. Evidence as to the nature of the ownership of defendant's grantor in trespass to try title *held* not objectionable as hearsay; it being impossible to secure better evidence on the subject in view of the long lapse of time since the declarations were made.—*Conroy v. Sharman* (Tex. Civ. App.) 244.

§ 274. On an issue as to the location of a boundary, evidence of declarations as to the removal of the line by the common source of title *held* admissible.—*Caruthers v. Hadley* (Tex. Civ. App.) 757.

IX. HEARSAY.

§ 317. A witness may not testify to what other witnesses stated in their depositions or on the witness stand on a former trial except for impeachment purposes.—*Louisville Gas Co. v. Kentucky Heating Co.* (Ky.) 206.

§ 317. Evidence *held* properly excluded as hearsay.—*Missouri, K. & T. Ry. Co. of Texas v. Groseclose* (Tex. Civ. App.) 736.

§ 318. Against a stranger, a receipt is incompetent evidence of the payment acknowledged therein.—*Doherty v. Doherty* (Mo. App.) 1112.

X. DOCUMENTARY EVIDENCE.

Depositions, see Depositions, § 90.

In criminal prosecutions, see Criminal Law, §§ 440-445.

(C) Private Writings and Publications.

§ 359. Photographs *held* admissible in evidence.—*Bowling Green Gaslight Co. v. Dean's Ex'x* (Ky.) 1115.

§ 364. A mortality table *held* properly admitted, as bearing on the life expectancy of one suing for a personal injury.—*St. Louis, S. F. & T. R. Co. v. Taylor* (Tex. Civ. App.) 819.

(D) Production, Authentication, and Effect.

§ 376. Books of account showing purchase of goods *held* competent evidence to prove the purchase, as a part of *res gestæ*.—*Doherty v. Doherty* (Mo. App.) 1112.

XI. PAROL OR EXTRINSIC EVIDENCE AFFECTING WRITINGS.

To establish trust, see Trusts, §§ 43, 88.

(A) Contradicting, Varying, or Adding to Terms of Written Instrument.

§ 387. In an action to enforce an agreement with a county through its county or fiscal court, parol evidence *held* not admissible to show the agreement.—*Montgomery County v. Taylor* (Ky.) 894.

§ 390. A deed cannot be collaterally attacked by the parties to it by evidence showing an intent different from that which its language unmistakably expresses.—*Davis v. George* (Tex.) 326.

§ 390. In an action for trespass to try title to certain land, parol evidence *held* inadmissible to vary a deed.—*Davis v. George* (Tex.) 326.

§ 397. Where contracts are certain they cannot be explained by parol testimony in the absence of fraud or mistake.—*Sackett v. Maggard* (Ky.) 888.

§ 400. A written contract giving an option to purchase cannot be shown by parol to have been intended as a bond for title.—*Cornett v. Burchfield* (Ky.) 466.

§ 419. Parol evidence *held* admissible to show that a grantee agreed to assume a mortgage debt as a part of the price paid by him.—*Frase v. Lee* (Mo. App.) 10.

§ 423. Facts varying the terms of a note *held* not a defense to an action on it.—*First Nat. Bank v. Asel* (Mo. App.) 110, 111.

§ 425. Rule as to parol evidence as applied to deeds, stated.—*Davis v. George* (Tex.) 320.

(C) Separate or Subsequent Oral Agreement.

§ 441. In an action on a fire policy evidence *held* admissible of conversations between insured and the agent showing an agreement by which the inventory and iron-safe clauses should not bind insured.—*Shook v. Retail Hardware Mut. Fire Ins. Co. of Minnesota* (Mo. App.) 589.

§ 441. In an action on notes given pursuant to a written contract, a defense setting up matters in contradiction of the written contract *held* insufficient.—*Bucklew v. Pyron* (Mo. App.) 1064.

§ 442. A written order for goods *held* not a formal contract, precluding oral testimony.—*Boulware v. Victor Automobile Mfg. Co.* (Mo. App.) 7.

§ 442. If a written contract shows upon its face that it includes the entire agreement, parol testimony is inadmissible to prove an obligation not therein expressed.—*Boulware v. Victor Automobile Mfg. Co.* (Mo. App.) 7.

§ 442. Where a written contract purports to cover the entire transaction, prior and contemporaneous parol negotiations *held* merged therein.—*Banks v. Chicago, B. & Q. R. Co.* (Mo. App.) 1071.

(D) Construction or Application of Language or Written Instrument.

§ 448. A card sent by seller to buyer acknowledging receipt of an order *held* not subject to explanation by parol.—*Courtney Shoe Co. v. E. W. Curd & Son* (Ky.) 146.

§ 448. Intention of parties to a deed can be shown by extraneous evidence only when the

deed is ambiguous.—Green River Chemical Co. v. Board of Trustees of Town of Rockport (Ky.) 1164.

§ 450. A shipping contract construed, and held to enable the shipper to fill the car with other horses at a designated city.—Banks v. Chicago, B. & Q. R. Co. (Mo. App.) 1071.

§ 450. Terms of a note held sufficiently ambiguous to warrant parol proof of a contract that the note should not bear interest.—Couturie v. Roensch (Tex. Civ. App.) 413.

§ 451. A patent ambiguity in a contract cannot be aided by parol evidence, and where the written instrument does not evidence a contract without the aid of parol evidence, it cannot be enforced.—State v. Racine Sattley Co. (Tex. Civ. App.) 400.

§ 456. Parol evidence held inadmissible to show the meaning of "manufacturing business" in a deed.—Green River Chemical Co. v. Board of Trustees of Town of Rockport (Ky.) 1164.

XII. OPINION EVIDENCE.

In criminal prosecutions, see Criminal Law, §§ 448-485.

(A) Conclusions and Opinions of Witnesses in General.

§ 471. Where one testified that the sudden start of a car "jerked me from the car into the gutter," it was not a conclusion, but a statement of a fact.—Musick v. United Rys. Co. of St. Louis (Mo. App.) 31.

§ 471. A witness having shown knowledge as to one's mental condition may state that condition as a fact.—Rankin v. Rankin (Tex. Civ. App.) 392.

§ 471. A nonexpert witness in a contractor's suit for compensation may not give his opinion as to the character of the work done on defendant's building.—Taub v. Woodruff (Tex. Civ. App.) 750.

§ 471. Evidence of the manager of a drawee bank that checks presented by a collecting agent would not have been paid in cash if cash had been demanded held not objectionable as an opinion.—First Nat. Bank v. First Nat. Bank (Tex. Civ. App.) 831.

§ 472. A company sued on an oral contract for driving its logs held not entitled to show what its manager understood the contract to be.—Jones Lumber Co. v. Howard (Ky.) 133.

§ 473. In an action for the burning of plaintiff's barn, evidence of witnesses who had examined the burned area that they concluded that the fire burned from defendant's railroad toward plaintiff's barn held admissible.—Houston & T. C. R. Co. v. Ellis (Tex. Civ. App.) 246.

§ 474. In an action by the purchaser of corporate stock against a stockholder and director to recover the price on the ground of misrepresentations, certain evidence as to value held inadmissible.—Long v. Douthitt (Ky.) 453.

§ 474. A witness held competent to testify as to the value of land.—Boyce v. Gingrich (Mo. App.) 79.

§ 474. On an issue of undue influence over decedent inducing a deed, opinions as to her mental condition and as to whether she was easily influenced held properly admitted.—Rankin v. Rankin (Tex. Civ. App.) 392.

§ 478. Opinions of nonexpert witnesses held competent to prove mental capacity or incapacity.—Pulaski County v. Hill (Ark.) 973.

§ 493. A mother, who has raised several children and has had experience with burns, may express an opinion that the scar appears

to have been caused by a burn.—Jerome v. United Rys. Co. of St. Louis (Mo. App.) 107.

§ 498½. The admission of the testimony of a witness as to the value of property rests largely in the discretion of the court, and an appellate court will not interfere therewith unless the discretion has been abused.—Boyce v. Gingrich (Mo. App.) 79.

(B) Subjects of Expert Testimony.

In criminal prosecutions, see Criminal Law, §§ 474-485.

§ 506. Testimony of a physician held admissible, as against the objection that it was an invasion of the province of the jury.—Jerome v. United Rys. Co. of St. Louis (Mo. App.) 107.

§ 528. A physician may give the probable results of a described injury.—Witty v. Springfield Traction Co. (Mo. App.) 82; Jerome v. United Rys. Co. of St. Louis (Mo. App.) 107.

§ 528. An attending physician, who has examined a wound, can express an opinion whether or not it resulted from a burn or a cut of a knife.—Jerome v. United Rys. Co. of St. Louis (Mo. App.) 107.

(C) Competency of Experts.

§ 544. One having experience as a shipper of horses may testify as to the effect of keeping a horse on a train for 57 hours, tied so that it could not eat or lie down.—McKinstry v. Chicago, R. I. & P. Ry. Co. (Mo. App.) 1061.

(D) Examination of Experts.

In criminal prosecutions, see Criminal Law, § 485.

§ 548. A hypothetical question to a physician testifying as an expert in a personal injury case held proper.—Witty v. Springfield Traction Co. (Mo. App.) 82.

§ 550. Where plaintiff had testified as to her fall from a seat in a street car and the resultant injuries, a foundation was laid for expert testimony.—Witty v. Springfield Traction Co. (Mo. App.) 82.

§ 558. A street railway company, sued for personal injury, held entitled to make a stated showing to rebut any inference that a testifying medical expert favored it.—Metropolitan St. Ry. Co. v. Houghton (Tex. Civ. App.) 422.

§ 560. To contradict a medical expert, it was permissible to show that he occupied a position as medical expert for a mining company.—Witty v. Springfield Traction Co. (Mo. App.) 82.

XIV. WEIGHT AND SUFFICIENCY.

Credibility, impeachment, contradiction, and corroboration of witnesses, see Witnesses, §§ 330-336.

Instructions as to weight and sufficiency, see Trial, § 237.

Of newly discovered evidence, as affecting right to new trial, see New Trial, § 108.

Questions for jury, see Trial, §§ 139-143.

Review as dependent on presentation of question in lower court, see Appeal and Error, § 213.

Scope and extent of review, see Appeal and Error, §§ 989-1022.

Verdict contrary to evidence, ground for new trial, see New Trial, § 72.

Waiver and correction of errors in rulings as to weight and sufficiency, see Trial, § 418.

As to particular facts or issues.

See Adverse Possession, § 114; Alteration of Instruments, § 29; Boundaries, § 37; Dedication, § 44; Deeds, §§ 207, 208.

Adultery as ground for divorce, see Divorce, § 129.

Agency, see Brokers, § 8.
 Bar of statute of limitations, see Limitation of Actions, § 197.
 Compensation for property taken for public use, see Eminent Domain, § 300.
 Consideration of bill or note, see Bills and Notes, § 518.
 Damages, see Damages, § 185.
 Delivery of deed, see Deeds, § 208.
 Execution of deed, see Deeds, § 207.
 Good faith of purchaser of bill or note and payment of value, see Bills and Notes, § 525.
 Incompetency of fellow servant, see Master and Servant, § 279.
 Loss of or injury to goods in course of transportation, see Carriers, § 184.
 Negligence of fellow servant, see Master and Servant, § 279.
 Negligence of master causing injury to servants, see Master and Servant, § 278.
 Payment, see Payment, § 74.
 Payment of bill or note, see Bills and Notes, § 527.
 Personal injuries and physical suffering, see Damages, § 185.

In particular civil actions or proceedings.

See Ejectment, § 93; Replevin, § 72; Trespass, § 46; Trespass to Try Title, § 41; Work and Labor, § 28.
 Accounting by guardian, see Guardian and Ward, § 157.
 By or against trustees in bankruptcy, see Bankruptcy, § 303.
 By owner of property taken for public use, see Eminent Domain, § 300.
 Election contests, see Elections, § 295.
 For breach of contract, see Contracts, § 350.
 For breach of warranty of goods sold, see Sales, § 441.
 For delay in transportation or delivery of live stock, see Carriers, § 228.
 For divorce, see Divorce, §§ 128, 129.
 For injuries at railroad crossings, see Railroads, § 348.
 For injuries from fowage, see Waters and Water Courses, § 179.
 For injuries to passengers, see Carriers, § 318.
 For injuries to servants, see Master and Servant, §§ 276-279.
 For loss of or injury to goods in course of transportation, see Carriers, § 134.
 For loss of or injuries to live stock shipped, see Carriers, § 228.
 Negligence or misconduct of broker, see Brokers, § 38.
 On assigned claims, see Assignments, § 137.
 On bills or notes, see Bills and Notes, §§ 517-527.
 On bond of administrator, see Executors and Administrators, § 537.
 On claim against estate of decedent, see Executors and Administrators, § 221.
 On insurance policies, see Insurance, § 665.
 To establish boundaries, see Boundaries, § 37.
 To recover price paid for corporate stock, see Corporations, § 121.

§ 588. Testimony of witnesses held not as a matter of law contradictory to physical facts.—*Zeiler v. Metropolitan St. Ry. Co.* (Mo. App.) 1067.

§ 594. The testimony of a party is not necessarily binding, though it is not expressly contradicted.—*Thos. Goggan & Bros. v. Synnott* (Tex. Civ. App.) 1184.

EXAMINATION.

Of election ballots on contests, see Elections, § 299.
 Of witnesses in general, see Depositions, § 64; Witnesses, §§ 286, 287.
 Of expert witnesses, see Criminal Law, § 485; Evidence, §§ 548-560.

EXCEPTIONS.

In judicial proceedings.

Bill of exceptions in general, see Exceptions, Bill of.
 Necessity and sufficiency for purpose of review in civil cases, see Appeal and Error, § 274.
 Necessity and sufficiency for purpose of review in criminal cases, see Criminal Law, § 1055.
 To arguments and conduct of counsel, see Criminal Law, § 728.
 To evidence, see Trial, § 105.
 To pleadings, review of decisions, see Appeal and Error, § 1040.
 To rulings as to venue, see Venue, § 32.

EXCEPTIONS, BILL OF.

In criminal cases, see Criminal Law, §§ 1090-1094.
 Necessity for purpose of review, see Appeal and Error, § 549.
 Taking exceptions at trial, see Trial, § 105.

I. NATURE, FORM, AND CONTENTS IN GENERAL.

§ 6. The court held entitled to incorporate in a bill of exceptions settled after the term a stipulation as to the amount of the verdict.—*Louisville & N. R. Co. v. Sewell* (Ky.) 162.

§ 27. A bill of exceptions stating that testimony was objected to "because" of certain facts held no evidence of their existence.—*Rankin v. Rankin* (Tex. Civ. App.) 392.

II. SETTLEMENT, SIGNING, AND FILING.

In criminal cases, see Criminal Law, § 1092.

EXCESSIVE DAMAGES.

See Damages, §§ 130-132.
 For causing death, see Death, § 99.

EXCISE.

Regulation of traffic in intoxicating liquors, see Intoxicating Liquors.

EXCLUSIVE PRIVILEGES.

Constitutional prohibition of grant of special privileges or immunities, see Constitutional Law, § 205.

EXCUSABLE HOMICIDE.

See Homicide, §§ 244, 300.

EXECUTION.

See Attachment; Garnishment; Judicial Sales.
 Exemptions, see Homestead.
 In suit to foreclose mortgage, see Mortgages, § 562.
 Of contracts, see Contracts, § 33.
 Of trust by trustee or by court, see Trusts, § 283.
 Of will, see Wills, § 75.

V. STAY, QUASHING, VACATING, AND RELIEF AGAINST EXECUTION.

§ 163. On motion to quash an execution, finding that the creditor had agreed to assume the claim involved held against the weight of the evidence.—*Castle v. Terry* (Mo. App.) 78.

§ 163. Where, pending a suit to subject a husband's alleged interest in land to plaintiff's judgment, plaintiff caused the husband's interests to be advertised for sale on execution, it was not error to refuse to dissolve the execu-

tion on motion.—*Skinner v. D. Sullivan & Co.* (Tex. Civ. App.) 426.

VII. SALE.

(A) **Manner, Conduct, Validity, and Confirming or Vacating.**

§ 258. To make an execution sale immune from collateral attack, there must be a valid judgment and execution.—*Bailey v. Block* (Tex.) 323.

(B) **Title and Rights of Purchaser.**

§ 269. Where a husband purchased a moiety of certain land partly with his wife's money, the wife was entitled as against the husband's creditors to an undivided interest in proportion to the amount of consideration she contributed.—*Skinner v. D. Sullivan & Co.* (Tex. Civ. App.) 426.

EXECUTORS AND ADMINISTRATORS.

See Descent and Distribution; Wills.

Competency of executor as trustee, see Trusts, § 163.

Competency of witnesses as to transactions with decedent, see Witnesses, § 140.

Extent and execution of testamentary powers, see Powers, § 33.

Taxation of decedent's estate under ancillary administration, see Taxation, §§ 90, 357.

Testamentary trustees, see Trusts.

Testimony as to transactions with persons subsequently deceased, see Witnesses, §§ 139-181.

I. ADMINISTRATION IN GENERAL.

Competency of independent executor, as witness, see Witnesses, § 139.

§ 7. The rule of caveat emptor applies to a purchaser from an independent executor as well as from an ordinary executor.—*Roberts v. Holland* (Tex. Civ. App.) 810.

II. APPOINTMENT, QUALIFICATION, AND TENURE.

Resignation of independent executor to qualify as witness, see Witnesses, § 139.

§ 22. Under the statute, an administrator presenting a claim against his decedent's estate *held* not to thereby forfeit his office.—*Goodman v. Griffith* (Mo. App.) 1051.

III. ASSETS, APPRAISAL, AND INVENTORY.

Right to proceeds of life or accident insurance policy payable to insured, his representatives or estate, see Insurance, § 583.

IV. COLLECTION AND MANAGEMENT OF ESTATE.

Extent and execution of testamentary powers, see Powers, § 33.

(A) **In General.**

§ 111. An attorney employed by an administrator *held* not to forfeit his right to compensation merely because he represented the administrator and his wife in presenting a claim against decedent's estate.—*Goodman v. Griffith* (Mo. App.) 1051.

V. ALLOWANCES TO SURVIVING WIFE, HUSBAND, OR CHILDREN.

§ 173. Bounties allowed the widow out of the estate of her husband by Rev. St. 1909, §§ 114, 115, 116, 117, *held* not a part of the widow's dower.—*Martin v. Jones* (Mo. App.) 1097.

§ 181. A widow under Rev. St. 1899, §§ 105, 107 (Ann. St. 1906, pp. 372., 373), *held* enti-

tled to receive from a pension, given by the United States government on death of her husband, a railway postal clerk, killed while on duty, \$400 and the reasonable funeral expenses of decedent actually paid by her.—*Wolfe v. Wolfe* (Mo. App.) 33.

§ 189. Where a widow, after renouncing under her husband's will, elected, in accordance with Rev. St. 1909, § 353, to take under Rev. St. 1909, § 351, she was entitled to the bounty provided for in Rev. St. 1909, §§ 116, 117.—*Martin v. Jones* (Mo. App.) 1097.

VI. ALLOWANCE AND PAYMENT OF CLAIMS.

(A) **Liabilities of Estate.**

§ 206. Requisites to entitle one to recover for services which he was morally bound to render, stated.—*Sutherland v. Sutherland's Ex'rs* (Ky.) 1152.

§ 221. Evidence *held* insufficient to show that board, nursing, etc., were furnished by a daughter-in-law under expectation of compensation.—*Sutherland v. Sutherland's Ex'rs* (Ky.) 1152.

(B) **Presentation and Allowance.**

§ 224. A holder of a note executed by a decedent to a third person and purchased by the holder after decedent's death *held* required to probate the note as a claim against decedent's estate.—*Watkins v. Parker* (Ark.) 1187.

§ 225. Demands against decedents, not exhibited within the statutory period, *held* barred.—*Watkins v. Parker* (Ark.) 1187.

§ 231. Under Act May 28, 1907 (Laws 1907, pp. 1170, 1171), a claim against the estate of a deceased person, not duly authenticated and filed within one year, is barred, though the will directed all just debts to be paid.—*Kaufman Bros. v. Redwine* (Ark.) 1193.

§ 238. Rev. St. 1909, § 220, *held* not to oust equity of its jurisdiction to set aside a judgment allowing demand against estate on the ground of fraud.—*Walther v. Null* (Mo.) 993.

§ 241. A judgment of the probate court allowing a claim against a decedent's estate *held* conclusive, except as against a direct attack by bill in equity or by a proceeding under Rev. St. 1909, § 220.—*Walther v. Null* (Mo.) 993.

(D) **Priorities and Payment.**

§ 269. The court *held* required to prevent vexatious litigation involving decedents' estates.—*Petry v. Petry* (Ky.) 922.

§ 283. The validity of a judgment of the probate court allowing a claim and assigning it to a class cannot be questioned in the circuit court on appeal from a denial of an order to pay the demand.—*Dooley v. Ryan's Estate* (Mo. App.) 30.

§ 283. The validity of the judgment allowing and classifying a demand *held* not in issue either in the probate court or in the circuit court on appeal.—*Dooley v. Ryan's Estate* (Mo. App.) 30.

VII. DISTRIBUTION OF ESTATE.

Partition of property of estate, see Partition.

VIII. SALES AND CONVEYANCES UNDER ORDER OF COURT.

(A) **When Authorized.**

§ 327. Where a will directs the sale of land, equity will direct a sale, if the administrator with the will annexed would not have such power.—*Durham's Adm'r v. Clay* (Ky.) 153.

(C) **Sale.**

Limitations applicable to action to recover land sold, see Limitation of Actions, § 19.

X. ACTIONS.

Survival of actions by or against decedents, see Abatement and Revival, § 54.

§ 434. A claim against a decedent barred by the statute of nonclaim cannot be set off to an action by the administrator for a debt due his intestate.—*Watkins v. Parker* (Ark.) 1187.

§ 434. Under Kirby's Dig. § 6102, a defendant *held* not entitled to set off a note given by plaintiff's intestate to a third person and purchased by defendant after intestate's death.—*Watkins v. Parker* (Ark.) 1187.

XI. ACCOUNTING AND SETTLEMENT.**(A) Duty to Account.**

§ 460. The right to call an executor or administrator to account extends to any person in interest in the estate.—*Goodman v. Griffith* (Mo. App.) 1051.

(B) Proceedings for Accounting.

§§ 473, 474. An exception to the report of a referee allowing a note against an estate on the ground that the note was procured by undue influence raises a common-law issue triable by jury.—*Barton v. Barton's Adm'r* (Ky.) 902.

§§ 473, 474. On the trial of exceptions to the report of a commissioner, allowing a note against an estate, whether claimant procured the note from decedent by undue influence *held* for the jury.—*Barton v. Barton's Adm'r* (Ky.) 902.

(D) Compensation.

§ 500. An administrator presenting a claim against his decedent's estate *held* not thereby deprived of his right to compensation.—*Goodman v. Griffith* (Mo. App.) 1051.

(E) Stating, Settling, Opening, and Review.

§ 504. An objection to the final settlement of the accounts of an administrator *held* not properly entertained by the court, but the remedy is by proceedings under Rev. St. 1890, §§ 74-78 (Ann. St. 1906, pp. 362-364), now Rev. St. 1909, §§ 70-74, or by a resistance to settlement of the accounts of the administrator.—*Goodman v. Griffith* (Mo. App.) 1051.

§ 509. Mere illegal allowances or omissions of proper debts do not justify the setting aside of a final settlement of an executor or administrator.—*Goodman v. Griffith* (Mo. App.) 1051.

§ 513. Settlements by administrators are conclusive unless appealed from.—*Floyd v. Newton* (Ark.) 934.

§ 513. A final settlement of an administration has the force of a final judgment, and cannot be attacked collaterally, but can only be reached under charges of fraud by a direct proceeding.—*Goodman v. Griffith* (Mo. App.) 1051.

§ 513. The right to directly attack for fraud a final settlement of administration extends to any person in interest in the estate.—*Goodman v. Griffith* (Mo. App.) 1051.

§ 515. A settlement of an estate by the heirs, *held* binding on them.—*Petry v. Petry* (Ky.) 922.

XIII. LIABILITIES ON ADMINISTRATION BONDS.

§ 537. A complaint in a suit on an administration bond *held* insufficient.—*Floyd v. Newton* (Ark.) 934.

§ 537. In an action on administratrix's bond, evidence *held* insufficient to show any fraud, accident, or mistake in the settlement.—*Floyd v. Newton* (Ark.) 934.

EXECUTORY CONTRACTS.

In general, see Contracts.

Assignment, see Assignments, § 19.

EXEMPLARY DAMAGES.

See Damages, § 91.

For wrongful distress, see Landlord and Tenant, § 274.

EXEMPTIONS.

See Homestead.

Allowance to surviving wife, husband, or children from estate of decedent, see Executors and Administrators, §§ 173-189.

From liability for loss of or injury to goods, see Carriers, §§ 159, 180.

From liability for loss of or injury to live stock, see Carriers, § 218.

EX PARTE PROCEEDINGS.

Habeas corpus, see Habeas Corpus.

EXPECTANCY.

Of life, evidence, see Death, § 71.

EXPENDITURES.

By executor or administrator, see Executors and Administrators, § 111.

EXPENSES.

Family expenses, liabilities of husband or wife, see Husband and Wife, § 19.

EXPERT TESTIMONY.

See Criminal Law, §§ 474-485; Evidence, §§ 506-528, 544, 548-560.

EXPRESS TRUSTS.

See Trusts, §§ 20-43.

EXPROPRIATION.

See Eminent Domain.

EXTENSION.

Of time for payment of insurance premium or assessment, see Insurance, § 358.

Of time for presentation, allowance, and filing of bills of exceptions, see Criminal Law, § 1002.

Of time for presentation of claims against estate of decedent, see Executors and Administrators, § 225.

EXTORTION.

See Threats.

EXTRA WORK.

Compensation for alterations and extra work by party to contract, see Contracts, § 232.

EXTRINSIC EVIDENCE.

In general, see Evidence, §§ 387-456.

FACT.

Evidence of matters of fact or conclusions, see Evidence, § 471.

Findings of fact, see Trial, §§ 394-403.

Judicial notice of facts, see Evidence, §§ 18-43.

Questions of law and fact, province of court and jury, see Criminal Law, § 741; Trial, §§ 139-143.

FACTORIZING PROCESS.

See Garnishment.

FACTORS.

See Brokers.

Enforcement of lien against bankrupt's estate, see Bankruptcy, § 214.

§ 1. An agent employed by bankrupts to purchase cotton for them with his own funds on a salary, *held* a factor.—*Couturie v. Roensch* (Tex. Civ. App.) 413.

§ 45. A factor purchasing cotton for bankrupts with his own funds, *held* entitled to interest on the amount advanced.—*Couturie v. Roensch* (Tex. Civ. App.) 413.

§ 47. A factor's possession of goods on which he has made advances, is his own, for the purpose of sustaining a lien as against the principal.—*Couturie v. Roensch* (Tex. Civ. App.) 413.

§ 47. An agent employed by bankrupts to purchase cotton for them with his own funds on a salary *held* a factor having a common-law lien on the bankrupts' goods for a general balance on account.—*Couturie v. Roensch* (Tex. Civ. App.) 413.

FALSE IMPRISONMENT.

See Kidnapping; Malicious Prosecution.

I. CIVIL LIABILITY.

(A) Acts Constituting False Imprisonment and Liability Therefor.

§ 7. Plaintiffs' arrest at night by members of the state militia in active service *held* unjustifiable, rendering the soldiers liable for damages for false imprisonment.—*Franks v. Smith* (Ky.) 484.

FALSE PRETENSES.

§ 31. An information charging that prosecuting witness was "induced" by false pretenses to pay defendant a certain sum *held* insufficient.—*State v. Johnston* (Mo. App.) 38.

FALSE REPRESENTATIONS.

See False Pretenses; Fraud.

Affecting validity of deed, see Deeds, § 70.

Affecting validity of sale, see Sales, § 38.

FALSIFYING.

Accounts of executors and administrators, see Executors and Administrators, § 509.

FAMILY.

See Husband and Wife; Parent and Child.

Homestead, see Homestead.

Services rendered between persons in family relation, see Executors and Administrators, § 206.

FAMILY EXPENSES.

Liabilities of husband and wife, see Husband and Wife, § 19.

FATHER.

See Parent and Child.

FAULT.

See Negligence.

FEDERAL COURTS.

See Courts, § 363.

Leave of court to sue receiver appointed by federal court, see Receivers, § 174.

FEEES.

Of attorneys, see Attorney and Client, §§ 153-190.

Of tax collectors, see Taxation, § 549.

FELLOW SERVANTS.

See Master and Servant, §§ 185-201, 216, 279, 294.

FEME COVERT.

See Husband and Wife.

FIDEI COMMISSUM.

See Trusts.

FIDUCIARY RELATIONS.

See Brokers; Factors; Guardian and Ward; Partnership; Principal and Agent; Trusts.

FIERI FACIAS.

See Execution.

FILING.

Claim or statement of mechanic's lien, see Mechanics' Liens, § 132.

Record on appeal or writ of error, see Appeal and Error, § 627.

FINAL ACCOUNTS.

Of executors and administrators, see Executors and Administrators, §§ 460-515.

FINAL JUDGMENT.

Rendering final judgment on appeal or other proceeding for review, see Appeal and Error, § 1175.

FINDINGS.

By court in general, see Trial, §§ 394-403.

Contrary to law or evidence, ground for new trial, see New Trial, § 72.

In proceedings to revoke liquor licenses, see Intoxicating Liquors, § 108.

On appeal or error, see Appeal and Error, § 1122.

Review in appellate court, see Appeal and Error, §§ 931, 1008-1010, 1071, 1159.

FIREARMS.

See Weapons.

FIRE INSURANCE.

See Insurance.

FIRES.

Civil liability for injuries from fires caused by operation of railroad, see Railroads, § 485.

FISCAL MANAGEMENT.

Of counties, see Counties, §§ 152-191.

Of municipal corporations, see Municipal Corporations, §§ 886-907.

Of school districts, see Schools and School Districts, § 97.

FIXTURES.

§ 7. A dummy elevator and sludge table which could be removed from a mining plant without injury to the real estate were trade fixtures.—*Weeks-Betts Hardware Co. v. Roosevelt Lead & Zinc Co.* (Mo. App.) 35.

§ 15. A holder of a mining lease at the end of his term has the right to remove a mining plant and machinery erected by him to mine, clean, and prepare ore for market, and the plant and machinery are personal property.—*Weeks-Betts Hardware Co. v. Roosevelt Lead & Zinc Co.* (Mo. App.) 35.

§ 27. Covenants restricting a tenant's ordinary right to remove trade fixtures are always strictly construed.—*Weeks-Betts Hardware Co. v. Roosevelt Lead & Zinc Co.* (Mo. App.) 35.

§ 27. Provision in lease of mining plant and machinery as to ownership of improvements and repairs held not to apply to dummy elevator and sludge table installed by lessee.—*Weeks-Betts Hardware Co. v. Roosevelt Lead & Zinc Co.* (Mo. App.) 35.

§ 33. Lessor of mining plant and machinery claiming to own dummy elevator and sludge table installed by lessee held not entitled to assert that a mortgagee thereof forfeited its right to the property by not removing it within a reasonable time.—*Weeks-Betts Hardware Co. v. Roosevelt Lead & Zinc Co.* (Mo. App.) 35.

FLAGMEN.

At railroad crossing, see Carriers, § 284.

FLOATAGE.

Of rafts or logs, see Logs and Logging, § 15.

FLOWAGE.

See Waters and Water Courses, §§ 171-179.

FORCED SALE.

See Judicial Sales.

FORCIBLE DEFILEMENT.

See Rape.

FORCIBLE ENTRY AND DETAINER.

Actions for unlawful detainer of demised premises, see Landlord and Tenant, §§ 288-291. Trespass, see Trespass.

I. CIVIL LIABILITY.

§ 4. Certain acts of a lessor and her agents held not to be forcible entry and detainer, under Rev. St. 1909, § 7656, but at most a mere trespass.—*Kimble v. McDermott* (Mo. App.) 1029.

§ 15. Unlawful detainer, being a possessory action, lies only against one in actual possession.—*Forder v. Handlan* (Mo. App.) 1110.

FORECLOSURE.

Of mortgage, see Chattel Mortgages, §§ 255-284; Mortgages, §§ 556-587.

FOREIGN ATTACHMENT.

See Garnishment.

FOREIGN LAWS.

Judicial notice of laws of other states, see Evidence, § 35.

Presumptions as to laws of other states, see Evidence, § 80.

FOREMAN.

Liability of master for injuries to servant from acts or omissions of foreman, see Master and Servant, § 189.

Of grand jury, signature to indictment, see Indictment and Information, § 33.

FORFEITURES.

For breach of condition in deed, see Deeds, § 168.

For taking or exacting usury, see Usury, §§ 138-148.

Of bail bonds, see Bail, § 80.

Of compensation of attorney, see Attorney and Client, § 153.

Of compensation of attorney for administrators, see Executors and Administrators, § 111.

Of franchise of corporation in general, see Corporations, § 618.

Of insurance, see Insurance, §§ 748-755.

Of insurance, estoppel or waiver affecting right, see Insurance, §§ 375, 376.

Of liquor license, see Intoxicating Liquors, §§ 106-108.

Of rights under mining lease, see Mines and Minerals, § 70.

FORGERY.

Payment of forged paper by bank, see Banks and Banking, § 148.

FORMER ADJUDICATION.

Operation and effect in general, see Judgment, §§ 619, 713-743.

FORMER JEOPARDY.

Bar to prosecution, see Criminal Law, § 162.

FORMS OF ACTION.

See Ejectment; Forcible Entry and Detainer, §§ 4-15; Replevin; Trespass, §§ 40-52; Trespass to Try Title; Trover and Conversion.

FORNICATION.

See Seduction.

FOURTEENTH AMENDMENT.

See Constitutional Law, § 278.

FRANCHISES.

Corporate franchises in general, see Corporations, §§ 34, 618.

FRATERNAL ASSOCIATIONS.

See Insurance, §§ 699-825.

FRAUD.

Constructive trust arising from fraud, see Trusts, § 95.

Conveyances and transactions fraudulent as to creditors or subsequent purchasers, see Fraudulent Conveyances.

Limitation of actions for relief on ground of fraud, see Limitation of Actions, § 100.

Offenses involving fraud, see False Pretenses.

By particular classes of persons, or persons in particular relations.

Sellers of goods, see Sales, § 38.

In particular classes of conveyances, contracts, transactions, or proceedings.

See Contracts, § 94; Deeds, § 70.

Payment of forged or altered paper by bank, see Banks and Banking, § 148.

Sale of corporate stock, see Corporations, § 121.
Sales, see Sales, § 38.

I. DECEPTION CONSTITUTING FRAUD, AND LIABILITY THEREFOR.

Liability of infant, see Infants, § 59.

§ 17. A defendant *held* liable for damages for fraud.—Weikel v. Sterns (Ky.) 908.

II. ACTIONS.

(C) Evidence.

§ 50. Fraud is not presumed.—James v. Holdam (Ky.) 435.

§ 52. In an action for fraud inducing one to convey his land in exchange of other land, the value of his land *held* not in issue.—Boyce v. Gingrich (Mo. App.) 79.

(D) Damages.

§ 59. Measure of damages for fraud inducing one to convey his land in consideration of other land determined.—Boyce v. Gingrich (Mo. App.) 79.

§ 60. The benefits of a bargain are proper elements of damages in cases of *ex delicto* based upon fraud.—Boyce v. Gingrich (Mo. App.) 79.

III. CRIMINAL RESPONSIBILITY.

See False Pretenses.

FRAUDS, STATUTE OF.

VI. REAL PROPERTY AND ESTATES AND INTERESTS THEREIN.

§ 70. Parol establishment and recognition of a new boundary line between adjoining land-owners is not obnoxious to the statute of frauds.—Caruthers v. Hadley (Tex. Civ. App.) 757.

§ 71. A contract for the sale of land must be in writing.—Cornett v. Burchfield (Ky.) 466.

§ 72. Where standing timber is not sold for immediate severance from the soil, title thereto can only be passed by some writing signed by the seller and delivered to the purchaser.—Second Nat. Bank of Ashland v. Rouse (Ky.) 1121.

§ 74. An oral agreement to convey land *held* unenforceable, as being within the statute of frauds and perjuries (section 470, Ky. St. [Russell's St. § 1775]).—Estes v. Estes (Ky.) 494.

§ 76. A partnership agreement as to land *held* not within the statute of frauds.—Beebe v. Olentine (Ark.) 936.

§ 78. An oral agreement to enter into a partnership to buy land is not within the statute of frauds.—Wiedemann v. Crawford (Ky.) 495.

VIII. REQUISITES AND SUFFICIENCY OF WRITING.

§ 103. A note and an indorsement thereof *held* not to evidence a contract of sale of standing timber, within the statute of frauds (Ky. St. § 470 [Russell's St. § 1775]).—Second Nat. Bank of Ashland v. Rouse (Ky.) 1121.

§ 115. A contract for the sale of land is enforceable under the statute of frauds against the vendee, though signed only by the vendor.—Evans v. Stratton (Ky.) 1154.

IX. OPERATION AND EFFECT OF STATUTE.

§ 129. The delivery of timber to a third party and agreement of defendant to pay the price

held sufficient to take it out of the statute.—Robinson v. Wynne (Ark.) 319.

§ 130. A parol agreement by a grantee of lands to convey part to another or to account to him for its value *held* an inseparable contract of which one part is within and one part without the statute of frauds, so that the entire agreement was invalid.—Wolfskill v. Wells (Mo. App.) 51.

X. PLEADING, EVIDENCE, TRIAL, AND REVIEW.

§ 160. An instruction as to the application of the statute of frauds in respect to contract to answer for the debt of another *held* properly refused.—Cheek v. Boyd (Tex. Civ. App.) 252.

FRAUDULENT CONVEYANCES.

I. TRANSFERS AND TRANSACTIONS INVALID.

(A) Grounds of Invalidity in General.

§ 8. A conveyance *held* in fraud of a creditor of the grantor.—Walther v. Null (Mo.) 993.

(E) Consideration.

§ 80. An agreement for future support *held* not a sufficient consideration to support a conveyance as against existing creditors.—Walther v. Null (Mo.) 993.

III. REMEDIES OF CREDITORS AND PURCHASERS.

(D) Jurisdiction, Limitations, and Laches.

§ 249. Delay *held* not to defeat an action to set aside a conveyance as fraudulent as against creditors.—Walther v. Null (Mo.) 993.

FREIGHT.

Carriage of goods, see Carriers, §§ 46-185.
Carriage of live stock, see Carriers, §§ 203-230.

FRIEND OF THE COURT.

See Amicus Curiae.

FRIGHT.

Frightening animals at railroad crossing, see Railroads, § 305.
Frightening animals on or near railroad track, see Railroads, § 360.
Frightening animals on street, see Municipal Corporations, §§ 705, 733.

FUNDS.

Of religious societies, see Religious Societies, §§ 23-25.
Public funds, see Counties, §§ 152-191; Municipal Corporations, §§ 886-907.

GAMBLING.

See Gaming.

GAMING.

III. CRIMINAL RESPONSIBILITY.

(A) Offenses.

§ 74. Rev. St. 1909, § 4750, *held* to prohibit keeping poker tables for gaming.—State v. Cannon (Mo.) 513.

(B) Prosecution and Punishment.

Duplicity in indictment, see Indictment and Information, § 125.

Election between counts of indictment, see Indictment and Information, § 132.
 Indictment following language of statute, see Indictment and Information, § 110.

§ 98. Evidence *held* to sustain a conviction for keeping a gaming table.—State v. Cannon (Mo.) 513.

GARNISHMENT.

See Attachment.

Of municipal funds, see Municipal Corporations, § 1031.

I. NATURE AND GROUNDS.

§ 1. Plaintiff must follow the garnishment statute strictly, as the garnishee cannot safely waive compliance with any of its substantial requirements, or submit to an unauthorized garnishment.—Buchanan v. A. B. Spencer Lumber Co. (Tex. Civ. App.) 292.

§ 1. Garnishment is a proceeding in rem, and the garnishee is the receiver of the court to hold the res until it is determined who is entitled to it.—Buchanan v. A. B. Spencer Lumber Co. (Tex. Civ. App.) 292.

II. PERSONS AND PROPERTY SUBJECT TO GARNISHMENT.

§ 17. As school districts are not subject to a garnishment, the assignee of the contract with the school board given as security for a note cannot be deprived of such security, by subsequent garnishment by creditors of the assignor, whether the garnishee knew of such assignment when the writ of garnishment was served or not.—Buchanan v. A. B. Spencer Lumber Co. (Tex. Civ. App.) 292.

§ 20. One to whom a fund exempt from garnishment is due can waive the exemption; but, unless he does so his debtor cannot.—Buchanan v. A. B. Spencer Lumber Co. (Tex. Civ. App.) 292.

VI. PROCEEDINGS TO SUPPORT OR ENFORCE.

§ 124. Under an order of publication in attachment, the court *held* not to have acquired jurisdiction, so that a garnishee therein was not bound by a judgment against him.—Missouri, K. & T. Ry. Co. v. Morris (Mo. App.) 1027.

§ 146. Where a fatal omission from a garnishee's answer was due to oversight only, the trial court properly permitted the garnishee to file a new answer.—Capps v. Citizens' Nat. Bank of Longview (Tex. Civ. App.) 808.

VIII. CLAIMS BY THIRD PERSONS.

§ 201. The holder of an assignment of the amount due on a contract *held* to have priority over garnishment by other creditors of the assignor.—Buchanan v. A. B. Spencer Lumber Co. (Tex. Civ. App.) 292.

GAS.

§ 17. A corporation engaged in manufacturing and distributing gas is bound to exercise a degree of care commensurate with the danger, to guard against injury to persons and property.—Pulaski Gas Light Co. v. McClintock (Ark.) 1189.

§ 18. The negligence of a gas company in making alterations in a service pipe leading to decedent's dwelling house, and leaving the old pipe exposed, *held* the proximate cause of decedent's death by being asphyxiated while attempting to take up the old pipe.—Pulaski Gas Light Co. v. McClintock (Ark.) 1189.

§ 19. In an action for death by asphyxiation, defendant gas company *held* entitled to a verdict, if decedent disconnected a riser connected with the service pipe and inhaled the gas, unless he did so voluntarily.—Pulaski Gas Light Co. v. McClintock (Ark.) 1189.

§ 19. Where the court found that decedent was asphyxiated and died instantaneously without suffering, after having disconnected a gas pipe riser under the porch of his house, there was no longer any question of negligence in his remaining under the house and attempting to connect the gas.—Pulaski Gas Light Co. v. McClintock (Ark.) 1189.

§ 20. Decedent *held* not negligent as a matter of law in unscrewing a riser connected with a live service gas pipe, on the assumption that it was still connected with an old service pipe that had been abandoned.—Pulaski Gas Light Co. v. McClintock (Ark.) 1189.

GENERAL DEMURRER.

See Pleading, § 205.

GOOD FAITH.

Of purchaser from incompetent, see Insane Persons, § 61.

Of purchaser of bill or note, see Bills and Notes, §§ 334, 335.

Of purchaser of land, see Vendor and Purchaser, § 230.

Of purchaser of mortgaged property, see Chattel Mortgages, § 153.

GOODS.

See Property.

Mortgage, see Chattel Mortgages.

Sale, see Sales.

GOOD WILL.

Contracts, in restraint of trade, see Contracts, § 117.

GOVERNMENT.

Distribution of governmental powers, see Constitutional Law, §§ 70-73.

GOVERNOR.

Authority to call militia into service, see Militia, § 15.

GRAND JURY.

See Indictment and Information.

§ 34. Under Code Cr. Proc. 1895, art. 414, construed with article 559, *held*, that a county attorney may be present with the grand jury except when it is deliberating or voting upon an indictment.—Haywood v. State (Tex. Cr. App.) 218.

GRANTS.

See Deeds.

Of public lands, see Public Lands.

GRASS.

Johnson grass on railroad right of way, penalties, see Agriculture, § 8.

GROSS NEGLIGENCE.

Ground for recovery of punitive damages for injuries to servants, see Master and Servant, § 282.

GUARANTY.

See Principal and Surety.

GUARDIAN AND WARD.

See Parent and Child.

Matters relating to infants and their property irrespective of guardianship, see Infants.

II. APPOINTMENT, QUALIFICATION, AND TENURE OF GUARDIAN.

§ 21. Under Gen. St. 1873, c. 48, art. 1, § 12, in force in 1875, a female ward on marrying before majority may demand a settlement of her guardian, on which her husband is entitled to demand and receive the money due her.—Mouser v. Nunn (Ky.) 1148.

VI. ACCOUNTING AND SETTLEMENT.

§ 157. The burden was upon a statutory ward, suing her guardian for an accounting, to overcome the prima facie case made by a receipt given by her.—Gilliam v. Guffy (Ky.) 1162.

§ 157. In proceedings against a guardian for an accounting, evidence *held* to sustain a finding that the ward received a certain sum which she claimed had not been accounted for.—Gilliam v. Guffy (Ky.) 1162.

§ 164. A receipt executed by the husband of a female ward to her guardian *held* to support a plea of payment in an action by her against her guardian's heirs for an accounting.—Mouser v. Nunn (Ky.) 1148.

GUILTY.

Plea of guilty as bar to action for malicious prosecution, see Malicious Prosecution, § 24.

GUNS.

See Weapons.

HABEAS CORPUS.

II. JURISDICTION, PROCEEDINGS, AND RELIEF.

§ 51. In proceedings against a defendant for contempt, and to obtain his discharge by habeas corpus for refusal to testify before a commissioner, plaintiffs *held* to have a sufficient interest to authorize them to appear in resistance of habeas corpus.—Ex parte Brockman (Mo.) 977.

§ 83. Under Rev. St. 1909, §§ 2442 and 2456, petitioner *held* not entitled to his discharge on habeas corpus by reason of an alleged defect in the writ, with reference to which no issue was joined by the petition and return.—Ex parte Brockman (Mo.) 977.

§ 83. A petitioner committed in contempt proceedings for refusal to testify before a commissioner *held* not entitled to his discharge on habeas corpus, because of alleged want of proof that the commissioner was appointed to take testimony.—Ex parte Brockman (Mo.) 977.

§ 85. A finding that defendant had violated an injunction restraining the sale of intoxicating liquors *held* not to be disturbed on habeas corpus.—Ex parte Roper (Tex. Cr. App.) 334.

§ 85. The Court of Criminal Appeals on habeas corpus for the discharge of one imprisoned for contempt for violating an injunction granted by the district court must assume that the injunction was properly granted.—Ex parte Looper (Tex. Cr. App.) 845.

§ 89. Where a return to a writ of habeas corpus shows that petitioner is held under defective commitment, his remedy is by motion for discharge.—Ex parte Brockman (Mo.) 977.

§ 90. Under the statute as to habeas corpus, *held*, that the hearing under the writ must be in the county where the indictment was found.—Ex parte Overcash (Tex. Cr. App.) 700.

§ 113. An order amending an original order for the issuance of habeas corpus *held* not appealable.—Ex parte McFarlane (Tex. Cr. App.) 685.

HABITUAL CRIMINALS.

See Criminal Law, § 1202.

HARMLESS ERROR.

In civil actions, see Appeal and Error, §§ 1026-1074.

In criminal prosecutions, see Criminal Law, §§ 1166½-1170½; Homicide, § 340.

HAWKERS AND PEDDLERS.

Peddlers' notes, see Bills and Notes, § 107.

HAZARD.

See Gaming.

HEALTH.

Regulation of practice of medicine, see Physicians and Surgeons.

II. REGULATIONS AND OFFENSES.

Regulation of practice of medicine, see Physicians and Surgeons.

HEARING.

In equity, see Equity, §§ 377-381.

On motion or application for direction of verdict, see Trial, § 178.

HEARSAY EVIDENCE.

See Evidence, §§ 317, 318.

HEIRS.

See Descent and Distribution.

Time for redemption from tax sale, see Taxation, § 699.

HIGHWAYS.

Crossing by railroads, see Railroads, §§ 301-351.

Dedication of land for highway, see Dedication.

Streets in cities, see Municipal Corporations, §§ 671-706.

I. ESTABLISHMENT, ALTERATION, AND DISCONTINUANCE.

Dedication, see Dedication.

II. HIGHWAY DISTRICTS AND OFFICERS.

Mandamus to compel allowance of claim for compensation of supervisors, see Mandamus, §§ 107, 176.

Mandamus to compel appointment of supervisors, see Mandamus, § 76.

§ 93. Where a fiscal court has abolished the office of supervisor of roads, as authorized by Ky. St. § 4313 (Russell's St. § 5446), and itself made rules for the maintenance of roads, an appointment of a road supervisor by a county judge is invalid.—O'Connor v. Weissinger (Ky.) 1127.

§ 93. Under Ky. St. § 4313 (Russell's St. § 5446), relating to the appointment of road supervisors, the authority of the county judge can be exercised only when the fiscal court is not holding a regular term.—O'Connor v. Weissinger (Ky.) 1127.

§ 94. Under Ky. St. § 1845 (Russell's St. § 2979), members of fiscal court *held* qualified to serve on committee for road supervision at a compensation of \$3.00 per day.—O'Connor v. Weissinger (Ky.) 1126.

III. CONSTRUCTION, IMPROVEMENT, AND REPAIR.

Power of fiscal court to purchase automobile for use in inspection of highways, see Counties, § 113.

§ 105. Action of fiscal court in planning to keep up public roads *held* authorized by Ky. St. §§ 1845, 4748b (Russell's St. §§ 2979, 5492-5507).—O'Connor v. Weissinger (Ky.) 1126.

§ 105. Ky. St. § 1889 (Russell's St. § 3025) relates only to the disposition of surplus funds in counties, and does not require that the maintenance of roads should be intrusted to commissioners.—O'Connor v. Weissinger (Ky.) 1126.

V. REGULATION AND USE FOR TRAVEL.

(B) Use of Highway and Law of the Road. Use of street as highway, see Municipal Corporations, §§ 703-706.

(C) Injuries from Defects or Obstructions. Accidents at railroad crossings, see Railroads, §§ 301-351. In streets, see Municipal Corporations, §§ 755-822.

HINDERING.

Creditors, by fraudulent transfers in general, see Fraudulent Conveyances.

HIRING.

Of premises, see Landlord and Tenant.

HOLIDAYS.

See Sunday.

HOMESTEAD.

Dower or rights of widow in real property of deceased husband, see Dower.

I. NATURE, ACQUISITION, AND EXTENT.

(D) Property Constituting Homestead.

§ 59. A bona fide housekeeper who acquires an interest in land by descent has a reasonable time after his ancestor's death to have his share set apart as a homestead.—Robinson v. Robinson (Ky.) 1130.

V. PROTECTION AND ENFORCEMENT OF RIGHTS.

§ 193. Claim of homestead right *held* not unreasonably delayed.—Robinson v. Robinson (Ky.) 1130.

HOMICIDE.

Civil liability for causing death, see Death, §§ 33-104.

I. THE HOMICIDE.

§ 3. Instruction that the weapon used was, as a matter of law, a deadly weapon, *held* proper.—State v. Belfiglio (Mo.) 508.

II. MURDER.

§ 22. Motive is not essential to murder in the first degree, if it is committed with malice aforethought.—Butler v. State (Tex. Cr. App.) 230.

§ 30. One is responsible for a homicide whether he fired the fatal shot or not, if he was present aiding and assisting.—Butler v. State (Tex. Cr. App.) 230.

IV. ASSAULT WITH INTENT TO KILL.

§ 90. A pistol, used as a firearm, is a "deadly weapon."—Hartfiel v. State (Tex. Cr. App.) 1180.

§ 99. Under Pen. Code 1895, art. 680, an owner cannot retake stolen property by such means as would result in loss of life or serious bodily injury.—Hartfiel v. State (Tex. Cr. App.) 1180.

VI. INDICTMENT AND INFORMATION.

§ 142. Under an indictment for homicide, the court properly charged that if defendant II., charged as an aider and abettor, in fact struck the blow which caused the death, she could still be convicted.—Higgins v. Commonwealth (Ky.) 1135.

§ 142. Though an indictment charges the murder to have been committed on February 24, 1910, and the evidence shows it was committed on January 24th, relevant evidence of facts that occurred prior to the date charged was not for that reason inadmissible.—Ridge v. State (Tex. Cr. App.) 732.

VII. EVIDENCE.

(B) Admissibility in General.

Res gestæ, see Criminal Law, § 364.

§ 156. Testimony as to statement by defendant in prosecution for homicide *held* admissible to show malice.—State v. Whitsett (Mo.) 555.

§ 158. Testimony as to threats by defendant in prosecution for homicide *held* admissible to show malice.—State v. Whitsett (Mo.) 555.

§ 158. Competency of threats as evidence against defendant accused of homicide *held* not affected by their nearness or remoteness.—State v. Whitsett (Mo.) 555.

§ 166. Threats of defendant before the homicide and statements of defendant as to deceased after the homicide *held* competent, and proof of motive.—State v. Glasscock (Mo.) 549.

§ 169. Evidence of defendant, shortly before and at the place of the killing, having flourished a pistol in the face of another, *held* not incompetent.—State v. Boyer (Mo.) 542.

§ 169. Evidence that decedent was called out of a house just before being shot *held* inadmissible against accused.—Clements v. State (Tex. Cr. App.) 728.

§ 171. The state could show that shells appearing to have been recently exploded and fresh bullet marks on a tree were found the next morning at the scene of the homicide.—Butler v. State (Tex. Cr. App.) 230.

§ 174. Evidence that defendant did not call at the house or attend the funeral of deceased, his neighbor, *held* admissible as proof of consciousness of guilt.—State v. Glasscock (Mo.) 549.

§ 174. Proof of false statement by defendant that he was not near the scene of the murder *held* admissible as showing consciousness of guilt.—State v. Glasscock (Mo.) 549.

§ 174. Certain evidence *held* admissible to form a link in the chain of circumstances.—Ridge v. State (Tex. Cr. App.) 732.

(E) Weight and Sufficiency.

§ 232. Evidence in homicide of deliberation and premeditation *held* sufficient.—State v. Boyer (Mo.) 542.

§ 244. Evidence *held* to support a conviction for homicide.—*Gatliff v. Commonwealth* (Ky.) 133.

§ 244. Evidence in a homicide case *held* insufficient to support a plea of self-defense.—*Florence v. State* (Tex. Cr. App.) 689.

§ 250. Circumstantial evidence *held* sufficient to sustain a conviction of murder.—*Ridge v. State* (Tex. Cr. App.) 732.

§ 253. Evidence *held* to sustain a conviction of murder in the first degree.—*Butler v. State* (Tex. Cr. App.) 230.

§ 254. Evidence *held* to sustain a conviction of murder in the second degree.—*State v. Glasscock* (Mo.) 549.

§ 257. Evidence *held* to sustain a conviction of assault with intent to murder.—*Sellers v. State* (Tex. Cr. App.) 348.

VIII. TRIAL.

(B) Questions for Jury.

§ 268. Where a mortal wound is inflicted with any weapon not generally known as a deadly weapon, the issue whether the weapon used was of a deadly nature is for the jury.—*State v. Belfiglio* (Mo.) 508.

§ 268. Evidence *held* sufficient to carry the case to the jury and to sustain a conviction.—*State v. Belfiglio* (Mo.) 508.

(C) Instructions.

§ 286. A charge *held* sufficient upon the intent with which the wound was inflicted.—*Cornwell v. State* (Tex. Cr. App.) 221.

§ 294. On a prosecution for homicide, an instruction on insanity *held* sufficient.—*Duke v. State* (Tex. Cr. App.) 705.

§ 300. Instruction *held* to sufficiently charge that if accused believed, or had reasonable ground to believe, that he was in imminent danger, he could act upon such appearances and kill.—*Potter v. Commonwealth* (Ky.) 462.

§ 300. A charge *held* to give accused the full benefit of his claim of self-defense.—*Day v. State* (Tex. Cr. App.) 215.

§ 307. The rule requiring instructions on the several grades of homicide does not apply where the evidence clearly shows that accused is either guilty of murder or innocent.—*Higgins v. Commonwealth* (Ky.) 1135.

§ 308. Where the evidence clearly shows a killing in perpetration of robbery, instructions on murder in the perpetration of robbery are properly given.—*Ridge v. State* (Tex. Cr. App.) 732.

§ 309. An instruction *held* to sufficiently submit the issue of manslaughter.—*Thurman v. Commonwealth* (Ky.) 174.

§ 310. In a prosecution for assault to murder, the court should submit to the jury the question of simple assault, where there is evidence on such issue.—*King v. State* (Tex. Cr. App.) 687.

IX. APPEAL AND ERROR.

§ 325. Sufficient objection to introduction of evidence in a homicide *held* not made to authorize its review.—*State v. Boyer* (Mo.) 542.

§ 340. Under Rev. St. 1899, §§ 2369, 2535 (Ann. St. 1906, pp. 1457, 1509 [Rev. St. 1909, §§ 4903, 5115]), a person convicted of murder in the second degree under indictment charging murder in the first degree *held* in no position to complain of instruction on the lower grade.—*State v. Whitsett* (Mo.) 555.

§ 340. Instruction, in trial for an assault with intent to commit murder, *held* harmless.—*Hartfiel v. State* (Tex. Cr. App.) 1180.

HORSES.

See Livery Stable Keepers.

Frightening, see Railroads, §§ 305, 360.

HOSPITALS.

Act providing for bipartisan hospital board as grant of special privileges, see Constitutional Law, § 205.

Issuance of bonds for erection of municipal hospital, see Municipal Corporations, § 907.

HOSTILE POSSESSION.

Of occupant of real estate holding adversely, see Adverse Possession, §§ 60-62.

HOUSEBREAKING.

See Burglary.

HOUSE OF ILL FAME.

See Disorderly House.

HUMANITARIAN DOCTRINE.

Injury avoidable notwithstanding contributory negligence, see Negligence, § 83; Railroads, §§ 346, 348, 390.

HUSBAND AND WIFE.

See Divorce; Dowry.

Allowance to survivor from estate of decedent, see Executors and Administrators, §§ 173-189.

Bigamy, see Bigamy.

Competency as witnesses for or against each other, see Witnesses, § 53.

Competency of witnesses as to transactions with decedent, see Witnesses, § 140.

Execution of power by married women by will, see Wills, § 75.

Testamentary capacity of married women, see Wills, § 28.

Widow of tenant at will as tenant by sufferance, see Landlord and Tenant, § 119.

I. MUTUAL RIGHTS, DUTIES, AND LIABILITIES.

Property subject to mechanic's lien, see Mechanics' Liens, § 57.

§ 11. Where a husband in 1891 or 1892 reduced the personal property of his wife to possession, it became his property under the law then in force.—*Cooper v. Walker* (Ky.) 171.

§ 14. Owners of the estate by entirety take by the whole, and not by the moiety.—*Craig v. Bradley* (Mo. App.) 1081.

§ 14. A note *held* part of the estate by the entirety surviving to a wife.—*Craig v. Bradley* (Mo. App.) 1081.

§ 14. Requisites of an estate in entirety stated.—*Craig v. Bradley* (Mo. App.) 1081.

§ 14. Evidence *held* to show that deposits in the name of husband and wife were intended to pass to the survivor.—*Craig v. Bradley* (Mo. App.) 1081.

§ 14. Whether bank deposits by a husband alone in the name of both himself and wife are held in entirety *held* to depend upon intention.—*Craig v. Bradley* (Mo. App.) 1081.

§ 14. A note *held* property of an estate in entirety.—*Craig v. Bradley* (Mo. App.) 1081.

§ 14. Estates by the entirety in personal property exist as at common law, unaffected by the married women's statutes.—*Craig v. Bradley* (Mo. App.) 1081.

§ 19. A wife has an implied agency to pledge her husband's credit for necessities for herself or his minor children.—*French v. Burlingame* (Mo. App.) 1100.

§ 25. The acts of a husband as agent for his wife *held* to bar her recovery on her goods sold by him.—*Glass v. Cincinnati Tobacco Warehouse Co.* (Ky.) 897.

V. WIFE'S SEPARATE ESTATE.

(A) What Constitutes.

§ 110. There is no distinction under the chancery rules arising out of the formal nature of a wife's separate estate, whether it vested at common law, by statute, or in equity.—*Hankins v. Columbia Trust Co.* (Ky.) 498.

§ 119. A husband's deed to his wife, with power to dispose of the same by will, *held* not to create a separate estate in the wife.—*Hankins v. Columbia Trust Co.* (Ky.) 498.

§ 133. Evidence in trespass to try title in which defendant claimed under a deed from his mother, *held* to show that his mother owned the property as her separate property.—*Conroy v. Sharman* (Tex. Civ. App.) 244.

(D) Conveyances and Contracts to Convey.

§ 193. A married woman's separate deed *held* not a valid conveyance because of Ky. St. §§ 506, 2128 (Russell's St. §§ 2076, 4631), relating to conveyances by married women.—*Simpson v. Smith* (Ky.) 1166.

VI. ACTIONS.

Replevin against husband as agent of wife, see Principal and Agent, § 184.

§ 207. Under a conveyance of land to a husband and wife since the married woman's act of 1889 (Rev. St. 1889, §§ 6856-6870) each of the grantees has an interest, not only in the inheritance, but in the possession which he or she sue alone to protect.—*Independence Sash, Door & Lumber Co. v. Bradfield* (Mo. App.) 118.

VII. COMMUNITY PROPERTY.

§ 273. A widow's petition for damages for malicious prosecution of her husband *held* not required to allege that there was no administration on his estate, and no need of any.—*Missouri, K. & T. Ry. Co. of Texas v. Groseclose* (Tex. Civ. App.) 736.

§ 273. In an action by a widow and children for the malicious institution of a criminal charge against the husband, plaintiffs could only recover damages accruing to decedent.—*Missouri, K. & T. Ry. Co. of Texas v. Groseclose* (Tex. Civ. App.) 736.

§ 273. Charges in an action for malicious prosecution *held* not conflicting.—*Missouri, K. & T. Ry. Co. of Texas v. Groseclose* (Tex. Civ. App.) 736.

§ 273. Damages recovered by a widow and children for a malicious criminal prosecution against the husband and father being community property, damages recovered will be equally divided between the widow and children.—*Missouri, K. & T. Ry. Co. of Texas v. Groseclose* (Tex. Civ. App.) 736.

VIII. SEPARATION AND SEPARATE MAINTENANCE.

Alimony in actions for divorce, see Divorce, §§ 249-271.

§ 281. In an action by a wife to enforce a settlement contract with her husband and for a divorce a mensa, as incidental relief only, she

could not recover counsel fees under Ky. St. § 900 (Russell's St. § 2687).—*Hite v. Hite* (Ky.) 138.

HYPOTHECATION.

See Chattel Mortgages; Pledges.

HYPOTHETICAL QUESTIONS.

In examination of expert witnesses, see Criminal Law, § 485.

IDENTITY.

Of causes of action or defenses as affecting operation of former judgment as bar, see Judgment, § 619.

Of issues or subject-matter of action as affecting conclusiveness of judgment, see Judgment, §§ 713-743.

IDIOTS.

See Insane Persons.

IGNORANCE.

Of cause of action as affecting limitation, see Limitation of Actions, § 95.

ILLEGAL IMPRISONMENT.

See False Imprisonment.

ILLEGALITY.

Of contracts, see Contracts, §§ 117-138.

ILL FAME.

Houses of ill fame, see Disorderly House.

IMBECILES.

In general, see Insane Persons.

IMITATION.

Of trade-mark or trade-name as unfair competition, see Trade-Marks and Trade-Names, § 70.

IMMORALITY.

Legality of partnership, see Partnership, § 26.

IMMOVABLES.

In general, see Property.
Conveyances, see Deeds.
Mortgages, see Mortgages.
Sales, see Vendor and Purchaser.

IMMUNITY.

Constitutional guaranties of privileges or immunities of citizens, see Constitutional Law, §§ 205-208.

IMPAIRING OBLIGATION OF CONTRACT.

See Constitutional Law, § 126.

IMPANELING JURY.

See Jury, § 149.

IMPEACHMENT.

Of verdict by affidavits and testimony of jurors on motion for new trial, see Criminal Law, § 957.

Of witness, see Witnesses, §§ 330-336.
Of witness, newly discovered impeaching evidence as ground for new trial, see Criminal Law, § 942.

IMPLICATION.

Creation of easement, see Easements, § 18.

IMPLIED CONTRACTS.

See Money Paid; Work and Labor.
Limitation of actions for breach, see Limitation of Actions, § 40.

IMPLIED TRUSTS.

See Trusts, § 95.

IMPLIED WARRANTY.

On sale of personal property, see Sales, § 267.

IMPRISONMENT.

See Bail; False Imprisonment; Kidnapping.
Punishment for crime, see Criminal Law, § 1208.
Release on habeas corpus, see Habeas Corpus.

IMPROVEMENTS.

Compensation for improvements in trespass to try title, see Trespass to Try Title, § 56.
Liens, see Mechanics' Liens.
On mortgaged property, see Mortgages, § 203.
Public improvements, see Highways; Levees; Municipal Corporations, §§ 347-547.

IMPUTED NEGLIGENCE.

See Negligence, § 92.

INCAPACITY.

In general, see Infants; Insane Persons.
To commit crime, see Infants, § 66.
To make will, see Wills, § 28.

INCOME.

Of trust, see Wills, § 684.

INCOMPETENCY.

See Insane Persons.

INCONSISTENCY.

In defenses alleged, see Pleading, § 93.
In description of boundaries, see Boundaries, § 3.
Of alternative remedies, see Election of Remedies, § 3.
Of positions as trustee and as executor, see Trusts, § 163.
Statements by witnesses inconsistent with testimony as ground for impeachment, see Witnesses, §§ 379-392.

INCUMBRANCES.

See Mechanics' Liens; Mortgages.

INDEBTEDNESS.

Deduction from valuation of property for taxation, see Taxation, § 357.
Of corporations in general, see Corporations, § 450.
Of counties, see Counties, §§ 152-191.
Of municipal corporations, see Municipal Corporations, §§ 886, 907.
Of school districts, see Schools and School Districts, § 97.

INDEMNITY.

See Principal and Surety.
To surety by principal, see Principal and Surety, §§ 174-185.

INDEPENDENT EXECUTORS.

See Executors and Administrators, § 7.
Competency as witness, see Witnesses, § 159.

INDICTMENT AND INFORMATION.

See Grand Jury.
Indorsement of names of witnesses, see Criminal Law, § 628.
Review of questions as dependent on prejudicial nature of error, see Criminal Law, § 1167.

For particular offenses.

See False Pretenses, § 31; Homicide, § 142; Rape, § 20; Sodomy, § 5.
Practicing medicine without license, see Physicians and Surgeons, § 6.
Violations of liquor laws, see Intoxicating Liquors, §§ 204-223.
Violation of Sunday laws, see Sunday, § 29.

II. FINDING AND FILING OF INDICTMENT OR PRESENTMENT.

§ 10. An indictment *held* not assailable for matters concerning the impaneling of a grand jury, not ground for challenge to the array or to the polls under Rev. St. 1909, §§ 5067, 5068. —State v. Glasscock (Mo.) 549.

III. FORMAL REQUISITES OF INDICTMENT.

§ 33. Failure of the foreman of the grand jury to sign an indictment as required by Code Cr. Proc. 1895, arts. 432, 439, *held* not to invalidate the indictment in view of article 565.—Day v. State (Tex. Cr. App.) 215.

V. REQUISITES AND SUFFICIENCY OF ACCUSATION.

§ 86. Under Rev. St. 1909, §§ 5107, 5115, *held*, an indictment is not invalid because stating the venue only in the margin.—State v. McDonough (Mo.) 545.

§ 110. An information under Rev. St. 1909, § 4750, charging a keeping of gaming tables, in the language of the statute, is sufficient.—State v. Cannon (Mo.) 513.

VI. JOINDER OF PARTIES, OFFENSES, AND COUNTS, DUPLICITY, AND ELECTION.

§ 125. Counts for gaming *held* not double so as to require election by the state.—State v. Cannon (Mo.) 513.

§ 132. The state should have been required to elect on which of two counts charging keeping a poker table and a crap table, respectively, it would rely.—State v. Cannon (Mo.) 513.

VII. MOTION TO QUASH OR DISMISS, AND DEMURRER.

§ 147. Matters not appearing on the face of indictment *held* not ground for demurrer.—State v. Glasscock (Mo.) 549.

IX. ISSUES, PROOF, AND VARIANCE.

In prosecution for homicide, see Homicide, § 142.
In prosecution for violations of liquor laws, see Intoxicating Liquors, § 223.

INDORSEMENT.

Of names of witnesses on indictment or information, see Criminal Law, § 628.

INDUCEMENT.

In contracts, see Contracts, § 47.

INFANTS.

See Guardian and Ward; Parent and Child.
Care required of master as to infant servant, see Master and Servant, § 153.

Dangerous machinery as attractions to children, see Negligence, § 23.

Infancy as affecting limitation of actions, see Limitation of Actions, § 72.

Injuries to children on or near street railroad, see Street Railroads, § 95.

Injuries to minors employed in violation of statute, see Master and Servant, § 95.

Power of city to prohibit operation of automobiles by minors, see Municipal Corporations, § 703.

Proximate cause of injury to minor employes, see Master and Servant, § 96.

I. DISABILITIES IN GENERAL.

§ 11. A former order removing a minor's disabilities *held* not presumptively regular in a collateral suit.—*Lemons v. Gulf, C. & S. F. Ry. Co.* (Tex. Civ. App.) 742.

II. CUSTODY AND PROTECTION.

Injuries to minors employed in violation of statute, see Master and Servant, § 95.

Proximate cause of injury to minor children, see Master and Servant, § 96.

III. PROPERTY AND CONVEYANCES.

Sale of remainder, see Remainders, § 16.

V. TORTS.

§ 59. A child of tender years *held* civilly liable for trespass.—*Munden v. Harris* (Mo. App.) 1076.

§ 59. An infant is not guilty of fraud, unless he has sufficient years of discretion to invent and perpetrate a fraud.—*Munden v. Harris* (Mo. App.) 1076.

§ 60. Liability of an infant for libel and slander stated.—*Munden v. Harris* (Mo. App.) 1076.

VI. CRIMES.

§ 66. Evidence, in a prosecution for burglary of one under the age of 16 years when the offense was committed, *held* to support a finding that defendant had sufficient discretion to understand the nature and illegality of the act when the offense was committed.—*Ragsdale v. State* (Tex. Cr. App.) 234.

§ 66. That an accused, who was between the ages of 9 and 13 years when the offense was committed, had sufficient discretion to understand the nature and illegality of his act, may be shown by circumstances.—*Ragsdale v. State* (Tex. Cr. App.) 234.

§ 66. The degree of comprehension with respect to the illegality of the act which is essential in order to convict one of an offense committed between the ages of 9 and 13 years, stated.—*Ragsdale v. State* (Tex. Cr. App.) 234.

§ 66. Where it appears that accused was between the ages of 9 and 13 years when the offense was committed, the burden is upon the state to show that he had sufficient discretion to understand the nature and the illegality of the act.—*Ragsdale v. State* (Tex. Cr. App.) 234.

§ 68. A charge in a burglary prosecution *held* not reversible error.—*Ragsdale v. State* (Tex. Cr. App.) 234.

§ 68. Under Code Cr. Proc. 1895, art. 1145, as amended by act approved March 17, 1909

(Laws 1909, c. 54), the district court is not bound to dismiss or transfer the case to the juvenile docket upon showing that an infant defendant was under 16 years, but may order the case tried before it.—*Ragsdale v. State* (Tex. Cr. App.) 234.

INFERIOR COURTS.

See Courts, § 163.

INFLUENCE.

Constructive trust in respect to property acquired by undue influence, see Trusts, § 95.

INFORMATION.

Criminal accusation, see Indictment and Information.

INFRINGEMENT.

Of trade-mark or trade-name, see Trade-Marks and Trade-Names, § 93.

INHERITANCE.

See Descent and Distribution.

INITIATIVE AND REFERENDUM.

Enactment of ordinances, see Municipal Corporations, § 108.

Legislative control over acts of cities, see Municipal Corporations, § 65.

INJUNCTION.

Act authorizing injunction against sales of liquors as imposing additional punishment, see Criminal Law, § 162.

Relief against particular acts or proceedings.
See Nuisance, §§ 23-36.

Boring of oil well, see Mines and Minerals, § 52.

Enforcement of judgment, see Judgment, § 445.

Obstruction of street, see Municipal Corporations, § 671.

Violations of liquor laws, see Intoxicating Liquors, §§ 261-279.

Review of proceedings for injunction.

Decisions reviewable, see Appeal and Error, § 100.

I. NATURE AND GROUNDS IN GENERAL.**(B) Grounds of Relief.**

§ 17. Under Rev. St. 1899, § 3649 (Ann. St. 1906, p. 2035), an injunction will issue where an action for damages would be inadequate, though other adequate remedies at law exist.—*School Dist. No. 61 v. McFarland* (Mo. App.) 673.

II. SUBJECTS OF PROTECTION AND RELIEF.**(G) Personal Rights and Duties.**

§ 96. The right of privacy *held* a legal right within the protection of the law.—*Munden v. Harris* (Mo. App.) 1076.

III. ACTIONS FOR INJUNCTIONS.

Trial of causes together, see Trial, § 2.

IV. PRELIMINARY AND INTERLOCUTORY INJUNCTIONS.

Review of decisions, see Appeal and Error, § 100.

(A) Grounds and Proceedings to Procure.

§ 132. Grounds for granting a preliminary injunction to transfer the possession of land

from one person to another stated.—*Simms v. Reinsner* (Tex. Civ. App.) 278.

§ 158. A preliminary injunction continues in force until the matter is finally heard and determined, in the absence of a motion to dissolve.—*Ex parte Roper* (Tex. Cr. App.) 334.

VII. VIOLATION AND PUNISHMENT.

§ 230. One restrained by a preliminary injunction *held* not entitled to urge in contempt proceedings for a violation of the injunction that he had not been given a speedy trial.—*Ex parte Roper* (Tex. Cr. App.) 334.

§ 230. Under the express provisions of Rev. St. 1895, art. 3011, the court *held* authorized in vacation to punish a violation of an injunction.—*Ex parte Looper* (Tex. Cr. App.) 345.

INJURIES.

In general, see Damages; Negligence; Torts.

INNOCENT PURCHASERS.

Of bills or notes, see Bills and Notes, §§ 334, 335.

IN PAIS.

Estoppel, see Estoppel, §§ 50-117.

IN REM.

Election contest, see Elections, § 304.

INSANE PERSONS.

Competency as witness, see Witnesses, § 79.
Divorce from insane person, see Divorce, § 43.
Mental capacity to consent as element of rape, see Rape, § 12.
Opinion evidence as to mental capacity, see Evidence, § 478.
Time for redemption from tax sale of land of insane person, see Taxation, § 699.

I. DISABILITIES IN GENERAL.

§ 1. One *held* an insane person within Kirby's Dig. § 7812.—*Pulaski County v. Hill* (Ark.) 973.

V. PROPERTY AND CONVEYANCES.

Time for redemption from tax sale of land of insane person, see Taxation, § 699.

§ 61. A grantee *held* a bona fide purchaser.—*Campbell v. Kerrick* (Ky.) 186.

§ 61. The deed of a person of unsound mind is not void but voidable.—*Campbell v. Kerrick* (Ky.) 186.

§ 61. The deed of a person of unsound mind will be set aside as against a bona fide purchaser for value without notice of a grantor's soundness of mind.—*Campbell v. Kerrick* (Ky.) 186.

VIII. CRIMES.

Insanity as defense in criminal prosecutions, see Homicide, § 294.

IX. ACTIONS.

§ 89. Measure of damages of a grantor of unsound mind induced to convey by fraud, stated.—*Campbell v. Kerrick* (Ky.) 186.

INSOLVENCY.

See Assignments for Benefit of Creditors; Bankruptcy.

Of corporations in general, see Corporations, § 553.

Of employer affecting liability for compensation, see Master and Servant, § 24.

INSPECTION.

Of tools, machinery and appliances or places of work for protection of servant, see Master and Servant, § 265.

INSTRUCTIONS.

By court to jury, see Criminal Law, §§ 761-763, 764, 769-815, 824-830; Trial, §§ 191-206, 423.

By master to servant, see Master and Servant, §§ 153-155.

INSTRUMENTS.

Alteration, see Alteration of Instruments.

As hearsay evidence, see Evidence, § 318.

Best and secondary evidence, see Criminal Law, § 398; Evidence, §§ 158-174.

Cancellation, see Cancellation of Instruments.

Delivery as escrow, see Escrows.

Documentary evidence, see Criminal Law, §§ 440-445; Evidence, §§ 359-376.

Parol or other extrinsic evidence, see Evidence, §§ 387-456.

Requisites and sufficiency of writing to satisfy statute of frauds, see Frauds, Statute of, §§ 105-115.

Particular classes of written instruments.

See Assignments for Benefit of Creditors; Bills and Notes; Bonds; Chattel Mortgages; Compromise and Settlement; Indictment and Information; Insurance; Mortgages; Release; Wills.

Contracts in general, construction and operation, see Contracts, §§ 144-232.

Contracts in general, execution, see Contracts, § 33.

Deeds, see Deeds.

Deeds of trust, see Trusts, § 20.

INSULATION.

Of electric wires, see Electricity, § 14.

INSURANCE.

Contracts for payment of annuities, see Annuities.

Judicial notice as to net value of policies, see Evidence, § 18.

I. CONTROL AND REGULATION IN GENERAL.

§ 8. A bond given by a mutual fire insurance company to secure the payment of claims construed, and *held* to be within the terms of Laws 1905, p. 492, § 4, so as to cover claims accruing on policies issued without the term of the bond.—*Crawford v. Ozark Ins. Co.* (Ark.) 951.

§ 8. Liability of sureties on a bond given under Act April 24, 1905 (Laws 1905, p. 492) § 4, *held* to cover all claims accruing during the term of the bond.—*Crawford v. Ozark Ins. Co.* (Ark.) 951.

§ 8. Under Laws 1905, p. 492, § 4, and Kirby's Dig. § 4348, the bond of a mutual insurance company obligating the surety for only one year *held* to cover claims during two years.—*Crawford v. Ozark Ins. Co.* (Ark.) 951.

III. INSURANCE AGENTS AND BROKERS.

(A) Agency for Insurer.

§ 77. A fire insurance company *held* estopped to deny agency.—*Shook v. Retail Hardware Mut. Fire Ins. Co. of Minnesota* (Mo. App.) 589.

§ 87. The authority of an insurance agent is *prima facie* coextensive with the require-

ments of the business intrusted to him.—*Shook v. Retail Hardware Mut. Fire Ins. Co. of Minnesota* (Mo. App.) 589.

§ 90. Limitations upon an insurance agent's authority *held* not to bind insured under the circumstances stated.—*Shook v. Retail Hardware Mut. Fire Ins. Co. of Minnesota* (Mo. App.) 589.

V. THE CONTRACT IN GENERAL.

(A) Nature, Requisites, and Validity.

§ 142. An insurance company could not accept the part of an unauthorized contract made by an agent and reject the rest, but must ratify it as a whole.—*Shook v. Retail Hardware Mut. Fire Ins. Co. of Minnesota* (Mo. App.) 589.

(B) Construction and Operation.

§ 177. A contract of insurance *held* for a period long enough to carry it beyond the date of a loss.—*New Hampshire Fire Ins. Co. v. Blakely* (Ark.) 926.

VII. ASSIGNMENT OR OTHER TRANSFER OF POLICY.

§ 203. Under Shannon's Code, § 4030, a husband obtaining a policy on his life, payable to his executors, administrators, and assigns, *held* entitled to control the matter of who shall benefit by the insurance, and the policy is his property, subject to his disposition.—*Nashville Trust Co. v. First Nat. Bank* (Tenn.) 311.

§ 208. An assignment of a life policy may be oral.—*Nashville Trust Co. v. First Nat. Bank* (Tenn.) 311.

§ 222. A husband who assigned a policy on his life, made payable to his executors, administrators, or assigns, *held* estopped from securing possession of the policy in the hands of the assignee, without payment of the debt incurred on the faith of the policy as a security.—*Nashville Trust Co. v. First Nat. Bank* (Tenn.) 311.

X. FORFEITURE OF POLICY FOR BREACH OF PROMISSORY WARRANTY, COVENANT, OR CONDITION SUBSEQUENT.

(B) Matters Relating to Property or Interest Insured.

§ 323. A policy upon several buildings which provided for lapse if any one of them remained vacant for more than 10 days is avoided where only one is vacant.—*Mecca Fire Ins. Co. v. Coghlan* (Tex. Civ. App.) 266.

(E) Nonpayment of Premiums or Assessments.

Judicial notice as to net value of policies, see Evidence, § 18.

§ 350. Rev. St. 1899, § 7900 (Ann. St. 1906, p. 3755), specifying four situations with reference to life insurance to which the three preceding sections (7897, 7898, 7899 [Ann. St. 1906, pp. 3752-3754]) should be inapplicable, implies that such sections shall control all cases not so specified, whatever the form of the policy.—*Fahle v. Connecticut Mut. Life Ins. Co. of Hartford, Conn.* (Mo. App.) 60.

§ 350. Where insured after making default in the payment of premiums on an endowment policy, after having paid more than three full annual premiums, did not demand paid-up insurance prior to his death, Rev. St. 1899, § 7898 (Ann. St. 1906, p. 3753), had no application to the rights of his beneficiary under such policy.—*Fahle v. Connecticut Mut. Life Ins. Co. of Hartford, Conn.* (Mo. App.) 60.

§ 350. Under Rev. St. 1899, §§ 7897, 7898, 7900 (Ann. St. 1906, pp. 3752-3755), where insured paid more than three annual premiums on

an endowment policy, and made default, and at the time of the default three-fourths of the net value of the policy exceeded the net value of paid-up insurance provided in the policy, and was enough to purchase extended insurance beyond insured's death, his beneficiary was entitled to recover the full amount of the policy.—*Fahle v. Connecticut Mut. Life Ins. Co. of Hartford, Conn.* (Mo. App.) 60.

§ 350. A life policy issued while Rev. St. 1899, § 7897 (Ann. St. 1906, p. 3752), was in force, but before the enactment of section 6946, Rev. St. 1909, and a loan made thereon after enactment of the latter section, *held* to be one contract governed by section 7897.—*Christensen v. New York Life Ins. Co.* (Mo. App.) 100.

§ 350. Conduct of an insured in accepting a policy of extended insurance computed under Rev. St. 1909, § 6946, instead of under Rev. St. 1899, § 7897 (Ann. St. 1906, p. 3752), in force when the policy was issued, *held* not to preclude recovery on the policy, which, had the terms been properly computed, would have extended to insured's death.—*Christensen v. New York Life Ins. Co.* (Mo. App.) 100.

§ 350. A cancellation of life policies for default in payment of premiums and interest on a loan *held* under the facts not to be considered as though the policies had been surrendered for their cash surrender value, because the insured actually received the entire amount which he might have had under any theory as the cash surrender value of the policies.—*Paschedag v. Metropolitan Life Ins. Co.* (Mo. App.) 102.

§ 350. A life policy issued while Rev. St. 1899, § 7897 (Ann. St. 1906, p. 3752), was in force, but before the enactment of Rev. St. 1909, § 6946, and a loan made thereon after enactment of the latter section, *held* to be one contract governed by section 7897.—*Paschedag v. Metropolitan Life Ins. Co.* (Mo. App.) 102.

§ 350. A provision in a life policy for a surrender value *held* not an unconditional surrender value within Rev. St. 1899, § 7900 (Ann. St. 1906, p. 3755), so as to exempt the policy from section 7897 (page 3752), relating to extended insurance.—*Paschedag v. Metropolitan Life Ins. Co.* (Mo. App.) 102.

§ 350. In view of Rev. St. 1899, § 7897 (Ann. St. 1906, p. 3752), *held*, that the insurer cannot contract with insured for a loan taking his policy as a pledge, if the loan contract involves the insurer's right to the net value of the policy stipulated for in the statute which may be applied as a net single premium for purchase of extended insurance.—*Paschedag v. Metropolitan Life Ins. Co.* (Mo. App.) 102.

§ 350. The giving of policies to insurer as pledge for a loan by insured, who received an adequate consideration, *held* not to exempt the policy under Rev. St. 1899, § 7900 (Ann. St. 1906, p. 3755), from the provisions of the preceding sections, requiring the issuance of extended insurance upon default in payment of premiums.—*Paschedag v. Metropolitan Life Ins. Co.* (Mo. App.) 102.

§ 350. A life insurance policy *held* to fall within the nonforfeiture provisions of Rev. St. 1899, § 7897 (Ann. St. 1906, p. 3752), and not Rev. St. 1899, § 7900 (page 3755).—*Leeker v. Prudential Ins. Co. of America* (Mo. App.) 676.

§ 358. The act of an agent in telling an insured who was sick not to pay the premium then *held* not to extend time of payment or to be a refusal of the company to accept a tendered premium.—*Cook v. Metropolitan Life Ins. Co.* (Mo. App.) 13.

§ 367. The beneficiary of a life insurance policy which provided that the insured might borrow upon the policy cannot attack a loan upon the policy for the purpose of paying a pre-

mium.—*Leeker v. Prudential Ins. Co. of America* (Mo. App.) 676.

XI. ESTOPPEL, WAIVER, OR AGREEMENTS AFFECTING RIGHT TO AVOID OR FORFEIT POLICY.

§ 375. An agent of a fire insurance company with authority to issue policies *held* to bind the company by a policy.—*New Hampshire Fire Ins. Co. v. Blakely* (Ark.) 926.

§ 375. A fire insurance company *held* bound by a parol contract made with insured by the agent eliminating the iron-safe clause.—*Shook v. Retail Hardware Mut. Fire Ins. Co. of Minnesota* (Mo. App.) 589.

§ 376. Insurance agents *held* to have power to waive stipulations of the policy as stated.—*Shook v. Retail Hardware Mut. Fire Ins. Co. of Minnesota* (Mo. App.) 589.

XV. ADJUSTMENT OF LOSS.

§ 576. A fire insurance company *held* to have waived a provision of the policy requiring an appraisal.—*Shook v. Retail Hardware Mut. Fire Ins. Co. of Minnesota* (Mo. App.) 589.

XVI. RIGHT TO PROCEEDS.

§ 583. Where a life policy issued to one is made payable to his legal representatives and he dies without making any disposition of it, the claims of his widow and next of kin *held*, by virtue of Shannon's Code, § 4030, to prevail over the claims of his general creditors.—*Nashville Trust Co. v. First Nat. Bank* (Tenn.) 311.

§ 593. An assignment of a life policy *held* to vest the title thereto in the assignee, leaving only an equity in the assignor, so that his widow and heirs had but an equity, and could not recover the proceeds without paying the debt for which it was assigned as security.—*Nashville Trust Co. v. First Nat. Bank* (Tenn.) 311.

§ 593. An assignment of a life policy *held* to give to the assignee an interest in the policy to the amount insured owed the assignee.—*Smith v. Hessey* (Tex. Civ. App.) 256.

XVII. ACTIONS ON POLICIES.

Judicial notice as to net value of policies, see Evidence, § 18.

Parol evidence, see Evidence, § 441.

§ 612. Insured *held* not entitled to recover on fire policy without returning or tendering payment received in compromise of claim.—*Thomas v. Continental Ins. Co. of New York* (Ky.) 199.

§ 665. In an action by the beneficiary of a life insurance policy whose case depended upon the amount of extended insurance computed upon net value of the policy at the time of lapse, evidence *held* to show that the net value was not sufficient to carry the extended insurance up to insured's death.—*Leeker v. Prudential Ins. Co. of America* (Mo. App.) 676.

§ 668. In an action on a fire policy, *held* a jury question whether defendant's soliciting agent waived the iron-safe clause in the policy.—*Shook v. Retail Hardware Mut. Fire Ins. Co. of Minnesota* (Mo. App.) 589.

§ 672. In an action on life policies, *held*, under the pleadings and evidence, that there could be no deduction from the amount of the policies for unpaid premiums allowed by Rev. St. 1899, § 7899 (Ann. St. 1906, p. 3754).—*Paschedag v. Metropolitan Life Ins. Co.* (Mo. App.) 102.

XX. MUTUAL BENEFIT INSURANCE.

(A) Corporations and Associations.

§ 690. A contract by a fraternal insurance order whereby it assumes the obligation of a

benefit certificate issued by another order *held* to bind the order to pay only the amount called for in the original certificate.—*Hatcher v. National Annuity Ass'n* (Mo. App.) 1.

(B) The Contract in General.

§ 724. A local agent of a beneficiary society *held* to have power to waive a provision of a benefit certificate providing that it should not be delivered to the applicant unless in good health.—*Modern Brotherhood of America v. Phelps* (Ky.) 892.

§ 724. Facts *held* to show that a local agent of a beneficiary society had waived the provision of the certificate that it should not be delivered unless applicant was in good health.—*Modern Brotherhood of America v. Phelps* (Ky.) 892.

§ 726. A contract in a mutual benefit association certificate and the constitution relating to it should be construed according to their obvious meaning, and with a view to accomplish the purpose for which the association is maintained.—*Brotherhood of Locomotive Firemen & Enginemen v. Aday* (Ark.) 928.

§ 726. A contract in a mutual benefit association certificate is like any other insurance policy, and its provisions should, therefore, be construed most strongly against the insurer.—*Brotherhood of Locomotive Firemen & Enginemen v. Aday* (Ark.) 928.

(D) Forfeiture or Suspension.

§ 748. A forfeiture of a fraternal beneficiary certificate must be based on a violation of a precise condition in the contract.—*Britt v. Sovereign Camp of Woodmen of the World* (Mo. App.) 1073.

§ 748. Where a member of a benefit association died pending rehearing on appeal after the affirmance of a conviction for manslaughter, his certificate was not forfeited under a provision forfeiture if the member should be convicted of a felony.—*Woodmen of the World v. Dodd* (Tex. Civ. App.) 254.

§ 751. A fraternal beneficiary association and a member may agree that default in regular assessments without notice shall, ipso facto, suspend the member.—*Britt v. Sovereign Camp of Woodmen of the World* (Mo. App.) 1073.

§ 755. The conduct of a fraternal insurance association as to the payment of regular assessments, and as to carrying delinquent members, *held* a waiver of the provision for ipso facto forfeiture.—*Britt v. Sovereign Camp of Woodmen of the World* (Mo. App.) 1073.

(E) Beneficiaries and Benefits.

§ 787. Permanent paralysis of a hand *held* within the meaning of the term "permanent paralysis of either extremities," as expressed in the constitution of a mutual benefit association.—*Brotherhood of Locomotive Firemen & Enginemen v. Aday* (Ark.) 928.

§ 787. "Total disability" defined.—*Brotherhood of Locomotive Firemen & Enginemen v. Aday* (Ark.) 928.

§ 787. Where insured while insane and resisting arrest was killed by a sheriff, his policy was not forfeited because of death while violating the criminal laws of the state.—*Woodmen of the World v. Dodd* (Tex. Civ. App.) 254.

(F) Actions for Benefits.

§ 825. In an action on a mutual benefit certificate evidence *held* to present no question for the jury as to the total paralysis of plaintiff's hand, so that a verdict was properly directed for him.—*Brotherhood of Locomotive Firemen & Enginemen v. Aday* (Ark.) 928.

INTENT.

Affecting libel or slander, see Libel and Slander, §§ 2, 104.
 Element of homicide, see Homicide, §§ 156-158, 286.
 Parol evidence, see Evidence, § 300.

INTEREST.

See Usury.
 Effect of counterclaim, see Set-Off and Counterclaim, § 58.
 Interest subject to chattel mortgage, see Chattel Mortgages, § 17.
 On advances by factors, see Factors, § 45.
 On bill or note, see Bills and Notes, § 125.

I. RIGHTS AND LIABILITIES IN GENERAL.

§ 13. Judgment for interest notwithstanding verdict in action for price of timber held not error.—*Lang v. Bach* (Ky.) 188.

III. TIME AND COMPUTATION.

§ 57. Money advanced under a contract or at the instance or request of another does not constitute an "open account" on which interest is allowable from the first of the succeeding January, under Rev. St. 1895, art. 3102.—*Couturie v. Roensch* (Tex. Civ. App.) 413.

INTERLOCUTORY DECISIONS.

Review, see Habeas Corpus, § 113.

INTERLOCUTORY INJUNCTION.

See Injunction, §§ 132-158.

INTERMEDDLING.

In suits between others, see Champerty and Maintenance.

INTERMEDIATE COURTS.

Review of decisions, see Appeal and Error, § 1084.

INTERPRETATION.

Of language used in alleged libel or slander, see Libel and Slander, § 19.

Of contracts, instruments, or judicial acts and proceedings.

See Bonds, § 50; Chattel Mortgages, §§ 124-153; Release, § 29; Statutes, §§ 205-241; Wills, §§ 448-684.

Bills and notes, see Bills and Notes, § 125.

Conditions in will, see Wills, §§ 656, 657.

Constitutional provisions, see Constitutional Law, §§ 32-46.

Contracts in general, see Contracts, §§ 144-232.

Contracts of insurance, see Insurance, §§ 177, 726.

Contracts of sale, see Sales, § 81.

Deeds, see Boundaries, § 3; Deeds, §§ 120-168.

Instructions, see Trial, §§ 295, 296.

Judgment on trial of issues, see Judgment, § 525.

Leases, see Mines and Minerals, § 70.

Parol or extrinsic evidence to aid interpretation of written instruments, see Evidence, §§ 448-456.

Pleadings, see Pleading, § 34.

Powers, see Powers, § 33.

Rules of master governing work of servant, see Master and Servant, § 145.

Subleases, see Landlord and Tenant, § 80.

Suretyship agreement, see Principal and Surety, §§ 59-66.

Testamentary trusts, see Wills, § 684.

INTERPRETERS.

In criminal prosecution, see Criminal Law, § 642.

INTERSTATE COMMERCE.

Power to regulate, see Commerce.

INTERVENTION.

Claims to mortgaged goods in foreclosure proceedings by third persons, see Chattel Mortgages, § 284.

INTESTACY.

See Descent and Distribution.

Construction of will against intestacy, see Wills, § 448.

Disposition or devolution of property of testator not disposed of by will, see Wills, § 866.

INTIMIDATION.

See Threats.

INTOXICATING LIQUORS.

Taxation, see Taxation, § 545.

II. CONSTITUTIONALITY OF ACTS AND ORDINANCES.

Act authorizing injunction against sales of liquors as imposing additional punishment, see Criminal Law, § 162.

Ex post facto laws, see Constitutional Law, § 191.

Subject and title of statute, see Statutes, § 114.

III. LOCAL OPTION.

§ 33. Under Ky. St. § 2554 (Russell's St. § 4054), an order for a local option election cannot be made at the same term that the petition is received.—*Doody v. Bowman* (Ky.) 148.

§ 34. Misconduct of challengers and other officers of a local option election held not sufficient to invalidate the election.—*Hill v. Mottley* (Ky.) 469.

§ 34. Under Ky. St. § 2560 (Russell's St. § 4059), a local option election in a city on the same day in which such an election is held for the county held properly conducted.—*Hill v. Mottley* (Ky.) 469.

§ 36. Record of a county court held to show a sufficient compliance with Rev. St. 1899, § 3031 (Ann. St. 1906, p. 1737), providing for the publication of the result of a local option election.—*State v. Snider* (Mo. App.) 588.

§ 36. Under Rev. St. 1899, § 3031 (Ann. St. 1906, p. 1737), a record of the county court need not show a return of the publication of the result of a local option election where it shows that the publication was ordered.—*State v. Snider* (Mo. App.) 588.

§ 37. Citizens were not estopped from contesting a local option election by participating in it.—*Doody v. Bowman* (Ky.) 148.

§ 37. Under Ky. St. § 2560 (Russell's St. § 4063), published notice of contests of local option election need not contain the statement of grounds of contest.—*Doody v. Bowman* (Ky.) 148.

§ 37. A fact held not to show fraud or bribery at a local option election.—*Hill v. Mottley* (Ky.) 469.

§ 37. A fact held not to show a part of a plan to impress on illiterate voters that their votes were being marked so as to indicate whether they voted as they had agreed to.—*Hill v. Mottley* (Ky.) 469.

§ 37. Certain testimony *held* not to show bribery at a local option election.—Hill v. Mottley (Ky.) 469.

§ 37. Evidence *held* not to show that voters had been bribed to vote "wet" at a local option election.—Hill v. Mottley (Ky.) 469.

§ 37. Fraud and bribery connected with a local option election *held* not presumed from a certain fact.—Hill v. Mottley (Ky.) 469.

§ 37. That "wet" workers at a local option election carried voters to and from the polls in automobiles and carriages does not show bribery.—Hill v. Mottley (Ky.) 469.

§ 37. The practice of procuring certificates for persons who had lost their certificates and paying therefor *held* not evidence of fraud and bribery at an election.—Hill v. Mottley (Ky.) 469.

§ 37. Judgment declaring result of a contest of a local option election *held* not invalid because of certain publication of the result in a paper selected by the clerk of the court (Sayles' Ann. Civ. St. 1897, art. 3391).—Bickers v. Lacy (Tex. Civ. App.) 763.

§ 40. Under Const. 1876, art. 16, § 20, as amended on September 22, 1891, and Act June 24, 1876 (Laws 1874, c. 33 [Rev. St. 1895, art. 3395]), the adoption by a county of Act April 24, 1909 (Laws 1909 [1st Called Sess. 31st Leg.] c. 35), amending Pen. Code 1895, art. 402, fixing the penalty for violating the local option law at confinement in the penitentiary for not less than one nor more than three years, superseded the adoption of a prior law in any justice's precinct in the county, so that such penalty was operative throughout the county.—Garrett v. State (Tex. Cr. App.) 696.

IV. LICENSES AND TAXES.

§ 64. An owner of property leasing it for a saloon *held* not interested in the business within Acts 31st Leg. c. 17, § 9.—Doyle v. Scott (Tex. Civ. App.) 829.

§ 99. A license to sell liquor is not a contract, and is revocable.—State ex rel. Smith v. Dykeman (Mo. App.) 120.

§ 106. A license to sell liquor is not a contract and is revocable.—State ex rel. Smith v. Dykeman (Mo. App.) 120.

§ 106. A single sale of intoxicating liquor on Sunday by persons having a dramshop license is not ground for revocation of the license under Rev. St. 1899, § 3012 (Ann. St. 1906, p. 1727).—State ex rel. Smith v. Dykeman (Mo. App.) 120.

§ 106. Where persons licensed to conduct a saloon rent a part of the building as a house of prostitution, the liquor license *held* properly revoked.—State ex rel. Smith v. Dykeman (Mo. App.) 120.

§ 108. In certiorari to review proceedings for the revocation of a liquor license findings *held* sufficient to show a violation of Rev. St. 1899, § 3012 (Ann. St. 1906, p. 1727).—State ex rel. Smith v. Dykeman (Mo. App.) 120.

§ 108. In proceedings before the county court to revoke a dramshop license, no exact form of procedure is necessary.—State ex rel. Smith v. Dykeman (Mo. App.) 120.

§ 108. In proceedings for the revocation of a dramshop license, it is not necessary that the court should make specific findings of fact.—State ex rel. Smith v. Dykeman (Mo. App.) 120.

§ 108. On certiorari in a proceeding to revoke relator's dramshop license, the court can only examine the record certified to it to deter-

mine the authority of the court below.—State ex rel. Smith v. Dykeman (Mo. App.) 120.

V. REGULATIONS.

§ 115. Under Acts 31st Leg. c. 17, § 15, a saloon *held* conducted in an open house.—Doyle v. Scott (Tex. Civ. App.) 829.

VI. OFFENSES.

§ 132. Ky. St. § 2558a (Russell's St. § 3646) *held* to amend Acts 1873, c. 40, prohibiting the sale of liquor in a designated county.—Gambill v. Commonwealth (Ky.) 160.

§ 139. A possession of liquor *held* not to sustain a charge of storing liquor in violation of Rev. St. 1909, § 7227.—State v. Rawlings (Mo.) 530.

§ 139. To support a conviction of a violation of Rev. St. 1909, § 7227, the proof must show that accused kept, stored, or delivered intoxicating liquor.—State v. Rawlings (Mo.) 530.

VIII. CRIMINAL PROSECUTIONS.

Necessity of allocution, see Criminal Law, § 989.

§ 204. An indictment *held* to charge a violation of Acts 1873, c. 40, as amended by Ky. St. § 2558a (Russell's St. § 3646), relating to local option.—Gambill v. Commonwealth (Ky.) 160.

§ 205. In an indictment for a violation of Rev. St. 1909, § 7227, charged to have been committed in a local option county, an allegation of the adoption of local option in a city in the county *held* immaterial.—State v. Rawlings (Mo.) 530.

§ 205. Under Rev. St. 1909, § 5115, an information *held* to charge a violation of section 7227.—State v. Rawlings (Mo.) 530.

§ 222. An indictment for a violation of the local option law *held* not required to allege that accused does not come within the exceptions of the law.—Gambill v. Commonwealth (Ky.) 160.

§ 223. The state on a trial for a violation of Rev. St. 1909, § 7227, *held* required only to prove that the offense was committed at any place in the county where the local option law was in force.—State v. Rawlings (Mo.) 530.

§ 224. On a trial for a violation of Acts 1873, c. 40, as amended by Ky. St. § 2558a (Russell's St. § 3646) accused *held* required to show that he was a manufacturer of liquor and that prosecutor was either a wholesale dealer or a licensed retail dealer.—Gambill v. Commonwealth (Ky.) 160.

§ 224. The prosecution on a trial for a violation of the local option law *held* not required to prove that accused does not come within a class excluded from the operation of the law, but accused must show that he belongs to the excepted class.—Gambill v. Commonwealth (Ky.) 160.

§ 224. The burden is on defendant in a prosecution for violating the local option law to show failure of publication of notice of result of local option election under Rev. St. 1899, § 3031 (Ann. St. 1906, p. 1737).—State v. Snider (Mo. App.) 588.

§ 230. The state on a trial for a violation of Rev. St. 1909, § 7227, *held* authorized to show that accused ordered or received intoxicating liquor.—State v. Rawlings (Mo.) 530.

§ 238. Evidence *held* to justify the submission to the jury of the issue whether accused kept or delivered intoxicating liquor in violation of Rev. St. 1909, § 7227.—State v. Rawlings (Mo.) 530.

X. ABATEMENT AND INJUNCTION.

Act authorizing injunction against sales of liquors as imposing additional punishment, see Criminal Law, § 162.

Ex post facto laws, see Constitutional Law, § 191.

Jury trial, denial of right, see Jury, § 31.

§ 261. The court at the suit of a private citizen and taxpayer *held* not authorized to enjoin the maintenance of a saloon by one having a license, though he did not apply therefor, as required by Acts 31st Leg. c. 17, §§ 7, 9.—*Doyle v. Scott* (Tex. Civ. App.) 829.

§ 269. The district court has jurisdiction to issue an injunction to restrain a druggist from selling liquor, in violation of law.—*Ex parte Roper* (Tex. Cr. App.) 334.

§ 278. An injunction restraining a druggist licensed to sell liquor *held* not void because going beyond the limits authorized by law.—*Ex parte Roper* (Tex. Cr. App.) 334.

§ 279. One convicted of selling whisky in violation of the local option law and of an injunction *held* not entitled to plead his conviction in bar of contempt proceedings for a violation of the injunction.—*Ex parte Looper* (Tex. Cr. App.) 345.

INTOXICATION.

Duty of carrier to receive intoxicated person as passenger, see Carriers, § 236.

INTRUDERS.

On land, see Forcible Entry and Detainer; Trespass.

INVEIGLEMENT.

Of child, see Kidnapping.

INVITED ERROR.

See Appeal and Error, § 882.

IRON-SAFE CLAUSE.

In insurance policy, see Insurance, § 668.

ISSUES.

Applicability of instructions to issues, see Criminal Law, § 814; Trial, § 251.

Identity of issues as affecting conclusiveness of judgment, see Judgment, §§ 713-743.

In civil actions, see Pleading, §§ 387-395.

Instructions ignoring, see Trial, § 253.

Judgment on trial of issues, see Judgment, §§ 238-269.

Presented for review on appeal, see Appeal and Error, §§ 169-172.

Trial by jury of issues in equity, see Equity, §§ 377-381.

JAILS.

See Prisons.

JEOFAILS.

Statute of, see Pleading, § 433.

JEOPARDY.

Former jeopardy as bar to prosecution, see Criminal Law, § 162.

JOHNSON GRASS.

Instructions assuming facts in action for permitting Johnson grass to mature on right of way of railroad, see Trial, § 191.

On railroad right of way, penalties, see Agriculture, § 8.

JOINDER.

Of causes of action, see Action, §§ 38, 45.

Of counts in indictment or information, see Indictment and Information, § 132.

Of defenses, see Pleading, § 93.

Of parties in action for causing death, see Death, § 42.

JOINT ADVENTURES.

See Partnership.

Conspirators, see Conspiracy.

Joint estates, see Joint Tenancy.

JOINT LIABILITIES.

For torts in general, see Torts, § 22.

Judgment against one or more parties, see Judgment, § 238.

Ratification of acts of joint tort-feasors, see Principal and Agent, § 175.

Release of one of several jointly liable as release of all, see Release, § 29.

Reversal as to joint defendant, see Appeal and Error, § 1173.

Splitting causes of action, see Action, § 53.

JOINT OWNERS.

See Joint Tenancy.

Community property, see Husband and Wife, § 273.

JOINT TENANCY.

See Tenancy in Common.

Partition of joint property, see Partition.

§ 14. That plaintiffs suing as joint tenants to recover land allege the amount in acreage of the undivided interest of each does not affect their right to join in the action.—*Morse v. Tackaberry* (Tex. Civ. App.) 273.

JOINT TORT-FEASORS.

Application of doctrine of ratification of act of agent, see Principal and Agent, § 175.

Conspirators, see Conspiracy, § 14.

In general, see Torts, § 22.

Release of one of several joint tort-feasors, as release of all, see Release, § 29.

Reversal as to joint defendant, see Appeal and Error, § 1173.

Splitting causes of action, see Action, § 53.

JUDGES.

See Courts; Justices of the Peace.

Judicial powers and functions in general, and delegation thereof, see Constitutional Law, §§ 70-73.

Remarks and conduct on trial, see Criminal Law, § 655; Trial, § 29.

Subjects and titles of acts relating to judges, see Statutes, § 124.

II. SPECIAL OR SUBSTITUTE JUDGES.

§ 19. Plea alleging that a special judge is disqualified to try a case *held* required to be proved by evidence.—*Hart v. State* (Tex. Cr. App.) 1178.

III. RIGHTS, POWERS, DUTIES, AND LIABILITIES.

Punishment for violation of injunction, see Injunction, § 230.

§ 29. Under Rev. St. 1895, art. 1108, the regular presiding judge of a district may vacate the bench, and the judge of another district may hold court for him.—*Hart v. State* (Tex. Cr. App.) 1178.

§ 30. Statement of right of judges to exchange under Const. art. 5, § 11.—*Johnson v. State* (Tex. Cr. App.) 225.

JUDGMENT.

Curing defective pleading by judgment, *see* Pleading, § 433.

Decisions of courts in general, *see* Courts, § 91.

On pleadings, *see* Pleading, § 343.

Sales under judgment, order, or decree, *see* Judicial Sales.

In actions by or against particular classes of persons.

See Executors and Administrators, § 500.

In particular civil actions or proceedings.

For accounting by executor or administrator, *see* Executors and Administrators, § 500.

For permanent alimony on divorce, *see* Divorce, § 271.

On insurance policy, *see* Insurance, § 672.

To abate nuisance, *see* Nuisance, § 36.

To confirm or try tax titles, *see* Taxation, § 816.

To enjoin liquor nuisance, *see* Intoxicating Liquors, § 278.

In criminal prosecutions.

See Criminal Law, § 989.

Review.

See Appeal and Error; Certiorari; Criminal Law, §§ 1020-1170½; Justices of the Peace, §§ 174-191.

Judgment on appeal or writ of error, *see* Appeal and Error, § 1122.

IV. BY DEFAULT.

(B) *Opening or Setting Aside Default.*

§ 137. Under the direct provisions of Rev. St. 1900, § 2004, the circuit court in its discretion may before final judgment set aside a default and allow the action to be defended.—*Dazey v. Elvin* (Mo. App.) 85.

§ 139. It was not an abuse of the trial court's discretion to allow one claiming to be a bona fide purchaser of land without notice to intervene and defend an action against the land after default, even though a *lis pendens* had been filed.—*Dazey v. Elvin* (Mo. App.) 85.

VI. ON TRIAL OF ISSUES.

(A) *Rendition, Form, and Requisites in General.*

Review of objections, *see* Appeal and Error, § 1073.

(B) *Parties.*

§ 238. Under Rev. St. 1909, § 2769, a judgment against one of two defendants *held* properly rendered in an action on an implied contract.—*Remmers v. Shubert* (Mo. App.) 1042.

(C) *Conformity to Process, Pleadings, Proofs, and Verdict or Findings.*

§ 248. A plaintiff must recover, if at all, on the issues tendered by his pleadings and evidence and submitted in his instructions.—*Chambers v. Kupper-Benson Hotel Co.* (Mo. App.) 45.

§ 252. Under a prayer for general relief, plaintiff may recover whatever the facts alleged and proved will justify.—*Jordan v. Massey* (Tex. Civ. App.) 804.

(D) *Arrest of Judgment.*

§ 269. Arrest of judgment for plaintiff for matters of substance *held*, under Shannon's Code, §§ 4446, 4585, not a bar to another action.—*Louisville & N. R. Co. v. Beasley & Beasley* (Tenn.) 306.

VIII. AMENDMENT, CORRECTION, AND REVIEW IN SAME COURT.

Effect of appeal, *see* Appeal and Error, § 440.

§ 334. Circuit courts can entertain writs of error *coram nobis*, or motions in the nature thereof.—*Reed v. Bright* (Mo.) 653.

§ 334. Statement of the nature of the facts to which the writ of error *coram nobis* generally relates.—*Reed v. Bright* (Mo.) 653.

§ 334. The record and the verity thereof cannot be attacked by writ of error *coram nobis*.—*Reed v. Bright* (Mo.) 653.

§ 334. One cannot have relief by writ of error *coram nobis* for facts which, with diligence, he should have known and brought to the attention of the court at the trial.—*Reed v. Bright* (Mo.) 653.

IX. OPENING OR VACATING.

Enforcements of judgment for alimony or other allowances on divorce, *see* Divorce, § 271. Order or decree on accounting by executor or administrator, *see* Executors and Administrators, § 500.

X. EQUITABLE RELIEF.

Bill of review in equity, *see* Equity, § 447.

(A) *Nature of Remedy and Grounds.*

§ 445. Fraud justifying the setting aside of a judgment on direct attack stated.—*Walther v. Null* (Mo.) 993.

XI. COLLATERAL ATTACK.

(B) *Grounds.*

§ 495. A county court having partitioned the estate of a decedent, its judgment could not be collaterally attacked for failure to show that it had jurisdiction to partition the particular estate.—*Caruthers v. Hadley* (Tex. Civ. App.) 757.

§ 504. Partition decree, though invalid for uncertainty, *held* admissible to show that both plaintiff and defendant claimed from a common source.—*Caruthers v. Hadley* (Tex. Civ. App.) 757.

XII. CONSTRUCTION AND OPERATION IN GENERAL.

§ 525. Judgment construed and *held* not a judgment by default.—*Todd v. State* (Tex. Civ. App.) 761.

XIII. MERGER AND BAR OF CAUSES OF ACTION AND DEFENSES.

(B) *Causes of Action and Defenses Merged, Barred, or Concluded.*

§ 619. Where an opportunity was afforded defendants to urge a particular defense in a prior suit, they were precluded by the decree whether they availed themselves of the right or not.—*Louisville Gas Co. v. Kentucky Heating Co.* (Ky.) 205.

XIV. CONCLUSIVENESS OF ADJUDICATION.

Decision of appellate court as law of the case in lower court, *see* Appeal and Error, § 1195. Former decision in same case as law of the case, *see* Appeal and Error, § 1097.

Judgment on accounting by executor or administrator, *see* Executors and Administrators, § 513.

(C) *Matters Concluded.*

§ 713. General rule as to conclusiveness of judgments stated.—*Pulaski County v. Hill* (Ark.) 973.

§ 715. In a suit to restrain interference with a passway, a judgment that the road was a public passway, *held* not conclusive as to issues pleaded, but not submitted.—*White v. Townsend* (Ky.) 876.

§ 720. A decree in a prior injunction suit, determining that defendants operated a lamp-black factory where they wasted natural gas from a field from which complainant obtained its gas, *held* binding on defendant in a subsequent suit to recover damages to plaintiff by reason of such alleged waste.—*Louisville Gas Co. v. Kentucky Heating Co.* (Ky.) 205.

§ 743. A chancery decree ordering sale of land for taxes *held* conclusive as to title to the land.—*Robinson v. Cross* (Ark.) 954.

XVI. JUDGMENTS IN REM.

Election contest, see Elections, § 304.

JUDICIAL ADMISSIONS.

As evidence, see Evidence, § 208.

JUDICIAL DISCRETION.

Admission of opinion evidence, see Evidence, § 498½.

Amendment of pleadings, see Pleading, § 236.

Continuance, see Criminal Law, § 586.

Control of argument and conduct of counsel, see Trial, § 106.

Opening or vacating judgment, see Judgment, § 139.

Reopening case for further evidence, see Trial, § 68.

Review of discretion in civil actions, see Appeal and Error, §§ 959-981.

Review of discretion in criminal prosecutions, see Criminal Law, §§ 1151-1156.

Specific performance of contract, see Specific Performance, § 8.

JUDICIAL NOTICE.

In civil actions, see Evidence, §§ 18-43.

In criminal prosecutions, see Criminal Law, § 304.

JUDICIAL OFFICERS.

See Judges; Justices of the Peace.

JUDICIAL POWER.

See Constitutional Law, §§ 70-73.

JUDICIAL SALES.

Exemption of real property, see Homestead.

Fraud in acquisition of property as creating constructive trusts, see Trusts, § 95.

Of property of decedent, see Executors and Administrators, § 327.

On execution, see Execution, §§ 258-269.

Sufficiency of title to maintain suit to quiet title, see Quieting Title, § 10.

Tax sales, see Taxation, § 643.

§ 50. In case of a judicial sale, *held*, the commissioner became a trustee for the purchaser.—*Green v. Maddox* (Ark.) 931.

JURISDICTION.

Acquisition by appearance, see Appearance, §§ 18, 19.

Amount or value in controversy, see Justices of the Peace, § 43.

Of courts in general, see Courts.

To determine validity of exercise of power of eminent domain, see Eminent Domain, § 66.

Want of jurisdiction ground for collateral attack on judgment, see Judgment, § 495.

Jurisdiction of particular actions or proceedings.

Criminal prosecutions, see Criminal Law, § 90.

Election contest, see Elections, § 275.

Prosecution for violation of ordinance, see Municipal Corporations, § 636.

To enjoin liquor nuisance, see Intoxicating Liquors, § 269.

Special jurisdictions and jurisdictions of particular classes of courts.

See Justices of the Peace, § 43.

Appellate jurisdiction, see Appeal and Error, § 21; Courts, §§ 223-231.

Equity jurisdiction, see Equity, §§ 3-32.

Federal courts in general, see Courts, § 363.

JURY.

See Grand Jury.

Affidavits, statements, and testimony of jurors on motion for new trial, see Criminal Law, § 957.

Custody, conduct, and deliberations, see Trial, § 317.

Instructions, see Criminal Law, §§ 761-763, 764, 760-815, 824-830; Trial, §§ 191-206, 423.

Misconduct of or affecting as ground for new trial, see Criminal Law, § 925.

Questions for jury in civil actions, see Trial, §§ 139-178.

Questions for jury in criminal prosecutions, see Criminal Law, §§ 741-763, 764.

Taking case or question from jury at trial, see Criminal Law, § 741; Trial, §§ 139-178.

Trial by jury of claims in administration suit, see Executors and Administrators, § 473.

Trial by jury of issues in equity, see Equity, §§ 377-381.

Verdict in civil actions, see Trial, §§ 329-337.

Verdict in criminal prosecutions, see Criminal Law, § 884.

II. RIGHT TO TRIAL BY JURY.

§ 31. The act of 1907, relating to injunctions to restrain violations of the local option law, *held* not invalid as denying the right to trial by jury.—*Ex parte Roper* (Tex. Cr. App.) 334.

III. QUALIFICATIONS OF JURORS AND EXEMPTIONS.

Disqualification of or misconduct affecting as ground for new trial, see New Trial, §§ 44-47.

§ 39. Acts 1883, c. 196, entitled "An act to amend" (Code 1858, § 3981, *held* to also amend sections 3988, 4010.—*Darnell v. State* (Tenn.) 307.

§ 53. A juror drawn for one week's service who served on a jury the first of the week is not disqualified from serving again the latter part of the week as having served on a jury within the year.—*Asmus v. United Rys. Co.* of St. Louis (Mo. App.) 92.

§ 53. Under Acts 1905, c. 233, §§ 4, 5, 7, 8, 11, 12, 13, one drawn as a regular juror *held* incompetent, if he had served as such within two years prior to the making of the jury list.—*Darnell v. State* (Tenn.) 307.

IV. SUMMONING, ATTENDANCE, DISCHARGE, AND COMPENSATION.

Subjects and titles of acts, see Statutes, § 124.

V. COMPETENCY OF JURORS, CHALLENGES, AND OBJECTIONS.

Incompetency of or misconduct affecting as ground for new trial, see New Trial, §§ 44-47.

§ 116. The mere absence of veniremen without any showing of a want of diligence to se-

cure their attendance is not ground for quashing the venire.—*Haywood v. State* (Tex. Cr. App.) 218.

§ 120. On a motion to quash a venire because out of 100 names drawn only 17 were present in court, evidence of insufficiency of officer's diligence *held* not admissible.—*Haywood v. State* (Tex. Cr. App.) 218.

VI. IMPANELING FOR TRIAL AND OATH.

§ 149. The refusal to discharge the jury on the ground of the misconduct of a bystander, *held* not erroneous.—*Thurman v. Commonwealth* (Ky.) 174.

JURY COMMISSIONERS.

Subject and title of act creating board, see Statutes, § 124.

JUSTICES OF THE PEACE.

III. CIVIL JURISDICTION AND AUTHORITY.

§ 43. Under Const. art. 7, § 40, the circuit court had no jurisdiction of an action to recover \$100 damages for a breach of a contract.—*Smith v. Taylor* (Ark.) 634.

IV. PROCEDURE IN CIVIL CASES.

§ 91. Rule governing pleadings in justice's court stated.—*Lord & Bushnell Co. v. Texas & N. O. R. Co.* (Mo. App.) 111.

V. REVIEW OF PROCEEDINGS.

(A) Appeal and Error.

§ 174. The parties in an action originating in justice's court may orally replead in the county court.—*Loomis v. Broadbuss & Leavell* (Tex. Civ. App.) 743.

§ 191. Statement of liability of sureties on a bond, under Rev. St. 1895, art. 1670, for appeal from a justice to the county court.—*Keahey v. Bryant* (Tex. Civ. App.) 409.

JUSTIFICATION.

Defense to action for libel or slander, see Libel and Slander, §§ 54, 110.

JUVENILE COURT.

Transfer of prosecution to juvenile docket, see Infants, § 68.

KIDNAPPING.

§ 1. That accused acted as agent for the mother in enticing away a child from the father, in whose custody it was, would not prevent his conviction, under Rev. St. 1909, § 4489.—*State v. Brandenburg* (Mo.) 529.

KNOWLEDGE.

Affecting competency of expert witness, see Evidence, § 544.

Affecting transfer of bill or note, see Bills and Notes, §§ 334, 335.

By former owner, as to possession alleged to be adverse, see Adverse Possession, § 31.

Ignorance of cause of action as affecting limitation, see Limitation of Actions, § 95.

Of defect or danger as affecting assumption of risk by servant, see Master and Servant, § 217.

Of defect or danger as affecting contributory negligence of servant, see Master and Servant, § 234.

Of defect or danger as affecting duty of master to warn or instruct servant, see Master and Servant, § 154.

Opinion evidence founded on special knowledge as to subject-matter, see Criminal Law, § 452; Evidence, § 474.

LABOR.

See Master and Servant; Work and Labor.

Claims against estates of decedents for services, see Executors and Administrators, § 206.

Liens on real property for work and materials, see Mechanics' Liens.

LACHES.

Affecting particular rights, remedies, or proceedings.

For new trial, see Criminal Law, § 951.

In equity, see Equity, §§ 67-71.

To confirm or try tax title, see Taxation, § 805.

To set aside transfer in fraud of creditors or subsequent purchasers, see Fraudulent Conveyances, § 249.

LANDLORD AND TENANT.

Fixtures as between landlord and tenant, see Fixtures, § 15.

Lease of mines and mineral lands, see Mines and Minerals, § 70.

Possession by tenant in action to quiet title, see Quieting Title, § 12.

II. LEASES AND AGREEMENTS IN GENERAL.

Lease of mines and mineral lands, see Mines and Minerals, § 70.

IV. TERMS FOR YEARS.

(B) Assignment, Subletting, and Mortgage.

§ 80. Lessor *held* entitled to maintain forcible detainer against third person taking possession of leased premises with consent of lessee.—*Willis v. Whayne* (Ky.) 150.

§ 80. A lessor may for any breach of conditions of the lease evict both the lessee and his subtenant.—*Doyle v. Scott* (Tex. Civ. App.) 828.

§ 80. A subtenant of a lessee *held* not entitled on the termination of the lease to assert any rights against the lessor.—*Doyle v. Scott* (Tex. Civ. App.) 828.

§ 80. A subtenant is chargeable with knowledge of the terms of the lessee's lease.—*Doyle v. Scott* (Tex. Civ. App.) 828.

VI. TENANCIES AT WILL AND AT SUFFERANCE.

§ 119. Where defendant's husband was only a tenant at will at his death, she resided on the land as a tenant by sufferance, if a tenant at all.—*Perry v. Veal* (Ky.) 458.

§ 120. The rights of a tenant at will in the land terminated at his death.—*Perry v. Veal* (Ky.) 458.

VII. PREMISES AND ENJOYMENT AND USE THEREOF.

(D) Repairs, Insurance, and Improvements.

Fixtures as between landlord and tenant, see Fixtures, § 15.

VIII. RENT AND ADVANCES.

Right to rents and profits of mortgaged property, see Mortgages, § 199.

Under mining lease, see Mines and Minerals, § 70.

(B) Actions.

Rights arising after commencement of action, see Action, § 65.

(C) Lien.

§ 254. Under the facts, *held* a landlord waived his lien.—*Keahey v. Bryant* (Tex. Civ. App.) 409.

(D) Distress.

Review of decisions, see Appeal and Error, § 172.

Rights arising after commencement of action, see Action, § 65.

§ 274. Evidence *held* insufficient to sustain an award of \$350 actual, and \$250 exemplary, damages, for wrongful distress against a farm tenant.—*Michalek v. Cernock* (Tex. Civ. App.) 270.

IX. RE-ENTRY AND RECOVERY OF POSSESSION BY LANDLORD.

§ 288. Proceedings by lessor to recover premises *held* properly by forcible detainer rather than by ejectment or action to quiet title.—*Willis v. Whayne* (Ky.) 150.

§ 290. Possession of lessee *held* to extend to boundaries pointed out by lessor, as affecting right of lessor to maintain forcible detainer proceedings.—*Willis v. Whayne* (Ky.) 150.

§ 290. Consent of lessee to entry by his brother on leased premises *held* to be implied from circumstances in forcible detainer proceedings.—*Willis v. Whayne* (Ky.) 150.

§ 290. When unlawful detainer lies under Rev. St. 1909, § 7637, stated.—*Forder v. Handlan* (Mo. App.) 1110.

§ 291. A complaint in unlawful detainer under Kirby's Dig. § 3630, *held* to sufficiently allege plaintiff's rent was due, and that defendant had refused to pay it.—*Lindsey v. Bloodworth* (Ark.) 959.

§ 291. In forcible detainer proceedings, court *held* not entitled to consider question of mistake in deed affecting tract in question.—*Willis v. Whayne* (Ky.) 150.

§ 291. Lessor *held* entitled to maintain forcible detainer proceedings against third person taking possession of leased premises, forcibly without consent of lessee, under Civ. Code Prac. § 452, subsec. 4, "defining forcible detainer."—*Willis v. Whayne* (Ky.) 150.

§ 291. Evidence *held* to sustain a finding that defendant in unlawful detainer was in actual possession as lessee.—*Forder v. Handlan* (Mo. App.) 1110.

LANDS.

See Property.

Conveyances, see Deeds; Vendor and Purchaser.

Mortgage, see Mortgages.

Public lands, see Public Lands.

LANGUAGE.

Of statute, following statutory language in indictment or information, see Indictment and Information, § 110.

LARCENY.

See False Pretenses.

I. OFFENSES AND RESPONSIBILITY THEREFOR.

§ 22. Kirby's Dig. § 2100, *held* not to allow conviction for larceny of one who merely received stolen property out of the state, and

brought it into the state.—*Wilson v. State* (Ark.) 623.

II. PROSECUTION AND PUNISHMENT.**(B) Evidence.**

§ 58. In prosecution for theft, evidence *held* to sustain charge of indictment that property taken was lawful money of United States.—*Bacon v. State* (Tex. Cr. App.) 690.

§ 60. Evidence *held* to sustain a conviction of larceny.—*Johnson v. State* (Tex. Cr. App.) 225.

(C) Trial and Review.

Instructions assuming facts, see Criminal Law, § 761.

§ 77. Declarations of defendant, introduced in evidence, *held* to authorize instruction on law of explanation of possession of recently stolen property.—*Bacon v. State* (Tex. Cr. App.) 690.

LAST CLEAR CHANCE.

Injury avoidable notwithstanding contributory negligence, see Negligence, § 83; Railroads, §§ 346, 348, 350, 390.

LATENT DEFECTS.

In machinery, appliances, and places for work as affecting assumption of risk by servant, see Master and Servant, § 219.

In machinery, appliances, and places for work as affecting duty of master to warn servant, see Master and Servant, § 155.

LAW.

See Common Law.

Conclusions of law, see Trial, §§ 394-403.

Due process of law, see Constitutional Law, § 278.

Judicial notice of laws, see Evidence, § 35.

Presumptions as to laws of other states, see Evidence, § 80.

Questions of law or fact, province of court and jury, see Criminal Law, § 741; Trial, §§ 139-143.

Statutory law, see Statutes.

LAW OF THE CASE.

Former decision on appeal, see Appeal and Error, §§ 1097, 1195.

LAWYERS.

See Attorney and Client.

LEASE.

See Landlord and Tenant.

Of mines and mineral lands, see Mines and Minerals, § 70.

LEAVE OF COURT.

To amend pleading, see Pleading, §§ 234-237.

To bring action against receiver, see Receivers, § 174.

LEGACIES.

See Wills.

LEGISLATION.

In general, see Statutes.

LEGISLATIVE POWER.

Control of acts, rights, and liabilities of municipal corporations, see Municipal Corporations, §§ 65-75.

LETTERS.

Secondary evidence of contents, see Evidence, § 168.
Threatening letters, see Threats, § 1.

LEVEES.

§ 2. Act March 15, 1909 (Laws 1909, p. 163, § 4), creating the Crawford County Levee District, which was amended by Act April 23, 1909 (Laws 1909, p. 472, § 1), *held* not repealed by the amending act, that being invalid, so that the district could proceed to levy assessments under the original act.—*Alexander v. Board of Directors of Crawford County Levee Dist. (Ark.)* 618.

§ 5. Acts approved March 15, 1909 (Laws 1909, p. 163, § 4), as amended by acts approved April 23, 1909 (Laws 1909, p. 472, § 1), creating the Crawford Levee District is not invalid as creating a district for local improvements outside of a city or town to be paid for by special assessment, without providing a method for obtaining the consent of the property owners within the district.—*Alexander v. Board of Directors of Crawford County Levee Dist. (Ark.)* 618.

§ 22. Act April 23, 1909 (Laws 1909, p. 472, § 1), amending Act March 15, 1909 (Laws 1909, p. 163, § 4), *held* void for authorizing assessments for levee purposes based on the valuation of the land as increased by the levee improvement.—*Alexander v. Board of Directors of Crawford County Levee Dist. (Ark.)* 618.

§ 23. Acts approved March 15 1909 (Laws 1909, p. 163, § 4), *held* to authorize the assessment of the property of a railroad company for the maintenance, etc., of a levee district.—*Alexander v. Directors of Crawford County Levee Dist. (Ark.)* 618.

LEWDNESS.

See Disorderly House.

LEX LOCI.

Judicial notice of laws of other states, see Evidence, § 35.
Presumptions as to laws of other states, see Evidence, § 80.

Contracts and conveyances.

See Contracts, § 144.
Contracts for carriage of goods, see Carriers, § 46.
Contract for shipment of live stock, see Carriers, § 203.

Remedies, and jurisdiction and procedure.

Conflicting jurisdiction of courts, see Courts, § 485.

LIBEL AND SLANDER.

I. WORDS AND ACTS ACTIONABLE, AND LIABILITY THEREFOR.

§ 2. The absence of intent to publish a libel *held* no excuse.—*Morris v. Sailer (Mo. App.)* 98.

§ 6. A publication *held* libelous per se.—*Patterson v. Evans (Mo. App.)* 1030.

§ 6. To falsely charge an infant of tender years with being afflicted with a loathsome disease or with a private and humiliating physical malformation is libelous.—*Munden v. Harris (Mo. App.)* 1076.

§ 15. Though a person suffer injury from a publication, it is not libelous under Laws 1901, c. 28 unless the reasonable conclusion to be drawn from it is that it was intended to in-

jure such person's reputation by exposing him to public contempt or financial injury.—*Galveston Tribune v. Guisti (Tex. Civ. App.)* 239.

§ 15. A certain newspaper publication *held* not libelous.—*Galveston Tribune v. Guisti (Tex. Civ. App.)* 239.

§ 16. Under Rev. Laws, 1909, § 4818, a publication of a picture in advertising *held* libelous as exposing one to public ridicule.—*Munden v. Harris (Mo. App.)* 1076.

§ 19. The meaning of an alleged libelous newspaper article *held*, in view of the whole, to be ambiguous.—*Morris v. Sailer (Mo. App.)* 98.

II. PRIVILEGED COMMUNICATIONS, AND MALICE THEREIN.

§ 41. "Qualified privilege" defined.—*De Van Rose v. Tholborn (Mo. App.)* 1093.

§ 48. The fact that the one libeled is a candidate for office and the one libeling is a newspaper is no justification.—*Morris v. Sailer (Mo. App.)* 98.

§ 51. A communication *held* not a privileged one if spoken with actual malice.—*De Van Rose v. Tholborn (Mo. App.)* 1093.

III. JUSTIFICATION AND MITIGATION.

§ 54. The substantial truth of matter complained of as libelous is a complete defense.—*Courier-Journal Co. v. Phillips (Ky.)* 446.

IV. ACTIONS.

(A) Right of Action and Defenses.

Liability of infant, see Infants, § 60.

(B) Parties, Preliminary Proceedings, and Pleading.

§ 80. A plaintiff suing for libel *held* required to distinctly plead a fact.—*Patterson v. Evans (Mo. App.)* 1030.

§ 97. The proper way to raise the question whether matter charged as libel is capable of that interpretation is by demurrer.—*Morris v. Sailer (Mo. App.)* 98.

§ 97. A question whether the innuendo charged in a petition is a reasonable inference from the statement complained of and the facts alleged *held* for the court.—*Galveston Tribune v. Guisti (Tex. Civ. App.)* 239.

§ 100. Where libelous language is ambiguous, the meaning ascribed thereto by plaintiff in his petition is binding on him.—*Patterson v. Evans (Mo. App.)* 1030.

§ 100. A libelous charge *held* not to imply that the person libeled was dishonest.—*Patterson v. Evans (Mo. App.)* 1030.

§ 100. Where a publication is libelous per se, special damages need not be alleged, and general damages may be proved.—*Patterson v. Evans (Mo. App.)* 1030.

(C) Evidence.

§ 104. Certain evidence *held* admissible.—*De Van Rose v. Tholborn (Mo. App.)* 1093.

§ 110. In an action for libel, the refusal to allow certain cross-examination of plaintiff *held* reversible error.—*Patterson v. Evans (Mo. App.)* 1030.

§ 110. In slander for having spoken words imputing unchastity to a woman, defendant might not attack her reputation or character by showing specific acts of immorality.—*De Van Rose v. Tholborn (Mo. App.)* 1093.

§ 112. In action for libel evidence *held* to show the truth of the statement complained of.—*Courier-Journal Co. v. Phillips (Ky.)* 446.

(E) Trial, Judgment, and Review.

§ 123. Though the jury is the judge both of the law and fact in libel cases, the question whether the matter charged as libel is capable of that interpretation is for the court.—*Morris v. Sailer* (Mo. App.) 98.

§ 123. Where the words in a publication are susceptible of both a libelous and an innocent meaning, the question how they were used is for the jury.—*Morris v. Sailer* (Mo. App.) 98.

§ 123. The meaning of an alleged libelous newspaper article *held*, in view of the whole, to be a question for the jury.—*Morris v. Sailer* (Mo. App.) 98.

§ 125. A verdict *held* equivalent to a finding against plaintiff on the claim that the publication charged her with unchastity.—*Galveston Tribune v. Guisti* (Tex. Civ. App.) 239.

LICENSES.**I. FOR OCCUPATIONS AND PRIVILEGES.**

For sale of intoxicating liquors, see *Intoxicating Liquors*, §§ 64-108.

II. IN RESPECT OF REAL PROPERTY.

Care required as to licensees in general, see *Negligence*, § 32.

Care required as to licensees on railroad right of way, see *Railroads*, § 358.

Injuries to licensees on or about railroads, see *Railroads*, §§ 274-282.

LIENS.

Effect of proceedings in bankruptcy, see *Bankruptcy*, § 214.

Enforcement against receiver, see *Receivers*, § 77.

Splitting causes of action to enforce lien, see *Action*, § 53.

Particular classes of liens.

See *Chattel Mortgages*, §§ 140-153; *Mechanics' Liens*; *Mortgages*, § 186; *Pledges*.

Factor's lien, see *Factors*, § 47.

Of attorney for compensation, see *Attorney and Client*, §§ 177-190.

Of landlord for rent, see *Landlord and Tenant*, § 254.

Of vendor for price of land, see *Vendor and Purchaser*, § 265.

On property in hands of receiver, see *Receivers*, § 77.

LIFE ESTATES.

See *Dower*; *Remainders*.

LIFE INSURANCE.

See *Insurance*.

LIGHTS.

See *Electricity*.

On trains, see *Railroads*, § 362.

LIMITATION.

Of indebtedness of corporation, see *Corporations*, § 237.

LIMITATION OF ACTIONS.

See *Adverse Possession*.

Contract limiting time to sue carrier for loss of or injury to goods, see *Carriers*, § 180.

Laches, see *Equity*, §§ 67-71.

Time for presentation of claims against estate of decedent, see *Executors and Administrators*, § 225.

Particular actions or proceedings.

Appeal or other proceedings for review, see *Appeal and Error*, § 345.

For new trial, see *Criminal Law*, § 951.

To confirm or try tax title, see *Taxation*, § 805.

I. STATUTES OF LIMITATION.**(B) Limitations Applicable to Particular Actions.**

§ 19. The plea of the five-year statute of limitations against recovery of land sold at a probate sale *held* unavailing where the court was without jurisdiction.—*Jennings v. Bouldin* (Ark.) 948.

§ 19. Under Ky. St. § 2505 (Russell's St. § 212), an action to escheat property of a corporation in process of liquidation under section 561 *held* not barred.—*Louisville Banking Co. v. Commonwealth* (Ky.) 1142.

II. COMPUTATION OF PERIOD OF LIMITATION.**(A) Accrual of Right of Action or Defense.**

§ 49. Limitations begin to run, in an action to recover usurious interest, when it is paid.—*Paine v. Levy* (Ky.) 1160.

(C) Personal Disabilities and Privileges.

§ 72. Since the husband of a female ward was entitled to demand and receive the balance of money due her from the guardian immediately on marriage, her coverture was no bar to limitations against their right to an accounting.—*Mouser v. Nunn* (Ky.) 1148.

§ 76. Under Ky. St. §§ 2505-2508 (Russell's St. §§ 212-215), an action for partition, where plaintiff's ancestor became insane and more than 30 years had elapsed after such ancestor's cause of action accrued, *held* barred by the statute of limitations.—*Hale's Heirs v. Ritchie* (Ky.) 474.

(F) Ignorance, Mistake, Trust, Fraud, and Concealment of Cause of Action.

§ 95. Under Ky. St. § 2519 (Russell's St. § 229), it was no answer to a plea of limitations, in a suit by a ward against her guardian's heirs for an accounting, more than 10 years after the right had accrued, that she did not know, and could not by the exercise of reasonable diligence have discovered, the indebtedness sooner.—*Mouser v. Nunn* (Ky.) 1148.

§ 100. Plaintiff's right to recover against a bank for an alleged conversion of a special bank deposit *held* barred by the two-year statute of limitations.—*Prosser v. First Nat. Bank* (Tex. Civ. App.) 781.

§ 100. Fraud or ignorance thereof, unaccompanied by concealment, will not prevent the running of limitations.—*Prosser v. First Nat. Bank* (Tex. Civ. App.) 781.

(G) Pendency of Legal Proceedings, Injunction, Stay, or War.

§ 107. A stay of proceedings *held* not to forbid the filing of an amended petition, and hence not to prevent limitations from running against claims first set up therein.—*Taub v. Woodruff* (Tex. Civ. App.) 750.

III. ACKNOWLEDGMENT, NEW PROMISE, AND PART PAYMENT.

§ 155. Payment of interest on a mortgage note *held* not to stop the running of limita-

tions; the payment being that of a volunteer.—*Frase v. Lee* (Mo. App.) 10.

IV. OPERATION AND EFFECT OF BAR BY LIMITATION.

§ 170. Where limitations are pleaded against purchase-money notes secured by a vendor's lien, plaintiff may change the cause of action, rescind the contract of sale, and recover the land.—*Lumpkin v. Story* (Tex. Civ. App.) 298.

V. PLEADING, EVIDENCE, TRIAL, AND REVIEW.

§ 197. As affecting limitations on a suit to cancel a deed for fraud, evidence held insufficient to warrant a finding that by using reasonable diligence grantor could have discovered that defendant was claiming under the deed.—*Rankin v. Rankin* (Tex. Civ. App.) 392.

LIMITATION OF LIABILITY.

Of carrier in respect to goods, see Carriers, §§ 159, 180; in respect to live stock, see Carriers, § 218; interstate commerce regulations, see Commerce, § 61.

LIQUIDATED DAMAGES.

See Damages, § 81.

LIQUIDATION.

In general, see Assignments for Benefit of Creditors; Bankruptcy.
Of corporations in general, see Corporations, §§ 553, 618.

LIQUOR SELLING.

See Intoxicating Liquors.

LIS PENDENS.

§ 13. A purchaser with actual notice of a pending suit held not entitled to complain of the failure to give a lis pendens notice required by Kirby's Dig. § 5149.—*Jennings v. Bouldin* (Ark.) 948.

§ 24. Where a person purchased land from a defendant in partition, he took subject to the rights of the other parties to the suit.—*Hale's Heirs v. Ritchie* (Ky.) 474.

LIVERY STABLE KEEPERS.

§ 7. A livery man is liable for injuries to horses in his care only when caused by his lack of ordinary care, which is that care an ordinary man would exercise over his own similar property under like conditions.—*Caldwell v. Nichol* (Ark.) 622.

§ 7. The knowledge of the owner of a horse injured in a livery stable that for a long time it had been kept in a certain stall did not estop him from asserting the negligence of the livery man in keeping him in a defective one.—*Caldwell v. Nichol* (Ark.) 622.

§ 7. Where a horse kept in a livery stable was injured through an alleged defective stall, the owner did not assume the risk of injury by his knowledge of the stall's condition.—*Caldwell v. Nichol* (Ark.) 622.

LIVE STOCK.

See Animals.
Carriage of, see Carriers, §§ 203-230.
Injuries to, by operation of railroad, see Railroads, §§ 446, 447.

LOANS.

Interest on, see Interest.
Liabilities of broker to third person as to loans and securities, see Brokers, § 97.
Usurious loans, see Usury.

LOCAL ASSESSMENTS.

See Levees, §§ 22, 23; Municipal Corporations, § 567.

LOCAL LAWS.

See Statutes, §§ 75-77.

LOCAL OPTION.

Traffic in intoxicating liquors, see Intoxicating Liquors, §§ 33-40, 205.

LOCATION.

Of railroad, see Railroads, § 58.
Of railroad stations, see Railroads, § 58.

LOGS AND LOGGING.

Damages for cutting and removal of timber, see Trespass, § 52.
Requirement of statute of frauds as to sales, see Frauds, Statute of, § 103.
Trial together of action for price of timber and suit to restrain removal of trees, see Trial, § 2.

§ 3. In an action for the price of timber, deposition as to branding of timber included in sale held erroneously excluded.—*Lang v. Bach* (Ky.) 188.

§ 3. Defendant held entitled to recover on counterclaim in action for price of timber, not only for standing trees, but also for staves made from other trees which he was prevented from removing.—*Lang v. Bach* (Ky.) 188.

§ 3. In an action for the price of timber, instructions held erroneous as calculated to mislead and confuse the jury.—*Lang v. Bach* (Ky.) 188.

§ 15. Deduction from a log driver's compensation under a contract held improper.—*Jones Lumber Co. v. Howard* (Ky.) 133.

LOOKOUTS.

From trains, see Railroads, § 238.

LORD'S DAY.

See Sunday.

LOSS.

Of goods by carrier, see Carriers, §§ 110-134, 177.

LOTTERIES.

Matters relating to wages and gambling in general, see Gaming.

LUMBER.

See Logs and Logging.

LUNATICS.

See Insane Persons.

MACHINERY.

Annexation to real property, see Fixtures.
Dangerous machinery, liability of master for injuries to servant, see Master and Servant, §§ 235, 236.

MAGISTRATES.

See Justices of the Peace.

MAIL CLERKS.

Allowance to surviving wife of railway clerk from pension money, see Executors and Administrators, § 181.

Pensions to legal representatives of railway clerks killed while in service, see Pensions, § 2.

MAINTENANCE.

See Champerty and Maintenance.

MALICE.

Element of homicide, see Homicide, §§ 156-158.
Element of libel or slander, see Libel and Slander, §§ 51, 104.

MALICIOUS PROSECUTION.

See False Imprisonment.

Wrongful attachment, without malice, see Attachment, §§ 368-377.

II. WANT OF PROBABLE CAUSE.

§ 20. Probable cause which will relieve a prosecutor from liability is a belief by him in the guilt of the accused, based on circumstances sufficiently strong to induce such belief in the mind of a reasonable and cautious man.—*Wilkerson v. McGhee* (Mo. App.) 595.

§ 24. A plea of guilty, afterwards withdrawn and followed by acquittal, held not necessarily a bar to a suit for malicious prosecution.—*Holtman v. Bullock* (Ky.) 480.

§ 24. Though a finding by a grand jury in an indictment is *prima facie* evidence of probable cause, a defendant may still be liable when the indictment is quashed without a trial on the merits.—*Wilkerson v. McGhee* (Mo. App.) 595.

§ 24. Where the defendant in malicious prosecution acted maliciously in procuring an indictment, where he knew there was no probable cause for such charge, that an indictment was returned without false testimony will not relieve the defendant of responsibility.—*Wilkerson v. McGhee* (Mo. App.) 595.

V. ACTIONS.

Distribution of damages as community property, see Husband and Wife, § 273.

Hearsay evidence, see Evidence, § 317.

Res gestæ, see Evidence, § 123.

Right of action as community property, see Husband and Wife, § 273.

Survival of causes of action, see Abatement and Revival, § 54.

§ 49. In an information for malicious prosecution, a general averment of want of probable cause is sufficient, and it is not necessary to allege facts tending to the proof thereof.—*Wilkerson v. McGhee* (Mo. App.) 595.

§ 49. In an action for malicious prosecution, it was not necessary for plaintiff to allege that witnesses before the grand jury testified falsely, where the defendant maliciously and without probable cause charged plaintiff before the grand jury with a crime upon which an indictment was returned.—*Wilkerson v. McGhee* (Mo. App.) 595.

§ 60. Certain evidence held admissible in an action for malicious prosecution to show that defendant had not communicated all of the facts to the county attorney, on whose advice

plaintiff was arrested.—*Missouri, K. & T. Ry. Co. of Texas v. Groseclose* (Tex. Civ. App.) 736.

§ 72. Instruction in an action for malicious prosecution held correct.—*Missouri, K. & T. Ry. Co. of Texas v. Groseclose* (Tex. Civ. App.) 736.

MANDAMUS.**II. SUBJECTS AND PURPOSES OF RELIEF.**

(A) Acts and Proceedings of Courts, Judges, and Judicial Officers.

§ 31. Where the court granting a preliminary injunction deliberately refuses to further proceed with the case, the party enjoined may by mandamus compel a hearing.—*Ex parte Roper* (Tex. Cr. App.) 334.

(B) Acts and Proceedings of Public Officers and Boards and Municipalities.

§ 76. Under Ky. St. § 4313 (Russell's St. § 5446), providing that the fiscal courts in counties "may" appoint road supervisors, the duty of the court is discretionary, and hence not subject to control by mandamus.—*O'Connor v. Weissinger* (Ky.) 1127.

§ 107. Under Civ. Code Prac. § 477, mandamus is the proper remedy to compel action on the part of a fiscal court.—*O'Connor v. Weissinger* (Ky.) 1127.

III. JURISDICTION, PROCEEDINGS, AND RELIEF.

§ 176. Under Civ. Code Prac. §§ 474-477, a writ of mandamus against a fiscal court will only compel action, without interference with its judicial discretion.—*O'Connor v. Weissinger* (Ky.) 1127.

MANDATE.

See Mandamus.

To lower court on decision on appeal or other proceeding for review, see Appeal and Error, §§ 1195-1214.

MARITAL RIGHTS.

See Husband and Wife.

MARK.

See Trade-Marks and Trade-Names.

MARRIAGE.

See Bigamy; Divorce; Husband and Wife.

Of ward affecting guardianship, see Guardian and Ward, § 21.

MARRIED WOMEN.

See Husband and Wife.

Execution of power by will, see Wills, § 75.

Testamentary capacity of married women, see Wills, § 28.

MASTER AND SERVANT.**I. THE RELATION.**

(A) Creation and Existence.

Employment of agents, see Principal and Agent, § 22.

(C) Termination and Discharge.

§ 24. Bankruptcy of a master during the term of a servant's employment held a breach of the contract, entitling the servant to recover the full amount of the balance of his salary for the remainder of the term on his being unable to

secure employment during such period.—*Courtney v. Roensch* (Tex. Civ. App.) 413.

§ 30. An employe *held* guilty of misconduct justifying his discharge.—*Wade v. William Barr Dry Goods Co.* (Mo. App.) 1084.

§ 39. A plea in an action for the wrongful discharge of an employe *held* to state facts justifying the discharge.—*Wade v. William Barr Dry Goods Co.* (Mo. App.) 1084.

III. MASTER'S LIABILITY FOR INJURIES TO SERVANT.

Statutory actions for death, see Death, §§ 33-104.

(A) Nature and Extent in General.

Release after injury, see Release, § 29.

§ 89. A master is not liable for negligent injuries to a servant, unless the servant at the time was engaged in the performance of a duty within the scope of his employment.—*Chamlee v. Planters' Hotel Co.* (Mo. App.) 123.

§ 90. To authorize a recovery for personal injuries to a servant, *held* only necessary to show that a reasonably prudent man would have anticipated some like injury.—*St. Louis, S. F. & T. R. Co. v. Taylor* (Tex. Civ. App.) 819.

§ 95. Act March 18, 1908 (Ky. St. § 331a, subsecs. 1, 2, 11 [Russell's St. §§ 3237, 3238, 3247]), restricting employment of children, construed.—*Casperson v. Michaels* (Ky.) 200.

§ 96. Facts stated *held* no defense to suit for injury to a child employed in a laundry in violation of Act March 18, 1908 (Ky. St. § 331a, subsec. 11 [Russell's St. § 3247]).—*Casperson v. Michaels* (Ky.) 200.

§ 96. Employment of a child in violation of Act March 18, 1908 (Ky. St. § 331a, subsec. 11 [Russell's St. § 3247]) *held* the proximate cause of her injury.—*Casperson v. Michaels* (Ky.) 200.

(B) Tools, Machinery, Appliances, and Places for Work.

§§ 101, 102. A telephone company owed a lineman the duty to use reasonable care to furnish him a reasonably safe place and appliances in and with which to labor.—*Angle's Adm'x v. East Tennessee Telephone Co.* (Ky.) 119.

§ 107. Rule as to employer's duty to provide a safe place of work, stated.—*Lantry-Sharpe Contracting Co. v. McCracken* (Tex. Civ. App.) 363.

§ 111. Facts *held* to show negligence.—*Louisville & N. R. Co. v. McMillen* (Ky.) 185.

§ 118. A master *held* liable for injuries to a servant employed in a mine under the safe place to work rule.—*Lone Star Lignite Mining Co. v. Caddell* (Tex. Civ. App.) 841.

(C) Methods of Work, Rules, and Orders.

§ 137. A railroad company *held* not liable for negligence in the death of a section hand, struck by a switch engine and cars while at work on the track in a railroad yard.—*Ginnocchio v. Illinois Cent. R. Co.* (Mo. App.) 129.

§ 137. A railroad company assumes no obligations to warn section hands of approaching trains, or otherwise look out for their well-being, except where they are actually seen to be in peril and oblivious to threatened danger.—*Ginnocchio v. Illinois Cent. R. Co.* (Mo. App.) 129.

§ 145. "Et cetera," as used in a railroad rule, defined.—*Louisville & N. R. Co. v. Sewell* (Ky.) 162.

§ 145. A railroad rule *held* to require caution to be exercised immediately on seeing the

signal.—*Louisville & N. R. Co. v. Sewell* (Ky.) 162.

§ 149. The foreman of a bridge crew *held* to have had a right to assume that a member of the crew would conduct himself as an ordinarily prudent person would.—*Myers v. Texas & P. Ry. Co.* (Tex. Civ. App.) 814.

(D) Warning and Instructing Servant.

§ 153. An employer need not warn an employe against dangers incident to the work, where the latter has represented himself to be competent.—*Lantry-Sharpe Contracting Co. v. McCracken* (Tex. Civ. App.) 363.

§ 154. Under the circumstances, *held* that an employer was not bound to warn an employe of the dangers attendant upon oil being upon the floor of the room in which the employe worked; the latter being familiar therewith.—*Dallas Oil & Refining Co. v. Carter* (Tex. Civ. App.) 418.

§ 155. Obligation of master to warn a servant, stated.—*Chicago, R. I. & P. Ry. Co. v. Grubbs* (Ark.) 636.

(E) Fellow Servants.

§ 185. In an action by a brakeman against a railroad company, where a conductor violated a rule of the company, *held*, that his act was that of a vice principal and not of a fellow servant.—*Louisville & N. R. Co. v. Hardy* (Ky.) 899.

§ 185. Orders given by a directing employe *held* those of the employer.—*Lantry-Sharpe Contracting Co. v. McCracken* (Tex. Civ. App.) 363.

§ 189. Rule as to who are vice principals stated.—*Lantry-Sharpe Contracting Co. v. McCracken* (Tex. Civ. App.) 363.

§ 190. A servant's foreman *held* guilty of negligence which was the proximate cause of the injury.—*Headrick v. H. D. Williams Co.* (Ark.) 957.

§ 190. A vice principal's knowledge of an employe's incompetency is imputed to the employer.—*Roberts v. Wabash R. Co.* (Mo. App.) 89.

§ 190. If a vice principal in hearing a negligent order given permits it to be obeyed, he thereby makes it his own.—*Lantry-Sharpe Contracting Co. v. McCracken* (Tex. Civ. App.) 363.

§ 190. Rule as to when a vice principal becomes a fellow servant stated.—*Lantry-Sharpe Contracting Co. v. McCracken* (Tex. Civ. App.) 363.

§ 191. A sectionhand shoveling cinders from a car can recover for the slight negligence of those in charge of an engine which bumped into the car.—*Illinois Cent. R. Co. v. Mayes* (Ky.) 436.

§ 201. Where the negligence of the master concurs with the negligence of the servant, the master is liable.—*Consumers' Lignite Co. v. Cameron* (Tex. Civ. App.) 283.

(F) Risks Assumed by Servant.

§ 203. A servant assumes all the ordinary risks of his employment.—*Louisville & N. R. Co. v. McMillen* (Ky.) 185.

§ 205. A servant may assume that the master has furnished reasonably safe appliances for him to use, and he need not inspect them before using them.—*St. Louis, S. F. & T. R. Co. v. Taylor* (Tex. Civ. App.) 819.

§ 206. The risks assumed by a servant stated.—*Myers v. Texas & P. Ry. Co.* (Tex. Civ. App.) 814.

§ 216. A servant does not assume risks occasioned by the negligence of other servants not his fellow servants.—*Louisville & N. R. Co. v. McMillen* (Ky.) 185.

§ 216. Plaintiff *held* a fellow servant of other employes, so that he assumed the risk of injury from their negligent acts.—*Trussle v. Cincinnati, N. O. & T. P. Ry. Co. (Ky.)* 1141.

§ 217. Where the place or work itself was unsafe, a servant voluntarily engaging therein, with knowledge thereof, assumed the risks.—*Chicago, R. I. & P. Ry. Co. v. Grubbs (Ark.)* 636.

§ 217. A servant knowing of the methods of work and the place therefor *held* to assume the risks of the dangers.—*Chicago, R. I. & P. Ry. Co. v. Grubbs (Ark.)* 636.

§ 217. Doctrine of assumption of risk, applied.—*Chicago, R. I. & P. Ry. Co. v. Grubbs (Ark.)* 636.

§ 217. A trainman knowing of obstructions maintained by the railroad over the track does not assume the risk.—*Louisville & N. R. Co. v. Roe (Ky.)* 437.

§ 217. A danger arising from a defect in machinery *held* not a risk incident to the employment.—*Chamlee v. Planters' Hotel Co. (Mo. App.)* 123.

§ 217. An employe injured while operating a passenger elevator in the line of his duty, *held* not to have assumed the risk.—*Chamlee v. Planters' Hotel Co. (Mo. App.)* 123.

§ 217. A servant, though he owes no duty of inspection, *held* not entitled to shut his eyes to dangers obvious to the ordinary man.—*Farmers' Cotton Oil Co. v. Barnes (Tex. Civ. App.)* 369.

§ 217. A servant continuing use of lever, knowing defect therein, *held* to have assumed the risk of injury therefrom.—*Texas Co. v. Garrett (Tex. Civ. App.)* 812.

§ 217. Elements of assumption of risk by a servant from use of defective implements stated.—*Texas Co. v. Garrett (Tex. Civ. App.)* 812.

§ 217. Rule as to knowledge of servant on question of assumption of risk stated.—*Lone Star Lignite Mining Co. v. Caddell (Tex. Civ. App.)* 841.

§ 219. A servant injured while attempting to mount a car to rearrange crosoties *held* to have assumed the risk of injury.—*Chicago, R. I. & P. Ry. Co. v. Grubbs (Ark.)* 636.

§ 220. Rule as to assumption of risk after promise of master to repair defect stated.—*Headrick v. H. D. Williams Cooperage Co. (Ark.)* 957.

§ 224. Facts *held* not to show liability of master for death of a servant.—*Anglen's Adm'r v. East Tennessee Telephone Co. (Ky.)* 1119.

§ 226. Assumption of risk *held* not to extend to a risk due to the master's negligence.—*Chamlee v. Planters' Hotel Co. (Mo. App.)* 123.

§ 226. An employe *held* not to assume risks arising from the employer's negligence.—*Tucker v. Mine La Motte Lead & Smelting Co. (Mo. App.)* 1101.

§ 226. An employe's assumption of obvious risks does not release the employer's liability for injury caused by the employer's intervening negligence.—*Lantry-Sharpe Contracting Co. v. McCracken (Tex. Civ. App.)* 363.

(G) Contributory Negligence of Servant.

§ 227. An employe sustaining injuries from his own negligence cannot recover.—*Anderson v. St. Louis, Southwestern Ry. Co. of Texas (Tex.)* 1175.

§ 231. An employe *held* entitled to assume that his employer has properly performed his duties.—*Anderson v. St. Louis, Southwestern Ry. Co. of Texas (Tex.)* 1175.

§ 233. Rule as to contributory negligence of a servant arising from choice of ways stated.—*Headrick v. H. D. Williams Cooperage Co. (Ark.)* 957.

§ 234. A servant's knowledge of abnormal conditions pertaining to the place in, or the appliance with, which he is to work, must be determined in applying the law of contributory negligence, by reference to the usual standard of what an ordinarily prudent person might do under like circumstances.—*Chamlee v. Planters' Hotel Co. (Mo. App.)* 123.

§ 235. A fence gang foreman *held* negligent in failing to keep a lookout for an open switch.—*Anderson v. St. Louis, Southwestern Ry. Co. of Texas (Tex.)* 1175.

§ 235. The duty of a fence gang foreman operating a hand car in yards to keep a lookout for open switches, stated.—*Anderson v. St. Louis, Southwestern Ry. Co. of Texas (Tex.)* 1175.

§ 235. A servant employed as oiler in a mill *held* not required to inspect to ascertain whether set screws are exposed and dangerous.—*Farmers' Cotton Oil Co. v. Barnes (Tex. Civ. App.)* 369.

§ 236. A section hand killed by a switch engine while at work on the track in a railroad yard *held* guilty of contributory negligence.—*Ginnochio v. Illinois Cent. R. Co. (Mo. App.)* 129.

§ 236. So far as section hands are concerned, the railroad is regarded, under the law, as entitled to a clear track, and the sectionmen are required to look out for their own safety.—*Ginnochio v. Illinois Cent. R. Co. (Mo. App.)* 129.

(H) Actions.

Instructions on weight of evidence in action for injuries, see *Trial*, § 194.
Request for instructions in action for injuries, see *Trial*, § 260.

§ 264. The variance between the petition, in an action for injuries to a servant, and the proof, *held* required to be disregarded, under *Rev. St. 1909*, §§ 1846, 1847.—*Chamlee v. Planters' Hotel Co. (Mo. App.)* 123.

§ 265. Burden of proof in an action for injuries to a servant stated.—*Louisville & N. R. Co. v. McMillen (Ky.)* 185.

§ 270. In an employe's action for personal injuries by falling into machinery, evidence *held* inadmissible that plaintiff's superintendent directed a platform to be built after plaintiff's injuries, in order to prevent others from falling where he fell.—*Dallas Oil & Refining Co. v. Carter (Tex. Civ. App.)* 418.

§ 270. An objection to certain evidence *held* without merit.—*Lone Star Lignite Mining Co. v. Caddell (Tex. Civ. App.)* 841.

§ 273. In an action for the death of an employe while operating a passenger elevator, certain evidence as to the meaning of a word among the employes about the elevator *held* properly received.—*Chamlee v. Planters' Hotel Co. (Mo. App.)* 123.

§ 276. Evidence *held* to sustain recovery for injury to a miner, on the theory that it was caused by negligent maintenance of a track.—*Tucker v. Mine La Motte Lead & Smelting Co. (Mo. App.)* 1101.

§ 278. Where a servant in a car was injured by the jar from the engine bumping into it, evidence *held* a finding that the negligence was gross.—*Illinois Cent. R. Co. v. Mayes (Ky.)* 436.

§ 278. In an action for the death of a miner owing to the caving in of the roof of a room in a mine, evidence *held* to warrant a finding that deceased was killed because of the unsafe condition of the place where he was at work.

which condition was due to defendant's negligent failure to prop the roof.—*Lone Star Lignite Mining Co. v. Caddell* (Tex. Civ. App.) 841.

§ 279. Evidence held not to show that the foreman of a bridge crew was negligent in directing the crew to remove a hand car on the track in front of an approaching train.—*Myers v. Texas & P. Ry. Co.* (Tex. Civ. App.) 814.

§ 282. A railroad engineer held guilty of gross negligence in running into a hand car on the track.—*Louisville & N. R. Co. v. Sewell* (Ky.) 162.

§ 284. In an action for injuries to an employé by the fall of an elevator, evidence held to justify a finding that the employé was at the time acting within the scope of his employment.—*Chamlee v. Planters' Hotel Co.* (Mo. App.) 123.

§ 286. In an action for injuries to a railroad track foreman in a collision between his hand car and a following passenger train, defendant's negligence held properly submitted to the jury.—*Louisville & N. R. Co. v. Sewell* (Ky.) 162.

§ 286. Construction and application of railroad rules offered in evidence in an action for injuries to a servant held for the court.—*Louisville & N. R. Co. v. Sewell* (Ky.) 162.

§ 286. In an action for personal injuries received by a train brakeman, the question of the railroad's negligence held under the evidence to be one for the jury.—*Louisville & N. R. Co. v. Roe* (Ky.) 437.

§ 286. Whether a street railway company was negligent in maintaining a pole near the track held a jury question, in an action for injury to a conductor struck by the pole.—*Tewksbury v. Metropolitan St. Ry. Co.* (Mo. App.) 682.

§ 286. Evidence in a servant's action for injuries held not to raise an issue as to the absence of a target from a switch.—*Anderson v. St. Louis Southwestern Ry. Co. of Texas* (Tex.) 1175.

§ 286. In an action by a track surfer for injuries at a switch caused by collision of a "shay" engine and log car on which plaintiff was riding, evidence held sufficient to go to the jury on the question of negligence of defendant.—*Howard v. Waterman Lumber & Supply Co.* (Tex. Civ. App.) 387.

§ 286. In an action for the death of a member of a bridge crew who was struck by a locomotive while attempting to remove a hand car from the track in front of an approaching train, held a question for the jury whether those in charge of the train were negligent.—*Myers v. Texas & P. Ry. Co.* (Tex. Civ. App.) 814.

§ 288. Whether a street railway conductor assumed the risk of being struck by a pole near the track held a jury question.—*Tewksbury v. Metropolitan St. Ry. Co.* (Mo. App.) 682.

§ 288. Whether a servant injured by being caught by an unguarded set-screw in a revolving shaft knew of the screw, or whether in the course of his work, he must have known thereof or of the danger incident thereto, held for the jury.—*Farmers' Cotton Oil Co. v. Barnes* (Tex. Civ. App.) 369.

§ 288. In an action by a track surfer for injuries at a switch, caused by collision of a "shay" engine and log car on which plaintiff was riding, evidence held to make the question of assumption of risk one for the jury.—*Howard v. Waterman Lumber & Supply Co.* (Tex. Civ. App.) 387.

§ 288. The question of assumption of risk held one for the jury.—*Lone Star Lignite Mining Co. v. Caddell* (Tex. Civ. App.) 841.

§ 289. In an action for injuries to a servant, held a question for the jury whether he was guilty of contributory negligence.—*Headrick v. H. D. Williams Cooperage Co.* (Ark.) 957.

§ 289. Whether a street railway conductor, struck by a pole near the track, was negligent, held a jury question.—*Tewksbury v. Metropolitan St. Ry. Co.* (Mo. App.) 682.

§ 289. In an action for injury to a workman, held proper to refuse a peremptory instruction on the theory that plaintiff had represented himself to be experienced.—*Lantry-Sharpe Contracting Co. v. McCracken* (Tex. Civ. App.) 363.

§ 289. In an action by a track surfer for injuries at a switch caused by collision of a "shay" engine and log car on which plaintiff was riding, evidence held sufficient to go to the jury on the question of contributory negligence of plaintiff.—*Howard v. Waterman Lumber & Supply Co.* (Tex. Civ. App.) 387.

§ 289. Evidence in an action for death of a railway trackman struck by a car held sufficient to go to the jury on an issue of discovered peril.—*Hardin v. St. Louis Southwestern Ry. Co. of Texas* (Tex. Civ. App.) 408.

§ 289. The question of contributory negligence was one for the jury.—*Lone Star Lignite Mining Co. v. Caddell* (Tex. Civ. App.) 841.

§ 291. An instruction that a miner injured should not have pushed a car with his back toward it held properly refused.—*Tucker v. Mine La Motte Lead & Smelting Co.* (Mo. App.) 1101.

§ 291. A charge in an action for injuries to a servant, which presents affirmatively the servant's theory of the case, should not also require the jury to find for plaintiff that he was not guilty of contributory negligence and had not assumed the risk.—*Farmers' Cotton Oil Co. v. Barnes* (Tex. Civ. App.) 369.

§ 291. In an action for injuries to a servant, an instruction held not objectionable as not requiring the servant to use ordinary care to see whether the appliances were reasonably safe.—*Farmers' Cotton Oil Co. v. Barnes* (Tex. Civ. App.) 369.

§ 291. In an action for injuries to a servant, the refusal to give a charge held proper because not justified by the evidence.—*Farmers' Cotton Oil Co. v. Barnes* (Tex. Civ. App.) 369.

§ 291. Where the evidence in an employé's injury action tended to show that the injuries were caused otherwise than as alleged, held error to refuse a requested instruction that, unless the injuries were caused as claimed, the jury should find for defendant.—*Dallas Oil & Refining Co. v. Carter* (Tex. Civ. App.) 418.

§ 294. In an action for injury to a workman, an instruction stating that the employé whose negligence caused the injury was a fellow servant held properly refused.—*Lantry-Sharpe Contracting Co. v. McCracken* (Tex. Civ. App.) 363.

§ 295. In an action for injuries to a servant, a charge held to properly submit the issue of assumption of risk.—*Farmers' Cotton Oil Co. v. Barnes* (Tex. Civ. App.) 369.

§ 295. Charge as to assumption of risk held not to be understood as instructing that, if breaking of lever caused injury, the jury should find for defendant, regardless of other grounds of negligence.—*Texas Co. v. Garrett* (Tex. Civ. App.) 812.

§ 296. In an action by a minor for injuries by a car jumping a track, certain charge requested by the plaintiff and given by the court

held not in conflict with another instruction given.—Consumers' Lignite Co. v. Cameron (Tex. Civ. App.) 283.

IV. LIABILITIES FOR INJURIES TO THIRD PERSONS.

Liability of carrier for acts or omissions of employees resulting in personal injury to passenger, see Carriers, § 283.

Liability of municipal corporations for torts of officers and employees, see Municipal Corporations, §§ 743½-747.

(A) Acts or Omissions of Servant.

Employees of railroad company, see Railroads, § 281.

§ 302. A master *held* not responsible for the wrongful act of a servant outside the scope of his employment.—Cincinnati, N. O. & T. P. Ry. Co. v. Rue (Ky.) 1144.

§ 304. A driver, whose wagon crushed one attempting to pass between it and a wall, *held* under no duty to warn the injured man.—Leopold v. Newport Coal Co. (Ky.) 1165.

§ 304. An electric light corporation *held* liable under Rev. St. 1895, art. 3017, cl. 2, for the negligent failure of an employé to properly inspect its wires and instrumentalities.—Jacksonville Ice & Electric Co. v. Moses (Tex. Civ. App.) 379.

(C) Actions.

Instructions ignoring evidence in action for injuries, see Trial, § 253.

§ 329. Where a negligent act is charged against a particular servant of defendant, the allegation is regarded as specific rather than general.—Miller v. United Rys. Co. of St. Louis (Mo. App.) 1045.

MATERIALS.

Liabilities of sureties on bond of public contractors, see Schools and School Districts, § 81.

Liens on real property for materials furnished, see Mechanics' Liens.

MEASURE OF DAMAGES.

See Damages, § 95.

For fraud, see Fraud, § 59.

For injuries from flowage, see Waters and Water Courses, § 178.

For trespass in removing timber, see Trespass, § 52.

MECHANICS' LIENS.

II. RIGHT TO LIEN.

(C) Agreement or Consent of Owner.

§ 57. Where a conveyance of land was made to a husband and wife since the married woman's act of 1889 (Rev. St. 1889, §§ 6856-6870), each of the grantees is an owner within the mechanic's lien laws, and may, by contract, subject his or her estate to a lien for improvements, though the other does not join in the contract.—Independence Sash, Door & Lumber Co. v. Bradfield (Mo. App.) 118.

§ 61. Knowledge by a trustee of a contract for construction of building *held* not to preclude him from conveying at the beneficiary's request.—Williams v. Humphrey (Ark.) 939.

§ 61. One suing to enforce a lien for a building erected by him under agreement for a division of the net profits *held* not entitled to complain of the devolution of title to the lots.—Williams v. Humphrey (Ark.) 939.

III. PROCEEDINGS TO PERFECT.

Notice to corporate officer as notice to corporation, see Corporations, § 428.

§ 124. The service of lien notice on one of two co-owners of property affected thereby *held* sufficient to hold his interest or estate subject to the lien.—Independence Sash, Door & Lumber Co. v. Bradfield (Mo. App.) 118.

§ 132. Under Sayles' Ann. Civ. St. 1897, arts. 3339a, 3339b, 3339c, providing for laborers' liens and time for filing them, where plaintiff was not to be paid until cotton was sold, but same was held in sequestration proceedings, and he presented his account within about two weeks thereafter, *held* that the lien was presented in time.—Neblett v. Barron (Tex.) 208.

§ 154. A lien notice verified by E. C. H., "Secretary," is sufficiently verified, as the word "secretary" is merely descriptive of the official title.—Independence Sash, Door & Lumber Co. v. Bradfield (Mo. App.) 118.

MEDICAL EXPERTS.

Testimony, see Evidence, §§ 506, 528, 548, 560.

MEDICAL JURISPRUDENCE.

See Physicians and Surgeons.

MEMBERS.

Of firms, see Partnership.

Of militia, see Militia.

Of religious societies, see Religious Societies.

Of unlawful combinations, rights, and liabilities, see Monopolies, § 21.

MEMORANDA.

Required by statute of frauds, see Frauds, Statute of, §§ 105-115.

MENTAL CAPACITY.

See Insane Persons.

Opinion evidence of in civil actions, see Evidence, § 478.

MERGER.

Of cause of action in judgment, see Judgment, § 619.

MESSAGES.

Transmission and delivery of telegraph or telephone messages, see Telegraphs and Telephones, §§ 66, 67.

METES AND BOUNDS.

See Boundaries.

MILITARY LAW.

See Militia.

MILITIA.

Liability of members of militia for false imprisonment, see False Imprisonment, § 7.

Power of court to interfere with executive call of militia into service, see Constitutional Law, § 73.

§ 1. Under Ky. St. § 2673 (Russell's St. § 4606), the state militia in active service and in every emergency is strictly subordinate to the civil authorities.—Franks v. Smith (Ky.) 484.

§ 15. A member of the state militia in active service has only the authority of a peace officer of the state, both under Cr. Code Prac. § 36, and under the common law.—Franks v. Smith (Ky.) 484.

§ 15. Under Const. § 69, Ky. St. §§ 2672, 2673, 2674 (Russell's St. §§ 4695, 4696, 4697) the Governor may order out the militia and direct their movements without request by any civil officer, and without placing them under the orders of the civil authorities in the territory into which they are sent.—*Franks v. Smith* (Ky.) 484.

§ 19. A member of the state militia while acting as a soldier in active service is not relieved from civil liability for his acts by the fact that he acted in obedience to orders received through regular military channels.—*Franks v. Smith* (Ky.) 484.

MINES AND MINERALS.

Condemnation of property for railroad right of way, see Eminent Domain, § 20.
Taxation of interest in mine, see Taxation, § 63.

II. TITLE, CONVEYANCES, AND CONTRACTS.

(A) Rights and Remedies of Owners.

§ 52. Evidence held insufficient to authorize a temporary injunction restraining defendant from boring for oil on land held under a lease.—*Simms v. Reisner* (Tex. Civ. App.) 278.

(C) Leases, Licenses, and Contracts.

Fixtures as between landlord and tenant, see Fixtures, §§ 15, 27.

§ 70. Rights under a mining lease which was to become effective only upon payment of a certain sum by a stipulated time held, under the evidence, not to be forfeited.—*Stafford v. Pinson* (Ky.) 909.

§ 70. The acceptance of a check for royalty containing a written proviso held not to prevent recovery of balance of royalty provided for in mining lease.—*Stafford v. Pinson* (Ky.) 909.

III. OPERATION OF MINES, QUARRIES, AND WELLS.

Trade fixtures, see Fixtures, §§ 7, 15, 27, 33.

(C) Rights and Liabilities Incident to Working.

Liability of master for injuries to servant from defective or dangerous condition of mines, quarries, and excavations, see Master and Servant, § 118.

MINORS.

See Infants.

MISCONDUCT.

Of counsel at trial, see Criminal Law, §§ 719-728.

Of or affecting jurors, ground for new trial, see Criminal Law, § 925.

Of trial judge, see Criminal Law, § 655.

MISJOINDER.

Of causes of action, see Action, §§ 38, 45.

MISREPRESENTATION.

See False Pretenses; Fraud.

Affecting validity of contract in general, see Contracts, § 94.

Affecting validity of contract of sale, see Sales, § 38.

Affecting validity of deed, see Deeds, § 70.

MISTAKE.

As ground for equitable relief, see Equity, § 6.
In contract, see Contracts, § 93.
In notice of mechanic's lien, see Mechanics' Liens, § 124.

MODIFICATION.

Contract for public improvement, see Municipal Corporations, § 354.

Of judgment, see Judgment, § 334.

Of requested instructions, see Trial, § 267.

MONEY.

Compensation for use, see Interest.
Deposits, see Banks and Banking, §§ 148-153.
Obtaining money under false pretenses, see False Pretenses.

MONEY LENT.

Bill or note given for loan of money, see Bills and Notes.

Interest on loans, see Interest.

Liabilities of broker to third person as to loans and securities, see Brokers, § 97.

Usurious loans, see Usury.

MONEY PAID.

Recovery of price paid for land, see Vendor and Purchaser, §§ 338-341.

§ 1. One voluntarily paying another's debt without any understanding for repayment cannot recover such money from the debtor.—*Cape Girardeau Bell Telephone Co. v. Hamil's Estate* (Mo. App.) 1103.

MONEY RECEIVED.

Recovery of price paid for land, see Vendor and Purchaser, §§ 338-341.

MONOPOLIES.

I. VALIDITY AND EFFECT OF GRANTS.

Grants of special privileges or immunities, constitutional prohibition, see Constitutional Law, § 205.

II. TRUSTS AND OTHER COMBINATIONS IN RESTRAINT OF TRADE.

Contracts, in restraint of trade, see Contracts, § 117.

Interstate commerce regulations, see Commerce, § 40.

§ 12. The word "conspiracy" in the anti-trust act of 1903 (Laws 1903, c. 94), defined.—*State v. Racine Sattley Co.* (Tex. Civ. App.) 400.

§ 12. Under the anti-trust act of 1903 (Laws 1903, c. 94), restrictions in trade are prohibited without regard to their immediate effect on trade.—*State v. Racine Sattley Co.* (Tex. Civ. App.) 400.

§ 21. Where an agreement in violation of the anti-trust law of 1903 (Laws 1903, c. 94) has been made, and one party pursues the course of conduct agreed on, the law presumes that the acts done by him were the result of the agreement, so that the parties thereto are liable.—*State v. Racine Sattley Co.* (Tex. Civ. App.) 400.

§ 30. A petition held to charge a violation of the anti-trust law of 1903 (Laws 1903, c. 94).—*State v. Racine Sattley Co.* (Tex. Civ. App.) 400.

§ 30. A petition, in an action by the state against a foreign corporation for a violation of the anti-trust act of 1903 (Laws 1903, c. 94), *held* to show, as against a general demurrer, that the transaction relied on was not an interstate transaction, but was subject to the anti-trust laws of the state.—*State v. Racine Sattley Co.* (Tex. Civ. App.) 400.

§ 30. In an action by the state for the penalty under the anti-trust law of 1903 (Laws 1903, c. 94) for making a contract in restraint of trade, the fact that the contract made an exhibit to the petition contained certain blanks *held* not to make the petition demurrable.—*State v. Racine Sattley Co.* (Tex. Civ. App.) 400.

MOOT QUESTIONS.

Determination on appeal or writ of error, see Appeal and Error, § 1084.

MORTALITY TABLES.

As documentary evidence, see Evidence, § 364.

MORTGAGES.

As assignment for creditors, see Assignments for Benefit of Creditors, § 14.
Of personal property in general, see Chattel Mortgages.

I. REQUISITES AND VALIDITY.

(A) Nature and Essentials of Conveyances as Security.

§ 27. A deed to another than the purchaser at judicial sale, with right to the purchaser to redeem from the grantee declared therein, *held* in effect an equitable mortgage.—*Green v. Maddox* (Ark.) 931.

III. CONSTRUCTION AND OPERATION.

(D) Lien and Priority.

§ 186. Evidence *held* to show that a mortgagee had notice of a claim for a mechanic's lien, and that such lien was superior to the mortgage under Ky. St. § 2463 (Russell's St. § 2383).—*First Nat. Bank v. Chowning Electric Co.* (Ky.) 1156.

IV. RIGHTS AND LIABILITIES OF PARTIES.

§ 187. Where a mortgage contained no reservation of the right of occupancy, the legal title passed under a mortgage, and the right of possession follows the legal title.—*Wilson v. Rogers* (Ark.) 318.

§ 199. Statement of liability of grantee of a mortgagee in possession for rent as affected by the betterment act (Kirby's Dig. § 2754 et seq.).—*Green v. Maddox* (Ark.) 931.

§ 203. Statement of how far the grantee of a mortgagee in possession was entitled to the benefits of the betterment act (Kirby's Dig. § 2754 et seq.).—*Green v. Maddox* (Ark.) 931.

VI. TRANSFER OF PROPERTY MORTGAGED OR OF EQUITY OF REDEMPTION.

Part payment by purchaser as affecting limitations, see Limitation of Actions, § 155.

§ 280. An agreement by a grantee made after purchasing to pay a mortgage executed by a prior grantee *held* not to bind the promisor, if not supported by a new consideration.—*Frase v. Lee* (Mo. App.) 10.

X. FORECLOSURE BY ACTION.

(D) Limitations and Laches.

Effect of part payment, see Limitation of Actions, § 155.

(K) Deficiency and Personal Liability.

§ 556. Mortgage "deficiency" defined.—*Bailey v. Block* (Tex.) 323.

§ 556. Prerequisites to recourse against a mortgagor's general property on a deficiency stated.—*Bailey v. Block* (Tex.) 323.

§ 562. Irregularity in selling a mortgagor's general property on judgment in foreclosure, under Rev. St. 1895, art. 1340, before exhausting the mortgaged property, is subject to collateral attack.—*Bailey v. Block* (Tex.) 323.

§ 562. Under Rev. St. 1895, arts. 1340, 2343, sale of a mortgagor's general property under foreclosure judgment before exhausting the mortgaged property *held* void.—*Bailey v. Block* (Tex.) 323.

(O) Operation and Effect.

§ 587. Where owners of land are not parties to a foreclosure suit against it, they are not concluded by the judgment.—*Ilaves v. Martin* (Ark.) 626.

MOTHER.

See Parent and Child.

MOTIONS.

For particular purposes or relief.

See Injunction, § 158.

Direction of verdict, see Trial, §§ 169-178.

New trial, see Criminal Law, §§ 951-958; New Trial, § 155.

Presentation of objections, for purpose of review, see Appeal and Error, § 237.

Quashing venire, see Jury, §§ 116-120.

Relating to pleadings, see Pleading, §§ 343-367.

Striking out evidence, see Trial, § 89.

MOTIVE.

As element of first degree murder, see Homicide, § 22.

Evidence of, in criminal prosecutions, see Homicide, § 166.

Power of commissioner taking deposition to determine good faith in bringing action, see Depositions, § 52.

MOTOR VEHICLES.

On streets, liabilities for injuries, see Municipal Corporations, § 706.

Power of city to prohibit operation by minors, see Municipal Corporations, § 703.

Power of fiscal court to purchase automobiles for use of inspection of highways, see Counties, § 113.

MUNICIPAL CORPORATIONS.

See Counties; Schools and School Districts, §§ 13-97.

Levee districts, see Levees, § 5.

Street railroads, see Street Railroads.

I. CREATION, ALTERATION, EXISTENCE, AND DISSOLUTION.

Of counties, see Counties, § 16.

(B) Territorial Extent and Subdivisions, Annexation, Consolidation, and Division.

Quo warranto to determine validity of extension of corporate limits, see Quo Warranto, § 57.

§ 29. Facts *held* to sustain a commissioner's conclusion that an ordinance extending the limits of Kansas City was reasonable.—*State ex Inf. Major v. Kansas City* (Mo.) 1007.

§ 29. Rule for determining the reasonableness of extension of city limits stated.—State ex inf. Major v. Kansas City (Mo.) 1007.

(C) Amendment, Repeal, or Forfeiture of Charter, and Dissolution.

Self-executing constitutional provisions, see Constitutional Law, § 32.

§ 46. Const. art. 9, § 16, *held* to limit the authority of a city as to the number of voters necessary to adopt a charter amendment to three-fifths of the qualified voters voting at the election.—State ex inf. Major v. Kansas City (Mo.) 1007.

§ 46. Invalidity of Kansas City Charter, art. 1, § 17, with reference to the majority required to adopt an amendment as violating Const. art. 9, § 16, *held* not to invalidate the ordinance in toto.—State ex inf. Major v. Kansas City (Mo.) 1007.

II. GOVERNMENTAL POWERS AND FUNCTIONS IN GENERAL.

§ 58. Dallas City Charter granted by Spec. Acts 30th Leg. c. 71, art. 2, § 1, par. 2, relating to the powers conferred thereby, *held* to add nothing to the other terms of the charter.—Southwestern Telegraph & Telephone Co. v. City of Dallas (Tex.) 321.

III. LEGISLATIVE CONTROL OF MUNICIPAL ACTS, RIGHTS, AND LIABILITIES.

§ 65. The Legislature, in creating municipal corporations, may provide for the submission of proper subjects by the initiative method to the electors of the city.—Southwestern Telegraph & Telephone Co. v. City of Dallas (Tex.) 321.

§ 75. Effect of a city's adoption of Laws 1895, p. 58, relating to sewer improvements, stated.—Hall v. City of Sedalia (Mo.) 650.

IV. PROCEEDINGS OF COUNCIL OR OTHER GOVERNING BODY.

(B) Ordinances and By-Laws in General.

§ 108. Under Dallas City Charter, granted by Spec. Acts 30th Leg. c. 71, art. 3, par. 1; art. 2, § 8, pars. 7, 27; art. 8, par. 1; and art. 2, § 1, par. 2—*held*, that an ordinance adopted by the electors under the initiative and referendum method, regulating the rate of telephone charges was invalid.—Southwestern Telegraph & Telephone Co. v. City of Dallas (Tex.) 321.

V. OFFICERS, AGENTS, AND EMPLOYÉS.

Of counties, see Counties, § 74.

(A) Municipal Officers in General.

§ 167. As to bona fide acts of honest agents a city has knowledge through the knowledge of its agents.—City of St. Louis v. Ruecking (Mo.) 657.

VI. PROPERTY.

§ 225. A town *held* not entitled to recover land conveyed in aid of a manufacturing enterprise, because the conveyance was ultra vires.—Green River Chemical Co. v. Board of Trustees of Town of Rockport (Ky.) 1164.

VII. CONTRACTS IN GENERAL.

Laws impairing obligation of contracts, see Constitutional Law, § 126.
Of counties, see Counties, § 113.

IX. PUBLIC IMPROVEMENTS.

(A) Power to Make Improvements or Grant Aid Therefor.

Special laws, see Statutes, § 77.

§ 270. Sess. Laws 1895, p. 58, *held* to authorize construction of a municipal sewage disposal plant.—Hall v. City of Sedalia (Mo.) 650.

§ 284. A city council may delegate to the city clerk authority to sign special tax bill.—First Nat. Bank of Independence v. Shewalter (Mo. App.) 42.

(C) Contracts.

§ 347. Under Rev. St. 1899, §§ 6761, 6762 (Ann. St. 1906, p. 3328), one furnishing labor or material to a contractor or subcontractor on a public work *held* entitled to sue on the bond given as required by the statute.—Board of Education of City of St. Louis v. United States Fidelity & Guaranty Co. (Mo. App.) 18.

§ 348. A suit by a city on the bond of municipal contractors for the expense of replacing defective tile under a sewer construction contract *held* not based on a certain section of the contract.—City of St. Louis v. Ruecking (Mo.) 657.

§ 348. Suit by a city on the bond of sewer contractors for expense in repairing broken tile *held* sufficiently covered by stated instructions.—City of St. Louis v. Ruecking (Mo.) 657.

§ 348. Whether substitution of loose earth for sand in laying sewer pipe under a sewer contract was substantial compliance *held*, under the evidence, for the jury.—City of St. Louis v. Ruecking (Mo.) 657.

§ 354. Under Ky. St. §§ 3094, 3096 (Russell's St. §§ 1205, 1207) a city council committee *held* powerless to modify a street improvement contract.—City of Newport v. Schoolfield (Ky.) 503.

§ 359. The doctrine of substantial performance applies to municipal sewer construction contracts.—City of St. Louis v. Ruecking (Mo.) 657.

§ 360. No implied promise to make payment above the contract price of a street improvement arises from acceptance of work with knowledge of beneficial changes.—City of Newport v. Schoolfield (Ky.) 503.

§ 365. A city *held* to have waived a particular brand of brick required by a street improvement contract.—City of Newport v. Schoolfield (Ky.) 503.

365. A city *held* to have ratified its agents' unauthorized acts in permitting substitution of material in laying pipe under a sewer contract.—City of St. Louis v. Ruecking (Mo.) 657.

§ 365. Provision in a municipal sewer construction contract *held* to preclude recovery for defects discovered in the work after final acceptance.—City of St. Louis v. Ruecking (Mo.) 657.

§ 374. A street contractor *held* not entitled to recover for a city's breach of contract by delaying him.—City of Newport v. Schoolfield (Ky.) 503.

(D) Damages.

Compensation or damages for property taken under power of eminent domain, see Eminent Domain.

Error in instructions cured by giving other instructions in action by owners of property for damages, see Trial, § 296.

§ 396. Special benefits that may be considered in the reduction of damages to abutting property by a change in the grade of the street stated.—Powell v. City of Columbia (Mo. App.) 78.

§ 404. An instruction, in an action for damages changing the grade of a street, *held* not erroneous for the use of a word.—*Powell v. City of Columbia* (Mo. App.) 76.

§ 404. In an action for damages for changing the grade of a street, the admission of evidence *held* not erroneous, though special damages were not pleaded.—*Powell v. City of Columbia* (Mo. App.) 76.

(F) Enforcement of Assessments and Special Taxes.

§ 567. The sufficiency of the petition in an action on a special tax bill of a city of the third class *held* not affected by the tax bill in the petition, not reciting performance of some preliminary steps in the proceeding.—*First Nat. Bank of Independence v. Shewalter* (Mo. App.) 42.

X. POLICE POWER AND REGULATIONS.

(B) Violations and Enforcement of Regulations.

Criminal jurisdiction of police court, see Criminal Law, § 90.

§ 631. Where plaintiff residing outside the city limits permitted his cow to wander within the city limits, he was guilty of violating an estray ordinance within the city.—*Tutt v. City of Greenville* (Ky.) 890.

§ 636. Where plaintiff residing outside the city limits permitted his cow to wander within the city limits, he was subject to prosecution in the city police court for violating an estray ordinance.—*Tutt v. City of Greenville* (Ky.) 890.

§ 642. A conviction of violating a city ordinance affirmed for noncompliance with the statute and rules governing prosecution of civil appeals.—*City of Caruthersville v. Palsgrove* (Mo. App.) 1032.

XI. USE AND REGULATION OF PUBLIC PLACES, PROPERTY, AND WORKS.

Dedication of property to public or to municipality, see Dedication.

(A) Streets and Other Public Ways.

County roads, see Highways.

Dedication of, see Dedication.

Injuries to persons on street by collision with street cars, see Street Railroads, §§ 81-118.

§ 671. A city cannot authorize a street railroad to use a street as to materially obstruct ingress and egress of an abutting owner.—*Zimmerman v. Metropolitan St. Ry. Co.* (Mo. App.) 40.

§ 671. An abutting owner on a street *held* entitled to have his ingress and egress not materially obstructed.—*Zimmerman v. Metropolitan St. Ry. Co.* (Mo. App.) 40.

§ 671. A material obstruction of right of ingress and egress of an abutting owner on a street constitutes a private nuisance, so that he is entitled to injunction.—*Zimmerman v. Metropolitan St. Ry. Co.* (Mo. App.) 40.

§ 703. Under *Sayles' Ann. Civ. St.* 1897, art. 430, a city *held* not authorized to prohibit the operation of automobiles on the streets by any person under the age of 16 years.—*Ex parte Epperson* (Tex. Cr. App.) 685.

§ 705. Duty stated of a person as to hitching a team of horses near a public thoroughfare.—*Miller v. United Rys. Co. of St. Louis* (Mo. App.) 1045.

§ 706. In an action for injuries to beggar caused by automobile, instruction requested by

defendant *held* proper.—*Millsaps v. Brogdon* (Ark.) 632.

§ 706. There is no presumption of negligence from the fact that the driver of an automobile ran against a beggar on the street.—*Millsaps v. Brogdon* (Ark.) 632.

§ 706. A certain charge *held* properly refused.—*Miller v. United Rys. Co. of St. Louis* (Mo. App.) 1045.

§ 706. An instruction *held* not objectionable as authorizing a recovery for plaintiff for negligence not counted upon in the pleading.—*Miller v. United Rys. Co. of St. Louis* (Mo. App.) 1045.

§ 706. Whether a person has exercised reasonable care in hitching a team of horses near a public street *held* a question of fact.—*Miller v. United Rys. Co. of St. Louis* (Mo. App.) 1045.

XII. TORTS.

(A) Exercise of Governmental and Corporate Powers in General.

§ 733. A city *held* not liable for injuries to one whose horse was frightened by the escape of steam from a steam roller.—*Board of Council of City of Danville v. Fox* (Ky.) 883.

§ 734. A city *held* not liable to an adjoining owner for damages arising from maintenance of a prison as authorized by Ky. St. § 3290 (*Russell's St.* § 1307) subsec. 4.—*City of Bowling Green v. Rogers* (Ky.) 921.

(B) Acts or Omissions of Officers or Agents.

Special laws, see Statutes, § 77.

§ 745½. A city is not liable for negligence of its officers in exercising its governmental functions.—*City of Bowling Green v. Rogers* (Ky.) 921.

§ 745½. A city is not required to use the best or safest or any particular means in the conduct of its governmental business, and hauling a refuse wagon by a sprinkler is such business.—*City of Louisville v. Carter* (Ky.) 468.

§ 745½. In an action against a city for injuries caused by a refuse wagon attached to a sprinkling wagon, *held*, that the city was not liable.—*City of Louisville v. Carter* (Ky.) 468.

§ 747. In view of *Rev. St.* 1899, §§ 6067, 6075 (*Ann. St.* 1906, pp. 3049, 3053), and the *Kansas City Charter and Ordinances* 1898, art. 10, § 5, and other provisions, *held*, that in levying an assessment for park purposes the city acted in a governmental capacity, so that it was not liable for the failure of its treasurer to issue a certificate to a purchaser at a sale of property under an assessment levied to maintain parks and boulevards.—*Brightwell v. Kansas City* (Mo. App.) 87.

(C) Defects or Obstructions in Streets and Other Public Ways.

§ 755. Under *Sayles' Ann. Civ. St.* 1897, arts. 381, 419, 579, 594, a city *held* to have control over its sidewalks and liable for negligence with respect thereto.—*City of Haskell v. Barker* (Tex. Civ. App.) 833.

§ 762. In an action against a city and contractor for injuries caused by falling into an excavation in a sidewalk, an instruction that failure of the city to enforce an ordinance requiring lights and barriers was not actionable negligence *held* correct.—*Ryan v. Kansas City* (Mo.) 566.

§ 763. The care required of cities in keeping their sidewalks safe stated.—*City of Louisville v. Uebelhor* (Ky.) 152.

§ 768. A smooth worn place in a stone sidewalk, about two inches deep, was not such a

defect as would constitute negligence by the city in permitting it.—City of Louisville v. Uebelhor (Ky.) 152.

§ 806. In an action against a city for injuries caused by falling into an excavation in a sidewalk, an instruction requiring plaintiff to have used ordinary care to have discovered the defect *held* correct.—Ryan v. Kansas City (Mo.) 566.

§ 818. Evidence *held* admissible that the crossing in which a hole was located was in the same condition at the time of trial for the purpose of showing measurements at that time.—City of Louisville v. Uebelhor (Ky.) 152.

§ 818. In an action for injuries from a defective sidewalk by tripping on loose boards, testimony that others had fallen by tripping on such boards was improperly admitted.—McNeill v. City of Cape Girardeau (Mo. App.) 582.

§ 818. In an action for personal injuries resulting from a defective sidewalk, evidence was only admissible as to the condition of the walk in the immediate vicinity of the injury.—McNeill v. City of Cape Girardeau (Mo. App.) 582.

§ 818. In an action for injuries from an obstruction in a city street, evidence of city officers that they knew of the obstruction, and had issued orders that it be removed *held* admissible not only to show the condition of the street, but also notice to the city.—City of Ft. Worth v. Lopp (Tex. Civ. App.) 824.

§ 821. The question of whether a sidewalk was in a reasonably safe condition for use *held* for the jury.—City of Louisville v. Uebelhor (Ky.) 152.

§ 822. In an action against a city for injuries from a defective sidewalk, an instruction as to notice of the defect *held* erroneous.—City of Haskell v. Barker (Tex. Civ. App.) 833.

XIII. FISCAL MANAGEMENT. PUBLIC DEBT, SECURITIES, AND TAXATION.

Of counties, see Counties, §§ 152-191.

(B) Administration in General, Appropriations, Warrants, and Payment.

§ 886. A general creditor of a city cannot subject to his debt money applicable to current expenses and insufficient therefor.—Camp v. Citizens' Nat. Bank of Longview (Tex. Civ. App.) 808.

(C) Bonds and Other Securities, and Sinking Funds.

§ 907. Act March 14, 1910 (Laws 1910, c. 8), relating to public hospital bonds, *held* not unconstitutional for failing to expressly require a two-thirds vote within Const. § 157.—Render v. City of Louisville (Ky.) 458.

(D) Taxes and Other Revenue, and Application Thereof.

Of counties, see Counties, § 191.

XV. ACTIONS.

§ 1031. Funds of a city deposited in a city depository as provided by law cannot be subjected to the city's debts by garnishment.—(Apps v. Citizens' Nat. Bank of Longview (Tex. Civ. App.) 808.

MURDER.

See Homicide.

MUTUAL BENEFIT INSURANCE.

See Insurance, §§ 699-825.

MUTUALITY.

Of obligation of contract, see Contracts, § 10.

NAMES.

See Trade-Marks and Trade-Names.

NATIONAL BANKS.

See Banks and Banking, §§ 261-280.

NATIONAL GUARD.

See Militia.

NAVIGABLE WATERS.

Nonnavigable waters, see Waters and Water Courses.

I. RIGHTS OF PUBLIC.

Flottage of logs and rafts in nonnavigable waters, see Logs and Logging, § 15.

NECESSARIES.

For wife and family, liabilities of husband or wife, see Husband and Wife, § 19.

NECESSITY.

Ways of necessity, see Easements, § 18.

NEGLIGENCE.

Causing death, see Death, §§ 33-104.

By particular classes of persons.

See Brokers, § 38; Carriers, §§ 110-134, 159, 177, 280-321, 353-382; Municipal Corporations, §§ 733-822; Railroads, §§ 113, 274-282, 288-297, 301-351, 358-401, 446, 447, 485; Street Railroads, §§ 81-118.

Electric light or power companies, see Electricity, §§ 13-19.

Employers, see Master and Servant, §§ 89-201.

Employers, liability for injuries to third persons, see Master and Servant, §§ 302-329.

Fellow servants, see Master and Servants, §§ 185-201.

Gas companies, see Gas, §§ 17-20.

Telegraph or telephone companies, see Telegraphs and Telephones, §§ 66, 67.

Condition or use of particular species of property, works, machinery, or other instrumentalities.

See Gas, §§ 17-20; Railroads, §§ 113, 274-282, 288-297, 301-351, 358-401, 446, 447, 485; Street Railroads, §§ 81-118; Telegraphs and Telephones, §§ 66, 67.

Automobiles, see Municipal Corporations, § 706.

Carrier's premises, see Carriers, § 286.

Conveyances and other means for transportation of passengers, see Carriers, § 300.

Railroad lands and structures, see Railroads, § 113.

Streets and highways, see Municipal Corporations, §§ 755-822.

Tools, machinery, appliances, and places for work, see Master and Servant, §§ 101, 102-118.

Use of street by traveler, see Municipal Corporations, § 705.

Injuries to particular species of property.

Animals in operation of railroads, see Railroads, §§ 446, 447.

Goods shipped, see Carriers, §§ 110-134, 177.

I. ACTS OR OMISSIONS CONSTITUTING NEGLIGENCE.

(A) Personal Conduct in General.

§ 1. One suing for an injury negligently inflicted by another *held* required to show certain

facts.—*De Glopper v. Nashville Ry. & Light Co.* (Tenn.) 609.

§ 4. "Ordinary care" defined.—*Creamer v. Louisville Ry. Co.* (Ky.) 193.

§ 4. "Negligence" and "ordinary care," defined.—*Louisville, H. & St. L. Ry. Co. v. Stillwell* (Ky.) 202.

§ 11. A distinction exists between ordinary and intentional wrongdoing, in that when willfulness enters negligence steps out; the former being characterized by advertence and the latter by inadvertence.—*Christy v. Butcher* (Mo. App.) 1058.

(B) Dangerous Substances, Machinery, and Other Instrumentalities.

Electricity, see Electricity, §§ 13-19.

§ 23. On facts stated, *held*, in an action against a railroad company by a minor for injuries received by jumping from a box car, that the doctrine of the turntable cases did not apply.—*Louisville & N. R. Co. v. Ray* (Tenn.) 858.

§ 23. Doctrine and theory of the turntable cases *held* not to apply to cars left standing on a railroad track to be loaded in the course of business.—*Louisville & N. R. Co. v. Ray* (Tenn.) 858.

§ 24. Plaintiff *held* not entitled to recover for injuries to her thumb by defendant's clerk, without proof that the clerk knew or should have known that her thumb was in a dangerous position on a table when he closed it.—*Greene v. Burns* (Ky.) 1134.

(C) Condition and Use of Land, Buildings, and Other Structures.

Carrier's premises, see Carriers, § 286.

Streets and highways, see Municipal Corporations, §§ 755-822.

Tools, machinery, appliances, and places for work, see Master and Servant, §§ 101, 102-118.

§ 32. A landowner owes a licensee no duty to keep his premises in a safe condition.—*Mack v. Houston E. & W. T. Ry. Co.* (Tex. Civ. App.) 846.

II. PROXIMATE CAUSE OF INJURY.

Loss of or injury to goods shipped, see Carriers, § 123.

§ 56. The primary cause of an injury may be the proximate cause of a disaster, though it may operate through successive instruments.—*Pulaski Gas Light Co. v. McClintock* (Ark.) 1180.

§ 59. Though in general, it must appear that an injury is the natural and probable consequence of the negligence or wrongful act, it is not necessary that the particular injury should have been foreseen, in order to render the injury the proximate result of the negligence.—*Pulaski Gas Light Co. v. McClintock* (Ark.) 1180.

§ 61. If the defendant's negligence operated as a contributing element proximate to the injury, it is liable, even though such injury was due to an act of God.—*South Side Realty Co. v. St. Louis & S. F. R. Co.* (Mo. App.) 1034.

§ 61. Right to recover against tort-feasors, stated.—*Miller v. United Rys. Co. of St. Louis* (Mo. App.) 1045.

§ 61. Where an injury results from negligence of another, such negligence is deemed the proximate cause, though it occurs with negligence of another independent actor intervening subsequently thereto.—*Miller v. United Rys. Co. of St. Louis* (Mo. App.) 1045.

III. CONTRIBUTORY NEGLIGENCE.

Of owner of land damaged by spread of Johnson grass, see Agriculture, § 8.

Of owners of goods lost or injured in course of transportation, see Carriers, § 121.

Of passengers, see Carriers, §§ 327-347.

Of person injured by defects or obstructions in street, see Municipal Corporations, § 806.

Of person injured by electricity, see Electricity, § 18.

Of person injured by escape of gas, see Gas, § 19.

Of person injured by operation of railroad, see Railroads, §§ 278, 326-332, 381.

Of person injured on or near street railroad tracks, see Street Railroads, § 98.

Of servants, see Master and Servant, §§ 227-236, 280, 296.

(A) Persons Injured in General.

§ 83. It is sufficient to sustain a recovery under the doctrine of discovered peril that, when the peril was discovered, the injury could be avoided by the use of the agencies at hand.—*Gehring v. Galveston Electric Co.* (Tex. Civ. App.) 288.

(C) Imputed Negligence.

§ 92. The fact that a motorman of a street car crossing a railroad track failed to exercise proper care did not excuse negligence of operators of a train.—*Augustus v. Chicago, R. I. & P. Ry. Co.* (Mo. App.) 22.

IV. ACTIONS.

Damages, inadequate and excessive, see Damages, §§ 130-132.

Damages, measure, see Damages, § 95.

(A) Right of Action, Parties, Preliminary Proceedings, and Pleadings.

§ 111. A petition in one count *held* to charge negligence.—*Christy v. Butcher* (Mo. App.) 1058.

§ 112. A petition in one count *held* to charge willfulness.—*Christy v. Butcher* (Mo. App.) 1058.

§ 119. Where specific acts of negligence are alleged, they must be proved as laid, and the presumption of negligence may not be invoked.—*Miller v. United Rys. Co. of St. Louis* (Mo. App.) 1045.

(B) Evidence.

Acts and statements accompanying or connected with transaction as constituting part of res gestæ, see Evidence, § 123.

§ 121. The plaintiff, suing for a personal injury negligently inflicted, *held* required to prove, either by direct testimony or by direct proof of related facts, the duty defendant owed him, the injury done, the negligence of defendant, and its proximate cause.—*De Glopper v. Nashville Ry. & Light Co.* (Tenn.) 609.

§ 121. The mere fact of injury never raises a presumption of negligence.—*De Glopper v. Nashville Ry. & Light Co.* (Tenn.) 609.

§ 121. Where an act which caused injury was shown by direct evidence, and the circumstances of the accident were proved, and the only reasonable explanation gave rise to an inference of negligence, the rule of *res ipsa loquitur* *held* applicable.—*De Glopper v. Nashville Ry. & Light Co.* (Tenn.) 609.

§ 122. The burden is on the one alleging negligence to establish it, and upon the other alleging contributory negligence to prove it, unless it is shown by the plaintiff's testimony.—*Mill-saps v. Brogdon* (Ark.) 632.

§ 122. Contributory negligence will not be presumed, but must be proved.—*Jacksonville Ice & Electric Co. v. Moses* (Tex. Civ. App.) 379.

(C) Trial, Judgment, and Review.

§ 136. In an action for negligence, based upon the theory of the turntable cases, the court *held* required to give a special instruction as a matter of law.—*Louisville & N. R. Co. v. Ray* (Tenn.) 858.

NEGOTIABLE INSTRUMENTS.

See Bills and Notes; Bonds.

Municipal bonds and other securities, see Municipal Corporations, § 907.

NEWLY DISCOVERED EVIDENCE.

Ground for bill of review, see Equity, § 447.
Ground for new trial, see Criminal Law, §§ 938-942; New Trial, §§ 102-108.

NEWSPAPERS.

Publication of libelous articles, see Libel and Slander.

Publication of result of local option election contest, see Intoxicating Liquors, § 37.

NEW TRIAL.

Granted by appellate court, see Appeal and Error, §§ 1177, 1178, 1214.

Necessity of motion for purpose of review, see Appeal and Error, §§ 281-283.

In particular actions or proceedings.

Criminal prosecutions, see Criminal Law, §§ 916-958.

Review of proceedings.

Necessity of bill of exceptions, see Criminal Law, § 1090.

Review of proceedings on motion involving discretion of court, see Appeal and Error, §§ 977-981; Criminal Law, § 1156.

Scope and extent of review on appeal from decision on motion, see Appeal and Error, § 867.

II. GROUNDS.**(D) Disqualification or Misconduct of or Affecting Jury.**

Time for objection to misconduct affecting jury, see Trial, § 317.

§ 44. Alleged misconduct of a jury *held* not to require a new trial under Rev. St. 1895, art. 1371, as amended by Gen. Laws 1905, c. 18.—*City of Ft. Worth v. Lopp* (Tex. Civ. App.) 824.

§ 47. Facts *held* not to show grounds for a new trial because of misconduct of a juror.—*De Van Rose v. Tholborn* (Mo. App.) 1093.

(F) Verdict or Findings Contrary to Law or Evidence.

Review of discretion of court in granting new trial, see Appeal and Error, § 979.

§ 72. In an action against a street car company for colliding with plaintiff's automobile, grant of new trial on the ground that the verdict for defendant was against the weight of the evidence *held* not an abuse of discretion.—*Hawver v. Springfield Traction Co.* (Mo. App.) 70.

(G) Surprise, Accident, Inadvertence, or Mistake.

New matter ground for bill of review in equity, see Equity, § 447.

(H) Newly Discovered Evidence.

Review of discretion of trial court, see Appeal and Error, § 981.

§ 102. Diligence exercised by attorneys for a city to discover evidence before trial which

was put forward as newly discovered evidence on an application for a new trial *held* insufficient.—*City of Ft. Worth v. Lopp* (Tex. Civ. App.) 824.

§ 102. A new trial for newly discovered evidence *held* properly denied.—*Kidd v. McCracken* (Tex. Civ. App.) 839.

§ 108. Alleged newly discovered evidence of doubtful weight, and conflicting with that of other credible witnesses, *held* insufficient to require a new trial.—*City of Ft. Worth v. Lopp* (Tex. Civ. App.) 824.

§ 108. An affidavit made upon a motion for a new trial for newly discovered evidence *held* too indefinite.—*Kidd v. McCracken* (Tex. Civ. App.) 839.

III. PROCEEDINGS TO PROCURE NEW TRIAL.

Effect of motion for new trial on time for taking appeal or other proceeding for review, see Appeal and Error, § 345.

§ 155. Under Acts 1871, c. 59, Acts 1885, c. 65, §§ 1, 2 (Shannon's Code, § 4898), and Shannon's Code, § 5892, subsec. 3 (Acts 1895, c. 45, § 2), the judge of the circuit court may determine a motion for a new trial after the expiration of 30 days from rendition of judgment.—*Louisville & N. R. Co. v. Ray* (Tenn.) 858.

§ 155. Under Acts 1899, c. 40, a motion for a new trial may be carried over with the suit to the next term.—*Louisville & N. R. Co. v. Ray* (Tenn.) 858.

NEXT OF KIN.

See Descent and Distribution.

NON COMPOS MENTIS.

See Insane Persons.

NONJOINDER.

Of parties, see Parties, § 84.

NONRESIDENCE.

Appearance by nonresident, see Appearance, § 19.

Taxation of decedent's estate under ancillary administration, see Taxation, §§ 99, 357.

NONSUIT.

Voluntary nonsuit, see Dismissal and Nonsuit, §§ 7-42.

NOTES.

Promissory notes, see Bills and Notes.

NOTICE.

Judicial notice, see Evidence, §§ 18-43.

As affecting particular classes of persons.
See Attorney and Client, § 180; Carriers, §§ 110, 159; Corporations, § 420; Master and Servant, § 220.

Officers or agents of banks, see Banks and Banking, § 116.

Purchasers of bills or notes, see Bills and Notes, §§ 334, 335.

Purchasers of land, see Vendor and Purchaser, § 230.

As affecting particular rights, duties, and liabilities.

Liability of corporation in general as affected by notice to officers or agents, see Corporations, § 428.

Liability of master for injuries to servant as affected by notice of defects, see Master and Servant, § 220.

Liability on bill or note, see Bills and Notes, §§ 334, 335.

Rights and liabilities of bona fide purchasers of real property, see Vendor and Purchaser, § 230.

Right to attorney's lien, see Attorney and Client, § 180.

Right to mechanic's lien, see Mechanics' Liens, §§ 124-154.

Of particular facts, acts, or proceedings not judicial.

Attorney's lien, see Attorney and Client, § 180.
Claim of mechanic's lien, see Mechanics' Liens, §§ 124-154.

Dangers of employment as affecting assumption of risk, see Master and Servant, § 220.
Defects in title of vendor of land, see Vendor and Purchaser, § 230.

Defenses to bill or note, see Bills and Notes, §§ 334, 335.

Local option election, see Intoxicating Liquors, § 33.

Loss of or injury to goods shipped, see Carriers, § 159.

Nature and value of goods shipped, see Carriers, § 110.

Possession adverse to owner, see Adverse Possession, § 31.

Of particular judicial proceedings.

See Attachment, § 209; Lis Pendens, § 13.

Local option election contest, see Intoxicating Liquors, § 37.

Pendency of action in general, see Lis Pendens, § 13.

NOVATION.

§ 5. A third person agreeing to assume the account of a debtor, *held* responsible for the account.—Cariker & Wintz v. W. J. Vawters & Son (Tex. Civ. App.) 780.

§ 10. Where a third person had assumed the debt of a debtor, the creditor *held* entitled to apply a credit on the account as against the third person.—Cariker & Wintz v. W. J. Vawters & Son (Tex. Civ. App.) 780.

NOXIOUS PLANTS.

See Agriculture, § 8.

NUISANCE.

Obstruction, discharge and pollution of surface waters, see Waters and Water Courses, § 119.

Violation of liquor laws, see Intoxicating Liquors, §§ 261-279.

1. PRIVATE NUISANCES.

(A) Nature of Injury, and Liability Therefor.

§ 3. A prison is not a nuisance per se.—City of Bowling Green v. Rogers (Ky.) 921.

§ 5. A railroad company subdividing and selling its lands, but reserving a right, *held* not to reserve the right to create, or to give a lessee the right to erect, a nuisance on the right of way.—Stark v. Coe (Tex. Civ. App.) 373.

(C) Abatement and Injunction.

§ 23. Under Sayles' Ann. Civ. St. 1897, art. 2989, subd. 1, a party aggrieved by a nuisance *held* entitled to sue in equity to abate the nuisance, though defendant was solvent.—Stark v. Coe (Tex. Civ. App.) 373.

§ 25. Neither the convenience nor inconvenience of the public affects one's right to have a

nuisance abated, for under Const. art. 1, § 17, one's property may not be destroyed for the convenience of the public, unless he is compensated therefor.—Stark v. Coe (Tex. Civ. App.) 373.

§ 25. In an action to abate a nuisance created by a manufacturing plant, the fact of public convenience or necessity of the surrounding country *held* not a defense.—Stark v. Coe (Tex. Civ. App.) 373.

§ 33. In an action to abate a nuisance, evidence *held* to justify a finding of the existence of a nuisance.—Stark v. Coe (Tex. Civ. App.) 373.

§ 34. The court in an action to abate a nuisance created by operation of a corn elevator and sheller *held* to have properly submitted to the jury the issue whether the plant could be run so as not to create a nuisance.—Stark v. Coe (Tex. Civ. App.) 373.

§ 34. In an action to abate a nuisance, a charge *held* beneficial to defendant.—Stark v. Coe (Tex. Civ. App.) 373.

§ 36. Where, in an action to abate a nuisance created by the operation of a corn elevator and sheller, the jury found that the plant could not be operated so as not to become a nuisance, the court did not err in refusing to reform the judgment so as to allow defendant to operate the plant.—Stark v. Coe (Tex. Civ. App.) 373.

II. PUBLIC NUISANCES.

Offenses constituting nuisances, see Disorderly House.

OATH.

To voters, see Elections, § 219.

OBJECTIONS.

In judicial proceedings.

In garnishment proceedings, by garnishee, see Garnishment, § 124.

Necessity and sufficiency for purpose of review in civil actions, see Appeal and Error, §§ 169-237.

Necessity and sufficiency for purpose of review in criminal prosecutions, see Criminal Law, §§ 1035, 1036.

To argument and conduct of counsel, see Criminal Law, § 728.

To competency of witness, see Witnesses, § 181.

To evidence at trial, see Criminal Law, § 695; Trial, § 105.

To jurors, see Jury, §§ 116-120.

To parties, see Parties, § 84.

To pleadings, see Pleading, §§ 403-433.

To record on appeal or writ of error, see Appeal and Error, §§ 630-644.

To special judge, see Judges, § 19.

OBLIGATION OF CONTRACTS.

Laws impairing, see Constitutional Law, § 126.

OBSTRUCTIONS.

Of access to property as ground for compensation, see Eminent Domain, § 106.

Of streets, see Municipal Corporations, §§ 671, 818.

OCCUPATION.

Subjects and titles of acts relating to occupations and employments, see Statutes, § 114.

OCCUPYING CLAIMANTS.

Allowance or recovery of compensation for improvements, see Trespass to Try Title, § 56.

OFFENSES.

See Criminal Law.

OFFER.

Proposals for contract, see Contracts, § 24;
Sales, §§ 22, 23.

OFFICE JUDGMENT.

See Judgment, §§ 137-139.

OFFICERS.

Liability of municipal corporation for torts of officers, see Municipal Corporations, §§ 745½-747.

Mandamus to public officers in general, see Mandamus, §§ 76-107.

Parol or extrinsic evidence to contradict or vary official records, see Evidence, § 387.

Regulation and conduct of elections in general, see Elections.

Particular classes of officers.

See Judges; Justices of the Peace; Receivers; Sheriffs and Constables.

Attorneys, see Attorney and Client.

Bank officers, see Banks and Banking, § 116.

Corporate officers in general, see Corporations, §§ 306-337.

County officers, see Counties, § 74.

Highway officers, see Highways, §§ 93, 94.

Municipal officers, see Municipal Corporations, § 167.

Tax collectors, see Taxation, §§ 545-549.

Trustees, see Trusts.

Trustees in bankruptcy, see Bankruptcy, §§ 214-303.

I. APPOINTMENT, QUALIFICATION, AND TENURE.

Of highway officers, see Highways, § 93.

Regulation and conduct of elections in general, see Elections.

(G) Resignation, Suspension, or Removal.

Mandamus to compel removal from or reinstatement to office, see Mandamus, § 76.

III. RIGHTS, POWERS, DUTIES, AND LIABILITIES.

Compensation of county officers in general, see Counties, § 74.

Compensation of tax collectors, see Taxation, § 549.

Liability for false imprisonment, see False Imprisonment, § 7.

Of judges, see Judges, §§ 29, 30.

Of municipal officers, see Municipal Corporations, § 167.

IV. LIABILITIES ON OFFICIAL BONDS.

Bonds of sheriffs and constables, see Sheriffs and Constables, § 157.

Indemnity to sureties, see Principal and Surety, § 174.

OFFSET.

See Set-Off and Counterclaim.

OPENING.

Account of executor or administrator, see Executors and Administrators, § 509.

Highways, see Highways, § 105.

Judgment, see Judgment, §§ 137-139.

OPINION EVIDENCE.

See Criminal Law, §§ 448-485; Evidence, §§ 471-500.

ORAL AGREEMENTS.

See Frauds, Statute of.

Parol acceptance of written assignment of land contract, see Vendor and Purchaser, § 214.

ORAL PLEADING.

On appeal from justice's court, see Justices of the Peace, § 174.

ORDERS.

For local option election, see Intoxicating Liquors, § 33.

Of master, see Master and Servant, § 149.

Orders of court.

On accounting by executor or administrator, see Executors and Administrators, § 509.

On motion or application for injunction, see Injunction, § 158.

Review of appealable orders, see Appeal and Error; Criminal Law, §§ 1020-1170½.

ORDINANCES.

Municipal ordinances, see Municipal Corporations, §§ 108-163, 164.

ORES.

See Mines and Minerals.

ORGANIC LAW.

See Constitutional Law.

OUSTER.

Re-entry and recovery of possession by landlord, see Landlord and Tenant, §§ 288-291.

OUTSTANDING TITLE.

Acquisition by cotenant, see Tenancy in Common, § 19.

OVERSEERS.

Of highways, see Highways, §§ 93, 94.

OWNERSHIP.

Of land as affecting right to mechanic's lien for improvements, see Mechanics' Liens, §§ 57-61.

Of property as affecting performance of contract of sale, see Vendor and Purchaser, §§ 133-137.

PAIS.

Estoppel in pais, see Estoppel, §§ 56-117.

PANEL.

Challenge to jury panel, see Jury, §§ 116-120.

PARAPHERNAL PROPERTY.

See Husband and Wife, § 273.

PARENT AND CHILD.

See Guardian and Ward; Infants.

Liability of estate of decedent for services rendered by child, see Executors and Administrators, § 206.

§ 3. A father is liable for reasonable necessities of life furnished to his minor children. —French v. Burlingame (Mo. App.) 1100.

§ 3. A father held liable for a surgeon's fee for performing an operation on his minor child. —French v. Burlingame (Mo. App.) 1100.

§ 17. Defendant, prosecuted under Rev. St. 1909, § 4492, for neglecting to provide necessary food, etc., for his infant children, *held* not guilty where the food, etc., actually necessary was supplied by others.—*State v. Thornton* (Mo.) 519.

PARI MATERIA.

Construction of statute in *pari materia*, see Municipal Corporations, § 847.

PARISHES.

See Counties.

PARK COMMISSIONERS.

See Municipal Corporations, § 747.

PAROL AGREEMENTS.

See Frauds, Statute of.

Parol acceptance of written assignment of land contract, see Vendor and Purchaser, § 214.

PAROL EVIDENCE.

In civil actions, see Evidence, §§ 387-456.

PARTIAL INVALIDITY.

Of contract, see Contracts, § 9.

PARTIES.

Competency as witnesses of parties interested in event, see Witnesses, § 140.

Competency as witnesses of parties of record, see Witnesses, § 139.

Death ground for abatement, see Abatement and Revival, § 54.

Domicile or residence as determining venue, see Venue, § 32.

Rights and liabilities as to costs, see Costs.

Weight and effect of testimony of party, see Evidence, § 594.

In actions by or against particular classes of persons.

Joint tenants, see Joint Tenancy, § 14.

In particular actions or proceedings.

See Forcible Entry and Detainer, § 15; Habeas Corpus, § 51.

For causing death, see Death, § 42.

To enforce specific performance, see Specific Performance, § 106.

Judgment and relief as to parties, and parties affected by judgments or proceedings thereon.

Parties to judgment on trial of issues, see Judgment, § 238.

Review as to parties, and parties to proceedings in appellate courts.

Reversal as to one or more coparties, see Appeal and Error, § 1173.

Review of questions as dependent on prejudicial nature of error, see Appeal and Error, § 1036.

Review of questions as dependent on presentation in lower court, see Appeal and Error, § 187.

Right to allege error affecting only coparty, see Appeal and Error, § 880.

To conveyances, contracts, or other transactions. See Release, § 29.

Assignment, see Assignments, §§ 94-109.

Bonds or other securities on appeal or writ of error, see Appeal and Error, § 376.

I. PLAINTIFFS.

(B) Joinder.

In action for causing death, see Death, § 42.

III. NEW PARTIES AND CHANGE OF PARTIES.

Claims by third person in foreclosure proceedings, see Chattel Mortgages, § 284.

V. DEFECTS, OBJECTIONS, AND AMENDMENT.

Objections raised for first time on appeal, see Appeal and Error, § 187.

§ 84. Failure to object to nonjoinder of a pledgee of a note in an action by the sureties against the maker after having paid the same *held* a waiver of the objection.—*Maysville Telephone Co. v. First Nat. Bank* (Ky.) 886.

PARTITION.

Creation of cotenancies and rights and liabilities of cotenants in general, see Joint Tenancy; Tenancy in Common.

II. ACTIONS FOR PARTITION.

(B) Proceedings and Relief.

§ 77. The court in partition may not compel an adult to sell his land, or compel one to purchase against his will, except where property cannot be divided without materially impairing its value.—*Middleton v. Fields* (Ky.) 180.

§ 78. The court in partition should allot the part of the land to the parties owning adjoining lands, provided it can be done without material detriment to the interests of the others.—*Middleton v. Fields* (Ky.) 180.

PARTNERSHIP.

Application of statute of frauds to partnership contracts in respect to lands or interests therein, see Frauds, Statute of, § 76.

I. THE RELATION.

(A) Creation and Requisites.

§ 5. An agreement *held* to create a partnership to deal in lands.—*Beebe v. Olentine* (Ark.) 936.

§ 5. On stated facts an existing partnership and a corporation *held* to be partners in a transaction.—*Ramsey & Montgomery v. Empire Timber & Lumber Co.* (Tex. Civ. App.) 294.

§ 9. Where a partnership buys lumber, and then contracts with a corporation or its representative to sell the stock for it for a compensation or commission of one-third of the net profits, the parties are not partners.—*Ramsey & Montgomery v. Empire Timber & Lumber Co.* (Tex. Civ. App.) 294.

§ 26. An executed contract of partnership, though tainted with immorality, *held* enforceable as far as a division of profits was concerned.—*Mitchell v. Fish* (Ark.) 940.

III. MUTUAL RIGHTS, DUTIES, AND LIABILITIES OF PARTNERS.

(B) Individual Transactions.

§ 98. A transaction *held* a fraud of a partner on his copartner which could not prevail.—*Beebe v. Olentine* (Ark.) 936.

(C) Actions Between Partners.

§ 121. Evidence *held* to support a chancellor's finding that a note and mortgage signed by all members of a partnership was for the individual debt of one partner.—*Ramsey v. Weedman* (Ark.) 1197.

**VII. DISSOLUTION, SETTLEMENT,
AND ACCOUNTING.****(D) Actions for Dissolution and Accounting.**

§ 325. On application for appointment of a receiver between partners, evidence held insufficient to show that the property or funds were in danger of being lost or materially injured as required by Rev. St. 1895, art. 1465.—*Sanborn v. Nelson* (Tex. Civ. App.) 855.

§ 325. An order appointing a receiver under Rev. St. 1895, art. 1465, held not sustainable, though partially good as to personal property involved.—*Sanborn v. Nelson* (Tex. Civ. App.) 855.

PART OWNERS.

In general, see Joint Tenancy; Tenancy in Common.

PART PAYMENT.

Within statute of limitations, see Limitation of Actions, § 155.

PART PERFORMANCE.

Of contracts within statute of frauds, see Frauds, Statute of, § 129.

PASSENGERS.

See Carriers, §§ 236-382.

PASSWAYS.

See Easements.

PATENT AMBIGUITY.

Parol evidence to explain, see Evidence, § 451.

PAYMENT.

See Compromise and Settlement.

Part payment within statute of limitations, see Limitation of Actions, § 155.

Recovery for money paid for the use or benefit of another, see Money Paid.

Subrogation on payment, see Subrogation.

Of particular classes of obligations or liabilities.

See Bills and Notes, §§ 499, 527; Costs, § 282.

Claims against estate of decedent, see Executors and Administrators, §§ 269-283.

Compensation of broker, see Brokers, § 75.

Insurance premiums or dues, see Insurance, §§ 350-367, 751.

**IV. PLEADING, EVIDENCE, TRIAL,
AND REVIEW.**

Receipt as hearsay evidence, see Evidence, § 318.

§ 74. A receipt is prima facie evidence of the payment therein recited, and, when uncontradicted, is conclusive.—*Goodman v. Griffith* (Mo. App.) 1061.

V. RECOVERY OF PAYMENTS.

For corporate stock, see Corporations, § 121.

Payments for land sold, see Vendor and Purchaser, §§ 338-341.

Payments made by plaintiff to a third person for the use of defendant, see Money Paid.

PEACE OFFICERS.

Members of militia in active service, see Militia, § 15.

PECUNIARY LOSS.

Element of damages in general, see Damages, § 38.

PEDDLER'S NOTES.

See Bills and Notes, § 107.

PENALTIES.

Distinction between liquidated damages and penalties, see Damages, § 81.

For taking or exacting usury, see Usury, §§ 138-148.

For violation of anti-trust law, see Monopolies, § 30.

PENDENCY OF ACTION.

See Lis Pendens.

PENSIONS.

Allowance to surviving wife of railway clerk from pension money, see Executors and Administrators, § 181.

§ 2. Act of Congress (Act April 28, 1904, c. 1759, 33 Stat. 436) giving pension to the legal representatives of railway mail clerks killed on duty construed.—*Wolfe v. Wolfe* (Mo. App.) 33.

PEREMPTORY INSTRUCTIONS.

See Trial, §§ 169-178.

PERFORMANCE.

Of particular classes of duties or obligations.

Conditions of deed, see Deeds, § 160.

Contract in general, see Contracts, §§ 280-305.

Contract of sale, see Sales, §§ 168-181; Vendor and Purchaser, §§ 133-137.

Contract within statute of frauds, see Frauds, Statute of, § 129.

Contract with municipal corporation, see Municipal Corporations, §§ 359-365.

Services by broker, see Brokers, §§ 49-57.

PERISHABLE PROPERTY.

Duty of consignor, see Carriers, § 87.

PERPETUATION OF TESTIMONY.

See Depositions.

PERSONAL CONTRACTS.

Assignability, see Assignments, § 19.

PERSONAL INJURIES.

Causing death, see Death, §§ 33-104.

Particular causes or means of injury.

See Electricity, §§ 13-19; Gas, §§ 17-20.

Acts or omissions of carrier, see Carriers, §§ 280-321.

Acts or omissions of municipality in general, see Municipal Corporations, §§ 733-822.

Acts or omissions of municipal officers or agents, see Municipal Corporations, §§ 745½-747.

Defects or obstructions in streets, see Municipal Corporations, §§ 755-822.

Negligence in general, see Negligence.

Negligence in use of street, see Municipal Corporations, § 705.

Operation of railroads, see Railroads, §§ 274-282, 288-297, 301-351, 358-401.

Operation of street railroads, see Street Railroads, §§ 81-118.

Particular classes of persons injured.

Employees, see Master and Servant, §§ 80-296.
 Passengers, see Carriers, §§ 280-321, 327-347.
 Travelers on streets, see Municipal Corporations, §§ 755-822.

Remedies.

See Damages.

Evidence admissible as part of *res gestæ*, see Evidence, § 123

Opinion evidence as to cause and effect, see Evidence, § 528.

Release of claim for damages, see Release, § 29.

Survival of cause of action, see Abatement and Revival, § 54.

PERSONAL PROPERTY.

See Property.

Accession, see Accession.

Annexation to real property, see Fixtures.

Mortgage, see Chattel Mortgages.

Offenses involving or affecting, see False Pretenses; Threats.

Pledge, see Pledges.

Remedies involving or affecting, see Replevin.

Sales, see Sales.

Taxation of, see Taxation.

Wrongful conversion, see Trover and Conversion.

PERSONAL REPRESENTATIVES.

See Executors and Administrators.

PERSONS.

Offenses against the person, see Homicide; Kidnapping; Rape; Seduction, §§ 32-50; Sodomy.

Protection of personal rights by injunction, see Injunction, § 96.

PETITION.

See Pleading.

PETIT JURY.

See Jury.

PHOTOGRAPHS.

Competency as evidence, see Evidence, § 359.

PHYSICAL SUFFERING.

Evidence of damages, see Damages, § 185.

PHYSICIANS AND SURGEONS.

Expert testimony, see Criminal Law, §§ 474, 528, 548, 560.

Liability of parent for services to child, see Parent and Child, § 3.

§ 6. Under prosecution for practicing medicine without having filed the required certificate, the charge *held* to have fairly submitted the defense.—*Newman v. State* (Tex. Cr. App.) 688.

§ 6. In a prosecution for practicing medicine without having filed the required certificate, evidence *held* sufficient to sustain a conviction.—*Newman v. State* (Tex. Cr. App.) 688.

§ 6. An indictment for unlawfully practicing medicine *held* sufficient, under Acts 30th Leg. c. 123, § 4, and section 13, subd. 2.—*Young v. State* (Tex. Cr. App.) 736.

§ 21. The subsequent death of one upon whom a surgeon performed a proper operation does not affect the surgeon's right to compensation.—*French v. Burlingame* (Mo. App.) 1100.

§ 24. In an action by physicians to recover for their services, evidence *held* to present a question for the jury as to the existence of a contract on the part of defendant to pay for the services.—*Cheek v. Boyd* (Tex. Civ. App.) 252.

PICTURES.

Competency as evidence, see Evidence, § 359.

Damages for unauthorized use, see Torts, §§ 5, 8.

Exemplary damages for unauthorized use, see Damages, § 91.

Libelous publication, see Libel and Slander, § 16.

PISTOLS.

See Weapons.

PLACE.

For work, duties and liabilities of master as to servants, see Master and Servant, §§ 101, 102-118.

Of hearing in habeas corpus proceedings, see Habeas Corpus, § 90.

Of offense, allegations in indictment or information, see Indictment and Information, § 86.

Of trial, see Venue.

PLEA.

In civil actions, see Pleading, §§ 93-127, 253.

In criminal prosecutions, see Criminal Law, § 301.

PLEADING.

Admissibility in evidence as judicial admissions, see Evidence, §§ 208, 265.

Applicability of instructions to pleadings and issues, see Trial, § 251.

Conformity of judgment to pleadings, see Judgment, §§ 242-252.

Indictment or criminal information or complaint, see Indictment and Information.

Practice in justices' courts, see Justices of the Peace, § 91.

Sham counterclaim as affecting jurisdictional amount in controversy, see Courts, § 223.

Allegations as to particular facts, acts, or transactions.

See Customs and Usages, § 18; Malicious Prosecution, § 49.

Amount due on bill or note, see Bills and Notes, § 471.

Damages, see Damages, § 143.

In actions by or against particular classes of persons.

See Brokers, § 82; Carriers, §§ 184, 227, 315; Master and Servant, §§ 39, 264, 329; Railroads, § 344.

National banks, see Banks and Banking, § 280.

In particular actions or proceedings.

See Garnishment, § 146; Quieting Title, § 34; Torts, § 26; Trespass, § 40; Trover and Conversion, § 32; Work and Labor, § 22.

For compensation of broker, see Brokers, § 82.

For delay in transportation or delivery of live stock, see Carriers, § 227.

For injuries at railroad crossings, see Railroads, § 344.

For injuries by servants, see Master and Servant, § 329.

For injuries from flowage, see Waters and Water Courses, § 179.

For injuries from negligence, see Negligence, §§ 111-119.

For injuries to licensees on railroad, see Railroads, § 282.

For injuries to passengers, see Carriers, § 315.

For injuries to servants, see Master and Servant, § 204.

For judgment against real property for taxes, see Taxation, § 643.
 For libel or slander, see Libel and Slander, §§ 89-100.
 For loss of or injury to live stock in course of transportation, see Carriers, § 227.
 For malicious prosecution, see Malicious Prosecution, § 49.
 For malicious prosecution, by survivor of community, see Husband and Wife, § 273.
 For penalties for violation of anti-trust law, see Monopolies, § 30.
 For specific performance of contract between church factions, see Religious Societies, § 25.
 For wrongful discharge of servant, see Master and Servant, § 39.
 On bail bonds, see Bail, § 89.
 On bills or notes, see Bills and Notes, §§ 471-485.
 On bond of administrator, see Executors and Administrators, § 537.
 Pleas in criminal prosecutions, see Criminal Law, § 301.
 To cancel written instrument, see Cancellation of Instruments, §§ 37-45.
 To confirm or try tax title, see Taxation, § 809.
 To recover possession of demised premises, see Landlord and Tenant, § 291.
 To sell land to enforce assessment for public improvements, see Municipal Corporations, § 567.

Review of decisions and pleading in appellate courts.

Presumptions on appeal or writ of error, see Appeal and Error, §§ 916, 917.
 Record for purpose of review, see Appeal and Error, § 518.
 Review of decisions as dependent on prejudicial nature of error, see Appeal and Error, §§ 1040, 1041.
 Review of decisions involving discretion of court, see Appeal and Error, §§ 959-981.

I. FORM AND ALLEGATIONS IN GENERAL.

Oral pleading on appeal from justice's court, see Justices of the Peace, § 174.

§ 20. To bring an allegation within Rev. St. 1899, § 626 (Ann. St. 1906, p. 650), a fact alternatively pleaded must be positively alleged coupled with an averment of the pleader's belief of one or the other alternative so alleged.—Otrich v. St. Louis, I. M. & S. Ry. Co. (Mo. App.) 665.

§ 33. The common-law rule that allegations of time in a pleading are immaterial unless a matter of description is recognized under the Code.—Louisville Banking Co. v. Commonwealth (Ky.) 1142.

§ 34. On general demurrer, every reasonable intendment will be indulged in favor of the pleading.—Mack v. Houston E. & W. T. Ry. Co. (Tex. Civ. App.) 846.

§ 36. The allegations of the petition are conclusive on plaintiff, and he may not contradict them by evidence on the trial.—Otrich v. St. Louis, I. M. & S. Ry. Co. (Mo. App.) 665.

II. DECLARATION, COMPLAINT, PETITION, OR STATEMENT.

Conformity of judgment to prayer for relief, see Judgment, § 252.

In justices' courts, see Justices of the Peace, § 91.

Joinder of causes of action, see Action, § 45.

Single and entire cause of action, see Action, § 38.

In particular actions or proceedings.

See Cancellation of Instruments, § 37; Quiet-
 ing Title, § 34; Trespass, § 40; Trover and
 Conversion, § 32; Work and Labor, § 22.

By or against national bank, see Banks and
 Banking, § 280.

For injuries from negligence in general, see
 Negligence, §§ 111, 112.

For libel or slander, see Libel and Slander, §
 89.

For malicious prosecution, by survivor of com-
 munity, see Husband and Wife, § 273.

For specific performance of contract between
 church factions, see Religious Societies, § 25.

On bills or notes, see Bills and Notes, § 471.

On bond of administrator, see Executors and
 Administrators, § 537.

To recover possession of demised premises, see
 Landlord and Tenant, § 291.

§ 72. Effect of prayer for general relief under
 Sayles' Ann. Civ. St. 1897, art. 1191, stat-
 ed.—Jordan v. Massey (Tex. Civ. App.) 804.

§ 72. Scope and effect of a prayer for gen-
 eral relief, stated.—Jordan v. Massey (Tex.
 Civ. App.) 804.

§ 72. A prayer cannot change the legal ef-
 fect of the facts alleged in the charging part
 of the petition.—Wilks v. Krels (Tex. Civ.
 App.) 833.

III. PLEA OR ANSWER, CROSS-COM- PLAINT, AND AFFIDAVIT OF DEFENSE.

In action on bills or notes, see Bills and Notes,
 § 485.

In garnishment, see Garnishment, § 146.

(A) Defenses in General.

§ 93. In an action for the price of an animal
 alleged to have been sold, certain pleas *held* in-
 consistent.—Brown v. Emerson (Mo. App.) 1108.

(C) Traverses or Denials and Admissions.

§ 127. A plea of contributory negligence in-
 terposed by street railway company in an ac-
 tion for injuries to a street car passenger *held*
 not to admit the allegations of the petition as
 to its operation of the car at the time of the
 accident.—Reisenleiter v. United Rys. Co. of
 St. Louis (Mo. App.) 11.

V. DEMURRER OR EXCEPTION.

Presumptions on appeal or writ of error, see
 Appeal and Error, § 917.

Review of decisions, see Appeal and Error, §
 1040.

§ 193. A petition in one count, alleging in-
 jury was caused by negligence and by willful
 act, *held* properly attacked by demurrer, and
 not by motion to compel an election, or to
 make more definite and certain.—Christy v.
 Butcher (Mo. App.) 1058.

§ 193. If evidence admissible under the al-
 legation of a petition might show a cause of
 action, the petition is good on general demur-
 rer.—Mack v. Houston, E. & W. T. Ry. Co.
 (Tex. Civ. App.) 846.

§ 194. A defect in a pleading by a purchas-
 er pending a suit against his vendor, in which
 a lis pendens was not filed as required by Kir-
 by's Dig. § 5149, *held* not available by demur-
 rer.—Jennings v. Bouldin (Ark.) 948.

§ 205. A demurrer *held* general, and not spe-
 cial.—Fritter v. Pendleton (Tex. Civ. App.) 1186.

§ 214. A general demurrer to a petition ad-
 mits the truth of all the facts alleged in the pe-
 tition and of all inferences reasonably deducible
 therefrom, for the purposes of the demurrer.—
 State v. Racine Sattley Co. (Tex. Civ. App.)
 400.

§ 217. A demurrer opens up the whole rec-
 ord and goes back to the first defective plead-
 ing.—Thompson v. Jacoway (Ark.) 955.

VI. AMENDED AND SUPPLEMENTAL PLEADINGS AND REPLEADER.

In action for injuries from flowage, see *Waters and Water Courses*, § 179.
Review of decisions, see *Appeal and Error*, §§ 959, 1041.

§ 234. Under Civ. Code Prac. §§ 132, 134, a petition may not be amended after answer without leave of court.—*Petry v. Petry* (Ky.) 922.

§ 236. Under *Sayles' Ann. Civ. St.* 1897, arts. 1188, 1189, refusal of leave to amend petition held not an abuse of discretion.—*Bayle v. Norris* (Tex. Civ. App.) 767.

§ 237. Refusal of the court to allow an amendment to the petition, so as to make it conform to the proof received without objection held erroneous.—*Ferrell v. City of Haskell* (Tex. Civ. App.) 784.

§ 253. Where the filing of an amended petition is improper, the filing of an answer and cross-complaint is also improper.—*Petry v. Petry* (Ky.) 922.

§ 276. Under Civ. Code Prac. § 135, a supplemental pleading may not be filed without leave of court.—*Petry v. Petry* (Ky.) 922.

VII. SIGNATURE AND VERIFICATION.

Verification of plea, answer, or affidavit of defense in action on bill or note, see *Bills and Notes*, § 485.

Verification of petition in suit to foreclose lien for taxes, see *Taxation*, § 643.

§ 290. A plea of fraud on the jurisdiction not verified is a nullity.—*Fritter v. Pendleton* (Tex. Civ. App.) 1186.

VIII. PROPERT, OYER, AND EXHIBITS.

§ 311. The description of land in a complaint may be aided by that in a notice attached thereto as an exhibit.—*Lindsey v. Bloodworth* (Ark.) 959.

§ 311. An exhibit merely attached to the petition is not thereby made a part thereof.—*Brown v. T. J. Moss Tie Co.* (Mo. App.) 1103.

XI. MOTIONS.

§ 343. Verified answer filed to an unverified complaint held not to entitle defendant to judgment.—*Todd v. State* (Tex. Civ. App.) 761.

§ 367. A defect in a pleading by a purchaser pending a suit against his vendor, in which a lis pendens was not filed as required by Kirby's Dig. § 5149, held available only by motion to make more specific.—*Jennings v. Bouldin* (Ark.) 948.

XII. ISSUES, PROOF, AND VARIANCE.

Applicability of instructions to issues, see *Trial*, § 251.

Responsiveness of verdict to issues, see *Trial*, § 329.

In particular actions or proceedings.

See *Torts*, § 26.

For compensation of broker, see *Brokers*, § 82.
For injuries from negligence, see *Negligence*, § 119.

For injuries to passengers, see *Carriers*, § 315.
For injuries to servants, see *Master and Servant*, § 264.

For libel or slander, see *Libel and Slander*, § 100.

For loss of or injury to goods shipped, see *Carriers*, § 184.

§ 387. A party cannot sue on one cause of action and recover on another.—*Chamlee v. Planters' Hotel Co.* (Mo. App.) 123.

§ 387. The proof must correspond with the allegations in the pleadings.—*American Lead Pencil Co. v. Nashville, C. & St. L. Ry.* (Tenn.) 613.

§ 388. Under the express terms of Rev. St. 1909, §§ 1846, 1847, when a variance is immaterial, a court can find the facts according to the evidence.—*Lord & Bushnell Co. v. Texas & N. O. R. Co.* (Mo. App.) 111.

§ 395. Plaintiff, suing a loan broker on the theory that defendant was the agent of the lender, held not entitled to recover on the theory that defendant was his own agent.—*Peters v. Carroll* (Mo. App.) 49.

XIII. DEFECTS AND OBJECTIONS, WAIVER, AND AID BY VERDICT OR JUDGMENT.

§ 403. A defective complaint held cured by an answer.—*Thompson v. Jacoway* (Ark.) 955.

§ 422. Plaintiff's failure to object to a plea to an answer of non est factum on the ground that it was not verified by oath held to be a waiver of such objection.—*Standard Underground Cable Co. v. Southern Independent Telephone Co.* (Tex. Civ. App.) 429.

§ 433. Where a petition was not demurred to, the court after verdict must indulge in its favor all reasonable intendments.—*Ferrell v. City of Haskell* (Tex. Civ. App.) 784.

PLEDGES.

See *Chattel Mortgages*.

§ 11. Delivery held essential to a pledge.—*Nashville Trust Co. v. First Nat. Bank* (Tenn.) 311.

§ 21. Title of pledgor held not divested until foreclosure of the pledge.—*Nashville Trust Co. v. First Nat. Bank* (Tenn.) 311.

POKER TABLES.

See *Gaming*, § 74.

POLICE COURTS.

Criminal jurisdiction, see *Criminal Law*, § 90.

POLICE POWER.

Of municipality, see *Municipal Corporations*, §§ 631-642.

Particular subjects of regulation, see *Sunday*.

POLICY.

Of insurance, see *Insurance*.

POLITICAL PARTIES.

Act providing for bipartisan hospital boards as grant of special privileges, see *Constitutional Law*, § 205.

POLITICAL RIGHTS.

Suffrage, see *Elections*.

POLYGAMY.

See *Bigamy*.

POOLS.

Combinations in violation of anti-trust acts, see *Monopolies*, §§ 12-30.

POPULAR VOTE.

Amendment of city charter, see Municipal Corporations, § 46.

POSSESSION.

See Adverse Possession.

Declarations by person in possession or control of property as to possession, see Evidence, § 273.

Of defendant in action for recovery of possession, see Replevin, § 10.

Of demised premises, recovery by landlord, see Landlord and Tenant, §§ 288-291.

Of mortgaged property, rights and liabilities of parties, see Mortgages, § 187.

Of personal property, remedies for recovery, see Replevin.

Of pledged property, see Pledges, § 11.

Of property as element of burglary, see Burglary, § 46.

Of real property, remedies for recovery, see Ejectment; Forcible Entry and Detainer, §§ 4-15; Trespass to Try Title.

To support action to quiet title, see Quieting Title, § 12.

POSSESSORY WARRANT.

Actions for recovery of personalty founded on right of possession, see Replevin.

POSTAL CLERKS.

Allowance to surviving wife of railway clerk from pension money, see Executors and Administrators, § 181.

Pensions to legal representatives of railway clerks killed while in service, see Pensions, § 2.

POSTPONEMENT.

Continuance of civil actions, see Continuance.

Continuance of criminal prosecutions, see Criminal Law, §§ 586-614.

POWERS.

Of attorney, see Principal and Agent.

II. CONSTRUCTION AND EXECUTION.

Execution by will, see Wills, § 75.

§ 83. Execution of a power will be inferred where there is a reference thereto in the instrument, where there is a reference to the property, or where the instrument would be a nullity, except as an execution of the power.—*Hankins v. Columbia Trust Co. (Ky.)* 498.

PRACTICE.

Retrospective laws relating to remedies, see Constitutional Law, § 191.

In particular civil actions or proceedings.

See Attachment, §§ 74, 209; Bankruptcy; Ejectment, §§ 93, 123; Execution; Forcible Entry and Detainer, §§ 4-15; Garnishment, §§ 124-146; Habeas Corpus, §§ 51-113; Injunction, §§ 132-158; Mandamus, § 176; Partition, §§ 77, 78; Quieting Title, § 34; Quo Warranto, § 57; Replevin; Trespass, §§ 40, 46, 52; Trespass to Try Title, § 41; Trover and Conversion, §§ 32-68; Work and Labor, §§ 22-28.

Accounting by executor or administrator, see Executors and Administrators, §§ 473, 504-515.

Accounting by guardian, see Guardian and Ward, §§ 157-164.

Accounting by trustee, see Trusts, §§ 315-329.

Against connecting carriers in respect to goods shipped, see Carriers, §§ 184, 185.

Against sureties, see Principal and Surety, § 133.

Assessment of damages, see Damages, §§ 208-216.

Between partners, see Partnership, § 121.

By or against assignee or assignors, see Assignments, § 137.

By or against corporations in general, see Corporations, § 521.

By or against executors or administrators, see Executors and Administrators, § 434.

By or against husband or wife, or both, see Husband and Wife, § 207.

By or against insane persons, see Insane Persons, § 89.

By or against municipal corporations, see Municipal Corporations, § 1031.

By or against principals or agents, see Principal and Agent, §§ 184-184.

By or against receivers, see Receivers, § 174.

By or against trustees in bankruptcy, see Bankruptcy, § 303.

By owners of property wrongfully taken for public use, see Eminent Domain, §§ 206-300.

Election contest, see Elections, §§ 289-304.

For breach of contract, see Contracts, §§ 350-353.

For breach of contract of sale, see Sales, §§ 382, 405; Vendor and Purchaser, § 331.

For breach of covenant, see Covenants, § 130.

For causing death, see Death, §§ 42, 65-71, 99, 103, 104.

For compensation of attorney, see Attorney and Client, § 158.

For compensation of broker, see Brokers, §§ 79-88.

For contempt for violation of injunction, see Injunction, § 230.

For continuance, see Continuance, § 37.

For delay in transportation or delivery of live stock, see Carriers, §§ 227-230.

For divorce, see Divorce, §§ 123, 129.

For ejection of passenger, see Carriers, § 332.

For fraud, see Fraud, §§ 50-60.

For infringement of trade-mark or trade-name, see Trade-Marks and Trade-Names, § 93.

For injuries at railroad crossings, see Railroads, §§ 344-351.

For injuries by servants, see Master and Servant, § 329.

For injuries from accidents to trains, see Railroads, § 297.

For injuries from defects or obstructions in streets, see Municipal Corporations, §§ 818-822.

For injuries from escape or explosion of gas, see Gas, § 20.

For injuries from fires caused by operation of railroad, see Railroads, § 485.

For injuries from negligence in general, see Negligence, §§ 111-136.

For injuries from negligence or default in transmission or delivery of telegraph or telephone message, see Telegraphs and Telephones, §§ 66, 67.

For injuries from negligence or misconduct of broker, see Brokers, § 38.

For injuries from negligent use of street, see Municipal Corporations, § 706.

For injuries from production or use of electricity, see Electricity, § 19.

For injuries to animals on or near railroad tracks, see Railroads, §§ 446, 447.

For injuries to licensees or trespassers on railroad property in general, see Railroads, § 282.

For injuries to passengers, see Carriers, §§ 315-321, 344-347.

For injuries to persons on or near railroad tracks, see Railroads, §§ 400, 401.

For injuries to persons on or near street railroad tracks, see Street Railroads, §§ 112-118.

For injuries to servants, see Master and Servant, §§ 264-296.

For judgment against real property for taxes, see Taxation, § 643.

For judgment by default, see Judgment, §§ 137-139.
 For libel or slander, see Libel and Slander, §§ 89-100, 104-112, 123-125.
 For loss of or injury to goods, see Carriers, §§ 132-134.
 For loss of or injury to live stock, see Carriers, §§ 227-230.
 For malicious prosecution, see Malicious Prosecution, §§ 49-72.
 For new trial, see New Trial, § 155.
 For purchase money on sale of goods, see Sales, § 364.
 For tort in general, see Torts, §§ 26, 27.
 For unpaid taxes, see Taxation, § 593.
 For wrongful attachment, see Attachment, §§ 368-377.
 For wrongful discharge of servant, see Master and Servant, § 39.
 On bills or notes, see Bills and Notes, §§ 471-534.
 On bonds of executors or administrators, see Executors and Administrators, § 537.
 On bonds or undertakings on appeal or writ of error, see Justices of the Peace, § 191.
 On contracts of suretyship, see Principal and Surety, § 133.
 Scire facias to enforce bail bond, see Bail, § 89.
 To abate or enjoin liquor nuisance, see Intoxicating Liquors, §§ 269-279.
 To cancel written instrument, see Cancellation of Instruments, §§ 37-45.
 To enforce assessment for public improvement, see Municipal Corporations, § 567.
 To enforce dissolution and accounting of partnership, see Partnership, § 325.
 To enforce forfeiture for breach of conditions in deed, see Deeds, § 168.
 To enforce specific performance, see Specific Performance, §§ 106-119.
 To enforce taxes, see Taxation, §§ 545-593, 643.
 To establish and determine heirship, see Descent and Distribution, § 71.
 To establish and enforce rights or liens against estate of bankrupt, see Bankruptcy, § 214.
 To establish boundaries, see Boundaries, §§ 37-45.
 To foreclose mortgage, see Chattel Mortgages, § 284; Mortgages, §§ 556-587.
 To procure liquor license, see Intoxicating Liquors, § 64.
 To protect attorney's lien, see Attorney and Client, § 190.
 To revoke or forfeit liquor license, see Intoxicating Liquors, § 108.
 To set aside fraudulent conveyance, see Fraudulent Conveyances, § 249.

Particular proceedings in actions.

See Abatement and Revival; Appearance; Continuance; Costs; Damages, §§ 143-216; Depositions; Dismissal and Nonsuit; Evidence; Execution; Judgment; Judicial Sales; Jury; Limitation of Actions; New Trial; Parties; Pleading; Trial; Venue.
 Directing verdict, see Trial, §§ 169-178.
 Examination of witnesses, see Witnesses, §§ 286, 287.
 Instructions to jury, see Trial, §§ 191-296, 423.
 Notice of pendency of action, see *Lis Pendens*.
 Transfer of causes from one state court to another, see Courts, § 485.
 Verdict, see Trial, §§ 329-337.

Particular remedies in or incident to actions.
 See Attachment; Depositions; Garnishment; Injunction; Receivers; Sequestration.

Procedure in criminal prosecutions.

See Bail, §§ 58-89; Criminal Law; Grand Jury; Indictment and Information; Jury. Habeas corpus proceedings, see Habeas Corpus.

Procedure in exercise of special or limited jurisdiction.

Bankruptcy, see Bankruptcy.
 Equity, see Equity.
 Justices' courts in civil cases, see Justices of the Peace, § 91.
 Probate and administration, see Executors and Administrators, §§ 283, 473, 504-515; Guardian and Ward, §§ 21, 157-164.
Procedure in or by particular courts or tribunals.
 See Courts; Justices of the Peace, §§ 174-191.
 Courts of appellate jurisdiction in particular states, see Courts, §§ 223-231.

Procedure on review.

See Appeal and Error; Criminal Law, §§ 1120-1170½; Exceptions, Bill of; New Trial.

PRAYER.

For instructions, see Criminal Law, §§ 824-830; Trial, §§ 256-267.
 For relief, see Pleading, § 72.

PREDICATE.

For impeachment of witnesses, see Witnesses, § 388.

PREJUDICE.

Ground for reversal in civil actions, see Appeal and Error, §§ 1026-1074.
 Ground for reversal in criminal cases, see Criminal Law, §§ 1166½-1170½.

PRELIMINARY EVIDENCE.

Proof of execution, and authentication of documents offered in evidence, see Evidence, §§ 364-376.

PRELIMINARY INJUNCTION.

See Injunction, §§ 132-158.

PREMEDITATION.

Element of murder, see Homicide, §§ 156-158, 232, 286.

PREMIUMS.

Insurance premiums, see Insurance, §§ 350-367, 672.

PREROGATIVE WRITS.

See Certiorari; Habeas Corpus; Mandamus; Quo Warranto.

PRESCRIPTION.

See Limitation of Actions.

PRESENTATION.

Of claims against estate of decedent, see Executors and Administrators, § 224.

PRESUMPTIONS.

In civil actions, see Evidence, §§ 78-80.
 On appeal or writ of error in civil actions, see Appeal and Error, §§ 907-931.
 On appeal or writ of error in criminal prosecutions, see Criminal Law, § 1144.

PRETENSE.

See False Pretenses; Fraud.

PREVENTIVE RELIEF.

See Injunction.

PRICE.

Of goods sold, see Sales, § 364.

PRINCIPAL AND ACCESSORY.

See Homicide, § 30.

PRINCIPAL AND AGENT.

See Master and Servant.

Declarations by agent as evidence against principal, see Evidence, §§ 242-244.

Kidnapping by agent, see Kidnapping, § 1.

Agency in particular relations, offices, or occupations.

See Attorney and Client; Banks and Banking, § 116; Brokers; Factors; Husband and Wife, § 25; Insurance, §§ 77-90, 358, 375, 376.

Corporate agents, see Corporations, §§ 306-337, 398-432.

County agents, see Counties, § 74.

I. THE RELATION.

Brokers, see Brokers, §§ 8-11.

(A) Creation and Existence.

§ 22. Agency may not be established by the mere declaration of one claiming to be agent.—*Baltimore & O. S. W. R. Co. v. Clift* (Ky.) 917.

II. MUTUAL RIGHTS, DUTIES, AND LIABILITIES.

Attorneys, see Attorney and Client, §§ 153-190.
Brokers, see Brokers, § 38.

(A) Execution of Agency.

§ 62. One merely authorized by another to act for him and represent his interest in a lease *held* to be under no duty to use his own means to make erections on the leased property required by the lease to prevent forfeiture thereof.—*Smallhouse v. Keller* (Ky.) 493.

§ 70. A person may act as agent for both parties to a transaction where both know of his relation to each, and see fit, mutually, to trust him.—*Peters v. Carroll* (Mo. App.) 49.

(B) Compensation and Lien of Agent.

Brokers, see Brokers, §§ 40-75, 79-88.

III. RIGHTS AND LIABILITIES AS TO THIRD PERSONS.

Brokers, see Brokers, § 97.

Liability of master for injuries to third persons by acts or omissions of servants or independent contractors, see Master and Servant, §§ 302-329.

(A) Powers of Agent.

Authority of agents of corporations in general, see Corporations, §§ 398-432.

Authority of attorney, see Attorney and Client, §§ 70-72.

Declarations by agent as evidence against principal, see Evidence, §§ 242-244.

Insurance agents, see Insurance, §§ 87-90, 375, 376.

(C) Unauthorized and Wrongful Acts.

Liability of municipal corporation for torts of officers and agents, see Municipal Corporations, §§ 745½-747.

(D) Ratification.

§ 175. The rule that a principal profiting by the unauthorized act or contract of his agent takes it cum onere does not apply as between tort-feasors.—*Laughlin v. Excelsior Powder Mfg. Co.* (Mo. App.) 116.

§ 175. Where a principal profits by or ratifies the unauthorized acts or contract of his agent, he takes the same cum onere.—*Laughlin v. Excelsior Powder Mfg. Co.* (Mo. App.) 116.

(E) Notice to Agent.

Notice to officer or agent of bank, see Banks and Banking, § 116.

Notice to officers or agents of corporations in general, see Corporations, § 428.

(F) Actions.

§ 184. Where defendant's act in seizing property as to which there was a contract between plaintiff and defendant's wife, was tortious and unjustifiable, replevin will lie against defendant, though he only acted as agent for his wife.—*Kimble v. McDermott* (Mo. App.) 72.

§ 184. An agent *held* not liable to replevin, if his possession is in good faith.—*Kimble v. McDermott* (Mo. App.) 72.

§ 194. In an action to recover money deposited under an automobile sales agency contract, an instruction on the alleged apparent authority of defendant's general sales agent *held* erroneous.—*Thompson v. Joseph W. Moon Buggy Co.* (Mo. App.) 1088.

§ 194. In an action to recover a deposit under an automobile sales agency contract, an instruction that, unless defendant's agent had authority to modify plaintiff's contract as he did, plaintiff could not recover, *held* proper.—*Thompson v. Joseph W. Moon Buggy Co.* (Mo. App.) 1088.

PRINCIPAL AND SURETY.

See Bonds.

Bonds for payment of claims by insurance companies, see Insurance, § 8.

Sureties on bail bond, see Bail.

Sureties on bond of executor or administrator, see Executors and Administrators, § 527.

Sureties on bond of sheriff or constable, see Sheriffs and Constables, § 157.

Sureties on bond on appeal or other proceeding for review, see Justices of the Peace, § 191.

II. NATURE AND EXTENT OF LIABILITY OF SURETY.

Bonds for payment of claims by insurance companies, see Insurance, § 8.

§ 59. A contract of suretyship must be given a reasonable interpretation according to the intention of the parties.—*Board of Education of City of St. Louis v. United States Fidelity & Guaranty Co.* (Mo. App.) 18.

§ 66. A surety's obligation cannot be extended to other subjects, persons or periods of time than those expressed or necessarily included in his contract.—*State ex rel. Zimmerman v. Schaper* (Mo. App.) 671.

IV. REMEDIES OF CREDITORS.

Cure of defects in pleading by pleading of adverse party, see Pleading, § 403.

§ 133. Where a note executed by a corporation was paid by a new note of the sureties thereon, and the old note was pledged to secure the new, the creditor could not sue the corporation until the new note matured, and then only on the sureties' right to contribution.—*Maysville Telephone Co. v. First Nat. Bank* (Ky.) 886.

V. RIGHTS AND REMEDIES OF SURETY.**(B) As to Principal.**

§ 174. Under Ky. St. § 723 (Russell's St. § 4364), authorizing surety companies to con-

tract for indemnity, they cannot obtain it when not contracted for, in a proceeding under sections 4659, 4663, 4664 (sections 2027, 2031, 2032).—United States Fidelity & Guaranty Co. v. Paxton (Ky.) 481.

§ 184. Where officers of a corporation, sureties on its note to a bank, executed their own note, in which the corporation did not join, in payment of the original one, they could sue the corporation as for money paid.—Maysville Telephone Co. v. First Nat. Bank (Ky.) 886.

§ 185. To entitle a surety company to indemnity from its principal, under Ky. St. § 723 (Russell's St. § 4364), an agreement to indemnify must have been in the contract.—United States Fidelity & Guaranty Co. v. Paxton (Ky.) 481.

§ 185. Sureties on a note for money borrowed for a corporation held entitled to reimbursement for interest paid thereon.—Maysville Telephone Co. v. First Nat. Bank (Ky.) 886.

§ 185. A surety has a right to be indemnified by his principal for whatever sum he has paid out in discharge of the principal's obligation.—Board of Education of City of St. Louis v. United States Fidelity & Guaranty Co. (Mo. App.) 18.

PRINTING.

Libelous printed words, see Libel and Slander, §§ 15, 16.

PRIOR ADJUDICATION.

Operation and effect in general, see Judgment, §§ 619, 713-743.

PRIORITIES.

Of mortgages, see Chattel Mortgages, §§ 140-153; Mortgages, § 186.

PRISONS.

See False Imprisonment.

As nuisance, see Nuisance, § 3.

Liability of city for injuries from maintenance of prison, see Municipal Corporations, § 734.

§ 10. The keeper of a prison is liable for damages resulting from his negligent failure to keep it clean and sanitary.—City of Bowling Green v. Rogers (Ky.) 921.

PRIVACY.

Exemplary damages for unauthorized use of pictures, see Damages, § 91.

Invasion by unauthorized use of pictures, see Torts, §§ 5, 8.

Protection by injunction, see Injunction, § 96.

Unauthorized publication of picture as libel, see Libel and Slander, § 16.

PRIVATE NUISANCE.

See Nuisance, §§ 3-36.

PRIVATE ROADS.

Right of way, see Easements.

PRIVILEGE.

Grants of special privileges or immunities, constitutional prohibition, see Constitutional Law, § 205.

PRIVILEGED COMMUNICATIONS.

See Libel and Slander, §§ 41-51.

PRIVITY.

Admissions by privies, see Evidence, § 230.

PROBABLE CAUSE.

For prosecution, see Malicious Prosecution, §§ 20-24.

PROCEDURE.

See cross-references under Practice.

PROCEEDS.

Of insurance, rights of parties, see Insurance, §§ 583-593.

PROCESS.

In particular actions or proceedings.

See Attachment, § 209.

Particular forms of writs or other process.

See Certiorari; Execution; Garnishment; Habeas Corpus; Mandamus; Quo Warranto; Replevin; Sequestration.

IV. ABUSE OF PROCESS.

False imprisonment, see False Imprisonment.

Malicious prosecution, see Malicious Prosecution.

Wrongful attachment, see Attachment, §§ 368-377.

PROFITS.

Of mortgaged land, rights and liabilities of parties, see Mortgages, § 199.

Sharing profits as element of partnership, see Partnership, §§ 5-9.

PROHIBITION.

Of traffic in intoxicating liquors, see Intoxicating Liquors.

Prohibitory injunction, see Injunction.

PROMISE.

See Contracts.

PROMISSORY NOTES.

See Bills and Notes.

PROOF.

See Criminal Law, §§ 304-508; Depositions; Evidence; Witnesses.

Amendment to conform to proof, see Pleading, § 237.

Burden of proof in general, see Evidence, § 94.

Order of proof, see Trial, §§ 62-68.

Pleading and proof, see Pleading, §§ 387-395.

Reception of evidence at trial of civil actions in general, see Trial, §§ 55-105.

Reception of evidence at trial of criminal causes in general, see Criminal Law, §§ 671-673.

PROPERTY.

Constitutional guaranty of right of property, see Constitutional Law, §§ 83, 278.

Exemptions, see Homestead, § 59.

Subject of allowance to surviving wife, husband, or children from estate of decedent, see Executors and Administrators, § 181.

Subject of commerce, see Commerce, §§ 33-40.

Of particular classes of persons.

See Husband and Wife, §§ 11-14; Insane Persons, § 61; Municipal Corporations, § 225; Receivers, § 77; Religious Societies, §§ 23-25.

Married women, see Husband and Wife, §§ 110-193.

Particular estates or interests.

See Dower; Remainders.

Community and separate property, see Husband and Wife, § 273.

Married woman's separate property, see Husband and Wife, §§ 110-193.

Particular species of property.

See Animals; Fixtures; Mines and Minerals; Waters and Water Courses.

Corporate stock, see Corporations, §§ 104-121. Logs and lumber, see Logs and Logging.

Remedies involving or affecting property.

See Attachment; Ejectment; Execution; Forcible Entry and Detainer, §§ 4-15; Fraudulent Conveyances; Garnishment; Judicial Sales; Lis Pendens; Partition; Quieting Title; Replevin; Sequestration; Specific Performance; Trespass, §§ 40-52; Trespass to Try Title; Trover and Conversion, §§ 32-68.

Actions for unlawful detainer of demised premises, see Landlord and Tenant, §§ 288-291.

Bankruptcy proceedings, see Bankruptcy.

Condemnation proceedings, see Eminent Domain, §§ 206-300.

Distress for rent, see Landlord and Tenant, § 274.

Enforcement of landlord's lien, see Landlord and Tenant, § 284.

Enforcement of liens against property of bankrupt, see Bankruptcy, § 214.

Enforcement of mechanics' liens, see Mechanics' Liens.

Establishment and enforcement of right of exemption, see Homestead, § 193.

Establishment of boundaries, see Boundaries, §§ 37-48.

Foreclosure of mortgages, see Chattel Mortgages, §§ 255-284; Mortgages, §§ 556-587.

Forfeiture for breach of condition in deed, see Deeds, § 168.

Jurisdiction of courts, see Courts, § 17.

Recovery of possession of leased premises by landlord, see Landlord and Tenant, §§ 288-291.

Setting aside transfer in fraud of creditors or subsequent purchasers, see Fraudulent Conveyances, § 249.

Transfers and other matters affecting title.

See Adverse Possession; Assignments; Assignments for Benefit of Creditors; Chattel Mortgages; Deeds; Descent and Distribution; Mortgages; Partition; Pledges; Powers.

Accession, see Accession.

Dedication to public use, see Dedication.

Escheat, see Escheat.

Receivership, see Receivers, § 77.

Sale, see Sales; Vendor and Purchaser.

Sale of property of decedent, see Executors and Administrators, § 327.

Taking for public use, see Eminent Domain.

Offenses against or involving property.

See Burglary; Larceny; Nuisance; Threats.

Obtaining property by false pretenses, see False Pretenses.

§ 2. Property held to consist of incorporeal things.—Munden v. Harris (Mo. App.) 1076.

§ 9. Where three persons are shown to have once owned stock of a corporation, and nothing to the contrary appears, the presumption is that the ownership still exists.—Osmer v. Le May-Wegmann Brokerage Co. (Mo. App.) 65.

PROPOSALS.

For contract, see Contracts, § 24.

PROPOSITIONS.

Accompanying assignment of errors, see Appeal and Error, § 742.

PROSTITUTION.

See Disorderly House.

PROVINCE OF COURT AND JURY.

See Criminal Law, §§ 741-763, 764; Trial, §§ 139-178, 191-194.

PROVISIONAL REMEDIES.

See Attachment; Bail; Garnishment; Injunction; Receivers; Sequestration.

Review of decisions, see Appeal and Error, § 100.

PROXIMATE CAUSE.

Of injury in general, see Negligence, §§ 56-61.

Of injury to servant, see Master and Servant, § 96.

Of loss of or injury to goods shipped, see Carriers, § 123.

PUBLICATION.

Of process or notice in attachment, see Attachment, § 209.

Of result of local option election contest, see Intoxicating Liquors, § 37.

PUBLIC BUILDINGS.

See Municipal Corporations, § 225.

PUBLIC CORPORATIONS.

See Counties; Municipal Corporations.

Levee districts, see Levees, § 5.

PUBLIC DEBT.

See Counties, §§ 152-191; Municipal Corporations, §§ 886-907; Schools and School Districts, § 97.

PUBLIC DOMAIN.

See Public Lands.

PUBLIC FUNDS.

See Counties, §§ 152-191; Municipal Corporations, §§ 886-907.

PUBLIC GRANTS.

See Public Lands.

PUBLIC HIGHWAYS.

See Highways.

PUBLIC IMPROVEMENTS.

See Highways; Levees; Municipal Corporations, §§ 347-547.

PUBLIC LANDS.**III. DISPOSAL OF LANDS OF THE STATES.**

§ 151. Under Ky. St. §§ 4702-4704 (Russell's St. §§ 2758a1-2758a3), the entry and survey of public lands of the state withdraws the land appropriated from subsequent entry, but does not pass the legal title from the state.—Bevins v. Collinsworth (Ky.) 441.

§ 151. Under Ky. St. §§ 4702-4704 (Russell's St. §§ 2758a1-2758a3), where land in controversy had been entered by defendant's ancestor as part of a survey but had not been in fact surveyed or patented, plaintiff with

knowledge of the facts could not obtain title by a subsequent attempted entry and survey of the part not included in the prior survey.—*Bevins v. Collinsworth* (Ky.) 441.

§ 173. Acts 26th Leg. 1st Called Sess. c. 81, declaring that lands theretofore recovered by the state should become part of the permanent school fund, *held* not to have a retroactive effect as to land, the patent to which, after being declared invalid by judgment, had theretofore been validated by the Legislature.—*State v. Powell* (Tex. Civ. App.) 746.

§ 173. An act of 1900 (Acts 26th Leg. 1st Called Sess. c. 11), declaring more than half of the public domain to have been exhausted for purposes other than for the benefit of the public free school fund, cannot be looked to in aid of the contention that it had been so exhausted five years prior thereto.—*State v. Powell* (Tex. Civ. App.) 746.

§ 173. Statement of when, under Const. art. 7, § 2, land covered by a patent would at once become property of the public free school fund, on rendition of a judgment in favor of the state canceling the patent.—*State v. Powell* (Tex. Civ. App.) 746.

§ 175. Act April 7, 1897 (Acts 25th Leg. c. 88) § 1, *held* to validate a patent under Confederate Land Certificate Act April 9, 1881 (Acts 17th Leg. c. 106), notwithstanding a prior judgment canceling it for noncompliance with the act of 1881.—*State v. Powell* (Tex. Civ. App.) 746.

PUBLIC LAWS.

See Statutes.

PUBLIC POLICY.

Validity of contracts, see Contracts, §§ 117-138.

PUBLIC PROPERTY.

See Municipal Corporations, § 225.

PUBLIC REVENUE.

See Taxation.

PUBLIC SALES.

See Judicial Sales.

PUBLIC SCHOOLS.

See Schools and School Districts, §§ 13-97.

PUBLIC SERVICE COMMISSIONERS.

Railroad and warehouse commissioners, jurisdiction of election contest, see Elections, § 275.

PUBLIC SERVICE CORPORATIONS.

See Carriers; Corporations; Railroads; Street Railroads.

Electric light and heating companies, see Electricity.

Gas companies, see Gas.

Interstate commerce laws, see Commerce.

Telegraph and telephone companies, see Telegraphs and Telephones.

PUBLIC USE.

Dedication of property, see Dedication.

Taking property for public use in general, see Eminent Domain.

What constitutes public use for which property may be taken under power of eminent domain, see Eminent Domain, § 20.

PUBLIC WAYS.

See Highways; Municipal Corporations, §§ 671-706, 756-822.

PUBLIC WORKS.

See Counties, § 113; Highways; Levees; Municipal Corporations, §§ 347-547.

PUNISHMENT.

Appellate jurisdiction as dependent on extent of penalty, see Criminal Law, § 1020.

Assessment by verdict, see Criminal Law, § 884.

For crime in general, see Criminal Law, § 1208.

For refusing to give deposition, see Depositions, § 71.

Instructions as to punishment of accused, see Criminal Law, § 796.

PUNITIVE DAMAGES.

See Damages, § 91.

PURCHASERS.

See Sales; Vendor and Purchaser.

QUALIFICATIONS.

Of expert witnesses, see Evidence, § 544.

Of jurors, see Jury, §§ 39-53.

Of witnesses in general, see Witnesses, §§ 53-181.

QUALIFIED FEE.

Construction of wills, see Wills, § 602.

QUANTUM MERUIT.

See Work and Labor.

QUASHING.

Execution, see Execution, § 163.

Venire, see Jury, §§ 116-120.

QUESTIONS OF LAW AND FACT.

In civil actions, see Trial, §§ 139-178, 191-194.

In criminal prosecutions, see Criminal Law, §§ 741-763, 764.

QUIA TIMET.

See Quieting Title.

QUIETING TITLE.

Tax titles, see Taxation, §§ 790-816.

I. RIGHT OF ACTION AND DEFENSES.

§ 7. Equity has inherent jurisdiction of a bill to remove a cloud on a land title.—*Shelton v. Horrell* (Mo.) 988.

§ 10. Plaintiff in an action to quiet title must recover on the strength of his own title, and not on the weakness of defendant's.—*Wilson v. Rogers* (Ark.) 318.

§ 10. A contention that defendant, in a suit to quiet title, had no title to the property because held by a levee district, *held* unavailable.—*Robinson v. Cross* (Ark.) 954.

§ 10. Title of defendant in a suit to quiet title *held* good as against the possession of the plaintiff.—*Robinson v. Cross* (Ark.) 954.

§ 12. Superiority of title *held* subject to determination in a suit to quiet title.—*Vance v. Gray* (Ky.) 181.

§ 12. Possession by tenant will support an action to quiet title.—*Upchurch v. Sutton Bros.* (Ky.) 477.

§ 12. A bill in equity to quiet title, by parties not in actual possession of the land, will not lie.—*Hall v. Pratt* (Ky.) 900.

II. PROCEEDINGS AND RELIEF.

Leave to sue receiver, see *Receivers*, § 174.

§ 34. A bill to remove a cloud from a land title *held* required to show title in plaintiff when suit was brought.—*Shelton v. Horrell* (Mo.) 988.

§ 34. A bill to remove a cloud from a land title must allege what title or interest plaintiff has in the property.—*Shelton v. Horrell* (Mo.) 988.

QUITCLAIM.

See *Deeds*, § 121.

QUO WARRANTO.

II. JURISDICTION, PROCEEDINGS, AND RELIEF.

§ 57. An objection that the reasonableness of an extension of city limits was not reviewable in quo warranto was waived, where not raised until final hearing.—*State ex inf. Major v. Kansas City* (Mo.) 1007.

§ 57. In quo warranto by the state, to determine the validity of an extension of the limits of a city, the question whether such extension will deprive a private individual of his property without due process of law is not reviewable.—*State ex inf. Major v. Kansas City* (Mo.) 1007.

RAFTS.

Rafting logs, see *Logs and Logging*, § 15.

RAILROAD COMMISSIONERS.

Railroad and warehouse commissioners, jurisdiction of election contest, see *Elections*, § 275.

RAILROADS.

See *Street Railroads*.

Allowance to surviving wife of railway clerk from pension money, see *Executors and Administrators*, § 181.

As employers, see *Master and Servant*.

Carriage of goods and passengers, see *Carriers*.
Pensions to legal representatives of railway clerks killed while in service, see *Pensions*, § 2.

I. CONTROL AND REGULATION IN GENERAL.

Railroad and warehouse commissioners, jurisdiction of election contest, see *Elections*, § 275.

Regulation of, as regulation of commerce, see *Commerce*, §§ 33-40, 58, 61.

IV. LOCATION OF ROAD, TERMINI, AND STATIONS.

Act requiring erection of depot as regulation of interstate commerce, see *Commerce*, § 58.
Legislative power as to erection of depot, see *Constitutional Law*, § 70.

Special laws, see *Statutes*, §§ 75, 76.

§ 58. Acts 1909, p. 986, requiring establishment of depot, *held* not invalid as unreasonable.—*St. Louis Southwestern Ry. Co. v. State* (Ark.) 970.

§ 58. In requiring railroad to maintain depot, Legislature *held* required to act reasonably according to its necessity to serve public needs.—*St. Louis Southwestern Ry. Co. v. State* (Ark.) 970.

§ 58. That cost of maintenance of depot would exceed revenues *held* to be considered, but not controlling, on question of necessity for its maintenance.—*St. Louis Southwestern Ry. Co. v. State* (Ark.) 970.

V. RIGHT OF WAY AND OTHER INTERESTS IN LAND.

Acquisition of rights under power of eminent domain, see *Eminent Domain*.

Instructions assuming fact in action for permitting Johnson grass to mature on right of way of railroad, see *Trial*, § 191.

Operation of corn-shelling plant on right of way as nuisance, see *Nuisance*, § 5.

Penalty for permitting Johnson grass to mature on right of way, see *Agriculture*, § 8.

VI. CONSTRUCTION, MAINTENANCE, AND EQUIPMENT.

Injuries from flowage, see *Waters and Water Courses*, § 171.

Operation of corn-shelling plant on right of way as nuisance, see *Nuisance*, § 5.

Spread of Johnson grass by diversion of surface waters, see *Agriculture*, § 8.

§ 113. Where a railroad constructs a bridge, it must use ordinary care not to injure the rights of owners of adjacent property.—*South Side Realty Co. v. St. Louis & S. F. R. Co.* (Mo. App.) 1034.

X. OPERATION.

Carriage of passengers, see *Carriers*, §§ 236-382.

Fellow servants, see *Master and Servant*, § 191.

Injuries to employes, see *Master and Servant*, §§ 89-296.

(A) Duty to Operate.

Special laws for construction of depots at stations, see *Statutes*, §§ 75, 76.

(B) Statutory, Municipal, and Official Regulations.

Special laws, see *Statutes*, §§ 75, 76.

(D) Injuries to Licensees or Trespassers in General.

Ejection from passenger trains, see *Carriers*, §§ 353-382.

Instructions ignoring evidence in action for injuries, see *Trial*, § 253.

§ 274. A railroad company *held* not liable for the death of a trespasser on the track at night, at a place where the railroad company was not bound to anticipate the presence of persons on the track, or to keep a lookout to guard against injuring them.—*Louisville & N. R. Co. v. Bays' Adm'r* (Ky.) 450.

§ 274. A railroad is not liable for injuries to person falling through hole in sidewalk maintained by the town.—*Farmer v. International & G. N. Ry. Co.* (Tex. Civ. App.) 356.

§ 274. A railroad is under no duty to keep in repair the streets and sidewalks in a town or city.—*Farmer v. International & G. N. Ry. Co.* (Tex. Civ. App.) 356.

§ 274. A railroad's responsibility for defects in walks relates only to the approach from a street to its depot, and it is not liable to keep in repair the crossing of such street.—*Farmer v. International & G. N. Ry. Co.* (Tex. Civ. App.) 356.

§ 274. That a railroad permitted the town to use part of its right of way on which to construct a walk is not sufficient to impose liability for defects therein on the railroad.—*Farmer v. International & G. N. Ry. Co.* (Tex. Civ. App.) 356.

§ 274. One *held* to be impliedly invited at a railroad station, and hence entitled to reasonable care.—*Mack v. Houston E. & W. T. Ry. Co.* (Tex. Civ. App.) 846.

§ 275. Where the employes of defendant railroad company prematurely removed a flag placed on the end of a car which was being repaired, *held*, that defendant was bound to inform plaintiff of the removal of the flag, or to operate its engine upon the repair track so as not to injure plaintiff.—*Atchison, T. & S. F. Ry. Co. v. Classin* (Tex. Civ. App.) 358.

§ 278. A car repairer of another railroad company *held* negligent in going under one of defendant's cars which was being repaired, if he knew there was no blue flag up.—*Atchison, T. & S. F. Ry. Co. v. Classin* (Tex. Civ. App.) 358.

§ 278. A car inspector of another railroad company going under one of defendant's cars to inspect it with knowledge that the blue repair flag placed thereon to protect it had been removed *held* to have assumed the risk of the car being run into by other of defendant's cars.—*Atchison, T. & S. F. Ry. Co. v. Classin* (Tex. Civ. App.) 358.

§ 278. A car inspector of another railroad company which had requested defendant company to repair one of its cars, so that it could be received by his own company, *held* not to have assumed the risks of injury from the negligence of defendant's servants in repairing the car, unless he knew, or should have known, thereof.—*Atchison, T. & S. F. Ry. Co. v. Classin* (Tex. Civ. App.) 358.

§ 281. A crew of a freight train *held* authorized by implication to eject trespassers by using necessary force.—*Cincinnati, N. O. & T. P. Ry. Co. v. Rue* (Ky.) 1144.

§ 281. Members of a train crew inflicting injury on a person *held* to act outside the scope of their employment, so as to relieve the railroad company from liability.—*Cincinnati, N. O. & T. P. Ry. Co. v. Rue* (Ky.) 1144.

§ 282. In an action against a railroad company for injuries to a car inspector by the moving of a car under which he went to inspect it, whether plaintiff was negligent in going under the car after the flag indicating that it was being repaired had been removed *held* for the jury.—*Atchison, T. & S. F. Ry. Co. v. Classin* (Tex. Civ. App.) 358.

§ 282. In an action against a railroad company, an allegation of negligence, *held* sufficient to allow certain proof.—*Mack v. Houston E. & W. T. Ry. Co.* (Tex. Civ. App.) 846.

(E) Accidents to Trains.

Injuries to passengers, see Carriers, § 284. Negligence of carrier imputable to passenger, see Negligence, § 92.

§ 288. A railway company operating trains across a street over which a street railway company operates cars *held* required to exercise ordinary care to guard against a collision at the crossing.—*Augustus v. Chicago, R. I. & P. Ry. Co.* (Mo. App.) 22.

§ 288. The rear brakeman of a train must keep a lookout and give warning of the presence of peril to people on the street cars.—*Augustus v. Chicago, R. I. & P. Ry. Co.* (Mo. App.) 22.

§ 297. In an action for injuries to a street car passenger in a collision between the car and a train at a crossing, evidence *held* to jus-

tify a finding of actionable negligence on the part of the railway company.—*Augustus v. Chicago, R. I. & P. Ry. Co.* (Mo. App.) 22.

(F) Accidents at Crossings.

§ 301. Rights of the railroad company and the public at crossings stated.—*Cox v. Illinois Cent. R. Co.* (Ky.) 911.

§ 308. A railway company's duty to maintain crossings in a reasonably safe condition extends to private as well as public highways.—*Louisville & N. E. Co. v. Sweet* (Ky.) 204.

§ 308. Scope of a railway company's duty to maintain private farm crossings in reasonably safe condition stated.—*Louisville & N. E. Co. v. Sweet* (Ky.) 204.

§ 305. Trainmen should anticipate the presence of travelers with horses at crossings.—*Cox v. Illinois Cent. R. Co.* (Ky.) 911.

§ 305. Trainmen should prevent unusual noises, so as to avoid frightening horses at crossings.—*Cox v. Illinois Cent. R. Co.* (Ky.) 911.

§ 305. Rule stated in regard to duty of trainmen in removing engines from crossings.—*Cox v. Illinois Cent. R. Co.* (Ky.) 911.

§ 305. Obligation of trainmen operating trains at private crossings to prevent injury to persons there and to prevent the frightening of stock stated.—*St. Louis Southwestern Ry. Co. of Texas v. Edwards* (Tex. Civ. App.) 264.

§ 326. That a railway company failed to perform its statutory duty as to a proper overhead crossing *held* not to prevent the defense of contributory negligence of a traveler injured while using the highway.—*Marshall & E. T. Ry. Co. v. Petty* (Tex. Civ. App.) 406.

§ 327. A traveler on a highway who crosses a railroad track is guilty of contributory negligence if he fails to look and listen for trains.—*St. Louis, I. M. & S. Ry. Co. v. Stacks* (Ark.) 315.

§ 330. A person approaching a railroad crossing where trains could not be seen until the crossing was practically reached *held* entitled to rely on the giving of warning signals.—*Illinois Cent. R. Co. v. Moss' Adm'r* (Ky.) 1122.

§ 332. Where a person approaching a crossing sees and knows that an engine is letting off steam, he should not drive over the crossing without notifying the trainmen.—*Cox v. Illinois Cent. R. Co.* (Ky.) 911.

§ 332. Where plaintiff knew the conditions, and attempted to drive her horse near an engine letting off steam, *held*, that she was guilty of contributory negligence.—*Cox v. Illinois Cent. R. Co.* (Ky.) 911.

§ 344. Negligence in violating a statute prohibiting the standing of trains for an unnecessary length of time at crossings must be pleaded.—*Cox v. Illinois Cent. R. Co.* (Ky.) 911.

§ 346. In an action against a railway company by one injured in crossing the track, the burden of proving contributory negligence is upon the defendant.—*St. Louis, I. M. & S. Ry. Co. v. Stacks* (Ark.) 315.

§ 346. Burden on the plaintiff under the humanitarian rule stated.—*Pennell v. Chicago, R. I. & P. Ry. Co.* (Mo. App.) 114.

§ 346. It cannot be presumed that, because a train was being negligently run and struck plaintiff, the defendant's servants were guilty of negligence under the last chance doctrine.—*Pennell v. Chicago, R. I. & P. Ry. Co.* (Mo. App.) 114.

§ 347. Evidence as to calculations showing to what extent the view of railroad tracks at a crossing was cut off by the presence of cars

held admissible in an action for injuries received.—*St. Louis, I. M. & S. Ry. Co. v. Stacks* (Ark.) 315.

§ 348. In an action for injuries at a railroad crossing, *held* that plaintiff was guilty of contributory negligence.—*Pennell v. Chicago, R. I. & P. Ry. Co.* (Mo. App.) 114.

§ 348. In an action for injuries at crossing, *held* that defendant was not guilty of negligence under the last chance doctrine.—*Pennell v. Chicago, R. I. & P. Ry. Co.* (Mo. App.) 114.

§ 349. Punitive damages *held* not recoverable for the death of a traveler, due to the negligence of the operatives of a railroad train in failing to give warning signals on approaching a dangerous crossing.—*Illinois Cent. R. Co. v. Moss' Adm'r* (Ky.) 1122.

§ 350. In an action by one injured while driving over a railroad crossing, the question of contributory negligence *held* under the evidence for the jury.—*St. Louis, I. M. & S. Ry. Co. v. Stacks* (Ark.) 315.

§ 350. Unless the undisputed evidence shows that one injured while crossing a railroad track failed to look and listen, the question of his contributory negligence is for the jury.—*St. Louis, I. M. & S. Ry. Co. v. Stacks* (Ark.) 315.

§ 350. Whether plaintiff was guilty of contributory negligence in attempting to take a threshing outfit across a railway track just before a train was due *held* a jury question.—*Louisville & N. R. Co. v. Sweet* (Ky.) 204.

§ 350. In an action for death at a railroad crossing, evidence *held* to require submission of the question of defendant's negligence to the jury.—*Illinois Cent. R. Co. v. Moss' Adm'r* (Ky.) 1122.

§ 350. Whether trainmen discovered the peril of a person leading an animal through the gate of a private crossing in time to refrain from sounding the whistle and frightening the animal, *held* for the jury.—*St. Louis Southwestern Ry. Co. of Texas v. Edwards* (Tex. Civ. App.) 284.

§ 351. An instruction *held* erroneous as failing to require deceased to exercise increased care at a railroad crossing, unless he knew it was unusually dangerous, without placing on him the burden of ordinary care to discover the fact.—*Illinois Cent. R. Co. v. Moss' Adm'r* (Ky.) 1122.

§ 351. In an action for injuries at a railroad crossing, instructions *held* to fairly present the question of contributory negligence.—*Coffee v. Chicago, R. I. & G. Ry. Co.* (Tex.) 1174.

(G) *Injuries to Persons on or near Tracks.* Injuries to persons on or near street railroad tracks, see *Street Railroads*, §§ 81-118. Instructions ignoring issues in actions for injuries, see *Trial*, § 253.

§ 358. Failure of operatives of a railroad train to use ordinary care to discover persons entitled to be on the track *held* negligence warranting recovery of damages by one injured thereby, if not himself negligent.—*Howard v. Waterman Lumber & Supply Co.* (Tex. Civ. App.) 387.

§ 358. A railroad company *held* required to exercise due care in the operation of its trains so as not to injure licensees on the right of way.—*St. Louis Southwestern Ry. Co. of Texas v. McCauley* (Tex. Civ. App.) 798.

§ 358. An engineer who discovers the peril of a traveler on a part of the right of way used by the public must use the means at hand to avoid threatened injury.—*St. Louis Southwestern Ry. Co. of Texas v. McCauley* (Tex. Civ. App.) 798.

§ 358. In an action for injuries to one struck by a wire cable operated in connection with a sand train while walking on a path near the railroad track, evidence *held* to warrant a charge on negligence.—*Missouri, K. & T. Ry. Co. of Texas v. Schroeter* (Tex. Civ. App.) 826.

§ 360. Operators of engines on a track parallel to a part of right of way used by the public *held* required to exercise ordinary care in the operation thereof.—*St. Louis Southwestern Ry. Co. of Texas v. McCauley* (Tex. Civ. App.) 798.

§ 360. Where a part of a railroad right of way had been used as a public street, the railroad company *held* liable for injuries to a traveler thereon, where her horse was frightened by unnecessary noises of an engine.—*St. Louis Southwestern Ry. Co. of Texas v. McCauley* (Tex. Civ. App.) 798.

§ 362. The backing of cars or an engine in the dark without a light in front in localities where the presence of persons on the track should be reasonably anticipated is negligence.—*Louisville & N. R. Co. v. Bays' Adm'r* (Ky.) 450.

§ 367. A lookout duty obtains as to railroad engines and cars operated in cities and towns and places where the presence of persons on the tracks should be reasonably anticipated.—*Louisville & N. R. Co. v. Bays' Adm'r* (Ky.) 450.

§ 367. Reasonable warning of the approach of a train must be given, where it is being operated on a track where the presence of persons is reasonably to be anticipated.—*Louisville & N. R. Co. v. Bays' Adm'r* (Ky.) 450.

§ 369. Operatives of trains must use diligence in keeping a lookout for persons along its track, and to use proper precaution to prevent inflicting injury upon them.—*Missouri, K. & T. Ry. Co. of Texas v. Schroeter* (Tex. Civ. App.) 826.

§ 376. Duty of train employes on discovering peril of one on the track stated.—*Texas & P. Ry. Co. v. Gullett* (Tex. Civ. App.) 262.

§ 381. In an action for injuries to one struck by a wire cable operated in connection with a sand train while walking on a path near the railroad track, evidence *held* insufficient to show contributory negligence.—*Missouri, K. & T. Ry. Co. of Texas v. Schroeter* (Tex. Civ. App.) 826.

§ 390. That a pedestrian was guilty of contributory negligence on a railway track *held* not to preclude recovery for his death.—*Texas & P. Ry. Co. v. Gullett* (Tex. Civ. App.) 262.

§ 400. Whether a traveler on a part of a railroad right of way was guilty of contributory negligence *held* for the jury.—*St. Louis Southwestern Ry. Co. of Texas v. McCauley* (Tex. Civ. App.) 798.

§ 401. In an action for injuries to a traveler on a railroad right of way, a charge as to the duty of the engineer *held* not misleading.—*St. Louis Southwestern Ry. Co. of Texas v. McCauley* (Tex. Civ. App.) 798.

§ 401. In an action for injuries to plaintiff, who while walking on a path near a track was struck by a wire cable operated in connection with a sand train, it was proper to refuse a requested instruction on the principle of "safe and dangerous" way.—*Missouri, K. & T. Ry. Co. of Texas v. Schroeter* (Tex. Civ. App.) 826.

(H) *Injuries to Animals on or near Tracks.*

§ 446. In an action for killing cattle at a crossing, evidence *held* sufficient to take the case to the jury.—*Tate v. Wabash Ry. Co.* (Mo. App.) 14.

§ 447. A charge *held* erroneous as requiring a railroad company to both sound the whistle and ring the bell at a crossing.—*Tate v. Wabash Ry. Co.* (Mo. App.) 14.

(I) Fires.

Instructions assuming facts in action for injuries, see Trial, § 191.

Usage affecting liability, see Customs and Usages, § 18.

§ 485. In an action for burning plaintiff's barn, a charge requiring defendant to equip its engine with the most approved spark arrester *held* not to require too high a degree of care.—*Houston & T. C. R. Co. v. Ellis* (Tex. Civ. App.) 246.

RAILWAY MAIL CLERKS.

Allowance to surviving wife of railway clerks from pension money, see Executors and Administrators, § 181.

Pensions to legal representatives of railway clerks killed while in service, see Pensions, § 2.

RAPE.

I. OFFENSES AND RESPONSIBILITY THEREFOR.

§ 4. It is no defense to a prosecution for rape on a female under 15 years of age that she had had intercourse with other men.—*Foreman v. State* (Tex. Civ. App.) 229.

§ 12. Carnal intercourse with woman mentally incapable of consenting *held* rape, unless the man is ignorant of the infirmity.—*State v. Warren* (Mo.) 522.

§ 12. Extent of proof required in prosecution for rape upon woman mentally incapable of consenting thereto stated.—*State v. Warren* (Mo.) 522.

§ 12. Mere insanity *held* not to make act of intercourse rape, unless sufficient to destroy capacity of prosecutrix to consent.—*State v. Warren* (Mo.) 522.

§ 12. That the incapacity of prosecutrix was apparent to ordinary observers *held* not to make act of intercourse with her rape, in absence of actual knowledge of defendant of such incapacity.—*State v. Warren* (Mo.) 522.

§ 12. Showing merely that prosecutrix was weak-minded, and that defendant knew of it, *held* insufficient.—*State v. Warren* (Mo.) 522.

II. PROSECUTION AND PUNISHMENT.

(A) Indictment and Information.

§ 20. An information for rape *held* sufficient.—*State v. Warren* (Mo.) 522.

(B) Evidence.

Declarations as to other acts, see Criminal Law, § 415.

Secondary evidence, see Criminal Law, § 398.

§ 36. Burden *held* to be on state to show defendant's knowledge of incapacity of prosecutrix to consent to act of intercourse.—*State v. Warren* (Mo.) 522.

§ 51. Evidence *held* insufficient to show defendant's knowledge of incapacity of prosecutrix to consent to act.—*State v. Warren* (Mo.) 522.

§ 52. In a prosecution for carnally knowing an unmarried female, a finding that prosecutrix was of previous chaste character *held* supported by substantial evidence.—*State v. Sutton* (Mo.) 663.

§ 52. In a prosecution under Rev. St. 1909, § 4472, evidence *held* sufficient to warrant a

finding that prosecutrix was unmarried.—*State v. Sutton* (Mo.) 663.

(C) Trial and Review.

Instructions assuming facts, see Criminal Law, § 761.

§ 59. Evidence *held* to raise the issue of assault with intent to rape, so as to authorize an instruction on such issue.—*State v. Hoag* (Mo.) 509.

§ 59. In view of Rev. St. 1909, § 4904, *held* error not to charge on the law of common assault in a prosecution for assault with intent to rape.—*State v. Hoag* (Mo.) 509.

RATIFICATION.

Of act of agent, see Principal and Agent, § 175.
Of act of insurance agent, see Insurance, § 142.

REAL ACTIONS.

See Ejectment; Forcible Entry and Detainer, §§ 4-15; Trespass to Try Title.

REAL ESTATE AGENTS.

See Brokers.

REAL PROPERTY.

See Property.

Annexation of chattels to real property, see Fixtures.

Conveyances, see Deeds; Vendor and Purchaser. Effect of statute of frauds on agreements relating to real property, see Frauds, Statute of, §§ 70-76.

Liens for improvements, see Mechanics' Liens.

Limitation of actions to recover, see Limitation of Actions, § 19.

Mortgage, see Mortgages.

Remedies involving or affecting, see Ejectment; Forcible Entry and Detainer, §§ 4-15; Trespass to Try Title.

Sales by executors or administrators, see Executors and Administrators, § 327.

Trespass to, see Trespass.

REBUTTAL.

Admission in rebuttal of evidence proper in chief, see Trial, § 62.

Testimony of party or person interested in rebuttal of testimony of adverse party as to transactions with person since deceased or incompetent, see Witnesses, § 177.

RECEIPTS.

As evidence of payment, see Payment, § 74.

As hearsay evidence, see Evidence, § 318.

RECEIVERS.

Of corporations in general, see Corporations, § 553.

Of partnership, see Partnership, § 325.

I. NATURE AND GROUNDS OF RECEIVERSHIP.

(A) Nature and Subjects of Remedy.

§ 1. Power to appoint a receiver being a delicate one, especially when invoked upon ex parte applications, should be exercised with extreme caution, and never in a doubtful case.—*Blades v. Billings Mercantile Co.* (Mo. App.) 579.

§ 6. One of the essentials to the appointment of a receiver is that there is no other adequate remedy.—*Blades v. Billings Mercantile Co.* (Mo. App.) 579.

III. TITLE TO AND POSSESSION OF PROPERTY.

§ 77. An equitable lien for price of personalty may be enforced, even though the property be in the hands of a receiver.—*Arkansas Cypress Shingle Co. v. Meto Valley Ry. Co.* (Ark.) 1195.

VI. ACTIONS.

State laws as rules of decision in federal court, see Courts, § 373.

§ 174. Act Cong. Aug. 13, 1888, c. 866, § 3, 25 Stat. 436 (U. S. Comp. St. 1901, p. 582), relating to federal court receivers, does not authorize a suit against a federal court receiver in a state court without leave of the federal court, primarily to recover land or to remove a cloud on title, and incidentally to recover damages for the cutting of timber.—*Morse v. Tackaberry* (Tex. Civ. App.) 273.

RECEIVING STOLEN GOODS.

Bringing stolen property into state, see Larceny, § 22.

RECEPTION.

Of evidence at trial, see Criminal Law, §§ 671-673; Trial, §§ 55-105.

RECITALS.

In judgment, construction and operation, see Judgment, § 525.

RECOGNIZANCES.

See Bail.

On appeal or writ of error in criminal prosecutions, see Criminal Law, § 1076.

RECONVENTION.

See Set-Off and Counterclaim.

RECORDS.

In criminal prosecutions, see Criminal Law, § 440.

Of chattel mortgage, see Chattel Mortgages, §§ 152, 153, 194, 627.

Parol or extrinsic evidence to contradict or vary, see Evidence, § 387.

Transcript on appeal or writ of error, see Appeal and Error, §§ 499-714; Criminal Law, §§ 1090-1128.

RECOUPMENT.

See Set-Off and Counterclaim.

REDEMPTION.

From tax sale, see Taxation, § 699.

REDIRECT EXAMINATION.

See Witnesses, §§ 286, 287.

REFERENCE.

III. REPORT AND FINDINGS.

Review of questions of fact, see Appeal and Error, § 1022.

REFERENDUM.

Enactment of ordinances, see Municipal Corporations, § 108.

Legislative control over acts of cities, see Municipal Corporations, § 65.

REFORMATION OF INSTRUMENTS.

See Cancellation of Instruments.

REHEARING.

See New Trial.

REINSURANCE.

See Insurance, § 699.

RELATIONSHIP.

Disqualification of witness by relationship to party, see Witnesses, § 53.

RELEASE.

See Compromise and Settlement; Payment. Allowances to surviving spouse or children, see Executors and Administrators, § 189.

From arrest, see Bail.

Of liability of carrier in respect to goods, see Carriers, § 159.

II. CONSTRUCTION AND OPERATION.

§ 29. By releasing one of several joint tortfeasors, plaintiff estops himself to deny liability of that one.—*Laughlin v. Excelsior Powder Mfg. Co.* (Mo. App.) 116.

§ 29. A valid release of one of several joint tortfeasors releases all.—*Laughlin v. Excelsior Powder Mfg. Co.* (Mo. App.) 116.

§ 29. A release signed by the car inspector of another railroad company releasing it and certain named corporations from liability for injuries while inspecting one of defendant's cars held not to prevent him from suing defendant for the injuries sustained, though the amount of the recovery should be reduced by the sum paid under the release.—*Atchison, T. & S. F. Ry. Co. v. Classin* (Tex. Civ. App.) 353.

RELEVANCY.

Of evidence, see Criminal Law, § 364.

RELIGIOUS SOCIETIES.

§ 23. Contract between factions of church held not required to be authorized and entered into by a majority of all the members.—*Bottom v. Tinsley* (Tex. Civ. App.) 833.

§ 25. An answer in action for specific performance of contract between factions of church and for injunction held to state a defense.—*Bottom v. Tinsley* (Tex. Civ. App.) 833.

§ 25. A petition for specific performance of a contract between factions of church, and to enjoin defendant faction from interfering with rights of plaintiff faction, held sufficient at least as against general demurrer.—*Bottom v. Tinsley* (Tex. Civ. App.) 833.

REMAINDERS.

§ 16. The proceeds from the sale of land in which a father had a life estate and his children the remainder cannot, under Civ. Code Prac. § 491, which authorizes such sales, be used to improve other real property of the same owners.—*Globe Realty Co. v. Lentz* (Ky.) 882.

§ 16. Sale of a house in which infants have a remainder held proper under Civ. Code Prac. § 491.—*Globe Realty Co. v. Lentz* (Ky.) 882.

REMAND.

Of cause by appellate court, see Appeal and Error, §§ 1195-1214.

REMEDIES.

See Action.

REMEDY AT LAW.

Effect on jurisdiction of equity, see Chattel Mortgages, § 255.

Effect on jurisdiction in equity, see Injunction, § 17.

REMEDY OVER.

By surety against principal, see Principal and Surety, §§ 174-185.

Substitution of third person paying debt to rights of creditor against debtor, see Subrogation.

REMISSION.

Of debt, see Release.

REMITTITUR.

Of cause by appellate court, see Appeal and Error, §§ 1195-1214.

REMOVAL.

Of minor's disabilities, see Infants, § 11.

Of passengers or intruders from passenger trains, see Carriers, §§ 353-382.

Of trustee, see Trusts, § 166.

REMOVAL OF CAUSES.

See Quieting Title.

Transfer of causes from one state court to another, see Courts, § 485.

RENDITION.

Of judgment, see Judgment, §§ 238, 248-252.

RENEWAL.

Of cause of action barred, or against which limitation has commenced to run, see Limitation of Actions, § 155.

RENT.

See Landlord and Tenant, §§ 254-274.

Of mortgaged land, rights and liabilities of parties, see Mortgages, § 199.

Under mining leases, see Mines and Minerals, § 70.

REOPENING CASE.

For further evidence, see Trial, § 68.

REPEAL.

Of statute, see Statutes, § 168.

REPETITION.

Of instructions, see Trial, § 260.

REPLEVIN.

To recover possession of goods sold, see Sales, § 403.

I. RIGHT OF ACTION AND DEFENSES.

Liability of agent, see Principal and Agent, § 184.

§ 10. Evidence of possession of property by defendant *held* sufficient to support replevin.—Kimble v. McDermott (Mo. App.) 72.

IV. PLEADING AND EVIDENCE.

§ 72. In replevin of a note brought by the payee against the maker, evidence *held* to justify a verdict for the payee.—St. Victor v. Edwards (Mo. App.) 1105.

REPLY BRIEFS.

On appeal or writ of error, see Appeal and Error, § 762.

REPORT.

By corporation, construction of penal laws, see Statutes, § 241.

REPRESENTATION.

Of bank by officers and agents, see Banks and Banking, § 116.

Of client by attorney, see Attorney and Client, §§ 70-72.

Of corporation by officers and agents, see Corporations, §§ 398-432.

Of principal by agent, see Brokers, § 97.

REPRESENTATIONS.

False representations, see False Pretenses; Fraud.

REPRESENTATIVES.

Personal representatives, see Executors and Administrators.

REPUGNANCY.

In defenses alleged, see Pleading, § 93.

In description of boundaries, see Boundaries, § 3.

REPUTATION.

As element of seduction, see Seduction, § 32.

Of witness, see Witnesses, § 340.

REQUESTS.

For instructions, see Criminal Law, §§ 824-830; Trial, §§ 256-267.

RESCISSION.

Cancellation of written instrument, see Cancellation of Instruments.

Of contract, see Contracts, § 265.

Of contract of sale, see Sales, § 119.

RESERVATIONS.

Of power to alter or amend corporate charter, see Constitutional Law, § 126.

RES GESTÆ.

In civil actions, see Evidence, § 123.

In criminal prosecutions, see Criminal Law, § 304.

RESIDENCE.

Appearance by nonresident, see Appearance, § 19.

Of parties to action as determining venue, see Venue, § 32.

RESIDUARY CLAUSE.

See Wills, §§ 587, 588.

RES IPSA LOQUITUR.

Negligence in general, see Negligence, § 121.

Negligence of carrier, see Carriers, §§ 132, 316.

RES JUDICATA.

See Judgment, §§ 619, 713-743.
Former decision as law of the case, see Appeal and Error, §§ 1097, 1195.

RESPONDEAT SUPERIOR.

See Master and Servant, §§ 302-329.

RESPONSIVENESS.

Of verdict to issues, see Trial, § 329.

RESTORATION.

Of amount received in settlement of insurance policy as condition precedent to action on policy, see Insurance, § 612.

RESTRAINT OF TRADE.

Contracts in restraint of trade, see Contracts, § 117.
Trusts and other combinations, see Monopolies, §§ 12-30.

RETAINER.

Of attorney, see Attorney and Client, §§ 70-72.

RETROSPECTIVE LAWS.

Constitutional restrictions, see Constitutional Law, § 191.

RETURN.

Of amount received in settlement of insurance policy as condition precedent to action on policy, see Insurance, § 612.

REVENUE.

See Taxation.

REVERSAL.

Of judgment or order in civil actions, see Appeal and Error, §§ 1165-1178.

REVERSIONS.

Of property to state for want of persons competent to hold or take, see Escheat.

REVIEW.

See Appeal and Error; Certiorari; Criminal Law, §§ 1120-1170½; Habeas Corpus.
Bill in equity, see Equity, § 447.
Of judgment in same court, see Judgment, § 334.
Of judgment of justice of the peace, see Justices of the Peace, §§ 174-191.

REVISION.

Of statutes, see Statutes, § 231.

REVIVAL.

Of cause of action barred by statute of limitations, see Limitation of Actions, § 155.

REVOCATION.

See Cancellation of Instruments.
Of liquor licenses, see Intoxicating Liquors, §§ 106-108.
Of will, see Wills, § 191.

RIGHT OF WAY.

See Easements.

RISKS.

Assumed by servant, see Master and Servant, §§ 203-226, 273, 288, 295.

ROADS.

See Highways; Street Railroads.
In cities, see Municipal Corporations, §§ 671-706.

ROLLS.

Assessment roll, see Taxation, § 446.

ROUTE.

For transportation of goods by carrier, see Carriers, §§ 79, 173.

ROYALTIES.

Under mining leases, see Mines and Minerals, § 70.

RULE IN SHELLEY'S CASE.

See Wills, § 608.

RULES.

Of master governing work of servant, see Master and Servant, § 145.

SABBATH.

See Sunday.

SALARY.

Of tax collectors, see Taxation, § 549.

SALES.

Individual liability of corporate officer on undertaking of corporation for sale to third person, see Corporations, § 306.
Parol or extrinsic evidence to contradict or vary contract of sale, see Evidence, § 400.
Powers of sale, see Powers.
Regulation of commerce, see Commerce, § 40.
Validity as to creditors or subsequent purchasers, see Fraudulent Conveyances.

Sales by or to particular classes of persons.

See Corporations, § 410.
Cotenants, purchase of outstanding title, or claim, see Tenancy in Common, § 19.
Independent executors, see Executors and Administrators, § 7.
Officers and agents of corporations in general, see Corporations, § 410.

Sales of particular species of, or estates or interests in, property.

See Intoxicating Liquors.
Mortgaged property, see Mortgages, § 280.
Real property in general, see Vendor and Purchaser.
Shares of corporate stock, see Corporations, § 121.
Standing timber, see Logs and Logging, § 3.

Sales on judicial or other proceedings.

See Execution, §§ 258-269.
Tax sales, see Taxation, § 643.

I. REQUISITES AND VALIDITY OF CONTRACT.

§ 22. Facts held insufficient to show a meeting of minds between buyer and seller as to the price until the buyer accepted a delivery and paid a draft for the price.—D. S. Cage & Co. v. Black (Ark.) 942.

§ 22. Acceptance by wire of an offer to sell rice *held* not an acceptance at \$5.75 per sack.—D. S. Cage & Co. v. Black (Ark.) 942.

§ 22. Any qualification of, or departure from, the terms of an offer to sell, invalidates the offer, unless agreed to by the person making it.—D. S. Cage & Co. v. Black (Ark.) 942.

§ 22. A contract to sell is not complete until the price has been agreed on.—D. S. Cage & Co. v. Black (Ark.) 942.

§ 23. A postal card sent by seller to buyer, acknowledging receipt of an order from the buyer to the seller's drummer, promising prompt and careful attention, *held* not an acceptance of the order.—Courtney Shoe Co. v. E. W. Curd & Son (Ky.) 146.

§ 38. Written contract for sale of threshing machine, containing a warranty and signed by the buyer without reading it, *held* binding.—J. I. Case Threshing Mach. Co. v. Mattingly (Ky.) 1131.

§ 52. Evidence *held* not to show a contract for the sale and purchase of ties.—Brown v. T. J. Moss Tie Co. (Mo. App.) 1103.

§ 53. An offer by wire to sell rice *held* not to fix the price at \$5.75 per barrel, as a matter of law.—D. S. Cage & Co. v. Black (Ark.) 942.

II. CONSTRUCTION OF CONTRACT.

Parol or extrinsic evidence to contradict or vary written contract, see Evidence, § 400.

§ 81. Stipulations as to the time of performance of a contract of sale, *held* conditions precedent.—Estis v. Harnden (Mo. App.) 43.

III. MODIFICATION OR RESCISSION OF CONTRACT.

(C) Rescission by Buyer.

§ 119. A buyer of goods for delivery in installments, who received a part of the installments, may revoke the order as to future installments because the goods delivered failed to comply with the contract.—Ungerer & Co. v. Louis Maull Cheese & Fish Co. (Mo. App.) 56.

IV. PERFORMANCE OF CONTRACT.

(C) Delivery and Acceptance of Goods.

§ 166. A contract for the sale and purchase of an article *held* to call for a delivery of goods of the particular kind described.—Ungerer & Co. v. Louis Maull Cheese & Fish Co. (Mo. App.) 56.

§ 166. A sale by sample does not relieve the seller from the obligation assumed by him in selling by description, and, where the sample is an imitation not discoverable by inspection, the goods delivered may not be an imitation of what the contract calls for.—Ungerer & Co. v. Louis Maull Cheese & Fish Co. (Mo. App.) 56.

§ 166. Certain testimony *held* admissible to prove a fact going to defeat seller's right to recover damages for refusal of the buyer to accept the goods.—Ungerer & Co. v. Louis Maull Cheese & Fish Co. (Mo. App.) 56.

§ 176. A buyer, having more than one reason for rejecting goods, does not, by assigning one reason, conclusively admit that there is no other.—Ungerer & Co. v. Louis Maull Cheese & Fish Co. (Mo. App.) 56.

§ 181. In an action for the breach of a contract to receive ties, subject to inspection, evidence *held* to show a rejection of the ties by the inspector.—Brown v. T. J. Moss Tie Co. (Mo. App.) 1103.

V. OPERATION AND EFFECT.

(A) Transfer of Title as Between Parties.

§ 201. Agreement on sale of a cow that the buyer would take her at a specified time *held* not a condition precedent to the passing of title.—Estis v. Harnden (Mo. App.) 43.

(D) Bona Fide Purchasers.

Of mortgaged property, see Chattel Mortgages, § 153.

VI. WARRANTIES.

Authority of officer or agent of corporation, see Corporations, § 410.

§ 267. For an express warranty in a contract of sale to exclude an implied warranty, it must contain all the obligations assumed by the warrantor.—Boulware v. Victor Automobile Mfg. Co. (Mo. App.) 7.

§ 283. Certain facts *held* not to constitute a warranty of title.—Thompson v. Jacoway (Ark.) 955.

VII. REMEDIES OF SELLER.

(B) Lien.

Enforcement against property in hands of receiver, see Receivers, § 77.

Priority between vendors' liens and chattel mortgages, see Chattel Mortgages, § 140.

(E) Actions for Price or Value.

§ 364. In an action to recover the price of a jack, refusal of instructions *held* erroneous.—Brown v. Emerson (Mo. App.) 1108.

(F) Actions for Damages.

§ 382. In an action for damages for a buyer's refusal to accept goods, certain evidence *held* admissible as bearing on whether a resale of the goods by the seller was a proper criterion of market value.—Ungerer & Co. v. Louis Maull Cheese & Fish Co. (Mo. App.) 56.

VIII. REMEDIES OF BUYER.

(A) Recovery of Price.

Disregard of instructions, see Trial, § 337.
Inconsistent defenses, see Pleading, § 93.
Of corporate stock, see Corporations, § 121.

(B) Recovery of Goods.

§ 403. A purchaser of a cow *held* entitled to maintain replevin to recover possession.—Estis v. Harnden (Mo. App.) 43.

(C) Actions for Breach of Contract.

Responsiveness of verdict to issues, see Trial, § 329.

§ 405. In an action for damages for a buyer's breach to accept goods, certain evidence *held* admissible in support of the buyer's counterclaim for damages for failure to deliver goods called for by the contract.—Ungerer & Co. v. Louis Maull Cheese & Fish Co. (Mo. App.) 56.

(D) Actions and Counterclaims for Breach of Warranty.

§ 428. Buyer of threshing machine *held* not entitled to counterclaim for damages for alleged breach of seller's warranty.—J. I. Case Threshing Mach. Co. v. Mattingly (Ky.) 1131.

§ 441. Evidence *held* to show that brick-making machinery complied with the seller's warranty.—Walton Brick Co. v. Anderson Foundry & Machine Works (Ky.) 136.

IX. CONDITIONAL SALES.

§ 477. A seller under a conditional contract having accepted a second note for the balance of the price and taken a chattel mortgage, *held*

to have elected to consider the sale as absolute.
—*Thornton v. Findley* (Ark.) 627.

SALOONS.

See Intoxicating Liquors.

SAMPLE.

Sales by sample, see Sales, § 166.

SANITY.

Determination of sanity of witness question of law, see Witnesses, § 79.

SATISFACTION.

See Compromise and Settlement; Payment; Release.

SCHOOLS AND SCHOOL DISTRICTS.

Garnishment of school district, see Garnishment, §§ 17, 201.

II. PUBLIC SCHOOLS.

(A) Establishment, School Lands and Funds, and Regulation in General.

Disposal of school lands in general, see Public Lands, § 173.

§ 13. "Colored children," within Const. § 187, defined.—*Mullins v. Belcher* (Ky.) 1151.

(B) Creation, Alteration, Existence, and Dissolution of Districts.

§ 32. Rev. St. 1899, § 9742 (Ann. St. 1906, p. 4463), *held* not to authorize a common school district to attach a part of a village school district organized under sections 9860-9879a (Ann. St. 1906, pp. 4519-4530).—*School Dist. No. 61 v. McFarland* (Mo. App.) 673.

§ 39. Under Rev. St. 1899, § 3649 (Ann. St. 1906, p. 2055), *held*, that an injunction would issue to prevent a common school district from attaching a part of a village school district.—*School Dist. No. 61 v. McFarland* (Mo. App.) 673.

(D) District Property, Contracts, and Liabilities.

§ 81. The obligation of a surety in a bond executed to a board of education *held* measured by the contract and the bond, read together, and Rev. St. 1899, §§ 6761, 6762 (Ann. St. 1906, p. 3328).—*Board of Education of City of St. Louis v. United States Fidelity & Guaranty Co.* (Mo. App.) 18.

§ 81. Under Rev. St. 1899, §§ 6761, 6762 (Ann. St. 1906, p. 3328), a bond by a contractor for work on a public school building *held* to bind the surety to answer for the default of the contractor, but not the default of a third person.—*Board of Education of City of St. Louis v. United States Fidelity & Guaranty Co.* (Mo. App.) 18.

(E) District Debt, Securities, and Taxation.

§ 97. An election for the purpose of issuing bonds for a school district under Ky. St. § 448 (Russell's St. § 5758), *held*, in view of Ky. St. § 448 (Russell's St. § 5a1), not to be in substantial compliance with the statute and hence void.—*Hughes v. Roberts* (Ky.) 168.

(F) Claims Against District, and Actions.
Right of action for escheat, see Escheat, § 6.

SCIRE FACIAS.

To enforce bail bond, see Bail, § 89.

SECONDARY EVIDENCE.

See Criminal Law, § 398; Evidence, §§ 158-174.

SECURITY.

See Bail; Bonds; Chattel Mortgages; Mortgages; Principal and Surety.

Collateral security in general, see Pledges.

Liabilities of broker to third person as to loans and securities, see Brokers, § 97.

On appeal or writ of error, see Appeal and Error, § 376; Criminal Law, § 1076; Justices of the Peace, § 191.

Public securities, see Municipal Corporations, § 907.

SEDUCTION.

II. CRIMINAL RESPONSIBILITY.

§ 32. In a prosecution for seduction upon promise to marry, the good repute of the prosecutrix is an essential element.—*State v. Walker* (Mo.) 516.

§ 44. In a prosecution for seduction, the relations of the defendant, with all the attending circumstances, are competent evidence.—*State v. Walker* (Mo.) 516.

§ 44. Certain letters of defendant to prosecutrix by which he sought to win her affection *held* competent evidence against him.—*State v. Walker* (Mo.) 516.

§ 45. The evidence to support a conviction of seduction must be measured and governed by the rules governing the sufficiency of evidence to justify a conviction of any other crime.—*Nash v. State* (Tex. Cr. App.) 709.

§ 46. Evidence *held* to sufficiently corroborate the testimony of prosecutrix to support a conviction of seduction.—*Nash v. State* (Tex. Cr. App.) 709.

§ 46. Under Code Cr. Proc. 1895, arts. 769, 781, a prosecutrix *held* sufficiently corroborated to justify a conviction for seduction when there are any facts that tend to show that accused committed the offense.—*Nash v. State* (Tex. Cr. App.) 709.

§ 50. An instruction on question of corroboration of prosecutrix as to promise of marriage *held* not erroneous.—*State v. Walker* (Mo.) 516.

§ 50. On a trial for seduction, the refusal to charge on prosecutrix's prior criminal misconduct, *held* reversible error.—*Sharp v. State* (Tex. Cr. App.) 333.

SELF-DEFENSE.

Defense to prosecution for homicide, see Homicide, §§ 244, 300.

SELF-EXECUTING.

Provisions of Constitution, see Constitutional Law, §§ 32-46.

SELF-SERVING DECLARATIONS.

As evidence, see Evidence, § 271.

SENTENCE.

See Criminal Law, § 989.

SEPARATE ESTATE.

Of husband or wife, distinguished from community property, see Husband and Wife, § 273.

Of married woman, see Husband and Wife, §§ 110-193.

SEPARATE MAINTENANCE.

See Husband and Wife, § 281.

SEPARATE PROPERTY.

Testamentary capacity of married women to dispose of separate property, see Wills, § 28.

SEPARATION.

Of husband and wife, see Divorce; Husband and Wife, § 281.

SEQUESTRATION.

§ 16. In replevin to recover certain personal property, evidence *held* to require submission of the issue of title to the jury.—*Ricketson v. Best* (Tex. Civ. App.) 353.

§ 16. In an action to recover certain personal property, or its value, the statute of exemptions *held* immaterial.—*Ricketson v. Best* (Tex. Civ. App.) 353.

§ 21. On the vacation of an attachment, evidence of plaintiff's good faith in suing out the same is material only as against a claim for exemplary damages.—*Ricketson v. Best* (Tex. Civ. App.) 353.

§ 21. Where plaintiff, having purchased certain property from a firm, sued to recover it against a purchaser from an individual member of the firm, evidence of plaintiff's belief that the property belonged to the firm, and the reasons thereof, was admissible.—*Ricketson v. Best* (Tex. Civ. App.) 353.

§ 21. In replevin to recover certain personal property, evidence that plaintiff was ignorant of defendant's claim at the time suit was brought *held* inadmissible.—*Ricketson v. Best* (Tex. Civ. App.) 353.

SERVANTS.

See Master and Servant.

SERVICE.

Of copies of record on appeal or error, see Appeal and Error, § 633.

SERVICES.

See Master and Servant; Work and Labor. Claim against estates of decedent, see Executors and Administrators, § 206.

Liens on real property for services rendered, see Mechanics' Liens.

Military service, see Militia.

Of broker, sufficiency to entitle to compensation, see Brokers, §§ 49-57.

Of physician or surgeon, right to compensation, see Physicians and Surgeons, §§ 21-24.

SERVITUDE.

See Easements.

SET-OFF AND COUNTERCLAIM.

Sham counterclaim as affecting jurisdictional amount in controversy, see Courts, § 223.

In particular actions or proceedings.

By executor or administrator, see Executors and Administrators, § 434.

For price of timber, see Logs and Logging, § 3.

Particular demands or liabilities.

Benefits in reduction of damages from public improvements, see Municipal Corporations, § 396.

Damages for breach of warranty against claim for price of goods sold, see Sales, § 428.

II. SUBJECT-MATTER.

§ 35. Where the term of an employment contract, which had been breached, had expired, in an action against the servant on a note, the amount the servant was entitled to recover for breach of the contract was available as a proper counterclaim.—*Couturie v. Roensch* (Tex. Civ. App.) 413.

III. OPERATION AND EFFECT.

§ 58. Where, in an action on a note bearing no interest, defendant pleaded and proved a counterclaim for more than the amount of the note, plaintiff could not recover interest after suit brought or attorney's fees.—*Couturie v. Roensch* (Tex. Civ. App.) 413.

SETTING ASIDE.

Account of executor or administrator, see Executors and Administrators, § 509.

Execution, see Execution, § 163.

Judgment, see Judgment, §§ 137-139.

Verdict, see New Trial.

SETTLEMENT.

See Compromise and Settlement; Payment; Release.

Between partners, see Partnership, § 325.

Of accounts of executors or administrators, see Executors and Administrators, § 480.

Of accounts of guardians, see Guardian and Ward, §§ 157-164.

Of accounts of trustees, see Trusts, §§ 315-329.

Of bill of exceptions, see Criminal Law, § 1092.

SEWERS.

Construction by city of sewage disposal plant, see Municipal Corporations, §§ 75, 270.

In cities, power of municipality to make improvements, see Municipal Corporations, § 270.

In cities, special legislation, see Statutes, § 77.

SEXUAL INTERCOURSE.

See Rape; Seduction.

SHAM PLEADING.

Sham counterclaim as affecting amount in controversy, see Courts, § 223.

SHARES.

Of corporate stock, see Corporations, §§ 104-121.

SHELLEY'S CASE.

Rule in, see Wills, § 608.

SHERIFFS AND CONSTABLES.**II. COMPENSATION.**

As collectors of taxes, see Taxation, § 549.

III. POWERS, DUTIES, AND LIABILITIES.

As tax collectors, see Taxation, §§ 545-549.

IV. LIABILITIES ON OFFICIAL BONDS.

§ 137. In view of Rev. St. 1909, § 5325, the storing of dynamite taken from persons arrested by a constable for having explosives in a dwelling *held* not a part of his official duties, so that his sureties were not liable for injuries caused by its explosion.—*State ex rel. Zimmerman v. Schaper* (Mo. App.) 671.

§ 157. The sureties of a public officer are only responsible for his performance of the duties imposed on him by law.—State ex rel. Zimmerman v. Schaper (Mo. App.) 671.

SIDEWALKS.

Injuries from defects or obstructions, see Municipal Corporations, §§ 755-822.

SIGNALS.

From trains, see Railroads, §§ 349, 367-369.

SIGNATURES.

To indictment, see Indictment and Information, § 33.

To memorandum of contract within statute of frauds, see Frauds, Statute of, § 115.

SILENCE.

Element of fraud, see Fraud, § 17.

SIMULATION.

Conveyances and transactions in fraud of creditors, see Fraudulent Conveyances.

SITUS.

Of property for purpose of taxation, see Taxation, § 99.

SLANDER.

See Libel and Slander.

SODOMY.

§ 5. An indictment for sodomy held sufficient.—James v. State (Tex. Cr. App.) 699.

SOLDIERS.

See Militia.

Pensions, see Pensions.

SOLICITORS.

See Attorney and Client.

SPECIAL DEPOSITS.

See Banks and Banking, § 153.

SPECIAL JUDGES.

See Judges, § 19.

SPECIAL LAWS.

See Statutes, §§ 75-77.

SPECIAL PRIVILEGES.

Grant of special privileges or immunities, constitutional prohibition, see Constitutional Law, § 205.

SPECIAL PROCEEDINGS.

See Certiorari; Habeas Corpus; Mandamus; Quo Warranto.

Application for liquor license, see Intoxicating Liquors, § 64.

Establishment of boundaries, see Boundaries, §§ 37-48.

Revocation of liquor license, see Intoxicating Liquors, § 108.

SPECIAL TAX BILL.

See Municipal Corporations, § 284.

SPECIAL TAXES.

For levees, see Levees, §§ 22, 23.

SPECIFIC PERFORMANCE.

I. NATURE AND GROUNDS OF REMEDY IN GENERAL.

§ 4. Specific performance of a contract which would burden land in the hands of an innocent purchaser refused because there was an adequate remedy at law.—Dazey v. Elvin (Mo. App.) 85.

§ 4. Under stated facts, a vendor held not entitled to maintain specific performance.—Clark v. Asbury (Tex. Civ. App.) 286.

§ 8. Specific performance of a contract is not a matter of right, but rests in the sound discretion of a court of equity, which should consider the interest of all parties concerned.—Dazey v. Elvin (Mo. App.) 85.

IV. PROCEEDINGS AND RELIEF.

§ 106. Under Kirby's Dig. §§ 6006, 6011, a party having an interest in the property to which a contract to convey relates is not a necessary or proper party to a suit for its specific performance.—Tombler v. Sumpter (Ark.) 967.

§ 106. As a general rule, the parties to a contract to convey property are the only necessary parties to the suit to enforce its specific performance.—Tombler v. Sumpter (Ark.) 967.

§ 119. The burden of proving a former owner of land insolvent held to be upon one seeking specific performance of a contract which would burden land now in the hands of an innocent purchaser.—Dazey v. Elvin (Mo. App.) 85.

SPEED.

Of horses and vehicles on streets, see Municipal Corporations, § 705.

SPIRITUOUS LIQUORS.

Regulation of manufacture and sale, see Intoxicating Liquors.

SPLITTING CAUSES OF ACTION.

See Action, § 53.

SPOILIATION.

Of instruments, see Alteration of Instruments.

STABLES.

See Livery Stable Keepers.

STALE DEMANDS.

Laches in general, see Equity, §§ 67-71.

STARE DECISIS.

See Courts, § 91.

STATE BANKS.

See Banks and Banking, §§ 116-161.

STATEMENT.

Accompanying assignment of errors, see Appeal and Error, § 742.

Admissions, see Evidence, §§ 205-265.

By accused or other persons as part of res gestæ, see Criminal Law, § 364.

By parties or other persons as part of res gestæ, see Evidence, § 123.

By witness inconsistent with testimony, see Witnesses, §§ 379-392.
 Declarations, see Criminal Law, § 424; Evidence, §§ 269-274.
 Hearsay, see Evidence, §§ 317, 318.
 Of case or facts for purpose of review, see Criminal Law, § 1097.
 Of mechanic's lien, see Mechanics' Liens, §§ 124-154.
 Of plaintiff's demand, see Pleading, § 72.

STATES.

Courts, see Courts.
 Reversion of property to state for want of persons competent to hold, or take, see Escheat.
 State militia, see Militia.

II. GOVERNMENT AND OFFICERS.

Authority of Governor to call militia into service, see Militia, § 15.
 Control by Legislature, of acts, rights, and liabilities, of municipal corporations, see Municipal Corporations, §§ 65-75.
 Mandamus to state boards or officers, see Mandamus, §§ 76-107.

III. PROPERTY, CONTRACTS, AND LIABILITIES.

Disposal of public lands, see Public Lands, §§ 151-175.
 Laws impairing obligation of contracts, see Constitutional Law, § 126.

STATIONS.

Railroad stations, see Railroads, § 58.

STATUTE OF FRAUDS.

See Frauds, Statute of.

STATUTE OF LIMITATIONS.

See Limitation of Actions.

STATUTES.

For statutes relating to particular subjects, see the various specific topics.
 Charging statutory offenses, see Indictment and Information, § 110.
 Constitutionality in general, see Constitutional Law.
 Laws impairing obligation of contracts, see Constitutional Law, § 126.
 Municipal ordinances, see Municipal Corporations, § 108.
 Statute of frauds, see Frauds, Statute of; Limitation of Actions.
 Statutory bonds, see Bonds, § 50.
 Validity of retrospective and ex post facto laws, see Constitutional Law, § 191.

I. ENACTMENT, REQUISITES, AND VALIDITY IN GENERAL.

Legislative power to determine sufficiency of notice, see Constitutional Law, § 70.

§ 5. Under Const. art. 4, § 55 (Ann. St. 1906, p. 204), the Legislature convened in extra session *held* authorized to enact any law which the Governor by special message recommends, notwithstanding article 5, § 9 (page 207).—State v. Rawlings (Mo.) 530.

II. GENERAL AND SPECIAL OR LOCAL LAWS.

Grant of special privileges or immunities, see Constitutional Law, § 205.

§ 75. Acts 1906, p. 986, enacted while Act May 17, 1907, amending Act April 5, 1907

(Acts 1907, pp. 356, 821), was in force, *held* not violative of Const. art. 5, § 24, relating to suspension of general laws.—St. Louis Southwestern Ry. Co. v. State (Ark.) 970.

§ 76. Acts 1909, p. 986, enacted while Act May 17, 1907, amending Act April 5, 1907 (Acts 1907, pp. 356, 821), was in force, *held* not violative of Const. art. 5, § 24, providing that in all cases where a general law can be made applicable no special law shall be enacted.—St. Louis Southwestern Ry. Co. v. State (Ark.) 970.

§ 76. Validity of special law *held* to depend on whether general law can be made applicable whether one has been passed or not.—St. Louis Southwestern Ry. Co. v. State (Ark.) 970.

§ 77. Sess. Laws 1895, p. 58, *held* not to violate Const. art. 9, § 7 (Ann. St. 1906, p. 260) relating to the classification of municipal powers.—Hall v. City of Sedalia (Mo.) 650.

III. SUBJECTS AND TITLES OF ACTS.

§ 114. The title of Laws 1907, p. 231, *held* sufficient within Const. art. 4, § 28 (Ann. St. 1906, p. 185), to support a provision of the law.—State v. Rawlings (Mo.) 530.

§ 114. Under Const. art. 4, § 28 (Ann. St. 1906, p. 185), the title of Laws 1907, p. 231, *held* not sufficient to include a specified provision.—State v. Rawlings (Mo.) 530.

§ 124. That it may be within the title of Acts 1905, c. 233, *held*, a provision of section 19 should be construed to apply only to counties of the population provided by the title.—Darnell v. State (Tenn.) 307.

IV. AMENDMENT, REVISION, AND CODIFICATION.

Amendment of act relating to levee, see Levees, § 2.

V. REPEAL, SUSPENSION, EXPIRATION, AND REVIVAL.

Repeal of statute relating to levees, see Levees, § 2.

Repeal of statutes relating to collection of taxes, see Taxation, § 545.

§ 168. Act March 15, 1909 (Laws 1909, p. 163, § 4), creating the Crawford County Levee District, which was amended by Act April 23, 1909 (Laws 1909, p. 472, § 1), *held* not repealed by the amending act, that being invalid, so that the district could proceed to levy assessments under the original act.—Alexander v. Board of Directors of Crawford County Levee Dist. (Ark.) 618.

VI. CONSTRUCTION AND OPERATION.

(A) General Rules of Construction.

Laws relating to liability of sureties on contractor's bond, see Municipal Corporations, § 347.

Law requiring verification of petition in suit to foreclose lien for taxes, see Taxation, § 643.

§ 205. In order to correctly construe a statute, it is necessary to ascertain what its subject is.—School Dist. No. 61 v. McFarland (Mo. App.) 673.

§ 212. The court should not assume that a statutory provision means nothing.—National Bank of the Republic v. Current (Ky.) 479.

§ 220. Courts are not bound by the Legislature's erroneous construction of a statute.—Hall v. City of Sedalia (Mo.) 650.

§ 231. Where the law construed is a revision, the old law may be considered to deter-

mine what change was made in the law.—National Bank of the Republic v. Current (Ky.) 479.

(B) Particular Classes of Statutes.

§ 241. Rev. St. 1899, § 1017, providing a penalty for a corporation's failure to make certain reports to the secretary of state, must be strictly construed.—State ex rel. Lawrence County v. Grier Land & Mining Co. (Mo. App.) 1087.

(D) Retroactive Operation.

Constitutionality of retroactive and ex post facto laws, see Constitutional Law, § 191.
Laws relating to public lands, see Public Lands, § 173.

VII. PLEADING AND EVIDENCE.

Judicial notice, see Evidence, § 35.
Presumptions as to laws of other states, see Evidence, § 80.

STATUTES CONSTRUED

UNITED STATES.

CONSTITUTION.

Art. 1, § 8..... 970

STATUTES AT LARGE.

1887, Feb. 4, ch. 104, 24
Stat. 379 (U. S. Comp.
St. 1901, p. 3154)..... 866

1887, Feb. 4, ch. 104, § 20,
24 Stat. 386 (U. S.
Comp. St. 1901, p. 3169).
Amended by Act 1906,
June 29, ch. 3591, § 7, 34
Stat. 595 (U. S. Comp.
St. Supp. 1909, p. 1168)
..... 275, 665

1888, Aug. 13, ch. 806, § 3,
25 Stat. 436 (U. S. Comp.
St. 1901, p. 582)..... 273

1904, April 28, ch. 1759, 33
Stat. 436..... 33

1906, June 29, ch. 3591, §
7, 34 Stat. 595 (U. S.
Comp. St. Supp. 1909, p.
1168) ... 275, 665, 778, 1061

COMPILED STATUTES

1901.

Page 582 273
Page 3154 866
Page 3169 275, 665

**COMPILED STATUTES
SUPP. 1909.**

Page 1166.....
..... 275, 665, 778, 1061

ARKANSAS.

CONSTITUTION.

Art. 5, §§ 24, 26..... 970
Art. 7, § 40..... 634

KIRBY'S DIGEST.

§§ 1227, 1228..... 617
§ 1500 631
§ 2100 623
§ 2754 et seq..... 931
§ 3630 959
§ 4348 951
§ 5149 948
§ 5396 627
§§ 6006, 6011..... 967
§ 6102 1187
§ 6290 949
§§ 7095, 7812..... 973

LAWS.

1905, pp. 408, 409, §§ 1-5 634
1905, p. 492, § 4..... 951
1907, p. 356. Amended by
Laws 1907, p. 821..... 970
1907, p. 821..... 970
1907, pp. 1170, 1171..... 1193

1909, p. 163, § 4. Amend-
ed by Laws 1909, p. 472,
§ 1..... 618
1909, p. 472, § 1..... 618
1909, p. 986..... 970

IOWA.

CODE 1897.

§ 2074..... 1061

KENTUCKY.

CONSTITUTION.

3 458
69 484
143 890
157 458
187 1151
192 1142

**CIVIL CODE OF PRAC-
TICE.**

113, subsec. 8..... 1159
132 922
134 809, 922, 1122
135 922
315 182
425 161
452, subsec. 4..... 150
§§ 474-477..... 1127
491 882
§§ 597, 598..... 1135
606, subsec. 2..... 902
755 191
760 475

**CRIMINAL CODE OF
PRACTICE.**

36..... 484
§§ 188, 189..... 174
240 1135

GENERAL STATUTES 1873.

Ch. 48, art. 1, § 12..... 1148
Ch. 113, § 4..... 498

STATUTES 1894.

§ 1852 894

STATUTES 1903.

§ 4111..... 463

STATUTES 1909.

§ 331a, subsecs. 1, 2, 11
(Russell's St. §§ 3237,
3238, 3247)..... 200
§ 448 (Russell's St. § 5a1) 168
§ 470 (Russell's St. §
1775)..... 494, 1121
§ 508 (Russell's St. §
2076)..... 1166
§ 550 (Russell's St. § 2134) 165
§ 561 (Russell's St. §
2147)..... 1142
§ 723 (Russell's St. § 4364) 481

§ 806 (Russell's St. § 5350) 143
§ 900 (Russell's St. § 2687) 138
§ 950 (Russell's St. §
2784) 1141, 1150
§ 1130 (Russell's St. §
3154) 456
§ 1475 (Russell's St. §
4034) 469
§ 1627 (Russell's St. § 86) 456
§ 1840 (Russell's St. §
2975) 176
§§ 1845, 1889 (Russell's St.
§§ 2979, 3025)..... 1128
§ 1910 (Russell's St. §
2104) 196
§ 2068 (Russell's St. §
3844) 153
§ 2128 (Russell's St. §
4631) 1166
§ 2147 (Russell's St. §
4654) 498
§ 2463 (Russell's St. §
2383) 1156
§ 2505 (Russell's St. §
212) 474, 1142
§§ 2506-2508 (Russell's St.
§§ 213-215)..... 474
§ 2519 (Russell's St. §
229) 1148
§ 2554 (Russell's St. §
4054) 148
§ 2558a (Russell's St. §
3646) 160
§ 2560 (Russell's St. §
4059) 460
§ 2566 (Russell's St. §
4063) 148
§§ 2672-2674 (Russell's St.
§§ 4695-4697)..... 484
§ 2971 (Russell's St. §
850) 1142
§§ 3094, 3096 (Russell's St.
§§ 1205, 1207)..... 503
§ 3290 (Russell's St. §
1307) subsec. 4..... 921
§ 3651 (Russell's St. §
1662) 890
§§ 3858, 3859 (Russell's St.
§§ 3888, 3889)..... 481
§§ 4019-4231s (Russell's
St. §§ 5904-6230)..... 463
§§ 4215, 4216, 4223 (Rus-
sell's St. §§ 6159, 6158,
1800) 479
§ 4313 (Russell's St. §
5446) 1127
§§ 4318, 4318a (Russell's
St. §§ 5462, 5463)..... 176
§ 4481 (Russell's St. §
5758) 168
§§ 4659, 4663, 4664 (Rus-
sell's St. §§ 2027, 2031,
2032) 481
§§ 4702-4704 (Russell's St.
§§ 2758a1-2758a3)..... 441
§ 4748b (Russell's St. §§
5492-5507) 1126
§§ 4839, 4845 (Russell's St.
§§ 3962, 3968)..... 498

RUSSELL'S STATUTES.

§ 5a1 (St. 1909, § 448)...	168
§ 86 (St. 1909, § 1627)...	456
§ 212 (St. 1909, § 2505)...	474, 1142
§§ 213-215 (St. 1909, §§ 2506-2508)...	474
§ 229 (St. 1909, § 2519)...	1148
§ 850 (St. 1909, § 2971)...	1142
§§ 1205, 1207 (St. 1909, §§ 3094, 3096)...	503
§ 1307 (St. 1909, § 3290) subsec. 4...	921
§ 1662 (St. 1909, § 3851)...	890
§ 1775 (St. 1909, § 470)...	494, 1121
§ 1800 (St. 1909, § 4223)...	479
§§ 2027, 2031, 2032 (St. 1909, §§ 4659, 4663, 4664)...	481
§ 2076 (St. 1909, § 506)...	1166
§ 2104 (St. 1909, § 1910)...	196
§ 2134 (St. 1909, § 550)...	165
§ 2147 (St. 1909, § 561)...	1142
§ 2383 (St. 1909, § 2463)...	1156
§ 2687 (St. 1909, § 900)...	138
§§ 2758a1-2858a3 (St. 1909, §§ 4702-4704)...	441
§ 2784 (St. 1909, § 950)...	1141, 1159
§ 2975 (St. 1909, § 1840)...	176
§§ 2979, 3025 (St. 1909, §§ 1845, 1889)...	1126
§ 3154 (St. 1909, § 1130)...	456
§§ 3237, 3238, 3247 (St. 1909, § 331a, subsecs. 1, 2, 11)...	200
§ 3646 (St. 1909, § 2558a)...	160
§ 3844 (St. 1909, § 2068)...	153
§§ 3888, 3889 (St. 1909, §§ 3858, 3859)...	481
§§ 3962, 3968 (St. 1909, §§ 4839, 4845)...	498
§ 4034 (St. 1909, § 1475)...	469
§ 4054 (St. 1909, § 2554)...	148
§ 4059 (St. 1909, § 2560)...	469
§ 4063 (St. 1909, § 2568)...	148
§ 4364 (St. 1909, § 723)...	481
§ 4631 (St. 1909, § 2128)...	1166
§ 4654 (St. 1909, § 2147)...	498
§§ 4695-4697 (St. 1909, §§ 2672-2674)...	484
§ 5350 (St. 1909, § 806)...	143
§ 5446 (St. 1909, § 4313)...	1127
§§ 5462, 5463 (St. 1909, §§ 4318, 4318a)...	176
§§ 5492-5507 (St. 1909, § 4748b)...	1126
§ 5758 (St. 1909, § 4481)...	168
§§ 5904-6230 (St. 1909, §§ 4019-4281a)...	463
§§ 6158, 6159 (St. 1909, §§ 4216, 4215)...	479

PRIVATE LAWS.

1879-80, ch. 871.....	894
-----------------------	-----

LAWS.

1869, ch. 1872, § 7.....	894
1873, ch. 40. Amended by St. 1909, § 2558a (Russell's St. § 3646).....	160
1894, ch. 76.....	498
1904, ch. 40.....	463
1910, ch. 8.....	458
1910, ch. 8, § 1.....	458

MISSOURI.

CONSTITUTION.

Art. 4, §§ 28, 53, 55 (Ann. St. 1906, pp. 185, 197, 204).....	530
Art. 5, § 9 (Ann. St. 1906, p. 207).....	530

Art. 6 (Ann. St. 1906, p. 212).....	538
Art. 8, § 9 (Ann. St. 1906, p. 255).....	511
Art. 9, § 7 (Ann. St. 1906, p. 260).....	650
Art. 9, § 16.....	1007

AMENDMENT 1884.
(COURTS OF APPEALS.)

§ 6 (Ann. St. 1906, p. 244).....	537
----------------------------------	-----

REVISED STATUTES 1889.

§§ 6856-6870.....	118
-------------------	-----

REVISED STATUTES 1899.

§§ 74-78 (Ann. St. 1906, pp. 362-364).....	1051
§§ 105, 107 (Ann. St. 1906, pp. 372, 373).....	33
§ 626 (Ann. St. 1906, p. 650).....	665
§ 1017 (Ann. St. 1906, p. 967).....	1087
§ 1972 (Ann. St. 1906, p. 1312).....	38
§§ 2369, 2535 (Ann. St. 1906, pp. 1457, 1509).....	555
§ 2689 (Ann. St. 1906, p. 1587).....	571
§ 2800 (Ann. St. 1906, p. 1619).....	562
§ 3012 (Ann. St. 1906, p. 1727).....	120
§ 3031 (Ann. St. 1906, p. 1737).....	588
§ 3649 (Ann. St. 1906, p. 2055).....	673
§§ 6067, 6075 (Ann. St. 1906, pp. 3049, 3063).....	87
§§ 6761, 6762 (Ann. St. 1906, p. 3328).....	18
§ 7056 (Ann. St. 1906, p. 3424).....	511
§ 7897 (Ann. St. 1906, p. 3752).....	60, 100, 102, 676
§ 7898 (Ann. St. 1906, p. 3753).....	60
§ 7899 (Ann. St. 1906, pp. 3754).....	60, 102
§ 7900 (Ann. St. 1906, p. 3755).....	60, 102, 676
§§ 9742, 9860-9879a (Ann. St. 1906, pp. 4463, 4519-4530).....	673

ANNOTATED STATUTES 1906.

Pages 185, 197, 204, §§ 28, 53, 55.....	530
Page 207, § 9.....	530
Page 212.....	538
Page 244, § 6.....	537
Page 255, § 9.....	511
Page 260, § 7.....	650
§§ 74-78.....	1051
§§ 105, 107.....	33
§ 626.....	665
§ 1017.....	1087
§ 1927.....	38
§§ 2369, 2535.....	555
§ 2689.....	571
§ 2800.....	562
§ 3012.....	120
§ 3031.....	588
§ 3649.....	673
§§ 6067, 6075.....	87
§§ 6761, 6762.....	18
§ 7056.....	511
§ 7897.....	60, 100, 102, 676
§ 7898.....	60
§ 7899.....	60, 102
§ 7900.....	60, 102, 676
§§ 9742, 9860-9879.....	673

REVISED STATUTES 1909.

§§ 70-74.....	1051
§§ 114-117.....	1097
§ 220.....	993
§§ 351, 353.....	1097
§ 583.....	596
§ 965.....	116
§ 1751, subsec. 4.....	1056
§ 1752.....	1056
§§ 1846, 1847.....	111, 123
§ 1850.....	1112
§ 1972.....	993
§ 1980.....	18
§ 2082.....	1112
§ 2094.....	85
§§ 2306, 2314.....	1056
§§ 2442, 2456.....	977
§ 2769.....	1042
§ 2868.....	51
§ 3049.....	1034
§§ 3926, 3939.....	538
§ 4472.....	629
§ 4489.....	529
§ 4492.....	519
§§ 4720, 4721.....	528
§ 4750.....	513
§ 4818.....	1076
§ 4903.....	555
§ 4904.....	509
§ 5019.....	562
§§ 5067, 5068.....	549
§ 5107.....	545
§ 5115.....	530, 545, 555
§§ 5130, 5132.....	562
§ 5231.....	509, 516, 535
§§ 5242, 5254.....	545
§§ 5263, 5264.....	537
§ 5285.....	571
§ 5325.....	671
§ 5431.....	1045
§ 5951.....	511
§ 6354.....	1095
§§ 6356, 6384, 6404.....	977
§ 6946.....	100, 102
§ 7227.....	530
§ 7656.....	1029
§ 7657.....	1110

CITY CHARTERS.

Kansas City, art. 1, § 17.....	1007
Kansas City, art. 10, § 5.....	87

LAWS.

1895, p. 58.....	650
1907, p. 231.....	530

TENNESSEE.

CODE 1858.

§ 3981. Amended by Laws 1883, ch. 198.....	307
§§ 3988, 4010.....	307

SHANNON'S CODE.

§ 4030.....	311
§ 4446, 4585.....	306
§ 4898.....	858
§ 5892, subsec. 3.....	858
§§ 6471, 7206.....	306

LAWS.

1805, ch. 45, § 2.....	858
1871, ch. 59.....	858
1883, ch. 198.....	307
1885, ch. 65, §§ 1, 2.....	858
1899, ch. 40.....	858
1905, ch. 233, §§ 4, 5, 7, 8, 11-13, 18.....	307

TEXAS.

CONSTITUTION.

Art. 1, § 17.....	373
Art. 5, § 11.....	225

Art. 7, § 2	746	Art. 1340	323	Dallas, art. 2, § 8, pars. 7,	
Art. 8, § 1	787	Art. 1371. Amended by		27. Sp. Laws 1907, ch.	
Art. 11, § 7	823	Laws 1905, ch. 18.....	824	71	321
Art. 14, § 7	787	Art. 1465	855	Dallas, art. 3, par. 1. Sp.	
Art. 16, § 20	696	Art. 1670	409	Laws 1907, ch. 71.....	321
Art. 16, § 44	267	Arts. 2306, 2308, 2312.....	695	Dallas, art. 8, par. 1. Sp.	
		Art. 2343	323	Laws 1907, ch. 71.....	321
CODE OF CRIMINAL PRO-		Art. 2467	267		
CEDURE 1895.		Art. 3011	345	SPECIAL LAWS.	
Art. 414	218	Art. 3017, cl. 2.....	379	1907, ch. 71, art. 2, § 1,	
Arts. 432, 439.....	215	Art. 3102	413	par. 2.....	321
Art. 559	218	Art. 3106. Amended by		1907, ch. 71, art. 2, § 8,	
Art. 565	215	Laws 1907, ch. 143.....	302	para. 7, 27.....	321
Art. 598	690	Art. 3353a	736	1907, ch. 71, art. 3, par. 1	321
Art. 753	234	Art. 3395	696	1907, ch. 71, art. 8, par. 1	321
Art. 764	695	Art. 5345	210		
Arts. 769, 781.....	709			LAWS.	
Art. 817	690	SAYLES' ANNOTATED CIV-		1876, ch. 33	696
Art. 887	687	IL STATUTES 1897.		1881, ch. 106	746
Art. 1145. Amended by		Arts. 381, 419.....	833	1897, ch. 88, § 1.....	746
Laws 1909, ch. 54.....	234	Art. 430	685	1900 (1st Called Sess.) cha.	
PENAL CODE 1895.		Arts. 579, 594	833	11. 81.....	746
Art. 402. Amended by		Arts. 1188, 1189	767	1901, ch. 26	239
Laws 1909 (1st Called		Art. 1191	804	1903, ch. 94	400
Sess.) ch. 35.....	696	Art. 1301	839	1905, ch. 18	824
Art. 600	702	Art. 1483	273	1907, ch. 123, § 4.....	736
Art. 680	1180	Art. 2989, subsec. 1.....	373	1907, ch. 123, § 113, sub-	
		Art. 3240	270	sec. 2.....	736
REVISED STATUTES 1895.		Arts. 3339a-3339c.....	208	1907, ch. 143.....	302
Arts. 326, 331a	328	Art. 3391	763	1907, (Ex. Sess.) ch. 7....	851
Arts. 656, 661	429	Art. 4651	1184	1909, ch. 10	819
Art. 1018	1183	Art. 5062	787	1909, ch. 17, §§ 7, 9, 15...	829
Art. 1108	1178	Art. 5232f	761	1909, ch. 34, § 2.....	272
Art. 1298	409			1909, ch. 54	234
Art. 1317	294	CITY CHARTERS.		1909, (1st Called Sess.) ch.	
Art. 1333	851	Dallas, art. 2, § 1, par. 2.		35	696
		Sp. Laws 1907, ch. 71... 321			

STAY.

Arrest of judgment, see Judgment, § 269.

STEALING.

See Burglary; False Pretenses; Kidnapping; Larceny.

STIFLING.

Competition, see Monopolies.

STOCK.

Live stock, see Animals.

Live stock, carriage of, see Carriers, §§ 203-230.

Live stock, injuries to by operation of railroad, see Railroads, §§ 446, 447.

Of corporation or association, see Corporations, §§ 104-121.

STREET RAILROADS.

See Railroads.

Carriage of passengers, see Carriers, §§ 236-247, 280-321, 327-347, 353-382.

Judicial notice of ownership, see Evidence, § 22.

I. ESTABLISHMENT, CONSTRUCTION, AND MAINTENANCE.

Injuries to passengers, see Carriers, § 284.

II. REGULATION AND OPERATION.

Injuries to passengers, see Carriers, §§ 280-321, 327-347.

Liability of railroad company, see Railroads, § 288.

Negligence of carrier imputable to passenger, see Negligence, § 92.

§ 81. It is negligence to run a street car over a busy street at the speed of an express

train.—Gordon v. Metropolitan St. Ry. Co. (Mo. App.) 26.

§ 86. A street railway which maintains a dangerous switch on a street is guilty of negligence, even if it does not practically prevent public use of the highway.—*Asmus v. United Rys. Co. of St. Louis* (Mo. App.) 92.

§ 86. Under St. Louis city charter, street car companies must keep the streets within a certain distance of their rails in repair and keep the street as near even with the top of the rails as possible, and a company is liable for its failure both to the city and a private person.—*Asmus v. United Rys. Co. of St. Louis* (Mo. App.) 92.

§ 93. A motorman approaching a car on the adjacent track from which passengers are alighting must keep a sharp lookout, and must give timely notice of his approach.—*Creamer v. Louisville Ry. Co. (Ky.)* 193.

§ 93. A street car passenger alighting from a car and going behind it to cross a parallel track, on which cars are run in the opposite direction, *held* entitled to recover for injury sustained from a collision with car on the parallel track.—*Creamer v. Louisville Ry. Co. (Ky.)* 193.

§ 93. A street car motorman *held* not entitled to assume that one approaching the track will stop in a place of safety.—*Gordon v. Metropolitan St. Ry. Co. (Mo. App.)* 26.

§ 93. That a street railway company permitted so large a number of passengers to occupy a car as to heavily load it while on a sharp ascent in the street did not show actionable negligence to a traveler on the street.—*De Glopper v. Nashville Ry. & Light Co. (Tenn.)* 606.

§ 93. Evidence *held* not to show actionable negligence of a street railway company in the operation of a car, causing injury to a traveler

on the street.—*De Glopper v. Nashville Ry. & Light Co.* (Tenn.) 609.

§ 95. In an action for injuries to a pedestrian in a collision with a street car at a crossing, the court properly charged that it was the duty of a motorman approaching a public crossing where people might reasonably be expected to be to keep a lookout ahead for people and vehicles on the track.—*Louisville Ry. Co. v. Bryant* (Ky.) 182.

§ 98. Plaintiff in an action for personal injuries against a street railway company held guilty of contributory negligence.—*Paul v. United Rys. Co. of St. Louis* (Mo. App.) 3.

§ 98. Where a person crossing a street railroad track could by looking discover the true facts as to whether a car was approaching, he cannot go ahead on the assumption that a car will not approach at a high rate of speed.—*Paul v. United Rys. Co. of St. Louis* (Mo. App.) 3.

§ 98. Conduct of a person crossing a street over a street car track held to be negligence in law, precluding a recovery for his death.—*Gordon v. Metropolitan St. Ry. Co.* (Mo. App.) 26.

§ 112. On the evidence in an action against a street railway company for personal injuries, held, that the doctrine of last chance had no bearing.—*Paul v. United Rys. Co. of St. Louis* (Mo. App.) 3.

§ 112. Where plaintiff in an action for personal injuries against a street railroad does not show familiarity with or reliance upon a speed ordinance, it will not be presumed that he relied upon its observance.—*Paul v. United Rys. Co. of St. Louis* (Mo. App.) 3.

§ 117. In an action against a street railway company for the death of a teamster alleged to have been caused by the maintenance of a certain kind of switch, the question of negligence in maintaining such a switch held under the evidence for the jury.—*Asmus v. United Rys. Co. of St. Louis* (Mo. App.) 92.

§ 118. In an action for injuries in a collision with a street car, a charge held to sufficiently submit the issue of contributory negligence.—*Creamer v. Louisville Ry. Co.* (Ky.) 193.

§ 118. In an action against a street railway company for a wrongful death, instructions held to properly present the issues.—*Asmus v. United Rys. Co. of St. Louis* (Mo. App.) 92.

§ 118. In an action against a street railway company for a wrongful death, an instruction held not warranted by the pleadings.—*Asmus v. United Rys. Co. of St. Louis* (Mo. App.) 92.

§ 118. In an action for death of a pedestrian by being struck by a street car, an instruction on discovered peril held erroneous.—*Gehring v. Galveston Electric Co.* (Tex. Civ. App.) 288.

STREETS.

See Highways.

Crossing by railroads, accidents at crossings, see Railroads, §§ 301-351.

Dedication of, see Dedication.

Improvement of, see Municipal Corporations, §§ 347-547.

Injuries from defects or obstructions, see Municipal Corporations, § 822.

Injuries to persons on street by collision with street cars, see Street Railroads, §§ 81-118.

Use and regulation in general, see Municipal Corporations, §§ 671-706.

STRIKING OUT.

Evidence, see Trial, § 89.

Matter from record, on appeal or other proceeding for review, see Appeal and Error, § 655.

SUBLETTING.

See Landlord and Tenant, § 80.

SUBROGATION.

§ 26. When one paying another's debt may procure an assignment thereof and enforce it against the debtor, stated.—*Cape Girardeau Bell Telephone Co. v. Hamil's Estate* (Mo. App.) 1103.

SUBSTITUTES.

For public officers, see Judges, § 19.

SUBSTITUTION.

Of words in construction of will, see Wills, § 461.

SUCCESSION.

See Descent and Distribution.

SUFFERANCE.

Tenancy at sufferance, see Landlord and Tenant, §§ 119, 120.

SUFFRAGE.

In general, see Elections.

SUIT.

See Action; Equity.

SUMMARY PROCEEDINGS.

For collection of taxes, see Taxation, § 593.

SUNDAY.

Documentary evidence in prosecution for violating Sunday law, see Criminal Law, § 440.

§ 29. On a trial for permitting a theatrical performance on Sunday, testimony of witnesses as to what took place in the building on the occasion was admissible.—*Gould v. State* (Tex. Cr. App.) 695.

§ 29. An information held to charge a violation of the Sunday law, by permitting a theatrical performance on Sunday.—*Gould v. State* (Tex. Cr. App.) 695.

SUPERINTENDENTS.

Liability of master for injuries to servant from acts or omissions of persons engaged in superintendence, see Master and Servant, § 189.

SUPERVISORS.

Of highways, see Highways, §§ 93, 94.

Of road, mandamus to compel allowance of claim for compensation, see Mandamus, §§ 107, 176.

Of roads, mandamus to compel appointment, see Mandamus, § 76.

SUPERVISORY CONTROL.

Writs of, see Mandamus.

SUPPLEMENTAL PLEADING.

See Pleading, § 276.

SUPPORT.

Of children, see Parent and Child, §§ 8, 17.

SUPREME COURTS.

Of states, see Courts, §§ 223-231.

SURETYSHIP.

See Principal and Surety.

SURFACE WATERS.

See Waters and Water Courses, § 119.

SURGEONS.

See Physicians and Surgeons.

SURPRISE.

Ground for new trial, see Criminal Law, § 936.

SURRENDER.

Of principal in bail bond, see Bail, § 80.

SURVIVAL.

Of cause of action, see Abatement and Revival, § 54.

SURVIVORSHIP.

Allowances to surviving wife, husband, or children from estate of decedent, see Executors and Administrators, §§ 173-189.
Rights and liabilities of survivor of community as to community property, see Husband and Wife, § 273.

SUSPENSION.

Of running of statute of limitations, see Limitation of Actions, §§ 95-100, 107.

SWINDLING.

See False Pretenses.

TACKING.

Successive possessions, see Adverse Possession, § 43.

TAXATION.*Local or special taxes.*

See Counties, § 191.

For construction and maintenance of levees, see Levees, §§ 22, 23.

For municipal improvements, see Municipal Corporations, § 567.

Occupation or privilege taxes.

Sale of intoxicating liquors, see Intoxicating Liquors, §§ 64-108.

II. CONSTITUTIONAL REQUIREMENTS AND RESTRICTIONS.

§ 40. A direction to an assessor to assess mineral rights severed from the surface in a conveyance *held* not to render such assessment invalid for inequality.—State v. Downman (Tex. Civ. App.) 787.

§ 40. An assessment of mineral rights severed from the ownership of the surface *held* not invalid because the owners of the surface were required to pay the same tax as other owners who had not severed the mineral rights in their land.—State v. Downman (Tex. Civ. App.) 787.

III. LIABILITY OF PERSONS AND PROPERTY.**(A) Private Persons and Property in General.**

§ 63. Under Const. art. 14, § 7, art. 8, § 1, and Sayles' Ann. Civ. St. 1897, art. 5062, a deed to mineral rights *held* a severance in ownership of the minerals from the surface of the ground, authorizing taxation of the grantee's interest as an interest in land.—State v. Downman (Tex. Civ. App.) 787.

§ 63. Minerals contained in land are property, and when severed from the land by a proper conveyance may be taxed separately from the land itself.—State v. Downman (Tex. Civ. App.) 787.

§ 99. The foreign executor of a nonresident testator should while the estate is in his hands for settlement and distribution list for taxation and pay the taxes on personal property of the estate at the place of his qualification, without regard to the residence of the beneficiaries.—Commonwealth v. Camden (Ky.) 914.

V. LEVY AND ASSESSMENT.**(C) Mode of Assessment in General.**

§ 357. The foreign executor of a nonresident testator should while the estate is in his hands for settlement and distribution list for taxation, and pay the taxes on personal property of the estate at the place of his qualification, without regard to the extent or character of the debts of the estate.—Commonwealth v. Camden (Ky.) 914.

(E) Assessment Rolls or Books.

§ 446. In an action to recover taxes on a mineral interest in certain land, evidence *held* insufficient to warrant a finding that it was intended in an assessment of the surface to include the mineral interest.—State v. Downman (Tex. Civ. App.) 787.

§ 446. Introduction of tax roll showing an assessment of a mineral interest severed from the ownership of the surface of the land, *held* to establish a prima facie case for the state, in an action to recover taxes.—State v. Downman (Tex. Civ. App.) 787.

VIII. COLLECTION AND ENFORCEMENT AGAINST PERSONS OR PERSONAL PROPERTY.**(A) Collectors and Proceedings for Collection in General.**

§ 545. Act March 15, 1906 (Ky. St. §§ 4019-4281s [Russell's St. §§ 5904-6230]), *held* to repeal so much of Acts 1904, c. 40, as authorized payment of taxes levied on warehouse spirits to the county clerk, and re-enacted so much of the act of 1902 (St. 1903, § 4111) as required such payment to the proper officer of the city, county, town, or taxing district.—Anderson County v. Collins (Ky.) 463.

§ 549. Where a county clerk collected taxes that it was the duty of the sheriff to collect, the county was liable to the sheriff for fees he would have earned.—Anderson County v. Collins (Ky.) 463.

(B) Summary Remedies and Actions.

§ 593. Where a conveyance of mineral rights operated to sever the ownership of the minerals from the ownership of the surface, the burden was on the grantee resisting a tax on his interest to show that the land did not contain minerals.—State v. Downman (Tex. Civ. App.) 787.

IX. SALE OF LAND FOR NONPAYMENT OF TAX.

§ 643. Sayles' Ann. Civ. St. 1897, art. 5232i, providing for verification of a petition by the

state to recover taxes is directory only, so that a failure to comply therewith is not a jurisdictional defect.—*Todd v. State* (Tex. Civ. App.) 761.

X. REDEMPTION FROM TAX SALE.

§ 699. The right to redeem from a tax sale, given by Kirby's Dig. § 7095, *held* to inhere in the land and to pass to the heirs on the death of the insane owner.—*Pulaski County v. Hill* (Ark.) 973.

§ 699. One *held* an insane person within Kirby's Dig. § 7095.—*Pulaski County v. Hill* (Ark.) 973.

XI. TAX TITLES.

(A) Title and Rights of Purchaser at Tax Sale.

§ 734. A sale of land for taxes which had been in fact paid passes no title.—*Wilson v. Rogers* (Ark.) 318.

(C) Actions to Confirm or Try Title.

§ 790. Remedy against an irregular tax sale stated.—*Shelton v. Horrell* (Mo.) 988.

§ 796. Title by adverse possession of seven years is sufficient to support an action to quiet title against one claiming under a void tax sale.—*Wilson v. Rogers* (Ark.) 318.

§ 805. Plaintiff *held* barred by laches from suing to quiet title against a tax deed.—*Shelton v. Horrell* (Mo.) 988.

§ 809. A bill to quiet title against a tax deed *held* bad for failing to aver notice to defendants of irregular acts.—*Shelton v. Horrell* (Mo.) 988.

§ 816. A judgment *held* not to bar an action to redeem from a tax sale.—*Pulaski County v. Hill* (Ark.) 973.

TAX BILLS.

See Municipal Corporations, § 284.

TECHNICAL ERRORS.

See Appeal and Error, § 1170.

TECHNICAL WORDS.

Construction of in will, see Wills, § 457.

TELEGRAPHS AND TELEPHONES.

I. ESTABLISHMENT, CONSTRUCTION, AND MAINTENANCE.

Election of remedy against telephone company, see Election of Remedies, § 7.

II. REGULATION AND OPERATION.

Enactment of ordinances regulating charges, see Municipal Corporations, § 108.

§ 66. In an action for delay in the transmission of a telegraph message, certain evidence *held* admissible.—*Western Union Telegraph Co. v. Landry* (Tex. Civ. App.) 848.

§ 67. A message of a daughter to her father *held* to give notice to the telegraph company that she expected some one of her near relatives, including her father, to come to her.—*Western Union Telegraph Co. v. Landry* (Tex. Civ. App.) 848.

TEMPORARY INJUNCTION.

See Injunction, §§ 132-158.

TENANCY.

Cotenants, see Joint Tenancy.
For years, see Landlord and Tenant, § 80.

TENANCY IN COMMON.

See Joint Tenancy.

Partition of property held in common, see Partition.

II. MUTUAL RIGHTS, DUTIES, AND LIABILITIES OF COTENANTS.

§ 15. Limitations do not run in favor of one joint owner in exclusive possession, unless his possession was adverse to the other joint owners, who had notice of his claim of ownership of the whole.—*Middleton v. Fields* (Ky.) 180.

§ 19. The purchase of an outstanding title by defendant *held* to have been made while he was a tenant in common with complainant of the land in controversy, so that such purchase inured to their joint benefit.—*Cornett v. Burchfield* (Ky.) 468.

TENDER.

Of amount received in settlement of insurance policy as condition precedent to action on policy, see Insurance, § 612.

TERM.

Of lease, see Landlord and Tenant, § 80.

Of preliminary injunction, see Injunction, § 158.

TERMINATION.

Of authority of trustee, see Trusts, §§ 163-168.

Of employment, see Master and Servant, §§ 24-39.

Of relation of carrier and passenger, see Carriers, § 247.

Of tenancy, see Landlord and Tenant, § 120.

TESTAMENT.

See Wills.

TESTAMENTARY CAPACITY.

See Wills, § 28.

TESTAMENTARY POWERS.

See Powers, § 33.

TESTIMONY.

See Depositions; Evidence; Witnesses.

THEATERS AND SHOWS.

Violation of Sunday laws, see Sunday, § 29.

THEFT.

See Burglary; Larceny.

THREATS.

Evidence of, in prosecutions for homicide, see Homicide, § 158.

§ 1. One *held* not guilty of violating Pen. Code, art. 600, punishing one who by threats prevents another from engaging in any lawful employment.—*Franklin v. State* (Tex. Cr. App.) 702.

TIMBER.

See Logs and Logging.

Cutting and removing, damages, see Trespass, § 52.

TIME.

Computation of period of limitation, see Limitation of Actions, §§ 49-107.

Materiality of allegations of time, see Pleading, § 33.

Of accrual of right of action within statute of limitations, see Limitation of Actions, § 49.

Of accrual of right to devise or legacy, see Wills, § 733.

For particular acts in or incidental to judicial proceedings.

Appeal or other proceeding for review, see Appeal and Error, § 345.

Filing conclusions of law and fact, see Trial, § 403.

Filing record on appeal or error, see Appeal and Error, § 627.

Motion or application for new trial, see Criminal Law, §§ 155, 951.

Objections to misconduct affecting jury, see Trial, § 317.

Presentation, allowance, and filing of bill of exceptions, see Criminal Law, § 1092.

Redemption from tax sale, see Taxation, § 699.

For particular acts not judicial.

Claim of homestead, see Homestead, § 193.

Delivery of goods sold, see Sales, § 81.

Filing claim or statement of mechanic's lien, see Mechanics' Liens, § 132.

Notice of defenses to bill or note as affecting good faith of purchaser, see Bills and Notes, § 334.

Payment of insurance premium or assessment, see Insurance, § 358.

Payment of interest, see Interest, § 57.

Presentation of claims against estate of decedent, see Executors and Administrators, § 225.

§ 9. Under Civ. Code Prac. § 760, petition filed February 21st for reviewing a decision rendered January 17th held in time.—East Tennessee Telephone Co. v. Board of Councilmen of City of Frankfort (Ky.) 475.

TITLE.

See Property.

By adverse possession, see Adverse Possession, § 106.

Conclusiveness of judgment as to title or claim to property in general, see Judgment, § 743.

Declarations by person in possession or control of property as to title, see Evidence, § 273.

Defects in principal's title as affecting broker's right to compensation, see Brokers, § 61.

Of purchaser at execution sale, see Execution, § 269.

Of purchaser at judicial sales in general, see Judicial Sales, § 50.

Of receiver, see Receivers, § 77.

Of vendor, sufficiency to support contract of sale, see Vendor and Purchaser, §§ 133-137.

Removal of cloud, see Quieting Title.

Tax titles, see Taxation, §§ 734-816.

Particular matters affecting title.

See Adverse Possession; Dedication; Deeds; Descent and Distribution; Escheat; Mortgages.

Pledge, see Pledges, § 21.

Sale of personal property in general, see Sales. Sale of real property in general, see Vendor and Purchaser.

Particular species of property or rights.

See Bills and Notes, §§ 334, 335, 525.

Personal property in general, see Sales, § 201.

Title necessary to maintain particular actions.

See Quieting Title, § 10.

Titles of particular acts or proceedings.

See Statutes, §§ 114-124.

TOOLS.

Liability of master for injuries to servant from defects in or failure to furnish tools, see Master and Servant, §§ 101, 102-118.

TORTS.

Application of doctrine of ratification of act of agent, see Principal and Agent, § 175.

Release of one of several joint tort-feasors as release of all, see Release, § 29.

Reversal as to joint defendants, see Appeal and Error, § 1173.

Splitting causes of action, see Action, § 53.

Survival of cause of action, see Abatement and Revival, § 54.

Liabilities of particular classes of persons.

See Brokers, § 38; Carriers, §§ 110-134, 159, 177, 280-321, 353-382; Infants, §§ 59, 60; Municipal Corporations, §§ 733-822; Railroads, §§ 113, 274-282, 288-297, 301-351, 358-401, 446, 447, 485; Street Railroads, §§ 81-118.

Banks, see Banks and Banking, § 148.

Chauffeurs, see Municipal Corporations, § 706.

Electric light or power companies, see Electricity, §§ 13-19.

Employers, for injuries to employes, see Master and Servant, §§ 89-296.

Employers, for injuries to third persons, see Master and Servant, §§ 302-329.

Gas companies, see Gas, §§ 17-20.

Telegraph or telephone companies, see Telegraphs and Telephones, §§ 66, 67.

Unauthorized use of picture, exemplary damages, see Damages, § 91.

Liabilities respecting particular species of property or instrumentalities.

See Electricity, §§ 13-19; Railroads, §§ 113, 274-282, 288-297, 301-351, 358-401, 446, 447, 485; Street Railroads, §§ 81-118; Telegraphs and Telephones, §§ 66, 67.

Automobiles, see Municipal Corporations, § 706.

Carrier's premises, see Carriers, § 286.

Conveyances and other means for transportation of passengers, see Carriers, § 300.

Drains and reservoirs, see Waters and Water Courses, § 171.

Gas or gasworks and appliances, see Gas, §§ 17-20.

Streets and highways, see Municipal Corporations, §§ 755-822.

Tools, machinery, appliances, and places for work, see Master and Servant, §§ 101, 102-118.

Particular Torts.

See Conspiracy, §§ 1-14; False Imprisonment, § 7; Forcible Entry and Detainer, §§ 4-15; Fraud; Libel and Slander; Malicious Prosecution; Nuisance; Trespass.

Causing death, see Death, §§ 33-104.

Ejection of passenger or intruder from train, see Carriers, §§ 353-386.

Escape or explosion of gas, see Gas, §§ 17-20.

Injuries by servants, see Master and Servant, §§ 302-329.

Injuries from construction or maintenance of railroad, see Railroads, § 113.

Injuries from defects or obstructions in streets, see Municipal Corporations, §§ 755-822.

Injuries from flowage of lands, see Waters and Water Courses, § 171.

Injuries from negligence, see Negligence.

Injuries from negligence or default in transmission or delivery of telegraph or telephone message, see Telegraphs and Telephones, §§ 66, 67.

Injuries from negligent or wrongful use of street, see Municipal Corporations, §§ 705, 706.

Injuries from operation of railroads, see Railroads, §§ 274-282, 288-297, 301-351, 358-401, 446, 447, 485.

Injuries from operation of street railroads, see Street Railroads, §§ 81-118.

Injuries incident to production or use of electricity, see Electricity, §§ 13-19.

Injuries to passengers, see Carriers, §§ 280-321.

Injuries to servants, see Master and Servant, §§ 89-296.
 Loss of or injury to goods by carrier, see Carriers, §§ 110-134, 159.
 Loss of or injury to goods shipped, see Carriers, § 177.
 Payment by bank of forged or altered check, see Banks and Banking, § 148.
 Wrongful attachment, see Attachment, §§ 368-377.
 Wrongful conversion, see Trover and Conversion.

Remedies for torts.

See Damages; Trespass, §§ 40-52; Trover and Conversion, §§ 32-68.

§ 5. Where one's exclusive right to his picture is invaded, general and exemplary damages may be recovered.—Munden v. Harris (Mo. App.) 1076.

§ 8. One *held* to possess the exclusive right to his picture as a property right.—Munden v. Harris (Mo. App.) 1076.

§ 22. Each joint tort-feasor is considered as sanctioning the acts of the others, and is therefore liable for the whole damage.—Laughlin v. Excelsior Powder Mfg. Co. (Mo. App.) 116.

§ 26. An action based on a joint tort *held* not supported by proof of a cause of action founded on separate torts of the tort-feasors.—Otrich v. St. Louis, I. M. & S. Ry. Co. (Mo. App.) 665.

§ 27. Where it was claimed that defendants were maliciously wasting gas from a gas field to injure plaintiff in its business, evidence of a witness that defendant gas company desired to use him to ascertain the extent of plaintiff's holdings and business in the gas field was admissible.—Louisville Gas Co. v. Kentucky Heating Co. (Ky.) 205.

TOTAL DISABILITY.

Of insured, see Insurance, § 787.

TOWNS.

See Counties; Municipal Corporations; Schools and School Districts, §§ 13-97.
 Highways, see Highways.

II. GOVERNMENT AND OFFICERS.

Constables, see Sheriffs and Constables.

TRADE.

Combinations in restraint of trade, see Monopolies, §§ 12-30.
 Contracts in restraint of trade, see Contracts, § 117.

TRADE FIXTURES.

See Fixtures, §§ 7, 15.

TRADE-MARKS AND TRADE-NAMES.

I. MARKS AND NAMES SUBJECTS OF OWNERSHIP.

§ 3. The term "travelers' insurance" defined.—Travelers' Ins. Mach. Co. v. Travelers' Ins. Co. of Hartford, Conn. (Ky.) 877.

§ 3. The term "travelers' insurance" *held* a generic name, the exclusive right to use of which cannot be acquired.—Travelers' Ins. Mach. Co. v. Travelers' Ins. Co. of Hartford, Conn. (Ky.) 877.

IV. INFRINGEMENT AND UNFAIR COMPETITION.

(B) What Competition Unlawful.

§ 70. Under circumstances stated, *held* that defendant company will not be enjoined from using the term "travelers' insurance" as a part of its name.—Travelers' Ins. Mach. Co. v. Travelers' Ins. Co. of Hartford, Conn. (Ky.) 877.

§ 73. When a generic term may not be used as a part of a trade-name stated.—Travelers' Ins. Mach. Co. v. Travelers' Ins. Co. of Hartford, Conn. (Ky.) 877.

(C) Actions.

§ 93. In a suit to enjoin defendant from using certain words as a part of its name, evidence *held* to show that "travelers' insurance" is a distinct class of insurance.—Travelers' Ins. Mach. Co. v. Travelers' Ins. Co. of Hartford, Conn. (Ky.) 877.

TRAINS.

See Carriers; Railroads.

TRANSFER OF CAUSES.

From one state court to another, see Courts, § 485.
 Transfer of criminal prosecution to juvenile docket, see Infants, § 68.

TRANSFERS.

See Assignments; Deeds; Sales; Vendor and Purchaser.

By purchaser of property subject to vendor's lien, see Vendor and Purchaser, § 285.

Of bills and notes, see Bills and Notes, §§ 334, 335.

Of insurance policies, see Insurance, §§ 203-222.

Of mortgaged property or of equity of redemption by mortgagor, see Mortgages, § 280.

Of personal property as security, see Chattel Mortgages.

Of real property as security, see Mortgages.

Of shares of corporate stock, see Corporations, § 121.

Of title as between parties to sale, see Sales, § 201.

TRANSMISSION.

Of record on appeal or other proceeding for review, see Appeal and Error, §§ 627-633.

Of telegraph of telephone messages, see Telegraphs and Telephones, §§ 66, 67.

TRANSPORTATION.

Of animals, see Carriers, §§ 203-230.

Of goods, see Carriers, §§ 46-185.

Of goods regulation of commerce, see Commerce, §§ 33-40.

Of passengers, see Carriers, §§ 236-382.

TRAVELERS.

On streets in general, see Municipal Corporations, §§ 703-706.

Of injuries from defects or obstructions, see Municipal Corporations, §§ 755-822.

TRAVERSE.

In pleading in general, see Pleading, § 127.

TREES.

See Logs and Logging.

Cutting and removing, damages, see Trespass, § 52.

TRESPASS.

See False Imprisonment.

Injuries to trespassers, see Railroads, §§ 274-282, 358-401.

Right of owner to retake property from trespasser after enhancement of value, see Accession, § 2.

To try title, see Trespass to Try Title.

II. ACTIONS.

(A) Right of Action and Defenses.

Liability of infant, see Infants, § 59.

(B) Jurisdiction, Parties, Preliminary Proceedings, and Pleading.

§ 40. An allegation *held* not to charge that a trespass was willful.—*Sligo Furnace Co. v. Hobart-Lee Tie Co.* (Mo. App.) 585.

(C) Evidence.

§ 46. In an action for cutting and using timber, evidence *held* to show a willful trespass by defendant.—*Sligo Furnace Co. v. Hobart-Lee Tie Co.* (Mo. App.) 585.

§ 46. In an action to foreclose a vendor's lien and to recover damages against a third person for a trespass impairing the security of the lien, evidence *held* insufficient to support the verdict against the third person.—*Craven Lumber Co. v. Allen* (Tex. Civ. App.) 238.

(D) Damages.

§ 52. Measure of damages for the cutting of timber under honest mistake or by a willful trespass stated.—*Sligo Furnace Co. v. Hobart-Lee Tie Co.* (Mo. App.) 385.

TRESPASS TO TRY TITLE.

See Ejectment; Forcible Entry and Detainer.

I. RIGHT OF ACTION AND DEFENSES.

§ 18. Defendant in trespass to try title may defeat the action by proving an outstanding title in a third person was anterior to that of the common source, and which never vested in the common source.—*Caruthers v. Hadley* (Tex. Civ. App.) 757.

II. PROCEEDINGS.

§ 41. Proof of an outstanding title in a third person when a common grantor conveyed to defendant *held* not sufficient to defeat plaintiff's claim.—*Caruthers v. Hadley* (Tex. Civ. App.) 757.

III. DAMAGES, USE AND OCCUPATION, IMPROVEMENTS, AND TAXES.

§ 56. In trespass to try title *held* proper not to allow a party the value of certain improvements.—*Sutherland v. Kirkland* (Tex. Civ. App.) 851.

TRIAL.

Practice in equity, see Equity, §§ 377-381.

Trial by jury of issues in equity, see Equity, §§ 377-381.

Trial de novo on appeal, see Appeal and Error, § 893; Justices of the Peace, § 174.

Witnesses, see Witnesses.

Proceedings incident to trials.

See Continuance; New Trial.

Assessment of damages, see Damages, §§ 208-216.

Competency of and challenge to jurors, see Jury, §§ 116-120.

Entry of judgment after trial of issues, see Judgment, §§ 238-269.

Examination of witnesses, see Witnesses, §§ 286, 287.

Impaneling jury, see Jury, § 149.

Place of trial, see Venue.

Qualifications of jurors, and exemptions, see Jury, §§ 39-53.

Right to trial by jury, see Jury, § 31.

Trial of actions by or against particular classes of persons.

See Brokers, § 88; Carriers, §§ 230, 320, 321, 347, 348; Corporations, § 621; Master and Servant, §§ 284-296; Principal and Agent, § 194; Railroads, §§ 350, 351, 400, 401, 446, 447, 485; Street Railroads, §§ 117, 118.

Insurance companies, see Insurance, §§ 668, 825.

Trial of particular civil actions or proceedings.

See Libel and Slander, §§ 123-125; Malicious Prosecution, § 72; Trover and Conversion, § 68.

Accounting by executor or administrator, see Executors and Administrators, § 473.

For breach of contract of sale, see Vendor and Purchaser, § 331.

For causing death, see Death, §§ 103, 104.

For compensation of broker, see Brokers, § 88.

For compensation of physician, see Physicians and Surgeons, § 24.

For injuries at railroad crossings, see Railroads, §§ 350, 351.

For injuries caused by electricity, see Electricity, § 19.

For injuries from accident to trains, see Railroads, § 297.

For injuries from defects or obstructions in streets, see Municipal Corporations, §§ 821, 822.

For injuries from escape of gas, see Gas, § 20.

For injuries from fires caused by operation of railroads, see Railroads, § 485.

For injuries from flowage, see Waters and Water Courses, § 179.

For injuries from negligence, see Negligence, § 136.

For injuries from negligent or wrongful use of street, see Municipal Corporations, § 706.

For injuries from public improvements, see Municipal Corporations, § 404.

For injuries to animals on or near railroad tracks, see Railroads, §§ 446, 447.

For injuries to licensees on railroad, see Railroads, § 282.

For injuries to passengers, see Carriers, §§ 320, 321, 347, 348.

For injuries to persons on or near railroad tracks, see Railroads, §§ 400, 401.

For loss of or injury to live stock in course of transportation, see Carriers, § 230.

For price of timber, see Logs and Logging, § 3.

For price or value of goods sold, see Sales, § 364.

On insurance policies, see Insurance, § 825.

To abate nuisance, see Nuisance, § 34.

To establish boundaries, see Boundaries, § 41.

Trial of criminal prosecutions.

See Burglary, § 46; Criminal Law, §§ 628-884; Homicide, §§ 268-310; Larceny, § 77; Seduction, § 50.

Carrying weapons, see Weapons, § 17.

For practicing medicine without license, see Physicians and Surgeons, § 6.

Violations of liquor laws, see Intoxicating Liquors, § 238.

I. NOTICE OF TRIAL AND PRELIMINARY PROCEEDINGS.

In criminal prosecutions, see Criminal Law, § 623.

§ 2. Action for the price of timber commenced while injunction proceedings were pending against defendant *held* to be consolidated with the latter for trial.—*Lang v. Bach* (Ky.) 188.

II. DOCKETS, LISTS, AND CALENDARS.

Transfer of causes from one state court to another, see Courts, § 485.

III. COURSE AND CONDUCT OF TRIAL IN GENERAL.

In criminal prosecutions, see Criminal Law, §§ 639-655.

§ 18. Rule relating to a trial judge's discretion in conducting a trial, stated.—*Chesapeake & O. Ry. Co. v. Stein* (Ky.) 1169.

§ 29. Remarks by trial court in admitting certain evidence held not to be improper.—*Brinkman v. Gottenstroeter* (Mo. App.) 584.

IV. RECEPTION OF EVIDENCE.

Examination of witnesses, see Witnesses, §§ 286, 287.

In criminal prosecutions, see Criminal Law, §§ 671-673.

On new trial, see Appeal and Error, § 1214.

Review of rulings as dependent on presentation of question in lower court, see Appeal and Error, § 206.

(A) Introduction, Offer, and Admission of Evidence in General.

§ 55. Where defendant was not called upon to account for his absence at the trial, the fact that he was paralyzed was properly excluded.—*Fritter v. Pendleton* (Tex. Civ. App.) 1186.

(B) Order of Proof, Rebuttal, and Reopening Case.

§ 62. Where defendant on cross-examination imputed an effort to bribe a witness to testify for plaintiff, plaintiff was entitled to show by his father, mother, and attorneys that they had not offered any one anything to testify.—*City of Ft. Worth v. Lopp* (Tex. Civ. App.) 824.

§ 68. Under Rev. St. 1895, art. 1208, held, it was not an abuse of discretion to refuse to reopen the case for testimony.—*Keahy v. Bryant* (Tex. Civ. App.) 409.

(C) Objections, Motions to Strike Out, and Exceptions.

In criminal prosecutions, see Criminal Law, § 695.

Necessity for purpose of review on appeal or writ of error, see Appeal and Error, §§ 206, 237.

§ 89. Testimony held subject to a motion to strike as hearsay where it was shown to have been such on a witness' cross-examination.—*Houston E. & W. T. Ry. Co. v. Inman, Akers & Inman* (Tex. Civ. App.) 275.

§ 105. Where evidence is admitted without objection, it is not error to refuse a charge withdrawing the same from the jury.—*Stark v. Coe* (Tex. Civ. App.) 373.

V. ARGUMENTS AND CONDUCT OF COUNSEL.

In criminal prosecutions, see Criminal Law, §§ 719-728.

Review of proceedings involving discretion of lower court, see Appeal and Error, § 972.

§ 106. The propriety of the arguments and conduct of counsel rests in the discretion of the trial court.—*Brinkman v. Gottenstroeter* (Mo. App.) 584.

§ 121. Conduct of attorney in asking objectionable questions and obtaining answers held to held reversible error, notwithstanding objec-

tions were sustained.—*Jordan v. Massey* (Tex. Civ. App.) 804.

§ 131. A general objection held insufficient to render a ruling improper which allowed certain remarks of counsel to go unchallenged.—*Brinkman v. Gottenstroeter* (Mo. App.) 584.

VI. TAKING CASE OR QUESTION FROM JURY.

In criminal prosecutions, see Criminal Law, §§ 741-763, 764.

Presumptions on appeal or writ of error, see Appeal and Error, § 927.

Review of rulings as dependent on prejudicial nature of error, see Appeal and Error, § 1062.

Review of rulings as dependent on presentation of question in lower court, see Appeal and Error, § 213.

(A) Questions of Law or of Fact in General.

As to particular facts, issues, or subjects.

See Adverse Possession, § 115.

Assumption of risk by servant injured, see Master and Servant, § 288.

Construction of contract, see Contracts, § 176.

Contributory negligence of passenger, see Carriers, § 347.

Contributory negligence of servant injured, see Master and Servant, § 289.

Damages, see Damages, § 208.

Negligence of master causing injury to servant, see Master and Servant, § 286.

Validity of contract of sale, see Sales, § 53.

In particular civil actions or proceedings.

See Libel and Slander, § 123.

Accounting by executor or administrator, see Executors and Administrators, § 473.

Assessment of damages, see Damages, § 208.

For breach of contract of sale, see Vendor and Purchaser, § 331.

For causing death, see Death, § 103.

For compensation of broker, see Brokers, § 88.

For compensation of physician, see Physicians and Surgeons, § 24.

For injuries at railroad crossings, see Railroads, § 350.

For injuries caused by electricity, see Electricity, § 19.

For injuries from defects or obstructions in street, see Municipal Corporations, § 821.

For injuries from escape of gas, see Gas, § 20.

For injuries from flowage, see Waters and Water Courses, § 179.

For injuries from negligence, see Negligence, § 136.

For injuries from negligent or wrongful use of street, see Municipal Corporations, § 706.

For injuries to animals on or near railroad tracks, see Railroads, § 446.

For injuries to licensees on railroad, see Railroads, § 282.

For injuries to passengers, see Carriers, §§ 320, 347.

For injuries to persons on or near railroad tracks, see Railroads, § 400.

For injuries to persons on or near street railroad tracks, see Street Railroads, § 117.

For injuries to servants, see Master and Servant, §§ 284-289.

For loss of or injury to live stock in course of transportation, see Carriers, § 230.

On insurance policies, see Insurance, §§ 668, 825.

§ 139. Where there is evidence to support an issue, it should be submitted to the jury.—*W. B. Samuels & Co. v. T. M. Gilmore & Co.* (Ky.) 169.

§ 139. Where the evidence most favorable to plaintiff is sufficient to raise a question for the

jury, it is error to direct a verdict for the defendant.—Howard v. Waterman Lumber & Supply Co. (Tex. Civ. App.) 387.

§ 140. The credibility of the witnesses is for the jury.—St. Victor v. Edwards (Mo. App.) 1105.

§ 143. Where the testimony is conflicting, the court may not direct a verdict.—Lancaster v. School Dist. No. 17 (Ark.) 314.

§ 143. It is the province of the jury to decide questions of evidence, especially where the evidence is conflicting.—Cincinnati, N. O. & T. P. Ry. Co. v. Rue (Ky.) 1144.

§ 143. The weight to be given conflicting testimony is for the jury.—Hardin v. St. Louis Southwestern Ry. Co. of Texas (Tex. Civ. App.) 408.

(B) Demurrer to Evidence.

Presumptions on appeal or writ of error, see Appeal and Error, § 927.

(C) Dismissal or Nonsuit.

Presumptions on appeal or writ of error, see Appeal and Error, § 927.

(D) Direction of Verdict.

§ 169. Where a cause of action to which the proof is directed is unproved in its entire scope, the court must direct a verdict for defendant, but it must not do so when the proof is defective or does not precisely conform to the averments in some particular way.—Chamlee v. Planters' Hotel Co. (Mo. App.) 123.

§ 169. A motion for a directed verdict *held* to amount to only a demurrer to the petition.—Ferrell v. City of Haskell (Tex. Civ. App.) 784.

§ 178. On the question of the propriety of a peremptory instruction for defendant, the plaintiff's evidence in so far as it conflicts with that of the defendant must be taken as true.—J. I. Case Threshing Mach. Co. v. Mattingly (Ky.) 1131.

§ 178. To authorize a directed verdict for defendant, it must appear that admitting plaintiff's testimony to be true, and every inference fairly deducible therefrom, he has failed to support his cause of action.—Cincinnati, N. O. & T. P. Ry. Co. v. Rue (Ky.) 1144.

VII. INSTRUCTIONS TO JURY.

In criminal prosecutions, see Criminal Law, §§ 769-815, 824-830.

Review as dependent on prejudicial nature of error, see Appeal and Error, §§ 1064-1068.

Review as dependent on presentation of question in lower court, see Appeal and Error, § 215.

Review as dependent on presentation of question in record, see Appeal and Error, § 702.

As to particular issues or subjects.

See Boundaries, § 41.

Assumption of risk by servant injured, see Master and Servant, § 295.

Bar of statute of frauds, see Frauds, Statute of, § 160.

Carrying weapons, see Weapons, § 17.

Contributory negligence of passenger, see Carriers, § 348.

Contributory negligence of servant injured, see Master and Servant, § 296.

Damages, see Damages, §§ 210-216.

Death, see Death, § 104.

Incompetency or negligence of fellow servant, see Master and Servant, § 294.

In particular civil actions or proceedings.

See Malicious Prosecution, § 72.

Assessment of damages, see Damages, §§ 210-216.

By or against corporation, see Corporations, § 521.

By or against principal or agent, see Principal and Agent, § 194.

For breach of contract, see Contracts, § 353.

For injuries at railroad crossings, see Railroads, § 351.

For injuries caused by electricity, see Electricity, § 19.

For injuries from defects or obstructions in streets, see Municipal Corporations, § 822.

For injuries from fires caused by operation of railroads, see Railroads, § 485.

For injuries from negligent or wrongful use of street, see Municipal Corporations, § 706.

For injuries from public improvements, see Municipal Corporations, § 404.

For injuries to animals on or near railroad tracks, see Railroads, § 447.

For injuries to passengers, see Carriers, §§ 321, 348.

For injuries to persons on or near railroad tracks, see Railroads, § 401.

For injuries to persons on or near street railroad tracks, see Street Railroads, § 118.

For injuries to servants, see Master and Servant, §§ 291-296.

For loss of or injury to live stock in course of transportation, see Carriers, § 230.

For price of timber, see Logs and Logging, § 3.

For price or value of goods sold, see Sales, § 364.

To establish boundaries, see Boundaries, § 41.

(A) Province of Court and Jury in General.

In criminal prosecutions, see Criminal Law, §§ 761-763, 764.

§ 191. In an action for the burning of plaintiff's barn, an instruction *held* not objectionable as assuming that the fire was set out by snarks from defendant's engine.—Houston & T. C. R. Co. v. Ellis (Tex. Civ. App.) 246.

§ 191. In an action against a railroad company for penalties and damages under the statute for permitting Johnson grass to mature on its right of way, the court may in its charge assume that the act of the company in permitting the grass to mature was negligent.—Missouri, K. & T. Ry. Co. of Texas v. Tolbert (Tex. Civ. App.) 280.

§ 194. An instruction to ascertain the amount of damages for negligent death in money, and to make that good, was erroneous as upon the weight of the evidence.—Texas & P. Ry. Co. v. Gullett (Tex. Civ. App.) 262.

§ 194. In an action by a miner for injuries caused by a car jumping the track, an instruction requested by defendant *held* properly refused as on the weight of evidence.—Consumers' Lignite Co. v. Cameron (Tex. Civ. App.) 283.

§ 194. In an action against an electric light company for death by electric shock, an instruction *held* properly refused as on the weight of evidence.—Jacksonville Ice & Electric Co. v. Moses (Tex. Civ. App.) 379.

§ 194. In an action for injuries to a traveler on a highway, an instruction *held* erroneous as on the weight of the evidence.—Marshall & E. T. Ry. Co. v. Petty (Tex. Civ. App.) 406.

(B) Necessity and Subject-Matter.

§ 203. Refusal to give a special charge submitting issues raised by the pleadings and evidence *held* erroneous.—Cariker & Wintz v. W. J. Vawters & Son (Tex. Civ. App.) 780.

§ 207. Where evidence of witnesses at a former trial is introduced to impeach them, the jury should be instructed to consider such evidence only for impeachment purposes.—Louisville Gas Co. v. Kentucky Heating Co. (Ky.) 205.

§ 208. Course of a trial judge in correcting an erroneous ruling on measure of damages held proper.—*Chesapeake & O. Ry. Co. v. Stein* (Ky.) 1169.

(C) **Form, Requisites, and Sufficiency.**

§ 234. An instruction as to damages for loss of time and earning power arising from personal injuries held proper.—*Louisville & N. R. Co. v. Roe* (Ky.) 437.

§ 237. A charge, when considered in connection with preceding instructions, held not misleading.—*Texas Seating Co. v. Farmers' & Mechanics' Nat. Bank* (Tex. Civ. App.) 807.

§ 244. In an action against an electric light company for death by electric shock, the refusal to give a charge on the issue of contributory negligence held not erroneous in view of the charge given.—*Jacksonville Ice & Electric Co. v. Moses* (Tex. Civ. App.) 379.

(D) **Applicability to Pleadings and Evidence.**

Review as dependent on prejudicial nature of error, see *Appeal and Error*, § 1066.

§ 248. Requested instructions which were academic discussions of the law held properly refused.—*City of Louisville v. Uebelhor* (Ky.) 152.

§ 250. Instructions in an action for the price of a jack held erroneous as being inapplicable to the issues and evidence.—*Brown v. Emerson* (Mo. App.) 1108.

§ 250. Under Rev. St. 1895, art. 1317, a charge of the court must be confined to the issues made by the pleadings and evidence.—*Ramsey & Montgomery v. Empire Timber & Lumber Co.* (Tex. Civ. App.) 294.

§ 251. An instruction on a point concerning which no issue is raised is properly refused.—*Dillender v. Lester* (Mo. App.) 1041.

§ 252. An instruction based on facts not shown by the evidence was properly refused.—*Caldwell v. Nichol* (Ark.) 622.

§ 252. Where there is no evidence to support a phase of a case, the trial court properly ignores it in the instructions.—*Briukman v. Gottenstroeter* (Mo. App.) 584.

§ 252. Where there was no evidence of waiver of certain conditions after loss, it was error to submit that issue to the jury.—*Shook v. Retail Hardware Mut. Fire Ins. Co. of Minnesota* (Mo. App.) 589.

§ 252. An instruction not supported by evidence held properly refused.—*Galveston, H. & S. A. R. Co. v. Jones* (Tex.) 328.

§ 252. An instruction presenting a theory not supported by the evidence is properly refused.—*Cheek v. Boyd* (Tex. Civ. App.) 252.

§ 253. On suit against a railway company for assault by an operator, an instruction held improper as ignoring a defense.—*Roberts v. Wabash R. Co.* (Mo. App.) 89.

§ 253. In an action by a miner for injuries caused by a car jumping a track, the refusal of an instruction held not erroneous in view of the evidence.—*Consumers' Lignite Co. v. Cameron* (Tex. Civ. App.) 283.

§ 253. Instructions, abstractly correct, held properly refused as ignoring an issue.—*Ramsey & Montgomery v. Empire Timber & Lumber Co.* (Tex. Civ. App.) 294.

§ 253. A charge in an action for injuries to a servant, which presents affirmatively the servant's theory of the case, is not erroneous for ignoring the defensive issues of assumed risk and contributory negligence, fairly submitted in another charge.—*Farmers' Cotton Oil Co. v. Barnes* (Tex. Civ. App.) 369.

§ 253. A requested instruction ignoring an issue raised by the evidence held properly refused.—*Keahey v. Bryant* (Tex. Civ. App.) 409.

§ 253. In an action for injuries to a traveler on a railroad right of way, an instruction held properly refused because ignoring the issue of discovered peril.—*St. Louis Southwestern Ry. Co. of Texas v. McCauley* (Tex. Civ. App.) 798.

(E) **Requests or Prayers.**

In criminal prosecutions, see *Criminal Law*, §§ 824-830.

Review as dependent on prejudicial nature of error, see *Appeal and Error*, § 1067.

Review as dependent on setting forth of instructions refused, see *Appeal and Error*, § 702.

§ 256. Where a defendant street railway company failed to request the trial court to define technical words used in instructions, it cannot on appeal complain of a failure to define such terms.—*Asmus v. United Rys. Co. of St. Louis* (Mo. App.) 92.

§ 256. Where the charge of the court was not affirmatively erroneous on an issue, the failure to present the issue in a negative form may not be complained of in the absence of a requested charge supplying the omission.—*Jacksonville Ice & Electric Co. v. Moses* (Tex. Civ. App.) 379.

§ 260. A requested charge which is covered by an instruction already given, is properly refused.—*New Hampshire Fire Ins. Co. v. Blakeley* (Ark.) 926; *Louisville Ry. Co. v. Bryant* (Ky.) 182; *Louisville & N. R. Co. v. Roe* (Ky.) 437; *St. Victor v. Edwards* (Mo. App.) 1105; *Cheek v. Boyd* (Tex. Civ. App.) 252; *Consumers' Lignite Co. v. Cameron* (Tex. Civ. App.) 283; *Farmers' Cotton Oil Co. v. Barnes* (Tex. Civ. App.) 369; *Missouri, K. & T. Ry. Co. of Texas v. Groseclose* (Tex. Civ. App.) 736; *St. Louis Southwestern Ry. Co. of Texas v. McCauley* (Tex. Civ. App.) 798; *St. Louis, S. F. & T. R. Co. v. Taylor* (Tex. Civ. App.) 819; *Missouri, K. & T. Ry. Co. of Texas v. Schroeter* (Tex. Civ. App.) 826.

§ 260. Where the trial court at the request of the defendant railroad gave instructions fully covering the look and listen rule, it was not error to refuse additional ones on the same subject.—*St. Louis, I. M. & S. Ry. Co. v. Stacks* (Ark.) 315.

§ 260. Where a party's case has been clearly presented by the instructions given, the refusal of an instruction making selection of special features of the case is proper.—*Gould v. St. John* (Mo. App.) 578.

§ 260. In an action for injury to a miner caused by a car jumping the track, refusal of certain instruction for the defendant on the question of assumed risk held not erroneous in view of another instruction given.—*Consumers' Lignite Co. v. Cameron* (Tex. Civ. App.) 283.

§ 260. In an action for injuries to a servant caught by a set screw, the refusal to give a charge held not erroneous in view of the charge given.—*Farmers' Cotton Oil Co. v. Barnes* (Tex. Civ. App.) 369.

§ 261. Requested instructions, not correct in themselves, are properly refused.—*Louisville & N. R. Co. v. Smith* (Tenn.) 806.

§ 261. Where the court charged generally on an issue, a party complaining of the failure to give a more specific instruction must request a correct special charge covering the omission.—*Jacksonville Ice & Electric Co. v. Moses* (Tex. Civ. App.) 379.

§ 261. The rule as to the sufficiency of requested instructions held to apply to cases only where there has been a failure of the court

to present in its charge a material issue.—*Jacksonville Ice & Electric Co. v. Moses* (Tex. Civ. App.) 379.

§ 287. A requested instruction in an action between a husband and wife *held* to be unnecessary, in view of the issue, and hence its modification was not improper.—*Doherty v. Doherty* (Mo. App.) 1112.

(F) Objections and Exceptions.

Necessity of objection or request for purpose of review, see *Appeal and Error*, § 215.

(G) Construction and Operation.

§ 295. The charge of the court to determine its correctness must be considered as a whole.—*Stark v. Coe* (Tex. Civ. App.) 373.

§ 295. In an action against a telegraph company for delay in transmitting a message, instructions *held* not misleading when considered as a whole.—*Western Union Telegraph Co. v. Landry* (Tex. Civ. App.) 848.

§ 296. Abstract instruction on contributory negligence *held* not to cure defect in instruction as to negligence of passenger in taking position on platform of coach.—*Louisville, H. & St. L. Ry. Co. v. Stillwell* (Ky.) 202.

§ 296. The error in an instruction, in an action for damages for changing the grade of a street, *held* obviated by another instruction.—*Powell v. City of Columbia* (Mo. App.) 76.

§ 296. Particular instructions are not reversible error, where, on considering all the instructions, the jury could not have been misled.—*Tewksbury v. Metropolitan St. Ry. Co.* (Mo. App.) 682.

§ 296. An incorrect measure of duty given in an instruction *held* not cured by another one giving the correct measure.—*Houston & T. C. R. Co. v. Ellis* (Tex. Civ. App.) 246.

§ 296. In an action to abate a nuisance, an instruction *held* not erroneous as shifting the burden of proof.—*Stark v. Coe* (Tex. Civ. App.) 373.

VIII. CUSTODY, CONDUCT, AND DELIBERATIONS OF JURY.

Disqualification or misconduct of or affecting jury, ground for new trial, see *New Trial*, §§ 44-47.

§ 317. Misconduct of official stenographer *held* waived when first presented to the trial court on motion for new trial; one of the affidavits being by the president of defendant company who was present at the trial and saw what occurred.—*American Engineering & Construction Co. v. Crawford* (Ky.) 448.

IX. VERDICT.

In action for libel, see *Libel and Slander*, § 125.

In criminal prosecutions, see *Criminal Law*, § 884.

On trial by jury of issues in suit in equity, see *Equity*, § 381.

Presumptions on appeal or writ of error, see *Appeal and Error*, § 930.

Review of objections to verdict or findings, see *Appeal and Error*, § 1070.

Review of sufficiency of evidence, see *Appeal and Error*, §§ 990-1004.

Setting aside verdict, see *New Trial*.

Verdict contrary to law or evidence ground for new trial, see *New Trial*, § 72.

(A) General Verdict.

§ 329. A verdict for nominal damages *held* not objectionable because no instructions for nominal damages were asked or given.—*Thompson v. Joseph W. Moon Buggy Co.* (Mo. App.) 1088.

§ 329. In an action to recover a deposit under an automobile sales agency contract, a verdict for defendant on plaintiff's cause of action and awarding defendant nominal damages on defendant's counterclaim for breach of contract *held* within the issues.—*Thompson v. Joseph W. Moon Buggy Co.* (Mo. App.) 1088.

§ 337. In an action to recover the purchase price of a threshing machine, a verdict in disregard of instructions *held* erroneously received.—*J. I. Case Threshing Mach. Co. v. Mattingly* (Ky.) 1131.

(B) Special Interrogatories and Findings.

Harmless error in submission of, or refusal to submit, special interrogatories, see *Appeal and Error*, § 1062.

Instructions on weight of evidence, see *Trial*, § 194.

X. TRIAL BY COURT.

Hearing in equity, see *Equity*, §§ 377-381.

Presumptions on appeal or writ of error, see *Appeal and Error*, § 931.

Review dependent on prejudicial nature of error, see *Appeal and Error*, § 1054.

Review of proceedings and findings as dependent on prejudicial nature of error, see *Appeal and Error*, § 1071.

(B) Findings of Fact and Conclusions of Law.

§ 394. Rev. St. 1909, § 1972, *held* applicable only to actions at law.—*Walther v. Null* (Mo.) 993.

§ 403. Conclusions of law and fact, under Rev. St. 1895, art. 1333, and Acts Ex. Sess. 1907, c. 7, *held* required to be filed within the time specified by the statute.—*Sutherland v. Kirkland* (Tex. Civ. App.) 851.

§ 403. It is the plain right of any party to have conclusions of law and fact filed as provided by Rev. St. 1895, art. 1333, and Acts Ex. Sess. 1907, c. 7.—*Sutherland v. Kirkland* (Tex. Civ. App.) 851.

XI. WAIVER AND CORRECTION OF IRREGULARITIES AND ERRORS.

Error in instructions cured by verdict or judgment, see *Appeal and Error*, § 1068.

Review in appellate court as dependent or prejudicial nature of error, see *Appeal and Error*, §§ 1026-1074.

Review in appellate court as dependent on presentation of questions in lower court, see *Appeal and Error*, §§ 169-283.

§ 418. Where defendant preserves his exceptions to an adverse ruling on a demurrer to the evidence he may return in the appellate court to his first position.—*Gordon v. Metropolitan St. Ry. Co.* (Mo. App.) 26.

§ 418. A defendant who, after the overruling of his demurrer to plaintiff's evidence, puts in testimony thereby waives the demurrer.—*Remmers v. Shubert* (Mo. App.) 1042.

§ 423. Statement by defendant that he agreed that one instruction correctly stated the law after objection and exception to all the instructions *held* not a waiver of any error, in the instructions.—*Lang v. Bach* (Ky.) 188.

TRIAL DE NOVO.

On appeal, see *Appeal and Error*, § 893; *Justices of the Peace*, § 174.

TRIBUNALS.

See *Courts*.

TROVER AND CONVERSION.

See *Larceny*.

II. ACTIONS.**(B) Jurisdiction, Parties, Preliminary Proceedings, and Pleading.**

§ 32. An action *held* one for damages for the conversion of mules, and not for their possession.—Wilks v. Kreis (Tex. Civ. App.) 838.

(D) Damages.

§ 46. Where defendant takes property of plaintiff willfully or by culpable negligence in not knowing the true ownership, the measure of damages is the value at the time of demand, and if the property has been altered by manufacture, the value in its manufactured state may be recovered; but if the taking was under belief of title in good faith and not culpably negligent, the measure of damages is the value at the time and place of taking.—Bayle v. Norris (Tex. Civ. App.) 767.

(E) Trial, Judgment, and Review.

§ 68. In an action for damages for the conversion of mules, the verdict need only state their value; that being plaintiff's measure of damages, with interest thereon.—Wilks v. Kreis (Tex. Civ. App.) 838.

TRUST DEEDS.

See Chattel Mortgages; Mortgages.

TRUSTEE PROCESS.

See Garnishment.

TRUSTEES.

See Trusts.

TRUSTS.

Combinations to monopolize trade, see Monopolies, §§ 12-30.

Conveyances in trust for creditors, see Assignments for Benefit of Creditors.

Creation and construction of particular devises and bequests, see Wills, § 684.

Particular fiduciary relations, see Brokers; Executors and Administrators; Factors; Guardian and Ward; Principal and Agent.

Powers in general, see Powers.

Trust deeds, see Chattel Mortgages; Mortgages.

I. CREATION, EXISTENCE, AND VALIDITY.**(A) Express Trusts.**

§ 20. Where a grantor by absolute deed for a valuable consideration and as to which no fraud or want of consent was shown declares a trust in the land conveyed for the benefit of a son, the trust declared is an express, and not a resulting trust.—Wolfskill v. Wells (Mo. App.) 51.

§ 43. Under Rev. St. 1909, § 2868, a trust in land *held* not provable by parol.—Wolfskill v. Wells (Mo. App.) 51.

(B) Resulting Trusts.

§ 88. An implied or resulting trust may be shown by parol.—Wolfskill v. Wells (Mo. App.) 51.

(C) Constructive Trusts.

§ 95. Another than the purchaser at judicial sale having, with knowledge of the facts, paid the purchase price and taken the deed, *held*, he became a constructive trustee for the purchaser.—Green v. Maddox (Ark.) 931.

II. CONSTRUCTION AND OPERATION.

Construction of particular devises and bequests, see Wills, § 684.

III. APPOINTMENT, QUALIFICATION, AND TENURE OF TRUSTEE.

§ 163. Certain relations of a trustee with the cestui que trust *held* not to render him incompetent as a trustee.—Wiegand v. Woerner (Mo. App.) 596.

§ 163. Duty stated of a trustee where his position as trustee was antagonistic through his position as executor of the beneficiary.—Wiegand v. Woerner (Mo. App.) 596.

§ 166. Grounds stated for removal of a trustee.—Wiegand v. Woerner (Mo. App.) 596.

IV. MANAGEMENT AND DISPOSAL OF TRUST PROPERTY.

§ 219. A beneficiary of a trust fund *held* not entitled to interest on the fund while she holds it before turning it over to the trustees.—Wiegand v. Woerner (Mo. App.) 596.

§ 226. Trustees of a fund are entitled to credit for taxes on the fund while in their hands for which they are liable.—Wiegand v. Woerner (Mo. App.) 596.

§ 227. Trustees made defendants to a suit *held* entitled to \$250 counsel fees.—Wiegand v. Woerner (Mo. App.) 596.

§ 268. Costs of litigation brought on by a trustee in the interest of the beneficiary's estate of which he was executor, and in violation of his duty as trustee, *held* to be taxed against him as executor.—Wiegand v. Woerner (Mo. App.) 596.

V. EXECUTION OF TRUST BY TRUSTEE OR BY COURT.

§ 283. Mere suggestion of the relationship of trustee and cestui que trust by the beneficiary does not avoid dealings of the trustee with the trust funds.—Heath v. Tucker (Mo. App.) 572.

§ 283. There is no difference in law between the dealings between trustee and cestui que trust and with strangers, except with reference to the burden of proof.—Heath v. Tucker (Mo. App.) 572.

VI. ACCOUNTING AND COMPENSATION OF TRUSTEE.

§ 315. \$500 *held* a reasonable compensation for the services of trustees.—Wiegand v. Woerner (Mo. App.) 596.

§ 318. The rule that, where one of two or more trustees acts in harmony with his co-trustee in connection with an adverse claim of such cotrustee, neither of them are entitled to compensation, need not be enforced where the trustees acted in apparent good faith.—Wiegand v. Woerner (Mo. App.) 596.

§ 329. Where the court made a temporary allowance to a beneficiary, to be paid pending proceedings for an accounting, from which the trustee appealed and obtained a supersedeas, the court could proceed with the accounting and render a decree requiring further payments by the trustee.—Patrick v. Birkhead (Ky.) 483.

TUTORS.

See Guardian and Ward.

ULTRA VIRES.

Acts of national bank, see Banks and Banking, § 261.

Effect of ultra vires acts and contracts of corporations in general, see Corporations, § 388. Effect of ultra vires acts and contracts of municipal corporation, see Municipal Corporations, § 225.

UNDERTAKINGS.

See Bail; Bonds.

On appeal or writ of error, see Criminal Law, § 1076; Justices of the Peace, § 191.

UNDERWRITERS.

See Insurance.

UNDUE INFLUENCE.

Constructive trust in respect to property acquired by undue influence, see Trusts, § 95.

UNFAIR COMPETITION.

See Trade-Marks and Trade-Names, §§ 70-73.

UNIFORMITY.

Constitutional requirement as to equality and uniformity of taxation, see Taxation, § 40.

UNILATERAL CONTRACTS.

See Contracts, § 10.

UNITED STATES.

Courts, see Courts, § 363.

UNLAWFUL DETAINER.

See Forcible Entry and Detainer.

Of demised premises, see Landlord and Tenant, §§ 288-291.

UNNATURAL OFFENSE.

See Sodomy.

USAGES.

See Customs and Usages.

USURY:**I. USURIOUS CONTRACTS AND TRANSACTIONS.**

(B) Rights and Remedies of Parties.

Application of general statute of limitations, see Limitation of Actions, § 49.

§ 100. One receiving usurious interest cannot be deprived of the principal and legal interest paid him.—Paine v. Levy (Ky.) 1160.

§ 100. Usury will not be regarded as paid until the legal interest and principal have been satisfied.—Paine v. Levy (Ky.) 1160.

§ 100. Where usury is set up as a defense, the court, if asked, may apply the sums paid as a credit on the principal, but is not warranted in so doing, where only an abatement of further interest is sought.—Taylor v. Shelton (Tex. Civ. App.) 302.

§ 113. The burden is upon one claiming that a debt represented by a note was usurious to show what part of the debt was usurious.—Paine v. Levy (Ky.) 1160.

II. PENALTIES AND FORFEITURES.

§ 138. "Usurious interest" as used in Rev. St. 1895, art. 3106, as amended by Acts 1907, c. 143, providing a recovery of double the amount of such interest, defined.—Taylor v. Shelton (Tex. Civ. App.) 302.

§ 141. Defendant, who had taken usurious interest upon a note held liable after his assignment thereof for the penalty provided by Rev. St. 1895, art. 3106, as amended by Acts

1907, c. 143.—Taylor v. Shelton (Tex. Civ. App.) 302.

§ 142. Usurious interest is recoverable under Rev. St. 1895, art. 3106, as amended by Acts 1907, c. 143, though the principal sum has not been paid.—Taylor v. Shelton (Tex. Civ. App.) 302.

§ 146. Under the statute, the taint of usury forfeits any further interest, and thereafter leaves only the principal as what is actually owing to the creditor.—Taylor v. Shelton (Tex. Civ. App.) 302.

VACANCY.

In office of supervisor of roads, see Highways, § 93.

VACATION.

Of particular acts, instruments, or proceedings.

See Execution, § 163.

Account of executor or administrator, see Executors and Administrators, § 509.

Judgment by default, see Judgment, §§ 137-139.

Verdict, see New Trial.

Proceedings during vacation of courts.

Punishment for violation of injunction, see Injunction, § 230.

VAGRANCY.

Expert testimony, see Evidence, § 506.

VALUE.

Limits of jurisdiction, see Courts, § 223; Justices of the Peace, § 43.

Of insurance policies, judicial notice, see Evidence, § 18.

Of property as measure of damages for conversion, see Trover and Conversion, § 46.

Opinion evidence, see Evidence, § 498½.

VARIANCE.

Between judgment and process, pleadings, proofs, verdict, or findings, see Judgment, §§ 248-252.

Between pleading and proof in civil actions, see Pleading, §§ 387-395.

VENDOR AND PURCHASER.

Compensation of broker procuring conveyance, see Brokers, §§ 40-75.

Declarations by vendor as evidence against vendee and subsequent purchasers, see Evidence, § 230.

Parol or extrinsic evidence to contradict or vary contract of sale, see Evidence, § 400.

Powers of sale, see Powers.

Purchasers pending suit, see Lis Pendens, § 24.

Specific performance of contract, see Specific Performance.

Validity of sales as to creditors or subsequent purchasers, see Fraudulent Conveyances.

Sales by or to particular classes of persons.

See Executors and Administrators, § 327.

Cotenants, see Tenancy in Common, § 19.

Independent executors, see Executors and Administrators, § 7.

Mortgagors, see Mortgages, § 280.

Sales of particular species of, or estates or interests in, property.

Lands held adversely, see Champerty and Maintenance, § 7.

Mortgaged property, see Mortgages, § 280.

Personal property in general, see Sales.

Property of decedent, see Executors and Administrators, § 327.

Property subject to remainder interest, see Remainders, § 16.
Public lands, see Public Lands, §§ 151-175.
Standing timber, see Logs and Logging, § 3.

Sales on judicial or other proceedings.

See Execution, §§ 258-260.
By executors or administrators, see Executors and Administrators, § 327.
Tax sales, see Taxation, § 643.

I. REQUISITES AND VALIDITY OF CONTRACT.

Application of statute of frauds, see Frauds, Statute of, §§ 71-76.
Deposits to be forfeited on breach of contract as liquidated damages, or penalties, see Damages, § 81.

II. CONSTRUCTION AND OPERATION OF CONTRACT.

Parol or extrinsic evidence to contradict or vary written contract, see Evidence, § 400.

IV. PERFORMANCE OF CONTRACT.

(A) Title and Estate of Vendor.

§ 133. Effect of a vendor's obligation to furnish a "satisfactory deed," stated.—Clark v. Asbury (Tex. Civ. App.) 286.

§ 133. What constitutes a "good deed" within a contract to convey, stated.—Clark v. Asbury (Tex. Civ. App.) 286.

§ 137. Under a contract for the sale of land, the decision of an attorney as the merchantability of the title, *held* decisive.—Atwood v. Fagan (Tex. Civ. App.) 765.

V. RIGHTS AND LIABILITIES OF PARTIES.

Purchasers at execution sales, see Execution, § 269.
Purchasers at judicial sales in general, see Judicial Sales, § 50.
Purchasers at tax sales, see Taxation, § 734.
Purchasers of mortgaged property, see Mortgages, § 280.
Purchasers pending suit, see Lis Pendens, § 24.

(A) As to Each Other.

Part payment by purchasers as affecting limitations, see Limitation of Actions, § 155.

(B) As to Third Persons in General.

§ 214. Acceptance of an assignment of a written contract for the sale of land by the assignee may be by parol.—Evans v. Stratton (Ky.) 1154.

§ 214. Assignment of an accepted written contract for the sale of land signed only by the assignor held valid and enforceable against both parties.—Evans v. Stratton (Ky.) 1154.

§ 219. Evidence *held* to warrant a finding of a parol acceptance of an assignment of a contract for the sale of land.—Evans v. Stratton (Ky.) 1154.

(C) Bona Fide Purchasers.

From persons of unsound mind, see Insane Persons, § 61.

§ 230. A purchaser *held* chargeable with notice of provisions in an unrecorded deed through which he must trace title.—Green v. Maddox (Ark.) 931.

VI. REMEDIES OF VENDOR.

Splitting causes of action, see Action § 53.

(A) Lien and Recovery of Land.

Recovery of land after bar of action by limitations on note, see Limitation of Actions, § 170.

§ 265. A purchaser, who assumed vendor's lien notes executed by his grantor, was bound to make payment thereof to the holder at maturity.—Lott v. Cousins (Tex. Civ. App.) 270.

(C) Actions for Damages.

§ 331. In an action by a vendor for damages, *held* that the good faith of the vendee's attorney in finding that the title was not a merchantable one as shown by the vendor's abstract was a question for the jury.—Atwood v. Fagan (Tex. Civ. App.) 765.

§ 331. Whether an abstract of title showed a merchantable title *held* one of fact.—Atwood v. Fagan (Tex. Civ. App.) 765.

VII. REMEDIES OF PURCHASER.

(A) Recovery of Purchase Money Paid.

Deposits to be forfeited on breach of contract as liquidated damages or penalties, see Damages, § 81.

§ 338. Generally a sale of land will be treated as for a stated price in solido, unless the deed shows a sale by the acre or warrants the acreage; but equity will relieve against fraudulent representations or mistake as to quantity.—Engel v. Powell (Mo. App.) 74.

§ 341. One suing for a deficit in the acreage of land sold him *held* entitled to show the agreement for the sale and the vendors' representations made when and before the contract and deed were made.—Engel v. Powell (Mo. App.) 74.

VENDORS' LIENS.

See Vendor and Purchaser, § 265.

VENEREAL DISEASES.

False charges in pleading as cruelty, grounds for divorce, see Divorce, § 27.

VENUE.

Of attachment, see Attachment, § 74.

II. DOMICILE OR RESIDENCE OF PARTIES.

§ 32. Where an action was filed March 31, 1908, a plea of privilege, following exceptions and a general denial to the answer, filed January 26, 1910, is waived.—Fritter v. Pendleton (Tex. Civ. App.) 1186.

VERDICT.

Aider by, see Pleading, § 433.

Contrary to law or evidence, ground for new trial, see New Trial, § 72.

In action for conversion, see Trover and Conversion, § 68.

In action for libel, see Libel and Slander, § 125.

In civil actions in general, see Trial, §§ 320-337.

In criminal prosecutions in general, see Criminal Law, § 884.

On trial by jury of issues in suit in equity, see Equity, § 381.

Review in civil cases, see Appeal and Error, §§ 930, 999-1004, 1070.

Review in criminal cases, see Criminal Law, § 1159.

Setting aside, see New Trial.

VERIFICATION.

Of pleading, see Pleading, § 290.

VESTED RIGHTS.

Protection, see Constitutional Law, § 93.

VICE PRINCIPALS.

Liability of master for injuries to servant from acts or omissions of vice principal, see Master and Servant, §§ 189, 190.

VILLAGES.

See Municipal Corporations.

VINDICTIVE DAMAGES.

See Damages, § 91.

VOLUNTARY ASSIGNMENTS.

See Assignments for Benefit of Creditors.

VOLUNTARY DISMISSAL.

See Dismissal and Nonsuit, §§ 7-42.

VOTERS.

See Elections.

WAGERS.

See Gaming.

WAIVER.

See Estoppel.

Of objections to particular acts, instruments, or proceedings.

See Assignments, § 68.

Default or delay in delivering goods sold, see Sales, § 176.

Insurance policies, see Insurance, §§ 375, 376, 724, 755.

Irregularities and errors at trial in general, see Trial, §§ 418-423.

Misconduct affecting jury, see Trial, § 317.

Objection to nonjoinder of parties, see Parties, § 84.

Performance of contracts, see Contracts, § 305.

Performance of contracts for public improvements, see Municipal Corporations, § 365.

Pleadings, see Pleading, §§ 403-433.

Record on appeal or writ of error, see Appeal and Error, § 644.

Of rights or remedies.

See Venue, § 32.

Adjustment or arbitration of loss under insurance policy, see Insurance, § 576.

Allowance to surviving wife, husband, or children from estate of decedent, see Executors and Administrators, § 189.

Appeal or other proceeding for review, see Appeal and Error, § 753.

Conditions in conditional sale or of forfeiture for breach, see Sales, § 477.

Exemption from garnishment, see Garnishment, § 20.

Forfeiture of insurance policy, see Insurance, §§ 375, 376, 755.

Landlord's lien, see Landlord and Tenant, § 254.

Objections to evidence, see Trial, § 105.

Objections to testimony as to transactions with person since deceased, see Witnesses, § 181.

WAR.

See Militia.

WARDS.

See Guardian and Ward.

WARNING.

At railroad crossings, see Railroads, § 288.

From trains, see Railroads, § 340.

Precautions against injuries to servants, see Master and Servant, §§ 153-155.

WARRANTY.

Covenants of, damages for breach, see Covenants, § 130.

On sale of goods, see Sales, §§ 267-283.

WATERS AND WATER COURSES.

See Levees.

Driving, floating, or rafting logs, see Logs and Logging, § 15.

V. SURFACE WATERS.

Spread of Johnson grass by diversion of surface waters, see Agriculture, § 8.

§ 119. One seeking to recover under the common law and the statutes governing the construction of railroads with reference to the natural drainage of land *held* required to allege and prove negligence.—Missouri, K. & T. Ry. Co. of Texas v. Tolbert (Tex. Civ. App.) 280.

VIII. ARTIFICIAL PONDS, RESERVOIRS, AND CHANNELS, DAMS, AND FLOWAGE.

§ 171. A railroad company *held* liable for the damages to plaintiff's land by flooding caused by obstructing a stream.—South Side Realty Co. v. St. Louis & S. F. R. Co. (Mo. App.) 1034.

§ 171. If at the time of the construction of a railroad extraordinary inundations have occurred within the memory of men then living, their recurrence should be anticipated and provided against.—South Side Realty Co. v. St. Louis & S. F. R. Co. (Mo. App.) 1034.

§ 171. Under Rev. St. 1909, § 3049, relating to the building of bridges, a railroad company constructing its road over a water course must leave openings sufficient as an outlet for all water that may reasonably be expected, but need not anticipate unprecedented floods.—South Side Realty Co. v. St. Louis & S. F. R. Co. (Mo. App.) 1034.

§ 171. No one can materially interfere with the waters of running streams in such a way as to invade the rights of others, such interference being per se a nuisance.—South Side Realty Co. v. St. Louis & S. F. R. Co. (Mo. App.) 1034.

§ 178. In an action for damages to land by flooding caused by the obstruction of a stream, evidence *held* insufficient to sustain a finding of \$1,000 as the amount of damages to the sale of the property by the flood.—South Side Realty Co. v. St. Louis & S. F. R. Co. (Mo. App.) 1034.

§ 178. Measure of damages for injury to land by flooding stated.—South Side Realty Co. v. St. Louis & S. F. R. Co. (Mo. App.) 1034.

§ 179. In an action against a railroad for damages caused by obstructing a stream, thereby flooding plaintiff's land, evidence *held* to raise a question for the jury whether the rainfall could not have been anticipated.—South Side Realty Co. v. St. Louis & S. F. R. Co. (Mo. App.) 1034.

§ 179. Damages recoverable under plaintiff's amended complaint in an action against a railroad company stated.—Suter v. Ft. Worth & D. C. Ry. Co. (Tex. Civ. App.) 785.

§ 179. Evidence in an action against a railroad company for injuries to plaintiff's land *held* insufficient to warrant a verdict in plaintiff's favor.—Suter v. Ft. Worth & D. C. Ry. Co. (Tex. Civ. App.) 785.

WAYS.

Public ways, see Highways; Municipal Corporations, §§ 671-706.

WEAPONS.

§ 17. It was error to refuse to instruct that accused did not lawfully carry a weapon, if he took it during an encounter between others, and retained it only to prevent a shooting.—*Baker v. State* (Tex. Cr. App.) 686.

WEEDS.

See Agriculture, § 8.

WIDOWS.

Allowance from estate of husband, see Executors and Administrators, §§ 173-189.
Dower, see Dower.

Of tenant at will as tenant by sufferance, see Landlord and Tenant, § 119.

Rights as to community property, see Husband and Wife, § 273.

WIFE.

See Husband and Wife.

WILLS.

See Descent and Distribution; Executors and Administrators.

Powers created by will, see Powers.

Validity, construction, and execution of trusts, in general, see Trusts.

II. TESTAMENTARY CAPACITY.

§ 28. Act March 15, 1894 (Laws 1894, c. 76) was intended to authorize a married woman to dispose of her property, both general and separate, by will, and to supersede Gen. St. 1873, c. 113, § 4.—*Hankins v. Columbia Trust Co.* (Ky.) 498.

IV. REQUISITES AND VALIDITY.**(A) Nature and Essentials of Testamentary Dispositions.**

§ 75. Under Ky. St. §§ 4839, 4845 (Russell's St. §§ 3962, 3968), a will executed before the creation of a power of appointment in testator might operate as a sufficient execution of a subsequently created power.—*Hankins v. Columbia Trust Co.* (Ky.) 498.

§ 75. While, under Gen. St. 1873, c. 113, § 4, in force in 1881, the will of a married woman devising her general estate was void, the will attempting to exercise a power was not void by reason of the then nonexistence of the power, and would become effective by its acquisition before her death.—*Hankins v. Columbia Trust Co.* (Ky.) 498.

§ 75. The will of a married woman, executed in 1881, held a valid exercise of the power of appointment conferred on her in 1894, under Ky. St. §§ 4839, 4845 (Russell's St. §§ 3962, 3968) and Gen. St. 1873, c. 113, § 4, superseded by Act March 15, 1894 (Laws 1894, c. 76; Ky. St. § 2147 [Russell's St. § 4654]).—*Hankins v. Columbia Trust Co.* (Ky.) 498.

(G) Revocation and Revival.

§ 191. Under Rev. St. 1895, art. 5345, the will of a wife held valid despite the subsequent birth of a child.—*Pearce v. Pearce* (Tex.) 210.

VI. CONSTRUCTION.**(A) General Rules.**

§ 448. The presumption against intestacy has no place in the construction of a will if the words used are clearly referable to other subjects than the property omitted.—*Buckley v. Hogan* (Ky.) 1139.

§ 457. Though testator's intent should be given effect in view of Rev. St. 1909, § 583, yet technical words should be interpreted in their established legal sense.—*Wiegand v. Woerner* (Mo. App.) 596.

§ 461. Conjunctive words will be read as disjunctive, when necessary to effectuate testator's intention.—*Shaver's Adm'r v. Ewald's Ex'r* (Ky.) 906.

(D) Description of Property.

§ 578. A general residuary clause passes after-acquired property, real or personal.—*Durham's Adm'r v. Clay* (Ky.) 153.

§ 587. Testatrix's trustees held not to have acquired any title by the last clause of her will to property otherwise undisposed of.—*Buckley v. Hogan* (Ky.) 1139.

§ 588. A residuary clause construed and held not general.—*Durham's Adm'r v. Clay* (Ky.) 153.

(E) Nature of Estates and Interests Created.

§ 602. A devisee held upon the birth of a child to have acquired an absolute estate in fee.—*Pearce v. Pearce* (Tex.) 210.

§ 608. A devise held within the rule in *Shelley's Case*, the beneficiary taking the fee.—*Pearce v. Pearce* (Tex.) 210.

§ 619. A provision of a will held to create an annuity.—*Wiegand v. Woerner* (Mo. App.) 596.

(G) Conditions and Restrictions.

§ 656. The court will not extend by construction a condition in a will beyond its natural meaning.—*Shaver's Adm'r v. Ewald's Ex'r* (Ky.) 906.

§ 657. Conditions in a will construed.—*Shaver's Adm'r v. Ewald's Ex'r* (Ky.) 906.

(H) Estates in Trust and Powers.

Construction and execution of powers in general, see Powers, § 33.

Execution of trusts in general, see Trusts, § 283.

Management and disposal of trust property in general, see Trusts, §§ 219-268.

§ 684. A testamentary gift held a gift of the income of a fund after deducting the tax, fees, and costs of administration.—*Caperton's Ex'r v. Todd* (Ky.) 1163.

VII. RIGHTS AND LIABILITIES OF DEVISEES AND LEGATEES.**(A) Nature of Title and Rights in General.**

§ 733. An annuity created by a provision of a will held payable on the anniversary of testator's death.—*Wiegand v. Woerner* (Mo. App.) 596.

(C) Advancements, Ademption, Satisfaction, and Lapse.

§ 767. Testator's investment in land of money specifically bequeathed adeems the bequest.—*Durham's Adm'r v. Clay* (Ky.) 153.

§ 767. A bequest held not adeemed.—*Durham's Adm'r v. Clay* (Ky.) 153.

§ 767. A specific bequest is adeemed by a change in the property's form, only when such change is material.—*Durham's Adm'r v. Clay* (Ky.) 153.

§ 767. Rule concerning ademption of devises as affected by Ky. St. § 2068 (Russell's St. § 3844) stated.—*Durham's Adm'r v. Clay* (Ky.) 153.

(H) **Void, Lapsed, and Forfeited Devices and Bequests, and Property and Interests Undisposed of.**

§ 866. Undevised land passes to testator's heirs at law.—*Durham's Adm'r v. Clay* (Ky.) 153.

WIRES.

Of electric light or power companies, see Electricity.

WITHDRAWAL.

Of action, see Dismissal and Nonsuit, §§ 7-42.
Of plea in criminal prosecution, see Criminal Law, § 301.

WITNESSES.

See Depositions; Evidence.

Experts, see Criminal Law, §§ 474-485; Evidence, §§ 506-528, 544, 548-560.

Indorsement of witnesses on indictment or information, see Criminal Law, § 628.

Opinions, see Criminal Law, §§ 448-485; Evidence, §§ 471-560.

Testimony of accomplices, see Criminal Law, § 508.

I. ATTENDANCE, PRODUCTION OF DOCUMENTS, AND COMPENSATION.

Absence of witness, ground for continuance, see Continuance, §§ 23-28; Criminal Law, §§ 594, 595.

Fees as items of costs, see Costs, § 184.

II. COMPETENCY.

Of expert witnesses, see Evidence, § 544.

(A) **Capacity and Qualifications in General.**

§ 53. Rev. St. 1909, § 5242, limits the cross-examination of defendant's wife to the scope of her direct examination.—*State v. McDonough* (Mo.) 545.

§ 79. Whether a witness is sane held a question for the court.—*State v. Whitsett* (Mo.) 555.

§ 79. Objection to testimony of witness on ground of insanity held not to be sustained, in absence of request to examine witness on voir dire and motion to exclude testimony.—*State v. Whitsett* (Mo.) 555.

(C) **Testimony of Parties or Persons Interested, for or against Representatives, Survivors, or Successors in Title or Interest of Persons Deceased or Incompetent.**

§ 139. Plaintiff held disqualified to testify to a transaction with a decedent under whom he claims.—*James v. Holdam* (Ky.) 435.

§ 139. An independent executor can voluntarily resign as affecting his qualification as a witness.—*Rankin v. Rankin* (Tex. Civ. App.) 392.

§ 140. Under Rev. St. 1909, § 6354, relating to competency of witnesses as to transactions with deceased persons, a child and heir of intestate held not disqualified from testifying in behalf of the administrator.—*Norvell v. Cooper* (Mo. App.) 1095.

§ 140. In an action against an administrator on a note executed by intestate the husband of a child and heir of intestate held incompetent to testify for defendant.—*Norvell v. Cooper* (Mo. App.) 1095.

§ 142. An officer of a corporation held competent to testify in an action against the corporation as to transactions with a deceased person.—*Nashville Trust Co. v. First Nat. Bank* (Tenn.) 311.

§ 159. Certain testimony held objectionable as concerning a transaction with a decedent.—*Jordan v. Massey* (Tex. Civ. App.) 804.

§ 160. Conversations had between heirs of a decedent and decedent in the presence of claimant held admissible under the Code.—*Barton v. Barton's Adm'r* (Ky.) 902.

§ 177. Under Civ. Code Prac. § 606, subsec. 2, a party held entitled to testify as to conversations with a decedent where the adverse party introduced testimony as to such conversations.—*Barton v. Barton's Adm'r* (Ky.) 902.

§ 181. Plaintiff held to have waived the incompetency of a witness by failure to take timely objection thereto.—*Norvell v. Cooper* (Mo. App.) 1095.

§ 181. The incompetency of a witness to testify at a second trial held waived by failure to object to his competency at the first trial.—*Norvell v. Cooper* (Mo. App.) 1095.

III. EXAMINATION.

Of expert witnesses, see Criminal Law, § 485; Evidence, §§ 548-560.

On taking depositions, see Depositions, § 64.
Review of rulings, see Criminal Law, § 1170½.

(B) **Cross-Examination and Re-Examination.**

Of expert witnesses, see Evidence, § 558.

§ 286. Evidence of certain facts held admissible on redirect examination.—*Missouri, K. & T. Ry. Co. of Texas v. Groseclose* (Tex. Civ. App.) 736.

§ 287. The remainder of a conversation between persons in the absence of defendant, not being necessary to present the situation fairly, held not admissible, though part of it was drawn out on cross-examination of the state's witness.—*State v. McDonough* (Mo.) 545.

IV. CREDIBILITY, IMPEACHMENT, CONTRADICTION, AND CORROBORATION.

Credibility of witnesses as affecting weight and sufficiency of evidence, see Evidence, § 588.

Credibility of witnesses as question for jury, see Trial, § 140.

Instructions as to credibility, see Criminal Law, §§ 785, 786.

Newly discovered impeaching evidence as ground for new trial, see Criminal Law, § 942.

Review of questions of fact dependent on credibility of witnesses, see Appeal and Error, § 994.

(A) In General.

§ 330. In a prosecution for rape, defendant held entitled to cross-examine prosecutrix directly as to the time of defendant's last act of intercourse with her.—*Foreman v. State* (Tex. Cr. App.) 229.

(B) Character and Conduct of Witness.

§ 340. Defendant held not entitled to prove the reputation of certain persons for virtue and chastity.—*Florence v. State* (Tex. Cr. App.) 689.

(D) Inconsistent Statements by Witness.

§ 379. A statement made by a commonwealth's witness before the trial that she knew nothing about the case held admissible to contradict her.—*Higgins v. Commonwealth* (Ky.) 1135.

§ 379. In a prosecution for rape, evidence of prosecutrix's statements to others that she had had intercourse with other men mentioned, held admissible to impeach her.—*Foreman v. State* (Tex. Cr. App.) 229.

§ 379. Certain evidence *held* admissible for purposes of impeachment.—*Lone Star Lignite Mining Co. v. Caddell* (Tex. Civ. App.) 841.

§ 388. Alleged contradictory statements are inadmissible to impeach a witness under Civ. Code Prac. §§ 597, 598, unless a proper foundation is laid for their introduction.—*Higgins v. Commonwealth* (Ky.) 1135.

§ 392. A statement *held* admissible to contradict accused's witness.—*Butler v. State* (Tex. Cr. App.) 230.

(E) Contradiction and Corroboration of Witness.

Corroboration of testimony of female in prosecution for seduction, see Seduction, § 48.

§ 406. A book kept by a decedent *held* admissible to contradict the testimony of a witness.—*Barton v. Barton's Adm'r* (Ky.) 902.

§ 406. Evidence that a witness for the prosecution had made a certain statement to defendant's attorney *held* immaterial and inadmissible to contradict her.—*Higgins v. Commonwealth* (Ky.) 1135.

WOMEN.

Married women, see Husband and Wife.

WOODS AND FORESTS.

See Logs and Logging.

WORDS AND PHRASES.

"All the legatees."—*Shaver's Adm'r v. Ewald's Ex'r* (Ky.) 906.

"Annuity."—*Wiegand v. Woerner* (Mo. App.) 598.

"Any proposed ordinance."—*Southwestern Telegraph & Telephone Co. v. City of Dallas* (Tex.) 321.

"Call patent."—*Hall v. Pratt* (Ky.) 900.

"Certiorari."—*State ex rel. Smith v. Dykeman* (Mo. App.) 120.

"Colored children."—*Mullins v. Belcher* (Ky.) 1151.

"Conspiracy."—*State v. Racine Sattley Co.* (Tex. Civ. App.) 400.

"Contract."—*American Lead Pencil Co. v. Nashville, C. & St. L. Ry.* (Tenn.) 613.

"Convict."—*Woodmen of the World v. Dodd* (Tex. Civ. App.) 254.

"Conviction of a felony."—*Woodmen of the World v. Dodd* (Tex. Civ. App.) 254.

"Custom."—*American Lead Pencil Co. v. Nashville, C. & St. L. Ry.* (Tenn.) 613.

"Deadly weapon."—*State v. Belfiglio* (Mo.) 508; *Hartfield v. State* (Tex. Cr. App.) 1180.

"Debt."—*Sandifer v. Foard County* (Tex. Civ. App.) 823.

"Deficiency."—*Bailey v. Block* (Tex.) 323.

"Dinky engine."—*Howard v. Waterman Lumber & Supply Co.* (Tex. Civ. App.) 387.

"Disloyal."—*Wade v. William Barr Dry Goods Co.* (Mo. App.) 1084.

"Either."—*Brotherhood of Locomotive Firemen & Enginemen v. Aday* (Ark.) 928.

"Etc."—*Louisville & N. R. Co. v. Sewell* (Ky.) 162.

"Et cetera."—*Louisville & N. R. Co. v. Sewell* (Ky.) 162.

"Exceptions."—*Harding v. Missouri Pac. Ry. Co.* (Mo.) 641.

"Extremities of the body."—*Brotherhood of Locomotive Firemen & Enginemen v. Aday* (Ark.) 928.

"Forcible detainer."—*Willis v. Whayne* (Ky.) 150.

"Good deed."—*Clark v. Asbury* (Tex. Civ. App.) 286.

"Induced."—*State v. Johnston* (Mo. App.) 38.

"Insane person."—*Pulaski County v. Hill* (Ark.) 973.

"Interested in business."—*Doyle v. Scott* (Tex. Civ. App.) 829.

"International."—*Travelers' Ins. Mach. Co. v. Travelers' Ins. Co. of Hartford, Conn.* (Ky.) 877.

"Jurisdiction."—*State ex rel. St. Louis Dressed Beef & Provision Co. v. Nixon* (Mo.) 538.

"Laches."—*Walther v. Null* (Mo.) 993.

"Legal representatives."—*Wolfe v. Wolfe* (Mo. App.) 38.

"Libel."—*Munden v. Harris* (Mo. App.) 1076.

"Malice aforethought."—*Potter v. Commonwealth* (Ky.) 462.

"Manufacturing business."—*Green River Chemical Co. v. Board of Trustees of Town of Rockport* (Ky.) 1164.

"Matters of contract."—*Smith v. Taylor* (Ark.) 634.

"May."—*O'Connor v. Weissinger* (Ky.) 1127.

"Mentioned."—*Pearce v. Pearce* (Tex.) 210.

"Necessary."—*State v. Thornton* (Mo.) 519.

"Negligence."—*Louisville, H. & St. L. Ry. Co. v. Stillwell* (Ky.) 202.

"Net value."—*Fahle v. Connecticut Mut. Life Ins. Co. of Hartford, Conn.* (Mo. App.) 60.

"Not hitched."—*Miller v. United Rys. Co. of St. Louis* (Mo. App.) 1045.

"Objections."—*Harding v. Missouri Pac. Ry. Co.* (Mo.) 641.

"Open account."—*Couturie v. Roensch* (Tex. Civ. App.) 413.

"Open house."—*Doyle v. Scott* (Tex. Civ. App.) 829.

"Ordinary care."—*Caldwell v. Nichol* (Ark.) 622; *Creamer v. Louisville Ry. Co.* (Ky.) 193; *Louisville, H. & St. L. Ry. Co. v. Stillwell* (Ky.) 202.

"Peculiar."—*Powell v. City of Columbia* (Mo. App.) 76.

"Pledge."—*Nashville Trust Co. v. First Nat. Bank* (Tenn.) 311.

"Probable cause."—*Wilkerson v. McGhee* (Mo. App.) 595.

"Property."—*Munden v. Harris* (Mo. App.) 1076; *State v. Downman* (Tex. Civ. App.) 787.

"Qualified privilege."—*De Van Rose v. Tholborn* (Mo. App.) 1093.

"Reinvestment."—*Globe Realty Co. v. Lentz* (Ky.) 882.

"Right of privacy."—*Munden v. Harris* (Mo. App.) 1076.

"Satisfactory deed."—*Clark v. Asbury* (Tex. Civ. App.) 286.

"Special."—*Powell v. City of Columbia* (Mo. App.) 76.

"State."—*Houston E. & W. T. Ry. Co. v. Inman, Akers & Inman* (Tex. Civ. App.) 275.

"Stop to fill."—*Banks v. Chicago, B. & Q. R. Co.* (Mo. App.) 1071.

"Tending."—*Nash v. State* (Tex. Cr. App.) 709.

"Total disability."—*Brotherhood of Locomotive Firemen & Enginemen v. Aday* (Ark.) 928.

"Trade fixtures."—*Weeks-Betts Hardware Co. v. Roosevelt Lead & Zinc Co.* (Mo. App.) 35.

"Transfer."—*Union Trust & Savings Co. of Maysville v. Taylor* (Ky.) 196.

"Travelers' insurance."—*Travelers' Ins. Mach. Co. v. Travelers' Ins. Co. of Hartford, Conn.* (Ky.) 877.

"Trust."—*State v. Racine Sattley Co.* (Tex. Civ. App.) 400.

"Unsound mind."—*Pulaski County v. Hill* (Ark.) 973.

"Usage."—*American Lead Pencil Co. v. Nashville, C. & St. L. Ry.* (Tenn.) 613.

"Usurious interest."—*Taylor v. Shelton* (Tex. Civ. App.) 302.

"Vice principal."—*Lantry-Sharpe Contracting Co. v. McCracken* (Tex. Civ. App.) 363.

WORK AND LABOR.

See Master and Servant.

Claim against estate of decedent, for services, see Executors and Administrators, § 206.

Liens on real property for work and materials, see Mechanics' Liens.

Sharing profits as compensation for services as determining existence of partnership, see Partnership, § 9.

§ 4. Rule stated in regard to implied contracts for services which were accepted.—Crain v. Miles (Mo. App.) 52.

§ 22. In an action by real estate brokers, complaint in justice court held to present a cause of action based on quantum meruit.—Crain v. Niles (Mo. App.) 52.

§ 28. Evidence held to support a finding that plaintiff performed work and furnished materials at the request of the agent of defendant.—Remmers v. Shubert (Mo. App.) 1042.

WRITING.

Best and secondary evidence, see Evidence, §§ 158-174.

Documentary evidence, see Criminal Law, §§ 440-445; Evidence, §§ 359-376.

Necessity and sufficiency to constitute conveyance of real property, see Deeds, § 38.

Necessity and sufficiency under statute of frauds, see Frauds, Statute of.

Parol or other extrinsic evidence affecting writings, see Evidence, §§ 387-456.

Reduction of instructions to writing, see Criminal Law, § 804.

Requisites and sufficiency to satisfy statute of frauds, see Frauds, Statute of, §§ 105-115.

WRITS.

Particular writs.

See Habeas Corpus; Mandamus; Quo Warranto; Replevin; Sequestration.

Coram nobis, see Judgment, § 334.

Of certiorari, see Certiorari.

WRITTEN INSTRUMENTS.

Alteration, see Alteration of Instruments.

As hearsay evidence, see Evidence, § 318.

Best and secondary evidence, see Criminal Law, § 398; Evidence, §§ 158-174.

Cancellation, see Cancellation of Instruments.

Delivery as escrow, see Escrows.

Documentary evidence, see Criminal Law, §§ 440-445; Evidence, §§ 359-376.

Parol or other extrinsic evidence, see Evidence, §§ 387-456.

Requisites and sufficiency to satisfy statute of frauds, see Frauds, Statute of, §§ 105-115.

Particular classes of instruments.

See Assignments for Benefit of Creditors; Bonds; Chattel Mortgages; Compromise and Settlement; Indictment and Information; Insurance; Mortgages; Release; Wills.

Contracts in general, see Contracts.

Deeds, see Deeds.

Deeds of trust, see Trusts, § 20.

WRONGFUL ATTACHMENT.

See Attachment, §§ 368-377.

WRONGFUL DEATH.

See Death, §§ 33-104.

WRONGS.

See Torts.

YEAR.

Estates for years, see Landlord and Tenant.

TABLES OF SOUTHWESTERN CASES

IN

STATE REPORTS

VOL. 93, ARKANSAS REPORTS

Ark. Rep.	S. W. Rep.	Ark. Rep.	S. W. Rep.	Ark. Rep.	S. W. Rep.	Ark. Rep.	S. W. Rep.	Ark. Rep.	S. W. Rep.	Ark. Rep.	S. W. Rep.	Ark. Rep.	S. W. Rep.	Ark. Rep.	S. W. Rep.
Pg.	Vol.	Pg.	Vol.	Pg.	Vol.	Pg.	Vol.	Pg.	Vol.	Pg.	Vol.	Pg.	Vol.	Pg.	Vol.
1	123	768	85	124	518	205	124	514	290	124	263	371	125	437	443
5	123	801	88	124	239	209	124	247	295	124	257	376	125	443	447
11	123	365	93	124	525	215	124	259	298	124	786	382	125	423	454
15	123	783	103	124	255	224	124	776	301	124	772	383	125	430	457
20	123	762	109	124	238	228	124	757	307	124	762	389	125	643	462
24	123	1182	113	124	234	234	124	752	312	124	769	392	125	417	472
29	123	798	119	124	241	240	123	790	313	124	770	394	125	422	479
35	123	763	127	123	792	244	124	516	316	124	783	394	130	167	484
39	125	661	140	124	1048	250	124	514	316	130	167	397	125	439	490
42	123	778	153	124	524	252	124	510	324	124	778	406	125	416	490
46	123	786	156	124	781	260	124	766	329	124	780	409	125	414	497
57	124	244	162	124	764	263	124	1027	332	124	774	415	125	420	503
62	124	252	168	129	30	266	124	1026	336	124	1021	421	124	1037	521
66	124	264	176	124	747	269	124	1081	342	124	1023	426	124	1029	530
77	123	771	179	124	530	272	124	1025	346	124	1045	430	124	1036	537
79	123	785	183	124	748	275	124	1028	353	124	758	435	124	1019	548
81	123	790	191	124	768	277	124	1039	362	125	432	439	124	1033	564
84	124	236	195	124	521	286	124	1034	368	125	120				

*Reported in full, in the Southwestern; not reported in full in Arkansas Reports.

VOL. 93, ARKANSAS REPORTS

	Page		Page
Abeles & Co. v. National Surety Co. (133 S. W. 364).....	631	Charles T. Abeles & Co. v. National Surety Co. (133 S. W. 364).....	631
Adams v. State (124 S. W. 766).....	260	Chicago, R. I. & P. R. Co. v. Dyal (124 S. W. 771).....	*631
American Ins. Co. v. McGhee Liquor Co. (124 S. W. 252).....	62	Citizens' Fire Ins. Co. of Clarksville, Arkansas, v. Yates (133 S. W. 364).....	632
Arkansas Midland R. Co. v. J. B. Gallo-way & Co. (133 S. W. 364).....	631	Cox v. Smith (125 S. W. 437).....	371
Ashley v. Ashley (124 S. W. 778).....	324	Crosby v. State (124 S. W. 781).....	156
Bank of Waldron v. Euper (125 S. W. 1022).....	609	Crowder v. Fordyce Lumber Co. (125 S. W. 417).....	392
Barton v. Haltom (125 S. W. 418).....	*631	Cullin-McCurdy Const. Co. v. Vulcan Iron Works (124 S. W. 1023).....	342
Bell v. State (125 S. W. 1020).....	600	Dale v. Bland (124 S. W. 1026).....	266
Berman v. Shelby (125 S. W. 124).....	472	Davis v. Davis (124 S. W. 525).....	93
Blank v. Huddleston (124 S. W. 786).....	208	Donaghey v. Martineau (133 S. W. 364).....	632
Bluthenthal v. Atkinson (124 S. W. 510).....	252	Farmers' Union Gin & Milling Co. v. Seitz (124 S. W. 780).....	329
Board of Directors of St. Francis Levee Dist. v. Fleming (125 S. W. 132, 659).....	490	Fidelity Mut. Life Ins. Co. v. Click (124 S. W. 764).....	162
Rowman v. State (129 S. W. 80).....	168	First Nat. Bank of Lake Providence, Louisiana, v. Reinman (125 S. W. 443).....	376
Rowman v. Trainor (124 S. W. 1010).....	435	Fletcher v. Lyon (123 S. W. 801).....	5
Bradford v. St. Louis, I. M. & S. R. Co. (124 S. W. 516).....	244	Fort v. Chamberlin (124 S. W. 234).....	112
Brewer v. State (125 S. W. 127).....	479	Fort Smith Light & Traction Co. v. Purcell (133 S. W. 364).....	631
Brownson v. State (123 S. W. 762).....	20	Franks v. Town of Holly Grove (124 S. W. 514).....	250
Buford v. Lewis (134 S. W. 1199).....	632	Gay Oil Co. v. Roach (125 S. W. 122).....	454
Byles, Ex parte (126 S. W. 94).....	612	Gershner v. Scott-Mayer Commission Co. (124 S. W. 772).....	301
Cache Valley Lumber Co. v. Culver Co. (125 S. W. 430).....	383	Gibson v. Little Rock & H. S. W. R. Co. (124 S. W. 1033).....	439
Capital Fire Ins. Co. v. Davis (124 S. W. 520).....	179		
Carr v. State (122 S. W. 631).....	585		
Charles M. Newton Trap Rock Co. v. Good Roads Machinery Co. (133 S. W. 364).....	632		

*Reported in full, in the Southwestern; not reported in full in Arkansas Reports.

134 S.W.

(1341)

*Reported in full, in the Southwestern; not reported in full in Arkansas Reports.

93 ARK.—Continued.		Page		Page
Gilbert, Ex parte (124 S. W. 762).....	307	St. Louis, I. M. & S. R. Co. v. Dallas (124 S. W. 247).....	209	
Grammer v. Blansett (124 S. W. 1037).....	421	St. Louis, I. M. & S. R. Co. v. Davis (124 S. W. 754).....	484	
Grayson v. St. Louis & S. F. R. Co. (125 S. W. 1013).....	579	St. Louis, I. M. & S. R. Co. v. Jones (125 S. W. 1025).....	537	
Grubbs v. Nixon (123 S. W. 785).....	79	St. Louis, I. M. & S. R. Co. v. Magness (123 S. W. 786).....	46	
Haglin v. Atkinson-Williams Hardware Co. (124 S. W. 518).....	85	St. Louis, I. M. & S. R. Co. v. Murphy (134 S. W. 1199).....	632	
Hanna v. St. Louis & S. F. R. Co. (124 S. W. 514).....	205	St. Louis, I. M. & S. R. Co. v. Pollock (123 S. W. 790).....	240	
Hogue v. State (124 S. W. 783; 130 S. W. 167).....	316	St. Louis, I. M. & S. R. Co. v. Rhoden (123 S. W. 798).....	29	
Holbrook v. Neely (124 S. W. 1025).....	272	St. Louis, I. M. & S. R. Co. v. Rogers (126 S. W. 375, 1199).....	564	
Hunter v. State (124 S. W. 1028).....	275	St. Louis, I. M. & S. R. Co. v. Rush (123 S. W. 804).....	*631	
Independence County v. Tomlinson (125 S. W. 423).....	382	St. Louis, I. M. & S. R. Co. v. Townes (124 S. W. 1036).....	430	
Industrial Mut. Indemnity Co. v. Armstrong (124 S. W. 236).....	84	St. Louis, I. M. & S. R. Co. v. Waldrop (123 S. W. 778).....	42	
Ingham Lumber Co. v. Ingersoll (125 S. W. 139).....	447	St. Louis, I. M. & S. R. Co. v. Walker (125 S. W. 135).....	457	
Jobe v. Caldwell (125 S. W. 423).....	503	St. Louis, I. M. & S. R. Co. v. Weatherly (124 S. W. 1031).....	269	
Johnson Berger & Co. v. Iriquois Canning Co. (133 S. W. 364).....	632	St. Louis, I. M. & S. R. Co. v. Wells (124 S. W. 524).....	153	
Kansas City Southern R. Co. v. Frost (124 S. W. 748).....	183	St. Louis, I. M. & S. R. Co. v. White (125 S. W. 120).....	368	
Leifer Mfg. Co. v. Gross (124 S. W. 1039).....	277	St. Louis Southwestern R. Co. v. Burd (124 S. W. 239).....	88	
Lewis v. Buford (124 S. W. 244).....	57	St. Louis Southwestern R. Co. v. Jackson (124 S. W. 241).....	119	
Lewis v. Stringham (133 S. W. 364).....	632	St. Louis Southwestern R. Co. v. Oliphant (125 S. W. 121).....	*631	
Liberto v. Reutzel (133 S. W. 364).....	632	St. Louis & N. A. R. Co. v. Bratton (124 S. W. 752).....	234	
Love v. Cahn (124 S. W. 259).....	215	St. Louis & S. F. R. Co. v. Caldwell (124 S. W. 1034).....	286	
Lowe v. Hart (125 S. W. 1030).....	548	St. Louis & S. F. R. Co. v. State (125 S. W. 643).....	389	
McKewen v. St. Louis, I. M. & S. R. Co. (124 S. W. 506).....	530	Salysers v. Legate (125 S. W. 1010).....	606	
Majestic Mill. Co. v. Copeland (124 S. W. 521).....	195	School Dist. No. 4 v. School Dist. No. 84 (124 S. W. 233).....	109	
Mattar Bros. v. Winegar (133 S. W. 364).....	632	Sellers v. State (124 S. W. 770).....	313	
Merwin v. Fussell (124 S. W. 1021).....	336	Sherman v. Chicago, R. I. & P. R. Co. (123 S. W. 1182).....	24	
Miller v. Hammock (124 S. W. 769).....	312	Shinn v. State (124 S. W. 263).....	290	
Miller v. State (134 S. W. 1199).....	632	Smith v. Roswell (124 S. W. 264).....	66	
Montgomery v. Arkansas Cold Storage & Ice Co. (124 S. W. 768).....	191	Southern Anthracite Coal Co. v. Bowen (124 S. W. 1048).....	140	
Moore v. Sharp (125 S. W. 601).....	39	Spear Min. Co. v. Shinn (124 S. W. 1045).....	346	
Nashville Lumber Co. v. Barefield (124 S. W. 758).....	353	State v. Clay County (124 S. W. 757).....	228	
Newton Trap Rock Co. v. Good Roads Machinery Co. (133 S. W. 364).....	632	State v. Peyton (125 S. W. 416).....	406	
Okolona Mercantile Co. v. Greeson (124 S. W. 257).....	295	State v. Southwestern Land & Timber Co. (126 S. W. 73).....	621	
Paragould & M. R. Co. v. Smith (124 S. W. 776).....	224	Swain v. Morris (125 S. W. 432).....	362	
Peck-Hammond Co. v. Walnut Ridge School Dist. (123 S. W. 771).....	77	Sweeden v. Atkinson Imp. Co. (125 S. W. 439).....	397	
Penix v. Rice (124 S. W. 747).....	176	Terre Noir Drainage Dist. No. 3 v. Thornton (124 S. W. 774).....	332	
Peters v. Townsend (124 S. W. 255).....	103	Tharp v. Barnett (124 S. W. 1027).....	263	
Planters' Mut. Ins. Co. v. Simpson (125 S. W. 121).....	*631	Thompson Cotton Co. v. Gullick (134 S. W. 1199).....	631	
Poe v. Poe (124 S. W. 1029).....	426	Valley Planting Co. v. Wise (123 S. W. 768).....	1	
Read's Drug Store v. Hessig-Ellis Drug Co. (125 S. W. 434).....	497	Walker v. City of Fayetteville (125 S. W. 412).....	443	
Rommel v. Collier (125 S. W. 422; 130 S. W. 167).....	394	Warren & O. V. R. Co. v. Waldrop (123 S. W. 792).....	127	
Roach v. Rector (123 S. W. 399).....	521	Weller v. Studebaker Bros. Mfg. Co. (125 S. W. 129).....	462	
Sadler v. Craven (123 S. W. 365).....	11	Western Union Tel. Co. v. Crenshaw (125 S. W. 420).....	415	
St. Louis, I. M. & S. R. Co. v. Bell (134 S. W. 1199).....	632	Western Union Tel. Co. v. Tucker (134 S. W. 1199).....	631	
St. Louis, I. M. & S. R. Co. v. Brown (123 S. W. 763).....	35	Wheatley v. State (125 S. W. 414).....	409	
St. Louis, I. M. & S. R. Co. v. Carter (126 S. W. 99).....	589	Williams v. State (123 S. W. 780).....	81	
St. Louis, I. M. & S. R. Co. v. Clements (123 S. W. 783).....	15			

*Reported in full, in the Southwestern; not reported in full in Arkansas Reports.

*Reported in full, in the Southwestern; not reported in full in Arkansas Reports.

VOL. 149, MISSOURI APPEAL REPORTS

Mo. A.	S. W.	Mo. A.	S. W.	Mo. A.	S. W.	Mo. A.	S. W.	Mo. A.	S. W.	Mo. A.	S. W.	Mo. A.	S. W.	
Rep.	Rep.	Rep.	Rep.	Rep.	Rep.	Rep.	Rep.	Rep.	Rep.	Rep.	Rep.	Rep.	Rep.	
Pg.	Vol.	Pg.	Vol.	Pg.	Vol.	Pg.	Vol.	Pg.	Vol.	Pg.	Vol.	Pg.	Vol.	
1	129	57	119	130	110	210	130	403	317	130	394	413	120	476
8	129	252	121	130	96	223	130	445	331	130	107	428	129	1049
12	129	32	128	130	64	231	130	381	338	130	40	432	180	66
24	129	66	134	130	130	243	130	103	351	130	111	439	130	364
47	130	448	144	130	60	255	129	1033	354	130	89	456	130	441
53	130	508	153	130	98	259	130	87	360	130	85	467	130	506
61	130	56	157	129	1016	266	130	82	367	129	981	482	130	474
72	130	99	162	129	1070	274	130	129	369	129	1065	489	121	115
78	130	156	166	129	1060	278	130	48	372	130	78	493	130	1124
97	129	1073	170	130	62	286	129	1025	378	130	93	498	130	1121
102	129	1023	177	129	1014	291	130	73	379	130	439	501	131	117
104	129	1024	181	130	121	301	129	963	384	130	447	507	130	1123
107	129	979	188	130	373	306	130	80	397	130	385	511	130	1120
111	130	78	200	130	407	314	129	989	407	129	1066	515	130	1126

VOL. 149, MISSOURI APPEAL REPORTS

	Page		Page
Abbott v. Fidelity Trust Co. (130 S. W. 1120)	511	Connor v. Wabash R. Co. (129 S. W. 777)	675
Abercrombie v. Kansas City (131 S. W. 129)	539	Coonan v. City of Cape Girardeau (129 S. W. 745)	609
Adams v. St. Louis & S. F. R. Co. (130 S. W. 48)	278	Cowan v. Western Union Tel. Co. (129 S. W. 1066)	407
Anderson v. Meyer Bros. Drug Co. (130 S. W. 829)	554	Creason v. St. Louis, I. M. & S. R. Co. (130 S. W. 445)	223
Anderson v. St. Louis & S. F. R. Co. (130 S. W. 82)	266	Cronan v. St. Louis & S. F. R. Co. (130 S. W. 437)	384
Aultman & Taylor Machinery Co. v. Organ (129 S. W. 1023)	102	Decker v. Missouri Pac. R. Co. (131 S. W. 118)	534
Austin v. St. Louis & S. F. R. Co. (130 S. W. 385)	397	De Lisle v. St. Louis & S. F. R. Co. (129 S. W. 252)	8
Babbitt v. Chicago & A. R. Co. (130 S. W. 364)	439	Desgranges v. Newbauer (129 S. W. 759)	715
Bailey v. Stix, Baer & Fuller Dry Goods Co. (129 S. W. 739)	656	Dillender v. St. Louis & S. F. R. Co. (130 S. W. 107)	331
Baird v. First Nat. Bank of Campbell (129 S. W. 981)	367	Dixon v. Jackson Exch. Bank (129 S. W. 481)	585
Barnes v. Barnes (131 S. W. 114)	546	Doerner v. St. Louis & S. F. R. Co. (130 S. W. 62)	170
Barnett v. Star Paper Mill Co. (130 S. W. 1121)	498	Dorris v. Cronan (129 S. W. 1014)	177
Bigham v. Tinsley (130 S. W. 506)	467	Dorris v. Dorris (129 S. W. 979)	107
Brosius v. Sunflower Lead & Zinc Co. (130 S. W. 134)	181	Edmonson v. Lovan Carriage & Harness Co. (130 S. W. 64)	128
Canterbury v. Kansas City (131 S. W. 120)	520	Elliott v. Qualls (130 S. W. 474)	482
Cathey v. St. Louis & S. F. R. Co. (130 S. W. 130)	134	Evans v. St. Louis, I. M. & S. R. Co. (129 S. W. 1050)	166
Chilton v. Halstead (130 S. W. 60)	144	Farrar v. St. Louis & S. F. R. Co. (130 S. W. 373)	188
Chrisco Bros. v. Carroll (130 S. W. 93)	378	Forsythe v. Albright (130 S. W. 1126)	515
City of Caruthersville v. Barnett (129 S. W. 1070)	162	Gardner v. Eldridge (130 S. W. 403)	210
Coleman v. Treece (130 S. W. 56)	61		

149 MO. APP.—Continued.		Page		Page
Grant v. St. Louis, I. M. & S. R. Co. (130 S. W. 80).....	306	Neel v. Ryus (130 S. W. 76).....	111	
Hall v. Smith (130 S. W. 449).....	379	Neil v. Cunningham Store Co. (130 S. W. 503)	53	
Ham v. St. Louis & S. F. R. Co. (130 S. W. 407).....	200	O'Connell v. Missouri Pac. R. Co. (131 S. W. 117).....	501	
Haven v. Home Ins. Co. (130 S. W. 73)....	291	Petty v. St. Louis & S. F. R. Co. (130 S. W. 85).....	360	
Howell v. Wabash R. Co. (129 S. W. 725)....	621	Petz v. Hoffman (130 S. W. 98).....	153	
Hunter v. Mathewson (129 S. W. 749).....	601	Polster, State ex rel., v. Miles (129 S. W. 731)	638	
Hunter v. Wabash R. Co. (130 S. W. 103)	243	Raines v. Tetley-Klein Lumber Co. (129 S. W. 742).....	576	
International Stock Food Co. v. Burkhead (129 S. W. 1025).....	286	Robinson v. Robinson (129 S. W. 725)....	733	
International Text Book Co. v. Yount (129 S. W. 748).....	583	Savage v. Burkhead (129 S. W. 1025).....	286	
Joplin Supply Co. v. West (130 S. W. 156)	78	Settles v. Moore & Scobee (129 S. W. 455)	724	
Kellogg v. City of Kirksville (129 S. W. 57)	1	Severn v. St. Louis & S. F. R. Co. (129 S. W. 477).....	631	
Kile v. Union Electric Light & Power Co. (130 S. W. 89).....	354	Shepard v. Tinsley (129 S. W. 1049).....	428	
Kirn v. Cape Girardeau & C. R. Co. (129 S. W. 475).....	708	Short v. Morrison (130 S. W. 78).....	372	
Kraemer v. Ward (130 S. W. 66).....	432	Simms v. Gilmore (130 S. W. 1120).....	550	
Leach, Ex parte (130 S. W. 394).....	317	Smith v. Mount (129 S. W. 722).....	668	
Lee Levy & Co. v. Smith (129 S. W. 989)	314	State v. Bales (130 S. W. 111).....	351	
Levy & Co. v. Smith (129 S. W. 989).....	314	State v. Gamma (129 S. W. 734).....	694	
Liston v. St. Louis Transfer R. Co. (130 S. W. 381).....	231	State v. Johnson (130 S. W. 110).....	119	
Louisiana Purchase Exposition Co. v. Emerson (129 S. W. 753).....	594	State v. Nicholas (130 S. W. 96).....	121	
Luminate v. St. Louis & S. F. R. Co. (130 S. W. 448).....	47	State v. Stike (129 S. W. 1024).....	104	
McDaniel v. Emmick (130 S. W. 129).....	274	State ex rel. Polster v. Miles (129 S. W. 731)	638	
McHaney v. St. Louis & S. F. R. Co. (129 S. W. 1065).....	369	Stewart v. St. Louis Southwestern R. Co. (130 S. W. 441).....	456	
Maness v. Joplin & P. R. Co. (130 S. W. 87)	259	Sutherland v. Garetson-Greaseon Lumber Co. (130 S. W. 40).....	338	
Manzke v. Goldenberg (129 S. W. 32).....	12	Swift & Co. v. Wabash R. Co. (131 S. W. 124)	526	
Mathews v. Eby (129 S. W. 1016).....	157	Tickell v. St. Louis, I. M. & S. R. Co. (129 S. W. 727).....	648	
Michie v. Grainger (129 S. W. 983).....	301	Walton v. Fraternal Aid Ass'n (130 S. W. 1124)	493	
Miller v. Dorsey (129 S. W. 66).....	24	Williams v. Kansas City Elevated R. Co. (131 S. W. 115).....	489	
Miller v. Snyder (129 S. W. 1073).....	97	Woods v. Missouri Pac. R. Co. (130 S. W. 1123)	507	
Mitchell v. Samford (130 S. W. 99).....	72	Wright v. Sebastian (130 S. W. 1125).....	545	
Moudy v. St. Louis Dressed Beef & Provision Co. (130 S. W. 476).....	413			
Murphy v. St. Louis Southwestern R. Co. (129 S. W. 1083).....	255			

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